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**TABLE OF CONTENTS**

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**ARTICLES**

THE LAWYER WHO BUILT TITLETOWN: GERALD CLIFFORD AND THE GREEN BAY PACKERS.....3

MAUREEN B. COLLINS

**NOTES**

2013: THE YEAR OF TERMINATIONS.....45

NAZ NAZARINIA SCOTT

THE NCAA “DEATH PENALTY” - DEATH FOR PENN STATE OR DEATH FOR COMPETITION.....79

ZACHARY D. CROWE

MASHING UP THE COPYRIGHT ACT: HOW TO MITIGATE THE DEADWEIGHT LOSS CREATED BY THE AUDIO MASHUP.....117

ALEXANDER C. KREUGER-WYMAN

**THE LAWYER WHO BUILT TITLETOWN:  
GERALD CLIFFORD AND THE GREEN BAY PACKERS**

*By: Maureen B. Collins<sup>1</sup>*

DEDICATION

*This article is dedicated to the memory of my grandfather, Gerald Clifford. Although I never had the opportunity to know him, his legacy looms large in my life. In so many ways, he influenced my decision to become a lawyer, and a lifelong Packers fan. In telling his story, I hope that my children will better understand that not all heroes wear capes and throw thunderbolts. Some wear fedoras and rumpled suits, have an encyclopedic knowledge of the rules of evidence, and a keen understanding of the human spirit.*

INTRODUCTION

Why would thirty thousand people<sup>2</sup> clamor to buy stock with the full knowledge that there is not now and never will be the opportunity for financial gain? Why do otherwise sane adults gather in frigid conditions wearing blocks of plastic cheese on their heads?<sup>3</sup> Why does a relatively small town in northeastern Wisconsin bear the name “Titletown”<sup>4</sup> in reference to the many national titles its National Football League team has won? The answer to all three

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<sup>1</sup> Maureen Collins is an associate professor of law at The John Marshall Law School. She extends her gratitude to Michael Eisnach for his inestimable research assistance, and to the law school for its support of her scholarly endeavors. She also wishes to thank her mother, Patricia Clifford Collins and her aunt, Colleen Clifford Barnett, daughters of Gerald Clifford, and her cousin, Andrew Barnett, for their assistance with this article. In addition, I am grateful to Professors Arthur Acevedo, Robert Gerber, Sandy Olken and Julie Spanbauer for their guidance and comments.

<sup>2</sup> THE GREEN BAY PACKERS STOCK OFFERING, <http://www.packersowner.com>, last visited Mar. 25, 2013. The Green Bay Packers offered its fifth ever sale of stock in late 2011. *Id.* The organization offered and sold 250,000 new shares of stock. *Id.* The shares were priced at \$250 each. *Id.* As a result of this most recent stock sale, the author is a current shareholder.

<sup>3</sup> THE PACKER’S PRO SHOP, The Official Cheesehead Novelty Hat, [http://www.packersproshop.com/Green-Bay-Packers-Hats/Novelty-Hats/Authentic-Cheesehead/sku\\_0903090001/f\\_listing\\_hats\\_novelty\\_hats\\_\\_1\\_relevance\\_1/0e494c4ad4ed014f/](http://www.packersproshop.com/Green-Bay-Packers-Hats/Novelty-Hats/Authentic-Cheesehead/sku_0903090001/f_listing_hats_novelty_hats__1_relevance_1/0e494c4ad4ed014f/), last visited Mar. 25, 2013.

<sup>4</sup> THE GREEN BAY PACKERS, History, *Super Bowls and Championships*, <http://www.packers.com/history/super-bowls-and-championships.html>, last visited Mar. 25, 2013. The organization has won more national titles than any other team in the NFL – 13. *Id.* Five of those national titles represent Super Bowl victories, including Super Bowl I in 1967, II in 1968, XXXI in 1997, XXXII in 1998 and XLV in 2011. *Id.*

questions is the same: The Green Bay Packers. But perhaps the lesser known answer to those questions is Gerald Clifford, the attorney who developed and manipulated the unique corporate structure that has kept the Packers in the team's tiny hometown.<sup>5</sup>

Certainly, most Packer legends began on the field. They involved coaches with names like Lambeau<sup>6</sup> and Lombardi<sup>7</sup>, and quarterbacks with names like Starr<sup>8</sup>, Favre<sup>9</sup> and now Rogers.<sup>10</sup> But the living legend of the NFL team that is owned by the people of the city in which it plays started in a lawyer's office in the Bellin Building<sup>11</sup> on Washington Street. Under the articles of incorporation, the team is owned by its shareholders, none of whom can own more than a small portion of the shares in the corporation.<sup>12</sup> The stock is not publicly traded, there is no "value" to the stock, and there are strict limitations on its transfer.<sup>13</sup> Owning the stock entitles you to bragging rights and little else – other, of course, than a small piece of football history.

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<sup>5</sup> THE CITY OF GREEN BAY, WISCONSIN, Media Facts, [www.greenbay.com/media/facts](http://www.greenbay.com/media/facts), last visited Mar. 25, 2013. Green Bay is located in northeastern Wisconsin. *Id.* It has a population of approximately 100,000 people, making it the third largest city in Wisconsin. *Id.* Apart from its football team, the town is best known for its paper and meat packing industries. *Id.*

<sup>6</sup> THE GREEN BAY PACKERS, History, *All-Time Roster*, [http://nfl.packers.com/history/all\\_time\\_roster/players/](http://nfl.packers.com/history/all_time_roster/players/) (search coaches for "Lambeau"), last visited Mar. 25, 2013. Curly Lambeau coached the Packers from 1922 to 1950. *Id.*

<sup>7</sup> *Id.* (search coaches for "Lombardi") Vince Lombardi coached the Packers from 1959 to 1968. *Id.*

<sup>8</sup> *Id.* (search players for "Starr") Bart Starr was a Packers quarterback from 1956 to 1971. *Id.*

<sup>9</sup> *Id.* (search players for "Favre") Brett Favre was a Packers quarterback from 1992 to 2007. *Id.*

<sup>10</sup> *Id.* (search players for "Rodgers"). Aaron Rodgers has been the Packers starting quarterback since 2008. *Id.* In the 2011 season, Rodgers broke the record for the highest average quarterback rating, posting a 122.5 (158.3 is "perfect"). *Id.*

<sup>11</sup> THE PACKERS HERITAGE TRAIL, *Trail Sites*, <http://www.packersheritagetrail.com/TrailSites.aspx>, last visited Mar. 25, 2013.

<sup>12</sup> THE GREEN BAY PACKERS, Community, *Shareholders*, <http://www.packers.com/community/shareholders.html>, last visited Mar. 25, 2013 ("To protect against someone taking control of the team, the articles of incorporation prohibit any person from owning more than 200,000 shares.") *Id.*

<sup>13</sup> THE GREEN BAY PACKERS, *Packers Stock Sale to Begin December 6*, <http://www.packers.com/news-and-events/article-1/Packers-Stock-Sale-to-Begin-December-6/2e8bc358-31bb-4acf-8ce7-c97c9f260af1>, last visited Mar. 25, 2013. "Anyone considering the purchase of Packers stock should not purchase the stock to make a profit or to receive a dividend or tax deduction or any other economic benefit. . . The Packers will have no obligation to repay the amount a buyer pays to purchase Packers stock." *Id.*

Law and legend are surprisingly entwined in the early history of the Green Bay Packers. Several of its most famous early players were lawyers.<sup>14</sup> A number of the defining events in its early history read like exam questions from a Torts or Contract Law course.<sup>15</sup> And Attorney Gerald Clifford played an essential role in guiding the team through its entry into the National Football League and assuring its place in football history.

In fact, Clifford may well have been the first “sports law” attorney. As remarked at his induction into the Packers Hall of Fame, “Clifford is the reason that the Packers are in Green Bay and that Green Bay is in the NFL.”<sup>16</sup> His contributions to the Green Bay Packers were the result of his legal training, his loyalty to the team and to the town. He acted as the team attorney during the crucial years of the team's development, and is responsible for the unique articles of incorporation that have kept the team in Green Bay contrary to the financial logic of professional football. He tirelessly promoted the team throughout Wisconsin and Michigan in an effort to create a fan base for the team in its early years. He served on its Board of Directors for decades. He used his position on the Board to protect the Packers stock from privatization and emerged successful in a battle with beloved coach Curly Lambeau, keeping the team from moving to a warmer and more lucrative climate.

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<sup>14</sup> DENIS J. GULLIKSON & CARL HANSON, *BEFORE THEY WERE THE PACKERS: GREEN BAY'S TOWN TEAM DAYS 17* (Trails Books 2004) (listing T.P. Silverwood, an attorney, as a player for the team that would go on to become the Packers in the 1890's). *Id.*; LaVerne (Lavvie) Dilweg played in the late 1920s and early 1930s. *Id.* He later became a congressman and Clifford's law partner. JOHN MAXYMUK, *PACKERS BY THE NUMBERS: JERSEY NUMBERS AND THE PLAYERS WHO WORE THEM 94*, (McNaughton & Gunn 2003). Dilweg signed the Packers' Articles of Incorporation created in 1935 as a witness. *Id.* He was inducted into the Packers Hall of Fame in 1970. *THE GREEN BAY PACKERS HALL OF FAME, Hall of Famers*, LaVern Dilweg, <http://packershalloffame.com/players/lavern-dilweg/>, last visited Mar. 25, 2013. *See also* ERIC GOSKA, *GREEN BAY PACKERS: A MEASURE OF GREATNESS 345* (Krause Publications 2d ed. 2004) (noting Cluade Taugher's playing statistics for 1922). Taugher was Gerald Clifford's brother-in-law.

<sup>15</sup> The unique articles of incorporation; the Willard Bent trial and the safe place statute.

<sup>16</sup> Transcript of Hall of Fame Induction Speech for Gerald Clifford, 1991, (unpublished).

This article examines the historical origins of the corporate structure of the Green Bay Packers, the life of Gerald Clifford, the attorney responsible for the unique corporate structure of the Packers, and the impact the corporate structure has had on the development on one of the NFL's most storied teams. It also compares the structure of the Packers organization to that of the rest of the NFL teams and other professional sports organizations, and suggests how the not-for-profit stock ownership model could play a part in community development.

### **BACKGROUND**

In order to understand the why the Packers are so unique, it is necessary to understand the city from which they sprang.

#### ***Green Bay, Wisconsin***

Green Bay is the oldest city in the state of Wisconsin.<sup>17</sup> Originally called "La Baye Verte," it was founded as a fur trading city by the French in 1634.<sup>18</sup> Located in northeastern Wisconsin on the shores of Lake Michigan, it was settled by French, German, Irish, Dutch, Czech and Polish immigrants.<sup>19</sup> By the turn of the century, the paper mills began to open. Within years, Green Bay became widely known for those mills as well as the meat packing industry that lent the team its name.

Now, Green Bay is Wisconsin's third largest city, behind Milwaukee and Madison.<sup>20</sup> Like the rest of the Midwestern manufacturing belt, today's Green Bay has been hard hit by the

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<sup>17</sup> GREATER GREEN BAY CONVENTION AND VISITORS BUREAU, Media Facts, <http://www.greenbay.com/media/facts/>, last visited Mar. 25, 2013.

<sup>18</sup> THE GREEN BAY PACKERS, Community, *The City of Green Bay*, <http://www.packers.com/community/city-of-green-bay.html>, last visited Mar. 25, 2013.

<sup>19</sup> *Id.*

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

recession. The paper mills closed years ago, and downtown store fronts sit empty. In many ways, the Packers are now Green Bay's most well-known industry.

With a population of 100,000, Green Bay is by far the smallest market in professional sports. But despite its small market, Packers games have been sold out for decades. The stadium can seat roughly 70% of the city's population.<sup>21</sup> The waiting list for season tickets is estimated to be forty years.<sup>22</sup> It has been said that Green Bay exists in a "time warp. The team, the players, the stadium and the fans existing as part of one tight-knit community is a phenomenon that harkens back to the earliest days of professional sports, before TV and licensing agreements, free agents and salary caps. It's a journey back to a time when the local football team consisted of a bunch of guys with day jobs and a love or the game who enjoyed getting muddy and bloody on fall weekends."<sup>23</sup> Green Bay is football, and football is Green Bay.

### ***The Origins of the Team: From Town Team to the NFL***

Games bearing some resemblance to football as we know it began to be played between east coast colleges in the late 1860's and early 1870's.<sup>24</sup> The game's popularity spread, particularly among Ivy League colleges, although there are reports that the game had made its

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<sup>21</sup> See *id.* The population of Green Bay is 102,726. *Id.*; THE GREEN BAY PACKERS, Lambeau Field, Stadium History, *Hallowed Ground*, <http://www.packers.com/lambeau-field/stadium-info/history/index.html>, last visited Mar. 25, 2013. The seating capacity of Lambeau field is 73,142. *Id.*

<sup>22</sup> Josh Sanburn, The Green and Gold, *Waiting, and Waiting, and Waiting...*, TIME MAGAZINE.COM, Feb. 4, 2011, [http://www.time.com/time/specials/packages/article/0,28804,2046390\\_2046393\\_2046415,00.html](http://www.time.com/time/specials/packages/article/0,28804,2046390_2046393_2046415,00.html), last visited Mar. 25, 2013.

<sup>23</sup> DON GULBRANDSEN, GREEN BAY PACKERS: THE COMPLETE ILLUSTRATED HISTORY 11 (Compendium Publishing 2007)

This is how the Packers started out, just like every other team in what became the National Football League. But for some reason, while all those other teams morphed into privately owned franchises (and toys for rich boys), Green Bay managed to keep its football team in the hands of its citizens-and the story of how that transpired is one of the most fascinating in pro sports.

*Id.*

<sup>24</sup> See THE PRO FOOTBALL HALL OF FAME, Football History, <http://www.profootballhof.com/history/general/chronology/1869-1939.aspx>, last visited Mar. 25, 2013. Most recognize the 1869 game between Rutgers and Princeton using a round ball as the first American football game. *Id.*



way west to Wisconsin as early as the 1880's.<sup>25</sup> Highly unregulated and without today's technologically advanced protective gear, the game was a dangerous undertaking. In response to nineteen fatalities resulting from the game in 1905, President and fan Theodore Roosevelt is reported to have considered banning the sport entirely.<sup>26</sup> As a response, sixty-two schools met in New York to form the National College Athletic Association and a series of rules began to take shape.<sup>27</sup> The creation of the NCAA began the modernization of the sport that would eventually lead to its professionalization<sup>28</sup>.

The Green Bay Packers team has its origins in the "town team" leagues that predated the National Football League. *The Green Bay Sunday Gazette* reported the town's first football game played at Washington Park in 1895.<sup>29</sup> The game was played by several dozen men using a roundish ball and garnered few spectators. Over the next ten to fifteen years, as the popularity of the college game grew and a pool of former college players was created, a series of "town teams" developed throughout the Midwest. These town teams hailed from places like Oconto, Ishpeming, Rhinelander, Decatur, Escanaba, Canton and Beloit.<sup>30</sup> They often had lyrical names

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<sup>25</sup> See *id.* See also THE BENTLEY HISTORICAL LIBRARY, University of Michigan Athletics, <http://bentley.umich.edu/athdept/football/fbteam/1879fbt.htm>, last visited Mar. 25, 2013. On May 30, 1879, The University of Michigan played a Racine, Wisconsin team. *Id.* With 500 people in attendance, the University of Michigan prevailed. *Id.*; GULLIKSON & HANSON, *supra* note 14, at 7. Lawrence University in Appleton, Wisconsin is reputed to have been playing football as early as 1882. *Id.*; OLIVER KUECHLE & JIM MOTT, ON WISCONSIN: BADGER FOOTBALL (Strode Publishers 1977). Badger football at the University of Wisconsin is reported to have begun as early as 1883. *Id.*

<sup>26</sup> See John J. Miller, *How Teddy Roosevelt Saved Football*, THE WALL ST. J., Apr. 21, 2011, <http://online.wsj.com/article/SB10001424052748703712504576242431663682162.html>, last visited Mar. 25, 2013.

<sup>27</sup> *Id.* Most importantly, with regard to player safety, was legalizing the forward pass. *Id.* "Up to that point, quarterbacks couldn't toss the ball downfield." *Id.*

<sup>28</sup> See THE PRO FOOTBALL HALL OF FAME, History: Birth Of Pro Football, <http://www.profootballhof.com/history/general/birth.aspx>, last visited Mar. 25, 2013. On November 12, 1892, the Allegheny Athletic Association team defeated the team from the Pittsburgh Athletic Club. *Id.* One of the players, William (Pudge) Heffelfinger, was paid \$500 to participate in the game – removing it from the ranks of amateur competition. *Id.*

<sup>29</sup> See GULLIKSON & HANSON, *supra* note 14, at 5.

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

like the Skidoos, the Flivvers, the Staleys,<sup>31</sup> the Speed Boys and the Fairies.<sup>32</sup> The teams' ability to play each other was enabled by the railway system, particularly the Chicago Northwestern Railway.<sup>33</sup> Gate take was minimal; players may have been paid by passing the hat, or from the proceeds of a bake sale or a community dance.<sup>34</sup> The town teams began to fade away as the idea of professional football teams began to take shape.

*Enter Earl "Curly" Lambeau*



Earl "Curly" Lambeau, the son of Belgian and French immigrants, grew up playing football.<sup>36</sup> The star player at Green Bay East High School attended the University of Wisconsin as a freshman.<sup>37</sup> As per UW athletic rules, though, Lambeau was not permitted to play varsity football.<sup>38</sup> That year, freshman football was cancelled as the result of an insufficient number of participants. So in the fall of 1918, Curly Lambeau left Wisconsin to work with famed coach Knute Rockne at Notre Dame.<sup>39</sup> Lambeau's time there would be short. Early in his second

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<sup>31</sup> See THE CHICAGO BEARS, Tradition, History by Decade, 1920s, <http://www.chicagobears.com/tradition/history-by-decades/highlights-1920s.html>, last visited Mar. 25, 2013. *Id.* Later to be known as the Packers' nemesis, the Chicago Bears. *Id.*

<sup>32</sup> See GULLIKSON & HANSON, *supra* note 14.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 149.

<sup>35</sup> MILWAUKEE J.

<sup>36</sup> DAVID ZIMMERMAN, LAMBEAU: THE MAN BEHIND THE MYSTIQUE 31–33 (Eagle Books 2003).

<sup>37</sup> GULLIKSON & HANSON, *supra* note 14, at 37–39.

<sup>38</sup> *Id.*

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

semester, he was diagnosed with an acute case of tonsillitis.<sup>40</sup> He was sent home to Green Bay for treatment and recovery. By the time he was well, it was too late to resume his course work at Notre Dame for the semester.<sup>41</sup> While at home, he began working for the Indian Packing company, one of several meat packing companies located in Green Bay.<sup>42</sup> Well paid<sup>43</sup> and courting his first wife Marguerite, Lambeau lost interest in returning to Notre Dame. But he did not lose interest in football.

*Meet George “Cal” Calhoun*



In 1919, George Calhoun was the sports editor for the *Green Bay Press Gazette*. A long-time football fan,<sup>45</sup> Calhoun had covered Curly Lambeau’s high school football exploits and the two men had common friends and interests. After a chance meeting, Calhoun and Lambeau began to work together to form a professional Green Bay football team. Calhoun convinced his

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<sup>40</sup> JOHN B. TORINUS, *THE PACKER LEGEND: AN INSIDE LOOK: AN ACCOUNT OF THE GREEN BAY PACKERS* 13 (Larenmark Press 1983).

<sup>41</sup> *Id.* at 13. See GULLIKSON & HANSON, *supra* note 14.

<sup>42</sup> TORINUS, *supra* note 40, at 14.

<sup>43</sup> *Id.* at 13. He was earning the princely sum of \$250 per month. *Id.*

<sup>44</sup> MILWAUKEE J.

<sup>45</sup> TORINUS, *supra* note 40, at 21. Calhoun had himself been a collegiate athlete. *Id.* Juvenile arthritis had severely impacted the use of his hands, arms and legs. *Id.* He is often described as the quintessential sportswriter: gruff, cigar-chomping and a heart of gold. His former assistant at the *Green Bay Press Gazette*, John Torinus, says this about Calhoun: “Calhoun’s gruff exterior was an attempt on his part to keep people from feeling sorry from him. He adopted an outer crust of terrible temper to protect what on the outside was a very warm and emotional person. He spoke in streams of profanity, chewed and ate cigars instead of smoking them, and spit the juice into a brass spittoon always handy to his desk.” *Id.* at 21.

editor to run an advertisement in the *Press Gazette* to recruit players, and to provide coverage for the team's games.<sup>46</sup> Lambeau sought sponsorship from his employer, the Indian Packing Company.<sup>47</sup> He asked the company for \$500, the cost of uniforms<sup>48</sup>, and the use of the company's athletic field.<sup>49</sup> Lambeau's choice of sponsors would give the team one of the most curious and the most enduring names in professional sports.<sup>50</sup> Lambeau and a group of prospective players gathered with Calhoun in the editorial offices of the *Press Gazette*. Lambeau would coach the team and Calhoun would serve as its publicity director: the Green Bay professional football team was born.

#### *The Acme Packers and the APFA*

The Green Bay team played for several seasons, with more success on the field than at the bank. In 1921, the Clair brothers, owners of the Acme Packing Company and successor to the Indian Packing Company,<sup>51</sup> provided the funding for the team to be the first to purchase a franchise<sup>52</sup> in the newly-formed American Professional Football Association, precursor to the

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<sup>46</sup> GULBRANDSEN, *supra* note 23, at 15.

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

<sup>48</sup> CHUCK CARLSON, GREEN BAY PACKERS: YESTERDAY & TODAY 11 (West Side Publishing 2009). The team uniforms were originally blue and gold, a tribute to Notre Dame. *Id.*

<sup>49</sup> ARCH WARD, THE GREEN BAY PACKERS 40 (Van Rees Press 1946). Legendary sportswriter Arch Ward describes the exchange with Indian Packing Company official Frank Peck like this:

“Yes, what is it Curly?” inquired the packing company executive.

“Mr. Peck, there is a place for a football team in Green Bay,” Lambeau replied. “And I think I can round it up. We’ll need uniforms to start with. I’ll get the players and make up the schedule. We won’t have to worry about that. There are enough towns around here to choose up sides with. It would be a great thing for Green Bay and for the company. Will you back us?”

Peck realized that his employee was serious, and it didn’t take him long to make a decision, either.

“OK, Curly,” he said, “we’ll support you up to \$500 for uniforms. From there on, it’s yours.”

*Id.*

<sup>50</sup> LARRY D. NAMES, THE HISTORY OF THE GREEN BAY PACKERS, BOOK ONE: THE LAMBEAU YEARS 81 (Angel Press of Wisconsin 1987). Curly Lambeau didn’t favor the Packers name. *Id.* Early nicknames included the “the Bays” and “the Bay Blues.” *Id.*

<sup>51</sup> See THE GREEN BAY PACKERS, History, *Chronology*, <http://www.packers.com/history/chronology.html>, last visited Mar. 25, 2013.

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

NFL.<sup>53</sup> The town put up the money for materials for Lambeau's father to build a 2,000 seat bleachers and box seats, and a fence around Hagemeister Park for its first professional football games.<sup>54</sup> The Green Bay Football Club, Inc. continued to encounter success on the field, but ran afoul of the rules of the newly formed APFA when, in 1921, it hired college players under assumed names to play in its professional games. As a result, the league revoked the Packers' franchise.<sup>55</sup>

***Three Hundredths of an Inch of Rain and the Survival of the Team***

Lambeau reapplied for, and got<sup>56</sup>, his franchise back from the newly renamed National Football League. In its first stock offering, the Green Bay Football Club came up with \$1000 for the league deposit by selling stock, putting up 80 shares at \$100 each.<sup>57</sup> But stock sales and gate receipts weren't enough.

Barely able, and occasionally unable, to make the payroll for the team, the football team was over \$5,000 in debt in 1922. The team was required to meet guarantees for opposing teams who were reluctant to come to the league's smallest market to play when ticket sales were uncertain. Prior to the season, team management had taken out an insurance policy against losses in ticket sales suffered in case of inclement weather. There was some debate as to whether to hold the game and incur the costs associated with the guarantee or to forfeit, losing both the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See NAMES, *supra* note 50, at 68. At the same time Green Bay was required to turn in its franchise, so was the Decatur Staleys, owned by George Halas. *Id.* Halas was immediately granted a franchise for a Chicago team, the Bears – the Packers' perpetual nemesis. *Id.* 68.

<sup>56</sup> WILLIAM POVLETICH, GREEN BAY PACKERS: TRIALS, TRIUMPHS AND TRADITION 22 (Wisconsin Historical Society Press, 2012). Restoring the Packer franchise was a lengthy and inexplicably complicated process. *Id.* There are some who speculate that George Halas played a hand in drawing out the length of time it took for the franchise to be restored (while his Staleys franchise was promptly restored) so that he would have an advantage in recruiting players for the upcoming season. *Id.*

<sup>57</sup> NAMES, *supra* note 50, at 79.

gate and the game. Watching the dismal weather, Lambeau and Calhoun conferred with League president Joe Carr and decided to proceed with the game, confident that the weather insurance would cover the loss in ticket sales. Although 1,500 fans turned out to see the game despite the inclement weather, the news was not as good when the Green Bay management turned in its insurance claim. When measured by the rain gauge at the official government weather station, the rainfall was three one-hundredths of an inch shy of the requirement to collect on the policy.

The finances were bleaker than the weather: it looked as if the club would have no choice but to fold. Bankruptcy, and loss of the organization's greatest asset – its franchise – was imminent. Calhoun wrote a letter to the public, published in the *Press-Gazette*, detailing the team's dire financial straits<sup>58</sup>. But it was Nate Abrams<sup>59</sup>, a personal friend of Lambeau's, not the public, who enabled the team to finish out the season.

Nate Abrams was a childhood friend of Curly Lambeau. He had played football with and against Lambeau as a young man.<sup>60</sup> He organized the Green Bay Whales, a town team, while Lambeau was away at college. George Calhoun of the *Press-Gazette* was the Whales' team manager.<sup>61</sup> It was Abrams who helped Lambeau land the job at the Indian Packing Company.<sup>62</sup> Abrams is one of the signatories on the original articles of incorporation for the 1921 Green Bay Football Club, Inc. Yet Abrams' name is barely mentioned in most accounts of Packers history, nor is there any suggestion that he ever claimed title to the franchise despite the fact that he appears to have provided the funds necessary to keep it from being surrendered. There are some

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<sup>58</sup> *Id.* at 85–6.

<sup>59</sup> *See id.* at 86. Abrams is said to have seen the letter and loaned or given Lambeau \$3000 to relieve the team's immediate financial crisis. *Id.* Names reports that, at that time, Lambeau turned the franchise over to Abrams. *Id.* There is no official documentation of a transfer of the franchise from the corporation to Abrams or back from Abrams. *Id.*

<sup>60</sup> *Id.* at 33–35.

<sup>61</sup> *Id.* at 33–45.

<sup>62</sup> *Id.* at 33–35.

who say that he stepped back and let his friend Curly take all the glory.<sup>63</sup> Others suggest that because Abrams was Jewish in a tightly knit community that had few other non-Christians, he was destined not to be recognized for his contributions.<sup>64</sup>

Through Abram's generosity, then, the team was able to make it to the next season, albeit barely. Calhoun and Lambeau had begun to rely on *Press-Gazette* business manager Andrew Turnbull for his advice on keeping the struggling team afloat. Turnbull and NFL president Joe Carr knew that there were significant financial hurdles to the team's success: the low ticket prices, the small stadium, and the relatively small size of the market overall. Turnbull contacted several prominent businessmen (later to be known as the Hungry Five) for help in raising the money to keep the team alive. Gerald Clifford was one of those men.

*The Hungry Five*



Oliver Kuechle, a sportswriter for the Milwaukee Journal, coined the name "Hungry Five" after a popular radio program of the late Twenties.<sup>65</sup> The Hungry Five name was considered a

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<sup>63</sup> *Id.* at 86–87.

<sup>64</sup> *Id.* at 94.

<sup>65</sup> TORINUS, *supra* note 40, at 47. Left to right: A.B. Turnbull, Curly Lambeau, Emil Fischer, Bert Bell and Gerry Clifford. *Id.* Three of the "Hungry Five." *Id.*

<sup>66</sup> *See id.* at 99.

reference to the gentlemen's constant begging for funds to keep the team afloat.<sup>67</sup> Kuechle would say later, "If it is true that there would be no Green Bay Packers today except for Lambeau and his idea of a hometown football team, it is also true that there would be no Green Bay Packers except for the 'Hungry Five.' They were the men who formed the corporation that saved the Packers in 1923. They were the counselors in moments of crisis later. They were the men who dominated the Executive Committee and who unobtrusively filled the most important corporate offices."<sup>68</sup> The group that, with Lambeau, would comprise the Hungry Five, met for lunch, as they often did, in the Beaumont Hotel's Attic Room on the Monday after Thanksgiving in 1923. Turnbull was joined by his three friends, Leland H. Joannes, Dr. W. Webber Kelly, and Gerald F. Clifford.<sup>69</sup>

#### **A. Andrew Turnbull**

Andrew Turnbull was born in London, Ontario, moved to Detroit at a young age, and began his newspaper career at the *Detroit News*.<sup>70</sup> He worked at a number of newspapers throughout the Midwest before coming to the *Green Bay Press Gazette* in 1915.<sup>71</sup> He eventually served as the paper's Business Manager.<sup>72</sup> He was the Green Bay Packers Corp.' first president, serving in the position until 1927.<sup>73</sup> He was on the Board of Directors and the Executive

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

<sup>68</sup> MILWAUKEE J., June 7, 1965.

<sup>69</sup> See NAMES, *supra* note 50, at 99–100.

<sup>70</sup> See WARD, *supra* note 49, at 57.

<sup>71</sup> *Id.*

<sup>72</sup> *A Moment of Truth*, The Green Bay Press Gazette, <http://www.greenbaypressgazette.com/ic/legacy/history/pressgazette/andthepackers3.shtml>, last visited Mar. 25, 2013.

<sup>73</sup> THE GREEN BAY PACKERS HALL OF FAME, ANDREW TURNBULL, <http://packershalloffame.com/players/contributor-andrew-turnbull/>, last visited Mar. 25, 2013.



Committee until 1949.<sup>74</sup> His financial expertise and unflagging enthusiasm for the Packers led the fledgling team through many a crisis and resulted in the formation of the Hungry Five.

### **B. Leland Joannes**

Lee Joannes' family owned the well-established Green Bay Grocery wholesaling business. His family donated the land on which the Packers played their first games.<sup>75</sup> He was the first secretary/treasurer of the organization in 1923. He served as its president from 1930-1947:<sup>76</sup> the second longest term of any president. He was reputed for his business acumen and his popularity with the players.<sup>77</sup> When the team was in bankruptcy and faced the loss of its franchise,<sup>78</sup> Joannes made a personal loan to help the team avoid the crisis, and was instrumental in guiding the organization through its reorganization.

### **C. Dr. William Webber Kelly**

Dr. Kelly was born in Jamaica, educated in England and Belgium, and attended medical school at McGill University in Montreal, Quebec<sup>79</sup>. He was president of the Wisconsin Board of Health, a visiting regent to the University of Wisconsin and served as a consulting psychiatrist to the Veterans Administration.<sup>80</sup> Dr. Kelly served as the team physician from its earliest years through 1949. He was Packers president in 1929 and an Executive Committee member from

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<sup>74</sup> See THE GREEN BAY PACKERS HALL OF FAME, Gerald Francis Clifford, <http://geraldclifford.packershalloffame.com>, last visited Mar. 25, 2013.

<sup>75</sup> See WARD, *supra* note 49, at 60.

<sup>76</sup> THE GREEN BAY PACKERS HALL OF FAME, LEE JOANNES, <http://packershalloffame.com/players/lee-joannes/>, last visited Mar. 25, 2013.

<sup>77</sup> See WARD, *supra* note 49, at 60.

<sup>78</sup> THE GREEN BAY PACKERS HALL OF FAME, LEE JOANNES, <http://packershalloffame.com/players/lee-joannes/>, last visited Mar. 25, 2013.

<sup>79</sup> WARD, *supra* note 49, at 62.

<sup>80</sup> *Id.*

1923 to 1952. Dr. Kelly was considered a surrogate father by many Packers players and is an integral part of the most fascinating part of early Packers lore.

**D. Gerald F. Clifford**



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Gerald “Gerry” Clifford was born in 1889 in Chilton, Wisconsin. His father, Jeremiah Clifford, worked for the Chicago, Milwaukee & St. Paul Railroad. Clifford spent much of his childhood in the upper peninsula of Michigan near Escanaba and Iron Mountain. After graduating from high school, Clifford traveled to Europe on a cattle boat,<sup>82</sup> spending eighteen months traversing the continent and writing about his travels for the Escanaba paper. He returned to attend the University of Michigan where he received his law degree<sup>83</sup> from the U of M in 1912.<sup>84</sup> He began his practice in Green Bay, where his father had become a regional superintendent for the railroad.

Clifford's practice included both civil and criminal cases. In his criminal practice, he defended twenty-six murder cases, having no client convicted of the original charge. Clifford

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<sup>81</sup> THE GREEN BAY PACKERS HALL OF FAME, Gerald Francis Clifford, <http://geraldclifford.packershalloffame.com>, last visited Mar. 25, 2013.

<sup>82</sup> Email Interview with Patricia Clifford Collins, Daughter of Gerald Clifford, (February 10, 2013) in Evanston, Ill.

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

<sup>84</sup> THE WISCONSIN HISTORICAL SOCIETY, Dictionary of Wisconsin History, Gerald Francis Clifford, [http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term\\_id=2264&keyword=clifford](http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term_id=2264&keyword=clifford), last visited Mar. 25, 2013.

appeared frequently before the Wisconsin Supreme Court.<sup>85</sup> He was reputed to be a fierce cross-examiner and was widely regarded as a force to be reckoned with in the courtroom.<sup>86</sup> In his civil practice, he often represented railroad and labor clients. He was considered to be an expert on the rules of evidence, with particular expertise in search and seizure warrants, an expertise no doubt honed through his work with tavern keepers accused of Prohibition violations.<sup>87</sup>

Active in politics throughout his life, Clifford was well known in Green Bay as a liberal Democrat and fervent supporter of Franklin D. Roosevelt. He was a delegate to all four national conventions that nominated FDR and an outspoken advocate of the New Deal. He also served as a member of the Wisconsin State Central Committee and frequently spoke at state conventions and political gatherings. He was the unsuccessful Democratic Party nominee for Congress in 1934. He was particularly instrumental in bringing members of the Progressive Party, a third party which was a powerful force in Wisconsin politics from 1934-1946, into the Democratic fold.<sup>88</sup>

Personally, Clifford was well known as an avid hunter and gardener.<sup>89</sup> He was the husband of Mae Heney, whose uncle, Michael Heney, built the Alaskan Railway system.<sup>90</sup> Like Mark Twain, he had the unusual opportunity to state that reports of his death were greatly

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<sup>85</sup> Interview with Colleen Clifford Barnett, Daughter of Gerald Clifford (Dec. 23, 2013). *See generally*, THE WISCONSIN COURT SYSTEM, About the Court, *Court System Overview*, <http://www.wicourts.gov/courts/overview/overview.htm>, last visited Mar. 25, 2013. The Court of Appeals level of courts were created in 1978. *Id.* Thus, all appeals were handled by the Supreme Court. *Id.*

<sup>86</sup> Interview with Judge William Duffy (ret. federal judge) in Green Bay, WI. (Jan. 21, 2012).

<sup>87</sup> *Id.*

<sup>88</sup> *See* THE WISCONSIN HISTORICAL SOCIETY, On This Day in Wisconsin History, *May 19*, <http://www.wisconsinhistory.org/thisday/index.asp?day=19&month=5>, last visited Mar. 25, 2013. The Progressive Party played a dominant role in state politics given that it was a third party. It was comprised of farm and labor groups and represented what was then considered to be something of a "socialist" position. The party elected a number of its candidates to prominent positions, including governors and senators.

<sup>89</sup> GREEN BAY PRESS GAZETTE, Feb. 25, 1952 at 1.

<sup>90</sup> *See generally*, EDWARD A. HERRON, ALASKA'S RAILROAD BUILDER: MIKE HENEY, (Messner, 1960).

exaggerated when, hospitalized for a weakened heart brought on by an extended case of the hiccups, a local newspaper announced his death prematurely.<sup>91</sup>

Clifford acted as legal counsel to the Green Bay Packers from the time he drafted its articles of incorporation to his death in 1952. He served on the Board of Directors and was vice president of the organization for many years. In a less formal capacity, he traveled throughout Wisconsin and upper Michigan generating interest in the team and promoting ticket sales.<sup>92</sup> In recognition of these efforts, he was elected to the Green Bay Packer Hall of Fame in 1991.<sup>93</sup>

### *The Hungry Five Gets to Work*

As its first order of business, the Hungry Five sought to reorganize the football club and raise funds to pay off existing debts. The group arranged to address the capacity crowd of 400<sup>94</sup> gathered at the Green Bay Elks Club on Cherry Street. The group, many of whom were businessmen, had come to listen to the Dempsey/Firpo boxing match. The gathering presented an opportunity to explain to the businessmen the civic advantages of keeping the team in Green Bay.

The crowd was told that the newly formed The Green Bay Football Corporation would be a not-for-profit organization.<sup>95</sup> The shareholders would elect a Board of Directors consisting of 15 stockholders. The Board would choose an Executive Committee who would manage the corporation and report to the Board of Directors. The Board of Directors would then report to the shareholders at large. Officers would serve without compensation. There would be no

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<sup>91</sup> Telephone Interview with Patricia Clifford Collins, Daughter of Gerald Clifford, in Evanston, Ill. (Dec. 23, 2012).

<sup>92</sup> POVLETICH, *supra* note 56, at 22. "Gerald Clifford served as the team's primary ambassador, meeting with prominent business owners and fans throughout northeastern Wisconsin and Michigan's Upper Peninsula." *Id.*

<sup>93</sup> THE GREEN BAY PACKERS HALL OF FAME, Gerald Francis Clifford, <http://geraldclifford.packershalloffame.com>, last visited Mar. 25, 2013.

<sup>94</sup> See WARD, *supra* note 49, at 58. *But see*, Names, *supra* note 50, 101, suggesting ulterior motives of the crowd.

<sup>95</sup> Names, *supra* note 50, 101.

“owner” of the team. Football decisions, with the exception of approval for contract decisions, would be left to Lambeau. In an effort to appeal to the many veterans in the crowd, the decision was made to donate all of the club’s profits to the local American Legion post.<sup>96</sup> In a decision that would have even greater impact down the road, if the franchise were to be sold, those profits too would go the Green Bay’s Sullivan American Legion post, thus removing any personal profit motive to sell the franchise.<sup>97</sup>

Fifty leading businessmen put up \$100 each as a guarantee.<sup>98</sup> On August 14, 1923, the Articles of Incorporation were signed<sup>99</sup> and one thousand shares of stock were issued. The shares were sold for \$5 per share. Andrew Turnbull was named the first team President.

The Hungry Five had guided the team to surer financial footing, but all around the League teams were struggling with the fall out of economic uncertainty and a changing emphasis on franchise allocation. The NFL had shifted its sights from small city teams like Duluth and Rock Island and wanted to focus on franchises in big city markets. The annual failure rate for teams averaged between 35-40%.<sup>100</sup> The onset of the Great Depression only magnified the problems faced by the remaining teams.

The team’s finances may not have been rosy, but its football record was glorious. Curly Lambeau led the team to three consecutive championships in 1929, 1930 and 1931.<sup>101</sup> Fans wanted to see the team, but the Depression meant that pocket money was scarce. Packers’

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

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* at. 94–95.

<sup>99</sup> *See id.* at. 97–98. The Articles of Incorporation for Green Bay Packers Inc. were signed by Leland Joannes, Andrew Turnbull and John A. Kittell. MAXYMUK, *supra* note 14, at 94. They were witnessed by George Calhoun and Curly Lambeau. *Id.* It appears that Kittell was the scrivener of the articles although, as an attorney actively involved in reorganizing the team, Clifford would most likely have had a hand in coming up with the legal structure.

<sup>100</sup> POVLETICH, *supra* note 56.

<sup>101</sup> THE GREEN BAY PACKERS, History, *Super Bowls and Championships*, <http://www.packers.com/history/super-bowls-and-championships.html>, last visited Mar. 25, 2013.

revenue was dependent entirely on fan attendance. Then team President Lee Joannes moved to cut ticket prices to the cheapest in the league.<sup>102</sup> The team's debts began to mount again.

***From Bent to Bankruptcy***

Clifford represented the team when more legal trouble befell the Packers – quite literally. During the second game of the 1931 season against the Brooklyn Dodgers, fan Willard J. Bent was injured in a fall from “temporary” grandstands at the stadium. The corporation submitted the claim for Bent's injuries to its liability insurance company, Southern Surety Corporation, only to be told that the corporation, like many others during the Great Depression, was in bankruptcy.<sup>103</sup> To add insult to injury, the company was a mutual insurance company in which the Football Corporation was an investor. Not only was Bent's claim refused, the bankruptcy judge assessed the Football Corporation \$2,500 to help pay the insurer's debts.<sup>104</sup>

Unable to recover from the insurance company, Bent ultimately sued the Football Corporation for \$20,000. T.P. Silverwood, a Green Bay football legend, represented Bent in the litigation. The transcripts<sup>105</sup> of the original trial demonstrate Clifford's knowledge of evidentiary rules, his cross-examination skills, and his sense of humor.

At trial, Clifford argued several points. First, he argued that Wisconsin's “safe place” statute which held the Corporation to a higher standard of care was not applicable here because the bleachers from which Mr. Bent fell were not a permanent structure as required by the statute. As part of the demonstrative exhibits, Silverwood brought into the courtroom a small portion of something resembling the temporary bleachers. Clifford argued successfully that, in order to

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<sup>102</sup> POVLETICH, *supra* note 56.

<sup>103</sup> LARRY D. NAMES, THE HISTORY OF THE GREEN BAY PACKERS, BOOK TWO: THE LAMBEAU YEARS: PART TWO 32 (Angel Press of Wisconsin 1989).

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

<sup>105</sup> Available at the University of Wisconsin-Green Bay Archives.

understand fully the structure from which Bent fell, the jurors needed to see the real thing. As a result, the judge ordered that an entire bleacher section be rebuilt for examination. When the exhibit would not fit in the courtroom itself, it was built on the courthouse lawn, making quite a spectacle of the trial.<sup>106</sup>

Second, Clifford argued that the standard of care had been met because the bleachers had been duly inspected that very day by local building authorities and no problems had been identified. He brought in a series of experts to testify to the impact of meeting local safety standards on satisfying the duty of care.

Next, Clifford introduced evidence that Bent did not exercise his own duty of care by failing to look properly where he was placing his foot when he sat down. He argued that Bent was familiar with the bleachers, that he had chosen them over more stable seating in the permanent section of the stadium, that he had chosen the top seat, and that he had failed to look down to see where he was placing his foot when he fell.

Finally, witnesses were produced to testify to Bent's longstanding battle with alcohol. This served several purposes: to suggest that he was intoxicated at the time of the accident, and to reduce the damages to which he was entitled, the implication being that his future earnings were not likely to be considerable. The damages portion of the trial featured a number of witnesses who testified to Bent's checkered employment history.

Clifford was anxious to introduce testimony regarding what was apparently Bent's advanced case of syphilis, thinking that it would not endear the plaintiff to the jury, and would also suggest that his earning ability was already impaired by factors unrelated to his fall. Clifford had no success finding a way to introduce the evidence into the direct examination until

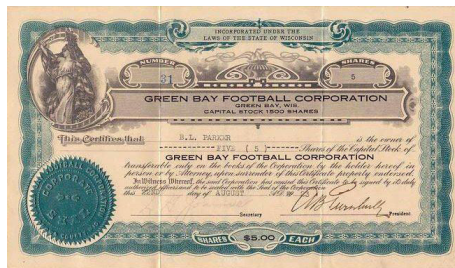
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<sup>106</sup> Bent v. Jonet, 252 N.W. 290 (WI 1934).

a chance conversation overheard between Johannes and Silverwood in the hallway gave him the opening he needed. Bent's doctor was forced to reveal Bent's syphilis on cross-examination.

Despite Clifford's skillful performance, the judge found for Bent and awarded him \$4,575.<sup>107</sup> The Wisconsin Safe Place statute was deemed applicable, and Bent was found to be 10% negligent. On appeal, the court affirmed the decision, finding that the temporary wooden bleachers were considered a "public building" within the terms of the Safe Place statute.<sup>108</sup> The court also affirmed the exclusion of the expert testimony from the building inspectors on the ground that there was no underlying building code which the bleachers were required to comply with.<sup>109</sup> Although the court acknowledged Bent's admission that he "paid no attention" when sitting on the bleacher, it was unwilling to change the allocation of negligence.<sup>110</sup> In affirming the judgment, it affirmed the Packers' dire financial situation.

*Reorganizing into the Green Bay Packers Inc.*



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In order to prevent Bent from being able to access the team's greatest financial asset – its franchise certificate – Clifford petitioned for bankruptcy on behalf of the Corporation.<sup>112</sup> It was

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

<sup>108</sup> *Id.*

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

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

<sup>111</sup> THE GREEN BAY PACKERS, Community, *Shareholders*, <http://www.packers.com/community/shareholders.html>, last visited Mar. 25, 2013.



arranged for Hungry Five member and then-president Lee Joannes to make a private loan to the Corporation to pay off a certain portion of its bills.<sup>113</sup> This maneuver made him the Corporation's largest creditor, even larger than Bent. Typically, the largest creditor is appointed receiver of a bankrupt organization.<sup>114</sup> This was not feasible in this case because of the conflict of interest presented by Joannes' position with the Corporation.<sup>115</sup> Instead, Frank Jonet, bookkeeper for the Acme Packing Company, a "friendly" receiver who had done accounting work for the Corporation, was appointed by Judge Henry Graass, the judge who had presided over the Bent trial. Things were reported to have gone on "more or less as before."<sup>116</sup> According to some reports, Silverwood, Bent's attorney, never pressed the conflict of interest because everyone felt that it was in the best interest of all parties concerned to see that the team survived.<sup>117</sup>

The constant financial concerns posed a very real threat to Green Bay fans: that the franchise would be moved to a much larger and more lucrative venue in Milwaukee. By now, the team had succumbed to pressure from NFL league president Joe Carr to play a significant portion of its games in Milwaukee.<sup>118</sup> If debts continued to mount while the receivership was still in place, it was likely that the court would order the Corporation to sell its only real asset: its National Football League franchise. An end to the receivership was conceived of in 1935.

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<sup>112</sup> NAMES, *supra* note 103, at 34.

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

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

<sup>115</sup> *Id.* at 35.

<sup>116</sup> *Id.* at 34. Judge Henry Graass appointed Frank J. Jonet as receiver. *Id.* Jonet, a certified public accountant, was company bookkeeper for the Acme Packing Company. *Id.*

<sup>117</sup> *Id.* at 35.

<sup>118</sup> WARD, *supra* note 49, at 128–129. Season ticket holders were able to purchase blue or gold tickets (still the team's colors at the time) depending upon which city they would attend games in. Devoted fans bought both packages. The Packers played games in Milwaukee until 1994 but vestiges of the old system remain in the current system of "green" and "gold" packages for season ticket holders. See GREEN BAY PACKERS, History, *Chronology*, <http://www.packers.com/history/chronology.html#1990>, last visited Mar. 25, 2013.

Under Clifford's direction, the team was reorganized yet again, but its strongest component - public ownership - was maintained.

Clifford, Turnbull and the other members of the Hungry Five went yet again with hat in hand to the business community of Green Bay. The team needed at least \$10,000 to survive. The pitch was a simple one: what was good for the team was good for the town.<sup>119</sup> The Association of Commerce Men agreed to help raise the money within a month's time by dividing the town up into neighborhood districts. By the end of the month, a reorganization meeting was held in the Brown County courthouse.<sup>120</sup>

The Green Bay Football Corporation was dissolved and replaced by the Green Bay Packers, Inc. The new corporation was also a not-for-profit corporation. 600 shares of no par common stock were issued at \$25 share. Again, any profits made by the Corporation would be donated to the Sullivan Post of the American Legion.<sup>121</sup> The Corporation would hold an annual meeting of stockholders on the Monday after the 4<sup>th</sup> of July each year at which the stockholders would elect a board of twenty directors. An Executive Committee of seven would be chosen from among the Board. As before, none of the board would receive a salary. Gerald Clifford and other members of the Hungry Five were among those chosen to be on the first Board of Directors of the new Green Bay Packers, Inc.<sup>122</sup> Again, the team became a new legal entity and took on a new legal name, one which it retains to this day.

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<sup>119</sup> Interview with Judge William Duffy (ret. federal judge) in Green Bay, WI. (Jan. 21, 2012) ("It took a lot of courage to get in there and battle to keep the club here . . . [Clifford] had a lot of vision politically as far as the Packers were concerned.") *Id.*

<sup>120</sup> NAMES, *supra* note 103, at 75.

<sup>121</sup> *Id.* at 76. Clifford pointed out at the meeting that the Football Corporation had donated \$4000 to the Sullivan Post and contributed \$39,000 toward the construction of City Stadium (prior to the Bent lawsuit). *Id.*

<sup>122</sup> *Id.* at 77. The Board included: H.J. Bero, George W. Calhoun, Gerald F. Clifford, Fred L. Cobb, E.R. Fischer, Leland Joannes, Frank Jonet, Leslie J. Kelly, Dr. W.W. Kelly, Fred Leicht, Harvey Lhost, Charles Mathys, John Moffett, J.E. Paeps; C.A. Raasch, Arthur E. Schumacher, Ed Schuster, H.J. Stoltz, A.B. Turnbull, Frank Walker, L.G. Wood, and H.J. Wintgens. *Id.*

*The Power Struggle*

The Packers would not exist without Lambeau, but the Packers would not have remained in Green Bay without Clifford.<sup>123</sup> The team was Lambeau's dream, and he brought that dream to fruition through determination, skill and community support. He kept the team going through lean times, and brought six national championships home to Green Bay. He was an athlete, a legendary coach, and a larger than life personality. Eventually that personality proved a bit too large for a town like Green Bay.

Professional football offers two things: fortune and fame. Curly Lambeau was famous in Green Bay and beyond. But for thirty years, Curly Lambeau had coached a not-for-profit football team which, for many of those years, had scraped to make payroll. Despite a notable increase in his salary over the years, Lambeau was not and would never be paid in Green Bay what he could make elsewhere. Curly Lambeau decided that he wanted to make some changes to the Packers organization. He wanted to change the not-for-profit structure and he wanted to centralize his authority. Gerald Clifford opposed him vehemently on both points, setting up a clash between these two founding members of the Hungry Five.

*Lambeau Goes Hollywood*

The team and its coach had always been an integral part of the town itself. Players lived, worked and shopped there. Curly Lambeau had grown up and gone to school there. His wife, Marguerite, was a much-beloved local girl. But Lambeau, a "natty dresser,"<sup>124</sup> with a flamboyant personality, had divorced his first wife and begun to spend more and more time in Los Angeles. His personal life became a bit racy by Green Bay standards. He married several

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<sup>123</sup> See THE GREEN BAY PACKERS HALL OF FAME, Gerald Francis Clifford, <http://geraldclifford.packershalloffame.com>, last visited Mar. 25, 2013.

<sup>124</sup> TORINUS, *supra* note 40, at 158.

more times<sup>125</sup>, and developed a reputation for spending money with little regard for its source.<sup>126</sup> According to reports, the boys at the Corner Drugstore and the Monday morning quarterbacks began to say that Curly had “gone Hollywood.”<sup>127</sup> The Packers Executive Committee became increasingly frustrated with Lambeau’s spending. This frustration reached a head when Lambeau purchased Rockwood Lodge.

Lambeau was an innovator in developing the concept of the team training camp. He arranged for the Packers to practice in advance of the season at a local Catholic college. This worked well for a number of years as players were able to attend daily practices while living at home and, as was the case at the time, continue to work their off-season jobs. But in the late 1940’s, Lambeau convinced the Packers to purchase a former recreation center known as Rockwood Lodge from the Catholic diocese.<sup>128</sup> The initial cost of the Lodge was \$32,000, but an additional \$8,000 was spent on what many on the Executive Committee considered excessive redecorating costs.<sup>129</sup> The purchase became a sore point quite literally when it was discovered that the players’ shin splints and injured feet were the result of a shallow topsoil over solid bedrock on the Rockwood Lodge playing field. Players were unhappy because wives and families were not allowed to join them at the Lodge. The townspeople were similarly unhappy because they were accustomed to encountering the players on a daily basis. Rockwood Lodge may have been the straw that broke the camel’s back.

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<sup>125</sup> *Id.* In 1935, Lambeau married a much younger Susan Johnston from Los Angeles. See GULLIKSON & HANSON, *supra* note 14, at 49. The marriage lasted less than a year and generated a great deal of local gossip. *Id.* In 1945, Lambeau married West Coast socialite Grace Carland and began spending most of the off-season in Los Angeles.

*Id.*

<sup>126</sup> *Id.*  
<sup>127</sup> *Id.* at 37.

<sup>128</sup> See LARRY D. NAMES, *THE HISTORY OF THE GREEN BAY PACKERS, BOOK THREE: THE LAMBEAU YEARS 150–52, 168–69* (Angel Press of Wisconsin 1990).

<sup>129</sup> TORINUS, *supra* note 40, at 60. At one meeting, members of the Financial Committee threatened to resign over the decorating bills Lambeau presented for his Rockwood Lodge cottage. *Id.*

*Corporate Changes to Balance the Power*

Lambeau's concentration of power had been a matter of some concern to Packers board members, particularly Clifford, given the team's constant financial struggles<sup>130</sup> and rumors about Lambeau's loyalty to the team and to the town. In 1947, corporate changes were instituted that laid the groundwork for curtailing that power, and widened the rift between Lambeau and the Executive Committee.

In 1947, Lambeau fired Packers co-founder George Calhoun from his position as public relations director.<sup>131</sup> Lambeau didn't tell Calhoun personally. Calhoun read that he had retired and been replaced as he manned the AP teletype wire at the *Press-Gazette*.<sup>132</sup> Lambeau also fired Clifford friend and ally Dr. Kelly from his long held position as team physician.<sup>133</sup> Both men still held their positions on the Packer board. That same year, Lee Joannes, president of the Packers Corporation since 1930, stepped down, reportedly weary of the increasing conflict with Lambeau.<sup>134</sup>

To address the issue, Clifford recommended that the board of directors be increased from 22 to 25 and the Executive Committee from 9 to 12. At its first meeting, the expanded Executive Committee created a new system of sub-committees – the first step in decentralizing Lambeau's power.<sup>135</sup> The Executive Committee also asked Lambeau to begin submitting weekly reports as

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<sup>130</sup> See NAMES, *supra* note 128, at 150–52, 168–69. One financial obligation incurred by Lambeau was always a sore point between he and Clifford: Rockwood Lodge. *Id.* at 150–51. Lambeau insisted on acquiring the residential and practice facilities located twelve miles outside of town. *See id.* Players were required to live there, without their families, during training camp. *Id.* As a result, many felt that the town and the team became disconnected, and Clifford felt that the facility was an unnecessary financial burden. *Id.*

<sup>131</sup> GULBRANDSEN, *supra* note 23, at 53.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> NAMES, *supra* note 128, at 64. Lambeau and President Fischer were a part of each of the sub-committees: Contracts and Publicity; Finance; Grounds; and Legal and League Affairs. *Id.*

vice-president and general manager of the team.<sup>136</sup> At the annual stockholders' meeting that year, two vice-presidents were authorized. Joannes was named to the additional vice-president position and local businessman Emil Fisher was named Packers president.<sup>137</sup> Lambeau's years of financial excess and unleashed power were coming to an end.

### *Leagues and Loyalty*

1948 and 1949 were the worst seasons in team history. As a result, seats were sitting empty in the stadium and the team's finances were once again in peril. Nonetheless, a longstanding battle for survival in the National Football League was drawing to a successful close.<sup>138</sup> A rival league, the All-America Conference, posed yet another threat to the Green Bay franchise. The AAC's Los Angeles Dons were said to be courting Curly Lambeau for the position of head coach.<sup>139</sup> Lambeau had spent increasing amounts of time on the West Coast over the years<sup>140</sup> and rumors swirled that he had an interest in relocating to a warm weather climate. Members of the Executive Committee, including Clifford, were angry with Lambeau over the purchase of Rockwood Lodge, the number of games being played in Milwaukee instead of Green Bay, and the decision to replace Kelly and Calhoun.<sup>141</sup> With all of this in play, Lambeau's contract was up for renewal.

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<sup>136</sup> TORINUS, *supra* note 40, 60. Lambeau had abruptly resigned as coach of the team in 1950. *Id.*

<sup>137</sup> GULBRANDSEN, *supra* note 23, at 59.

<sup>138</sup> NAMES, *supra* note 128, at 165. In mid-November 1949, then NFL commission Bert Bell stated: "I am most happy to hear that there is no foundation to this story that Green Bay may surrender its franchise" (quoting THE N.Y. DAILY NEWS). *Id.*

<sup>139</sup> *See id.* at 81–82. There is some suggestion that Lambeau accepted an offer for the coaching position, but was forced to rescind his acceptance when Clifford and Fischer threatened him with a breach of his newly-extended contract.

<sup>140</sup> *See id.* at 80–81, 142–45.

<sup>141</sup> *See id.* at 170–71.

At the stockholder meeting in August of 1949, Andrew Turnbull resigned from his positions on the Executive Committee and the Board of Directors.<sup>142</sup> Turnbull was replaced at both positions with wealthy attorney Victor McCormick, a well-known Lambeau supporter.<sup>143</sup> By November of that year, finances had gotten so tight that the team had to drop players from its roster and Lambeau was ordered to sell Rockwood Lodge.<sup>144</sup> In an effort to raise funds to continue the season, veteran Packer players put on an exhibition game on Thanksgiving Day, which raised nearly \$50,000 from an estimated 15,000 enthusiastic and loyal fans.<sup>145</sup>

The Executive Committee, including Clifford, decided that in order to address long-term financial concerns, another stock sale would be necessary. A special sub-committee, chaired by McCormick, was created to set up the stock sale. Lambeau, a member of the committee, announced at its first meeting what many had suspected all along: Lambeau wanted to take the team private. He promoted a plan that would change the community ownership structure and convert the Packers into a for-profit corporation.<sup>146</sup> Lambeau announced that he knew of four investors willing to put up \$50,000 each for the Packers stock. It was an open secret that Victor McCormick was one of the intended investors. Clifford was one of many on the Board who were incensed by Lambeau's plan to make the team for-profit; a move that would certainly lead to the team's quick departure from Green Bay.

Lambeau's plan was not without its supporters, though. The Packers were yet again faced with the real threat of losing their franchise as the result of shaky finances. The recent merger of the rival All-America Football Conference into the NFL had added three additional

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<sup>142</sup> TORINUS, *supra* note 40, 63.

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

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See* NAMES, *supra* note 128, at 175.

teams to the NFL roster.<sup>147</sup> NFL commissioner Bert Bell was considering paring down the number of teams.<sup>148</sup> Given Green Bay's small market and its history of financial uncertainty, the Packers franchise was vulnerable. In light of all this, Lambeau's proposal was opportune.

Clifford and other members of the Executive Committee rallied hard to keep Lambeau's proposal from passing. Clifford threatened Lambeau on the steps of the courthouse, saying that he would bring charges based on financial improprieties with Lambeau's team expense accounts if he did not drop the proposal.<sup>149</sup> The proposal was certainly part of the discussion of Lambeau's future with the Packers.

The proposal and Lambeau's two-year contract renewal were discussed at a heated board meeting on November 21<sup>st</sup> at the Brown County Courthouse.<sup>150</sup> The meeting lasted five hours; the debate was "so rancorous that observers standing outside the courthouse could hear the directors shouting at one another behind closed doors."<sup>151</sup> Clifford's efforts to call for a secret

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<sup>147</sup> GULBRANDSEN, *supra* note 23, at 58.

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

<sup>149</sup> NAMES, *supra* note 128, at 168

Jerry Clifford had heard a rumor that Lambeau and Vic McCormick and two other fellows whose names I can't recall right now were planning to take over the franchise from the corporation. Clifford stopped them on the courthouse steps and took Lambeau aside. He told Lambeau not to try taking the franchise back from the corporation. If he did, Clifford would make public Lambeau's abuse of his expense account and he would bring charges against Lambeau for malfeasance in office and misappropriating corporate assets. He promised Lambeau he wouldn't use the evidence to get him fired as head coach and general manager of the Packers. That's how Jerry Clifford stopped Curly Lambeau from taking back the franchise. (quoting John B. Torinus)

*Id.* See also DR. JAMES HURLEY, GREEN BAY: A CITY AND ITS TEAM 242 (Thomas Murphy Books, 2011)

Team attorney Gerry Clifford was so concerned that he accosted Lambeau as the two were exiting the courthouse and standing at the top of the steps. During this exchange, he threatened to expose Lambeau's abuse of his expense account and bring charges for financial malfeasance and misappropriating corporation assets if Lambeau continued in his bid to buy the team . . . A line in the sand had been drawn, and the implications for Lambeau were grave. Gerry Clifford's actions on the steps of the Brown County courthouse that evening may very well have saved the team from the same man who had nurtured [sic] it from its inception."

*Id.*

<sup>150</sup> See POVLETICH, *supra* note 56, at 77.

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



ballot on the renewal in a “rump session” were voted down.<sup>152</sup> Ultimately, Lambeau’s contract was renewed and, although the vote was never announced, it was clear that Clifford, Dr. Kelly and George Calhoun had voted against it.<sup>153</sup> Newspaper reports identifying Clifford as the leader of the “anti-Lambeau faction” suggested that these three were likely to be ousted from the Board when the elections came around in the spring.<sup>154</sup>

Lambeau claimed victory, announcing that he was pleased that there would now be “complete harmony in the organization.”<sup>155</sup> Dr. Kelly resigned from the Board a month later, saying that he strongly disagreed with the contract renewal. This left only two of the Hungry Five remaining: Lambeau and Clifford.

Although Lambeau’s contract was renewed, it was Clifford who had won the most important battle. The Packers would remain a not-for-profit corporation. The Board announced that the corporation would issue 20,000 new shares of stock at \$25 each in an effort to raise \$200,000. This, along with the \$50,000 that the fans had raised as part of the Thanksgiving Day drive,<sup>156</sup> would provide enough working capital to put the Packers back on sound footing. And the fans would remain the owners.

### *Lambeau Leaves Green Bay*

Although the Board had voted to extend Lambeau’s contract, he had yet to receive it as of mid-January 1950. Both Lambeau and President Fischer publicly attributed it to holiday absences from town.<sup>157</sup> Some reports suggest that the Board was hoping Lambeau would move

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<sup>152</sup> See NAMES, *supra* note 128, at 168.

<sup>153</sup> *Id.* See also TORINUS, *supra* note 40, at 63.

<sup>154</sup> NAMES, *supra* note 128, at 168 (citing the MILWAUKEE J).

<sup>155</sup> *Id.*

<sup>156</sup> See *id.* (noting that 20,000 new shares would be issued for \$10 each, raising a total of \$200,000 for the organization).

<sup>157</sup> *Id.* at 172.

on. Others indicate that Fischer had given Lambeau a contract in late January, which Lambeau had rejected.<sup>158</sup>

On January 2, 1950, Rockwood Lodge, the controversial training camp and the Packers largest financial asset, burned to the ground.<sup>159</sup> On February 1, 1950, after 31 years with the Green Bay Packers, Curly Lambeau quit to coach the Chicago Cardinals,<sup>160</sup> citing his differences with the Executive Committee as the reason for his departure.<sup>161</sup> Clifford said “We’ve had two good breaks in Green Bay in the last two weeks. We lost Rockwood Lodge and we lost Lambeau. If he had stayed for two more years we would have gone completely busted.”<sup>162</sup>

Clifford died in 1952, not long after his showdown with Lambeau. Clifford was inducted into the Green Bay Packer Hall of Fame in 1991 for “draft[ing] the articles of incorporation that created the Green Bay Packer Football Corp. Serving in a variety of positions,<sup>163</sup> including acting as the team’s first legal counsel and later as vice-president, Mr. Clifford has been credited as doing more to assure the team’s survival and growth during the 1930’s and 40’s than any other individual.”<sup>164</sup>

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<sup>158</sup> GULBRANDSEN, *supra* note 23, at 59.

<sup>159</sup> See POVLETICH, *supra* note 56, at 7. The investigation showed no wrongdoing. *Id.* The cause was attributed to faulty wiring in the attic. *Id.* The Packers received a \$50,000 insurance settlement, which was timely. *Id.* Few were saddened by the loss. *Id.*

<sup>160</sup> TORINUS, *supra* note 40, at 69. Lambeau coached the Cardinals for two seasons before moving to the Washington Redskins for another two seasons, after which he retired from professional football. GULBRANDSEN, *supra* note 23, at 60. Curly Lambeau died of a heart attack at age 67 near his home in Door County, Wisconsin. THE GREEN BAY PACKERS HALL OF FAME, CURLY LAMBEAU, <http://packershalloffame.com/players/curly-lambeau/> (last visited Mar. 25, 2013). The football legend is remembered by Packers fans as they approach the stadium in Green Bay that bears his name and features a statue of him next to one of the other legendary Packers coach Vince Lombardi. *Id.*

<sup>161</sup> NAMES, *supra* note 128, at 172. Lambeau said that the Executive Committee had become “obsolete and unworkable.” *Id.* He claimed that “[n]o group of twelve men can get together once a week during the football season, for an hour and half, including lunch, and run a professional football team. That can’t be done.” *Id.*

<sup>162</sup> ZIMMERMAN, *supra* note 36, at 204.

<sup>163</sup> THE GREEN BAY PACKERS HALL OF FAME, *supra* note 81.

<sup>164</sup> *Id.*

*The Packers Today*



Today, the Packers are governed by a board of forty-three directors with a seven-member Executive Committee.<sup>165</sup> With over a hundred thousand owners, and over 4.7 million shares of outstanding stock,<sup>166</sup> the Packers remain the only professional football team in Wisconsin. Lambeau Field, so named in 1965, seats 73,142 ardent fans. The wait for Packers season tickets is about thirty years long.<sup>167</sup> The team is widely regarded as one of the most popular sports teams in the nation. That popularity was boosted by a Super Bowl win in 2010.<sup>168</sup> The team leads the league in sales of merchandise.<sup>169</sup> The team has finally achieved its long sought after stability and even success. There is no one man or family who pockets the profits, nor is there any evidence of the lingering threat to move the franchise to a larger market, despite the fact that Green Bay remains the smallest market by a wide margin.<sup>170</sup> Given this success, why haven't more teams adopted the not-for-profit corporate structure?

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<sup>165</sup> See *Executive Committee and Board of Directors*, THE GREEN BAY PACKERS, <http://www.packers.com/team/executive-committee.html>, last visited Mar. 25, 2013.

<sup>166</sup> *Shareholder History & Financial History*, THE GREEN BAY PACKERS, <http://prod.static.packers.clubs.nfl.com/assets/docs/2012shareholder-history.pdf> (last visited Mar. 25, 2013).

<sup>167</sup> *Frequently Asked Questions, Tickets*, THE GREEN BAY PACKERS, FAN ZONE, <http://www.packers.com/fan-zone/faq.html> (last visited Mar. 25, 2013) ("The season ticket waiting list has more than 81,000 names. The Packers tell fans adding their names that the average wait is 30 years.") *Id.*

<sup>168</sup> *Super Bowls and Championships*, THE GREEN BAY PACKERS, HISTORY, <http://www.packers.com/history/super-bowls-and-championships.html> (last visited Mar. 25, 2013.)

<sup>169</sup> [http://www.forbes.com/lists/2011/30/nfl-valuations-11\\_Green-Bay-Packers\\_30281](http://www.forbes.com/lists/2011/30/nfl-valuations-11_Green-Bay-Packers_30281)

<sup>170</sup> *Green Bay Packers CEO Talks NFL and Economic Survival*, NIGHTLY BUSINESS REPORT, <http://www.nbr.com/beyond-the-scoreboard/green-bay-packers-ceo-talks-nfl-and-economic-survival-20120110> (last visited Mar. 25, 2013) (noting Green Bay is the NFL's smallest market). *Id.*

**NFL Ownership**

The National Football League rules now effectively prohibit any other professional football team from adopting the Packers not-for-profit community ownership model. Although the Packers were grandfathered into the League, these rules now prohibit any city, or any franchise, from utilizing such an organizational structure. Like the Packers, a remarkable number of NFL teams are still owned by some member of the same “family” who started them in the early days of the league. As the chart below indicates, the NFL is a family business. Many of the teams have been family-owned since the beginning of the league with very little turnover in ownership. All the names historically associated with the NFL are there: Rooney, Mara, Halas, Brown and Bidwell.

Team Name	Owner(s)	Structure	Owned Since
Arizona Cardinals	Bill Bidwill	Single Owner	1972 (owner had previous minority share previous to this date) <sup>171</sup>
Atlanta Falcons	Arthur Blank	Ownership Group	2004 <sup>172</sup>
Baltimore Ravens	Steve Bisciotti	Ownership Group	2004 (owner had previous minority share previous to this date) <sup>173</sup>

<sup>171</sup> See *Franchise*, THE ARIZONA CARDINALS, HISTORY, <http://www.azcardinals.com/history/franchise.html> (last visited Mar. 25, 2013). Bill Bidwill Sr. has owned the Arizona Cardinals since 1972. *Id.* From 1962 to 1972 Bidwill was a part-owner with his brother, Charles Jr. *Id.* Their father, Charles Bidwill Sr. owned the franchise from 1932 until his death in 1947. *Id.* Charles Sr.’s mother, Violet and a business partner then ran the franchise until Violet’s death in 1962 when Bill Sr. and Charles Jr. inherited the franchise. *Id.* Bill Sr. has now ceded most of the day to day operations of the franchise to his sons Bill Jr. and Michael. *Id.* at TEAM, STAFF.

<sup>172</sup> THE ATLANTA FALCONS 2011 MEDIA GUIDE 329 (2011); Associated Press, *Falcons Add Brian J. Barker as Partner*, [http://espn.go.com/nfl/story/\\_/id/7459740/atlanta-falcons-add-brian-j-barker-new-limited-partner](http://espn.go.com/nfl/story/_/id/7459740/atlanta-falcons-add-brian-j-barker-new-limited-partner) (last visited Mar. 25, 2013). Arthur Blank is a co-founder of The Home Depot and presently owns 90% of the Atlanta Falcons. Other individuals own the remaining 10%. Associated Press, *Falcons Add Brian J. Barker as Partner*, [http://espn.go.com/nfl/story/\\_/id/7459740/atlanta-falcons-add-brian-j-barker-new-limited-partner](http://espn.go.com/nfl/story/_/id/7459740/atlanta-falcons-add-brian-j-barker-new-limited-partner), last visited Mar. 25, 2013. Blank first acquired an ownership share of the Falcons in 2002. THE ATLANTA FALCONS 2011 MEDIA GUIDE 315 (2011). Blank bought the franchise from previous ownership group. *Id.* at 329. Rankin Smith acquired the team in 1965 and paid \$8.5 million to the NFL for the franchise—a record at the time. *Id.* at 308; *Rankin Smith, 72, the Owner of the Falcons*, THE N.Y. TIMES, OBITUARIES, available at <http://www.nytimes.com/1997/10/27/sports/rankin-smith-72-the-owner-of-the-falcons.html> (last visited Mar. 25, 2013). Smith owed the team until his death in 1997. THE ATLANTA FALCONS 2011 MEDIA GUIDE 308 (2011). His shares were passed to his five children who sold them to Blank in 2002. *Id.* at 329.

<sup>173</sup> *Baltimore Football History*, THE BALTIMORE RAVENS, TEAM, HISTORY, <http://www.baltimoreravens.com/team/history/baltimore-football-history.html> (last visited Mar. 25, 2013). Bisciotti

Buffalo Bills	Ralph Wilson	Single Owner	1960 (team's inception) <sup>174</sup>
Carolina Panthers	Jerry Richardson	Ownership Group	1993 (team's inception) <sup>175</sup>
Chicago Bears	Virginia Halas McCaskey	Ownership Group	1983 (heir of original owner) <sup>176</sup>
Cincinnati Bengals	Mike Brown	Single Owner	1991 (heir of original owner) <sup>177</sup>
Cleveland Browns	Jimmy Haslam	Ownership Group	2012 <sup>178</sup>
Dallas Cowboys	Jerry Jones	Single Owner	1989 <sup>179</sup>
Denver Broncos	Pat Bowlen	Ownership Group	1984 <sup>180</sup>
Detroit Lions	William Clay Ford Sr.	Single Owner	1963 <sup>181</sup>
Green Bay Packers	Green Bay Packers, Inc.	501(c)(3)	1923 <sup>182</sup>
Houston Texans	Robert C. McNair	Ownership Group	2002 (team's inception) <sup>183</sup>
Indianapolis Colts	Jim Irsay	Single Owner	1997 <sup>184</sup>

bought 49% of the franchise from Art Modell the original owner of franchise (1961-1995—Cleveland Browns, 1996-Present—Baltimore Ravens) in 2000. *Id.* In 2004, he bought the remaining 51%. *Id.*

<sup>174</sup> *Hall of Fame, THE BUFFALO BILLS HISTORY*, <http://www.history.buffalobills.com/Hall+of+Fame> (last visited Mar. 25, 2013). Ralph Wilson was inducted into the Pro Football Hall of Fame in 2009. *Id.*

<sup>175</sup> Greg Jones, *Richardson is Optimistic About Panthers' Future*, THE CHARLOTTE SPORTS EXAMINER, available at <http://www.examiner.com/sports-in-charlotte/panthers-richardson-morrison-will-aid-hurney-finding-coach> (last visited Mar. 25, 2013). Richardson owns 48% of the franchise. *Id.* 14 individuals own the other 52%. *Id.*

<sup>176</sup> *Heirs and Bears; As Icons of NFL old school, McCaskey Family Quietly Goes About its Business*, FOX SPORTS, <http://msn.foxsports.com/nfl/story/Heirs-and-Bears-As-icons-of-NFL-old-school-McCaskey-family-quietly-goes-about-its-business-48758244> (last visited Mar. 25, 2013). McCaskey controls 80% of the franchise, along with her children and grandchildren. *Id.* She inherited her share of the team from her father, George Halas, who was the original owners of the franchise. Patrick Ryan, executive chairman of AON and Andrew McKenna an AON director own 15% of the franchise. *Id.*

<sup>177</sup> The Associated Press, *Brown Family Increase Bengals Control*, ESPN.COM, [http://espn.go.com/nfl/story/\\_id/7384279/mike-brown-brown-family-increases-control-cincinnati-bengals](http://espn.go.com/nfl/story/_id/7384279/mike-brown-brown-family-increases-control-cincinnati-bengals) (last visited Mar. 25, 2013). Brown inherited the team from his father, a co-founder and owner of the team. *Id.*

<sup>178</sup> Adam Scheffer, *Sources: Browns Sold for Over \$1B*, ESPN.COM, [http://espn.go.com/nfl/story/\\_id/8225861/randy-lerner-sells-cleveland-browns-more-1b-sources-say](http://espn.go.com/nfl/story/_id/8225861/randy-lerner-sells-cleveland-browns-more-1b-sources-say) (last visited Mar. 25, 2013). Haslam purchased the organization from Randy Lerner, who inherited the franchise upon the death of his father, the original owner who died four years to the day after being awarded the franchise by the NFL. *Id.* Haslam has acquired 70% of the organization and is its majority shareholder. He has reportedly agreed to purchase the remaining 30%, which would make him the sole owner of the franchise. *Id.*

<sup>179</sup> *Jerry Jones, Owner/President/General Manager*, THE DALLAS COWBOYS, TEAM, PLAYERS & STAFF, [http://www.dallascowboys.com/team/team\\_biosCoachExec.cfm?newName=Jerry\\_Jones](http://www.dallascowboys.com/team/team_biosCoachExec.cfm?newName=Jerry_Jones) (last visited Mar. 25, 2013). All three of Jerry Jones' children work in the front office of the organization. *Id.*

<sup>180</sup> James Paton, *Clock Runs Out for Ex-Broncos Owner*, THE ROCKY MOUNTAIN NEWS, Oct. 2, 2008, available at <http://www.rockymountainnews.com/news/2008/oct/02/ex-broncos-owner-denied-chance-buy-back-team/> (last visited Mar. 25, 2013). The previous owner sued Bowlen when he offered John Elway a 10% share in 2001 for violating the right of first refusal clause in the sale agreement in 1984. *Id.* Bowlen lost at the trial court, but prevailed on appeal. *Id.* Elway now owns 10% of the organization. *Id.*

<sup>181</sup> *William Clay Ford, Sr., Owner and Chairman*, THE DETROIT LIONS, TEAM, ADMINISTRATION, <http://www.detroitlions.com/team/staff/william-clay-ford-sr/10a3ab6b-bd2f4967-ab7b-7d0e1916508c> (last visited Mar. 25, 2013).

<sup>182</sup> The Associated Press, *Yikes! Obama Now a Part Owner of the Packers*, THE CHICAGO SUN-TIMES, Aug. 12, 2011, available at <http://www.suntimes.com/news/metro/7036540-418/yikes-obama-now-a-part-owner-of-the-packers.html> (last visited Mar. 25, 2013). President Obama was gifted shares of the organization at the White House reception for the Super Bowl XLV champions. *Id.*

<sup>183</sup> The Associated Press, *Ex-Oiler Childless Among Texans' Minority Owners*, THE LUBBOCK AVALANCHE-J., July 7, 2001, available at [http://lubbockonline.com/stories/070701/pro\\_070701102.shtml](http://lubbockonline.com/stories/070701/pro_070701102.shtml). Bob McNair owns 70% of the franchise with group of minority investors owning the remaining 30%. *Id.*

Jacksonville Jaguars	Wayne Weaver	Ownership Group	1993 (team's inception) <sup>185</sup>
Kansas City Chiefs	Clark Hunt	Ownership Group	2006 (heir of original owner) <sup>186</sup>
Miami Dolphins	Stephan M. Ross	Ownership Group	2008 <sup>187</sup>
Minnesota Vikings	Zygi Wilf	Ownership Group	2005 <sup>188</sup>
New England Patriots	Robert Kraft	Single Owner	1994 <sup>189</sup>
New Orleans Saints	Tom Benson	Ownership Group	1985 <sup>190</sup>
New York Giants	John Mara & Steve Tisch	Ownership Group	2005 (heirs of the original owners) <sup>191</sup>
New York Jets	Robert Wood Johnson IV	Single Owner	2000 <sup>192</sup>
Oakland Raiders	Al Davis	Ownership Group	1976 (owner had previous minority share previous to this date) <sup>193</sup>
Philadelphia Eagles	Jeffrey Lurie	Single Owner	1994
Pittsburgh Steelers	Dan Rooney	Single Owner	1988 (heir of original owner) <sup>194</sup>

<sup>184</sup> *RetroIndy: Jim Irsay, Owner of the Indianapolis Colts, 1997-Jan. 16, 2011*, THE INDIANAPOLIS STAR, available at <http://www.indystar.com/article/99999999/NEWS06/90701052/StarFiles-Jim-Irsay> (last visited Mar. 25, 2013). Irsay's father bought the team when he was 12 years old. *Id.* When his father died in 1997 he had a legal battle with his stepmother for ownership of the franchise. *Id.* He prevailed. *Id.*

<sup>185</sup> Gene Frenette, *Behind the Scenes: Teal Brain Trust, Wayne Weaver Isn't the Only One Who Owns a Piece of the Jaguars*, Oct. 17, 2004, available at [http://jacksonville.com/tu-online/stories/101704/jag\\_16934681.shtml](http://jacksonville.com/tu-online/stories/101704/jag_16934681.shtml) (last visited Mar. 25, 2013). Weaver holds 70% with 8 others holding the remaining 30% of shares. *Id.*

<sup>186</sup> The Associated Press, *Clark Hunt Says He'll Run Chiefs Like His Father Did*, ESPN.COM, Dec. 31, 2006, <http://sports.espn.go.com/nfl/news/story?id=2715831> (last visited Mar. 25, 2013). Clark Hunt is the original owner's son and now represents the Hunt family and its shares. *Id.* He is also chairman of the board. *Id.*

<sup>187</sup> The Associated Press, *Anthony Joins Star-Studded Ownership*, ESPN.COM, July 22, 2009, <http://sports.espn.go.com/nfl/news/story?id=4344721> (last visited Mar. 25, 2013). Ownership group includes a host of celebrities and athletes. *Id.*

<sup>188</sup> Pat Borzi, *Vikings; Owner Makes a Name for Himself*, THE N.Y. TIMES, Aug. 19, 2005, available at <http://www.nytimes.com/2005/08/19/sports/football/19vikings.html> (last visited Mar. 25, 2013). There are 5 other minority owners. *Id.*

<sup>189</sup> *The Patriot Way. The History of the New England Patriots*, THE NEW ENGLAND PATRIOTS, TEAM, HISTORY, <http://www.patriots.com/team/history/full-history.html> (last visited Mar. 25, 2013). Robert Kraft became the sole owner in 1994. *Id.*

<sup>190</sup> Elizabeth R. Mullener, *Rita Benson LeBlanc is Climbing to the Top of the Saints Roster with Hard Work, Not Just Pedigree*, NOLA.COM BY THE TIMES-PICAYUNE, July 26, 2009, available at [http://www.nola.com/news/index.ssf/2009/07/rita\\_benson\\_leblanc\\_is\\_climbin.html](http://www.nola.com/news/index.ssf/2009/07/rita_benson_leblanc_is_climbin.html) (last visited Mar. 25, 2013). The ownership group includes the majority owner's granddaughter. *Id.* She has been named as Tom Benson's (current owner) successor. *Id.*

<sup>191</sup> Judy Battista, *Three Football Families, Linked by Philosophies*, THE N.Y. TIMES, Feb. 4, 2012, available at <http://www.nytimes.com/2012/02/05/sports/football/three-football-families-linked-by-philosophies.html> (last visited Mar. 25, 2013). Mara and Tisch each own 50% of the franchise. *Id.* John is the third generation Mara to own the Giants. *Id.* His grandfather, Tim, founded the Giants. *Id.* Tisch is also an heir of an original owner. *Id.*

<sup>192</sup> Richard Sandomir, *The Jets Fill One Opening: New Owner at \$635 Million*, THE N.Y. TIMES, Jan. 12, 2000, available at <http://www.nytimes.com/2000/01/12/sports/the-jets-fill-one-opening-new-owner-at-635-million.html?ref=leonhess> (last visited Mar. 25, 2013). Robert Wood Johnson IV Outbid Cablevision's Chairman and paid \$635 million for the franchise. *Id.* That is the third highest amount ever paid for a sports franchise and the highest in New York. *Id.*

<sup>193</sup> Eric Young, *Davis Sells Minority Stake in Raiders for \$150M*, THE SAN FRANCISCO BUSINESS TIMES, Nov. 19, 2007, available at <http://www.bizjournals.com/sanfrancisco/stories/2007/11/19/daily6.html> (last visited Mar. 25, 2013). Davis sold a minority interest in the franchise in 2007, apparently about 20%. *Id.*

San Diego Chargers	Alex Spanos	Ownership Group	1984 (owner had previous minority share previous to this date) <sup>195</sup>
San Francisco 49ers	Jed York	Single Owner	2009 (owner had previous minority share previous to this date) <sup>196</sup>
Seattle Seahawks	Paul Allen	Single Owner	1997 <sup>197</sup>
St. Louis Rams	Stan Kroenke	Single Owner	2010 (owner had previous minority share previous to this date) <sup>198</sup>
Tampa Bay Buccaneers	Malcolm Glazer	Single Owner	1995 <sup>199</sup>
Tennessee Titans	Bud Adams	Single Owner	1960 (team's inception) <sup>200</sup>
Washington Redskins	Dan Snyder	Ownership Group	1999 <sup>201</sup>

<sup>194</sup> Robert Dvorchak, NFL Approves New Ownership Structure for Steelers, *The Pittsburgh Post-Gazette*, Dec. 18, 2008, available at <http://www.post-gazette.com/stories/local/breaking/nfl-approves-sale-of-steelers-shares-to-dan-rooney-and-son-625778/> (last visited Mar. 25, 2013). In 2008 the Rooney family restructured the organization. *Id.* Each of the five Rooney's own 16% of the franchise. *Id.* The McGinley family owns the remaining 20%. *Id.*

<sup>195</sup> The Associated Press, Chargers Stake off the Market, *ESPN.com*, June 10, 2011, <http://sports.espn.go.com/nfl/news/story?id=6649477> (last visited Mar. 25, 2013). Alex Spanos is the majority owner and at one point pursued a possible sale of a minority stake, up to 36%, of the franchise. *Id.* Spanos may own close to 97% of the franchise; prominent San Diego restaurateur and former Charger, George Pernicano, owns 3%. See Jay Paris, Minority Owner Pernicano is a Link to Bolts' Past, *The North County Times*, Oct. 20, 2005, available at <http://www.utsandiego.com/news/2005/Oct/30/minority-owner-pernicano-is-a-link-to-bolts-past/all/> (last visited Mar. 25, 2013).

<sup>196</sup> The Associated Press, 49ers, Giants Renew Playoff Rivalry for NFC Crown, *Wall St. J.*, Jan. 21, 2012, available at <http://online.wsj.com/article/AP99645fe10e83467390ea74ae7aaf464.html> (last visited Mar. 25, 2013). York is the nephew of former owner Ed DeBartolo. *Id.* See also Sam Farmer, Eddie DeBartolo Keeps a Close Eye on 49ers, *From Far Away*, *The Los Angeles Times*, Jan. 13, 2012, available at <http://articles.latimes.com/2012/jan/13/sports/la-sp-farmer-nfl-playoffs-20120114> (last visited Mar. 25, 2013).

<sup>197</sup> The Associated Press, Allen Battling Lymphoma, *ESPN.com*, Nov. 17, 2009, <http://sports.espn.go.com/espn/news/story?id=4661907> (last visited Mar. 25, 2013). Allen also owns the Portland Trailblazers. *Id.* NFL rules prohibit team owners from either outright ownership or a majority share of another sports team outside its home market if they play in the same city as another NFL team. See Constitution and Bylaws of the National Football League, Rev. 2006, Art. IV (unpublished) (on file with author). Portland does not have an NFL team.

<sup>198</sup> Benjamin Hochman, Josh Kroenke Building a Legacy on his Own, *The Denver Post*, April 17, 2011, available at [http://www.denverpost.com/nuggets/ci\\_17865859](http://www.denverpost.com/nuggets/ci_17865859) (last visited Mar. 25, 2013). Kroenke used to own the Denver Nuggets (NBA) and the Colorado Avalanche (NHL). *Id.* He avoided the NFL ownership rule cited in n.197 by transferring the Colorado teams to his son Josh. *Id.*; *supra* note 197.

<sup>199</sup> Buccaneers Sold to Glazer, *The N.Y. Times*, Jan. 17, 1995, available at <http://www.nytimes.com/1995/01/17/sports/buccaneers-sold-to-glazer.html?src=pm> (last visited Mar. 25, 2013). Glazer bought the franchise when the previous owner died. *Id.* It was the most ever paid for a sports franchise at the time (in excess of \$185 million). *Id.* He also owns a controlling interest in the Manchester United soccer team. Roundup: League chief plans Glazer meeting, *The N.Y. Times*, May 18, 2005, available at <http://www.nytimes.com/2005/05/17/sports/17iht-world.html> (last visited Mar. 25, 2013).

<sup>200</sup> See Jeff Z. Klein, A City's Hockey Identity Distilled Into One Man, *The N.Y. Times*, Dec. 30, 2011, available at <http://www.nytimes.com/2011/12/31/sports/hockey/philadelphias-hockey-identity-boils-down-to-ed-snyder.html?pagewanted=all> (last visited Mar. 25, 2013). Adams is the senior owner in the NFL. *Id.* The Oilers (now Titans) were admitted to the NFL months before Ralph Wilson's Buffalo Bills. History: 1959-1969, *The Tennessee Titans, Team, History*, <http://www.titansonline.com/team/history/history-1959-1969.html> (last visited Mar. 25, 2013).

<sup>201</sup> Richard Sandomir, Pro Football; N.F.L. Approves \$800 Million Purchase of Redskins, *The N.Y. Times*, May 26, 1999, available at <http://www.nytimes.com/1999/05/26/sports/pro-football-nfl-approves-800-million-purchase-of->

But the ownership rules in the NFL are more restrictive than in any other major professional sports league. Under the rules, one family must own a total of a 30% share of the team.<sup>202</sup> The rules have been relaxed in recent years so that the only 10% of that family share must be owned by a single controlling owner and the remaining 20% must be owned by other family members.<sup>203</sup> In order to take advantage of the relaxed rules, families are required to have a succession plan in place.<sup>204</sup> This “relaxation[] recognizes both the increased value of the franchises and the increasing age and family divisions among the original owners.”<sup>205</sup> Even with this relaxation, the NFL still maintains an interest in fostering family ownership of franchises, and in preventing syndicates from joining the ranks of owners. Arguably, it is in the interest of the League to have a single voice representing each team,<sup>206</sup> and a single deep pocket in place if the team requires financial assistance.<sup>207</sup>

The Packers model has prohibited the franchise from being sold or relocated to a more lucrative market. Under the contractual agreements requiring profit-sharing among teams from

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redskins.html (last visited Mar. 25, 2013). Synder bought the team in 1999 when the previous owner died. *Id.* The ownership group includes Fred Drasner, Mort Zuckerman. *Id.*

<sup>202</sup> 2004 Resolution FC-1A to the National Football League Constitution, reprinted in the Constitution and Bylaws of the National Football League in Art. III § 3.2(B)(3) (“rules governing aggregation of a Principal Owner’s ownership interest with those of immediate family members for the purposes of determining whether such Principal Owner holds at least a 30% beneficial interest.”) (unpublished) (on file with author). *Id.*

<sup>203</sup> Daniel Kaplan, *NFL Pares Ownership Rule*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, Oct. 26, 2009, <http://www.sportsbusinessdaily.com/Journal/Issues/2009/10/20091026/This-Weeks-News/NFL-Pares-Ownership-Rule.aspx> (last visited Mar. 25, 2013). Previously, 30% of a team had to be owned by the controlling member. *Id.* “The league revised the rule in 2004 to allow the lead owner, or general partner, to own as little as 20 percent of the team, but with his or her family needing to own at least another 10 percent, such that the total family ownership would be at 30 percent.” *Id.* Presently, however, a lead owner must only control a mere 10%. *Id.*

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

<sup>205</sup> *Id.*

<sup>206</sup> *See id.* Would a single owner have helped the Packers to challenge the highly questionable call made by substitute referees during the strike during the game against the Seattle Seahawks? Many fans have asked this very question.

<sup>207</sup> *Id.* But see Brian Solomon, *Baseball Bandit: Frank McCourt Escapes Dodgers with \$860 Million Profit*, FORBES.COM, Mar. 28, 2012, <http://www.forbes.com/sites/briansolomon/2012/03/28/baseball-bandit-frank-mccourt-escapes-dodgers-with-860-million-profit/> (last visited Mar. 25, 2013). The divorce of Frank McCourt, the former owner of the Los Angeles Dodgers, resulted in the team being temporarily owned by Major League Baseball when Mr. McCourt declared the team bankrupt during his divorce proceeding. *See id.*



profitable broadcasting contracts and gate receipts, the Packers contribute little. The structure is nothing but a thorn in the side of the NFL, one its ownership percentage requirements are not likely to permit in the future. Moreover, the existing NFL rules expressly prohibit ownership by a not-for-profit, religious or governmental organization.<sup>208</sup> The NFL has virtually guaranteed that we will not see another community-owned professional team.

Other major professional sports leagues provide similar prohibitions against community or not-for-profit ownership, even if they are not as strict as the NFL. As a result, there is no other professional sports team in the United States that utilizes the Packers model. It is used on a small scale in several other countries, however. Three Canadian Football League teams<sup>209</sup> are owned this way: in Edmonton, Saskatchewan and Winnipeg. Several European soccer clubs are reported to operate on a similar model.<sup>210</sup> At least one minor baseball league – Wisconsin’s own Timber Rattler’s—has a not-for-profit stock ownership structure identical to the Packers.<sup>211</sup>

This mandated limited ownership structure puts professional sports franchises, something akin to a public trust, in the hands of single families. Yet, these same families often seek public funds to support their private ventures in the form of financial incentives,<sup>212</sup> and funds to build or

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<sup>208</sup> Constitution and Bylaws of the National Football League, Rev. 2006, Art. III § 3.2(A) (unpublished) (on file with author). *Id.*

<sup>209</sup> See, e.g., The Edmonton Eskimos, Saskatchewan Roughriders, and The Winnipeg Blue Bombers (providing examples of publicly owned football teams). Terry Jones, *Edmonton Eskimos President and CEO Len Rhodes Opens Up in Exclusive Terry Jones Interview*, EDMONTON SUN, Nov. 23, 2012, available at <http://www.edmontonsun.com/2012/11/24/edmonton-eskimos-president-and-ceo-len-rhodes-opens-up-in-exclusive-terry-jones-interview> (last visited Mar. 25, 2013); Reuters, *Roughriders Get Chance to Amend Grey Cup Gaffe*, FOXNEWS.COM, Nov. 26, 2010, <http://www.foxnews.com/sports/2010/11/26/saskatchewan-roughriders-chance-amend-grey-cup-gaffe/> (last visited Mar. 25, 2013); Don Marks, *Community-Owned Works, Cal Proved*, THE WINNIPEG SUN, Feb. 19, 2012, available at <http://www.winnipeg.sun.com/2012/02/19/community-owned-works-cal-proved> (last visited Mar. 25, 2013).

<sup>210</sup> See Brian R. Cheffins, *Playing the Stock Market: “Going Public” and Professional Team Sports*, 24 J. CORP. L. 641, 643–46 (1999).

<sup>211</sup> Vic Gold, *A Look At The Four Redskins Owners*, WASHINGTONIAN MAGAZINE, Nov. 1, 2007, available at <http://www.washingtonian.com/articles/people/a-look-at-the-four-redskins-owners/> (last visited Mar. 25, 2013).

<sup>212</sup> See, e.g., Michael Buteau, *New Falcons Football Stadium Plans Approved by Atlanta Authority*, BLOOMBERG, Dec. 10, 2012, available at <http://www.bloomberg.com/news/2012-12-10/new-falcons-football-stadium-plans->

renovate arenas or stadiums.<sup>213</sup> Essential community assets which, as owners often preach to legislatures and fans, bring so much coincidental benefit to surrounding businesses and serve an important public relations function for cities like Cleveland and Detroit, are in the control of the very, very few. While these strict ownership rules may have made sense in the formative years of professional sports, are they really necessary in light of the significant economic changes in a globalized sports market?

Granted, the NFL's restriction on public ownership has survived challenges on anti-trust grounds.<sup>214</sup> But many of the harms cited by the NFL in objecting to forms of public ownership – splintered team control, commercialization of the sport, or unfair competitive advantage<sup>215</sup> – have either already happened, as in the case of commercialization, are addressed by existing means, as the unfair competitive advantage is addressed by the salary cap and revenue sharing, or can be accomplished by other means, as the Packers model suggests with team control.

So is there a place for the Packers model in today's NFL? Modifying existing NFL rules to embrace the Packers model created with such foresight many years ago would permit the reemergence of the concept of “town teams,” albeit on a much larger scale. It would eliminate

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approved-by-atlanta-authority.html (last visited Mar. 25, 2013) (detailing how the City of Atlanta will pay for about \$300 million of the Atlanta Falcons new football stadium).

<sup>213</sup> But see, *The Rosemont Cubs*, THE CHICAGO TRIBUNE, Mar. 20, 2013, available at [http://articles.chicagotribune.com/2013-03-20/news/ct-edit-wrigley-20130320\\_1\\_rooftop-owners-chicago-cubs-rosemont-mayor-brad-stephens](http://articles.chicagotribune.com/2013-03-20/news/ct-edit-wrigley-20130320_1_rooftop-owners-chicago-cubs-rosemont-mayor-brad-stephens) (last visited Mar. 25, 2013) (noting that the Cubs' owners, the Ricketts family, is not seeking public funds for any of the \$500 million cost to renovate its stadium. However, the City of Chicago is blocking the team's efforts).

<sup>214</sup> *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994). Former New England Patriots owner, William H. Sullivan, sued the NFL on antitrust grounds for restricting team owners from selling shares of the member organizations to the public. *Id.* at 1095. Sullivan hoped to sell 49% of the Patriots in an effort to raise capital for a financially struggling team. *Id.* Due to the NFL's restriction on a public stock offering, Sullivan was forced to sell the team, which caused great instability for the club for six years. *Id.* In 1988, Sullivan sold the team to Victor Kiam, who resold the team four years later to James Orthwein. *See id.* at 1096. Just two years later, in 1994, Orthwein sold the Patriots to the current owner, Robert Kraft. *See Robert Kraft, Chairman and CEO*, THE NEW ENGLAND PATRIOTS, TEAM, FRONT OFFICE, <http://www.patriots.com/team/staff/robert-kraft/e4af13f7-fe19-430c-9485-e3fe17042ca6> (last visited Mar. 25, 2013); *see also* Lynn Reynolds Hartel, *Community-Based Ownership of a National Football League Franchise: The Answer to Relocation and Taxpayer Financing of NFL Teams*, 18 LOY. L.A. ENT. L.J. 589 (1998).

<sup>215</sup> Hartel, *supra* note 214, at 612.

franchise hopping from city to city and financial blackmail by owners who threaten to leave a community without a beloved franchise if its demands for a stadium or tax benefits are not met.<sup>216</sup> It would not only allow for, but also encourage, a community's investment in a community asset, and there is green and gold evidence that this model can succeed.

### *Community Ownership Today*

As a pragmatist, though, I will not hold my breath in ardent hope for change in the NFL any time soon when there is so very much money at stake and such an entrenched structure. But if the Timber Rattler's can do it, then why can't other minor league clubs in other sports? Or in less "developed" sports that are still finding a foothold or still creating "professional" models? Soccer springs to mind, followed by volleyball and lacrosse. And women's leagues in more traditional sports like basketball that are still developing an audience. It seems that these types of organizations would be a perfect breeding ground for a community buy in – both literally and figuratively. It is unlikely that such strict "ownership" regulation is in place to prevent it, and equally likely that any form of community-based financing would be welcome. The same types of communities that welcomed "town teams" in the early days of football as a means of inviting community entertainment and involvement would seem to be a perfect petri dish for this model.

Perhaps, though, there is an even more useful place for the adoption of this model – a broader stage for the not-for-profit publicly held corporate concept outside the field of professional sports. In a 1995 report for the Wisconsin Policy Research Institute,<sup>217</sup> Dr. Daniel

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<sup>216</sup> See generally, *id.* (regarding additional discussion on how and why the Packers model could be employed).

<sup>217</sup> WISCONSIN PUBLIC POLICY RESEARCH INSTITUTE REPORT, THE GREEN BAY PACKERS: AMERICA'S ONLY NOT-FOR-PROFIT MAJOR-LEAGUE SPORTS FRANCHISE, Nov. 1995 Vol. 8, No. 9. Dr. Alesch suggested that the model would be particularly useful for creating or enhancing assets that would have the opportunity to be self-supporting. *Id.* It might also be used to preserve a natural amenity from destruction or development. *Id.* He specifically mentioned Sturbridge Village in Massachusetts and Mystic Seaport in Connecticut as two candidates for this type of ownership. *Id.*

Alesch examined the many benefits the Packers brought to the Green Bay community. Upon doing so, he suggested that the same not-for-profit publicly held corporate structure could just as easily be applied to community assets in other educational and recreational realms.<sup>218</sup> Anyone who has ever listened to a membership pledge drive for public radio can easily see why having a community invested in a project can lead to a positive result in terms of investment. Anyone who has ever run a not-for-profit corporation can tell you that relief from having to report and pay earnings and dividends can allow important community assets to function.

One concern that community assets like a museum or an orchestra might face is that the purchase of stock in the corporation is just that- a purchase. As a result, there is no tax deduction for a "donation" to a charitable entity for the stock purchase price. In exchange, though, "owners" have a vested interest in the asset and, as a stockholder, a voice in the management of the asset. The trade off of a tax deduction for participation in management may not be desirable in every instance. An investor/donor may be more interested in one than the other. The Packers notwithstanding, it seems likely that an established and beloved community asset in a smaller city or town may be the most likely candidate to follow the community ownership model.

While laws vary by state, most require that a not-for-profit serve a particular public<sup>219</sup> or mutual<sup>220</sup> benefit. Formalities and fiduciary standards may be similar to for-profit corporations, but not-for-profits rarely issue stock because their assets may not inure to the benefit of a private individual, nor may they be distributed to an individual upon dissolution.<sup>221</sup> The Packers are able to offer stock even though organized as a not-for-profit because they are scrupulously

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<sup>218</sup> *Id.*

<sup>219</sup> *See e.g.*, Wis. Stat. Ann. § 181.0302(15) (West 2013). Typically a charitable purpose. *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> 26 C.F.R. § 150(c)3-1(c)(2).

careful about identifying the fact that the stock has no monetary value,<sup>222</sup> both in stock offering documents and on the face of the stock certificates themselves<sup>223</sup>. The trading restrictions<sup>224</sup> help to ensure that they are not traded for financial gain in violation of the not-for-profit restrictions.

The unique corporate structure of the Green Bay Packers has allowed the team to survive and eventually flourish into an essential part of the city's history and its economy. The structure can serve as a model to other communities seeking to protect their own unique assets at a time when municipal government budgets can no longer be counted on, and large private donors have become increasingly scarce.

#### CONCLUSION

Gerald Clifford was a pioneer in the field we now refer to as sports law. He used his legal talent, his commitment to the people of Green Bay and his love for the Packers to help build an enduring, if quiet legacy. His understanding of the law helped to keep the Packers in Green Bay against all odds. His community leadership helped to organize the support the team needed to persevere. His willingness to advocate on behalf of the team, and to devote his services to a cause in which he so strongly believed, serves as a model for all lawyers, be they Packers fans or not.

The community ownership structure he advocated saved the Green Bay Packers and presents the potential to preserve community assets both in and outside of the athletic environment. Clifford's career demonstrates that, through skill, knowledge, creativity and passion, an attorney's work can impact a team, a town and a sport for decades to come.

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<sup>222</sup> See Hartel, *supra* note 214, at 593–95.

<sup>223</sup> See, e.g., TORINUS, *supra* note 40, at 19, 70; GREEN BAY PACKERS, SHAREHOLDER HISTORY, at 538–39, available at <http://prod.static.packers.clubs.nfl.com/assets/docs/2012shareholder-history.pdf> (last visited Mar. 25, 2013).

<sup>224</sup> See GREEN BAY PACKERS, SHAREHOLDER HISTORY, at 539, available at <http://prod.static.packers.clubs.nfl.com/assets/docs/2012shareholder-history.pdf> (last visited Mar. 25, 2013).

**2013: THE YEAR OF TERMINATIONS**

*By: Naz Nazarinia Scott<sup>1</sup>*

ABSTRACT

*Musicians have taken back their songs! The start of 2013 marked the first year that artists who created works of art and gave those rights away in a contract were able to terminate their agreement and reclaim their work. The Copyright Act of 1976 gave recording artists and songwriters the possibility to cancel contracts to works they licensed 35 years ago. Thirty-five years ago, artists like Bruce Springsteen, The Village People and The Eagles, who were virtually unknowns signed licensing agreements in the 1970's and now are able to break their contracts or enter into new renegotiated contracts. These artists are only few amongst many who now have the opportunity to cancel contracts and reclaim their works.*

**INTRODUCTION**

United States copyright law is a balancing act of promoting creativity by providing a limited monopoly.<sup>2</sup> Copyright laws have undergone changes, substantively and structurally, throughout the years. The most recent and most significant revisions of the last century occurred in the Copyright Act of 1909<sup>3</sup> (hereinafter the "1909 Act") and the Copyright Act of 1976 (hereinafter the "1976 Act"). Each overhaul of the United States copyright law was preceded by a pressing need to resolve problems that emerged after the previous act had been ushered through the court system with unforeseen and undesirable outcomes.

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<sup>1</sup> © 2013 Naz Nazarinia Scott received her Juris Doctorate in 2013 from the University of Utah S.J. Quinney College of Law and is with the law firm of Richards Brand Miller Nelson based in Salt Lake City. Her previous experience includes work as a summer intern for CMG Brands and CMG Worldwide, an intellectual property rights management company located in West Hollywood, California; and as a research assistant researching Copyright Law preemption of contracts. She would like to extend a sincere thanks to Rita T. Reusch for her valuable comments on the previous drafts of this paper and a special thank you to her family and friends for all their support. Comments are welcomed at [Naziol.Nazarinia@law.utah.edu](mailto:Naziol.Nazarinia@law.utah.edu).

<sup>2</sup> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> Copyright Act of 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075 (1909) (repealed and replaced in 1976).

The copyright system is structured to incentivize authors to create works, permitting those authors to exclusively exploit their works before eventually “falling” into the public domain for unrestricted use. Beginning with a historical analysis of the legal frustrations in the 1909 Act with respect to copyright renewal terms, this paper then proceeds to discuss the 1976 Act’s restructuring of the law. The creation of a copyright holder’s right to terminate copyright transfers or assignment, often simply called termination rights, in the 1976 Act will be the focus of discussion with an emphasis on the unexpected problems that have subsequently surfaced regarding those termination rights, most of which have not yet been resolved by Congress or the courts.

#### **PART I: BACKGROUND**

The passage of the 1976 Act was a congressional response to problems that had emerged from provisions within the copyright law of the 1909 Act. The 1976 Act purged many of the formal requirements imposed to retain copyright protection and removed the author’s right to a renewal term by replacing it with one single, but longer term. The renewal term in the 1909 Act provided authors of a copyrighted work a second chance to benefit from their work. The abolition of the renewal term eliminated that inherent second chance and replaced it by a newly created right, a termination right. The termination right allows an author to terminate a license or transfer that they granted in a copyrighted work after a given period of years.<sup>4</sup>

These newly created termination rights were implemented by the 1976 Act to remedy problems in the 1909 Act, but instead subsequently created new problems. Termination rights have been, and will continue to be, a “hot topic” area in copyright because the first termination rights for works created on or after January 1, 1978 go into effect in 2013. While terminations of

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<sup>4</sup> See *infra* Section II.

copyright transfers affect a broad spectrum of business, this paper primarily uses examples from the music industry to illustrate the problems that have arisen with respect to termination rights. Many record labels are already becoming involved in legal battles involving artists who seek to reclaim the copyright in their musical works. They, along with many others, are on the cusp of even more litigation as more artists become eligible to exercise their legal termination rights. With very little legal precedent, and even less statutory interpretation to help guide the courts, a rights holder or a transferee is left guessing the outcome or consequence resulting from an attempt to terminate a copyright that was licensed or transferred after 1978. Courts are relegated into uncharted legal theory and policy, uncertain of the path ahead. This paper explores some of the pending controversies expected in the ensuing years surrounding copyright termination rights.

## **PART II: 1909 COPYRIGHT ACT**

Prior to the 1909 Act, the last major revision to copyright laws was in 1790.<sup>5</sup> The 1909 Act introduced many changes to the United States copyright scheme. However, Congress did attempt to maintain some consistency by preserving much of the language of earlier laws in order to maintain the judicial interpretation and case law already established in those provisions.<sup>6</sup>

The 1909 Act contained two terms: an initial term and a so-called “renewal term.”<sup>7</sup> Congress recognized copyrights as being extremely difficult to accurately value at creation, and therefore provided the renewal term, which was meant to give authors a second chance at benefiting from their work, given the later knowledge of its commercial value. It permitted

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<sup>5</sup> 1-4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 4.02 (1992).

<sup>6</sup> H.R. REP. NO. 60-2222, at 4 (1909) (“Many amendments of [phraseology] were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.”).

<sup>7</sup> See Copyright Act of 1790, Ch. 15, 1 Stat. 124, § 1 (1790) (A renewal term did exist as part of copyright law prior to the enactment of the 1909 Act); see also Copyright Act of 1831, Ch. 16, 4 Stat. 436 (1831) (Congress made changes to the laws concerning renewal terms in the 1831 Copyright Act.).



authors to re-license their work with new and different contract terms, despite the fact that they may have licensed their work at the beginning of the initial term for less than the later, actual realized value. “[The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to ‘secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings.’”<sup>8</sup> In recognizing this, one of the most notable changes in the 1909 Act is that it effectively doubled the copyright term from 14 to 28 years.<sup>9</sup>

Copyright law under the 1909 Act also contained two schemes of protection: unpublished works were provided state common law protection and published works were given federal statutory protection.<sup>10</sup> The 1909 Act included formal requirements for any published work in order to maintain its federal copyright protection.<sup>11</sup> Publication of works without the necessary formalities resulted in the loss of common law protection as well as federal statutory protection. Whether a copyrighted work was a “published” work under the 1909 Act was a significant source of controversy, and is beyond the scope of this paper.<sup>12</sup> Once a copyrighted work was deemed to have been published, it would shift from its previously held common law protection scheme to the federal statutory protection.<sup>13</sup> However, that was only if the necessary formal requirements were followed when the work was published.<sup>14</sup>

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<sup>8</sup> *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (citations omitted).

<sup>9</sup> Copyright Act of 1909, Pub. L. No. 60-349, §9, 35 Stat. 1075 (1909) (repealed with the Copyright Act of 1976 Act).

<sup>10</sup> See Nimmer, *supra* note 5, § 4.02.

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

<sup>12</sup> Nimmer, *supra* note 54, § 4.03 (“‘Publication’ was a term of art under the 1909 Act. The relevant decisions under [the 1909 Act] indicated that publication occurred when, by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur.”).

<sup>13</sup> *Id.*

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

*Notice of Copyright*

One of the formal requirements to maintain copyright protection was a “notice of copyright” to be affixed on any published work for which the author sought federal copyright protection.<sup>15</sup> A published work contained a notice of copyright by including a “©” on each copy of the work.<sup>16</sup> This notice granted the work with protection by the federal statutory copyright laws. Publication of the work without the notice resulted in the author losing copyright protection.<sup>17</sup>

Loss of protection due to failure to publish with a notice of copyright was one of the most prevalent problems in the 1909 Act. A large number of works, otherwise protected by federal copyright, fell into the public domain this way.<sup>18</sup> Proponents who supported the formal requirement of a notice of copyright argued that the benefit of requiring authors to take affirmative steps was that they had to indicate their desire to protect their works.<sup>19</sup> This requirement, in turn, allowed the use of more works for which authors did not seek protection.<sup>20</sup> Only those works where the author had a genuine interest in protecting and exploiting their work received protection (if the formal requirements were followed), while others works became available for public use. The argument opposing the formal requirements pointed to the vast volume of works that were unintentionally falling into the public domain because mistakes in meeting formality requirements at the time of publication caused a loss of protection. Many

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<sup>15</sup> Copyright Act of 1909 § 9 (1909).

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

<sup>17</sup> 2-7 Nimmer § 7.14 (“If a copyright notice is required, and its omission is not excused, the legal consequence is to inject the work into the public domain.”).

<sup>18</sup> R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 184 (2007) (citing The Registration of Copyright Senate Comm. on the Judiciary, 86th Cong., Study No. 17: Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary 33 (Comm. Print 1960)).

<sup>19</sup> See Matthew W. Turetzky, *Applying Copyright Abandonment in the Digital Age*, DUKE L. & TECH. REV., 19, 38 (2010) (citing Marshall Leaffer, *Understanding Copyright Law*, 161, 162 (4th ed. Matthew Bender & Co 2005)).

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

authors who did intend to protect their works accidentally lost protection because of a simple, but irreversible, mistake or omission at the time of publication.<sup>21</sup>

### ***Renewal Rights***

Even the author's renewal right, intended to give them a second chance at exploiting their works, was coupled with formality requirements.

When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work. That is the method with which the separate renewal term was intended to operate.<sup>22</sup>

To take advantage of the 28-year renewal term, authors had to formally register, and renew, their copyright with the Copyright Office.<sup>23</sup>

Registration with the Copyright Office was the pre-requisite to obtaining the renewal right.<sup>24</sup> Though registration was not required for the initial term, to continue protection for the renewal period, the work needed to be registered.<sup>25</sup> Initial registration could take place at any time during the initial term, but the renewal of a copyrighted work was required to have been made within one year of the expiration of the first term.<sup>26</sup> Failure to renew the copyright or mistakes made in the renewal process often resulted in works unintentionally falling into the public domain.<sup>27</sup> "At present about 15% of subsisting copyrights are being renewed; in fiscal

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<sup>21</sup> H.R. REP. NO. 94-1476, at 57 (1985) ("One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.")

<sup>22</sup> *Stewart v. Abend*, 495 U.S. 207, 229 (1990) (citing Barbara A. Ringer, *Renewal of Copyright* (1960) reprinted in Copyright Law Revision Study No. 31: prepared for the Senate Committee on the Judiciary, 86th Cong., 125 (1961)).

<sup>23</sup> Copyright Act of 1909 at § 24.

<sup>24</sup> *Id.* at § 11.

<sup>25</sup> *Id.* at § 24.

<sup>26</sup> *Id.* at §§ 24, 25.

<sup>27</sup> *Id.* at § 23.

1959, for example, roughly 21,500 copyrights were renewed, as against 124,500 that went into the public domain at the end of their first 28-year term.”<sup>28</sup>

An example of the formal renewal requirements gone awry is demonstrated through the circumstances surrounding a feature film titled “*It’s a Wonderful Life*.” After the copyright ownership changed hands numerous times, the rights holder, at the time the one-year renewal window was tolling did not properly renew the work because of a simple clerical error.<sup>29</sup> As a result, the film “fell” into the public domain after losing its federal copyright protection because it failed to adhere to the formal copyright requirements.<sup>30</sup>

The transfer of the author’s renewal right became a standard provision in most entertainment contracts. Many first-term contracts already contained language requiring authors to assign their right of renewal to a record label or a production company with which they were under contract, essentially negating the purpose of the second-term afforded to authors.<sup>31</sup> Until 1943, however, it was unclear whether the provisions assigning renewal rights were valid and enforceable in court under the law.<sup>32</sup> In 1943, a landmark Supreme Court copyright case, *Fred Fisher Music Co. v. M. Witmark & Sons*, made clear that assignment of renewal terms was

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<sup>28</sup> BARBARA A. RINGER, S. COMM. ON THE JUDICIARY, 86<sup>TH</sup> CONG., RENEWAL OF COPYRIGHT 187 (Comm. Print 1961) (study prepared by author for the Senate Subcommittee on Patents, Trademarks, and Copyrights).

<sup>29</sup> Sam Williams, *Should Auld Copyrights Be Forgotten*, UPSIDE TODAY (Dec. 22, 1999), <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/Williams12-22-99.html> (“After languishing for nearly two decades in the studio vaults, “*It’s a Wonderful Life*” fell into the public domain. Movie historians disagree on the reason behind this. Some attribute it to a clerical error. Others credit simple disinterest on the part of studio management.”).

<sup>30</sup> *Id.* (explaining that the film was a derivative work and it was eventually protected through assertion of rights in the original work which had maintained its federal copyright protection. Although the film as a whole was not protected, it was precluded from being shown due to existing copyrights in compositions and music within the film).

<sup>31</sup> See Daniel Gould, *Time’s Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 101 (2007).

<sup>32</sup> HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 11:26 (“Prior to the Fred Fisher decision there was some uncertainty over whether transfers of rights in the renewal term were valid prior to the vesting of the renewal term.”); see also *Corcovado Music Corp. v. Hollis Music, Inc.*, 981 F.2d 679, 684 (2d Cir. 1993) (“[T]here is a strong presumption against the conveyance of renewal rights: [I]n the absence of language which expressly grants rights in ‘renewals of copyright’ or ‘extensions of copyright’ the courts are hesitant to conclude that a transfer of copyright even if it includes a grant of ‘all right, title and interest’ is intended to include a transfer with respect to the renewal expectancy.”) (internal citation omitted).

permitted and enforceable under the law.<sup>33</sup> Two sentences was all it took to validate contractual transfers of renewal rights making copyrighted works fully assignable and transferable:

While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law. We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests.<sup>34</sup>

“After this decision, it became common for publishers to require authors to assign their renewal rights at the same time as the initial copyright term,” effectively neutralizing the authors ability to take advantage of their second term.<sup>35</sup>

The original reasoning for the renewal term was rooted in a belief that copyrights (and other intellectual properties) are difficult to accurately value when first created.<sup>36</sup> The renewal right was a way for authors to recapture their works and exploit them a second time after the value had been better determined.

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, [Congress] felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that he could not be deprived of that right.<sup>37</sup>

The Supreme Court’s 1943 decision in *Fred Fisher Music Co.* guaranteed the enforceability of an author’s alienation of their renewal right and effectively extinguished the congressional intent with respect to the reversion of a renewal right to an author.<sup>38</sup> Though authors *could* refuse to assign their renewal rights in a contract, the practical result was that most,

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<sup>33</sup> *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943).

<sup>34</sup> *Id.* at 657.

<sup>35</sup> Michael J. Bales, *The Grapes of Wrathful Heirs: Terminations of Transfers of Copyright and "Agreements to the Contrary,"* 27 *CARDOZO ARTS & ENT. L.J.* 663, 667 (2010).

<sup>36</sup> H.R. REP. NO. 94-1476, at 124 (1976).

<sup>37</sup> *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 654 (1943); *Stewart v. Abend*, 495 U.S. 207, 218 (U.S. 1990) (citing H.R. REP. NO. 60-2222, at § 23 (1909)).

<sup>38</sup> Bales, *supra* note 35, at 666.

if not all, were not in a bargaining position to negotiate, and overwhelmingly authors were left in disadvantageous bargaining positions without the power to obtain additional compensation for the renewal period.<sup>39</sup> “By the 1960s, recapture of rights through renewal was largely considered to be a failed experiment because corporations routinely required artists to assign their renewal rights away in the first contract negotiation. Such assignments were held to be legally enforceable even though they evaded the legislative intent of protecting authors.”<sup>40</sup> This judicial interpretation of the 1909 Act influenced the way Congress reformed the structure of copyright law in the 1976 Act.<sup>41</sup> The need for copyright reform was becoming increasingly evident as more time passed since the 1909 Act.<sup>42</sup>

The purpose of the renewal right was part of the balance achieved by Congress; the assignment of these renewal rights disturbed that congressional balance. Congress still recognized that copyrights were extremely difficult to accurately value at the time of creation<sup>43</sup> and it wanted to find another way to provide authors with a second chance to benefit after the value of their copyright had been fairly realized.<sup>44</sup> The drafting of the 1976 Act was intended to continue some aspects of copyright law while resolving the issues that had arisen since the enactment of the 1909 Act.<sup>45</sup>

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<sup>39</sup> Gould, *supra* note 31, at 101.

<sup>40</sup> *Id.*

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

<sup>42</sup> Emily Burrows, *Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clause*, 30 REV. LITIG. 101, 105 (2010) (“The Copyright Act of 1976 was created in response to the technological changes associated with the development of the motion picture, phonograph, radio, and television.”) (internal citations omitted).

<sup>43</sup> H.R. REP. NO. 94-1476, at 124 (1976); *see also* Stewart v. Abend, 495 U.S. 207, 219 (1990) (“[U]nlike real property and other forms of personal property, [a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation.”) (citation omitted); Mills Music, Inc. v. Snyder, 469 U.S. 153, 172-73 (1985).

<sup>44</sup> H.R. REP. NO. 94-1476, at 124 (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”).

<sup>45</sup> *See* Ringer, *supra* note 28.

**PART III: 1976 COPYRIGHT ACT**

Congress finally began reexamining the United States copyright law in the 1960's and began drafting a copyright reform bill in the mid-1970's.<sup>46</sup> Among the reasons for the new law were the much needed reforms due to new technologies and mass media.<sup>47</sup> Changes included the elimination of formal requirements and a major change with respect to the dual copyright terms being replaced with one single, longer term.<sup>48</sup> International considerations played a significant role in the removal of the dual copyright terms because it brought the United States in line with international treaties and, in turn, provided the United States with reciprocal protection for the works of its authors in foreign countries.<sup>49</sup> The creation of the longer term in the United States was one step toward meeting the intellectual property requirements needed to join the Berne Convention, an international agreement governing copyright.<sup>50</sup> These changes, along with the subsequent elimination of the notice of copyright requirements, significantly reduced the number of works that lost protection and fell into the public domain due to an inadvertent failure to accurately follow all the formalities of copyright protection.<sup>51</sup>

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<sup>46</sup> See generally H.R. REP. NO. 94-1476 (explaining proposed legislation revising copyright law).

<sup>47</sup> Burrows, *supra* 42, at 105.

<sup>48</sup> After the 1976 Act was enacted, works in their first term under the 1909 Act still had to be formally renewed until 1992. The Copyright Renewal Act of 1992 amended the copyright law and removed the renewal requirement, automatically renewing works still in their first term. See Copyright Renewal Act of 1992, 17 U.S.C. § 304(a)(1)(C)(iv) (2012) (detailing conditions for renewal of the copyright). Any works created after 1978 fell under the 1976 Act so the amendment only affected works which were created between 1963 and 1977.

<sup>49</sup> See *Golan v. Holder*, 132 S. Ct. 873, 877-78 (2012); Ringer, *supra* note 28, at 216.

<sup>50</sup> To get the protection the United States needed to meet the requirements contained within the Berne Convention, the United States finally joined the Berne Convention in 1988. Thomas P. Arden, *The Questionable Utility of Copyright Notice: Statutory and Nonlegal Incentives in the Post-Berne Era*, 24 LOY. U. CHI. L.J. 259, 259-60 (1993).

<sup>51</sup> The formal requirement for a 'notice of copyright,' indicated with a ©, was removed by the Berne Convention's own elimination of that formality in 1988, after the United States had already become a member. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat 2853 (1988) ("An Act to amend title 17, United States Code, to implement the Berne Convention for the Protection of Library and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes."); Arden, *supra* note 50.

However, to continue to preserve the authors chance at a “second bite of the apple” for works that may have been initially undervalued, Congress created a new right contained within the copyright law—a termination right. This right gave an author the ability to terminate an exclusive or non-exclusive license or grant and recapture the rights in their copyrighted work.<sup>52</sup>

### ***Termination Right Basics***

The termination right was an attempt by Congress to create another avenue for authors to benefit from their works a second time.<sup>53</sup> While the creation of the termination right sought to address some of the problems that had emerged with respect to renewal rights, new problems emerged with this newly created right, and the courts have yet to develop a solution.<sup>54</sup>

The termination right was structured to create a window of time in which an author is able to reclaim their copyright after providing a license or grant of use in their work. The most significant change from a renewal right was that the termination right did not automatically “revert” the copyright back to the author, but rather the author is required to actively go after their right and serve a notice of termination.<sup>55</sup> This structure was formed because Congress was already aware of the unequal bargaining power in contracts negotiations for copyright grants. Rather than allowing a repeat of the 1909 Act where judicial interpretation permitted assignment of a right intended for the author’s benefit, Congress included an explicit clause in the statute prohibiting assignments, “Termination of the grant may be effected *notwithstanding any*

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<sup>52</sup> Stephen W. Tropp, *It Had to Be Murder or Will Be Soon* - 17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform, 51 J. COPYRIGHT SOC’Y U.S.A. 797, 798 (2004) (“The statutory structure enacted by Congress in the 1909 Act was carried over into the 1976 Act in § 304(c). With respect to the 1909 Act works in their initial term on the effective date of the Copyright Act of 1976 (Jan. 1, 1978), § 304(c) effectively gave defined heirs a second bite at the apple to potentially cut off rights to derivative works produced under the initial grant.”).

<sup>53</sup> See *Woods v. Bourne Co.*, 60 F.3d 978, 982 (2d Cir. 1995) (“When the Copyright Act was thoroughly revised in 1976, Congress attempted to restore a second chance to authors or their heirs.”) (internal citation omitted).

<sup>54</sup> See *infra* Section II.C.

<sup>55</sup> H.R. REP. NO. 94-1476, at 143 (1976).



*agreement to the contrary*, including an agreement to make a will or to make any future grant.”<sup>56</sup> This additional language was significant in that it precluded any contractual assignment of termination rights.<sup>57</sup>

The termination right was structured in such a way that authors had a five-year window in which they could terminate any past license or grant of their work. The five-year window began thirty-five years after the initial grants for works after January 1, 1978.<sup>58</sup> For works created prior to January 1, 1978 the window began fifty-six years after the creation of the copyright or beginning January 1, 1978, whichever is later.<sup>59</sup>

The 1976 Act carved out several exceptions with respect to works eligible for the right of termination. One exception pertained to pre-1978 works where the renewal term was bequeathed to another in a will. Two other exceptions to the termination right, discussed below, apply to works for hire and derivative works.<sup>60</sup>

Termination of a copyright may be brought about by the author, if living, or by the heirs if the author is deceased.<sup>61</sup> If the author is deceased, the rights to terminate are apportioned among heirs and governed by the statute itself in a “waterfall” like fashion.<sup>62</sup> The rights vest first with the widow(er) entirely unless there are surviving children or grandchildren of the author.<sup>63</sup> Conversely, if the author has no widow(er), the surviving children or grandchildren are granted the entire right.<sup>64</sup> If both a widow(er) and surviving children or grandchildren exist, the widow(er) maintains one-half of the interest and the other half is divided amongst any children

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<sup>56</sup> 17 U.S.C. §§ 203(a)(5), 304(c)(5) (2010) (emphasis added).

<sup>57</sup> *But see* Bales, *supra* note 35, at 665.

<sup>58</sup> 17 U.S.C. §203(a)(3).

<sup>59</sup> 17 U.S.C. §304(c)(3).

<sup>60</sup> 17 U.S.C. § 204(c)(6)(a).

<sup>61</sup> 17 U.S.C. § 304(c)(1).

<sup>62</sup> 17 U.S.C. § 304(c)(2).

<sup>63</sup> 17 U.S.C. § 304(c)(2)(A).

<sup>64</sup> 17 U.S.C. § 304(c)(2)(B).

or grandchildren.<sup>65</sup> If the author dies without a widow(er), children, or grandchildren, the author's executor shall own the termination interest.<sup>66</sup> This proportional system is identical in 17 U.S.C. §304 for pre-1978 works and 17 U.S.C. §203 for post-1978 works raises some questions with respect to fairness of termination abilities discussed below.

For the termination to take effect, the author must serve a notice to terminate to the grantee of the work.<sup>67</sup> The notice to terminate could be served as early as ten years before the opening of the termination window and as late as two years prior to the termination date.<sup>68</sup> The minimum two year notice requirement prohibits a last minute notice as the termination window is closing.<sup>69</sup> If the author does not exercise their termination right during the termination window, they lose their right indefinitely and may not reclaim their grant of copyright.<sup>70</sup> One problem is the lack of clarity in the notice of termination requirements, which may be hindering terminations being submitted effectively.<sup>71</sup>

The actual effect of terminating a right is that all rights revert to the author, authors, or other persons who owned the termination interest. As a practical matter, the exercise of termination prompts a renegotiation.<sup>72</sup> For joint works with multiple authors, the majority of

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<sup>65</sup> 17 U.S.C. § 304(c)(2)(C).

<sup>66</sup> 17 U.S.C. § 304(c)(2)(D).

<sup>67</sup> 17 U.S.C. §§ 304(c)(4), 203(a)(4).

<sup>68</sup> 17 U.S.C. §§ 304(c)(4)(A), 203(a)(4)(A).

<sup>69</sup> See *infra* Section II. C. a. (This two-year requirement may affect the grantee's ability to exploit the work more so by creating derivative works which would be ineligible for termination.).

<sup>70</sup> Arguably, the closing of this termination window could result in the missed opportunity for recovery of rights by authors similar to the missed opportunity for recovery of the renewal one-year renewal window under the 1909 Act; see Burrows, *supra* 42, at 110 ("[I]t is still easy for an author or his heir to miss the termination window or not include sufficient information to make the termination effective."); *c.f.* Marc H. Greenberg, *Reason or Madness: A Defense of Copyright's Growing Pains*, 7 J MARSHALL REV. INTELL. PROP. L. 1, 6 (2007).

<sup>71</sup> Burrows, *supra* 42, at 110.

<sup>72</sup> Ryan Ashley Rafoth, Note, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 VAND. L. REV. 1021, 1050 (2000) ("Congress intended the right of termination to give these artists a chance to renegotiate royalties after their work enters the market and obtains definite value.") (citation omitted); Tropp, *supra* note 52, at 801.

those who executed the grant of copyright must join to terminate it. Once the grant is terminated by a majority of the authors, the entire grant is terminated; those who did not join in the termination also have their rights reverted.<sup>73</sup>

Congress passed the 1976 Act knowing there would be subsisting copyrights when the new law was enacted; thus, it included two separate termination provisions in the 1979 Act. The first, 17 U.S.C. §304, applies to works which were created before January 1, 1978 and the second, 17 U.S.C. §203, applies to grants made on or after January 1, 1978. Although somewhat paralleling each other, the law, in effect, applies slightly differently to works created after 1978 compared to works that pre-existed 1978, the effective date of the law.

#### **§304 – Works Created Before January 1, 1978**

Section 304 applies to copyrighted works created prior to January 1, 1978. A form of termination rights applied to pre-1978 works with some variations is discussed below. Pre-1978 copyrighted works in their original term on January 1, 1978 were still entitled to a twenty-eight year original term and were given a forty-seven year renewal term, resulting in an additional nineteen year extension of the duration of their copyright term.<sup>74</sup>

One exception in the 1976 Act was for those works assigned in a will; they were ineligible for termination because the grants were made and executed prior to the law being enacted.<sup>75</sup> Renewal terms assigned or licensed after 1978 could be terminated because Congress

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<sup>73</sup> 17 U.S.C. § 203 (b)(3) (2010).

<sup>74</sup> See *Fred Ahlert Music Corp. v. Warner/Chappell Music*, 155 F.3d 17, 18 (2d Cir. N.Y. 1998). Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (further extending copyright terms from 75 years to 95 years, adding a 20 years to copyrights); see also 17 U.S.C. § 304(b) (2002); see “Gap Works” discussion *infra* Section II.D.b.

<sup>75</sup> 17 U.S.C. §304(c) (2002). It is important to understand the discussion has shifted from when the work was created to when the grant was executed. The execution date of the grant will affect which provision, 17 U.S.C. §304 or 17 U.S.C. §203, applies to determine termination right; see *infra* Section II.C.b. “Gap Works” discussion.

assumed constructive notice and knowledge of the new law along with the termination right.<sup>76</sup> Renewal rights not assigned in a will were governed by §304(c). The termination right may be affected by authors or any of the author's heirs.<sup>77</sup> The grant of copyright may be exclusive or non-exclusive for the renewal of the copyright and must be executed before January 1, 1978.<sup>78</sup>

Works in their first term or renewal term were eligible to be terminated during a five year window beginning "fifty-six years from the date the copyright was originally secured, or January 1, 1978, whichever is later."<sup>79</sup> Termination after the end of the renewal term was permitted by authors and their heirs because Congress viewed subsequent extensions of the copyright term as "new" rights that the original grants did not contemplate signing away since they did not yet exist when the copyright were granted.<sup>80</sup>

A copyright grant may be terminated by the person who executed it, or in the case of one or more authors of the work, may be terminated by those who exercise a "total of more than one-half of that author's termination interest."<sup>81</sup> The phrasing in this provision of the statute refers to instances where the author has died and the termination interest has been distributed amongst multiple beneficiaries.<sup>82</sup> To effectuate a termination, enough beneficiaries must seek or join in the termination so that the proportional interest is more than one-half of the original termination right.<sup>83</sup>

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<sup>76</sup> 17 U.S.C. §304(c).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at § 304(c)(3).

<sup>80</sup> H.R. REP. NO. 94-1476, at 141 (1985); *Stewart v. Abend*, 495 U.S. 207, 218 (1990) (citing *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d. Cir. 1951) (the renewal right "creates a new estate, and the ... cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright.")).

<sup>81</sup> 17 U.S.C. § 304(c)(1) (2002).

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

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

**§203 – Works created on or after January 1, 1978**

Works created on or after January 1, 1978 are governed by 17 U.S.C. §203 of the 1976 Act. Of notable significance, the termination of a grant is only permitted if the grant was executed by the author.<sup>84</sup> A grant executed by anyone other than the author, such as when an heir later grants an assignment of an inherited copyrighted work, is not eligible for termination.<sup>85</sup> Another exception for the right of termination is expressed in the phrase “otherwise than by will.”<sup>86</sup> Though unclear, this seems to indicate that an author’s intent in a will should supersede statutory rules.<sup>87</sup> The termination window in 17 U.S.C. §203 begins thirty-five years after the date of an execution of a grant. For grants that provide the grantee the right of publication of a work, the period begins thirty-five years after the date of publication or at the end of forty years from the date of execution of the grant, whichever date is earlier.<sup>88</sup>

Termination of a copyright can only be effected by a majority of the people who executed the grant originally. Thus, the determination of who may terminate a copyright grant may be difficult if the termination interest has been divided amongst many heirs of an author. As explained above, the termination interests are apportioned statutorily depending on whether there is a surviving widow(er), children or grandchildren. Termination interests divided among the author’s children or grandchildren are on a per stirpes basis, meaning each child of the author receives an equal share of the termination interest. A child’s share is then distributed equally to their children, or the author’s grandchildren. In other words, the grandchildren are given an equal portion of only their parent’s inheritance, and not an equal portion of the entire termination

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<sup>84</sup> 17 U.S.C. § 203(a).

<sup>85</sup> *Id.*

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

<sup>87</sup> See *David Donahue*, Statutory Termination Of Transfers, 932 PLI/Pat 457, 466 (2008) (expressing that there is little understanding regarding this exception but that the legislative history suggests Congress intended to give an author’s intent embodied in a will more weight.).

<sup>88</sup> 17 U.S.C. § 304(a)(3).

interest.<sup>89</sup> The statute goes on to indicate that, in order to exercise the share of the deceased child of the author, a majority of the children must join in the action.<sup>90</sup> The same difficulty can arise, as explain below in Section C., in the discussion of the termination of joint works.

With the understanding that this provision in the statute controls grants executed after January 1, 1978, the termination window for these works begins January 1, 2013, thirty-five years after the execution. Although notices of termination have already been served for these works, the new immediacy of these terminations and the actual opening of the termination window will result in a rush of litigation.<sup>91</sup> The ambiguity and uncertainty surrounding termination rights leave much to be determined. The remaining sections of this paper explore a variety of problems created by the 1976 Act, most of which have yet to be adjudicated or interpreted by the courts. Understanding the intricacies of these problems is necessary in order to successfully develop solutions.

### **A. Derivative Works<sup>92</sup> Exception**

The derivative works exception was one of a few single points where the balancing of other considerations produced an exception to the author's ability to reclaim their rights through termination.<sup>93</sup> This exception permits derivative works created under the grant of a copyrighted work, which inherently contain elements of the original work, to continue being "utilized" after

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<sup>89</sup> 17 U.S.C. § 304(a)(2)(C).

<sup>90</sup> *Id.*

<sup>91</sup> Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. TIMES, Aug. 15, 2011.

<sup>92</sup> 17 U.S.C. § 101 defines derivative work as: "a work based upon one or more pre-existing works, such as a translation, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"

<sup>93</sup> *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 174 (1985).

the termination of the grant.<sup>94</sup>

This provision granting the derivative works exception was discussed by the Supreme Court in *Mills Music, Inc. v. Snyder*.<sup>95</sup> The claim at issue was “whether an author's termination of a publisher's interest in a copyright also terminates the publisher's contractual right to share in the royalties on such derivative works.”<sup>96</sup> The party seeking termination argued that the payments made for the derivative works should have been reassigned to the individual who terminated the grant of the original copyrighted work.<sup>97</sup> In its analysis, the court’s primary focus was on the phrase “under the terms of the grant” in 17 U.S.C. §304(c)(6)(A). The court interpreted the statutory provision to allow a termination of a copyright grant, but held that the statutory termination did not also result in a “statutory assignment of contractual rights.”<sup>98</sup> In other words, licensing and contractual grants of a derivative work, based on a previous and separate grant of a pre-existing work, would remain in place. The grantor of the derivative work who is also the grantee of the pre-existing work would continue to receive royalty fees regardless of the termination.<sup>99</sup>

Based on congressional legislative history, the court found that “Congress saw no reason to draw a distinction between a direct grant by an author to a party that produces derivative works itself and a situation in which a middleman is given authority to make subsequent grants to such producers.”<sup>100</sup> The court recognized that excluding this specific category of works may be unfair to the author, stating the purpose of preserving the “right of the owner of a derivative work to exploit it, notwithstanding the reversion” was more important than the termination rights

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<sup>94</sup> 17 U.S.C. § 304(b)(1).

<sup>95</sup> 469 U.S. 153 (1985).

<sup>96</sup> *Mills Music, Inc.*, 469 U.S. at 156.

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

<sup>98</sup> *Id.* at 168.

<sup>99</sup> Gould, *supra* note 31, at 131.

<sup>100</sup> *Mills Music, Inc.*, 469 U.S. at 172.

granted to the author or the author's heirs.<sup>101</sup> The purpose in protecting derivative works was to "enable [these] works to continue to be accessible to the public after the exercise of an author's termination rights."<sup>102</sup> This simple statutory exception has a profound impact because "on its face [it] would not restrict the record labels from quickly preparing a large number of derivative works upon receiving notice of termination, which would compete with any future re-licensing by the artist to a different label."<sup>103</sup>

The derivative works exception is a stark contrast from the 1909 interpretation of renewal rights. Under the 1909 Act, a grant of a renewal right was viewed as a contingent right that only vested if the author was alive the first day of the renewal term.<sup>104</sup> Under the 1909 Act, if an author died before the beginning of the renewal term, the renewal right reverted to the heirs of the author while the owner who was assigned the renewal right in a grant received nothing.<sup>105</sup> The court reasoned that "assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues."<sup>106</sup> The assignment of an author's renewal right was viewed as a contingent interest, which did not vest until the first day of the renewal term and only if the author was still alive.<sup>107</sup>

In contrast, the 1976 Act does not have a renewal right, and in turn, no contingent interest. When interpreting the 1976 termination provisions, the court recognized that the

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<sup>101</sup> Mills Music, Inc., 469 U.S. at 173.

<sup>102</sup> *Id.* at 176.

<sup>103</sup> Gould, *supra* note 31, at 131.

<sup>104</sup> Copyright Act of 1909 at §24; Stewart v. Abend, 495 U.S. 207, 216 (1990).

<sup>105</sup> Copyright Act of 1909 at § 24; Stewart, 495 U.S. at 219-20 (The legislative history of the 1909 Act echoes this view: "The right of renewal is contingent. It does not vest until the end of the original term. If the author is alive at the time of renewal, then the original contract may pass it, but his widow or children or other persons entitled would not be bound by that contract.") (internal modification omitted) (internal citation omitted).

<sup>106</sup> Stewart, 495 U.S. at 208.

<sup>107</sup> *See id.* at 222.



reformation of the Copyright Act was the result of the congressional balancing of interests.<sup>108</sup> The new structure of termination rights with the derivative works exception was one of the characteristics of the newly found balance.<sup>109</sup> This balancing act between competing parties was apparent in the drafts of the 1976 Act, as well as the legislative history.<sup>110</sup> The Court found that Congress would not have made the derivative work exception explicit in the 1976 Act if it had “assumed that the owner continued to hold the right to sue for infringement even after incorporation of the pre-existing work into the derivative work.”<sup>111</sup> Thus, under the 1976 Act, the termination of a grant only eliminates the ability to create new, post-termination derivative works, but has no effect on derivative works prepared prior to the termination of the grant using the pre-existing copyright.<sup>112</sup>

In another case, the Second Circuit relied heavily on the statutory interpretation of the derivative works exception in *Mills*.<sup>113</sup> In *Woods v. Bourne Co.*, an heir to the author Harry Woods terminated the grant to a copyrighted song called “*When the Red, Red Robin Comes Bob, Bob, Bobbing Along*,” at the end of the renewal term in 1982.<sup>114</sup> The company that owned the rights during the original and renewal terms had exploited the song for approximately 20 different arrangements.<sup>115</sup> The company claimed that each arrangement was a derivative work of the original and argued that they all fell under the derivative works exception and could continue

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<sup>108</sup> *Id.* at 210.

<sup>109</sup> *See id.* at 225.

<sup>110</sup> Ringer, *supra* note 28; H.R. REP. NO. 94-1476 (1985); H.R. CONF. REP. NO. 94-1733, 71; *see also* Stewart v. Abend, 495 U.S. 207, 229 (1990) (“While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward... their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works”) (internal citation omitted).

<sup>111</sup> Stewart, 495 U.S. at 226-27; *Cf.* *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (Section 304(c)(6)(A) “carves out an exception from the reversion of rights that takes place when an author exercises his right to termination.”).

<sup>112</sup> 17 U.S.C. § 304(c)(6)(A) (2002).

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

<sup>114</sup> *Woods v. Bourne*, 60 F.3d 978, 982-84 (2d Cir.1995).

<sup>115</sup> *Id.* at 983.

to be used after termination of the copyright grant.<sup>116</sup>

After recognizing that an exception is created with respect to derivative works, the court articulated the rule in which any derivative works created under the authority of a grant can continue to be used after the termination of the grant for the pre-existing work.<sup>117</sup> The court then examined the arrangements to determine whether they added enough originality to qualify as derivative works.<sup>118</sup> The burden of proof to show that the pre-termination works did in fact qualify as derivative works was assigned to the party claiming the exception.<sup>119</sup> Finding that many of the arrangements were not original enough to qualify as derivative works, the court held they did not fall under the derivative works exception. Therefore, the termination of the copyright grant gave heirs a right to all royalties, rather than the fifty percent as indicated in the contract terms if the works were found to be derivatives.<sup>120</sup>

## **B. Gap Works**

The 1976 Act created a gap in governance that has resulted in tremendous uncertainty for authors who are wishing to terminate their grants. “Gap Works” refer to grants of a work where the contracts were executed prior to January 1, 1978 for works that were not actually created until after January 1, 1978. A simple example can illustrate this: a writer who signs a contract in 1977 to write a book within 5 years, which she has not yet begun. The work, begun after 1978 and completed shortly thereafter, is a so-called “gap work.”

The issue lies with the fact that §203 of the 1976 Act applies to grants that were *executed*

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<sup>116</sup> *Id.* at 986.

<sup>117</sup> *Id.* at 989-90.

<sup>118</sup> *Id.* at 990.

<sup>119</sup> *Id.* at 993-94 (“The district court placed the burden on Bourne, as the party claiming an exception to the heirs’ right of termination to prove that any post-termination performances were based upon pre-termination derivative arrangements of the Song.”) (citations omitted).

<sup>120</sup> *Id.* at 992-93.

on or after January 1, 1978.<sup>121</sup> In the scenario above, the grant was executed prior to the required date so the grant does not fall under §203. Looking to §304 only creates confusion as the content of that section reveals that the statute discusses terminations in the context of works in their original or renewal term on January 1, 1978.<sup>122</sup> Thus, §304 only applies to works which were created prior to the 1976 Act taking effect. Therefore, a work, which has not yet been created, does not fall under §304 of the 1976 Act and the contract providing a grant is not governed by §203. This leaves the author, and her attorney, unsure with respect to which section to follow when seeking to terminate a copyright grant.<sup>123</sup> These “gap works” find themselves hopelessly lost between two statutory provisions, neither of which seem to govern the circumstances.

The Authors Guild estimates there are thousands of works which fall into this “gap” created by the 1976 Copyright Act.<sup>124</sup> The well-recognized song by Charlie Daniels called “*The Devil Went Down to Georgia*” is one such copyrighted work that falls within this gap.<sup>125</sup> Daniels, who signed a recording deal with Universal Music Group before 1978, wrote the song in 1979 while in the studio.<sup>126</sup> Thus, based on the face of the plain language in the statutory provisions, the work is not governed by either §203 or §304 of the 1976 Act.

The “gap works” problem caught the attention of the United States Copyright Office, which acted first by requesting public comments on how to address the problem. The Copyright Office subsequently issued an analysis and possible solutions to gap works.<sup>127</sup> In its discussion, it

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<sup>121</sup> 17 U.S.C. § 203(a) (2002); Jake Shafer, *The Gap Years*, 34-Nov. L.A. Law. 36, 38 (2011).

<sup>122</sup> 17 U.S.C. § 304(a).

<sup>123</sup> See Shafer, *supra* note 121.

<sup>124</sup> Charles J. Sanders & Jan F. Constantine, *In the Matter of Gap in Termination Provisions: Comments of the Authors Guild and the Songwriters Guild of America*, Fed. Reg. Doc. 2010-6936, available at <http://www.authorsguild.org/advocacy/articles/>.

<sup>125</sup> Brian Reisinger, *Charlie Daniels' Signature at Heart of Copyright Dispute*, NASHVILLE BUS. J., (Mar. 28, 2010).

<sup>126</sup> *Id.*

<sup>127</sup> U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISION OF TITLE 17 (Dec. 7, 2010); Gap in Termination Provisions, 75 Fed. Reg. 72771 (Nov. 26, 2010).

stated, very simply, that “it would be beneficial for Congress to clarify the statute.”<sup>128</sup> After exploring the comments received from the public, the Copyright Office suggested the best solution was viewing a contract for a copyrighted work that did not yet exist as merely executory.<sup>129</sup> “[I]n U.S. contract law, an ‘executed’ agreement is ‘one in which nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made,’ while ‘an executory contract is a contract to do some future act.’”<sup>130</sup> The Copyright Office believes that the correct interpretation is that a contract that grants a future copyright does not vest until the work is created.<sup>131</sup> Though the Copyright Office made this suggestion, little was done to actually resolve the conflict regarding the execution date differing from the vesting date. It is still unclear when the thirty-five years will begin to toll, at the date of execution or the date of creation for gap works. Although the Copyright Office will accept notices of termination, its rulemaking authority is not binding in a court and “the fact that the Office has recorded the notice does not mean that it is otherwise sufficient under the law.”<sup>132</sup> This non-binding administrative opinion could result in copyright holders missing their termination windows if a court interprets the statutory language differently than the Copyright Office.

Alternatives to the recommendation by the Copyright Office have included backdating

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<sup>128</sup> U.S. COPYRIGHT OFFICE, *supra* note 127.

<sup>129</sup> *Id.*; see also *T.B. Harms v. Stern*, 229 F. 42, 49 (2d Cir. 1915) (“At law one cannot transfer by a present sale what he does not then own, although he expects to acquire it. But, while the contract was without effect at law as a contract of sale, it operated as an executory agreement to sell.”).

<sup>130</sup> U.S. COPYRIGHT OFFICE, *supra* note 127.

<sup>131</sup> *Id.* (“For the reasons stated above, which are discussed more fully in the pages that follow, the Office suggests the following amendment [underlined] to Title 17: § 203. Termination of transfers and licenses granted by the author (a)... (3) ... For purposes of this section, and without prejudice to the operation of any other provision in Title 17, the date of execution of the grant is no earlier than the date on which the work is created.”).

<sup>132</sup> Gap in Termination Provisions, 75 Fed. Reg. 72771 (Nov. 26, 2010).

the contract once the work is created.<sup>133</sup> However, this creates problems for the party who was given a grant in the work: a grantee who expects at least thirty-five years to exploit the work is now robbed of the years the copyright was not in existence, but the author would be able to terminate the right thirty-five years after the date the contract was signed.

Though it is unlikely new gap works are being created, beginning on January 1, 2013 and a few years thereafter, post-1978 works are entering the first year of the five year termination window with uncertainty. One thing is evident: until gap works are addressed in court or clarified by amendment, authors will continue to tread in uncharted waters waiting for an answer.

### **C. Joint Works**

Termination of joint works is another field of uncertainty for authors that have yet to be resolved through judicial interpretation or congressional amendment. Notably, §304 and §203 of the 1976 Act have different statutory requirements in order to successfully terminate joint works. Section §304 governs works created prior to January 1, 1978, whereas Section §203 governs all grants executed on or after January 1, 1978.

Determining who the author of a work is, and whether there is more than one author, will affect the ability to execute a termination right. The determination of the authors of a joint work is still somewhat imprecise. To determine whether two parties are both authors, some courts look at factors such as intent of the contribution, whereas other look at the contribution alone and whether it is a copyrightable work.<sup>134</sup> However, the fact that “[a]cademic authorities [are] split on what type of ‘contribution’ the copyright law requires for joint authorship purposes,”<sup>135</sup> in turn causes ambiguity for termination rights. Though the Supreme Court originally applied an

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<sup>133</sup> *Id.*

<sup>134</sup> Tropp, *supra* note 52, at 811 (referring to the *Nimmer v. Goldstein* test).

<sup>135</sup> See *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990).

agency analysis for joint works, the issue is far from resolved.<sup>136</sup> Consider works created by bands rather than individuals, and the uncertainty with respect to what sort of contribution an individual must make to be considered an author of the work.<sup>137</sup> Only an author or their heirs may terminate a copyright grant. Determining *who* the authors of a work are is necessary in order to determine *who* actually holds the right to terminate a grant for a joint work.<sup>138</sup>

Looking beyond the difficulties in determining *who* the author of a work is, the grants executed for joint works are riddled with other problems with respect to the statutory meaning of words in the copyright provisions. The word “grant” as used in the termination provisions is undefined and, therefore, unclear. The ambiguity causes uncertainty for authors in deciding who may terminate a grant and what practical effect termination actually has.

It is useful here to take another step back and understand what the effect of being a joint author has in a copyright grant circumstance. Joint authors share full and undivided ownership of a copyrighted work.<sup>139</sup> The full ownership gives an individual author the ability to license the work without consent of the other author(s); however, the individual author’s ownership does not extend to the ability to sign an exclusive license in the work.<sup>140</sup> Put another way, each author of a joint work can allow nonexclusive use of the work without consent from the other authors of the joint work.<sup>141</sup>

Under §304 of the 1976 Act, a grant of a renewal term executed prior to January 1, 1978

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<sup>136</sup> See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740-42 (1989).

<sup>137</sup> Gould, *supra* note 31, at 93.

<sup>138</sup> Though issues surrounding authors of joint works are beyond the scope of this paper, it is notable to mention that the development of technology and ever-increasing collaboration between artists, producers, vocalists, writers, and the like is making that determination ever more complicated.

<sup>139</sup> See, e.g., *Ashton-Tate Corp.* 916 F.2d at 522; 17 U.S.C. § 201 (a); 1-6 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.03.

<sup>140</sup> Nimmer, *supra* note 139, § 6.10.

<sup>141</sup> *Id.*

may be terminated to the extent of that particular author's ownership in the renewal copyright.<sup>142</sup> The author who provides the grant for the renewal right may terminate their share of ownership in that grant. An example may provide better understanding of this concept: consider a circumstance where four authors collaborate on a book; each individual would be considered a joint author and the authors collectively agree to provide an exclusive license to the book for the duration of the renewal term in a contractual agreement with a publisher. Under §304, if one author wishes to terminate his or her grant, they may do so. The effect, as explained by *Nimmer*, is that the license is still in effect by the other three authors, and the termination of the fourth author removes only the exclusive license. The entire grant, however, is not wholly terminated; just the individual author's share of ownership is terminated. The publisher still has a valid grant from the three other joint authors and now shares a non-exclusive license with the terminating author.<sup>143</sup>

Under §203 of the 1976 Act, the outcome would be substantially different. For a grant executed by two or more authors of a joint work, the grant can only be terminated by a majority of the authors who executed the agreement.<sup>144</sup> In the example above, a single joint author would be unable to terminate the grant to the work unless two other joint authors agree to join in the notice of termination. The effect when a majority of authors who executed the grant terminate it, results in the grant being *completely* terminated, including the grants by authors who did not join in the termination.<sup>145</sup> No court has yet interpreted the implication of grants and terminations with respect to joint authors and it could, obviously, result in significant differences and

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<sup>142</sup> 17 U.S.C. § 304 (c)(1) (2002).

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

<sup>144</sup> 17 U.S.C. § 203 (a)(1).

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

outcomes for individual authors of joint works.<sup>146</sup> Another complication arises when discussion narrows around the meaning of a “grant” as understood in the 1976 Act. In a case currently before the United States District Court, the question asked is what is embodied in the meaning of a “grant” for purposes of termination by one author of a joint work?<sup>147</sup> The defendant in the case is Victor Willis, a member of the musical group the Village People, which saw broad success in the 1970’s and 1980’s.<sup>148</sup> Willis is seeking to terminate the copyright grants to the record labels for thirty-three musical compositions he co-authored.<sup>149</sup> The record label, Scorpio, sought a judicial declaration that Willis cannot terminate the grants without a majority of the joint authors under §203.<sup>150</sup>

The controversy surrounding the fact that the documents signed by Willis granting Scorpio his share of ownership in the work were separate and independent from the documents his co-authors signed.<sup>151</sup> As Willis argues, the plain language interpretation of the statute states that “a grant executed by two or more authors of a joint work” requires the grant to be embodied in a single writing.<sup>152</sup> In contrast, Scorpio argues that the “mere circumstance” that the writings for the grant are separate does not preclude the application of §203 requiring a “majority of the authors who executed it” in order to effectuate a termination.<sup>153</sup> Scorpio argues the “grant” does not refer to the actual paper but the actual legal right that is transferred.<sup>154</sup>

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<sup>146</sup> The preceding analysis was a prospective speculation. Nimmer, *supra* note 139.

<sup>147</sup> Complaint for Declaratory Relief, Scorpio Music S.A. and Can't Stop Productions, Inc., v. Victor Willis, No. 3:11-CV-01557 (S.D. Cal. July 14, 2011).

<sup>148</sup> Larry Rohter, *A Village Person Tests Copyright*, N.Y. TIMES, Aug. 16, 2011.

<sup>149</sup> *Id.*

<sup>150</sup> Complaint for Declaratory Relief at 2-4, Scorpio Music S.C. v Willis, 2012 WL 1598043 (S.D. Cal. 2012) (No. 3:11-CV-01557)

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

<sup>152</sup> Reply Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss the Complaint, Scorpio Music S.C. v Willis, 2012 WL 1598043 (S.D. Cal. 2012) (No. 3:11-CV-01557-BTM).

<sup>153</sup> Amended Memorandum of Points in Opposition to Motion to Dismiss Complaint for Declaratory Relief, Scorpio Music S.C. v Willis, 2012 WL 1598043 (S.D. Cal. 2012) (No. 3:11-CV-01557).

<sup>154</sup> *Id.*



If Willis succeeds he will have, at the very least, eliminated the record label's exclusive rights to the Village People songs. An exclusive grant is far more valuable to a record label because the rights can only be obtained from one source.<sup>155</sup> On the other hand, "[o]pportunities for strategic bargaining may also arise because producers and artists typically make grants to record labels in separate documents. Separate grantors can terminate separately and enjoy a non-exclusive license subject to accounting."<sup>156</sup> While the outcome of this litigation is still unclear, the implication of either outcome could send shock waves through the entertainment industry causing record labels and movie studios rushing to old file cabinets in order to determine whether other artists signed the same piece of paper, in what would then be considered the "same" grant.<sup>157</sup>

#### **D. Works Made for Hire**

Another major exception to termination rights are works for hire. Both termination provisions explicitly state that "any work other than a work made for hire," is terminable.<sup>158</sup> The function of a work for hire is based on whether the work and surrounding circumstances fits within either of two statutory prongs.<sup>159</sup> The first is if the party who creates the work is an

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<sup>155</sup> Gould, *supra* note 31, at 134-35.

<sup>156</sup> *Id* at 134.

<sup>157</sup> Subsequent to the writing of this note, the United States District Court in the Southern District of California resolved this case by granting a motion to dismiss by Willis viewing each grant as separately terminable. See generally *Scorpio Music S.C. v Willis*, 2012 WL 1598043 (S.D. Cal. 2012); see also Larry Rohter, *A Copyright Victory, 35 Years Later*, N.Y. TIMES, C1, Sept. 11, 2013

<sup>158</sup> 17 U.S.C. § 203 (a) (2002); 17 U.S.C. § 304 (c) (2002).

<sup>159</sup> A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a

employee of the company and the creation is within the scope of their employment, the work is considered a work for hire and the company is considered the author. The second prong allows a work for hire to fall within an enumerated category when the creator is not an employee of the company if three requirements are met: a work for hire must have 1) a written agreement 2) stating that the work is a work made for hire and 3) the work falls within one of the enumerated categories in the statute.<sup>160</sup>

Works that fall within the statutory definition of a work made for hire are particularly valuable to many businesses, particularly the recording industry. Most record labels have recently learned to expect the grants to their most successful copyrights to be terminated thirty-five years from execution unless they can show that it fits within the work for hire exception. However, record labels face an uphill battle in maintaining ownership of the works under this exception because it is unlikely they will succeed in court in most cases.<sup>161</sup>

Most record contracts explicitly state that the artist is an independent contractor and not an employee of the company.<sup>162</sup> Though an artist could still be an employee notwithstanding a written agreement, the agency analysis in almost all cases would reveal that the artist was not an employee.<sup>163</sup> If a record label was successful in claiming the artist is an employee, it would also face significant tax implications because of the likelihood that it did not pay employment tax, social security tax, etc. on behalf of those now-claimed “employees.”<sup>164</sup>

The other option for record labels is to claim the work falls within one of the enumerated

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literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. 17 U.S.C. § 101 (2013).

<sup>160</sup> *Id.*

<sup>161</sup> See Bales, *supra* note 35, at 671.

<sup>162</sup> See, e.g., Gould, *supra* note 31, at 96.

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

<sup>164</sup> *Id.* at 105 (“These subtleties should be kept in mind when applying the [work for hire] test in the recording industry context, since record labels do not pay taxes or benefits in connection with recording contracts.”).

categories in the copyright statute. For many works, this is an attempt to fit a square peg into a round hole. Most of the works for a record label would be considered a sound recording and would not fall within the categories enumerated as a work made for hire.<sup>165</sup> Alternatively, and on an extremely fact intensive basis, record labels could claim the works are a collective work or part of a compilation.<sup>166</sup> In those cases, if the work falls within the statutory exception, it would be immutably exempt from termination. Of course, the writing requirement would need to be met, but most recording agreements include standard clauses which easily meet this requirement.<sup>167</sup>

Obtaining these legal classifications of a work made for hire is extremely difficult and would likely need to be determined in a court of law with many dollars spent, but it could be well worth the money for a record label that wants to preserve its royalty rights to a successful copyrighted work.

The notion driving the works made for hire exception is that the company is the author and not the creator. One “rationale behind the doctrine recognizes the idea that if an employer pays an employee for the purpose of creating a work, the employer should reap the benefits of the payment,” by exploiting the created work.<sup>168</sup> Another argument is that the categories of works that are enumerated include many collaborators. “For example, collective works and audiovisual works both involve large numbers of contributors. Termination of copyrights for such works could lead to high transaction costs and co-authorship disputes that might effectively

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<sup>165</sup> Burrows, *supra* 42, at 123 (“Case law also supports the proposition that sound recordings are not a work for hire and should not be included on the list of enumerated categories.”).

<sup>166</sup> Ryan Ashley Raftery, Note, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 VAND. L. REV. 1021, 1042-43 (2000).

<sup>167</sup> Williams, *supra*, note 29.

<sup>168</sup> Burrows, *supra* note 42, at 111.

remove those works from the market.”<sup>169</sup> Many of the enumerated categories are of the type that would require many contributors and collaborators, and those contributors would have a claim of authorship in the work had it not been for the work made for hire designation.<sup>170</sup>

The work for hire exception has been very beneficial for companies, but the single fact that sound recordings are not included in the enumerated categories of a work made for hire is frustrating for many within the music industry.<sup>171</sup> Sound recordings were included in earlier drafts of the legislation but ultimately excluded from the final version of the 1976 Act. Some argue that they were distinguished because sound recordings are created with many fewer contributors than the other categories of enumerated works.<sup>172</sup> Attempts to re-insert sound recordings as an enumerated category in the work made for hire provision were made in 1999. This insertion was successful, but ultimately failed after the insertion was amended just one year later.<sup>173</sup>

### ***Termination Rights as Federal Policy***

Copyright, and more broadly intellectual property, has been treated differently than any other area of law. Courts often bring in legal principles and concepts from contract law and property law as parallels in their judicial interpretation.<sup>174</sup>

Similarly, copyright law is unique in that no other scheme of law permits an outright termination of a contractual agreement after thirty-five years simply on the desire to recapture

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<sup>169</sup> See Gould, *supra* note 31, at 107.

<sup>170</sup> *Id.* at 102.

<sup>171</sup> 17 U.S.C. § 101 (2013).

<sup>172</sup> See Gould, *supra* note 31, at 107.

<sup>173</sup> Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1011(d) (1999); Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444, 1444 sec. 2(a)(1) (2000).

<sup>174</sup> Ringer, *supra* note 28, at 188 (“There is an apparent conviction that copyright involves an element of personal creativity entitling an author to special consideration in his contractual dealings, together with a recognition that when most copyright bargains are made there is no way to judge the ultimate value or life of the work.”).

the rights. Congress has made a “market based assumption,” claiming that this ability to terminate an agreement stems from the fact that the valuation of a copyrightable work is inherently impossible at the time of creation.<sup>175</sup> It is arguable whether this should matter. Contractual agreements in industries such as the stock market carry the same, or more, uncertainty with respect to the future value of the item being bargained for; however, those circumstances do not permit such a termination of contractual rights. While investing in stocks is a risk/reward game, copyright authors get away with terminating their works when the value is higher than initially expected. The right to void an agreement is not reciprocal. Record labels are not able to ask for their advance back or cancel their deal if the first album by an author is a “flop.” Further cutting against termination rights is the fact that record labels are “assuming virtually all of the financial risk.”<sup>176</sup>

Congress has long had the preconceived notions of copyright valuation being difficult, but an analysis of copyrights in the new millennium renders those assumptions flawed and no longer valid.<sup>177</sup> The legislative history does not lend much in terms of support with respect to the author’s second chance; the legislative record simply states that “[t]he renewal copyright established in the Act of 1831 and elaborated in the Act of 1909 is a unique form of property whose nature and theoretical basis are still unclear.”<sup>178</sup> The argument was slightly stronger when the right of renewal was characterized by courts “as a ‘new estate’ or a ‘new grant’ rather than a mere continuation or extension.”<sup>179</sup> But with the renewal term now replaced with a termination right, the reason for granting a second chance, through a termination of a grant of rights, is

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<sup>175</sup> Tropp, *supra* note 52, at 821-22.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 825.

<sup>178</sup> Ringer, *supra* note 28, at 124.

<sup>179</sup> *Id.*

lost.<sup>180</sup>

Attempts to contract around the statutory termination provisions have not wholly been unsuccessful. Some courts have concluded that subsequent agreements extinguish the termination right. The courts reason that the effect embodied within the right, the ability for the holder to renegotiate the grant, has been accomplished through a new contract even if the termination itself was not completed.<sup>181</sup> Opponents of the right of termination have objected particularly to its inalienability, arguing that no other type of intellectual property is subject to governmental interference with the freedom to contract.<sup>182</sup> Is the perceived, if not actual, difficulty in accurately valuing copyrighted works enough to justify statutory preemption of contractual obligations or statutory restrictions on the freedom to contract?<sup>183</sup> Is there a valid basis for termination rights at all? And what will become of copyright law and recording contracts as technological advances give authors the ability to exploit their works without a record label's assistance?

#### CONCLUSION

Whatever the justification for an author's right of termination, the ambiguity leaves authors, record labels, and studios scrambling for a legal trail to follow when determining who owns a copyrighted work, who may terminate the grant, when they may terminate, and what is required to terminate. As technology continues to advance, the need for copyright reform will continue to grow and inevitably result in another

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<sup>180</sup> Tropp, *supra* note 52, at 825.

<sup>181</sup> Bales, *supra* note 35, at 670 ("As will be seen, seemingly contrary findings of several recent cases raise questions about whether the termination right is 'inalienable' and suggest that, in some circumstances, an author or heir will be able to effectively sell the right.").

<sup>182</sup> Gould, *supra* note 31, at 100.

<sup>183</sup> *Id.* ("[N]o other type of intellectual property was subject to governmental interference with freedom of contract.").

reform of copyright laws.

A wave of new terminations will be effective this year, in 2013, which also create a new range of problems, including what will be done with terminated copyrights after they are reclaimed. It has been argued that many works are not valuable enough to justify termination after thirty-five years. However, those works that hold value after thirty-five years are some of the most valuable in the entertainment industry, and in a record label's collection. Record labels have no choice but to move forward as the era of copyright termination shifts into full swing with artists terminating the best-selling songs of a past generation.

**THE NCAA “DEATH PENALTY” –  
DEATH FOR PENN STATE OR DEATH FOR COMPETITION?**

By: Zachary D. Crowe<sup>1</sup>

ABSTRACT

*The NCAA has enjoyed being the primary provider of college athletics for over a century. It has used this dominant position to impose its authority over member universities in a wide variety of areas. The NCAA has a plethora of enforcement measures and has enjoyed extensive judicial protection for its regulations, despite the fact that it essentially operates as a cartel. It has withstood an overwhelming majority of the charges alleging that it violates the Sherman Act by unreasonably restraining competition and it appears that this has resulted in the NCAA developing a feeling of immunity.*

*The NCAA’s most restrictive punishment is appropriately known as the “death penalty.” The NCAA uses the “death penalty” to exclude a university from competing in a certain sport for a period of at least one year. While this appears to be a blatant restraint of competition, the “death penalty” has never been successfully challenged. In 2012, the NCAA considered imposing the “death penalty” on Penn State University following the revelation of a child molestation scandal surrounding the Penn State football team. Ultimately, the NCAA decided to institute different sanctions on Penn State; however, the threat of the NCAA freely imposing the “death penalty” in this type of situation continues to exist. The Penn State situation serves as an important example because this is the first time the NCAA has contemplated implementing the “death penalty” for strictly social policy reasons.*

*This Note proposes that the use of the “death penalty” against Penn State would have violated the Sherman Act. The NCAA likely would not be able to advance any sustainable justifications for using the “death penalty” against Penn State, resulting in the punishment being declared an unreasonable restraint of competition. While this Note concludes that the “death penalty” would not have been an appropriate sanction in this particular case, it provides examples as to when it may be used by the NCAA as a viable punishment in the future. This Note should serve as a reminder to the NCAA that it is not immune from Sherman Act scrutiny and should consider the antitrust implications of its actions in the future.*

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<sup>1</sup> J.D. Candidate, 2014, Emory University School of Law. I would like to thank my friends and family for their continuing support and encouragement. I could not have come close to being where I am without them. I want to give a special thanks to my best friend in the world, Megan Sweeney, who read more drafts of this Note than anyone, and always did it with a smile. I would also like to give a special thanks to Professor Thomas Arthur for sculpting my shadow of an idea into a full-fledged argument. He has forgotten far more about the law than I can ever hope to learn.



INTRODUCTION

Over a several month period from 2011-12, Pennsylvania State University (“Penn State”) was the focus of a highly publicized scandal involving child molestation, perjury, and ignorance of moral obligations.<sup>2</sup> One of Penn State’s football coaches, Jerry Sandusky, was charged, and later convicted, of dozens of counts of child molestation,<sup>3</sup> including multiple sexual assaults at Penn State facilities.<sup>4</sup> It was also alleged that several Penn State officials attempted to cover up the sexual assaults that occurred under their watch, which resulted in the forced resignation of Penn State President, Graham Spanier,<sup>5</sup> the firing of long-time head coach, Joe Paterno,<sup>6</sup> and charges of perjury against top Penn State officials.<sup>7</sup> Former director of the FBI, Louis Freeh, led an internal investigation of Penn State and released the “Freeh report” on July 12, 2012, which exposed graphic details of the sexual abuse and the attempted cover-up that occurred at Penn State.<sup>8</sup>

To make matters worse for Penn State, on July 23, 2012, the National Collegiate Athletic Association (the “NCAA”) issued the university an array of institutional sanctions.<sup>9</sup> The sanctions included a \$60 million fine, a multi-year ban from postseason football competition, and

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<sup>2</sup> See Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012), <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>.

<sup>3</sup> Kimberly Kaplan & M. Alex Johnson, *Sandusky Convicted of 45 Counts, Plans to Appeal*, U.S. NEWS ON NBC NEWS (June 22, 2012, 9:38 PM), [http://usnews.nbcnews.com/\\_news/2012/06/22/12363955-sandusky-convicted-of-45-counts-plans-to-appeal?lite](http://usnews.nbcnews.com/_news/2012/06/22/12363955-sandusky-convicted-of-45-counts-plans-to-appeal?lite).

<sup>4</sup> Brenda Medina, *How Penn State’s Sex-Abuse Scandal Unfolded*, THE CHRONICLE OF HIGHER EDUCATION (Nov. 10, 2011), <http://chronicle.com/article/article-content/129767/>.

<sup>5</sup> See Chappell, *supra* note 2.

<sup>6</sup> See Chappell, *supra* note 2.

<sup>7</sup> See Associated Press, *Two Top Officials Step Down Amid Penn State Scandal*, FOX NEWS (Nov. 7, 2011), <http://www.foxnews.com/sports/2011/11/05/penn-state-ex-coach-others-charged-in-child-sex-case/>.

<sup>8</sup> FREEH, SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), available at <http://progress.psu.edu/the-freeh-report>.

<sup>9</sup> Eric Prisbell, *NCAA Hands out Severe Punishment for Penn State*, USA TODAY (July 23, 2012, 7:13 PM), <http://usatoday30.usatoday.com/sports/college/football/bigten/story/2012-07-23/ncaa-penn-state-punishment-sanctions/56427630/1>.

vacated of over 100 wins by the football team.<sup>10</sup> While the sanctions seemed harsh to some,<sup>11</sup> it was rumored that the NCAA contemplated an even stricter form of punishment: the “death penalty.”<sup>12</sup> The “death penalty” is the NCAA’s most serious form of punishment and results in the university being completely prohibited from participating in a certain sport for a period of years.<sup>13</sup> To summarize, when it implements the “death penalty,” the NCAA forbids all of its members from competing against the team being punished in a particular sport.<sup>14</sup> Prior to the NCAA delivering its official sanctions against Penn State, there was extensive discussion about whether it would invoke the “death penalty” and whether or not it had the authority to do so.<sup>15</sup>

This Note argues that, even if it desired, the NCAA could not have imposed the “death penalty” on Penn State without violating Section 1 of the Sherman Act. The “death penalty” gives rise to antitrust concerns because it is essentially a group boycott by all of the other NCAA members against the one member being punished.<sup>16</sup> This Note suggests that such an agreement to ban one member university from participating in football activities, based on a scandal unrelated to the competition of that member’s sports team, constitutes an unreasonable restraint of competition, inconsistent with antitrust law. Restricting a member university’s ability to

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<sup>10</sup> *Id.* During the period in which this Note was being written, the Governor of Pennsylvania filed an antitrust suit against these sanctions as well. Marc Edelman, *Pennsylvania Governor to File Antitrust Lawsuit Against NCAA*, FORBES.COM (Jan. 2, 2013, 4:05 PM), <http://www.forbes.com/sites/marcedelman/2013/01/02/pennsylvania-to-file-antitrust-lawsuit-against-ncaa/>.

<sup>11</sup> See, e.g., Bob Ford, *Bob Ford: Punishment for Penn State Misguided and Too Harsh*, PHILLY.COM (June 23, 2012), [http://articles.philly.com/2012-07-23/sports/32805756\\_1\\_mark-emmert-freeh-report-joe-paterno](http://articles.philly.com/2012-07-23/sports/32805756_1_mark-emmert-freeh-report-joe-paterno).

<sup>12</sup> See Dashiell Bennett, *Let Penn State Keep Playing Football*, THE ATLANTIC WIRE (July 16, 2012), <http://www.theatlanticwire.com/national/2012/07/let-penn-state-keep-playing-football/54623/>.

<sup>13</sup> See NCAA Academic and Membership Affairs Staff, *2009-10 NCAA Division I Manual*, Bylaw 19.5.2.2(j), 19.5.2.3.2(a) (2009).

<sup>14</sup> See *infra* PART I, *The NCAA*. See also *NCAA v. Bd. of Regents*, 468 U.S. 85, 106 (1984) (“[S]ince as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA’s [sanctions].”).

<sup>15</sup> See, e.g., Marc Edelman, *Sports and the Law: Professor Edelman Explains Why Giving Penn State the ‘Death Penalty’ May Never Have Been a Real Option*, ABOVE THE LAW (Aug. 2, 2012, 11:23 AM), <http://abovethelaw.com/2012/08/sports-and-the-law-professor-edelman-explains-why-giving-penn-state-the-death-penalty-may-never-have-been-a-real-option/>.

<sup>16</sup> See *infra* PART III, *Examining the Death Penalty*.

compete based on such a scandal is inconsistent with the NCAA's goals and justifications of maintaining a competitive balance and ensuring amateurism.

Part I of this Note presents a history of the NCAA and its "death penalty," as well as a brief background of antitrust law and the Sherman Act, including an examination of the three forms of antitrust scrutiny typically applied by the courts: per se analysis, Rule of Reason, and quick-look analysis. Part II examines the previous application of the Sherman Act by the courts to the NCAA and highlights the limited success plaintiffs have had in antitrust suits against the NCAA. Part III compares the Penn State situation to other antitrust suits against the NCAA and explains how the facts of the Penn State case lead to the conclusion that the "death penalty" would have been an unlawful violation of the Sherman Act. Part IV discusses, in general, the legality of the "death penalty" under the Sherman Act, ultimately concluding that the punishment would not violate antitrust law if enforced for procompetitive reasons, implying the sanction could be legally used by the NCAA in the future.

## **PART I: BACKGROUND**

### *The NCAA*

The NCAA is an unincorporated association of approximately 1,200 member schools<sup>17</sup> and operates as a non-profit, self-regulating organization.<sup>18</sup> Founded in 1906, one of the primary functions of the NCAA has been to "protect young people from . . . dangerous and exploitative athletics practices."<sup>19</sup> The fundamental purpose of the NCAA is to "preserve distinctively amateur athletics as part of the academic program of the nation's institutions of higher

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<sup>17</sup> *E.g.*, NCAA v. Smith, 525 U.S. 459, 462 (1999); *About the NCAA: Membership*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new>.

<sup>18</sup> *See, e.g.*, Stephanie M. Greene, *Regulating the NCAA: Making Calls Under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81, 83 (2000).

<sup>19</sup> *About the NCAA: History*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history>.

education.”<sup>20</sup> The NCAA regulates college athletics by creating and enforcing rules governing a broad array of topics, ranging from recruiting, eligibility, and academic requirements to rules governing the actual in-game performance of all collegiate sports.<sup>21</sup> By joining the NCAA, universities are bound to comply with the NCAA’s rules and regulations and are subject to discipline by the NCAA for noncompliance.<sup>22</sup>

The NCAA is governed in accordance with a lengthy and complex manual containing its constitution and bylaws.<sup>23</sup> The NCAA establishes its policies and considers amendments to its regulations at annual conventions.<sup>24</sup> At the Special Convention of 1985, NCAA officials considered a number of proposed amendments, including an addition to the NCAA enforcement procedures, which would increase minimum penalties upon members violating NCAA rules.<sup>25</sup>

Concerned with the criticism of its enforcement procedures, the NCAA sought to distinguish and disincentivize certain “major” violations by subjecting members to a heightened form of punishment if committed.<sup>26</sup> The NCAA officials approved this new form of punishment, known as the “death penalty,” by an overwhelming majority.<sup>27</sup> The “death penalty” was designed to increase the effectiveness of the NCAA’s enforcement capability and provide a stronger disincentive to member institutions attempting to “cheat.”<sup>28</sup> The “death penalty” allows the NCAA to punish member schools for “major” or “repeat” violations of NCAA rules by “prohibit[ing] some or all outside competition in the sport involved . . . for one or two sports

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<sup>20</sup> Carl L. Reisner, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656-57 (1978).

<sup>21</sup> See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 88 (1984). See generally NCAA Manual, *supra* note 13.

<sup>22</sup> NCAA Manual, *supra* note 13, at Const. art. 3.2.1.2; *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

<sup>23</sup> See WALTER T. CHAMPION JR., *FUNDAMENTALS OF SPORTS LAW* §12.3 (2d ed. 2012).

<sup>24</sup> See *id.*

<sup>25</sup> See Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 987, 1009 (1987).

<sup>26</sup> See *id.* at 994-1009 (“A major step toward gaining a significant degree of direct control over the governance of intercollegiate athletics.”).

<sup>27</sup> See *id.* at 1010 (427-6 vote).

<sup>28</sup> See *id.* at 987.

seasons.”<sup>29</sup> This Note does not discuss whether Penn State’s conduct constituted a “major” or “repeat” violation for purposes of implementing the “death penalty,” but some journalists have argued that it did not.<sup>30</sup>

It is important to note that the “death penalty” is not an NCAA regulation; it is a penalty for violating enumerated NCAA regulations.<sup>31</sup> Thus, it logically follows that if no underlying NCAA regulation has been violated, the NCAA has no authority to enforce the “death penalty.” The types of rule violations the NCAA has used the “death penalty” to punish has typically involved areas such as recruiting or player compensation.<sup>32</sup> However, in the Penn State situation it can be argued that there was no underlying rule violation at all; thus, the NCAA had no authority to punish them at all.<sup>33</sup> This argument is beyond the scope of this Note, but it does appear to have some merit.<sup>34</sup>

The NCAA has used the “death penalty” five times since 1985, but only once on a football program.<sup>35</sup> Southern Methodist University’s football team was given the “death penalty” for the 1987 and 1988 seasons and, arguably, has still not recovered from the punishment.<sup>36</sup> This is evidence that the “death penalty” has a long-term impact on punished programs even after the official ban from competition ends. The continued negative effects of the “death penalty” are a

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<sup>29</sup> NCAA Manual, *supra* note 13, at Bylaw 19.5.2.2(j), 19.5.2.3.2(a).

<sup>30</sup> See, e.g., Dave Zirin, *NCAA Out of Bounds With Penn State Sanctions*, CBS NEWS (July 23, 2012, 4:16 PM), [http://www.cbsnews.com/8301-215\\_162-57478152/ncaa-out-of-bounds-with-penn-state-sanctions/](http://www.cbsnews.com/8301-215_162-57478152/ncaa-out-of-bounds-with-penn-state-sanctions/).

<sup>31</sup> NCAA Manual, *supra* note 13, at art. 19 (listing NCAA Enforcement provisions).

<sup>32</sup> See, e.g., *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (punishing SMU for having a slush fund for football recruits).

<sup>33</sup> See *infra* notes 175-82 and accompanying text.

<sup>34</sup> The argument is that the NCAA is a self-appointed regulator and thus does not enjoy unlimited authority to punish universities. The NCAA is allowed to act as a private regulator in a limited context, consisting of the rules and regulations member universities have consented to. But if one of said regulations is not violated, the NCAA should not have authority to expand its authority over all actions of the universities.

<sup>35</sup> Jason Kirk, *Penn State and the Death Penalty: A Body Count for the Sake of a Body Count*, SB NATION (July 16, 9:00 AM), <http://www.sbnation.com/ncaa-football/2012/7/16/3157086/penn-state-football-death-penalty-ncaa-punishment>.

<sup>36</sup> See *id.* (describing how SMU went from a prominent football program team to only three winning seasons in the two decades since the program received the death penalty).

result of the reputational damage caused to the school, the loss of scholarships during the years of punishment, and enhanced NCAA scrutiny from that point forward.<sup>37</sup>

### *Section 1 of the Sherman Act*

Congress passed the Sherman Act in 1890 to prohibit restraints of competition and monopolies that were prevalent at the time.<sup>38</sup> Section 1 of the Sherman Act states “[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.”<sup>39</sup> Read literally, the Sherman Act makes every contract and agreement illegal. However, the Supreme Court has held that Congress only intended to prohibit “unreasonable” restraints of competition.<sup>40</sup> This coincides with the aim of Senator Sherman himself to “distinguish between lawful restraints in aid of production and unlawful combinations to prevent competition in restraint of trade.”<sup>41</sup> In addition, the courts have held that Section 1 of the Sherman Act only applies to agreements and activities which are commercial in nature.<sup>42</sup> This particular distinction between commercial and noncommercial practices has proved to be difficult among plaintiffs alleging antitrust violations against non-profit organizations, such as the NCAA.<sup>43</sup>

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<sup>37</sup> See David Williams, *Overcoming the Death Penalty: Southern Methodist, 21 Years Later*, BLEACHER REPORT (Apr. 7, 2008), <http://bleacherreport.com/articles/16678-overcoming-the-ncaa-death-penalty-southern-methodist-21-years-later> (discussing the continued up-hill battle SMU has faced in recovering from receiving the “death penalty.”).

<sup>38</sup> See AUSTIN T. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS § 38 (2012) (discussing the response of politicians to monopolies such as Standard Oil).

<sup>39</sup> 15 U.S.C. §1 (2006 & Supp. 2009).

<sup>40</sup> See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 688-89 (1978).

<sup>41</sup> Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 343 (2000) (citing 21 CONG. REC. 2456 (1890)).

<sup>42</sup> *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) (“It is axiomatic that section one . . . regulates only transactions that are commercial in nature.”) (citing *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

<sup>43</sup> See Gregory M. Krakau, *Monopoly and Other Children’s Games: NCAA’s Antitrust Suit Woes Threaten Its Existence*, 61 OHIO ST. L.J. 401, 403-04 (2000).

To prevail on a Section 1 Sherman Act claim, the plaintiff needs to show that the defendant “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”<sup>44</sup> However, the word “unreasonable” is nebulous and depends on the surrounding facts and circumstances. Thus, to evaluate whether an agreement unreasonably restrains trade in a market, courts typically apply one of three forms of analysis: the per se analysis, the Rule of Reason, or the “quick-look” analysis.<sup>45</sup>

### A. Per Se Analysis

Courts apply a per se approach to agreements that are so anticompetitive on their face as to warrant immediate condemnation.<sup>46</sup> A per se rule is applied when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”<sup>47</sup> The types of activities subject to per se rules are referred to as “naked restraints” because they are often imposed solely to inhibit competition.<sup>48</sup> When the court applies this type of rule, it simply presumes the agreement is an unreasonable restraint of trade and thus “illegal per se” without inquiring into the nature or market context of the activity.<sup>49</sup> Examples of agreements that are typically subject to per se rules are horizontal price-fixing and group boycotts.<sup>50</sup> For a claim alleging a per se illegal restraint of competition, the plaintiff merely

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<sup>44</sup> *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 959 (10th Cir. 1990)).

<sup>45</sup> See, e.g., *Agnew*, 683 F.3d at 335-36 (describing the three frameworks applied by the courts to analyze an action’s anticompetitive effects on a market).

<sup>46</sup> See WILLIAM HOLMES ESQ. & MELISSA MANGIARACINA, ESQ., *ANTITRUST LAW HANDBOOK* § 2:10 (2011-2012 ed.).

<sup>47</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

<sup>48</sup> Christopher L. Chin, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 *LOY. L.A. L. REV.* 1213, 1220 (1993).

<sup>49</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984).

<sup>50</sup> See generally Chin, *supra* note 48, at 1220; *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941). *But see Broad. Music*, 441 U.S. at 23 (holding that certain products/industries require horizontal restraints and price-fixing to make agreements function at all).

needs to show that the defendant engaged in the per se illegal activity.<sup>51</sup> The court will then deem the restraint unreasonable and a violation of the Sherman Act.<sup>52</sup>

### **B. Common Law Tests and the Rule of Reason**

Courts applied per se rules almost exclusively until the late 1970s.<sup>53</sup> However, over the next few decades, courts restricted the reach of per se rules and expanded the scope of what they referred to as “the Rule of Reason.”<sup>54</sup> Even once the courts began to apply what they were calling the Rule of Reason more regularly, they struggled with establishing a consistent standard for examining the restraints.<sup>55</sup> Different judges applied different common law standards, creating confusing precedent for future cases.<sup>56</sup>

One of the common law standards courts applied was the ancillary restraints doctrine. Former President of the United States, Judge Taft, articulated the ancillary restraints doctrine in the famous case of *Addyston Pipe*.<sup>57</sup> The ancillary restraints doctrine condemned naked restraints (restraints with the sole object of avoiding competition) as a matter of law, but allowed restraints that were “ancillary to the main purpose of a lawful contract” and necessary to protect the “fruits” of the contract.<sup>58</sup> This method of review was effective for examining actual cartels but insufficient for reviewing monopolistic mergers, which accomplished the same purpose as said cartels.<sup>59</sup> In order to account for this flaw, the court in *Addyston Pipe* added a third step<sup>60</sup> to the

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<sup>51</sup> See Holmes, *supra* note 46.

<sup>52</sup> See *id.*

<sup>53</sup> Arthur, *supra* note 41, at 337.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 341-57.

<sup>56</sup> See *id.* (courts applied the ancillary restraints doctrine, monopoly power doctrine and ‘all of the circumstances’ tests unsuccessfully).

<sup>57</sup> See generally *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898) *aff’d as modified*, 175 U.S. 211 (1899).

<sup>58</sup> *Id.* at 282.

<sup>59</sup> See Arthur, *supra* note 41.

<sup>60</sup> *Addyston Pipe*, 85 F. at 291 (holding that in monopolistic mergers “the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract” so they are still invalidated).



ancillary restraints doctrine to condemn monopolistic mergers as well.<sup>61</sup> However, this form of review was not capable of adequately balancing the restraint on competition caused by an agreement with the associated benefits of it, and was thus not sufficient for review of complex, less obvious restraints of competition.<sup>62</sup> The courts found little more success when applying an “all the factors” test, which permitted any restraint that *the particular court* found reasonable, essentially allowing that court to regulate price and output for the market.<sup>63</sup>

Finding these common law tests unworkable, the courts moved to a more functional Rule of Reason.<sup>64</sup> Today, in the absence of an inherently unreasonable activity,<sup>65</sup> courts will apply the Rule of Reason to weigh whether the affected market would be better off with or without the restraint.<sup>66</sup> Most restraints of trade are analyzed under this flexible test today.<sup>67</sup> When applying the Rule of Reason, the courts “weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>68</sup>

The Rule of Reason provides the Sherman Act with both flexibility and definition by focusing the analysis directly on the challenged restraint’s impact on competition.<sup>69</sup> This method of analysis is consistent with the purpose of the Sherman Act to distinguish between acceptable and unacceptable restraints based on their effect on competition.<sup>70</sup> The current Rule of Reason

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<sup>61</sup> See Arthur, *supra* note 41, at 344 n.33 (discussing Taft’s rationale behind adding a third step to the ancillary restraints doctrine).

<sup>62</sup> See *id.* at 343.

<sup>63</sup> United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 331-32 (1897) (discussing the unsuitability of the “all of the factors” test); see Arthur, *supra* note 41, at 344-45.

<sup>64</sup> See Arthur, *supra* note 41, at 351.

<sup>65</sup> Inherently unreasonable restraints will be declared illegal on their face. See *supra* PART I, Section 1 of the Sherman Act, Per Se Analysis.

<sup>66</sup> Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 79 (2011).

<sup>67</sup> United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (citing *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

<sup>68</sup> *Cont’l T.V.*, 433 U.S. at 49.

<sup>69</sup> *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

<sup>70</sup> See Arthur, *supra* note 41, at 343.

framework involves a three-step analysis, during which the burden shifts between the plaintiff and the defendant.<sup>71</sup>

In step one, the plaintiff bears the initial burden of showing that an agreement or practice has a substantially anticompetitive effect on a given market.<sup>72</sup> This requires the plaintiff to show several things. First, the plaintiff must establish a relevant market (i.e. product or service affected and a specific geographic area) within which the defendant competes and the alleged restraint will have an effect.<sup>73</sup> Second, the plaintiff must show that the defendant has “market power” in that relevant market.<sup>74</sup> In this context, market power means the ability to significantly affect the price or output of a market without losing one’s place in it.<sup>75</sup> This is often referred to as the “market power filter,” and may be satisfied if a plaintiff either shows evidence of actual detrimental impacts on the given market or that the defendant possesses enough control in the market to threaten competition.<sup>76</sup>

Finally, to satisfy the first step the plaintiff must show that the defendant’s use of its market power caused an anticompetitive effect on the relevant market.<sup>77</sup> Federal courts are split regarding whether a showing of an actual anticompetitive effect (i.e., higher prices, diminished service) is required or whether a showing that the defendant’s conduct is likely to cause an anticompetitive affect is sufficient.<sup>78</sup> Further, on occasion, courts have accepted direct evidence

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<sup>71</sup> See Krakau, *supra* note 433, at 408-11.

<sup>72</sup> See, e.g., *Brown Univ.*, 5 F.3d at 668; *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012).

<sup>73</sup> See *Baker*, *supra* note 66, at 86; *Holmes*, *supra* note 46, at § 2:10.

<sup>74</sup> See, e.g., *Agnew*, 683 F.3d at 335.

<sup>75</sup> See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (defining market power as “the ability to raise prices significantly above the competitive level without losing all of one’s business”).

<sup>76</sup> See *Holmes*, *supra* note 46, at § 2:10.

<sup>77</sup> See *Baker*, *supra* note 66, at 80.

<sup>78</sup> See *Holmes*, *supra* note 46, at § 2:10.

of actual market effects caused by the restraint even if no exact market can be defined.<sup>79</sup> It is thus unclear how much evidence of market effect the plaintiff is actually required to show in order for the court to move to the next step and shift the burden to the defendant.

If the plaintiff meets its initial burden, the court proceeds to step two, and the burden shifts to the defendant to produce evidence of “procompetitive effects” of the alleged unlawful agreement.<sup>80</sup> A restraint of trade may still survive scrutiny under the Rule of Reason if the procompetitive benefits and legitimate objectives of the restraint justify its anticompetitive effects.<sup>81</sup> The Supreme Court has held that justifications for anticompetitive restraints will only be considered valid if they have the net effect of “enhanc[ing] competition.”<sup>82</sup> Essentially, the only procompetitive justifications that will be accepted are efficiency justifications, such as cost cutting or quality improvement, that the restraint is reasonably necessary to produce.<sup>83</sup> If the defendant cannot justify the restraint by showing some procompetitive justification, the analysis ends and the court will declare the agreement an unreasonable restraint of trade.<sup>84</sup>

If the defendant is able to show procompetitive justifications for its restraint on competition, the court then moves to step three, and the burden shifts back to the plaintiff to show that the restraint is not “reasonably necessary” to achieve the legitimate objectives of the restraint, or that these objectives could be achieved in a “substantially less restrictive manner.”<sup>85</sup>

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<sup>79</sup> See Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L.J. 429, 432-33; *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104-08 (1984); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986).

<sup>80</sup> *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998). See *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); Baker, *supra* note 66, at 88 (describing the defendant’s burden of producing procompetitive justifications).

<sup>81</sup> *Law*, 134 F.3d at 1019.

<sup>82</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

<sup>83</sup> See *id.* at 113-20.

<sup>84</sup> See, e.g., *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (declaring a mandatory television plan an unreasonable restraint of competition because the court did not accept the NCAA’s justifications that it was beneficial because it limited college football television exposure, thus maintaining college football’s amateur characteristics).

<sup>85</sup> *Law*, 134 F.3d at 1019.

Step three provides the most unpredictable results because of its vagueness.<sup>86</sup> However, courts have clarified that the restraint does not need to be the *least* restrictive method possible of achieving a desired result to prevail under step three, only that it cannot “exceed[] the outer limits of restraint reasonably necessary to protect the defendant.”<sup>87</sup> While it is often said that the court weighs the procompetitive and anticompetitive effects of a restraint to determine its net effect,<sup>88</sup> this is normally not the case in practice. Instead, the courts shift the burden of proof between the parties as described above, as a built-in way of balancing the effects of the restraint without leaving it to the subjective calculation of a judge. Only if each party meets its burdens under the Rule of Reason will the courts perform a balance to see if the procompetitive benefits outweigh the anticompetitive harms of the restraint.<sup>89</sup> This is an important aspect that differentiates the current Rule of Reason from the failed and abandoned common law “all of the factors” approach, which simply allowed the judge to attempt to weigh all of the circumstances and determine if the restraint was reasonable or not.<sup>90</sup>

### C. Quick-look Analysis

Different courts and commentators have debated the function of the quick-look standard of review and have applied it in vastly different ways.<sup>91</sup> For simplicity, in this Note, the quick-look analysis is the abbreviated form of review that courts use when the per se framework is inappropriate, but where “no elaborate industry analysis is required to demonstrate the

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<sup>86</sup> Krakau, *supra* note 43, at 411.

<sup>87</sup> *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (quoting *Walt Disney Prods. v. American Broadcasting-Paramount Theaters*, 180 F. Supp. 113, 117 (S.D.N.Y. 1960)).

<sup>88</sup> FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, *Antitrust Guidelines for Collaborations Among Competitors* § 3.37 (Apr. 7, 2000), available at [http://ftc.gov/os/2000/04/ftc\\_dojguidelines.pdf](http://ftc.gov/os/2000/04/ftc_dojguidelines.pdf) (discussing the “overall” effect of the restraint).

<sup>89</sup> See 11 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1912i, at 302 (1998).

<sup>90</sup> See Arthur, *supra* note 41, at 344-45.

<sup>91</sup> See generally Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493 (2009) (outlining the confusion surrounding the diverse standards referred to as “quick-look”).

anticompetitive character of . . . an agreement” and proof of market power is not required.<sup>92</sup> This form of analysis can be thought of as essentially a quasi-per se test. Application of the quick-look approach instead of the full Rule of Reason is a case-specific judgment call by the court. Courts have applied the quick-look approach when restraints would normally be viewed as illegal per se, but some level of cooperation is required if the product at issue is to be made available at all.<sup>93</sup> Examples of industry agreements that courts have applied the quick-look analysis to include those made by dental associations, professional engineers, and sports leagues that need to cooperate to some extent in order to operate effectively.<sup>94</sup>

The application of the quick-look approach allows courts to skip a lengthy market power analysis and move directly to an analysis of a restraint’s procompetitive rationales.<sup>95</sup> The Supreme Court has applied the quick-look approach in multiple cases in which “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”<sup>96</sup> When using the quick-look approach, if the defendant cannot present any sound justifications for the facially anticompetitive practice, the court “condemns the practice without ado,” but if the court accepts the justifications, the court can uphold the restraint or perform a full Rule of Reason analysis if it deems it necessary.<sup>97</sup> The exact details of the quick-look approach are less clear than the full Rule of Reason review and appear to vary more on a case-by-case basis.<sup>98</sup>

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<sup>92</sup> *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012)(quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984)).

<sup>93</sup> *See id.*

<sup>94</sup> *See, e.g., Catherine Verschelden, Is the Quick-Look Antitrust Analysis in Polygram Holding Inherently Suspect?*, 32 J. CORP. LAW 447, 453-54 (2007) (discussing specific cases where courts have applied the quick-look approach).

<sup>95</sup> *See Brunet, supra* note 91, at 502-03.

<sup>96</sup> *California Dental Ass’n v. F.T.C.*, 526 U.S. 756, 770 (1999). *See generally* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Nat’l Soc’y of Prof’l Engineers v. U.S.*, 435 U.S. 679 (1978); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

<sup>97</sup> *Agnew*, 683 F.3d at 336 (citing *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)).

<sup>98</sup> *See Arthur, supra* note 41, at 359-62.

**PART II: APPLICATION OF THE SHERMAN ACT TO THE NCAA**

***Early Application of the Sherman Act and NCAA v. Board of Regents***

For many years, the courts did not apply antitrust law to the NCAA at all.<sup>99</sup> The theory was that antitrust laws like the Sherman Act did not apply to organizations who engaged in nonprofit activities, so the courts should not apply it to the NCAA because it is a self-regulating organization with noncommercial goals.<sup>100</sup> However, in 1975, the Supreme Court rejected this theory, holding that “the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.”<sup>101</sup> Since then, the courts have held that NCAA rules and regulations are subject to the Sherman Act in a plethora of cases.<sup>102</sup>

Even though its rules and practices are now subject to review under the Sherman Act, the NCAA has normally received a relaxed standard of antitrust analysis.<sup>103</sup> Courts have been reluctant to apply per se rules to NCAA practices, choosing to apply quick-look analysis or the Rule of Reason instead.<sup>104</sup> This is based on the logic that the NCAA is one of the organizations that would not be able to produce a product at all without some cooperation and restraint by members.<sup>105</sup> Without some cooperation and restraint, it would be impossible for college universities to agree upon even basic things necessary to produce collegiate sports (e.g. the actual rules of the sports they compete in, the size of the fields of competition, the number of

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<sup>99</sup> Reisner, *supra* note 20, at 663-664.

<sup>100</sup> *Id.*

<sup>101</sup> Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975) (holding that professional self-regulating organizations were subject to the Sherman Act too). *See also* American Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) (“There is no doubt that the sweeping language of §1 applies to nonprofit entities.”).

<sup>102</sup> *See* discussion *infra* PART II, *Sherman Act Applications to the NCAA*.

<sup>103</sup> NCAA regulations that would normally be deemed illegal per se receive analysis under the Rule of Reason instead. *See, e.g.*, Baker et. al., *supra* note 66, at 79 (“Courts are extremely reluctant to apply the per se rule to sports leagues, including the NCAA.”).

<sup>104</sup> *See* Hennessey v. NCAA, 564 F.2d 1136, 1151-53 (1976) (explaining why the Rule of Reason is most applicable to NCAA practices).

<sup>105</sup> *See* Baker et. al., *supra* note 66, at 79 (“This reluctance stems from the argument that sports leagues must combine both collective cooperation and competition.”).

scholarships that can be given out, etc.). That being said, despite showing some deference to the NCAA's goals and purpose, the Supreme Court has held that "the role of the NCAA must be to preserve a tradition that otherwise might die [and] rules that restrict output are hardly consistent with this role."<sup>106</sup>

The preeminent case applying the Sherman Act to the NCAA is the 1984 Supreme Court case, *NCAA v. Board of Regents*.<sup>107</sup> The Supreme Court applied Section 1 of the Sherman Act to the NCAA's television plan that limited the ability of members to have their football games broadcast on television.<sup>108</sup> Despite recognizing that the NCAA was engaging in horizontal restraints that could be considered illegal per se, the Court chose to apply the quick-look approach, rather than per se review.<sup>109</sup> In applying its analysis, the Court found that the NCAA had market power in the field of television broadcasts (without performing a full, lengthy market power analysis) and that the NCAA could not meet its burden of producing procompetitive efficiencies for its policy.<sup>110</sup> Thus, the television plan was declared an unreasonable restraint of competition and a violation of Section 1 of the Sherman Act, without having to proceed to a full Rule of Reason analysis.<sup>111</sup>

The Court provided an important lesson to the NCAA by showing that it would not simply accept the NCAA's justifications of "maintaining competition" and "maintaining amateurism" as a procompetitive shield of immunity for every anticompetitive restraint in which

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<sup>106</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

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

<sup>108</sup> *Id.* at 91-94.

<sup>109</sup> *Id.* at 103 ("[d]espite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.").

<sup>110</sup> *See id.* at 112-20 (rejecting the NCAA's proposed procompetitive justifications of "protecting live attendance" and "equalizing competition" among amateur athletic teams).

<sup>111</sup> *Id.* at 96. The Court declared the restraint unreasonable without requiring the plaintiff to produce a less restrictive alternative to it. *Id.* at 119-20.

it engages.<sup>112</sup> The Court drew a distinction between procompetitive NCAA practices such as creating rules governing “the conditions of the contest [and] the eligibility of participants,” which courts have subsequently upheld as legal, and pure restraints of competition under the veil of maintaining a competitive balance between members.<sup>113</sup> This case also provides an example of the distinction between commercial NCAA rules, which have been subject to full antitrust review, and noncommercial rules, which the courts have declined to perform full review upon.<sup>114</sup>

### *Sherman Act Applications to the NCAA*

Since *Board of Regents*, the courts have dealt with a number of antitrust suits against the NCAA.<sup>115</sup> Consistent with the logic of *Board of Regents*, courts have looked closely at whether challenged NCAA regulations are “promot[ing] business objectives of the NCAA” (commercial) or “serv[ing] its primary objectives of maintaining a competitive, amateur athletic league” (noncommercial).<sup>116</sup> This is a complicated analysis because, regardless of their purpose or objective, NCAA regulations govern a multi-billion dollar industry.<sup>117</sup> As a threshold matter, prior to performing a full antitrust analysis, some courts have held that NCAA regulations designed to achieve a strictly noncommercial objective are not subject to antitrust review.<sup>118</sup> For example, courts have upheld NCAA rules governing player eligibility<sup>119</sup> and restrictions limiting

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<sup>112</sup> *Id.* at 117-19.

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

<sup>114</sup> Regulating television contracts and imposing appearance restrictions was clearly commercial. *See id.* at 112. *See also* Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998), vacated on other grounds by NCAA v. Smith, 525 U.S. 459 (1999) (holding that certain eligibility rules are not commercial and are not subject to antitrust analysis).

<sup>115</sup> *See, e.g.,* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Agnew v. NCAA, 638 F.3d 328 (7th Cir. 2012).

<sup>116</sup> *See* Greene, *supra* note 18, at 83-84.

<sup>117</sup> *See* Krakau, *supra* note 43, at 405-06; Mike McGraw et al., *Money Games Inside the NCAA: Revenues Dominate College Sports World*, KANSAS CITY STAR, Oct. 5, 1997, at A1.

<sup>118</sup> *See* Krakau, *supra* note 43, 403-04; Smith, 139 F.3d 180; Adidas America, Inc. v. NCAA, 40 F.Supp 2d 1275, 1281 (D. Kan. 1999).

<sup>119</sup> *See* Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Smith, 139 F.3d 180; Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).



the number of coaches a school may employ<sup>120</sup> without delving into the full Rule of Reason, on the grounds that they have a “noncommercial” character. Courts generally uphold these types of restraints on competition based on the justifications that “they preserve amateurism, maintain the identity of intercollegiate athletics as being distinct from professional athletics and [they] prevent the commercialization of intercollegiate athletics at the expense of educational values.”<sup>121</sup>

On the other hand, when an NCAA regulation *seems* to be commercial in nature (because the courts rarely label NCAA regulations as purely commercial)<sup>122</sup> the court will subject it to a full antitrust review.<sup>123</sup> Even when the courts apply the Rule of Reason, plaintiffs have had a difficult time meeting their burden in step one – establishing a relevant market in which the NCAA exercises market power.<sup>124</sup> For example, courts have refused to recognize relevant commercial markets for the “services” of student-athletes in cases brought by student-athletes themselves.<sup>125</sup> This difficulty in establishing a relevant commercial market in which NCAA regulations have an anticompetitive effect stems from the dual-natured characteristics of the regulations.<sup>126</sup> However, the courts have recognized anticompetitive effects of NCAA regulations in relevant markets before when plaintiffs have clearly shown an effect in the given market.<sup>127</sup>

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<sup>120</sup> See *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Bd. of Regents v. NCAA*, 561 P.2d 499 (Okla. 1977).

<sup>121</sup> Chin, *supra* note 48, at 1225 n.100.

<sup>122</sup> Chin, *supra* note 48, at 1225.

<sup>123</sup> See *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

<sup>124</sup> See, e.g., *Baker*, *supra* note 66, at 80-81.

<sup>125</sup> See *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Baker*, *supra* note 66, at 81-84 (Courts have refused to recognize “a relevant labor market for student athlete services.”).

<sup>126</sup> See *Krakau*, *supra* note 43, at 405-06 (“On one hand the NCAA is a nonprofit organization and was created for a wholly noncommercial reason. . . [o]n the other hand, intercollegiate athletics . . . generate millions of dollars annually, for member schools and for the NCAA itself.”).

<sup>127</sup> See *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85; *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (“[T]he transactions between NCAA schools and student-athletes . . . take place in a relevant market with respect to the Sherman Act.”).

The Tenth Circuit provided plaintiffs with another possible way to satisfy the relevant market definition requirement of step one of the Rule of Reason.<sup>128</sup> In *Law v. NCAA*, the court invalidated an NCAA regulation without explicitly defining a relevant market that was affected.<sup>129</sup> The court ruled that an NCAA regulation limiting the compensation of certain Division I coaches was an unreasonable restraint of competition by applying a quick-look approach to market power.<sup>130</sup> The court rejected the argument that the relevant market for the regulation was the market for men's basketball coaching services, but declined to define a specific market the regulation affected.<sup>131</sup> Instead, the court ruled that the regulation was a naked price restraint and that "where a practice has obvious anti-competitive effects . . . there is no need to prove that the [NCAA] possesses market power."<sup>132</sup> The court held that the NCAA's regulation clearly had an anticompetitive effect because it directly limited salaries; no further analysis was needed to show the NCAA had market power.<sup>133</sup> Once the plaintiff's burden was met, the court proceeded to weigh the procompetitive rationales behind the regulation and ultimately found the restraint unreasonable.<sup>134</sup>

The *Law* decision illustrates the principle that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."<sup>135</sup> The courts have held that when there is agreement not to compete in terms of price or output, no elaborate industry analysis is required where the very purpose and effect of a horizontal agreement is to fix prices so far as to make them unresponsive to a competitive marketplace.<sup>136</sup> Thus, even if plaintiffs

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<sup>128</sup> See *Law*, 134 F.3d at 1020.

<sup>129</sup> See *id.* at 1019-20.

<sup>130</sup> See *id.* at 1020 (The "REC Rule" set a max salary of \$16,000 for certain assistant coaches).

<sup>131</sup> *Id.* at 1019-20.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1020.

<sup>134</sup> *Id.* at 1021-24.

<sup>135</sup> *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986).

<sup>136</sup> *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

have difficulty establishing a relevant commercial market for NCAA regulations, courts may advance to step two of the Rule of Reason analysis when the regulation has a clear anticompetitive effect.

Regardless of which method a plaintiff uses to satisfy step one (proving anticompetitive effects of the restraint) of the Rule of Reason, the burden then shifts to the NCAA to demonstrate procompetitive justifications for the restraint.<sup>137</sup> The NCAA has argued that a variety of procompetitive benefits of its regulations offset any anticompetitive effects its regulations have.

One of the NCAA's most used justifications is that its regulations preserve amateurism.<sup>138</sup> Amateurism in this context means the inclusion of only real college students, who attend college classes, and compete in NCAA athletics. The rationale is essentially that preserving amateurism makes student-athletes engage in collegiate sports for the physical, mental, and social benefits the sports provide, rather than for economic benefit.<sup>139</sup> The NCAA's Constitution states that the NCAA's primary purpose is to promote intercollegiate athletics to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and to retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>140</sup>

Maintaining amateurism is likely the NCAA's strongest argument, when properly applied, because courts respect the idea of keeping collegiate athletics separate from professional sports.<sup>141</sup> The Court held in *Board of Regents* that NCAA actions are procompetitive if they are

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<sup>137</sup> See *supra* PART I, Section 1 of the *Sherman Act*, Common Law Tests and the Rule of Reason; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012).

<sup>138</sup> See, e.g., *Agnew*, 683 F.3d at 342-43.

<sup>139</sup> See *Chin*, *supra* note 48, at 1235-36.

<sup>140</sup> NCAA Manual, *supra* note 13, at Const. art. 1.3.1.

<sup>141</sup> *Baker*, *supra* note 66, at 88 (discussing Justice Steven's recognition in *Board of Regents*, that preservation of amateur sports had economic value by increasing consumer choice and that preserving amateurism is a procompetitive justification).

“justifiable means of fostering competition among amateur athletic teams” and therefore “enhance public interest in intercollegiate athletics.”<sup>142</sup> The NCAA has successfully used this as a procompetitive justification in a number of cases relating to regulations on issues such as player compensation<sup>143</sup> and eligibility rules<sup>144</sup> because they help protect the NCAA’s amateur distinction from professional sports. However, the courts have stressed that this justification is not a free ticket for the NCAA, and courts have rejected the NCAA’s argument that all regulations foster amateurism.<sup>145</sup>

The NCAA’s desire to maintain its amateur characteristics goes beyond wanting student-athletes to simply play for the love of the sport. It is important for the NCAA to preserve the identity of amateur collegiate sports so as to differentiate them from mere inferior professional sports. The NCAA offers unique products (e.g. college football, college basketball, etc.) that constitute a distinct market separate from professional sports.<sup>146</sup> Thus, NCAA actions that enforce collegiate sports’ amateur characteristics increase efficiency and its quality of output. The NCAA attempts to maintain its amateurism to avoid simply becoming minor league professional sports, which generate much less profit than collegiate sports currently do.<sup>147</sup> While some would argue that the amateur status of collegiate sports has been eroded over time and is

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<sup>142</sup> NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

<sup>143</sup> See McCormack v. NCAA, 845 F.2d 1338 (1988); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

<sup>144</sup> See Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) (upholding a regulation prohibiting players from entering the NFL draft and then returning to play college football); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992).

<sup>145</sup> See, e.g., Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

<sup>146</sup> McCormack, 845 F.2d at 1344 (“The NCAA markets college football as a product distinct from professional football.”).

<sup>147</sup> Bd. of Regents of Univ. of Okla., 468 U.S. at 101-02 (“The identification of this ‘product’ with an academic tradition . . . makes it more popular than professional sports to which it might otherwise be comparable, such as, for example minor league baseball.”).

now only nominal,<sup>148</sup> this Note assumes that amateurism still exists and is fundamental to the purpose of the NCAA's operation.

Another compelling procompetitive justification offered by the NCAA is that its regulations are necessary to ensure competitive equality.<sup>149</sup> The NCAA argues its regulations help ensure an "even playing field" and enhance competition between members, and that without this, parity between the member organizations would be disrupted, which could affect the public's interest in intercollegiate sports.<sup>150</sup> The courts have held this justification has a procompetitive effect on regulations regarding topics such as eligibility, but that it is not a justification legitimizing all NCAA restraints.<sup>151</sup> Thus, for NCAA regulations to be justified based on competitive equity, the NCAA must prove that its regulation actually creates a competitive balance that enhances the quality of intercollegiate athletics.<sup>152</sup>

The third step of the Rule of Reason only arises if the NCAA successfully convinces the court that its procompetitive justifications are legitimately related to the restraint.<sup>153</sup> The burden is then back on the plaintiff to show that this particular restraint is not reasonably necessary to accomplish the NCAA's legitimate objectives. This step has never actually been applied by the courts to an NCAA regulation because NCAA regulations have either been ruled unreasonable through a quick-look approach (which does not include this step), or the regulations have been

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<sup>148</sup> See Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in the NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 25-29 (2000) ("[A]mateurism is often little more than a myth at the upper levels of college athletics.").

<sup>149</sup> See, e.g., *Law*, 134 F.3d at 1023-24.

<sup>150</sup> *Baker*, *supra* note 66, at 92-93.

<sup>151</sup> See, e.g., *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990). See also *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85; *Law*, 134 F.3d 1010.

<sup>152</sup> See *Baker*, *supra* note 66, at 93.

<sup>153</sup> See *supra* PART I, Section 1 of the *Sherman Act*, Common Law Tests and the Rule of Reason.

upheld without addressing this step.<sup>154</sup> However, scholars have recognized that the least restrictive alternative analysis is potentially devastating for NCAA regulations.<sup>155</sup>

***McCormack v. NCAA: The First “Death Penalty” Challenge***

There has been only one previous Sherman Act challenge of the NCAA “death penalty.”<sup>156</sup> In *McCormack v. NCAA*, a group of alumni, football players, and cheerleaders sued the NCAA when Southern Methodist University’s (SMU’s) football team was given the “death penalty” for the 1987-88 seasons.<sup>157</sup> The NCAA issued the punishment based upon multiple violations by SMU regarding eligibility and player compensation restrictions.<sup>158</sup> The suit was doomed from the start, however, because SMU did not sue as a legal entity itself and the plaintiffs were not authorized to represent it, so they did not have proper standing.<sup>159</sup> The court devoted a large portion of its opinion to explaining why each of the plaintiffs did not have antitrust standing to sue in this case.<sup>160</sup> The court also held that since the eligibility rules the plaintiffs were challenging were reasonable, there was no way for the plaintiffs to recover for enforcement of them through the “death penalty” and thus, the plaintiffs claim did not survive the NCAA’s motion to dismiss.<sup>161</sup> Based on the particular violations SMU committed that led the NCAA to implement the “death penalty,” the court held that *in this case* the “death penalty” did not constitute an illegal group boycott that unreasonably restrained competition.<sup>162</sup>

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<sup>154</sup>See Krakau, *supra* note 43, at 411 (“[T]he issue was not addressed in *Board of Regents* or *Law*.”).

<sup>155</sup>Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2669 (1996) (“[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.”).

<sup>156</sup>*McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

<sup>157</sup>*Id.* at 1340.

<sup>158</sup>*Id.* SMU’s violations included having a “slush fund” to pay football players and recruits. Mark Asher, *NCAA Cancels SMU’s 1987 Football*, THE WASHINGTON POST, Feb. 26, 1987.

<sup>159</sup>*McCormack*, 845 F.2d at 1341.

<sup>160</sup>*Id.* at 1340-43 (“Only a person injured in his business or property may seek damages for violation of the antitrust laws”) (internal quotation marks omitted). The Court seems to have been saying the University itself was the proper plaintiff. *Id.*

<sup>161</sup>*Id.* at 1345.

<sup>162</sup>*Id.*

**PART III: APPLICATION OF THE SHERMAN ACT TO THE POSSIBILITY OF THE “DEATH PENALTY” IN THE PENN STATE SITUATION**

Having discussed the relevant background information, this section presents the Note’s main argument – that the application of the “death penalty” to Penn State would have been an unreasonable restraint of competition in violation of the Sherman Act – in more detail. PART III, *Examining the “Death Penalty,”* discusses the characteristics of the “death penalty” relevant to antitrust law. PART III, *Contrasting the SMU and Penn State Situations,* distinguishes the application of the “death penalty” in the Penn State situation from the *McCormack* case involving SMU. PART III, *Applying the Sherman Act to the Penn State Situation,* applies the Rule of Reason to a hypothetical enforcement of the “death penalty” in the Penn State situation and anticipates the probable arguments both parties would make, reaching the conclusion that a court would likely deem this use of the “death penalty” an unreasonable restraint.

***Examining the “Death Penalty”***

As described in PART I, *The NCAA*, the “death penalty” is the term for the NCAA punishing one of its members by banning it from NCAA competition in a certain sport for at least one year.<sup>163</sup> The NCAA implements this punishment by essentially forbidding other member institutions from competing with the targeted school.<sup>164</sup> The conscious decision by all of the members of the NCAA to not compete in a sport against the punished organization can be labeled a “group boycott.” Group boycotts are concerted refusals to deal with the targeted individual, which often denies the individual access to “a supply, facility, or market necessary to

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<sup>163</sup> See *supra* PART I, *The NCAA*.

<sup>164</sup> See *id.*

enable the boycotted [individual] to compete.”<sup>165</sup> As is typical of the boycotting group,<sup>166</sup> the NCAA enjoys a dominant position in the market with no reasonable substitutes.<sup>167</sup>

Although it is easy to classify the “death penalty” as a group boycott, this does not necessarily mean that it is an illegal restraint of competition. While group boycotts have been held as activities deserving per se invalidation in the past,<sup>168</sup> the Supreme Court has more recently applied the Rule of Reason to group boycotts,<sup>169</sup> and regardless of how they are reviewed generally, the NCAA is viewed as immune from per se standards.<sup>170</sup> While group boycotts may not be subject to per se review, when they are not justified by “plausible arguments that they were intended to enhance overall efficiency and make [the] market[] more competitive . . . the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.”<sup>171</sup> Thus, the reasonableness of the “death penalty” will hinge on whether its application in each scenario was intended to increase efficiency and competition, or merely to advance some unrelated NCAA motive.<sup>172</sup> While the fact that the “death penalty” is an intentional exclusion from dealing with the targeted university is not dispositive, it certainly subjects the “death penalty” to strict scrutiny under the Rule of Reason.

### ***Contrasting the SMU and Penn State Situations***

A variety of circumstances differentiate the SMU situation, litigated in *McCormack*, from the Penn State situation. The primary difference, and what could have led to a much different

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<sup>165</sup> *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).

<sup>166</sup> *See, e.g., id.* at 294; *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 348 (1963).

<sup>167</sup> *See Pekron, supra* note 148, at 33 (The NCAA received a tongue-in-cheek award as the best monopoly in the country).

<sup>168</sup> *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *N. Pac. Ry. Co v. United States*, 356 U.S. 1, 5 (1958).

<sup>169</sup> *See Nw. Wholesale Stationers*, 472 U.S. at 296-97.

<sup>170</sup> *See, e.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 101-04 (1984) (holding the NCAA is an industry in which horizontal restraints on competition are necessary to produce the product at all, so the restraints are not subject to per se invalidation).

<sup>171</sup> *Nw. Wholesale Stationers*, 472 U.S. at 294.

<sup>172</sup> *See infra* PART III-IV.



result if Penn State was given the “death penalty,” is the violations that occurred. SMU was punished by the NCAA for a multitude of eligibility violations, including major recruiting violations and illegal compensation of student-athletes.<sup>173</sup> As discussed in PART II, *Sherman Act Applications to the NCAA*, NCAA regulations relating to eligibility tend to be upheld under the justification that they preserve amateurism and maintain a competitive environment.<sup>174</sup>

On the other hand, Penn State was punished by the NCAA for being involved in a scandal which involved both social and criminal wrongs.<sup>175</sup> While there is no disputing the moral wrongfulness of the events that transpired at Penn State, none of Penn State’s violations dealt with student-athlete eligibility or other areas in which the courts have typically upheld NCAA regulations.<sup>176</sup> In fact, Penn State likely did not violate any NCAA regulations at all. The only possible NCAA regulation that Penn State violated is Bylaw 10.1, which forbids “unethical conduct.”<sup>177</sup> This Bylaw is the NCAA’s catch-all rule because after providing a list of examples of unethical conduct, it is left open by the phrase “may include, but is not limited to.”<sup>178</sup> However, Bylaw 10.1 has never been applied to a university without an underlying violation of a separate NCAA regulation.<sup>179</sup> The rationale behind this is the same as “[the] reason the IRS doesn’t punish murderers who pay their taxes.”<sup>180</sup> If the NCAA could punish members for acting “unethically” even when they did not violate any NCAA regulations, the NCAA could

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<sup>173</sup> See, e.g., Asher, *supra* note 158 and accompanying text.

<sup>174</sup> See *supra* PART II, *Sherman Act Applications to the NCAA*.

<sup>175</sup> See *supra* Introduction.

<sup>176</sup> See *id.*

<sup>177</sup> NCAA Manual, *supra* note 13, at 10.1.

<sup>178</sup> Andy Staples, *Justice in Penn State case should come from courts, not NCAA*, SPORTS ILLUSTRATED (July 2, 2012 12:05 PM), [http://sportsillustrated.cnn.com/2012/writers/andy\\_staples/07/02/penn-state-jerry-sandusky-ncaa/index.html](http://sportsillustrated.cnn.com/2012/writers/andy_staples/07/02/penn-state-jerry-sandusky-ncaa/index.html).

<sup>179</sup> See *id.* (describing how NCAA Bylaw 10.1 is normally used to punish universities for obstructing NCAA investigations into the universities’ violation of other NCAA regulations).

<sup>180</sup> *Id.*

essentially become morality police, privately regulating the majority of college universities.<sup>181</sup> The fact that Penn State did not violate any underlying NCAA regulations is a critical distinction between the Penn State and SMU situations because it has a major impact on the validity of the procompetitive rationales the NCAA advances, and thus the chances of the “death penalty” surviving Sherman Act analysis.<sup>182</sup>

Another important distinction between the SMU “death penalty” litigation and the hypothetical Penn State “death penalty” litigation would be the standing of the plaintiff. The university did not bring the Sherman Act claim on its own behalf in *McCormack*, and the court held that the plaintiffs that brought the suit did not have proper standing.<sup>183</sup> The court held that SMU, however, “remains the party most directly harmed by the NCAA’s action,” implying that the university being punished is the most proper plaintiff.<sup>184</sup> Knowing this, if the NCAA would have elected to invoke the “death penalty” on Penn State, the university would have likely learned from SMU’s mistakes, and brought the suit themselves, in order to avoid this issue. In making this change, Penn State would be in a more promising position to have the “death penalty” ruled an unreasonable restraint of competition. While this standing issue is not the heart of this Note’s argument, it could have a serious effect on the court’s disposition towards the suit.

### ***Applying the Sherman Act to the Penn State Situation***

In the hypothetical Penn State “death penalty” litigation, the court would have been unlikely to declare the “death penalty” a per se violation of the Sherman Act. As discussed in PART II, *Early Application of the Sherman Act and NCAA v. Board of Regents*, the courts have

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<sup>181</sup> If the NCAA could use Bylaw 10.1 to reach the scandal cover-up by the Penn State faculty, what is to stop them from punishing a different university for violations in their music or art departments in the future?

<sup>182</sup> See *supra* PART III, *Contrasting the SMU and Penn State Situations*.

<sup>183</sup> See *supra* PART II, *McCormack v. NCAA: The First “Death Penalty” Challenge*. Claims were brought by alumni, football players, and cheerleaders. *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1988).

<sup>184</sup> *Id.* at 1342-43.

never applied a per se standard of review to an NCAA regulation.<sup>185</sup> There is no reason to believe that this suit would have triggered a different approach by the courts. Moreover, the “death penalty” is not an activity that seems substantially more unreasonable on its face than other restraints the courts have refused to apply per se review in the past.<sup>186</sup> Having ruled out a per se approach, the court still would have had a choice between a quick-look approach and a full Rule of Reason analysis.<sup>187</sup> The courts have applied both forms of review to NCAA regulations in the past, so the choice would depend on how much of a facial restraint on competition the court considered the “death penalty.”<sup>188</sup> Even if the court initially elected to apply a quick-look approach to the “death penalty,” the court could have then conducted a full Rule of Reason analysis if it accepted the NCAA’s justifications for the restraint.<sup>189</sup>

Regardless of which of the two approaches the court took, the initial burden would have been on Penn State to show that the “death penalty” had an anticompetitive effect on some market.<sup>190</sup> If the court elected to apply the quick-look approach, they would have skipped a lengthy inquiry into what market the NCAA was restricting competition in and likely would have concluded the “death penalty” is anticompetitive based on its facial characteristics of restricting competition.<sup>191</sup> However, if the court applied the full Rule of Reason, Penn State would have needed to identify a relevant market in which the “death penalty” had an anticompetitive

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<sup>185</sup> See *supra* PART II, *Early Application of the Sherman Act and NCAA v. Board of Regents*. Due to the necessary cooperation to produce a quality product, even if a restraint seems unreasonable on its face, “a fair evaluation of [a regulation’s] competitive character requires consideration of the NCAA’s justifications for the restraints.” *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984).

<sup>186</sup> Despite finding that the restraints in *Board of Regents* and *Law* were obvious horizontal restraints, the courts did not apply a per se form of review. See *id.* at 103-04; *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998).

<sup>187</sup> See *supra* PART I, *Section 1 of the Sherman Act*, Common Law Tests and the Rule of Reason and Quick-look Analysis.

<sup>188</sup> The Court would only use the “quick-look” approach if “no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . [the] agreement.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

<sup>189</sup> See *supra* note 97 and accompanying text.

<sup>190</sup> *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012).

<sup>191</sup> See *supra* PART I, *Section 1 of the Sherman Act*, Quick-look Analysis.

effect.<sup>192</sup> Penn State would, presumably, have made several arguments about the market that the “death penalty” impacts. One market Penn State would likely have argued is the market for college football as a whole. While the courts have rejected this as a market before, recent decisions hint that it might now be considered a relevant market.<sup>193</sup>

The argument is essentially that the NCAA controls the market for, and output of, college football and by enforcing the “death penalty” on Penn State, the NCAA is making an agreement amongst the members to not let Penn State participate in the market at all. Penn State likely would have also argued that the “death penalty” had an anticompetitive effect in the market for television broadcasting. Knowing the Supreme Court has already recognized this as a relevant market that the NCAA has affected before,<sup>194</sup> Penn State would have likely argued that the “death penalty” unreasonably restrains its ability to have its football games broadcasted and its ability to receive the associated revenue.<sup>195</sup>

Penn State would have likely also suggested a market for revenue associated with the football program in general. While this would be a difficult area to show a precise amount of market impact,<sup>196</sup> it is a rather straightforward argument. By not being allowed to play football, Penn State would clearly lose revenue it would normally expect its football team to make through ticket sales and bowl game revenue,<sup>197</sup> and would likely also experience a related

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<sup>192</sup> See *supra* PART I, Section 1 of the *Sherman Act*, Common Law Tests and the Rule of Reason.

<sup>193</sup> See *Banks v. NCAA*, 977 F.2d 1081, 1088-89 (7th Cir. 1992). But see *White v. NCAA*, CV 06-999-RGK (C.D. Sept. 20, 2006); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990).

<sup>194</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 112 (1984).

<sup>195</sup> *Where does the Money Go?*, NCAA.ORG, [http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider\\_one](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one) (last visited Apr. 26, 2013) (“In 2009-10, the media agreements constituted 86 percent of the NCAA revenue.”).

<sup>196</sup> Penn State would have needed to perform a calculation and an itemized report of all income that it made through, or associated with, its football program in different years and how much less it made in those areas while being subject to the NCAA sanctions.

<sup>197</sup> Penn State’s football program generated \$43.8 million in 2011. Curtis Eichelberger, *Penn State Football Revenue Up as Team’s Start Worst Since 2006*, BLOOMBERG (Sep. 26, 2012 10:00 PM), <http://www.bloomberg.com/news/2012-09-27/penn-state-football-revenue-up-as-team-s-start-worst-since-2006.html>.

decrease in other areas such as merchandise sales and alumni donations. If the court accepted any of these markets as one in which the “death penalty” had a substantial anticompetitive effect, Penn State’s initial burden would be satisfied.

Once the court was satisfied with the showing of the anticompetitive effects of the “death penalty,” it would then consider the procompetitive rationales of the NCAA to see if they justified the anticompetitive effects of the “death penalty.”<sup>198</sup> The NCAA has used substantially the same set of justifications for years, and would probably have argued the same justifications for implementing the “death penalty” on Penn State’s football program.<sup>199</sup> The NCAA’s main argument that its regulations help preserve the amateurism of collegiate athletics would have little relevance here. Since the actions Penn State was being punished for had nothing to do with student-athletes or the actual sport of football at all, it is difficult to see how the NCAA could justify the “death penalty” as maintaining the amateur status of college football.<sup>200</sup> The Penn State scandal was an anomaly, not common to either collegiate or professional athletics, so it did not threaten to blur the distinction between the two products. As the Court noted in *Board of Regents*, the justification of protecting amateurism will not always be accepted,<sup>201</sup> and this seems like a situation in which the NCAA would simply have been using this argument as a veil to its true purpose for imposing the punishment.

Similarly, the argument that the use of the “death penalty” on Penn State helped enhance competition would be unconvincing in this situation. If anything, inflicting a punishment on one member institution that bans it from competing against other members in a given sport seems to explicitly restrict competition, rather than enhance it. This justification makes much more sense

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<sup>198</sup> See *supra* PART I, Section 1 of the *Sherman Act*, Common Law Tests and the Rule of Reason.

<sup>199</sup> See *supra* PART II, *Sherman Act Applications to the NCAA*.

<sup>200</sup> Chappell, *supra* note 2. *Contra* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1998) (punishing SMU for violating player compensation rules that separate the NCAA and professional sports).

<sup>201</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117-19 (1984).

when applied to NCAA regulations that impose certain requirements and restrictions on member institutions so that they will be on an even playing field with other members.<sup>202</sup> However, being involved in a child molestation scandal, and subsequent cover-up, provides no competitive advantage to Penn State, and no other universities would be better off if they were allowed to perform the same activity. Thus, it is unlikely that the court would accept ‘maintaining a competitive balance’ as a procompetitive justification in this case.

Since neither of its two most common justifications for restraints of competition would likely work, the NCAA would have to come up with new and specific procompetitive rationales for imposing the “death penalty” on Penn State. One of the main justifications left available to the NCAA would be a rationale based on ‘maintaining institutional control’ of its members to produce a better product. The NCAA has certain conduct requirements for member institutions and exercises some control over them to make sure they behave within the NCAA’s guidelines.<sup>203</sup> The NCAA would argue that Penn State failed to maintain adequate control over the events occurring at its school, and that it was imposing the “death penalty” to realign Penn State with the characteristics of the other NCAA members. However, it is hard to accept this procompetitive justification on its face because Penn State did not violate any substantive NCAA regulations, and there are no regulations imposing certain minimum control standards on a university.<sup>204</sup> It is unclear how the court would feel about this as a justification for restraining competition, but the NCAA has punished member institutions under this argument before.<sup>205</sup>

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<sup>202</sup> See, e.g., *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004).

<sup>203</sup> See generally NCAA Manual, *supra* note 133.

<sup>204</sup> See *supra* PART III, *Contrasting the SMU and Penn State Situations*; NCAA Manual, *supra* note 13.

<sup>205</sup> See, e.g., *California Institute of Technology Cited for Lack of Institutional Control*, NCAA.ORG (June 12, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/June/California+Institute+of+Technology+cited+for+lack+of+institutional+control>.

Another justification that the NCAA would likely advance is that the “death penalty” was being used to protect the reputation of its “brand.” The Court held in *Board of Regents* that an NCAA action is procompetitive if it is “tailored to the goal” of preserving the “product” of collegiate sports in the marketplace.<sup>206</sup> The NCAA obviously wants to protect its reputation, and there is no disputing that the events that happened at Penn State are morally, socially, and criminally wrong. The NCAA would argue that the use of the “death penalty” helps maintain the reputation of the NCAA by sending the message that the events that transpired at Penn State are not acceptable, and that “unethical conduct” will be severely punished.<sup>207</sup> However, it is unclear whether the court would accept advancement of these social objectives as a justification for the “death penalty” because acting as a moral policing entity is not one of the NCAA’s functions.<sup>208</sup> Accepting this justification would imply that as long as a restraint was motivated by the desire to advance the NCAA’s social objectives in order to maintain the reputation of its “brand,” it is not unreasonable. If the courts allowed this, it could lead to a very slippery slope.<sup>209</sup>

If the court did not ultimately accept the procompetitive quality of these justifications, the analysis would end, and imposing the “death penalty” on Penn State would be declared an unreasonable restraint of competition under either a quick-look approach or the full Rule of Reason. On the other hand, under a quick-look approach, if the court did find that the “death penalty’s” procompetitive rationales outweighed its anticompetitive effects, the court could either declare the “death penalty” reasonable or move into a full Rule of Reason analysis.<sup>210</sup> Thus, regardless of which form of review the court began with, it would now be at the point

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<sup>206</sup> The Harvard Law Review Ass’n, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1307 (1992) (citing Bd. of Regents of Univ. of Okla., 468 U.S. at 119).

<sup>207</sup> NCAA Manual, *supra* note 13, at Bylaw 10.1

<sup>208</sup> The courts have never addressed whether general social benefits is an acceptable procompetitive rationale that can outweigh anticompetitive effects of restraints. See generally NCAA Manual, *supra* note 133.

<sup>209</sup> See *supra* note 181 and accompanying text.

<sup>210</sup> See, e.g., *Agnew v. NCAA*, 683 F.3d 328, 336 (citing *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004).

where it put the burden on Penn State to show a less restrictive alternative than the “death penalty” that the NCAA could use to accomplish the same purpose.<sup>211</sup>

Since the less restrictive alternative doctrine has never been applied to an NCAA regulation, there is uncertainty regarding how it would be implemented by the court.<sup>212</sup> While the courts have emphasized that the restraint need not be the least restrictive approach possible, they have held that the restraint needs to be reasonably necessary to accomplish the defendant’s legitimate objectives.<sup>213</sup> It is unlikely that the court would find such a harsh penalty – completely restricting Penn State from competition – necessary to accomplish the NCAA’s goals even if the court accepted one of the NCAA’s procompetitive justifications. This can be evidenced via the sanctions short of the “death penalty” the NCAA has handed out to members in the past.<sup>214</sup> This conclusion is further supported by the fact that the NCAA actually did punish Penn State with lesser sanctions that still allowed them to compete in collegiate football.<sup>215</sup>

Thus, assuming the court followed precedent, it would hold that the use of the “death penalty” in the hypothetical Penn State litigation was an unreasonable restraint of competition. While the NCAA did not actually choose to implement the “death penalty” against Penn State, this should serve as a warning for future incidents in which the NCAA contemplates the “death penalty’s” use for similar reasons.

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<sup>211</sup> See *supra* PART I, Section 1 of the *Sherman Act*, Common Law Tests and the Rule of Reason; *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

<sup>212</sup> However, some scholars feel that this step would be devastating to NCAA regulations. See Roberts, *supra* note 155, at 2669 (“[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.”).

<sup>213</sup> See *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (quoting *Walt Disney Prods. v. Am. Broad. Paramount Theaters*, 180 F. Supp. 133, 117 (S.D.N.Y. 1960)).

<sup>214</sup> See, e.g., Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, THE NEW YORK TIMES (June 10, 2010), [http://www.nytimes.com/2010/06/11/sports/ncaafotball/11usc.html?\\_r=1&](http://www.nytimes.com/2010/06/11/sports/ncaafotball/11usc.html?_r=1&) (providing an example of the typical sanctions the NCAA doles out to universities for violating NCAA regulations).

<sup>215</sup> Prisbell, *supra* note 9.



**PART IV: THE FUTURE OF THE “DEATH PENALTY”**

This Note does not propose that the use of the “death penalty” by the NCAA in future situations will always violate the Sherman Act; rather, it merely suggests that its use can be illegal and would have been in the case of Penn State. While in theory the “death penalty” would never be sustained because there is always some less restrictive form of punishment that does not completely ban a member from competing, the court has never advanced to this stage of the analysis for an NCAA regulation before, so it is difficult to assume the court would suddenly start doing so.<sup>216</sup> Thus, assuming that the courts continue treating NCAA regulations the way they have, the “death penalty” stands a good chance of surviving antitrust review in future cases if it is actually used to advance procompetitive justifications accepted by the courts.

While the anticompetitive effects of the use of the “death penalty” by the NCAA will always be more or less the same,<sup>217</sup> the rest of the analysis the courts would inevitably engage in when applying quick-look analysis or the Rule of Reason could be substantially different. The difference between the use of the “death penalty” being upheld or struck down as unreasonable hinges upon the viability of the procompetitive justifications advanced by the NCAA. If the NCAA uses the “death penalty” in the future to punish a member for an activity that has an adverse effect on competition or the amateur product it offers, the punishment would likely be upheld as a reasonable restraint.

There is a good chance the courts would uphold the use of the “death penalty” against a member violating regulations such as those governing eligibility. Eligibility regulations involving issues such as player compensation, non-agent requirements for student-athletes, and

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<sup>216</sup> Roberts, *supra* note 155, at 2669 (“[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.”).

<sup>217</sup> See *supra* PART III, *Applying the Sherman Act to the Penn State Situation*.

transfer restrictions, have withstood antitrust analysis by the courts in previous cases.<sup>218</sup> The courts' rationale for upholding these regulations would likely be the same for upholding the "death penalty" if it were being used to punish violations of these eligibility regulations. These regulations are in place to ensure that the distinction between the NCAA's brand of amateur collegiate and professional athletics continues and that competition in collegiate sports is encouraged by having an even playing field. Thus, the use of the "death penalty" to punish members for violating these regulations is actually strongly tied to the NCAA's primary procompetitive arguments.<sup>219</sup>

To illustrate, the use of the "death penalty" to punish schools for engaging in illegal student-athlete compensation can be examined. The NCAA has a multitude of regulations prohibiting the compensation of student athletes beyond the amount they receive from their scholarships.<sup>220</sup> The NCAA has punished universities for violating these regulations in the past,<sup>221</sup> and may choose to use the "death penalty" to punish major violations in the future. If this use of the "death penalty" was litigated, the validity of the NCAA's procompetitive justifications would be fairly evident.

By punishing a university for paying players, the "death penalty" would be directly promoting the NCAA's main justification of maintaining the amateur status of intercollegiate athletics. Rules such as those governing player compensation are essential to preserving amateurism and the concept of the student-athlete.<sup>222</sup> The court would likely conclude the "death penalty's" use in this situation was enhancing the amateur product being offered by the NCAA,

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<sup>218</sup> *Agnew v. NCAA*, 683 F.3d 328, (7th Cir. 2012) ("Most – if not all – eligibility rules...fall comfortably within the presumption of procompetitiveness[.]").

<sup>219</sup> *See supra* PART III, *Applying the Sherman Act to the Penn State Situation* (outlining the NCAA's normal procompetitive justifications).

<sup>220</sup> *See generally* NCAA Manual, *supra* note 13.

<sup>221</sup> *See, e.g., McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

<sup>222</sup> *Agnew*, 683 F.3d at 343; *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992) ("[P]reserve[ing] the bright line of demarcation between college and 'pay for play' football.").

thus increasing overall efficiency even though one member would be excluded from competition. Furthermore, by excluding the sanctioned university from competition, the NCAA would be discouraging members from breaking rules to seek advantages over competing universities, thus increasing the level of competition in that sport. Therefore, the use of the “death penalty” to enforce player compensation regulations provides a clear example of the type of situation in which the procompetitive justifications of the “death penalty” would authorize its enforcement. Thus, the NCAA does not need to completely abandon the “death penalty” as a form of punishment going forward--it just needs to limit the “death penalty’s” use to situations in which it is actually related to their procompetitive justifications.

#### CONCLUSION

This Note argues that the threat contemplated by the NCAA of imposing the “death penalty” on Penn State as a punishment for the Jerry Sandusky scandal was futile. Section 1 of the Sherman Act would have prohibited the use of the “death penalty” in this case as an unreasonable restraint of competition. The use of the “death penalty” is essentially a group boycott of the targeted school, which is a horizontal restraint of competition. Thus, the restraint would only be upheld if it survived applicable antitrust review.

Applying the Rule of Reason, as is typical in antitrust cases involving the NCAA, the “death penalty” would be deemed unreasonable in the Penn State situation. The “death penalty” would clearly be a group boycott by NCAA members prohibiting Penn State from playing college football and realizing the associated opportunities and revenue. While the NCAA would certainly attempt to advance procompetitive justifications for its use of the “death penalty,” it is unlikely that the courts would accept them in this case. Even though the courts have previously accepted many of the same justifications the NCAA would likely propose, the difference in this

case, punishing a member for social and criminal wrongs unrelated to the football team or its players, is not reasonably related to any of these procompetitive justifications. Furthermore, even if the courts did accept one of the NCAA's proffered procompetitive rationales for using the "death penalty," it is probably not a reasonably necessary means for accomplishing its goals since many lesser punishments could accomplish the same goals. This fact could prove fatal to the "death penalty," but only if the courts actually address it.

However, while the NCAA's use of the "death penalty" would have been inappropriate for the Penn State situation, it need not abandon the use of the "death penalty" as a form of punishment in all scenarios. The use of the "death penalty" going forward will simply require a case by case examination to decide if it is appropriate. When the reasons for the use of the "death penalty" actually bear a close relation to the associated procompetitive justifications of maintaining the NCAA's amateur product or enhancing competition between member schools, the courts are likely to uphold the use of the "death penalty." It is likely that the courts will allow the NCAA to continue to use the "death penalty" to enforce regulations related to areas such as player eligibility and compensation. Ultimately, the NCAA needs to rethink the way it views its regulation of member institutions and realize that, while it may get some deference from the courts, it is not immune to Sherman Act prosecution and should consider the effects of its sanctions on competition prior to imposing them.



**MASHING UP THE COPYRIGHT ACT: HOW TO MITIGATE THE  
DEADWEIGHT LOSS CREATED BY THE AUDIO MASHUP**

*By: Alexander C. Krueger-Wyman<sup>1</sup>*

**INTRODUCTION**

In the past decade, the music industry has welcomed a new art form to its center stage: the audio mashup. Mashups, which involve digital sampling from multiple songs combined to create a form of “recycled art,”<sup>2</sup> have officially become mainstream with the rise in popularity of artists like Girl Talk.<sup>3</sup> While some artists who sample do so legally by obtaining the appropriate licenses, the vast majority of mashup artists sample without a license, sometimes from upwards of two hundred artists on a single album.<sup>4</sup> This practice of unlicensed sampling deprives the original artists of valuable licensing fees and the mashup artists of the ability to sell their music through music vendors such as iTunes. Instead, mashup artists rely on public performances for revenue, and the original artists and production companies are left to sue under an uncertain legal framework to recover licensing fees. Currently, there is no consensus among copyright scholars for how to remedy this problem. It is clear, however, that this increasingly popular and innovative form of music demands protection under the Copyright Act. The inability of copyright law to address the tension between mashup artists and the artists from whom they sample creates a deadweight loss that is increasing with the rise in popularity of mashups.

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<sup>1</sup> I would like to thank my fiancée, Lindsey Dodge, and her family for supporting me through the composition of this paper. Thank you also to my family, who has been there for me through it all. Finally, thank you to the Entertainment Law Initiative for its recognition of this paper.

<sup>2</sup> Michael Allyn Pote, Comment, *Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 640 (2010).

<sup>3</sup> For a chronological account of the development of audio mashups, see Jeff Leeds, *Mix and Mash*, N.Y. TIMES, Jan. 9, 2005, [http://www.nytimes.com/2005/01/09/arts/music/09leed.html?\\_r=0](http://www.nytimes.com/2005/01/09/arts/music/09leed.html?_r=0).

<sup>4</sup> See Elina Lae, *Mashups – A Protected Form of Appropriation Art or Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 32 (2012) (describing how Girl Talk sampled from 167 artists on his third album titled “Night Ripper”).

**PART I: WHY MASHUPS DESERVE PROTECTION UNDER THE COPYRIGHT ACT**

Despite its designation as “recycled art,” mashups further the purpose of the Copyright Act by “promot[ing] the Progress of Science and useful Arts”<sup>5</sup> in several important ways. First, the audio mashup is a new form of music. As one commentator noted, “[A] sampler is a musical instrument. Producers who sample use pieces of existing songs to make new works of music.”<sup>6</sup> A mashup thus qualifies as an “original work[] of authorship” as required by the Copyright Act.<sup>7</sup> Moreover, these new works provide listeners with a new and innovative way of experiencing music. By layering together samples from multiple songs by a variety of artists, the mashup allows listeners to experience popular songs through a new lens, highlighting aspects of each song in a way that enables listeners to appreciate different nuances of their favorite songs. Copyright law, which seeks “to provide incentive to create,”<sup>8</sup> should thus seek to incentivize innovative forms of music such as the audio mashup, rather than inhibiting their creation through overly protective laws.<sup>9</sup>

Second, extending copyright protection to mashups promotes progress in music by incentivizing a wider base of artists to create. Thanks to widely available technology such as Musical Instrument Digital Interface and programs like Audiomulch, virtually anyone with a laptop can create mashups, making them easier and less expensive to create. Similarly, due in large part to their digital origin, mashups are easy to promote digitally through websites such as Remix.vg, which allow users to upload their mashups (or remixes or covers) and share them with

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<sup>5</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>6</sup> Jonathan D. Evans, *Solving the Sampling Riddle*, 29 ENT. & SPORTS LAW. 16, 16 (2012).

<sup>7</sup> 17 U.S.C. § 102(a) (2006). This standard for originality has been interpreted as requiring only a minimal level of creativity. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

<sup>8</sup> Katie Simpson-Jones, Comment, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to “Recast, Transform, or Adapt” Copyright*, 43 J. MARSHALL L. REV. 1067, 1088 (2010).

<sup>9</sup> See, e.g., Noah Balch, Comment, *The Grey Note*, 24 REV. LITIG. 581, 581 (2005) (arguing that “time and exclusivity” copyright protection can “stifle progress” for other innovators such as mashup artists).

other artists, who can then download them from the website.<sup>10</sup> Mashups, by facilitating both creation and dissemination of music, clearly further the purpose of the Copyright Act by promoting the progress of music.

Finally, mashups help promote music due to their wild popularity. Thousands of people attend mashup artists' concerts, sometimes paying up to \$400 for a ticket,<sup>11</sup> and even more download their albums on a daily basis. As a result, more and more people have expanded their love for music to include mashups, making their protection a necessary step for copyright law to keep up with emerging music trends. Copyright protection for mashups would thus serve the underlying purpose of copyright law of incentivizing innovation and maximizing production.

**PART II: THE PROBLEM: WHY CURRENT COPYRIGHT LAWS GIVE  
INADEQUATE PROTECTION TO MASHUPS**

Despite the importance of this new art form to the music industry, the current copyright framework fails to provide protection for mashups. Instead, mashup artists may be liable for infringement if they sell their music, sometimes without even a viable defense.<sup>12</sup> Moreover, copyright laws fail to offer a suitable approach to dealing with the issue of digital sampling, as each potential approach is rendered unworkable in the context of mashups.

***Digital Sampling in Mashups is Legally Actionable***

As a preliminary matter, mashup artists who fail to obtain a license are potentially liable under two provisions of the Copyright Act. First, a mashup may violate the copyright holders'

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<sup>10</sup> See *Mashups*, REMIX.VG, <http://remix.vg/category/mashups/> (last visited Jan. 2, 2013). Other similar websites include Soundcloud, Turntable, and Hype Machine.

<sup>11</sup> See Lae, *supra* note 4, at 32 & n.16.

<sup>12</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (applying a "per se" liability test to anyone who samples without obtaining a license).



exclusive rights to the underlying musical compositions in the sampled songs.<sup>13</sup> Second, a mashup may violate the sound recording copyrights of the sampled songs.<sup>14</sup> “The musical composition copyright holder and sound recording copyright holder may be, and often are, different.”<sup>15</sup> As a result, a mashup artist who does not obtain a license may potentially be liable to two sources for *each song sampled* in a single mashup.

Section 115 of the Copyright Act, which dictates a compulsory license for musical compositions, mitigates this enormous threat of liability.<sup>16</sup> Under this framework, an artist who wants to use another song’s musical notes and words can simply pay the musical composition’s copyright holder a statutorily defined rate to use it legally.<sup>17</sup> Although it may prove cost prohibitive for mashups that use a high number of songs, this compulsory license system generally enables cheap and efficient use of musical compositions. The real problem thus lies with the sound recording copyrights, which do not have a compulsory licensing system. Instead, artists who wish to use a sound recording must negotiate with the sound recording copyright holder to obtain a license. Because of the significant transaction costs that inevitably accompany such negotiations,<sup>18</sup> obtaining a license to use a sound recording is almost always cost prohibitive, particularly when a song includes multiple samples, as mashups do.

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<sup>13</sup> A musical composition copyright extends to the musical notes and accompanying words of a song. 17 U.S.C. § 102(a)(2) (2006).

<sup>14</sup> A sound recording copyright gives the copyright holder the narrow right to reproduce the actual recorded sounds. *Id.* § 102(a)(7).

<sup>15</sup> Pote, *supra* note 2, at 666.

<sup>16</sup> 17 U.S.C. § 115.

<sup>17</sup> The current rate for the license is “either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.” *Id.* § 115(c)(2). In reality, however, the artist who wishes to use the musical composition will often negotiate with a mechanical licensing agent such as the Harry Fox Agency for a lower price. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1311 (1996).

<sup>18</sup> See, e.g., Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 894 (2011) (discussing the high transaction costs inherent in obtaining a sound recording license).

***The Current Legal Framework for Sound Recording Infringement is Inadequate***

If a mashup artist is sued for infringing a sound recording copyright, the artist can typically raise two defenses. First, the artist can claim that the unlicensed use of the sound recording was not actionable. To prove a prima facie case of infringement, a plaintiff must establish not only that he or she owns a valid copyright and that the defendant in fact copied the original material, but that the copying was *actionable*.<sup>19</sup> Musical composition infringement claims universally include a de minimis inquiry, in which the court determines whether the copied portion was substantially similar enough to be actionable or whether it constituted only de minimis copying.<sup>20</sup> With regard to sound recordings, however, there is a split among courts regarding how to determine actionable copying. In 2005, the Sixth Circuit held in *Bridgeport Music v. Dimension Films* that any sampling whatsoever violates the sound recording copyright, and that any de minimis inquiry is thus inappropriate.<sup>21</sup> The court reasoned that the language of Section 114(b) of the Copyright Act<sup>22</sup> exhibits a clear intent by Congress to restrict the right to sample a recording, regardless of its size, to the copyright holder.<sup>23</sup> This reasoning was subsequently criticized by a district court in *Saregama India Ltd. v. Mosley*, which declined to follow *Bridgeport*'s "per se infringement" approach.<sup>24</sup> Instead, the *Saregama* court found the traditional de minimis inquiry appropriate to sound recordings.<sup>25</sup>

There remains no consensus as to which of these approaches should be applied to cases of digital sampling. Although *Bridgeport* represents the only opinion by a circuit court on the issue, its reasoning has been widely criticized since its holding, both by courts such as in

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<sup>19</sup> See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 137–38 (2d Cir. 1998).

<sup>20</sup> See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2003).

<sup>21</sup> 410 F.3d 792, 798 (6th Cir. 2005).

<sup>22</sup> Section 114 gives the scope of a copyright holder's exclusive rights in sound recordings. 17 U.S.C. § 114 (2006).

<sup>23</sup> *Bridgeport*, 410 F.3d at 799–800.

<sup>24</sup> 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009).

<sup>25</sup> *Id.* at 1341.

*Saregama* and by prominent copyright scholars such as Melville and David Nimmer.<sup>26</sup> Moreover, courts throughout the country have a long history of requiring substantial similarity in copyright claims to constitute actionable copying. It is thus unlikely that the *Bridgeport* “per se infringement” approach will replace substantial similarity as the primary inquiry for determining actionable copying. Given this lack of clarity in the area, however, artists who wish to sample sound recordings have little guidance for what level of sampling, if any, is allowable. A court may find a sampling de minimis, or it may tell the defendant simply, “Get a license or do not sample.”<sup>27</sup> The artist must therefore obtain licenses to ensure that he or she will not be found liable. Because negotiating for a license for every sound recording used in a mashup makes producing the song cost-prohibitive, this uncertainty among the courts effectively prohibits mashup artists from selling their music without risking potentially enormous liability.<sup>28</sup>

The second defense that a mashup artist can raise is the fair use doctrine.<sup>29</sup> This doctrine, which purports to protect “reasonable and customary use” of copyrighted material,<sup>30</sup> provides a copier with an affirmative defense to a prima facie case of copyright infringement based on (1) “the purpose and character of the use,” (2) “the nature of the copyrighted work,” (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and (4)

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<sup>26</sup> See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (2007); see also Michael Jude Galvin, *A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights* in *Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 538 (2007); Matthew R. Brodin, Comment, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims – The Sixth Circuit’s Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 825 (2005). But see Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355 (2008) (defending *Bridgeport*’s analysis).

<sup>27</sup> *Bridgeport*, 410 F.3d at 801.

<sup>28</sup> It is this risk, in fact, that has kept music vendors such as iTunes from carrying most mashup albums. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 12 (2008).

<sup>29</sup> The fair use doctrine is a statutorily defined “equitable rule of reason,” see H.R. REP. NO. 94-1476, at 65 (1976), that allows use of copyrighted material “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” 17 U.S.C. § 107 (2006).

<sup>30</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985) (internal quotation marks omitted).

“the effect of the use upon the potential market for or value of the copyrighted work.”<sup>31</sup> While these four factors seem to imply a wide range of potential fair uses, “Congress and the courts have narrowed the scope of the fair use privilege, converting it from a standard that left considerable room for copying as part of an effort to create a new work to a standard that permits such reuse only in isolated cases.”<sup>32</sup> Moreover, the Digital Millennium Copyright Act may also prohibit a fair use defense for mashups by failing to list fair use as an exception to its prohibition of circumventing access control measures to copyrighted material.<sup>33</sup> “This impedes the creation of new technology and erases the possibility that fair use would protect works created through the [circumventing] software.”<sup>34</sup> As a result, fair use typically only protects work that is either productive or “reasonable and customary” under an implied consent theory or a more general theory of socially acceptable conduct.<sup>35</sup>

Nevertheless, some commentators have argued that mashups qualify for the fair use defense.<sup>36</sup> Indeed, the prominent digital rights organization, Electronic Frontier Foundation, has stated that it believes mashups are “classic examples of fair use.”<sup>37</sup> Even if fair use provides a viable defense for mashup artists, however, it is not a practical solution to the problem presented by the uncertainty of liability discussed above. In theory, if artists could rely on fair use as a defense, this would significantly lower the transaction costs inherent in negotiating for licenses in sampling. The problem is that artists cannot rely on it precisely because it is a defense.

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<sup>31</sup> 17 U.S.C. § 107. Some commentators have argued that a fifth factor—good faith—is also considered by courts in the fair use context. See Lae, *supra* note 4, at 50–51.

<sup>32</sup> Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304–05 (1996).

<sup>33</sup> Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 527 (2004).

<sup>34</sup> Simpson-Jones, *supra* note 8, at 1087.

<sup>35</sup> For a more thorough account of the availability of the fair use defense, see generally Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

<sup>36</sup> See, e.g., Lae, *supra* note 4, at 56 (arguing that mashups involving multiple samples—“audio collages”—should be entitled to fair use).

<sup>37</sup> Julie Samuels, *RIP MCA: A Tribute to Paul’s Boutique and Music Sampling*, ELEC. FRONTIER FOUND. (May 4, 2012), <https://www.eff.org/deeplinks/2012/05/rip-mca-tribute-pauls-boutique-and-music-sampling>.

Copyright damages can be so large, sometimes even without a showing of harm,<sup>38</sup> that artists would be foolish to rely on fair use as an ironclad protection from liability, particularly when the material (mashups) involves so many potential plaintiffs (i.e., the number of artists from whom the mashup artist sampled). As Professor Christopher Sprigman commented about the problem, “The risks of failure are too great.”<sup>39</sup> As a result, fair use does little to alleviate the liability concerns of mashup artists (or the music vendors who refuse to carry their music).<sup>40</sup>

Not only do these two approaches fail to give mashup artists an adequate framework for determining the legality of their actions, they do not make sense in the context of mashups. It is ironic that under both approaches, the more the artist samples in a given song, the more likely that song is protected from liability. Under the substantial similarity inquiry for actionable copying, for instance, a mashup that samples snippets from numerous songs is much less likely to be “substantially similar” to any of the sampled songs than is a mashup that samples from one or two songs only. Similarly under a fair use analysis, the more songs used in a mashup, the more likely a court will find the use of those songs to be “transformative,” a factor weighing heavily in favor of fair use.<sup>41</sup> Each of these approaches thus incentivizes mashup artists to sample from more artists in each mashup in the hope that it will be less similar to the original songs or that it will constitute a transformative use of the songs. As mashup artists sample from more songs without obtaining valid licenses, the loss in potential licensing fees increases. As a result, these approaches not only fail to give adequate protection and guidance to mashup artists, they actually encourage the very practice that is causing the problem.

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<sup>38</sup> Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 324 (2009).

<sup>39</sup> *Id.* at 329.

<sup>40</sup> See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1087 (2007) (“The doctrine’s context sensitivity renders it of little value to those who require reasonable ex ante certainty about the legality of a proposed use.”).

<sup>41</sup> See Lae, *supra* note 4, at 56.

**PART III: THE SOLUTION — AMENDING THE COPYRIGHT ACT**

It should be obvious from the discussion above that Congress provided no effective method of handling digital sampling at the level employed by the audio mashup in the Copyright Act of 1976.<sup>42</sup> With advancements in technology and broadening conceptions of intellectual property over the past forty years, the current Copyright Act has become increasingly antiquated. The mashup serves a perfect example. Congress did not envision granting copyright protection to material like the mashup because, in 1976, the mashup did not exist in its current form.<sup>43</sup> Since the mashup has become mainstream, courts and commentators have attempted to squeeze the mashup into one of the Copyright Act's available legal frameworks.<sup>44</sup> Due to their lack of consistency, however, the product is a significant degree of uncertainty regarding the legality of unlicensed sampling in mashups. It is this uncertainty that is preventing mashup artists from paying for licenses at an affordable cost and from earning revenues on their increasingly popular music, creating the mashup deadweight loss. To mitigate future losses, Congress must resolve this uncertainty.

Once Congress decides to take action, it must survey its options for doing so. First, any attempt to fit mashups into either of the two approaches discussed above (actionable copying and fair use) must be dismissed. If, for instance, Congress declared that the substantial similarity test should be applied rather than the *Bridgeport* “per se” test in determining actionable copying, it would violate its constitutional powers by doing so. Congress lacks the power to dictate to

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<sup>42</sup> Pub. L. No. 94-553, 90 Stat. 2541 (1976). As many commentators have acknowledged, reform to the Copyright Act is long overdue. See generally Symposium: *Copyright@300: The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

<sup>43</sup> The earliest commercial mashup was first seen in 1983, when Club House created “Do It Again/Billie Jean,” a two-song mashup of Michael Jackson and Steely Dan. Wm. Ferguson et al., *The Recombinant DNA of the Mashup*, N.Y. TIMES, Jan. 9, 2011, at MM38. Some have even argued that the mashup in its modern form was not seen until 1994. See David Tough, *The Mashup Mindset: Will Pop Eat Itself?*, in GEORGE PLASKETES, PLAY IT AGAIN: COVER SONGS IN POPULAR MUSIC 205, 211 (2010).

<sup>44</sup> See *supra* Section II.B.

federal courts how to resolve a particular case, so by prescribing a particular rule of decision such as the substantial similarity analysis in digital sampling cases, it purports to exercise authority that exceeds its constitutional powers.<sup>45</sup> With regard to fair use, unless Congress radically transformed its fair use framework, the only way it could address mashups under Section 107 is to say, explicitly, that mashups constitute fair use. Doing so, however, would only fix half the problem. Mashup artists could earn revenue from their music's popularity, but the artists from whom the mashup artist sampled would still receive no licensing fees.

Instead of trying to fit mashups into an existing framework of the Copyright Act, Congress must develop a new system by which mashup artists can efficiently and affordably obtain licenses to sample from other artists. Given the prohibitively high transaction costs inherent in negotiating for licenses, the only effective solution is to eliminate the need for negotiation. The result would therefore have to be a compulsory licensing system akin to Section 115's provision for musical compositions. Indeed, just as a new compulsory licensing system is needed to accommodate mashups, Section 115 was necessary to enable another popular form of music not envisioned by the original Copyright Act: the cover recording.<sup>46</sup> Cover artists would be liable for infringing the underlying musical composition of their songs if Section 115 did not permit them to license the musical composition at a statutorily defined rate.<sup>47</sup> Through the rare use of a "liability rule"<sup>48</sup> in the Copyright Act, Section 115 effectively solved a similar

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<sup>45</sup> See *United States v. Klein*, 80 U.S. 128, 146 (1871).

<sup>46</sup> "[A] 'cover recording' is a later recording of a song that was previously recorded by another recording artist or group." Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 244 n.144 (2010).

<sup>47</sup> Section 115 was introduced in the 1909 Copyright Act due to the rise in popularity of player pianos and recorded music. Out of fear that music publishers could exercise monopoly power over recorded music, Congress passed what is now Section 115 to enable artists "to reproduce mechanically the musical work." An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (Mar. 4, 1909, effective July 1, 1909). For a thorough description of the Section's origins, see Abrams, *supra* note 46, at 217–21.

<sup>48</sup> A "liability rule" is one "which allow[s] access at a price set by a court or agency." Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 784 (2007).

problem by “guaranteeing public access to works through compulsory licensing, while insuring copyright owner royalty payments.”<sup>49</sup>

While this new system should be analogous to Section 115, it must be broader in scope. Because digital sampling potentially infringes upon both the musical composition and sound recording copyrights, any effective system must provide an opportunity to license from both copyright holders without having to negotiate with either. Moreover, because of the high number of songs and the varying lengths of samples used in mashups, this licensing provision must also be more elaborate than Section 115.<sup>50</sup> Congress must develop a system that provides for greater compensation based on the length and frequency of the samples, the popularity of the song sampled, and the importance of the portion sampled to the original song. Assessing prices based on these factors would enable artists to receive due compensation for their success while not prohibiting access to mashup artists who wish to sample. If Congress provided for such a licensing system, it would pave the way for music vendors or other business to develop efficient and inexpensive ways of obtaining these licenses,<sup>51</sup> just as the Harry Fox Agency and other mechanical licensing agents do for musical composition licenses. This system would enable mashup artists to produce their music legally and affordably,<sup>52</sup> while simultaneously providing the compensation to the artists that they deserve.

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<sup>49</sup> Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 273 n.259 (1993).

<sup>50</sup> Section 115 does, however, account for the amount of time the original song is used in the new song. See *supra* note 17.

<sup>51</sup> For an interesting approach to designing such a distribution system, see Evans, *supra* note 6, at 17–18 (describing an “integrated clearinghouse approach” to licensing digital samples).

<sup>52</sup> As the industry’s experience with musical composition licenses has shown, the emergence of licensing agents actually makes licensing cheaper for licensees, as the copyright holders through their agents are “bargaining in the shadow of the compulsory license.” Merges, *supra* note 17, at 1310.



CONCLUSION

As the world has entered into an increasingly digital era, the music industry has been drastically affected by changes in technology. Most prominent among these effects is the ease with which consumers and artists can copy, sample, and reproduce existing work. Copyright laws have tried, in vain, to keep up with these advances, but they have consistently been one step behind. The time has come to adapt and embrace these changes to the benefit of the industry.<sup>53</sup> As exhibited by the rising popularity of audio mashups, digital sampling and other forms of copying can be beneficial for the music industry. The key is to capitalize on their popularity by designing a method of incentivizing their creation through copyright protection while rewarding the original artists for use of their music. As this paper has shown, current copyright laws fail to achieve this balance. By introducing a compulsory licensing system to regulate digital sampling, Congress can ensure both that mashup artists receive revenue for their popular music and that the original artists can obtain royalties for use of their songs, thus eliminating the deadweight loss currently caused by the audio mashup.

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<sup>53</sup> In their recent influential book *The Knockoff Economy*, prominent copyright scholars Kal Raustiala and Chris Sprigman laid out a number of ways in which the music industry can do so, perhaps the most important of which was to return to an emphasis on performance. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 214–33 (2012). Although these suggestions are sensible with regard to the majority of musicians, they seem less applicable to mashup artists, whose performances often consist only of an artist playing a pre-recorded mix.