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*UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL*

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TABLE OF CONTENTS

CASE COMMENT

*SKIDMORE V. LED ZEPPELIN*: CHANGING MUSIC  
INFRINGEMENT ANALYSIS IN THE NINTH  
CIRCUIT..... 1  
ALEXANDER R. WOLFE

ARTICLES

A RE-UNION FOR MMA: REOCCURRING ISSUES PLAUGING  
MIXED MARTIAL ARTS FIGHTERS AND POTENTIAL  
SOLUTIONS .....11  
JASON DUNCAN

THE RIGHT WAY TO PAY INTERCOLLEGIATE STUDENT-  
ATHLETES: A LEGAL RISK  
ANALYSIS.....45  
IAN K. SCHUMAKER & LEEANN M. LOWER-HOPPE

DRIBBLING AROUND THE FIRST AMENDMENT: ANALYZING  
THE CONSTITUTIONALITY OF UNIVERSITY IMPOSED  
RESTRICTIONS ON STUDENT-ATHLETE’S USE OF SOCIAL  
MEDIA.....79  
JORDAN BERMAN

AGENTS OF CHANGE: THE ROLE OF THE NFL CONTRACT  
ADVISOR IN THE 2021 COLLECTIVE BARGAINING  
AGREEMENT.....119  
EMILY STAKER

HOLLYWOOD’S NEWEST LOOPHOLE: PUBLICITY RIGHTS ARE  
*LEAVING NEVERLAND* AS DOCUDRAMAS BECOME  
HOLLYWOOD’S NEW *VICE*.....143  
SOPHIE EDBROOKE

## **EDITOR'S NOTE**

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

Volume XXIII features a case comment discussing the changing landscape of intellectual property and the music industry.

The case comment is written by a staff editor on the Journal, Alexander Wolfe. This piece discusses the recent decision by the Ninth Circuit Court of Appeals regarding music copyright and the rules that govern music created prior to 1976.

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

The first article, written by Jason Duncan, examines the changing landscape of Mixed Martial Arts (MMA). Specifically, the industry's approach to unions and employee representation as the sport grows in popularity and revenue.

The second article, written by Ian K. Schumaker and Leeann M. Lower-Hoppe, dives into the debate regarding how student-athletes at the collegiate level should be compensated. Schumaker and Lower-Hoppe examine two methods for student-athlete compensation and the legal roadblocks associated with each.

Continuing on the discussion of collegiate athletics, the fourth article, written by Jordan Berman, looks closely at the restrictions imposed on student-athletes. Berman, through constitutional precedent, analyzes the use and limitations of social media placed on the modern-day student-athlete.

Our final sports related article is written by Emily Staker. Staker has served as the Journal's Senior Articles Editor for the 2019-2020 academic year. In her article, Staker discusses the rise of the professional football player's agent and the ultimate power distribution as a result of the 2011 NFL Collective Bargaining Agreement. Staker articulates what she believes should be established in the next CBA with regard to agents and their roles in professional football.

Transitioning to the entertainment industry, our final article, written by Sophie Edbrooke, takes a closer look at the world of online documentaries. Edbrooke examines the legal precedent and the conflict between the right of publicity and the first amendment, related to popular streaming platforms and docudramas.

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

A very special thank you to the editorial board, non-editorial board, and staff editors. This publication would not be possible without your hard work and commitment to making the Journal the best that it can be. Every year we grow stronger and I am excited for the future of this Journal.

In closing, I would like to thank my mother, Pam Shibao, and my sister, Kelsey. Your support means everything to me and without it I would not be in the position that I am in today. I owe you both more than I can ever explain.

GRANT SHIBAO  
EDITOR-IN-CHIEF (ACADEMIC YEAR 2019-2020)  
DENVER, COLORADO  
SPRING 2020

\*All comments and articles in this law journal are the opinions and conclusions of the authors and do not reflect the views and opinions of the Sports and Entertainment Law Journal

***SKIDMORE V. LED ZEPPELIN***  
**CHANGING MUSIC INFRINGEMENT ANALYSIS IN THE NINTH CIRCUIT**

*By: Alexander R. Wolfe\**

**ABSTRACT**

In 2014, Michael Skidmore (“Skidmore”), as Trustee for the estate of Randy Craig Wolfe (“Wolfe”), filed an action claiming that the opening notes in Led Zeppelin’s *Stairway to Heaven* were copied from Spirit’s 1967 song *Taurus*. Six years later, the United States Court of Appeals for the Ninth Circuit (the “court”), sitting en banc, overturned its earlier ruling and reinstated the jury verdict in favor of Led Zeppelin. The court found that the scope of the copyright in *Taurus* was defined by the single page of sheet music deposited with the copyright office because the Copyright Act of 1909, rather than the current 1976 Act, controlled. The court also took the opportunity to clarify the test for infringement in the Ninth Circuit. Finally, it joined the majority of circuits by abolishing the use of the inverse ratio rule, which allowed for a lower showing of substantial similarity when there was a high degree of access to the copyrighted work. While the immediate effects this ruling are already being felt, the long-term ramifications for the music industry are uncertain.

**FACTS OF THE CASE**

Randy Craig Wolfe was a guitarist, singer, and songwriter for the band Spirit. In 1967, he wrote the song *Taurus*, which was subsequently recorded and released by Spirit.<sup>1</sup> That same year, Wolfe gained copyright protection for *Taurus* when an unpublished single page of sheet music that represented the song was deposited with the United States Copyright Office (“*Taurus* deposit copy”).<sup>2</sup> Around this time, the band Led Zeppelin was also creating, recording, and performing music.<sup>3</sup> In the few

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<sup>1</sup> *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1057 (9th Cir. 2020).

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

<sup>3</sup> *Id.*

years between the 1967 release of *Taurus* and the 1971 release of Led Zeppelin's *Stairway to Heaven*, the two bands crossed paths several times.<sup>4</sup> Evidence was introduced showing that Led Zeppelin not only played the same day at the same festival as Spirit on at least three separate instances but it also performed a cover of Spirit's song *Fresh Garbage*.<sup>5</sup> However, there was no direct evidence that any member of Led Zeppelin had ever heard *Taurus* prior to the release of *Stairway to Heaven*.<sup>6</sup>

In 2014, forty-three years after the release of *Stairway to Heaven*, nearly two decades after Wolfe's passing, and immediately after the Supreme Court clarified that laches was not a defense where copyright infringement was ongoing,<sup>7</sup> Skidmore brought an infringement action against Led Zeppelin on behalf of Wolfe's estate.<sup>8</sup> Skidmore alleged that the opening lines of *Stairway to Heaven*—consisting of a descending chromatic minor chord progression played along with an ascending line—were substantially similar to an eight-measure passage of *Taurus*, which consisted of a descending chromatic musical scale (see figure 1).<sup>9</sup>

The image displays two systems of musical notation in 4/4 time. The top system, representing the opening of 'Stairway to Heaven', shows a descending chromatic minor chord progression in the bass line (Am, Ab, G, F, E, D, C, B) and an ascending line in the treble line. The bottom system, representing the opening of 'Taurus', shows a descending chromatic musical scale in the bass line (Am, G#, C/G, D/F#, E/maj7, G/B, Am) and an ascending line in the treble line. Chord symbols are written above the notes in both systems.

<sup>4</sup> *Id.*

<sup>5</sup> *Skidmore v. Led Zeppelin*, No. CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at \*40-43 (C.D. Cal. Apr. 8, 2016) (order granting in part and denying in part Defendants' Motion for Summary Judgment).

<sup>6</sup> *Skidmore*, 952 F.3d at 1057.

<sup>7</sup> *Id.* (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014) (“Laches ... cannot be invoked to preclude adjudication of a [copyright] claim for damages brought within the three-year [statute of limitations]”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1057-58.



**Figure 1.** Exhibit presented by Led Zeppelin’s expert, Dr. Lawrence Ferrara, which contrasts the portion of *Taurus* alleged to be copied against *Stairway to Heaven*. The upper two lines represent section “A” in *Taurus* with note values halved. The lower two lines represent measures one through four of *Stairway to Heaven*.

Prior to trial, the United States District Court for the Central District of California (the “trial court”) responded to Led Zeppelin’s motion for summary judgment.<sup>10</sup> In doing so, it ruled that because the song was copyrighted in 1967, the Copyright Act of 1909, rather than the 1976 Act, controlled the analysis.<sup>11</sup> Additionally, because the 1909 Act protects musical compositions in the form of sheet music but does not extend that protection to sound recordings, the court ruled that “only the one-page *Taurus* deposit copy, and not the sound recording, could be used to prove substantial similarity between *Taurus* and *Stairway to Heaven*.”<sup>12</sup> Later, the court followed this same reasoning when it granted Led Zeppelin’s motion in limine to exclude the use of the original sound recordings of *Taurus*, or any expert testimony based on those sound recordings, at trial.<sup>13</sup> At the conclusion of a five-day trial, the jury returned a verdict in favor of Led Zeppelin and found that while Skidmore owned a valid copyright of *Taurus* and Led Zeppelin had access to *Taurus*, the two songs were not substantially similar.<sup>14</sup>

Skidmore appealed the decision, raising several issues, two of which are relevant to this comment.<sup>15</sup> First, he challenged that substantial similarity must be proven using only the *Taurus* deposit copy.<sup>16</sup> Second, he challenged the trial court’s decision to deny his request to provide the jury with an inverse ratio rule instruction.<sup>17</sup> Initially, a three-judge panel of the court of appeals vacated the trial court’s judgment and remanded

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<sup>10</sup> *Id.* at 1058.

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

<sup>12</sup> *Id.*

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

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

<sup>15</sup> *Id.* at 1060.

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

<sup>17</sup> *Id.*

the case for a new trial.<sup>18</sup> However, the court then granted a rehearing en banc and reinstated the trial court's ruling.<sup>19</sup>

### THE 1909 ACT CONTROLS PRE-1978 MUSICAL COMPOSITIONS

Before reaching the issue of whether the deposit copy controlled the scope of copyright infringement, the court had to first determine which Copyright Act applied to *Taurus*.<sup>20</sup> The court walked through the history of copyright protection for music, which first protected musical compositions under the Copyright Act of 1831.<sup>21</sup> This Act, however, only protected against the unauthorized reproduction of copyrighted sheet music.<sup>22</sup> In 1908, the Supreme Court illustrated this limitation when they held that a self-playing piano did not infringe the copyright of the underlying musical composition it was playing.<sup>23</sup>

The following year, Congress rectified this problem when it created the Copyright Act of 1909 ("1909 Act").<sup>24</sup> The 1909 Act did not afford protection to musical recordings, but it did protect against the mechanical reproduction of a copyrighted musical composition, such as a sound recording that copied some portion of the musical composition.<sup>25</sup> Under the 1909 Act, copyright protection for a musical composition was acquired in one of two ways.<sup>26</sup> The work could either be published and distributed with appropriate copyright notice attached to it,<sup>27</sup> or, if unpublished, a copy of the work could be deposited with the U.S. Copyright Office.<sup>28</sup> Significantly, the Copyright Office required that this

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<sup>18</sup> *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1123 (9th Cir. 2018), *reh'g en banc granted sub nom. Skidmore v. Zeppelin*, 925 F.3d 999 (9th Cir. 2019), *and on reh'g en banc sub nom. Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>19</sup> *Skidmore v. Led Zeppelin*, 925 F.3d 999, 1000 (9th Cir. 2019) (ordering that the case be reheard en banc).

<sup>20</sup> *Skidmore*, 952 F.3d at 1057.

<sup>21</sup> Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1909).

<sup>22</sup> *Id.*

<sup>23</sup> *Skidmore*, 952 F.3d at 1057 (citing *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908)).

<sup>24</sup> Copyright Act of 1909, ch. 320, §§ 1–64, 35 Stat. 1075 (repealed 1976).

<sup>25</sup> *Id.* §§ 5, 11.

<sup>26</sup> *Id.* §§ 9 and 11.

<sup>27</sup> *Id.* § 9.

<sup>28</sup> *Id.* § 11.

“deposit copy” be a paper version of the work and would not accept a sound recording in its place.<sup>29</sup>

It was not until a 1971 amendment to the 1909 Act that musical recordings gained copyright protection.<sup>30</sup> However this protection was only applied to sound recordings created on or after February 15, 1972.<sup>31</sup> A few years later, Congress completely overhauled copyright law when it passed the Copyright Act of 1976, which had an effective date of January 1<sup>st</sup>, 1978.<sup>32</sup> The 1976 Act provided separate protection for musical compositions and sound recordings while also allowing protection to be garnered by providing a deposit copy to the Copyright Office in the form of a sound recording.<sup>33</sup> However, neither the 1971 amendment nor the 1976 Act are applicable to *Taurus* because neither are retroactive.<sup>34</sup> Therefore, the court found that the 1909 Act controls the analysis of the deposit copy.

#### DEPOSIT COPY DEFINES THE SCOPE OF THE COPYRIGHT

After establishing that the 1909 Act controls the analysis, the court turned to Skidmore’s argument that the *Taurus* deposit copy did not define the scope of the copyright but instead was more archival in nature.<sup>35</sup> The court did not find this argument persuasive, stating that such an interpretation did not align with the text of the statute.<sup>36</sup> Nor did it align with the purpose of the deposit copy—to “make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright.”<sup>37</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> The Sound Recording Act of 1971, 17 U.S.C. § 301(c) (providing protection for sound recordings fixed on or after February 15, 1972).

<sup>31</sup> *Id.*

<sup>32</sup> Copyright Act of 1976, 17 U.S.C. §101.

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

<sup>34</sup> *Skidmore*, 952 F.3d at 1062.

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

<sup>36</sup> *Id.* at 1063.

<sup>37</sup> *Id.* (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (explaining the deposit requirement provides the “Copyright Office with sufficient material to identify the work in which the registrant claims a copyright . . . [and] prevent[s] confusion about which work the author is attempting to register”), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Report of the Register of Copyrights on the General Revision of the U.S. Copyright*

Skidmore also raised an issue of public policy when it argued that limiting protection to the express contents of the deposit copy would disadvantage those musicians who could neither read sheet music nor afford to have their music transcribed into sheet music.<sup>38</sup> However, the court dismissed this argument as inapplicable to this situation because Wolfe transcribed *Taurus* into sheet music himself.<sup>39</sup> Confusingly, the court then pointed to modern technologies—“[d]igital transcription and other technological advances”—in an attempt to further undercut Skidmore’s argument. The court continued down this same road—departing even further from the applicable time period in which *Taurus* was written and copyrighted—when it stated that “for decades now, sound recordings have been accepted as the deposit copy.”<sup>40</sup>

The court concluded that the trial court did not err when it found that the 1909 Act controlled and that the *Taurus* deposit copy “circumscribes the scope of the copyright.”<sup>41</sup> To that end, the court further found that the trial court did not err when it denied Skidmore’s request to play the original sound recording of *Taurus* or admit it as evidence of substantial similarity because it included embellishments that were not included in the *Taurus* deposit copy.<sup>42</sup>

#### CLARIFYING THE TEST FOR INFRINGEMENT

The court then took the opportunity to provide much needed clarity to how the Ninth Circuit analyzes a music Infringement Action.<sup>43</sup> The court explained that in order for a plaintiff to prevail in a copyright infringement suit in the Ninth Circuit, she must prove that she owns a valid copyright and that the defendant copied protected aspects of that

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*Law* 71 (1961) (explaining that one of the purposes of the deposit is “to identify the work” being registered); *Merrell v. Tice*, 104 U.S. 557, 561 (1881) (explaining that the purpose of the deposit was to allow others to inspect it “to ascertain precisely what was the subject of copyright”).

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

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

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

<sup>41</sup> *Id.* at 1064.

<sup>42</sup> *Id.*

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

copyrighted work.<sup>44</sup> To prove that the defendant copied protected aspects of the work, a plaintiff must prove both “actual copying” and “unlawful appropriation.”<sup>45</sup> The court noted that while these two test are often incorrectly referred to jointly as “substantial similarity,” they are separate and independent test.<sup>46</sup> Actual copying can be proven by circumstantial evidence showing that the defendant had access to the plaintiff’s copyrighted work and that the two works share similarities probative of copying.<sup>47</sup> Unlawful appropriation can be proven by showing that protected elements of the two works share “substantial similarities.”<sup>48</sup>

The court explained that the Ninth Circuit uses a two-part test to determine whether the two works share “substantial similarities.”<sup>49</sup> The first part is the extrinsic test, which looks at the protectable portions of the copyrighted work and objectively compares the similarities of “specific expressive elements in the two works.”<sup>50</sup> The second part of the test is the intrinsic test, which looks at the similarities between the works from the viewpoint of the “ordinary reasonable observer.”<sup>51</sup> Only after both of these test have been met can infringement be found.<sup>52</sup> The court then foreshadowed its forthcoming decision when it pointed out that the infringement analysis is further complicated by the fact that the Ninth Circuit links the issue of substantial similarity with that of access by its use of the “inverse ratio rule,” which permits a plaintiff who provides a strong showing that the defendant had access to the plaintiff’s work to provide a lesser showing of substantial similarity.<sup>53</sup>

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<sup>44</sup> *Id.* (citing *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018)).

<sup>45</sup> *Id.* (citing *Rentmeester*, 883 F.3d at 1117).

<sup>46</sup> *Id.* (“Although these requirements[, “copying” and “unlawful appropriation,”] are too often referred to in shorthand lingo as the need to prove “substantial similarity,” they are distinct concepts”).

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

<sup>48</sup> *Id.* (citing *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (citing *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)).

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

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

<sup>53</sup> *Id.* (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (the inverse ratio rule requires “a lower standard of proof of substantial similarity when a high degree of access is shown”); *Rentmeester*, 883 F.3d at 1124 (under the inverse ratio rule, “the stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying”)).

### THE INVERSE RATIO RULE

At the conclusion of the trial, Skidmore proposed that an inverse ratio rule instruction be given to the jury, but the court decided not to provide one.<sup>54</sup> On appeal, Skidmore challenged that decision.<sup>55</sup> Finding no error in the trial court's decision, the court stated that the inverse ratio rule is "not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties."<sup>56</sup> It then abrogated the rule in the Ninth Circuit and overruled prior cases to the contrary.<sup>57</sup> In abrogating the rule, it joined the majority of circuits who have considered the rule.<sup>58</sup>

Explaining its decision, the court noted that prior rulings had caused confusion as to which part of the test—copying or unlawful appropriation—the rule applied to.<sup>59</sup> These decisions had also caused confusion regarding the amount of access and substantial similarity needed to invoke the rule.<sup>60</sup> The court further explained that the rule had been affected by the evolving ease with which access could be proven.<sup>61</sup> Specifically, a plaintiff in a copyright infringement action could prove access by showing that the work had been widely disseminated, which could be accomplished by showing that the work was part of an on-demand database that had gained ubiquitous usership, such as Netflix or YouTube.<sup>62</sup> This unfairly advantaged highly popular works, such as *The Office*, because those works were more likely to also be highly

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<sup>54</sup> *Id.* at 1066.

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

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

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (the Second, Fifth, Seventh, and Eleventh Circuits have rejected the rule while the Ninth and the Sixth Circuits have accepted it).

<sup>59</sup> *Id.* at 1066.

<sup>60</sup> *Id.* (citing *Sid & Marty Krofft TV Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) ("[n]o amount of proof of access will suffice to show copying if there are no similarities"); *Metcalf v. Bochco*, 294 F.3d 1069, 1074–75 (9th Cir. 2002) (in a case where access was not disputed, the court inferred "that the many [generic] similarities between [the works] were the result of copying, not mere coincidence"); *Three Boys Music*, 212 F.3d at 486 (holding that a low showing of access does not require a high showing of probative similarities); *Rentmeester*, 883 F.3d at 1124 (the more similarities probative of copying, the less evidence of access is required to prove copying)).

<sup>61</sup> *Id.*

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

accessible.<sup>63</sup> In summation, the court stated that while cautious to do so, “the constellation of problems and inconsistencies in the application of the inverse ratio rule prompt[ed] [it] to abrogate the rule.”<sup>64</sup>

### CONCLUSION OF THE CASE

Reaching a conclusion in the *Skidmore v. Led Zeppelin* saga has been “a long climb up the Stairway to Heaven.”<sup>65</sup> The court addressed a litany of copyright issues. In a decision hailed by many intellectual property commenters,<sup>66</sup> the court abrogated the inverse ratio rule, holding that “[a]ccess does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work.”<sup>67</sup> The court also confirmed that a musical composition created prior to the effective date of the 1976 Act is controlled by the 1909 Act. This led the court to find that the scope of a copyright in such musical composition is defined by the four corners of the deposit copy. After the court ruled on these as well as other issues, it affirmed the judgment that Led Zeppelin’s *Stairway to Heaven* did not infringe Spirit’s *Taurus*.

### EFFECTS AND OUTLOOK

The effects of this ruling have already been felt in at least one other music infringement action involving a song created prior to the effective date of

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1069.

<sup>65</sup> *Id.* at 1079.

<sup>66</sup> E.g., Samuel Lewis, *Stairway to Heaven: End of the Inverse Ratio Rule Apophthegm*, LAW.COM (Mar. 16, 2020, 12:15 PM), <https://www.law.com/dailybusinessreview/2020/03/16/stairway-to-heaven-end-of-the-inverse-ratio-rule-apophthegm/?slreturn=20200326222242>; Mike Masnick, *9th Circuit Gets It Right: Says Led Zeppelin Didn't Infringe; Dumps Dumb 'Inverse Ratio' Rule*, TECHDIRT (Mar 10m 2020, 9:20 AM), <https://www.techdirt.com/articles/20200309/12211244065/9th-circuit-gets-it-right-says-led-zeppelin-didnt-infringe-dumps-dumb-inverse-ratio-rule.shtml>; Elura Nanos, *Ninth Circuit Hands Led Zeppelin a Win, Finally Nixing Idiotic Copyright Rule*, LAWANDCRIME.COM (Mar. 10, 2020, 12:04 PM), <https://lawandcrime.com/opinion/ninth-circuit-hands-led-zeppelin-a-win-finally-nixing-idiotic-copyright-rule/>; Daniel A. Schnapp, *Good Times, Bad Times: Ninth Circuit Does Away With “Inverse Ratio Rule” in Led Zeppelin Copyright Case and Questions Need to Prove “Access,”* NIXON PEABODY (March 10, 2020), <https://www.nixonpeabody.com/en/ideas/articles/2020/03/10/inverse-ratio-ruling-in-zeppelin-copyright-case>.

<sup>67</sup> *Skidmore*, 952 F.3d at 1069.

the 1976 Act.<sup>68</sup> In *Griffin v. Sheeran*, the heirs of Ed Townsend filed an action alleging Ed Sheeran's song, *Thinking Out Loud*, infringed on the 1973 copyright of *Let's Get It On*—a song co-written by Ed Townsend and Marvin Gaye.<sup>69</sup> On March 24, 2020, the court granted Sheeran's Motion in Limine and excluded the use of the original sound recording of *Let's Get It On*—which included elements not in the deposit copy—from being used in comparisons between it and *Thinking Out Loud*.

Due to the conflicts previously surrounding the inverse ratio rule, its abrogation in this case distracts from the significance of the deposit copy ruling. This ruling makes it clear that for an unpublished song copyrighted prior to 1978, elements of the work's original sound recording not included in the deposit copy are not protected under the corresponding copyright. However, it is not clear what effect this will have on the manner in which the music industry will attempt to protect these currently unprotected elements. One commenter suggested that protection may still be garnered simply by filing a new copyright application for those unprotected elements.<sup>70</sup> This application can even be supported by depositing the original work's sound recording.<sup>71</sup> This, in theory, may be the best option for an artist whose song was created prior to the 1976 Act and is not well represented by the associated deposit copy. One caveat of this method is that any such copyright registration will not benefit from the original filing date, which in turn will limit any recovery for an infringement of those elements to copying that occurs after such registration.

The *Skidmore* ruling is likely to have a significant impact on the music industry. Not only did it clarify infringement analysis, it did away with the controversial inverse ratio rule. Finally, the deposit copy limitations this ruling has placed on music copyrighted prior to the 1976 Act has created a formidable challenge for copyright plaintiffs and will likely curb the recent uptick in music infringement actions in the Ninth Circuit.

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<sup>68</sup> *Griffin v. Sheeran*, No. 17-5221 (S.D.N.Y. Mar. 24, 2020).

<sup>69</sup> *Id.*

<sup>70</sup> Bob Clarida, *Music, Deposit Copies and 'Skidmore v. Led Zeppelin': A Workaround*, LAW.COM (Mar. 20, 2020, 2:00 PM), <https://www.law.com/newyorklawjournal/2020/03/20/music-deposit-copies-and-skidmore-v-led-zeppelin-a-workaround/?slreturn=20200327164204#>.

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



# A RE-UNION FOR MMA: REOCCURRING ISSUES PLAGUING MIXED MARTIAL ARTS FIGHTERS AND POTENTIAL SOLUTIONS

*By: Jason Duncan\**

## I. Introduction to Mixed Martial Arts in the U.S.A

In May, 2017, five-time NBA Champion, Kobe Bryant, spoke at an event for the Ultimate Fighting Championship (UFC) Athlete Retreat in Las Vegas. At the event, then-bantamweight fighter Leslie Smith asked him about the importance of a player's association to Bryant's life and career.<sup>1</sup> In his response, Bryant stated that if the fighters were to buy into the idea of a union or organization to represent themselves, it would cause ripple effects for the entire sport and make it better not only for their time but for up and coming fighters as well.<sup>2</sup> The fighters' excitement to Bryant's answer is palpable through a simple cell phone video recording of the conference.<sup>3</sup> The fighters' response seems to show a readiness, willingness and excitement about creating some form of organization to help them bargain for their rights, like nearly every other major sport in the United States.<sup>4</sup>

Sadly, fighters' unions have historically been unsuccessful when they were attempted two other times only to fall apart for any number of reasons.<sup>5</sup> Before diving further into the topic of unions and protections for fighters, it is important to examine what mixed martial arts is and

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<sup>1</sup> Paul Watcher, *Fists Up: The Most Important Fight in the UFC Is Happening Outside the Octagon*, THE RINGER (Jan. 23, 2019, 5:40 PM), <https://www.theringer.com/2019/1/23/18193121/ufc-unionization-efforts-project-spearhead-leslie-smith>; (stating "You guys have this union and you operate on the same page together it will 100% fortify the sport and make the sport better, not just for the present but for future generations.")

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

<sup>3</sup> Mike Bohn, *Leslie Smith Asked Kobe Bryant About 'Extremely Important' Union at UFC Athlete Retreat*, MMA JUNKIE (May 23, 2017), <https://mmajunkie.com/2017/05/leslie-smith-kobe-bryant-unions-ufc-athlete-retreat-lakers-mma>.

<sup>4</sup> *Id.*

<sup>5</sup> Liz Mullen, *UFC Fighters Make Union Push*, SPORTS BUSINESS JOURNAL (Mar. 12, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/03/12/Labor-and-Agents/MMA-union.aspx>.

where it came from.<sup>6</sup> Creating a new sport and phenomenon is not easy, but to quote Rocky from the film *Rocky Balboa*, “It ain’t how hard you hit; it’s about how hard you can get hit, and keep moving forward.” Mixed martial arts and their fighters have taken a beating over the years but have kept the sport moving forward in the United States nonetheless.

Mixed Martial Arts (“MMA”)<sup>7</sup> refers to “a wide variety of skills from a mixture of other combat sports” which includes using “both striking and grappling techniques while standing and on the ground.”<sup>8</sup> MMA is created by any combination of boxing, Brazilian Jiu-Jitsu, Jiu-Jitsu, Judo, Karate, Kung-Fu, Taekwondo and freestyle or Greco-Roman wrestling.<sup>9</sup> However, the broad range of styles led to a range of issues because there were no weight classes.<sup>10</sup> There were even advertisements for early UFC pay-per-views claiming, “There are no rules,” and the fact that the fights took place inside of an 8-sided cage linked fence called the Octagon helped further those impressions.<sup>11</sup> This type of rough marketing from the UFC received heavy scorn from the late Senator John McCain, who was loudly outspoken against the creation and implementation of MMA as a sport.<sup>12</sup> Senator McCain even went so far as to send letters to each state’s governor asking them to ban the sport.<sup>13</sup> Senator McCain’s push coincided the American Medical Association

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<sup>6</sup> *Id.*

<sup>7</sup> The term “Mixed Martial Arts” was coined during the UCF’s first pay-per-view, UCC 1, in 1993. Howard Rosener, *‘Ultimate’ Fight Lives Up to Name: Television: Pay-Per-View Battle Instead of Being Merely Gory and Funny Gets Interesting After the First Two Bouts*, LOS ANGELES TIMES (Nov. 15, 1993, 12:00 PM), <https://www.latimes.com/archives/la-xpm-1993-11-15-ca-57200-story.html>.

<sup>8</sup> *ABOUT THE UFC – THE SPORT*, UFC.COM <https://www.ufc.com/about/sport> (last visited Nov. 14, 2019).

<sup>9</sup> *INTRO TO MMA*, UFC.COM <https://www.ufc.com/intro-mma> (last visited Nov. 14, 2019).

<sup>10</sup> Adam Hill, *A Timeline of UFC Rules: From No-Holds-Barred To Highly Regulated*, BLEACHER REPORT (Apr. 24, 2013), <https://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated>.

<sup>11</sup> *Id.* (noting the late Senator McCain described early UFC events as “human cockfighting” stating specifically that it was “...not a sport”).

<sup>12</sup> Steven Marrocco, *Remembering John McCain’s Imperfect History With MMA*, MMA JUNKIE (Aug. 26, 2018, 4:15 PM), <https://mmajunkie.com/2018/08/john-mccain-dies-remembering-history-ufc-human-cockfighting>.

<sup>13</sup> David Plotz, *Fight Clubbed: Ultimate Fighting Ought to be a Great American Sport Instead Cable Companies Sen. John McCain and a Squeamish Public are Killing It*, SLATE (Nov. 17, 1999), <https://slate.com/news-and-politics/1999/11/fight-clubbed.html>.

recommending a ban of MMA, and many state athletic commissions refusing to sanction fights for the UFC, leaving them without a product to sell.<sup>14</sup> State public television channels were even refusing to air UFC's ads while lawsuits forced the company into smaller and smaller venues further away from mainstream or large city attractions.<sup>15</sup> This push by the mainstream outcry seemed to peak when the athletic commission in New York enacted a ban on the sport on the eve of UFC 12, forcing the promotion company to move the event to Alabama last minute.<sup>16</sup> The UFC began correcting itself by familiarizing and integrating itself with the state athletic commissions across the country in order to continue to get hosts for pay-per-views in the United States.<sup>17</sup>

The UFC continued correcting their public image and overall brand by implementing more rules and adding wholesale changes to their sports appearance.<sup>18</sup> These changes were created to push the sport back towards mainstream standards, in an effort to legitimize it and fight against the response from Senator McCain's coalition.<sup>19</sup>

In 2001, the UFC had its largest victory against public perception and state wariness when the New Jersey State Athletic Control Board adopted a broad set of required standards called the Unified Rules of Mixed Martial Arts.<sup>20</sup> The Unified Rules of Mixed Martial Arts changes included adding judges, time limits, rounds, weight classes, a scoring system and in particular how the fighters were able to strike each other or conduct themselves in the ring.<sup>21</sup> The UFC's acceptance of the newer, stricter rules caused the large shift they were looking for within the U.S.

In 2017, its most outspoken critic, Senator McCain spoke on how much the UFC had cleaned up its act and acknowledged how far the UFC

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<sup>14</sup> *Id.* (The UFC joined the Ku Klux Klan as being the only advertisements to have been rejected by public television.)

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

<sup>16</sup> Nate Wilcox, UFC 12: Run Out of New York; Bloody Elbow Apr. 15, 2009; <https://www.bloodyelbow.com/2009/4/15/838524/ufc-12-run-out-of-new-york>

<sup>17</sup> WHAT IS THE UFC, <https://web.archive.org/web/20110720031419/http://www.completemartialarts.com/whoswho/ufc/ufchistory.htm> (last visited Nov. 14, 2019).

<sup>18</sup> Hill, *supra* note 10.

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

<sup>20</sup> UNIFIED RULES OF MIXED MARTIAL ARTS, <https://www.ufc.com/unified-rules-mixed-martial-arts> (last visited Oct. 5, 2019).

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

had progressed the sport since his initial comments on it.<sup>22</sup> By 2009, even the Association of Boxing Commissions also recognized the UFC's rules and their applications, further adding to the legitimacy of the sport.<sup>23</sup> By March of 2016, New York became the last state to legalize MMA within its state's boundaries, making MMA matches legal in all states at that time.<sup>24</sup>

It is also important to note that in 2001 when the UFC began adopting the Unified Rules of Mixed Martial Arts, the original founders of the UFC sold the brand to Station Casino executives Lorenzo and Frank Fertitta, and their business associate Dana White.<sup>25</sup> They created Zuffa, LLC, who was the controlling entity during much of the UFC's growth in the early 2000s.<sup>26</sup> As Zuffa marched forward with a new, clearer purpose for the sport, it began devouring other MMA organizations throughout the world, both smaller, less threatening and larger, longstanding MMA.<sup>27</sup> The World Fighting Alliance (WFA) was created in 2001 however, small pay-per-view numbers and events drove them to sell to the UFC in 2006.<sup>28</sup> The UFC followed the small appetizer of the WFA by acquiring Pride, a Japanese based MMA organization that had been one of the longest standing MMA brands in the market for a

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<sup>22</sup> Specifically, Senator McCain was quoted in an NPR interview saying, "They have cleaned up the sport to the point, at least in my view, where it is not human cockfighting any more. I think they've made significant progress. They haven't made me a fan, but they have made progress." Showing that the UFC could be flexible when they needed to adjust to the market. Michael David Smith, *Don't Forget John McCain's Other MMA Quote*, MMA FIGHTING (June 4, 2008), <https://www.mmafighting.com/2008/06/04/dont-forget-john-mccains-other-mma-quote>.

<sup>23</sup> Hill, *supra* note 10.

<sup>24</sup> Bryan Armen Graham, *New York ends ban and becomes 50<sup>th</sup> state to legalize mixed martial arts*, THE GUARDIAN (Mar. 22, 2016), <https://www.theguardian.com/sport/2016/mar/22/new-york-legalizes-mma-ufc>.

<sup>25</sup> Adam Hill, *A Timeline of UFC Rules: From No-Holds-Barred to Highly Regulated*, BLEACHER REPORT (Apr. 24, 2013), <https://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated>;

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

<sup>27</sup> Chris Harty, *5 MMA Organizations Bought Out by UFC*, THERICHEST (Jan. 16, 2014), <https://www.therichest.com/sports/mma-sports/5-mma-organizations-bought-out-by-ufc/> (The WFA was home to future UFC Champions Quinton 'Rampage' Jackson and Lyoto Machida).

<sup>28</sup> *Id.*

decade.<sup>29</sup> Pride was the original home to some of the most world-renowned MMA athletes ever to grace the Octagon: Anderson Silva, Mauricio Rua, Alistair Overeem and Fedor Emelianenko.<sup>30</sup> After wolfing down Pride, the UFC had a dessert of the International Fight League (IFL) in 2008.<sup>31</sup> The IFL had only been operating since 2006 but had begun to make its impact when they became the first MMA organization to broker a major TV deal in the U.S., and by keeping fighters on paid salaries rather than the fighters winning their individual fight's purses.<sup>32</sup> Despite having well-known veteran coaches like Renzo Gracie and Ken Shamrock, the lack of top talent eventually led to their downfall.<sup>33</sup>

The UFC slightly changed tactics moving forward from simply acquiring all the companies to taking companies and running them as side organizations linked to the UFC.<sup>34</sup> The UFC started this by acquiring the World Extreme Cage fighting (WEC), which officially operated between 2001 and 2010 as its own separate brand.<sup>35</sup> The MMA used WEC to promote and expand lighter weight classes that were not available in the UFC originally; notably, a number of the most well-known light-weight UFC Champions got their starts in the WEC.<sup>36</sup> Despite the brand's initial success, the UFC eventually consolidated all MMA activities under the UFC banner.<sup>37</sup>

For its final acquisition, the UFC bought Strikeforce, a kickboxing organization founded in 1986 that turned into an MMA organization in 2006.<sup>38</sup> When it became an MMA organization, Strikeforce automatically became the second largest worldwide MMA organization and the most tangible threat to the UFC's dominance in

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<sup>29</sup> *Id.* (From 1997 to 2007, Pride was known for "its intensity, unrelenting physicality, and extremely high level of competition.", within MMA communities and was considered the largest worldwide MMA organization in its prime).

<sup>30</sup> *Id.* (Fedor Emelianenko being one of the one of the only worldwide-known MMA stars to never fight in the UFC).

<sup>31</sup> *Id.*

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

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

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

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

<sup>36</sup> *Id.* (The WEC fighters that became UFC Champions included Urijah Faber, Jose Aldo, Benson Henderson and Demetrius Johnson, who was considered the best pound for pound fighter for a number of years).

<sup>37</sup> *Id.*

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

North America.<sup>39</sup> Unfortunately for Strikeforce, bad business choices led to the UFC acquiring its rosters and being absorbed completely in 2013.<sup>40</sup>

This list just outlines the lasting power and strength of the UFC as a business in the United States and shows the organizations firm grasp on the market itself.<sup>41</sup> It also shows that the promotion company consistently finds ways to buy the best talent in the market with very few exceptions.<sup>42</sup> Unfortunately, the UFC's powerful grasp on the market is exactly what is leading to some of the issues the fighters are facing in sports today, specifically in regards to the UFC's treatment of its fighters.

## II. The Rich Get Richer... (a.k.a. Fighter Pay Disparity Across Sports)

The UFC has seemingly adopted a “get rich or die trying” approach. The UFC gets rich while the fighters are the ones in danger of dying (metaphorically speaking, to date no one has died in the ring or immediately after a bout due to injuries, though head trauma is still a high possibility). From 2004 to 2014, the UFC's revenue grew from \$4.5 million to \$522 million.<sup>43</sup> The UFC's 2017 revenue is said to have surpassed \$700 million<sup>44</sup> but with some fighters only making \$10,000 a fight.<sup>45</sup> While this number is impressive for what was a small, home-grown organization, the payout to the fighters was another story.<sup>46</sup> As of 2017, UFC fighters had a median salary roughly equal to that of a car

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

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

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

<sup>42</sup> *Id.*

<sup>43</sup> John S. Nash, *What investors are being told about UFC revenue*, BLOODY ELBOW (Oct. 20, 2015, 7:30 AM), <https://www.bloodyelbow.com/2015/10/20/9547333/what-deutsche-bank-moodys-and-standard-poors-tell-us-about-the-ufc>.

<sup>44</sup> John S. Nash, *Moody's reports UFC Holdings, LLC made 'well over \$700 million' last year*, BLOODY ELBOW (June 29, 2018, 10:00 AM), <https://www.bloodyelbow.com/2018/6/29/17508824/moodys-reports-ufc-holdings-llc-made-well-over-700-million-last-year-mma>.

<sup>45</sup> Jesse Holland, *Record year! UFC made over \$700 million in 2017 – while paying some fighters just \$10k per fight*, MMA MANIA (June 29, 2018, 4:03 PM), <https://www.mmamania.com/2018/6/29/17519416/ufc-made-over-700-million-2017-while-paying-some-fighters-just-10k-mma>.

<sup>46</sup> Scott Harris, *For Love, Not Money: How Low Fighter Pay Is Undermining MMA*, BLEACHER REPORT (Jan. 11, 2017), <https://bleacherreport.com/articles/2685605-for-love-not-money-how-low-fighter-pay-is-undermining-mma>.

salesman,<sup>47</sup> while sports professionals in nearly all other major sports are making at least ten times that amount.<sup>48</sup> For example, in 2015, the NBA had a minimum salary of \$525,093 and rookies across the MLB, NFL and NHL made around the same margins (MLB rookies made \$507,500, NFL rookies \$435,000, NHL rookies \$575,000).<sup>49</sup> Granted, those are some of the biggest sports in the country, but even when compared a smaller viewing sport, like golf, the pay disparities are profound.<sup>50</sup> As of 2017, the PGA tour had literally created hundreds of millionaires across all their ranks of professional golfers.<sup>51</sup> Of the 1,393 UFC fighters that MMA Manifesto had listed by career fighter earnings, 95 are career millionaires, while 211 have earned \$10,000 or less.<sup>52</sup>

Even younger, newer professional sports like MLS are paying their professional athletes a higher wage at just under \$309,000.<sup>53</sup> This figure makes the average salary for a professional player in the MLS over seven times more valuable than the average salary of a professional MMA fighter under the UFC.<sup>54</sup> When considering some of the major sports in the country, the disparity between professional MMA fighters and other professional athletes becomes much more apparent.<sup>55</sup> The following figures are gathered from the 2016-2017 season of the major sports leagues in the U.S.:

<b>League</b>	<b>Total Revenue</b>	<b>Avg. Athlete Salary<sup>56</sup></b>	<b>% of League Total Revenue</b>
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<sup>47</sup> *Car Salesman Annual Salary*, ZIPRECRUITER, <https://www.ziprecruiter.com/Salaries/Car-Salesman-Salary> (last visited Oct. 9, 2019).

<sup>48</sup> Harris, *supra* note 46 (to get technical, car salesmen get paid more than UFC MMA fighters by \$900 a year on average, without having the professional danger of being punched or kicked repeatedly).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (as of Apr. 16, 2016, the UFC on Fox had a Nielsen rating of 0.8 with three of the fighters that night earning \$100,000 or more and the main event winner earning \$170,000. On the same day the PGA Tour had a Nielsen rating of 1.2 with thirteen of the golfers earning \$100,000 or more and the winner earning \$1.06 million).

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

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

<sup>53</sup> Kurt Badenhausen, *The Average Player Salary And Highest-Paid in NBA, MLB, NHL, NFL And MLS*, FORBES (Dec. 15, 2016, 9:34 AM), <https://www.forbes.com/sites/kurtbadenhausen/2016/12/15/average-player-salaries-in-major-american-sports-leagues/#42589d991050>.

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

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

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

NBA	\$5,900,000,000. 00 <sup>57</sup>	\$4,400,000.00	0.074%
MLB	\$9,500,000,000. 00 <sup>58</sup>	\$6,200,000.00	0.065%
NHL	\$4,588,000,000. 00 <sup>59</sup>	\$2,900,000.00	0.063%
MLS	\$602,000,000.0 0 <sup>60</sup>	\$308,969.00	0.051%
NFL	\$7,800,000,000. 00 <sup>61</sup>	\$2,100,000.00	0.026%
UFC	\$700,000,000.0 0 <sup>62</sup>	\$151,798.00 63	0.021%

It is also important to note that the MLS has never officially released the league wide revenue information to the public, so the revenue

<sup>57</sup> *Forbes Releases 19<sup>th</sup> Annual NBA Team Valuations*, FORBES PRESS RELEASES (Feb. 17, 2017, 10:35 AM), [https://www.forbes.com/sites/forbespr/2017/02/15/forbes-releases-19th-annual-nba-team-valuations/?fbclid=IwAR2YDu7DOKJMBgn7u8Hn\\_4al-WzC8TVdi8sGU5qCuWzJLHjOP-Yazgmw0#512e426a7f03](https://www.forbes.com/sites/forbespr/2017/02/15/forbes-releases-19th-annual-nba-team-valuations/?fbclid=IwAR2YDu7DOKJMBgn7u8Hn_4al-WzC8TVdi8sGU5qCuWzJLHjOP-Yazgmw0#512e426a7f03).

<sup>58</sup> Mark Townsend, *MLB's Revenue Reportedly Passed \$10 billion for First Time Ever in 2017*, Yahoo Sports: Big League Stew (Nov. 22, 2017, 5:07 PM), <https://sports.yahoo.com/mlbs-revenue-reportedly-surpassed-10-billion-first-time-2017-000707520.html>.

<sup>59</sup> Mike Ozanian, *The NHL's Most Valuable Teams 2017*, FORBES: SPORTSMONEY (Dec. 5, 2017, 9:26 AM), <https://www.forbes.com/sites/mikeozanian/2017/12/05/the-nhls-most-valuable-teams-4/#2b359cc617c7>.

<sup>60</sup> Chris Smith, *Major League Soccer's Most Valuable Teams 2016: New York, Orlando Thrive in First Seasons*, FORBES: SPORTSMONEY (Sep. 7, 2016, 10:32 AM), <https://www.forbes.com/sites/chris-smith/2016/09/07/major-league-soccer-s-most-valuable-teams-2016-new-york-orlando-thrive-in-first-seasons/#6ade30b4270d>.

<sup>61</sup> John Breech, *Packers Financials Show That NFL Made Billions Despite National Anthem Controversy*, CBS SPORTS (July 16, 2018, 7:34PM), <https://www.cbssports.com/nfl/news/packers-financials-show-that-nfl-made-billions-despite-national-anthem-controversy/>.

<sup>62</sup> John S. Nash, *Moody's Reports UFC Holdings, LLC Made 'Well over \$700 Million' Last Year*, UFC NEWS MMA NEWS (June 29, 2018, 10:00 AM), <https://www.bloodyelbow.com/2018/6/29/17508824/moodys-reports-ufc-holdings-llc-made-well-over-700-million-last-year-mma>.

<sup>63</sup> Jeff Fox, *2016 UFC Fighter Salaries*, THE MMA MANIFESTO (Jan. 3, 2017), <https://thesportsdaily.com/2017/01/03/2016-ufc-fighter-salaries-fox11/>.



totals used are based on the total of each individual team's revenue.<sup>64</sup> Given the figures above, it is unsurprising that the professional fighters within the UFC are beginning to question the payout structure of the company, particularly given that the UFC was sold for \$3.77 billion dollars in mid-2016 after posting record revenues the year prior.<sup>65</sup> UFC fighters have the lowest percentage paid professional athletes and the lowest paid average athlete salary among some of the highest grossing sports in the country. This gap in the revenue and payout is worsened by the UFC President Dana White getting a straightforward nine percent of the annual profit of the company.<sup>66</sup>

### III. While the Poor Get Poorer (a.k.a. Fighter's Sponsorship Disparity & Failings)

The gap in pay is potentially worsened by the UFC signing an exclusive sponsorship deal with Reebok. In 2014, the UFC signed an exclusive uniform deal with Reebok, making them the provider of in-ring gear during fights, meaning that fighters had to wear UFC specific, Reebok branded fight gear during fights and fight promos.<sup>67</sup> UFC executives went on the record emphasizing the UFC's need to control the brands in the entire production in order to maximize their profit, while showing a complete disregard and lack of understanding to the second and third order effects of the UFC's heavy-handed restrictions.<sup>68</sup> Before the Reebok deal, the fighters were able to market themselves through sponsors on their fight gear and banners (similar to how NASCAR drivers

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<sup>64</sup> Ezechial Abatan, *MLS 'Will Imminently Join' World's Top 10 Leagues Revenue*, SPORTING INTELLIGENCE (June 12, 2018), <https://www.sportingintelligence.com/2018/06/12/mls-will-imminently-join-worlds-top-10-leagues-by-revenue-120601/>.

<sup>65</sup> Darren Rovell, *A Look at the Business of the UFC One Year After its Historic Sale*, ESPN: MMA (July 10, 2017), [https://www.espn.com/mma/story/\\_/id/19955598/a-look-ufc-one-year-historic-sale](https://www.espn.com/mma/story/_/id/19955598/a-look-ufc-one-year-historic-sale).

<sup>66</sup> *Id.*

<sup>67</sup> Paul Gift, *12 Things Learned About MMA Business from Executives Under Oath*, FORBES: SPORTSMONEY (Aug. 3, 2018, 9:25 AM), <https://www.forbes.com/sites/paulgift/2018/08/03/twelve-things-learned-business-ufc-summary-judgment-depositions-mma-news/#508671736240>.

<sup>68</sup> *Id.* (specifically the UFC Chief Operating Officer and Senior Executive Vice President Lawrence Epstein explained that "we're [the UFC] not in the business of exposing brands for free. So we're not going to advertise these brands that are all these fighters. So you're going to get a lot more media coverage from ESPN, which is incredibly important to the success of the UFC brand, to the success of all our athletes' brands and to successful pay-per-view events, which our athletes are partners in").

are able to give sponsors spots on their cars), but the UFC slammed the door on this entire revenue stream when they forced a uniform, clean look.<sup>69</sup> After the announcement of the Reebok deal, ESPN allegedly reached out to the UFC claiming that this would likely get the UFC more coverage.<sup>70</sup>

The Reebok deal with the UFC was a \$70 million, six year deal that provides about \$7 million a year to the fighters.<sup>71</sup> The deal is built like the deal Reebok's parent company, Adidas, had with the NBA, but the UFC-Reebok deal is much more restrictive.<sup>72</sup> In the NBA, the players would still be allowed to wear the shoe of their choice or sponsor during games or events, whereas in this deal the UFC fighters are restricted to only Reebok UFC gear.<sup>73</sup> The fighters cannot be sponsored by non-Reebok entities during fights, fight week or even weigh-ins, directly denying the fighters the sponsorship revenue they previously were relying on.<sup>74</sup> This locked-down approach tends to push away any potential other sponsorships to any fighters except the very top of the game, like Connor McGregor, because of their status within the industry.<sup>75</sup> The Reebok deal structure provides a minimum compensation on a fight-to-fight basis to the fighters based on their tenure with the UFC.<sup>76</sup>

<b>Tenure Tier (based on how many fights within the UFC)</b>	<b>Compensation (on a per bout basis)</b>
1 to 5 fights	\$2,500
6 to 10 fights	\$5,000
11 to 15 fights	\$10,000

<sup>69</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters And Condoning Pay Gaps?*, FORBES: SPORTSMONEY (May 16, 2016, 1:22 PM), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#3b5661b74a93>. (fighter sponsorships can range anywhere from smaller companies called Dynamic Fastener or to well-known producer of fighting goods, Venom).

<sup>70</sup> Gift, *supra* note 67.

<sup>71</sup> Brennan, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

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

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

16 to 20 fights	\$15,000
21 or more fights	\$20,000
Title Challenger	\$30,000
Champion	\$40,000 <sup>77</sup>

Essentially, the longer the fighter is in the UFC, the more potential they have to be paid higher by the Reebok sponsorship deal. This seems logical except when considering that 61% of the 1,300+ fighters on the UFC payroll fall within the 1 to 5 UFC fight categories.<sup>78</sup> As Lorenzo Fertitta (one of the former owners of the UFC) admitted, the average fighter fights between 3 or 4 times a year typically, meaning lower tiered fighters would have to fight steadily for nearly five years before they would see a \$20,000 sponsorship payout from the Reebok deal.<sup>79</sup> This becomes an issue because as of 2014, the average length of a fighter's career in MMA is about 1 ½ years or 3 bouts overall, for their entire career.<sup>80</sup>

Veterans within the UFC have been openly vocal against the Reebok deal because of the harsh sponsorship restrictions.<sup>81</sup> During a survey conducted after the announcement of the deal, fighters were claiming they would have an average loss of \$20,000 to \$25,000 per fight that they would have previously gotten from their sponsorships.<sup>82</sup> If fighters fight as often as Mr. Fertitta was quoted, they could be losing up to \$100,000 a year in sponsorship money.<sup>83</sup> Even UFC champions are

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

<sup>78</sup> Zane Simon, *Official Reebok Sponsorship Numbers Lower Than Initial Estimates*, Bloody Elbow UFC News (May 6, 2015, 1:53PM), <https://www.bloodyelbow.com/2015/5/6/8560801/ufc-offical-reebok-sponsorship-numbers-lower-initial-estimates-tiers-tenure-mma-news>.

<sup>79</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters And Condoning Pay Gaps?*, FORBES: SPORTSMONEY (May 16, 2016, 1:22 PM), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#7d9df7e24a93>.

<sup>80</sup> E Magraken, *Exclusive Contracts and UFC Fighter Career Length*, Combat Sports Law (Dec. 26, 2014), <https://combatsportslaw.com/2014/12/26/exclusive-contracts-and-ufc-fighter-career-length/>.

<sup>81</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters And Condoning Pay Gaps?*, FORBES: SPORTSMONEY (May 16, 2016, 1:22 PM), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#7d9df7e24a93>.

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

<sup>83</sup> *Id.* (and when comparing this to the estimated \$20 million annual salary of the UFC President Dana White, it is clear to see why the fighters are so angry).

claiming to be losing between \$20,000 and \$100,00 because of the Reebok deal's restrictions on personal sponsorships.<sup>84</sup> Former UFC veteran Brendan Schaub publicly claimed that when the deal went through, it brought his sponsorship earnings down from six figures a fight to approximately \$10,000 a fight.<sup>85</sup> A worldwide well-known fighter, long time UFC veteran and former Champion Vitor Belfort has claimed to have lost millions, and that he has had to turn his attention away from fighting full time and towards business to make up for the lost profit.<sup>86</sup> The Reebok system being slanted against new fighters also creates a de-facto systematic discrimination against the female fighters.<sup>87</sup> This is because women's divisions were not in the UFC prior until 2012, meaning that all women within the UFC will be guaranteed to make less than their male counterparts simply because the UFC created their divisions later than the men's.<sup>88</sup>

The numerous, public complaints about the deal caused Reebok to release a statement that boiled down to pointing the finger back at the UFC as the guilty party.<sup>89</sup> The UFC brushed the complaints off by stating nobody knew all the answers and emphasizing how good the deal was for Reebok, while saying absolutely nothing about the potential tens or hundreds of thousands of dollars the fighters are being excluded from.<sup>90</sup>

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<sup>84</sup> *Id.*

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

<sup>86</sup> *Id.* (Belfort stated he's a businessman who fights as a hobby under the Reebok deal, and specifically calling attention to the exploitative nature of the deal: "I'm not satisfied with the way the company is handling sponsorship. We are pretty much living in slavery. We can't use our own sponsors; they are banned inside the Octagon. We have no properties... It's a contact sport. I don't think it's fair for someone to earn 500 dollars to be elbowed in the face. There has to be a retirement plan, which does not exist now").

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

<sup>88</sup> *Id.*

<sup>89</sup> Jesse Holland, *Reebok has message for sponsorship haters: UFC decides how its fighters are paid, not us*, MMA Mania: UFC News (Oct. 26, 2015), <https://www.mmamania.com/2015/10/26/9616682/reebok-has-message-sponsorship-haters-ufc-decides-how-fighters-paid-not-us-mma>; (specifically Reebok stated, "...then there comes a decision point, and the UFC decides how the fighters are paid. That's not something we get involved in at all," and went on further explaining, "...I can understand that [Schaub is] looking at us and blaming us [Reebok] because it's a Reebok apparel deal. It's a little misplaced from my [Reebok's] standpoint").

<sup>90</sup> *Id.* (UFC President specifically said, "'The backlash to Reebok was ridiculous but everybody thinks they know all about this shit and they have all the answers...But let me tell you, this has been an absolute home run for Reebok. Home run for them").

This lack of flexibility with sponsorships and operational control over the fighters leads to the question: what is the fighter's status within the UFC?

#### **IV. They Are Who We Thought They Were (a.k.a. the Fighter's Employment Status Within the UFC)**

The fighters within the UFC are classified as independent contractors (ICs) rather than employees of the organization overall, which may lead to differing standards and tests that apply to them within the courts.<sup>91</sup> The excessive control the UFC exerts over its fighters is confusing their rival company, Bellator, who also treats fighters as ICs.<sup>92</sup> Bellator made it very clear when the Reebok deal was executed that free agent fighters were welcome to go to their promotional company without a tax on their sponsorships, so long as the promotions did not interfere with their main sponsors.<sup>93</sup> Under the current structure between the fighters and the promotions company, the UFC fighters are bound by U.S. Anti-Doping Agency (USADA) as well as the Reebok sponsorship/gear contract mentioned above.<sup>94</sup> The USADA requires the fighters to disclose their whereabouts at all times and make themselves available to the USADA for testing when they request.<sup>95</sup> A fighter's failure to comply with USADA guidelines results in a suspension from competition in the

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<sup>91</sup> Ben Fowlkes, *Are UFC Fighters Employees or Independent Contractors? Why the distinction matters – and could mean millions*, MMA Junkie (Aug. 12, 2017, 9:00 AM), <https://mmajunkie.com/2017/08/ufc-fighters-employees-or-independent-contractors>.

<sup>92</sup> *Id.* (explaining how Bellator President Scott Coker has stated that new signees to his rival promotional company have been complaining about the Reebok deal, and is quoted as saying, "Listen, they're independent contractors... How they're forced to wear a uniform, to this day, still baffles me. It should be against the labor laws or something." And while this sentiment is helpful because a rival company to help balance the playing field for fighters, it is important to note that it is unclear if Bellator fighters are classified as ICs or employees as well).

<sup>93</sup> Kyle Smith, *Bellator president Coker: 'The phone's been ringing' since UFC-Reebok deal was announced*, THE SCORE (2015), <https://www.thescore.com/mma/news/762644>.

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

<sup>95</sup> *UFC Whereabouts Policy*, USADA, <https://ufc.usada.org/testing/whereabouts/> (last visited Oct. 16, 2019) (explaining how the fighters are one step away from being chipped like loving pets).

sport.<sup>96</sup> These types of restrictions the UFC has put on fighters has started to raise questions about whether fighters should be considered employees or ICs for the purposes of being able to bring a cause of action.<sup>97</sup> The differences in the classifications have a variety of different effects. Additionally, there are a variety of different tests to determine whether a worker is properly classified as an employee or IC.

**a. Internal Revenue Service Tests for Employee/Independent Contractor Status**

While the Internal Revenue Service (IRS) does not have a direct interest in the control of or impacts on employee/IC relations, it does have a vested interest in the correct classifications of employees or ICs.<sup>98</sup> The IRS has an interest in the correct classification because the classification imposes a variety of cost ramifications on the employer, including: paying in/accounting for an employer's share in Social Security and Medicare taxes, overtime and minimum wage payments, employee health insurance and workers compensation insurance premiums that the employer must consider comply with.<sup>99</sup> Misclassification violations allow the IRS to impose civil penalties, such as fines, and criminal penalties, if the employer misclassified intentionally or fraudulently.<sup>100</sup> The IRS has developed a few tests over the years to determine who is any employee and who is an IC.<sup>101</sup>

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<sup>96</sup> *USDA Resolves Four Cases Involving Ostarine Following Positive Tests Under the UFC Anti-Doping Policy*, USADA (Apr. 23, 2019), <https://ufc.usada.org/usada-resolves-four-ostarine-cases-under-ufc-anti-doping-policy/>.

<sup>97</sup> Ben Fowlkes, *Are UFC fighters employees or contractors? Why the distinction matters – and could mean millions*, MMA JUNKIE (Aug. 12, 2017 9:00 AM), <https://mmajunkie.com/2017/08/ufc-fighters-employees-or-independent-contractors>.

<sup>98</sup> Frank Messina et al., *Employee Versus Independent Contractor: The IRS and Department of Labor's Focus on Worker Classification*, THE CPA JOURNAL (Feb. 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>.

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

<sup>100</sup> *Id.* (explaining how federal employment withholding taxes represent nearly 70% of all federal tax revenue to be paid to the IRS, so large scale misclassifications that cause underreporting or misrepresentation of employees/ICs would go towards the overall federal tax gap of missing money owed. In short, the government is owed it's due and the lack of it will be dealt with, much like a bookie collecting their money).

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

The IRS originally used a twenty-factor test that was based on common law factors, but has since shifted to a three-factor test.<sup>102</sup> Evidence of an individual's employment status tends to fall within one of their three categories: 1) behavioral control, 2) financial control, or 3) relationship control.<sup>103</sup> Behavioral control focuses on whether the company has control over what the worker does to complete the job, or how the job is done.<sup>104</sup> Financial control looks at who controls the worker's ability to earn income, outside of the original employer.<sup>105</sup> A worker's ability to work multiple jobs suggests the worker is an IC, whereas a worker's eligibility for travel costs and payment suggests the worker is an employee.<sup>106</sup>

Relationship control points towards how the parties view each other.<sup>107</sup> Paid vacation or retirement benefits points towards an employee whereas hiring workers for specific time periods points towards the worker being an IC.<sup>108</sup> If the IRS cannot fit the relationship of the worker and employee into these three broad categories, they will go by their older, previously used twenty-factor test.<sup>109</sup> The twenty factors included but was not limited to the level of instruction, amount of training, control of assistants, right of termination, realization of profit or loss and control over their discharge from employment.<sup>110</sup>

When applying the IRS's three factor test to the fighters under the UFC, there are indicators that go towards labeling fighters as employee and as IC equally. The behavioral control portion of the IRS test really could go either way, in favor of viewing the fighters as employees or IC.<sup>111</sup> The fact that the UFC has the right to control what the worker does, such as dictating their clothing/apparel/uniform restrictions and strictly limiting sponsorship options during fight week when they are getting the most promotional time points towards the fighters being

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

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

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

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

<sup>106</sup> *Id.*

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

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

<sup>109</sup> *Exhibit 2: IRS 20-Factor Test*, NYS SOCIETY OF CPAS, <https://www.nysscpa.org/cpaj-images/CPA.2019.89.1.032.t002.jpg>.

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

<sup>111</sup> Frank Messina, *Employee Versus Independent Contractor*, THE CPA JOURNAL (Feb. 11, 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>.

classified as employees.<sup>112</sup> However, the fighter has complete control over how to run their camp, prepare for the fight or how to actually fight the bout, pointing towards the fighter being an IC.<sup>113</sup> When applying the financial control portion of the IRS test, the treatment of the fighters makes them look much closer to employees.<sup>114</sup> The fighters are unable to work for multiple employers when under contract with the UFC and the UFC tends to cover the fighter's travel and bookings, which both point towards the fighters being classified as employees.<sup>115</sup> The restrictions on the fighters ability to choose the fighting services they can offer outside of the UFC promotion are restricted by their contract, essentially allowing the UFC to treat them as employees.<sup>116</sup> Finally, the relationship test seems to go towards the fighters being properly classified as ICs, as they work on the basis of written contracts that are for a set amount of time or bouts and there are no existing benefits packages, such as vacation or retirement points.<sup>117</sup> While there is an existing health insurance package for fighters working within the UFC, the majority of the relationship factors go towards the fighters being classified as ICs.<sup>118</sup> Overall, the application of the IRS test only shows how murky the classifications of the fighters are because of their treatment by the UFC, their apparent rights and existing benefits (or lack thereof depending how it is viewed).

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<sup>112</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, FORBES (May 16, 2016), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#360435094a93>.

<sup>113</sup> Frank Messina, *Employee Versus Independent Contractor*, THE CPA JOURNAL (Feb. 11, 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>.

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

<sup>115</sup> Matt De La Rosa, *Historic MMA Rivalries, Part Four: UFC vs. Fighters*, BLEACHER REPORT (Feb. 23, 2009), <https://bleacherreport.com/articles/128714-historic-mma-rivalries-part-4-ufc-vs-fighters>.

<sup>116</sup> Frank Messina, *Employee Versus Independent Contractor*, THE CPA JOURNAL (Feb. 11, 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>.

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

<sup>118</sup> Ahiza Garcia, *UFC Fighters get in the ring, but they're not employees*, CNN MONEY (Nov. 19, 2016), <https://money.cnn.com/2016/11/19/news/ufc-fighters-employees/index.html>.



**a. Department of Labor/Fair Labor Standards Act Test for Employee/Independent Contractor Status**

The Department of Labor (DOL) was created to help foster and promote the welfare of workers and potential workers through a variety of methods to ensure the workers and potential worker's rights are being protected as best as possible.<sup>119</sup> The DOL's test for employment comes from the Fair Labor Standards Act, which outlined possible factors for determining whether or not a worker is an employee or IC.<sup>120</sup> The DOL's factors they consider are: 1. The extent to which services rendered are an integral part of the principal's business; 2. The permanency of the relationship; 3. The amount of the worker's investment in facilities and equipment; 4. The nature and degree of control by the principal; 5. The worker's opportunities for profit and loss; 6. The amount of initiative, judgment or foresight in open market competition with others require for the success of the claimed IC and the amount of skill required to complete the job.<sup>121</sup>

When applying these factors to the fighters within the UFC and their fighters, DOL factors 1, 4, 5 and 6 all point towards the fighters being labeled as employees.<sup>122</sup> Factor 1 considers whether the worker's input into the organization is necessary for the principal's business, and within the UFC, the fighters are quite literally the stars of the show for the UFC.<sup>123</sup> Factors 4 and 5 examine the amount of control the UFC exerts over the workers and the worker's opportunities for profits and losses.<sup>124</sup> Considering the totality of the circumstances, the fighters' freedoms of movement (the fighters' whereabouts must be accessible to the USADA at all times),<sup>125</sup> the fighters' freedoms of sponsorship (the fighters must use/sponsor/wear Reebok uniforms during any fight week

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<sup>119</sup> *Frequently Asked Questions*, UNITED STATES DEPARTMENT OF LABOR, <https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=478>.

<sup>120</sup> *Fair Labor Standards Act Advisor*, E-laws Employment Laws Assistance For Workers and Small Businesses, <https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp>.

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

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

<sup>123</sup> *Id.* (Without the fighters, there would be literally no events).

<sup>124</sup> *Id.*

<sup>125</sup> *Whereabouts | UFC Anti-Doping Program*. UFC ANTI-DOPING PROGRAM (Sept. 15, 2019), <https://ufc.usada.org/testing/whereabouts/>.

promotions and are not allowed any other sponsors inside the ring),<sup>126</sup> and the fighters' abilities to fight outside of the promotion (fighters are locked into strictly UFC contracts and are unable to fight additional fights/with other promotion companies during that time)<sup>127</sup> all point towards the fighters being classified as employees.<sup>128</sup> Factor 6 focuses on the worker's involvement with the open market and the skill required to complete the jobs; it also focuses on whether or not someone with little training could complete the worker's job.<sup>129</sup> Once again, considering that the workers do not have the freedom to advertise their individual brands as they see fit during fight weeks or promotions, as well as the fact that some random person off the street could not walk into the Octagon and fight, the fighters might maintain an employee classification rather than that of an IC.<sup>130</sup>

Factors 2 and 3 are the only two of the DOL's considerations that make the fighters seem as though they are ICs.<sup>131</sup> UFC fighters are with the organization on a contract-to-contract basis making their permanency very dynamic, meaning factor 2 causes them to look like ICs rather than employees.<sup>132</sup> Factor 3 focuses on the worker's investment into the facilities and equipment, which slants heavily towards the fighters being classified as IC, as they are not reimbursed for expenditures of their

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<sup>126</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, FORBES (May 16, 2016), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#360435094a93>.

<sup>127</sup> Matt De La Rosa, *Historic MMA Rivalries, Part Four: UFC vs. Fighters*, BLEACHER REPORT (Feb. 23, 2009), <https://bleacherreport.com/articles/128714-historic-mma-rivalries-part-4-ufc-vs-fighters>.

<sup>128</sup> *Fair Labor Standards Act Advisor*, E-laws Employment Laws Assistance For Workers and Small Businesses, <https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp>.

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

<sup>130</sup> Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, FORBES (May 16, 2016), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#360435094a93>.

<sup>131</sup> Ben Fowlkes, *Are UFC fighters employees or contractors? Why the distinction matters – and could mean millions*. MMAJUNKIE (Aug. 12, 2017), <https://mmajunkie.com/2017/08/ufc-fighters-employees-or-independent-contractors>.

<sup>132</sup> *Fair Labor Standards Act Advisor*, E-laws Employment Laws Assistance For Workers and Small Businesses, <https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp>.

training camps or for the uses of supplies.<sup>133</sup> Furthermore, the UFC handles the entirety of the event and distribution costs over the event.<sup>134</sup> Overall, the DOL's factors heavily point towards the UFC fighters being considered employees rather than ICs; therefore, if there were cases brought alleging violations under the DOL, the fighters would have a greater chance of being classified as employees.

### **b. Common Law Test for Employee/Independent Contractor Status**

Common law tests for employee or IC can vary from state to state and from case to case, but consistently the courts consider how much supervisory control the employer has over the worker, specifically how the worker completes the job.<sup>135</sup> When the courts are judging the employer's ability to control how the worker does their job, they will use a variety of factors in their determination.<sup>136</sup> The common law test typically takes these additional factors from the Restatement Second of Agency, which, "...include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee".<sup>137</sup>

### **c. Common Law Test for Employee/Independent Contractor Status**

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

<sup>134</sup> Paul Gift, *12 Things Learned About MMA Business From Executives Under Oath*, FORBES (Aug. 3, 2018), <https://www.forbes.com/sites/paulgift/2018/08/03/twelve-things-learned-business-ufc-summary-judgment-depositions-mma-news/#651bec786240>.

<sup>135</sup> *S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.*, 769 P.2d 399, 403-404 (Cal. 1989).

<sup>136</sup> *Id.* at 404.

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

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The Court emphasized that despite potential attempts to limit the test for employee or IC to just the "control" over the employee and process, the additional considerations were the only way to view the situation in the totality of the circumstances when applying the common law test.<sup>142</sup> In *Borello*, the landowner growers claimed that the migrant harvesters were "sharefarmers", who were contracted for a finished job, applied their skill/judgment, controlled their own work and were

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<sup>138</sup> *S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.*, 769 P.2d 399, 403-404 (Cal. 1989).

<sup>139</sup> *Id.* at 404.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting *Germann v. Workers' Comp. Appeals Bd.*, 123 Cal. App.3d 776, 788 (1981)).

<sup>142</sup> *Id.* at 405.

compensated only for results.<sup>143</sup> The court stated clearly that the growers maintained complete control over the production/sale of the product, that the sharefarmers added no capital investment, performed tasks that did not require special skills, were regularly a part of the grower's business and dependent for the subsistence on whatever farm work they were able to obtain, making them a class of workers that the Worker's Compensation Act was meant to apply to.<sup>144</sup> The landowner grower's classifying the sharefarmers as ICs were irrelevant because functionally the workers were employees.<sup>145</sup>

When comparing the *Borello* analysis to the fighter's situation, there is some insight into how the courts could decide an employee or IC question based on the common law. The growers in *Borello* operationally controlled the land and crop choices and the growers decided what product to put out to the buyers.<sup>146</sup> The UFC maintains control over the entire fight setup process, including who each fighter will be fighting, what stakes the fight carries (championship or not), regardless of how the fighters sit within their rankings.<sup>147</sup> The common law additional factors applied with the UFC's control over the entire fight making process and product shows exactly why the fighters are beginning to wonder why they are not considered employees rather than ICs.<sup>148</sup> Oftentimes UFC favorites or old fan favorites who have taken a step back in the sport are given preferential treatment upon their return, despite what they may actually be ranked as, further showing the UFC has complete control over this key process, making the fighters appear to be employees.<sup>149</sup> The UFC even provides insurance for its fighters, treating the fighters much more like employees than that of ICs, who are responsible for running

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<sup>143</sup> *Id.* at 407.

<sup>144</sup> *Id.* at 407, 409.

<sup>145</sup> *Id.* at 408, 409.

<sup>146</sup> *Id.* at 408.

<sup>147</sup> John Stargaryen, *Why Ranking Fighters Hurts the UFC*, MMASUCKA (Feb. 8, 2019), <https://mmasucka.com/2019/02/08/ufc-rankings-hurts-fighters/>; (unlike boxing, MMA rankings are entirely controlled by votes of the MMA media rather than an independent body and are essentially ranked by their most recent performances, another potential problem that has led to outcry from the fighting community due to some fighters jumping rankings time and again).

<sup>148</sup> Ben Fowlkes, *Are UFC Fighters Employees or Contractors? Why the distinction matters – and could mean millions*, MMAJUNKIE, (Aug. 12, 2017, 09:00 AM), <https://mmajunkie.com/2017/08/ufc-fighters-employees-or-independent-contractors>.

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

their business and the costs that come along with running that business.<sup>150</sup> If there were a court applying the basic tenants of the common law test, it would likely result in the fighters being deemed employees of the UFC, rather than ICs.

#### d. Executive Branch's Impact on Test Choices

Unlike the IRS, DOL and common law employee/IC tests, which all come from legal or legislative precedence, agencies that are within the control of the Executive Branch are bound to change with every changing of the President. The National Labor Relations Board (NLRB) was created by the National Labor Relations Act (NLRA) of 1953.<sup>151</sup> The NLRA was created “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”<sup>152</sup> The NLRB is an independent federal agency whose purpose is to safeguard rights to organization and prevent unfair labor practices through the appointees of the Executive branch.<sup>153</sup> They do so by deciding cases, enforcing orders, facilitating settlements and investigating charges against employers.<sup>154</sup>

In 2014, the NLRB found that FedEx drivers were employees, despite being classified as independent contractors through their agreement with FedEx.<sup>155</sup> The board used similar factors found in the common law test from the Restatement (Second) of Agency, but placed special emphasis on the actual entrepreneurial opportunity that is provided to the worker in question that arose from a court cases decided in the D.C Court of Appeals.<sup>156</sup> In layman's terms, it would depend on whether or not the worker had control over how they get the job done and if they could hire additional help to complete the tasks that were assigned

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<sup>150</sup> Briam Hemminger, *Hurts so good: New details emerge about the UFC Health insurance plan*, MMAMANIA, (May 9, 2011 07:21 PM), <https://www.mmamania.com/2011/5/9/2162589/hurts-so-good-new-details-emerge-about-the-ufc-health-insurance-plan>.

<sup>151</sup> National Labor Relations Board: National Labor Relations Act (2019). <https://www.nlr.gov/how-we-work/national-labor-relations-act>.

<sup>152</sup> *Id.*

<sup>153</sup> National Labor Relations Board, *supra*, note 148 <https://www.nlr.gov/about-nlr/what-we-do>.

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

<sup>155</sup> 361 NLRB at 610.

<sup>156</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495–97 (D.C. Cir. 2009).

to them.<sup>157</sup> The NLRB ended up ruling that because of the amount of control that FedEx maintained over the ICs (such as their inability to negotiate over contract terms or extensions), they were actually supposed to be labeled and treated as employees.<sup>158</sup> This change in classification would have entitled the workers to all of the protections and benefits that would have followed that title of employee.

This NLRB decision was reversed in January of 2019 when franchisees of a SuperShuttle taxi company were determined to be ICs rather than employees.<sup>159</sup> This board also used and applied the common law test from the Restatement (Second) of Agency, but came to a different result.<sup>160</sup> The NLRB in the SuperShuttle case reversed the 2009 FedEx ruling. It stated that the previous board's refinement of the common law test was skewed for "implicit policy-based reasons..." even going so far as to state that the FedEx board's decision was based on "a classic straw-man analysis..." of the D.C. Circuit Court's description of entrepreneurial opportunity.<sup>161</sup>

The key change between 2014 and 2019 was the shift within the Executive branch's policies with the changeover of the 2016 election.<sup>162</sup> President Trump's appointees to the NLRB overturned and shifted Obama-era labor rulings quickly after assuming control of the agency and vowed to continue to do so in an attempt to strengthen the employer's powers and choices.<sup>163</sup> The Executive change specifically focused on reducing Obama-era changes that forced employers to bargain more with their workers if they were exercising "indirect control" over working conditions or essentially had direct control over the worker's choices.<sup>164</sup> President Trump's new general counsel appointee sent a memo to the

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<sup>157</sup> *Id.* at 497–98 (D.C. Cir. 2009) (the court specifies two distinct ways they have ruled when determining this, showing that the key ways to determine entrepreneurial opportunity revolves around the control the employer exercised over the workers).

<sup>158</sup> 361 N.L.R.B., at 621–25 (2014).

<sup>159</sup> *NLRB Returns to Long-Standing Independent-Contractor Standard*, NLRB.GOV (Jan. 25, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-returns-long-standing-independent-contractor-standard>.

<sup>160</sup> SuperShuttle DFW, Inv., 367 N.L.R.B. 1 (2019).

<sup>161</sup> 367 N.L.R.B., at 7, 8 (quoting FedEx Home Delivery, 361 N.L.R.B. at 629).

<sup>162</sup> Mark Joseph Stern, *Donald Trump, Union Buster*, SLATE (Dec. 19, 2017 1:35 PM), <https://slate.com/news-and-politics/2017/12/donald-trumps-union-busting-appointees-just-incinerated-obamas-labor-legacy.html>.

<sup>163</sup> *Id.* (the agency actually managed to erase years-old decisions before the end of 2017).

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

regional officers asking them “to flag disputes that involved cases handed down ‘over the last eight years that overruled precedent and involved one or more dissents.’”<sup>165</sup> This memo perfectly illustrates why employees or ICs must be clearly and distinctly defined within the confines of the law and their status easily determined. If they are not, a simple shift in the presidency could threaten many workers statuses.

## V. Contractual Bargaining Status/Rights of Fighters

One of the biggest potential indicators of whether or not the fighters are considered employees or ICs, is the right of the employer to control the actions/methods of the employee as they work for the employer.<sup>166</sup> The employer’s right to do so will typically stem from the contract or agreement they have with the worker, and when it comes to the UFC, they keep those contracts very close to the chest.<sup>167</sup> Dana White has gone on record stating, “[w]e [the UFC] don’t give out numbers...[w]e don’t say how much fighters get paid or what the company is making. It’s something that we don’t do and it drives people crazy.”<sup>168</sup> The UFC President’s statement may come off as coy or playful, but it also carries heavy business ramifications for both the UFC and the fighters. The UFC is able to maintain a superior bargaining position by keeping numbers out of any contract negotiations with the fighters because there is nothing for the fighter or their representation to compare it to.<sup>169</sup> However, former lightweight contender Eddie Alvarez’s contract became public knowledge when the UFC and Bellator were competing for the fighter’s business between their promotions.<sup>170</sup> To date, this is the only UFC contract that has been seen by the public,

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<sup>165</sup> *Id.*

<sup>166</sup> *Borello*, 769 P.2d at 407; Frank Messina et al., *Employee Versus Independent Contractor*, THE CPA JOURNAL (January 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>; elaws, *Fair Labor Standards Act Advisor*, U.S. DEPARTMENT OF LABOR, <https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp> (last visited Sep. 15, 2019).

<sup>167</sup> Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REPORT (May 14, 2013), <https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide0>.

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

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

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



and it caused former law professor and data scientist Zev Eigen to claim the UFC contract is the worst he had ever seen in the sports and entertainment field.<sup>171</sup> While many aspects of the UFC's standard contract are seen as boilerplate, there are some key parts of the them that are wildly out of the ordinary at the fighter's expense.<sup>172</sup>

#### **a. Issues with the Standard UFC Contract**

Jack Donaghy from NBC's show 30 Rock is known to be a fierce negotiator, even claiming, "I negotiate for a living, and I never lose," but even Jack Donaghy would struggle to negotiate under these circumstances.<sup>169A</sup> When there are sports contracts that could be seen as illegal or unfair, the courts will often "not permit equitable enforcement if the terms of the contract are too harsh and one-sided."<sup>173</sup> Professor Champion's sentiment of a court's typical ruling comes from a New York Southern District case, *Connecticut Prof. Sports Corp. v. Heyman*, in which a basketball league was attempting to get an injunction forcing a player to stay with their league for another year.<sup>174</sup> The court ruled that forcing the player to stay with the organization longer than that player wanted to be there was not an option the court would consider—though payment for breach of contract was.<sup>175</sup>

#### **b. The Unconscionables (a.k.a. the Term, Right to Match and Termination Articles)**

This exact same level of unconscionability that was the basis of *Heyman* is in the UFC standard contract articles that cover the term length, the right to match and the termination of the potential fighter (as

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<sup>171</sup> *Id.* (the former Northwestern University labor law professor and current data scientist Zev Eigen called the UFC contract the worst he's seen in the sports or entertainment fields, specifying that, "There's nothing that sets a minimum or basic standard below which the company can't go").

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

<sup>169A</sup> "It's Never Too Late for Now" 30 Rock, Season 5, Episode 15 NBC, 2011

<sup>173</sup> WALTER T. CHAMPION, JR., *Sports Law in a Nutshell* 19 (West Academic Publishing, 5th ed. 2017) (citing *Connecticut Prof. Sports Corp. v. Heyman*, 276 F. Supp. 618 (S.D.N.Y. 1967)).

<sup>174</sup> *Connecticut Prof. Sports Corp. v. Heyman*, 276 F. Supp. 618, 618–19 (S.D.N.Y. 1967).

<sup>175</sup> *Id.* at 621.

shown from the Eddie Alvarez contract that was discussed previously).<sup>176</sup> The UFC's Term Article contains a "Champions Clause" that automatically extends the contract for either one year or three UFC fights if the fighter becomes the champion, whether or not the fighter wants the extension.<sup>177</sup> The UFC's Right to Match Article states that the UFC has the right to match any offers for a full year following the end of the original contract.<sup>178</sup> This article also states that if there's any changes to the fighter's new deal offer, the UFC has a right to respond with a matching offer within that one-year period; meaning if the UFC wants to keep that fighter, they will always have a leg up in the bargaining against other parties.<sup>179</sup> Finally, the UFC's Termination Article is entirely one-sided and potentially damaging to any fighter.<sup>180</sup> The UFC retains the right to terminate any fighter's contract for breaching any of the previously listed terms within the contract, but also if the fighter "...is not declared the winner of any mixed martial arts bout...".<sup>181</sup> The UFC claims that "...it's the exception rather than the rule that we [the UFC] get rid of fighters when they lose", but the fact remains that the UFC holds this unconscionable, unenforceable power over any fighter who they have a contract with, though it's unlikely the fighters know it would be unenforceable.<sup>182</sup> Usually, there would be people in the fighter's corner like a manager or agent to tell the fighter what is really within the contract and advise the fighter, but recently, they are actively being pushed out of and shunned from the UFC, further strengthening the organizations bargaining position and weakening the fighters.<sup>183</sup> Before

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<sup>176</sup> *Eddie Alvarez Contract*, Combat Sports L., <https://canadianmmalawblog.files.wordpress.com/2014/04/eddie-alvarez-contract.pdf> (last updated Nov. 14, 2013).

<sup>177</sup> JONATHAN SNOWDEN, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REP. (May 14, 2013), <https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide4>.

<sup>178</sup> *Id.*

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

<sup>180</sup> *Id.*

<sup>181</sup> <https://canadianmmalawblog.files.wordpress.com/2014/04/eddie-alvarez-contract.pdf>; (specifically on page 13, Article X, subsections a., b. and d.).

<sup>182</sup> <https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide4>.

<sup>183</sup> See JESSE HOLLAND, *Mike Kogan No Longer Repping UFC Fighters*, SB NATION: MMA MANIA (Dec. 8, 2014), <https://www.mmamania.com/2014/12/8/7353963/mike-kogan-no-longer-repping-ufc-fighters-takes-promotion-task-phasing-out-managers->

these stringent and controlling deals, the managers would be able to negotiate contractual pieces or sponsorship money, but this entire lane of professional communication that exists for every other professional athlete has been shut down by the UFC.<sup>184</sup> No matter how this is looked at, the fighters are in an untenable bargaining position because of these highly questionable articles in the UFC contract and the UFC's highly publicized stance towards their fighters having/maintaining professional relationships with managers.

**c. The Almost Unconscionables (a.k.a. the Promotional Rights, Ancillary Rights, Commercial Identification and Confidentiality Articles)**

While the previously discussed articles from the UFC contract are unconscionable on their face and likely unenforceable, the following rights are nearly as bad, though with small caveats. The Promotion Rights Article gives the UFC the right to use the likeness and overall persona of the fighter for the promotion for the fight, as well as forever.<sup>185</sup> The UFC retains the right to control any sort of association or individualizing feature of the fighter for any sort of media (quite literally any media), promotion or product that the UFC creates and wants to use that fighter to promote.<sup>186</sup> This is a far stretch from the norm, because typically for many athletes after they have retired from their respective sport, they use

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mma; (UFC Fighter Nate Diaz wanted a new contract, which prompted UFC President Dana White to tweet to Diaz's former manager Mike Kogan, "...hey Kogan u scumbag POS if Nate didn't listen to ur dumb ass he wouldn't be in this position. Quit fuckin up kids careers dirtbag", which seems to be the UFC's stance towards the question of renegotiation of contracts).

<sup>184</sup> See also JESSE HOLLAND, *Nate Diaz UFC Update*, SB NATION: MMA MANIA (Aug. 3, 2014), <https://www.mmamania.com/2014/8/3/5964555/nate-diaz-ufc-update-manager-mike-kogan-says-right-now-nobody-taking-anybody-mma>; (former UFC manager Mike Kogan stated during a call into a radio show, "This thing [UFC Fighter Nate Diaz requesting a contract renegotiation] wasn't supposed to be played out in the media. I mean, we tried to have a private conversation a long time ago, and instead of having it, [the] UFC started trashing Nate to the media, saying he's turning down fights, and he's afraid, and this that and whatever, to which we responded. Now it's like Jerry Springer").

<sup>185</sup> Snowden, *supra* note 174.

<sup>186</sup> *Id.*

their likeness and persona to make money after their careers.<sup>187</sup> This is worsened when considering that under the Commercial Identification Article, the fighters were limited on which sponsors they could use to increase their brand.<sup>188</sup> Since this contract was publicly released, the Reebok sponsorship deal has been signed with the UFC, restricting the fighter's sponsorship choices and ability to control their own money flow even further.<sup>189</sup> This combination of sponsorship restriction coupled with the fact that the fighters do not have the right to use their own likeness for promotions after their contractual commitment is completed, and it is clear why so many fighters are claiming their salary is comparable to the average school teacher's.<sup>190</sup> The final contract article that is an issue is the Confidentiality Article, which keeps the fighter from being able to speak to anyone outside of his agents and professional advisers about the contract specifics.<sup>191</sup> This provision is against the NLRB's stance on employees being able to speak about their compensation, as well as a 2014 Executive Order from then-President Obama.<sup>192</sup> The order specified the only personnel who cannot discuss pay are individuals involved in a company's payroll or workers inside municipal governments and religious schools.<sup>193</sup> No matter how the Confidentiality Article is looked at or viewed by the ownership, it is highly unlikely to be enforceable.<sup>194</sup> Even the pseudo-unconscionable contract standards

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<sup>187</sup> See *Id* (specifically former law professor and data scientist Zev Eigen states, "...secondary markets are a huge driver of success in sports... That secondary market is entirely reserved for the owners in this contract").

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

<sup>189</sup> Andrew Brennan, *Why is the UFC-Reebok Deal Exploiting UFC Fighters & Condoning Pay Gaps?*, FORBES (May 16, 2016, 01:22 PM), <https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#7d9df7e24a93>.

<sup>190</sup> Scott Harris, *For Love, Not Money: How Low Fighter Pay Is Undermining MMA*, BLEACHER REP. (Jan. 11, 2017), <https://bleacherreport.com/articles/2685605-for-love-not-money-how-low-fighter-pay-is-undermining-mma>.

<sup>191</sup> Eddie Alvarez Contract, *supra* note 173, at 20.

<sup>192</sup> *Can Employees Discuss Pay & Salaries*, GOVDOCS (Apr. 23, 2014), <https://www.govdocs.com/can-employees-discuss-pay-salaries/>.

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

<sup>194</sup> Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REPORT (May 14, 2013), <https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide18>; (former owner Lorenzo Fertitta was quoted saying, "I've never had a fighter come to me and say, 'Would you please tell everybody how much money I make?', to which UFC President Dana White followed up with, "Or, 'please let me out

paint a clear picture of the organization being slanted against the fighters from the moment they put their pen to the paper on the contract. The next real question is: what can be done about it?

## VI. Fighting Back (Or How the Fighters Could Potentially Change Their Positions Forever)

There are a few choices for fighters to try and correct this separation of power. The easiest way to separate them would be to look at them from three possible angles of attack: a legislative approach, a lawsuit/classification challenge and forming an IC organization.

### a. Trusting Congress to Get Something Done (a.k.a. The Legislative Approach)

Back in 2000, Congress signed a law aiming to protect the rights of boxers and to help fight against the corruption that had run throughout the sport for years.<sup>195</sup> This bill was the Muhammad Ali Boxing Reform Act (Ali Act) which provided a number of new ways to protect fighters, including requiring promotional companies to disclose their revenues from fights, having rankings organized by third-parties and requiring provisions for how long fighters were allowed to be contracted.<sup>196</sup> In 2016, former MMA fighter and Congressman Markwayne Mullin proposed the Muhammad Ali Expansion Act, which would amend the Reform Act to cover MMA fighters as well.<sup>197</sup> Essentially, the expansion on the original Ali Act would specify that it applies to fighters, not just boxers.<sup>198</sup> While this seems like a small shift in a small act from almost two decades ago, it would dramatically shift the MMA landscape moving

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of this deal where I can't tell the press how much money I make.' You're never going to hear that..." and while this may conform with the typical norms of society to not discuss pay, it is still illegal).

<sup>195</sup> Jay Cranford, *Presidential Candidate Andrew Yang Supports Expanding Ali Act to MMA*, THE BODY LOCK (Mar. 11, 2019), <https://thebodylockmma.com/ufc/presidential-candidate-andrew-yang-supports-expanding-ali-act-to-mma/>.

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

<sup>197</sup> N/A, *The Muhammad Ali Expansion Act in MMA: News, Interviews, and Analysis*, SB NATION (July 2, 2015), <https://www.bloodyelbow.com/2017/11/1/16593256/muhammad-ali-expansion-act-mma-ufc-boxing-law-bill-politics-us-reform-mullin-contracts-money-news>.

<sup>198</sup> <https://www.congress.gov/bill/115th-congress/house-bill/44/text>.

forward.<sup>199</sup> The UFC would no longer be able to pick and choose who fights their champions, as they would have to be picked by an independent third-party<sup>200</sup>, and the previously mentioned unconscionable clauses in the standard UFC contract would all become null and void (specifically the Term and Right to Match articles).<sup>201</sup> It would also help correct the bargaining position the boxers find themselves in when discussing fight payouts, because they would have to be disclosed.<sup>202</sup> The main downside of going this route is that it is open to roadblocks, as it allows for the promotion companies to fight back through lobbyists.<sup>203</sup> From 2016 to 2017, the UFC disclosed up to \$630,000 spent to lobby against the act, while their longtime partner Viacom spent over \$1,000,000 lobbying against the Act by May of 2017.<sup>204</sup> Despite this outlook, the Act is still garnering some positive endorsements in 2019, as Democratic Nominee Andrew Yang made it a talking point during his campaigning.<sup>205</sup> Mr. Yang called for the Ali Act to be expanded to include MMA and allow the fighters to unionize.<sup>206</sup> While this is a positive step in the direction of protecting the fighters, it is not the only option available to them.

### **b. David vs. Goliath (a.k.a .The Lawsuit & Classification Challenge Approach)**

The fighters could also push to be classified as employees and form a union. This is what fighter Leslie Smith was doing way back in the opening paragraph.<sup>207</sup> Ms. Smith filed unfair labor practices claims

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<sup>199</sup> Brett Okamoto, *Ali Act Amendment Could Expand Federal Law's Coverage to MMA*, ESPN (May 18, 2016), [https://www.espn.com/mma/story/\\_/id/15589773/bill-aims-expand-muhammad-ali-boxing-reform-act-mma](https://www.espn.com/mma/story/_/id/15589773/bill-aims-expand-muhammad-ali-boxing-reform-act-mma).

<sup>200</sup> *Id.*

<sup>201</sup> Snowden, *supra* note 191.

<sup>202</sup> Cranford, *supra* note 192.

<sup>203</sup> Tim Bissell, *UFC Adds and Estimated \$210,000 to Ali Act Lobbying in 2017 Vidacom Joins*, SB NATION (Nov. 15, 2017), <https://www.bloodyelbow.com/2017/11/15/16655926/ufc-muhammad-ali-act-bellator-viacom-lobbying-2017-mma-politics-mullin-congress-government-news>.

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

<sup>205</sup> Cranford, *supra* note 192. (specifically, Mr. Yang stated in a tweet, "MMA fighters in the UFC receive only 10-15% of revenues vs. ~50% in other sports. I would apply the Ali Act to MMA and allow fighters to unionize...").

<sup>206</sup> *Id.*

<sup>207</sup> Wachter, *supra* note 1.

in 2018 with the NLRB following her dismissal from the UFC.<sup>208</sup> Ms. Smith's claims specifically asked for a determination of all fighters being seen as employees and that she was not resigned by the UFC as retaliation for engaging in union activities.<sup>209</sup> In October of 2018, the NLRB ruled that she was not unfairly terminated or resigned but chose not to address the claims of requesting classification as an employee.<sup>210</sup> While this is a personal loss for Ms. Smith, it possibly leaves the door open for the NLRB determining that UFC fighters, are in fact, employees.<sup>211</sup> This would still be a long road for the fighters to go through, because of the frequent flip-flopping of heads of independent agencies like the NLRB.<sup>212</sup> And even if the fighters were to be classified as employees by the NLRB, there are still a number of other tests that they could be challenged with (such as the IRS test<sup>213</sup> or the DOL test<sup>214</sup>) in court and potentially lose. Despite these odds, there has been attempts to get fighters classified as a class of people in an antitrust suit against the UFC by some of its former fighters, although last reports indicate the fighter's position was not looking good.<sup>215</sup> While it looks like these odds are severely against the fighters, it still may be worth challenging in the right court of law, because even California "sharefarmers" in the *Borello* case were able to show that they were employees of the landowners.<sup>216</sup> This option always remains open to the fighters (despite the UFC trying to contract that right away for nothing<sup>217</sup>), but this still may not be their best option available.

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<sup>208</sup> Liz Mullen, *NLRB Dismisses Charge by MMA Fighter Leslie Smith*, SPORTS BUSINESS JOURNAL (Oct. 15, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/10/15/Labor-and-Agents/Labor-and-Agents.aspx>.

<sup>209</sup> *Id.*

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

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

<sup>212</sup> Stern, *supra* note 159.

<sup>213</sup> Messina et al., *supra* note 163.

<sup>214</sup> elaws, *supra* note 120.

<sup>215</sup> See Paul Gift, *UFC Files for Summary Judgment in Class-Action Antitrust Lawsuit*, FORBES: SPORTSMONEY (Jul. 31, 2018, 5:36 AM) <https://www.forbes.com/sites/paulgift/2018/07/31/ufc-files-summary-judgment-class-action-antitrust-lawsuit-mma-news/#5d7caeb15015>.

<sup>216</sup> *Borello* 769 P.2d at 407, 408.

<sup>217</sup> See Snowden, *supra* note 164 (specifically Article X, Termination/Remedies, subsection 10.5).

### c. Picking the Right Fight (a.k.a. The Guild Approach)

The fighters have previously attempted to unionize in four other occasions, three of them unsuccessfully failing with the fourth currently being attempted now.<sup>218</sup> The current, ongoing attempt is called Project Spearhead and is being run by Leslie Smith as the groups interim President.<sup>219</sup> Their current plan is to attempt to fight their classification as an independent contractor, which would potentially fix many of the issues stemming from the unfair balance of power between the fighters and the UFC, as well as provide the fighters a seat at the table of bargaining.<sup>220</sup> However, if the fighters were to simply form a guild without challenging their classification as ICs, they could still have a voice and organization to collectively bargain with between them and the UFC.<sup>221</sup> Guilds are simply collective bargaining organizations that represent groups of independent contractors.<sup>222</sup> Former law professor and data scientist Zev Eigen aptly compared the two groups when dissecting Mr. Alvarez's contract, cleanly pointing out that all the guild really does for actors, no matter how famous or not, is guarantee that they are paid a fair minimum amount.<sup>223</sup> Being an MMA fighter is a specialized skill very similar to those of the entertainment world that also work within guilds, such as the Writer's Guild, Directors Guild and

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<sup>218</sup> Mullen, *supra* note 5.

<sup>219</sup> *Id.* (all the staff positions are interim because once they get the union running, they want the fighters to be able to vote on who they'd want in those key staff roles within the organization).

<sup>220</sup> *Id.*

<sup>221</sup> Christopher Schiller, *Legally Speaking, It Depends - Guild or Union, Part I*, WRITERS DIGEST: The Script (Aug. 19, 2014), <https://www.scriptmag.com/features/legally-speaking-guild-or-union>.

<sup>222</sup> *Id.*

<sup>223</sup> Snowden, *supra* note 164; (specifically the quote is: "Let's compare it to the Screen Actors Guild. Let's say you're a member of SAG and you're Tom Hanks. You don't really care about the minimum amounts the studio has to pay a day player. It's very different for Tom Hanks and a guy who's just going to show up to be in the background of Forrest Gump. Tom Hanks is going to get much more... So there's two negotiations that take place—negotiations between the movie studios and the Screen Actors Guild that says no one gets paid below 'X,' you have certain rights if your obscure character blows up into something big, and so on. There's a second layer of negotiation between Tom Hanks and the studio. And that doesn't have anything to do with the union. SAG doesn't even show up to those negotiations. All that stuff happens above the minimums").



Screen Actors Guild.<sup>224</sup> Horse jockeys, another very specialized skill group of athletes, also operate through their guild as ICs and have successfully been able to bargain and negotiate with the owners since the 1940's.<sup>225</sup> The jockeys have successfully bargained for insurance in the 1940s, improved sanitary features in the 1950s, a savings plan in the 1960s, worker's compensation in the 1970s, improved track safety in the 1980s and improved personal safety equipment in the 1990s.<sup>226</sup> If the fighters were to focus their efforts on coming together as a guild rather than attempt to go over the multiple hurdles of changing their classification from IC to employee, they may be able to bargain for many more things together as a group, just as the jockeys have for over the last eighty years.<sup>227</sup> If the fighters streamline their arguments by going around the employee or IC issue would potentially give them access to a baseline level of pay that is reflected within all the other major sports standard players contracts.<sup>228</sup>

## VII. Where next?

While there are a variety of choices for the fighters to make, one thing is clear: the fighters must stick together. Whether it is as a union, a guild or simply people with one common goal in mind: to be treated fairly and ensure that they are able to bargain with any employer they so choose, the UFC or otherwise. Kobe Bryant said it best when he stated, "...a rising tide raises all boats...."<sup>229</sup> Now it is time for the fighters to turn the tide.

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<sup>224</sup> Schiller, *supra* note 218.

<sup>225</sup> JOCKEYS' GUILD, <https://www.jockeysguild.com/history> (last visited Sep. 15, 2019).

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

<sup>227</sup> <https://www.scriptmag.com/features/legally-speaking-guild-or-union>.

<sup>228</sup> Champion, *supra* note 170, at 7.

<sup>229</sup> Wachter, *supra* note 1.



## THE RIGHT WAY TO PAY INTERCOLLEGIATE STUDENT-ATHLETES: A LEGAL RISK ANALYSIS

By: Ian K. Schumaker\* and Leeann M. Lower-Hoppe\*\*

### Abstract

“How should student-athletes get paid?” This is the next big question in the intercollegiate sport industry. While the National Collegiate Athletic Association (NCAA) fights relentlessly to protect the amateurism of intercollegiate athletics, public pressure continues to mount for establishing a method of paying student-athletes beyond scholarships and educational expenses. There are two compensation methods frequently discussed by the media, fans and practitioners in the industry: 1) compensating student-athletes through the university, or 2) compensating student-athletes through their name, image and likeness (NIL).

Method I gives rise to legal issues pertaining to Title IX,<sup>1</sup> Fair Labor Standards Act,<sup>2</sup> worker’s compensation,<sup>3</sup> vicarious liability,<sup>4</sup> taxation issues,<sup>5</sup> and antitrust issues.<sup>6</sup> Title IX accommodation would obligate universities to provide equal pay and opportunities for both male and female student-athletes.<sup>7</sup> Further, the Fair Labor Standards Act would require institutions to comply with minimum wage and overtime pay standards.<sup>8</sup> Comparatively, workers’ compensation would force

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<sup>1</sup> 20 U.S.C. § 1681

<sup>2</sup> Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. § 201 et seq.)

<sup>3</sup> U.S. Department of Labor, *Workers’ Compensation*, available at <https://www.dol.gov/general/topic/disability/workerscompensation> (last visited July 28, 2019).

<sup>4</sup> John T. Wolohan, *Civil Actions – Us and Them* (Jan. 1, 2004), available at [https://educationalathletics.weebly.com/uploads/2/9/9/0/29907311/us\\_and\\_them.pdf](https://educationalathletics.weebly.com/uploads/2/9/9/0/29907311/us_and_them.pdf) (last visited July 28, 2019).

<sup>5</sup> 26 U.S.C. § 501

<sup>6</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (1994)

<sup>7</sup> 20 U.S.C. § 1681

<sup>8</sup> Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. § 201 et seq.)

universities to provide monetary awards to student-athletes who are injured, disabled or killed during work related to their employment (i.e., athletic participation).<sup>9</sup> If student-athletes were considered university employees, the theory of vicarious liability would hold universities accountable for the tortious actions of their student-athletes while in the scope of their work.<sup>10</sup> If the schools were to compensate student-athletes, the NCAA and athletics departments would potentially lose their tax-exempt status, which would result in further financial concerns in the industry. Finally, antitrust issues would likely prohibit the NCAA from price-fixing any student-athlete stipends unless a formal collective bargaining agreement with players was organized.<sup>11</sup>

Method II brings forth legal issues pertaining to the First Amendment,<sup>12</sup> intellectual property<sup>13</sup>, and the Fourteenth Amendment.<sup>14</sup> While athletics administrations have a history of regulating student-athletes' free speech, universities would need to re-evaluate regulatory guidelines pertaining to student-athletes' self-expression in advertisements and endorsements. Guidelines and/or restrictions must also be established for student-athletes' potential use of university trademarks in advertisements and endorsements. In light of amateur eligibility requirements, student-athletes' rights to participation may be at issue. Precedent has established that participation in athletics is a privilege;<sup>15</sup> however when student-athletes receive monetary benefits (e.g., scholarship), a property interest is formed. Therefore, if student-athletes are permitted to profit from their NIL, eligibility by-laws will need to be reformed.

The purpose of this paper is to analyze relevant constitutional, statutory, and case law, as well as NCAA regulations, pertaining to the issue of paying intercollegiate student-athletes. The paper concludes with a recommendation advising the NCAA to use Method II, which recommends the reformation of the amateurism and athletic eligibility

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<sup>9</sup> U.S. Department of Labor, *supra* note 3

<sup>10</sup> See Wolohan, *supra* note 4.

<sup>11</sup> See Sherman Antitrust Act, 15 U.S.C.A. § 1 (2004).

<sup>12</sup> U.S. CONST. amend. I.

<sup>13</sup> DOYCE J. COTTON & JOHN WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS (Kendall Hunt Pub. 7th ed. 2016).

<sup>14</sup> U.S. CONST. amend. XIV.

<sup>15</sup> *Parish v. Nat'l Collegiate Athletic Ass'n*, 361 F. Supp. 1220, 1225 (W.D. La. 1973).

rules found in Article 12,<sup>16</sup> education of member institutions regarding their role in student-athlete compensation for their NIL, and education of student-athletes on the use of their NIL and restrictions pertaining to trademarks and copyrights. This proposed model seeks to compensate student-athletes while protecting the legal interests of the NCAA, universities, and student-athlete body.

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<sup>16</sup> 2018-19 NCAA DIVISION I MANUAL ART XII (2018).

## Table of Contents

<i>Method I: Compensating Student-Athletes Through the University</i> ..	53
Title IX .....	55
Fair Labor Standards Act .....	56
Workers' Compensation .....	58
Vicarious Liability .....	60
Taxation Issues .....	62
Antitrust Issues.....	63
First Amendment .....	66
Intellectual Property .....	68
Fourteenth Amendment .....	70
<i>Final Recommendations</i> .....	71
Step 1 .....	72
Step 2 .....	73
Step 3 .....	74
<i>Conclusion</i> .....	76

## Introduction

Is it finally time to open Pandora's box? The topic of compensating student-athletes has been a polarizing issue for decades within intercollegiate athletics and has continuously been brought to the legal system. For years, universities and the National Collegiate Athletic Association (NCAA) fiercely protected the amateurism of intercollegiate sport. The NCAA has made proclamations that any benefits provided to students playing sports should be tethered to educational expenses and that the educational experience the NCAA provides to students pays dividends for a lifetime. These statements affirm the NCAA's steadfast position to uphold the educational and amateur characteristics of collegiate athletics.<sup>17</sup> Contrastingly, the court of public opinion generally argues that student-athletes do not earn their fair share of college sport revenue.<sup>18</sup>

Intercollegiate athletics has grown to be a multi-billion-dollar industry that largely withholds its wealth from student-athletes - the 'labor force' behind the industry. Some see this economic inequity as a civil rights issue, such as U.S. Senator Chris Murphy who points to major inequalities within collegiate athletics in need of reform, such as coaches' salaries and facility costs<sup>19</sup>

For example, among Power Five conference programs, 16 percent of all revenue is allocated towards compensating 4,400 coaches.<sup>20</sup> Comparatively, only 12 percent of revenue is designated for compensating the nearly 45,000 student-athletes via scholarships. In April of 2019, it was announced that Clemson Head Football Coach, Dabo Sweeney, had signed a 10-year contract extension that totaled \$93 million.<sup>21</sup> These sizeable coaching contracts make it hard to use financial

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<sup>17</sup> Berit Skirstad & Packianathan Chelladurai, *For 'Love' and Money: A Sport Club's Innovative Response to Multiple Logics*, 25 J. Sport Mgmt. 339 (2011).

<sup>18</sup> CHRIS MURPHY, MADNESS INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS – EXCEPT THE PLAYERS 12 (2019).

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

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

<sup>21</sup> Kevin B. Blackstone, *Dabo Swinney Opposes 'Professionalizing College Athletics. He Just Signed a \$93 Million Deal*, WASHINGTON POST, Apr. 29, 2019, <https://www.washingtonpost.com/sports/colleges/dabo-swinney-opposes-professionalizing-college-athletics-he-just-signed-a-93-million->

constraints as a justification for not paying student-athletes. In light of his own lucrative employment contract, Coach Sweeney advocated for amateurism, stating that, “as far as paying players, professionalizing college athletics, that’s where you lose me. I’ll go do something else, because there’s enough entitlement in this world as it is.”<sup>22</sup> As collegiate athletics continues to evolve into a commercial model, it becomes increasingly difficult for the NCAA, and those who financially benefit from the work of student-athletes, like universities, to defend amateurism when coaching contracts and athletic expenses continue to outpace student-athlete benefits.<sup>23</sup>

Along with lucrative coaching contracts, lavish facilities have become the norm within athletics departments across the nation, as programs are financing extravagant facilities to attract recruits.<sup>24</sup> Even when adjusted for inflation, between 2004 and 2014, Power Five conferences nearly doubled facilities spending.<sup>25</sup> At The Ohio State University (OSU) alone, the Department of Athletics fundraised over \$100 million through private support in order to develop and update facilities within a six-year span. Put simply, “if a budget is a reflection of an institution’s values, these programs simply believe that coaches and even edifices are far more valuable than the student-athletes who provide all the labor”.<sup>26</sup> Murphy is not alone in his opinion. Many student-athletes and fans feel that if universities are able to afford multi-million-dollar coaching contracts and new facilities, universities should also have the ability to pay their student-athletes.

However, it’s not just the universities that are profiting from the over \$11 billion collegiate sport industry.<sup>27</sup> The net profits go directly to

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deal/2019/04/29/353d576c-6a7e-11e9-be3a-33217240a539\_story.html?utm\_term=.293acf2c6276 (last visited July 28, 2019).

<sup>22</sup> Aaron Brenner, *Clemson's Darius Robinson Featured on Al Jazeera America Program About NCAA Reform*, WASHINGTON POST, June 19, 2014, [https://www.postandcourier.com/sports/clemson-s-darius-robinson-featured-on-al-jazeera-america-program/article\\_ec08ff1d-a0fd-5e6b-a4d7-1ba2d66d3184.html](https://www.postandcourier.com/sports/clemson-s-darius-robinson-featured-on-al-jazeera-america-program/article_ec08ff1d-a0fd-5e6b-a4d7-1ba2d66d3184.html) (last visited July 28, 2019).

<sup>23</sup> *Id.*

<sup>24</sup> Murphy, *supra* note 18.

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

<sup>26</sup> *Id.* at 8.

<sup>27</sup> Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 Case W. Res. L. Rev. 61 (2013).



the athletic conferences and the NCAA as well. During the 2017 fiscal year, the NCAA's revenue topped \$1 billion for the first time.<sup>28</sup> In the 2018 fiscal year, the Big Ten Conference recorded nearly \$759 million in revenue.<sup>29</sup> The commissioner of that conference was paid \$5.5 million in the 2017 calendar year thanks to his efforts in securing new TV agreements that are equally distributed amongst the member schools.<sup>30</sup> Yet student-athletes are continuously excluded from receiving any compensation from revenue generators that can often include their own name, image and likeness (NIL) (e.g., broadcasts and rebroadcasts of games, television commercials, photographs, books, replica jerseys, video games etc.)

This highlights a distinct ethical concern. "I do believe that the name, image, likeness for an individual is a fundamental right... and I don't believe that a student-athlete who accepts a grant-in-aid simply waives that right to his or her name, image and likeness" stated Oliver Luck, former NCAA Vice President for Regulatory Affairs.<sup>31</sup> Many student-athletes, especially those of prominence and fame, are being exploited. While their NIL is used for profit, they are severely limited from compensation. In fact, student-athletes may be the only category of students on a university campus who are bound by an outside organization - the NCAA - that controls their compensation and hours of work.<sup>32</sup>

Furthermore, collegiate student-athletes are often extremely popular, influential and can even be the face of a university. Due to large fan bases, collegiate student-athletes are often more popular than some

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<sup>28</sup> Steve Berkowitz, *NCAA Reports Revenues of More Than \$1 Billion in 2017*, USA Today (Mar. 7, 2018), <https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/>.

<sup>29</sup> Steve Berkowitz, *Big Ten Conference had Nearly \$759 Million in Revenue in Fiscal 2018, New Records Show*, USA Today (May 15, 2019), <https://www.usatoday.com/story/sports/2019/05/15/big-ten-revenue-hit-nearly-759-million-fiscal-2018/3686089002/>.

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

<sup>31</sup> Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O'Bannon Name and Likeness Issue*, USA Today (Jan. 16 2015), <https://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331/>.

<sup>32</sup> Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. Econ. Perspectives 115, 124 (2015).

professional athletes.<sup>33</sup> For example, former University of Florida student-athlete and Heisman Trophy winner, Tim Tebow, had the number one selling football jersey among all National Football League (NFL) players before he played in a regular season game.<sup>34</sup> This was in no doubt due to his extreme popularity as a collegiate student-athlete. In a recent example, Zion Williamson, former Duke University basketball player, became a household name across the United States in his freshman season at the university. During his only year in the NCAA, he had more than 2.6 million Instagram followers and Duke's resale ticket prices averaged \$329, the highest in collegiate basketball.<sup>35</sup> However, due to NCAA rules prohibiting Zion from receiving compensation, much of his own marketing potential was unprofitable. As an example of this untapped opportunity, similar social media influencers who have one million followers or more can make up to \$20,000 per post from brands.<sup>36</sup>

Despite the ethical and financial reasonings for permitting student-athlete compensation, amateurism remains the foundation on which NCAA bylaws have been constructed and enforced for decades.<sup>37</sup> The NCAA is firm in their position that "replacing scholarships with salaries would devastate college sports," citing that it would incentivize athletics over academics, diminish student-athlete integration in the student community, and require universities to divert funds from their academic budgets.<sup>38</sup> However, the NCAA is being forced to consider alternative solutions after losing key legal battles (e.g., *O'Bannon v. NCAA* (2014),<sup>39</sup> *Alston v. NCAA et al.* (2014).<sup>40</sup>)

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<sup>33</sup> Michael A. Corgan, Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme, 19 Jeffrey S. Moorad Sports L.J. 371, 415-16 (2012).

<sup>34</sup> *Id.* at 416.

<sup>35</sup> Michael Smith, *The Business of Zion*, Sports Business Dailey (Mar. 11, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/03/11/In-Depth/The-Zion-Effect.aspx>.

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

<sup>37</sup> National Collegiate Athletic Association, *supra* note 16, at 4,5, 61-92.

<sup>38</sup> National Collegiate Athletic Association, *NCAA Defends Scholarships for College Athletes* (Sep. 5, 2018), available at <http://www.ncaa.org/about/resources/media-center/feature/ncaa-defends-scholarships-college-athletes> (last visited July 28, 2019).

<sup>39</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp.3d 955 (N.D. Cal. 2014)

<sup>40</sup> *In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

In *O'Bannon v. NCAA* (2014), the court held that the NCAA violated Section 1 of the Sherman Act due to its regulations prohibiting student-athletes from receiving a share of revenue from their own NIL.<sup>41</sup> As a result of the O'Bannon case, the NCAA allowed their member institutions to offer scholarships that cover the full cost of attendance.<sup>42</sup> This increase in scholarship money is intended to cover the costs of attending college not covered by the previous definition of a full scholarship, which included tuition, room and board, required fees and books. Each school determines their own cost of attendance and distributes this money according to its individual financial aid policies.<sup>43</sup> These annual stipends range from roughly \$3,000 to \$6,000.<sup>44</sup> However, this is not enough. As it becomes more difficult for the NCAA to protect amateurism, the discussion of optimal method(s) to pay student-athletes beyond scholarships and educational expenses becomes more pressing, with sport reform at the forefront of the solution.

The purpose of this paper is to conduct a legal risk analysis on the issue of compensating student-athletes in order to determine the optimal solution. Within the legal analysis, relevant constitutional, statutory, and case law will be reviewed to understand the primary legal issues and precedent around the predominant approaches to compensating student-athletes. NCAA regulations will be considered, in an effort to ensure athletes maintain eligibility if compensated. Finally, the paper will conclude with recommendations for the NCAA and its member institutions, proposing a model for compensating student-athletes that is equitable to all parties involved.

### **Method I: Compensating Student-Athletes Through the University**

In this method, the universities would be responsible for paying their student-athletes, which would likely classify student-athletes as

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<sup>41</sup> *O'Bannon*, 7 F. Supp.3d at 1007 (N.D. Cal. 2014)

<sup>42</sup> Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 Brook. L. Rev. (2016).

<sup>43</sup> National Collegiate Athletic Association, *Cost of attendance Q&A* (Sept. 3, 2015), available at <https://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> (last visited July 28, 2019).

<sup>44</sup> Michael McCann, *Why the NCAA Lost Another Landmark Antitrust Case*, Sports Illustrated (Mar. 9, 2019), <https://www.si.com/college-football/2019/03/08/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins> (last visited July 28, 2019).

employees of the university. There are a few potential approaches that could be used to compensate these student-athletes. The first is a basic “pay for play model” that allows student-athletes to be paid a stipend through their university.<sup>45</sup> This would be in addition to the cost of attendance stipend already being paid to scholarship student-athletes since 2015.<sup>46</sup> The second approach is a revenue sharing plan where student-athletes would receive a percentage of the revenue generated by the individual athlete’s respective team.<sup>47</sup> In this approach, it is likely that only men’s football and basketball players would be compensated, given they are the only teams that have historically generated revenue.<sup>48</sup> The final approach is a free market system, where the market could theoretically determine what each student-athlete is worth. Universities would then seek to pay whatever amount necessary based on the demand of a certain student-athlete.

These approaches would likely contradict the current model where “student-athletes are not employees within any definition of the National Labor Relations Act or the Fair Labor Standards Act.”<sup>49</sup> Currently, in numerous legal cases, the courts have sided with the NCAA and its member institutions in determining that student-athletes are not employees and as such are not entitled to the same rights as employees.<sup>50</sup> However, compensating student-athletes, outside of scholarship and educational benefits, may give rise to new legal precedent.

Perhaps the first case to establish a lack of employer-employee relationship between universities and student-athletes under the current model was *State Comp. Ins. Fund v. Indus. Com'n* (1957).<sup>51</sup> In 1955, Ray Dennison was playing collegiate football for Fort Lewis A&M college when he died from a head injury sustained while playing in a football

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<sup>45</sup> Corgan, *supra* note 33, at 406.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 410.

<sup>48</sup> Eben Novy-Williams, *College Sports*, Bloomberg (Sept. 27, 2017, 9:11 AM), <https://www.bloomberg.com/quicktake/college-sports-ncaa>.

<sup>49</sup> Donald Remy, *NCAA Responds to Union Proposal*, NCAA, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> (last visited July 28, 2019).

<sup>50</sup> Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. Times (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafotball/nlrb-says-northwestern-football-players-cannot-unionize.html>.

<sup>51</sup> *St. Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288, 289-90 (Colo. 1957).

game.<sup>52</sup> His widow filed a claim for death benefits with the Colorado Industrial Commission under the Workmen's Compensation Act.<sup>53</sup> While the commission approved the claim, and on appeal a district court affirmed the decision, Fort Lewis and the State Compensation Insurance Fund fought the case in the Colorado Supreme Court.<sup>54</sup> The court ruled that student-athletes were not employees and were not entitled to any death benefits.<sup>55</sup> According to the court, "Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist."<sup>56</sup> The precedent that student-athletes are not considered employees, limiting the university's relationship and responsibility to student-athletes, has been maintained under the current athletic model. However, if student-athletes were paid by their university, their potential employee status would bring forth six major legal risks: Title IX accommodation, workers' compensation, Fair Labor Standards Act effects, vicarious liability, taxation issues and antitrust issues.

### Title IX

Title IX requires athletics departments receiving federal funding to offer equal opportunity for participation, scholarships and benefits to both sexes.<sup>57</sup> Athletics departments subject to Title IX scrutiny must comply with at least one prong of a three-prong test stated in *Cohen v. Brown Univ.* (1992): 1) provide participation proportionate to enrollment; or 2) show history and continuing practice of program expansion for underrepresented sex; or 3) fully accommodate underrepresented sex.<sup>58</sup>

Similar to the justification for paying male coaches more than female coaches, Edelman argues that because men's sports generate more revenue than women's sports, the institution would not be required to compensate women to the same degree as men from an employment standpoint. For example, in *Stanley v. Univ. of S. Cal.* (1994), the court

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<sup>52</sup> *Id.* at 289.

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

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

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

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

<sup>57</sup> 20 U.S.C. § 1681 (2019).

<sup>58</sup> *Cohen v. Brown Univ.*, 809 F. Supp. 978, 985 (D.R.I. 1992).

decided the university was permitted to pay the men's basketball coach more than the women's coach because the men generated far more revenue annually.<sup>59</sup> This case is often used to justify the pay disparity between male and female coaches. Therefore, it could be argued the same logic would apply to student-athletes, undermining the original intent of Title IX.

### Fair Labor Standards Act

According to the United States Department of Labor, the Fair Labor Standards Act (FLSA) sets minimum wage standards, overtime pay, recordkeeping and youth employment standards.<sup>60</sup> Of note, in relation to the issue of paying student-athletes, is the minimum wage standards and overtime pay. Section 203(e)(1) of the FLSA defines an 'employee' as "any individual employed by an employer."<sup>61</sup> While this definition does not currently extend to student-athletes, it would apply to student-athletes who sign contracts with the university that outline a pay for play agreement.

In *Berger v. Nat'l Collegiate Athletic Ass'n* (2016), former track and field student-athletes at the University of Pennsylvania argued the NCAA and its member institutions violated the FLSA by not paying their student-athletes a minimum wage.<sup>62</sup> The court determined student-athlete "play" is not "work" and therefore not subject to the FLSA. In *Dawson v. Nat'l Collegiate Athletic Ass'n et al.* (2017), the same argument arose again, this time from a former football player at the University of Southern California.<sup>63</sup> Since football was a revenue generating sport, Dawson felt that his labor as a football player entitled him to the benefits of the FLSA. However, the court followed the precedent set by *Berger v. NCAA* (2016), determining there is no legal basis to consider student-athletes (even those participating in revenue-sports) as employees.<sup>64</sup>

If universities were to move forward with any number of the possible compensation methods, such as monthly stipends or revenue

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<sup>59</sup> *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994)

<sup>60</sup> Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. § 201 et seq.)

<sup>61</sup> *Id.*

<sup>62</sup> *Berger v. Nat'l Collegiate Athletic Ass'n*, No. 16-1558 (7th Cir. 2016)

<sup>63</sup> *Dawson v. Nat'l Collegiate Athletic Ass'n et al.*, 250 F.Supp.3d 401 (2017)

<sup>64</sup> *Berger v. Nat'l Collegiate Athletic Ass'n*, No. 16-1558 (7th Cir. 2016).

sharing, the relationship between the university and student-athletes would change, consequently impacting the classification of student-athletes and their legal rights. Assuming that student-athletes would sign contracts with a compensation clause outlining the pay for play compensation system, the previous interpretation of “play” would warrant re-evaluation as student-athletes receive compensation for their “work”. If universities were suddenly forced to comply with the FLSA, student-athletes may be entitled to minimum wage payments and overtime pay standards. It seems unlikely that an athletics department would be able to sustain the costs associated with paying student-athletes at the rate of the federal minimum wage, especially considering the time commitments associated with intercollegiate athletics. Exemplifying the severity of this issue, football players in the Division I Football Bowl Subdivision have reported spending an average of 44.8 hours per week engaged in athletics activities during the in-season.<sup>65</sup> This is despite the NCAA policy that limits student-athletes to no more than 20 hours per week of certain countable athletically related activities.<sup>66</sup>

Universities may attempt to juxtaposition athletic opportunities as unpaid internships – rather than employment - under the FLSA,<sup>67</sup> given the educational mission of the university and athletics department. This approach would eliminate the financial liability of paying student-athletes as “employees” for their athletic activities, outside of scholarship and educational benefits. However, when considering the primary beneficiary test, universities are unlikely to succeed on the factors pertaining to: student has no expectation of compensation; student’s work complements, not displaces, the work of paid employees.<sup>68</sup> Without the athletic activities of student-athletes, intercollegiate athletics would not be the business it is today, making it difficult to overlook their unique contribution.

The issues pertaining to the potential for student-athletes to be classified as “employees” and the university consequently subject to

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<sup>65</sup> National Collegiate Athletic Association, GOALS and SCORE Studies: How Student-Athletes Feel About Time Demands (2017).

<sup>66</sup> National Collegiate Athletic Association, Defining Countable Athletically Related Activities (2009).

<sup>67</sup> Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. § 201 et seq.).

<sup>68</sup> U.S. Department of Labor, *Fact sheet #71: Internship Programs Under the Fair Labor Standards Act* (2018), available at <https://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last visited July 28, 2019).

FLSA regulations could, once again, lead to a major downsizing in collegiate athletics. In order to attract the best recruits in revenue generating sports like football and men's basketball, universities would need to offer highly sought student-athletes significantly more money than the federal minimum wage, reflecting the free market system. This leaves less opportunity for student-athletes in non-revenue generating sports to get paid. Therefore, as to become a common theme in this method, universities would be forced to downsize their athletics departments and strictly limit the number of hours that non-revenue generating sports are permitted to "work".

### Workers' Compensation

Workers' compensation statutes protect employees who are injured while working within the scope and authority of their responsibilities. Workers' compensation is designed to ensure employees who are injured, disabled or killed on the job are provided with fixed monetary awards for themselves or for their dependents.<sup>69</sup> If universities are required to recognize student-athletes as employees as a result of compensating student-athletes beyond scholarship and educational benefits, the courts would be tasked with enforcing the responsibilities of an employer and rights of an employee.<sup>70</sup> All paid student-athletes would then be eligible for workers' compensation benefits.

To consider the current precedent, we must look to *Waldrep v. Tex. Emp'rs Ins. Ass'n.* (2000).<sup>71</sup> In the early 1970's, Kent Waldrep was a football player at Texas Christian University (TCU). During a game in 1974, Waldrep was critically injured and became paralyzed below the neck. He went to court to receive workers' compensation, yet the court determined Waldrep failed to prove that he was an employee of TCU at the time of the injury and thus was not eligible for worker's compensation. Waldrep did not qualify as a university employee because there was no employment contract between the university and Waldrep,

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<sup>69</sup> U.S. Department of Labor, *supra* note 3

<sup>70</sup> James M. Long, *Legal Analysis of NCAA Student-Athletes Worker's Compensation Status* (2017), available at [https://trace.tennessee.edu/utk\\_chanhonoproj/2153](https://trace.tennessee.edu/utk_chanhonoproj/2153) (last visited July 28, 2019).

<sup>71</sup> *Waldrep v. Tex. Emp'rs Ins. Ass'n.*, 21 S.W.3d 692, 695 (Tex. App. 2000).



financial aid did not represent income, and TCU did not pay Waldrep a salary.

Similarly, in *Rensing v. Ind. St. Univ. Bd. of Tr.* (1983), the Indiana Supreme Court held that a scholarship did not equal an employment contract.<sup>72</sup> Rensing was a football player on scholarship when he was paralyzed while making a tackle during practice. He sought compensation for permanent total disability as well as medical and hospital expenses, however, due to a lack of employment relationship with the university, he lost his case. In making their decision, the court chose to focus on NCAA policies that placed priority on amateurism and education.

Finally, in *Coleman v. W. Mich. Univ.* (1983), the economic reality test was used in finding that no employment relationship existed between Coleman, an injured football player on scholarship, and Western Michigan University.<sup>73</sup> In applying the economic reality test, while the court did find that a scholarship constituted a wage, the court could not find that Coleman's work performed (playing football) was an integral part of the university's business (education). For this reason, the court denied Coleman any worker's compensation benefits.

In all of these cases, the student-athlete was limited to compensation through the form of a scholarship. However, if student-athletes were to receive a stipend or financial benefit from revenue sharing, this may require contractual language similar to an employment contract with a compensation clause. In this case, paid student-athletes would be entitled to workers' compensation and insurance benefits. Traditionally, universities' liability and responsibilities to injured student-athletes has been limited. With this potential shift to an employer-employee relationship, universities would have a much larger fiscal responsibility to their student-athletes injured while engaged in athletic activities. This would be concerning considering the obvious physicality of collegiate athletics and the detrimental long-term head injuries, such as chronic traumatic encephalopathy (CTE), that has been observed in contact sports like football.<sup>74</sup>

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<sup>72</sup> *Rensing v. Ind. St. Univ. Bd. of Tr.*, 444 N.E.2d 1170 (1983).

<sup>73</sup> *Coleman v. W. Mich. Univ.*, 125 Mich. App. 35 (1983).

<sup>74</sup> Steve H. Monk, et al., *Imagining Findings After Acute Sport-Related Concussion in American Football Players: A Systematic Review*, 61 J. Clinical Neuroscience 28 (2019).

In order to control this risk, athletics departments would again be forced to evaluate and consider decreasing athletic opportunities in order to limit the amount of student-athlete injuries and afford liability insurance. For larger athletics departments, such as OSU which boasts 36 varsity sports, the landscape of athletics could drastically change. Universities may only be able to retain revenue generating sports and non-contact sports considered “safe”. Non-contact varsity sports such as rowing or cross country, sports that incur the least and most inexpensive injuries, would likely become very popular for universities to retain or adopt.

### Vicarious Liability

Under the theory of vicarious liability, employers are liable for the tortious actions committed by their employees within the scope of their workers' employment.<sup>75</sup> While most intentional torts occur outside of the scope of employment, there are cases where it is present in sports. In professional sports, cases of vicarious liability have been successfully argued due to the employer-employee relationship that exists between players and team organizations. For example, in the case of *Tomjanovich v. Cal. Sports, Inc.* (1979), Tomjanovich was a member of the Houston Rockets professional basketball team who was trying to break up a fight between two other players when he was struck in the face by a player on the Los Angeles Lakers.<sup>76</sup> As a result, Tomjanovich sued the Lakers under the theory of vicarious liability and won over \$3 million. The jury decided that the Lakers, as an employer of the player who struck Tomjanovich, was vicariously liable for torts committed within the scope of the player's employment.

However, in intercollegiate athletics, the courts have not found that universities are vicariously liable for their student-athletes' actions in competition. Exemplified in *Hanson v. Kynast* (1986), the courts held that Ashland University was not liable for the reckless acts of Kynast, one of their lacrosse student-athletes.<sup>77</sup> Though Kynast permanently disabled an opponent through a reckless act in competition, Ashland University was found not liable because Kynast was not a scholarship student-athlete and received no other types of benefits from participating in collegiate

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<sup>75</sup> Wolohan, *supra* note 4.

<sup>76</sup> *Tomjanovich v. Cal. Sports, Inc.*, No. 78-243 (S.D. Tex. Oct. 10, 1979).

<sup>77</sup> *Hanson v. Kynast*, 24 Ohio St. 3d 171 (Ohio 1986).

athletics. The court found no principal-agent relationship was established between Kynast and Ashland University. Furthermore, in Justice Holmes's concurring opinion, no principal-agent relationship would have been established even if the student-athlete benefited from an athletic scholarship. However, Justice Holmes noted that universities can be vicariously liable if payment is given from the university to a student-athlete for their participation in athletics. This would represent a contractual agreement sufficient to hold the university liable for student-athletes' reckless acts, similar to the courts' decisions surrounding professional athletes and teams.

This precedent is upheld in *Kavanagh v. Tr. of Boston Univ.* (2003).<sup>78</sup> Kavanagh was playing collegiate basketball for Manhattan College when he was punched in the face by a scholarship player on Boston University's team during a game. He sued both Boston University and Boston University's coach under the theory of vicarious liability. His argument was grounded in the scholarship status of the student-athlete who punched him, contending that the player who punched him was an agent of Boston University. However, the court held that an athletic scholarship is an educational contract rather than an employment agreement. Therefore, the university cannot be vicariously liable for the acts of a student-athlete unless this student-athlete is being compensated beyond the form of a scholarship.

If institutions compensate their student-athletes in addition to their traditional scholarships, an employer-employee relationship would likely form. If paid student-athletes become classified as "employees", universities would be responsible for the actions of these employees, committed while acting within the scope and authority of their position (i.e., athletic activities). While there is no "data to indicate whether student-athletes experience more violence than their non-athlete peers, nor if the athletics culture by nature increases the risk of interpersonal violence",<sup>79</sup> harassment, hazing and physical violence undoubtedly occur throughout sport, with implications for those liable. In these circumstances, victims would certainly target the defendant with the "deepest pockets", which would more often than not be the university and athletics administration.

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<sup>78</sup> *Kavanagh v. Tr. of Boston Univ.*, 795 N.E.2d 1170 (Mass. 2003).

<sup>79</sup> Gary T. Brown, et al., *Mind, Body and Sport: Understanding and Supporting Student-Athlete Mental Wellness* (2014).

In an effort to control this risk, athletics departments would be forced to take extra precautions during the recruiting process. If a student-athlete has a history of negligence, violence, or misconduct, they would be considered higher risk to the university. While many universities may currently turn a blind eye to these issues, the risk of vicarious liability would force schools to evaluate the character and personal conduct of student-athletes they recruit, which may negatively impact team performance if the recruit is deemed too high risk. Secondly, it would be critical for universities to engage in prevention practices that educate student-athletes on the importance of controlling aggression and harmful practices.<sup>80</sup> Though one might argue such practices should be implemented regardless of the “employee” status of the student-athletes. Finally, universities would need to adopt more severe penalties for student-athletes that exhibit this type of behavior, which could result in a greater number of suspensions, indirectly hurting team performance. While these preventive practices would hopefully deter student-athletes from actions that could put the institution at risk of litigation, they also limit the university’s ability to recruit the top student-athletes and promote athletic team performance.

### **Taxation Issues**

Currently, universities operate on a tax-exempt status for income directly related to its educational mission.<sup>81</sup> Historically, this has also included their athletics departments, with athletic scholarships remaining untaxed.<sup>82</sup> However, if student-athletes were to receive payments from the university for their “work” (i.e., athletic activities), both these student-athletes and the university would need to report the taxable income to the Internal Revenue Service (IRS). Furthermore, paying student-athletes undermines the institutional logic of amateurism and would fuel the argument that collegiate athletics is no longer substantially related to the educational mission of the university. Therefore, not only would student-

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

<sup>81</sup> Thomas R. Hurst, Payment of Student-Athletes: Legal & (and) Practical Obstacles, 7 Jeffrey S. Moorad Sports L.J. 55 (2000).

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

athletes be taxed on their new income, universities may also be in danger of losing their tax-exempt status.<sup>83</sup>

Similar to universities, the NCAA operates with an exemption from paying taxes on money generated from collegiate athletics under section 501(c)(3) of the Internal Revenue Code (IRC).<sup>84</sup> The NCAA is able to benefit from this exemption because they are recognized as an entity that exclusively operates for “educational purposes” and fosters “amateur sports competition”.<sup>85</sup> There is already substantial revenue being generated from college athletics, with coaches’ salaries significantly outweighing any academic faculty. Pair this with student-athletes being compensated by the university, and it is highly likely the IRS would no longer allow an income tax-exemption for the NCAA.

### Antitrust Issues

Antitrust laws would be of particular issue in the pay for play approach of compensating student-athletes through a fixed stipend. Section I of the Sherman Act states “every contract, combination..., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal”.<sup>86</sup> The NCAA undoubtedly engages in interstate commerce, with member institutions in all 50 states and nationwide recruiting, competition, and television contracts. It is therefore subject to the restrictions of the Sherman Act, which include its compensation bylaws.

Prior to the *O’Bannon v. Nat’l Collegiate Athletic Ass’n* (2014) case, which ruled the NCAA was in violation of the Sherman Act, the NCAA had some success defending its limited compensation bylaws.<sup>87</sup> In *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.* (1984), the Board of Regents of the University of Georgia and the University of Oklahoma opposed the NCAA rule that limited the number of basketball games a member institution could televise.<sup>88</sup> The Supreme

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

<sup>84</sup> 26 U.S.C. § 501.

<sup>85</sup> Corgan, *supra* note 33.

<sup>86</sup> Sherman Act, 15 U.S.C. § 1 (1994)

<sup>87</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp.3d 955, 1007 (N.D. Cal. 2014).

<sup>88</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 95 (1984) [hereinafter *Bd. of Regents of the Univ. of Okla.*].

Court found that the NCAA's limited compensation bylaw was not in violation of the Sherman Act because it enhanced competition and preserved education and amateurism in collegiate athletics.<sup>89</sup>

In *McCormack v. Nat'l Collegiate Athletic Ass'n* (1988), alumni, football players, and cheerleaders of Southern Methodist University (SMU) brought a class action lawsuit against the NCAA for their suspension of SMU's football program.<sup>90</sup> The program was suspended after the NCAA found that boosters of the program were making payments to football players. The plaintiffs argued the NCAA's limited compensation bylaw that prohibited student-athletes from receiving compensation based on his/her athletic ability outside of grant-in-aid was a price-fix, in violation of the Sherman Act.<sup>91</sup> After relying heavily on the Supreme Court's opinion in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.* (1984), regarding the preservation of education and amateurism, the court held that the NCAA's eligibility rules pertaining to compensation were again reasonable.<sup>92</sup>

In both the *McCormack v. Nat'l Collegiate Athletic Ass'n* (1988)<sup>93</sup> and *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.* (1984)<sup>94</sup> cases, the courts applied the rule of reason to evaluate the NCAA's bylaws because of its educational objectives. Under the rule of reason analysis, the court takes into consideration the competitive effects of the agreement and allows the defendant to justify the restraint. Up until the Court's decision in *O'Bannon*,<sup>95</sup> the NCAA's limited compensation bylaws were not found in violation of anti-trust laws. However, if the NCAA were to allow student-athletes to be compensated through the university, their preservation of education and amateurism defense would be weakened, along with the pro-competitive effects of the NCAA's limited compensation bylaws. Moreover, it would be difficult for the NCAA to justify its current limited compensation bylaws, making them susceptible to antitrust violation. One way the NCAA and universities may look to avoid anti-trust litigation would be to use the free market approach coupled with a salary cap that is determined using a collective

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<sup>89</sup> Hurst, *supra* note 81, at 62.

<sup>90</sup> *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1340 (5th Cir. 1988).

<sup>91</sup> Hurst, *supra* note 81, at 63.

<sup>92</sup> See *Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85.

<sup>93</sup> *McCormack*, 845 F.2d at 1344.

<sup>94</sup> *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 86.

<sup>95</sup> See *O'Bannon*, 7 F. Supp.3d 955 (N.D. Cal. 2014).

bargaining agreement (CBA). CBAs have been incorporated into numerous professional sports leagues including the National Basketball Association (NBA), National Hockey League (NHL), Major League Baseball (MLB), Major League Soccer (MLS), and the NFL, as a means of receiving protection under the non-statutory labor exemption from anti-trust scrutiny.<sup>96</sup> However, this would further diminish the educational and amateurism mission of the NCAA and athletics departments.

In May of 2019, the NCAA created a working group to examine the potential opportunity for student-athletes to profit from their NIL.<sup>97</sup> In taking this proactive step, the NCAA may relieve its member institutions from the possible burden of compensating student-athletes. Gene Smith - OSU senior vice president and athletics director - serving as the NCAA working group co-chair, confirmed this trajectory by sharing, “the group’s work will not result in paying students as employees... that structure is contrary to the NCAA’s educational mission and will not be a part of this discussion”.<sup>98</sup>

If student-athletes were to obtain the opportunity to profit off their NIL, the market would dictate how much a student-athlete is worth. This would nullify the legal risks associated with universities paying student-athletes, such as the liability attached to the employer-employee relationship. In Method II, companies would be able to hire student-athletes to endorse their products and services and/or could license the NIL of student-athletes to capitalize on their brand power, which the once popular EA Sports NCAA Football video game should have done if permissible. Student-athletes would also have the opportunity to profit off of their own entrepreneurship including the sale of their autographs, merchandise, or other businesses. This would require the NCAA to revise Article 12 of its operating bylaws pertaining to amateurism and athletics eligibility, which has to-date restricted athletes’ use of an agent, compensation for athletics reputation, engagement in promotional activities or media activities, etc.<sup>99</sup> While Method II may avoid the legal

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<sup>96</sup> Hurst, *supra* note 81, at 65.

<sup>97</sup> Michelle B. Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019, 2:40 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness>.

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

<sup>99</sup> National Collegiate Athletic Association, *supra* note 16.

risks associated with universities paying student-athletes (see Method I), it also brings about legal risks of its own, including: First Amendment, intellectual property, and Fourteenth Amendment.

### First Amendment

The First Amendment to the U.S. Constitution is designed to protect individual rights from government action.<sup>100</sup> The right protected under the First Amendment that is most relevant to the issue of allowing student-athletes to profit from their NIL is the freedom of speech. According to the First Amendment, state actors—such as public institutions—cannot abridge an individual’s freedom of speech, which includes both verbal and silent expression.<sup>101</sup> Within the athletics domain, if student-athletes were to engage in advertisement or endorsement initiatives, their expression – including the use of sponsored products – is protected.

If student-athletes were compensated through businesses and corporations for the use of their NIL, there would surely be concern over the balance of NCAA and university brand alignment with student-athlete freedom of speech. The NCAA engages in contractual relations with a number of corporate sponsors<sup>102</sup> – such as Coca Cola, AT&T, and Capital One – who are interested in becoming affiliated with sports, having access to intercollegiate athletics, media exposure, and product/service exclusivity.<sup>103</sup> Similarly, universities engage in a number of corporate partnerships to sponsor athletic teams and events, with an estimated \$1.24 billion spent on sponsoring college athletics collectively.<sup>104</sup> As such, the NCAA and universities alike would need to be concerned with

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<sup>100</sup> U.S. CONST. amend. I.

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

<sup>102</sup> *NCAA Corporate Champions and Partner*, NCAA (Oct. 1, 2019), <https://www.ncaa.com/news/ncaa/article/2011-02-25/corporate-champions-and-partners>.

<sup>103</sup> David K. Stotlar & James C. Kadlecck, *Examining NCAA Corporate Sponsorships*, ATHLETIC BUSINESS (Apr. 1993), <https://www.athleticbusiness.com/marketing/what-s-in-it-for-me.html> (last visited July 28, 2019).

<sup>104</sup> IEG Sponsorship Report, *Sponsorship Spending on College Athletics to Total \$1.24 Billion in 2017/2018 Season*, SPONSORSHIP.COM: COLLEGE SPORTS (Mar. 19, 2018), <https://www.sponsorship.com/Report/2018/03/19/Sponsorship-Spending-On-College-Athletics-To-Total.aspx>.



contractual liability if individual student-athletes partner with conflicting brands. Consider for example a student-athlete who is sponsored by an alcoholic beverage company. The university would likely not want to align itself with such a brand and may be tempted to prohibit the student-athlete from endorsing this brand. But do public universities have this right? Are student-athletes' decisions to endorse a brand protected under the First Amendment?

The case that sets precedent is *Tinker v. Des Moines Indep. Cmty. Sch. Dist. et al.* (1969).<sup>105</sup> In this case, several students wore black armbands in protest of the Vietnam War, contesting the school's policy prohibiting armbands. The U.S. Supreme Court found the black armbands did not lead to a disruption of or interference with the educational environment. Moreover, the court clarified public-school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate".<sup>106</sup> While universities may consider student-athlete endorsement as a disruption, due to their contractual obligations with potentially competing brands, it is unlikely courts would find this general form of expression as disruptive to the educational environment.

Universities would need to intentionally educate their student-athletes on their legal rights and encourage student-athletes to conduct business with companies that align with the university's values and its corporate partnerships. In *Tinker*, the Court established a substantial disruption test.<sup>107-108</sup> The substantial disruption test allows universities and athletics administrators to restrict student-athlete speech that substantially interferes with the team's operations, coach's authority, or broader educational environment.<sup>109</sup> While the courts have not yet evaluated a case of intercollegiate student-athlete and school brand alignment, given the current NCAA amateurism bylaws, universities could argue that student-athletes who endorse types of brands that are harmful to the university's reputation (e.g., alcohol, gambling, cigarettes) may cause substantial disruption to the school's operation. Moreover, a

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<sup>105</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>106</sup> *Id.* at 506.

<sup>107</sup> *Id.* at 503.

<sup>108</sup> Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 8 (2014).

<sup>109</sup> Cotton & Wolohan, *supra* note 13.

university could prohibit student-athletes from advertising such endorsements and argue this action exempt from constitutional scrutiny as the student-athlete's expression disrupts school operations and unreasonably harms the image of the institution. However, for neutral brands unlikely to damage the NCAA or university's reputation, these governing bodies will need to be prepared to negotiate exclusivity clauses with their sponsors and consider engaging in a form of collective bargaining with student-athletes to regulate their endorsement deals in an effort to avoid legal liability for all parties involved.<sup>110</sup>

### Intellectual Property

Intellectual property law includes copyrights, trademarks and patents. While multiple forms of intellectual property influence Method II, particular focus should be placed on copyright and trademark infringement. A copyright is an original work in tangible form and grants the copyright owner the exclusive right to copy, reproduce, distribute, publish, perform, or display one's work.<sup>111</sup> Comparatively, trademarks are "any word, name, symbol or device, or any combination thereof, adopted or used by some entity to identify their goods and distinguish them from those manufactured or sold by others".<sup>112</sup>

In order to improve marketability and brand recognition, the companies interested in endorsing student-athletes would likely want to associate their brand with that individual's university trademarks and copyrights in advertisements. Sponsors could look to associate with the university using university logos, jerseys, trademarked phrases, landmarks, or even the university's name. Universities, on the other hand, must restrict the use of their trademarks and copyrights to entities seeking to license the intellectual property, in order to protect their financial interests, current contractual obligations, and reputation. Again, universities would not want to associate with brands that may be harmful to the university's image or brands that compete with current university sponsorships and contracts. For example, a university spokesman at a Power Conference institution said of trademarks, "we do not license our trademarks for weapons, sexually explicit materials and other obvious

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 111.

categories that would not fit with our mission and values as an academic institution”.<sup>113</sup>

Several student-athletes may believe their ability to market themselves is reliant on associating with the university of which they attend. Companies would likely also encourage their student-athlete endorsers to associate with universities in advertisements to strengthen brand association and marketability. Within collegiate athletics, brand association is an especially useful marketing tool due to the characteristics of sports fans. The sports audience has been described as very loyal in its consumer behavior due to the emotional satisfaction that is experienced through sports fandom.<sup>114</sup> As such, sponsors desire to associate with the university brand through student-athletes, and the university’s desire to protect its intellectual property presents potential conflict.

Universities have already gone to great lengths to protect their brand. For example, in 2018 Duke University blocked a small California wine company, Duke’s Folly, from using their trademark.<sup>115</sup> Filed with the federal trademark office, the university argued that consumers would associate the winery with the university due to their use of the trademark “Duke”. As a result, the winery was required to stop usage of the trademark and change the company’s name.<sup>116</sup> This example demonstrates universities’ expedient efforts to protect the use of their brand.

Universities can control this risk by prohibiting student-athletes from using NCAA or university copyrights or trademarks unless authorized by the respective compliance office. This will protect universities’ financial interests, ongoing sponsorship contracts, and reputation. Any infringement of the NCAA or university’s intellectual property could be subject to litigation. While student-athletes are entitled to the use of their own NIL, this does not entitle the student-athlete the privilege of using the intellectual property of the institution to which they attend, any other member school, or of the NCAA. As lucrative

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<sup>113</sup> Megan Henry, *Ohio State willing to get tough on trademarks*, THE COLUMBUS DISPATCH (Sept. 8, 2018, 6:22 AM), <https://www.dispatch.com/news/20180908/ohio-state-willing-to-get-tough-on-trademarks>.

<sup>114</sup> Robert Madrigal, *The Influence of Social Alliances with Sports Teams on Intentions to Purchase Corporate Sponsors’ Products*, 29 J. ADVER. 13 (2000).

<sup>115</sup> Henry, *supra* note 113.

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

endorsement deals usually coincide with the popularity student-athletes achieve from success on the playing field,<sup>117</sup> Method II primarily benefits student-athletes who have the most success at the college level, in kind, those who contribute the most to the university's success.

### Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution prohibits state actors (e.g., universities and athletics administrators) from depriving any person of their life, liberty, or property, without due process.<sup>118</sup> The court of public opinion has long debated whether sport constitutes a property interest, and therefore a constitutionally protected right. Courts have consistently identified collegiate athletics a privilege, not a right. For example, in *Parish v. Nat'l Collegiate Athletic Ass'n* (1973), a student-athlete failed to receive injunctive relief after being denied NCAA athletic participation due to academic reasons.<sup>119</sup> While many argue athletic participation, scholarships, and future professional athletic career opportunities are all protected property interests under the Fourteenth Amendment, the NCAA has not been subject to constitutional scrutiny due to its status as a private actor. Moreover, in *Nat'l Collegiate Athletic Ass'n v. Tarkanian* (1988), it was established the NCAA is a voluntary organization and not a state actor because "the source of the legislations adopted by the NCAA is not [the state] but the collective membership, speaking through an organization that is independent of any particular State."<sup>120</sup>

The NCAA is able to institute eligibility requirements in part due to its private actor status and in accordance with precedent which has deemed sport a privilege. The NCAA eligibility requirements determine whether a student-athlete is eligible to compete in NCAA sanctioned competition. Whether the policy be pertaining to drugs/alcohol, grades, violence or other behaviors, the NCAA and its member institutions consistently enforce these regulations across the entire student-athlete

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<sup>117</sup> See Corgan, *supra* note 33.

<sup>118</sup> U.S. CONST. amend. XIV, § 1.

<sup>119</sup> *Parish v. Nat'l Collegiate Athletic Ass'n*, 361 F. Supp. 1220 (W.D. La. 1973).

<sup>120</sup> *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 (1988).

body.<sup>121</sup> In their current form, NCAA amateurism and athletic eligibility rules restrict student-athletes use of an agent, compensation for athletics reputation, engagement in promotional activities or media activities, etc.<sup>122</sup> Therefore, if student-athletes were to engage in endorsement contracts to profit from their NIL, they would be in violation of NCAA regulations and therefore ineligible for athletic participation, which would consequently diminish their value to sponsors and likely lead to no endorsement or collegiate athletic opportunities. Therefore, in order to support Method II, the NCAA would need to reform its existing operating bylaws pertaining to amateurism and athletic eligibility.

If student-athletes use of their NIL is considered too risky, the NCAA can maintain its eligibility requirements and force students to decide whether to continue participating at the college level without endorsements or pursue available professional sport opportunities that allow for outside income. The NCAA and its member institutions could also take the opportunity to educate student-athletes about the rules, guidelines, and dangers of licensing their NIL, as well as education pertaining to financial literacy, agent relationships, and contract negotiations to prepare student-athletes for post-college success. As long as the NCAA sets requirements that are rationally related to a legitimate governmental interest, they remain lawful and in the best interest of all parties – NCAA, universities, and student-athletes. However, in order to continue advancing intercollegiate athletics, reformation should be at the forefront of discussion.

### **Final Recommendations**

When considering the predominant methods of compensating student-athletes, legal risk analysis and preliminary discussion of the NCAA working group would point to Method II as the better compensation system. The employer-employee relationship that would be established if universities compensated student-athletes would be detrimental to the landscape of college sport in totality. While Method I undermines the educational mission of intercollegiate athletics,<sup>123</sup> it also

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<sup>121</sup> See generally Doug Bakker, *NCAA Initial Eligibility Requirements: The Case Law Behind the Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160 (2006).

<sup>122</sup> 2018-2019 NCAA Division I Manual, *supra* note 16.

<sup>123</sup> Hosick, *supra* note 97.

leaves universities vulnerable to substantial financial risks. In light of the legal implications of Method I, athletics departments across the nation would be forced to implement preventative strategies to mitigate liability, which may include dramatically downsizing athletics programs and eliminating athletic opportunities for thousands of student-athletes. Through analyzing the legal risks associated with each compensation method, it is clear the burden to pay student-athletes should be reserved for entities outside of the NCAA and its member institutions.

As the NCAA continues to examine NIL through their working group, it becomes necessary to discern how this new compensation system could be implemented while also balancing the financial and ethical concerns of their member institutions and protecting the interests of all student-athletes. Ultimately, the first step towards Method II requires the NCAA and its member institutions to take several proactive steps, including: 1) reforming the amateurism and athletic eligibility rules found in Article 12; 2) educating member institutions about their role in student-athletes' seeking outside compensation through their NIL; and 3) educating student-athletes around use of their NIL and restrictions pertaining to NCAA and university trademarks and copyrights, in an effort to protect the university's financial interests and the student-athletes' well-being.

### Step 1

NCAA Article 12 currently states that student-athletes would lose their amateur status if he or she:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation... or
- (g) Enters into an agreement with an agent.<sup>124</sup>

In order to allow student-athletes the ability to profit from their NIL, the NCAA would need to reform these three eligibility rules. The NCAA could revise the language of the bylaws to clarify permissible forms of compensation and employment, such as profiting from one's NIL, in order to maintain some regulatory control over student-athletes' means of compensation. An alternative route could be to require student-

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<sup>124</sup> 2018-2019 NCAA Division I Manual, *supra* note 16.

athletes desiring to profit off of their NIL to submit a form seeking relief of Article 12's legislative restrictions. Such legislative relief would be reviewed by the NCAA's Committee for Legislative Relief, formerly the Management Council Administrative Review Committee, which was established in 1993 in response to members' desire for rule flexibility.<sup>125</sup> This committee consists of members of the NCAA Legislative Council and reviews the application of NCAA legislation in cases of unique circumstances. Instituting some degree of control over student-athletes' engagement with outside companies would ensure the reputation of the NCAA and its member institutions remains protected.

If student-athletes were able to be compensated from outside companies, without NCAA legislative review, it is likely that universities would want to create an internal professional staff role dedicated to soliciting (and filtering) endorsement opportunities for student-athletes, similar to an agent. Universities may be eager to adopt this responsibility as it would allow them to target companies that align with the university's values and sponsors. Further, assisting student-athletes with profiting from their NIL could provide a recruiting advantage for the university.

However, due to concerns with boosters and negative perceptions of student-athlete oppression, the NCAA and its member institutions may decide to prohibit universities from providing their student-athletes with agents and soliciting endorsements for their student-athletes. This would provoke student-athletes to hire their own agents, which would provide some advantages to the university including: relieve any financial burden associated with employing agents, promote a more "equal playing field" by reducing the advantages afforded to larger schools, and decrease the possibility of non-legitimate contracts manufactured by universities and their boosters.

## Step 2

The NCAA must provide education to its member institutions about their role in student-athletes' seeking outside compensation through their NIL. While universities have demonstrated a history of successfully protecting their intellectual property, the biggest concern would be the legal ramifications of regulating the student-athletes'

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<sup>125</sup> NCAA Division I Committee for Legislative Relief Information Standards, *Guidelines and Directives*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (2019), [https://ncaaorg.s3.amazonaws.com/committees/d1/clr/D1CLR\\_Guidelines.pdf](https://ncaaorg.s3.amazonaws.com/committees/d1/clr/D1CLR_Guidelines.pdf).

intellectual property per se. In the process of protecting the university's intellectual property and reputation, the student-athletes freedom of speech may be infringed upon. Free speech becomes important to consider as student-athletes use their platform to endorse and market their sponsors. Whether it be in the form of a tweet, a television commercial or an article of clothing, student-athletes will use their freedom of speech to align with brands that may be in conflict with the university's values or ongoing sponsorship partners.

Universities should be educated on what type of speech is protected and what type of speech can be restricted. Similar to athletics departments' approach to regulating student-athletes use of social media, universities should provide guidelines for student-athletes' protected speech, only prohibiting speech that is not protected under the First Amendment (e.g., defamation, obscenity, fighting words). The NCAA should advise universities to take a conservative approach in regulating the companies student-athletes contract with, only prohibiting companies that are substantially disruptive to the school's operation and damaging to its reputation. Examples may include brands that are sexual or violent in nature. If it is found that a student-athlete is using speech considered substantially disruptive, punitive actions could be taken by the university including restricting their athletic eligibility.

Given universities currently assist student-athletes in the major areas of their lives (e.g., psychological, academic, career support), they may also be permitted to assume a sport agent type role and assist student-athletes with profiting from their NIL. As this would be a new form of support, the NCAA would need to educate its member institutions on the responsibilities of this fiduciary role and associated liabilities. Perhaps a best practice resource guide could be provided as a quality management tool, as well as to promote equity across schools engaging in this sport agent type role.

### **Step 3**

In an effort to protect the university's financial interests and the student-athlete's well-being, education and guidelines must be provided to student-athletes around use of their NIL. In light of the legal ramifications of allowing student-athletes to profit off of their NIL, the NCAA should add an eligibility requirement for student-athletes to complete an educational program around the issue of NIL to remain



eligible for competition. This program should be coordinated by the NCAA and implemented by its member institutions, designed to protect student-athletes from companies, agents, and themselves. Through the educational program, universities should be prepared to provide instruction on financial literacy, agent relationships, contract negotiations, university policies and procedures, and brand alignment. While increased eligibility requirements may receive resistance, it is ultimately in the best interest of the student-athlete, universities, and the NCAA.

In addition to the NCAA mandated program, universities should individually create guidelines as to which types of companies are substantially disruptive to their school's operation and potentially damaging to its reputation. Student-athletes should be made aware that if they choose to endorse these brands, their speech could be considered substantially disruptive and punitive actions could be taken by the university, including restricting their athletic eligibility. In these student-athlete guidelines, universities could suggest types of brands that student-athletes should align with, in an effort to protect the interests of the student-athlete and university as a whole. Universities may market sponsors already in contract with the university and inclined to endorse student-athletes. These strategies would benefit the university, university sponsors, and most importantly the student-athletes.

Similarly, on the topic of brand alignment, universities must be assertive in protecting their intellectual property. Student-athletes must be made aware that they are prohibited from associating with the university, through the use of university trademarks or copyrights, in any form of advertisements or endorsements, unless previously authorized by the university. This authorization would likely only occur if the university and sponsoring company are already in contract. For example, if a student-athlete is sponsored by Nike and competes at a Nike sponsored university, they might be permitted to appear in Nike advertisements using their team jerseys or the school's name. This would further incentivize student-athletes to align with university sponsors. Each university should educate their student-athletes on which brands they are in contract with and any procedures necessary to obtain authorization of the use of university trademarks and copyrights.

Finally, universities should be encouraged to assist and educate student-athletes in building their own personal brands. OSU Football's

“Brand U” initiative provides the resources necessary for OSU football players to build their own brand, including helping student-athletes create their own logos and slogans.<sup>126</sup> Currently, the initiative is intended to produce players with readymade brands, so they can immediately profit off of their NIL after leaving the university. However, this type of initiative has the potential to benefit student-athletes in real-time, if student-athletes are afforded the opportunity to profit from their NIL. Universities should educate and assist student-athletes with the process of filing a federal trademark application through the United States Patent and Trademark Office, if they wish to seek legal rights to their NIL. Initiatives like these would certainly benefit student-athletes seeking to profit off of their own personal trademarks while in school and after they leave the university.

Education is needed to protect the core values and educational mission of intercollegiate athletics, which emphasizes the well-being and lifelong success of college student-athletes.<sup>127</sup> Ultimately, athletics participation is a privilege and the NCAA has the authority to promote student-athlete financial responsibility through its governance of intercollegiate athletics. Student-athletes will be more inclined to maintain academic excellence and exhibit good conduct in order to meet the requirements necessary for athletic eligibility, as that is their stage to attract sponsors and future career opportunities.

### Conclusion

If the legal risks associated with Method II are considered and managed by the NCAA and its member institutions, it is possible for student-athletes to begin profiting off of their NIL. Currently, coaches, administrators, media personnel, conferences, universities, and countless others profit off of a student-athlete workforce that is limited to a scholarship and cost-of-attendance stipend. As public and legal pressure for reform continues to mount, the NCAA should act swiftly in beginning

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<sup>126</sup> Patrick Murphy, *Ohio State Helps Players Build Their Brand Through 'Brand U'*, (May 9, 2018), <https://247sports.com/college/ohio-state/Article/Ohio-State-Buckeyes-help-players-build-their-brand-through-Brand-U-118100314/> (last visited July 28, 2019).

<sup>127</sup> *What is the NCAA?* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (May 14, 2019), <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited July 28, 2019).

the steps necessary to permit student-athletes to profit from their NIL. Moreover, the NCAA must begin by reforming the amateurism and athletic eligibility rules found in Article 12. They must then educate their member institutions about their role in student-athletes' seeking outside compensation through their NIL. Finally, the NCAA and its member institutions must be proactive in educating student-athletes around use of their NIL and restrictions pertaining to NCAA and university trademarks and copyrights, in an effort to protect the university's financial interests and the student-athletes' well-being. As the NCAA continues to examine the possibility of reform, these recommendations should be considered for successful adoption of a new compensation system that will address the equity disparity in intercollegiate athletics.



**DRIBBLING AROUND THE FIRST AMENDMENT:  
ANALYZING THE CONSTITUTIONALITY OF UNIVERSITY-  
IMPOSED RESTRICTIONS ON STUDENT-ATHLETE'S USE  
OF SOCIAL MEDIA**

By: Jordan Berman \*

**I. INTRODUCTION**

In May 2010, Marvin Austin, a former defensive tackle at the University of North Carolina, caused quite a stir after posting a series of late-night tweets on his Twitter account.<sup>1</sup> The most notable of his tweets read: "I live in club LIV so I get the tenant rate ... bottles comin' like it's a giveaway."<sup>2</sup> When Austin's tweets were first discovered, his followers thought he was tweeting from LIV, an exclusive club in Miami Beach, where he was getting free bottles of liquor throughout the night.<sup>3</sup> For the average "tweeter," this tweet would probably never cause a problem. But, when you play for the University of North Carolina, this tweet appears to be a clear NCAA violation.<sup>4</sup> As it later came to light, Austin's tweet was rather meaningless; he was quoting a lyric from a song by Rick Ross.<sup>5</sup> However, once Austin caught the attention of the NCAA, Austin's Twitter feed was found to be full of "red flags" – red flags that UNC had previously missed.<sup>6</sup> The NCAA issued its first failure to monitor social media charge.<sup>7</sup> For years to follow, UNC was under the watchful eye of the NCAA. The NCAA's investigation into UNC began simply as reading athletes' Twitter pages, but quickly turned into reading emails and reviewing text messages.<sup>8</sup> UNC experienced years of punishments

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<sup>1</sup> Brian Barbour, *Marvin Austin's "Club Liv" Tweet was Five Years Ago Today*, Tarheel Blog (May 29, 2015, 10:23 AM), <https://www.tarheelblog.com/2015/5/29/8686135/marvin-austins-club-liv-tweet-was-five-years-ago-today>.

<sup>2</sup> Blake Richardson, *Colleges Educate Student-Athletes on Social Media Use*, Athletic Business (Oct. 2017), <https://www.athleticbusiness.com/web-social/colleges-education-student-athletes-on-social-media-use.html>.

<sup>3</sup> Barbour, *supra* note 1.

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

laid down by the NCAA for various violations stemming from this investigation.<sup>9</sup> These punishments included a postseason ban, scholarship reductions, and multiple suspended and banned players.<sup>10</sup>

Since that NCAA investigation, colleges and universities have found themselves in quite a predicament. The NCAA, as a private entity, can establish its own policies.<sup>11</sup> Thus, the NCAA may enact a rule that requires coaches to monitor their athletes' social media accounts. Likewise, the NCAA can require drug testing and can subject a player to suspension for inappropriate social media conduct. However, public colleges and universities do not possess the same power. As public entities, public academic institutions may not arbitrarily restrict their student-athletes' constitutional rights.<sup>12</sup> Consequently, these academic institutions are caught between the proverbial rock and a hard place. If a university does *not* monitor the social media accounts of its players, and any of its players commit a NCAA violation on social media, the NCAA can suspend the player or declare the player ineligible.<sup>13</sup> However, if the university *does* choose to monitor the social media accounts of its athletes, violating players' Constitutional rights, then the university may be subject to sanctions.<sup>14</sup> In attempting to find a middle ground, universities across the nation have begun implementing a variety of social media bans that may not pass constitutional muster.

Before exploring the different restrictions that are currently in place, Part I of this paper defines and explores First Amendment protection, and Part II examines how the First Amendment applies in the social media context. Part III discusses student speech precedent, which establishes that public institutions are generally constitutionally estopped

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

<sup>10</sup> *Id.*

<sup>11</sup> See U.S. Const. amend. I; *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988).

<sup>12</sup> See *Healy v. James*, 408 U.S. 169, 180 (1972) (“[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment.”).

<sup>13</sup> See Aaron Taube, *Marvin Austin Dismissed, Greg Little and Robert Quinn Ruled Ineligible*, Daily Tar Heel (Oct. 11, 2010, 10:19 PM), [https://www.dailytarheel.com/article/2010/10/marvin\\_austin\\_dismissed\\_greg\\_little\\_and\\_robert\\_quinn\\_ruled\\_ineligible](https://www.dailytarheel.com/article/2010/10/marvin_austin_dismissed_greg_little_and_robert_quinn_ruled_ineligible).

<sup>14</sup> See, e.g., *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 930 (Colo. 1993) (holding that, in absence of voluntary consents, university's random, suspicionless drug testing of student athletes was an unconstitutional search).

from restricting students' free speech. This section will also note the few exceptions to the general rule. Part IV answers the *what, where, why* and *how* questions as they pertain to the current restrictions on student-athletes. Specifically, what restrictions have been implemented? Where have these restrictions been implemented? Why are universities restricting the free speech of their student-athletes? And how are the restrictions being put into effect? Then, Part V asks and answers the question: What makes student-athletes different than average students when it comes to restricting speech. In other words, why are universities allowed to implement restrictions on athletes' free speech but not the student body in general? Part VI analyzes the constitutionality of the social media restrictions under existing case law as well as the time, place, and manner analysis. Part VII explores existing state and federal legislation dealing with social media privacy. Specifically, Part VII analyzes various state statutes, the Social Networking Online Privacy Act, and the Stored Communications Act. Finally, this paper briefly concludes with an alternative solution to the social media bans that are currently in place.

## II. THE FIRST AMENDMENT

### A. *Defining the First Amendment*

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>15</sup> In the simplest of terms, and as it pertains to this paper, the First Amendment means that the government may not restrict one's right to free speech.

It is well-settled that in order to bring a valid First Amendment claim, there must be state action.<sup>16</sup> Therefore, actions taken by public institutions are subject to First Amendment claims whereas actions by

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<sup>15</sup> U.S. Const. amend. I.

<sup>16</sup> Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 453 (2012).

private institutions are not.<sup>17</sup> This is especially important in the context of social media bans because student-athletes at private universities are subject to any and all policies held by the institution regardless of the restrictions on speech. For this reason, this paper will focus on the constitutionality of *public* institutions' bans on student-athletes use of social media.

### *B. Theories of the First Amendment*

Understanding the First Amendment requires a quick glance at its historical context. Since the drafting of the Constitution, interpreters have offered many different rationales for granting special protections to speech. However, three theories, in particular, have seemingly taken the spotlight.<sup>18</sup> The first rationale is that free speech helps citizens to find the truths in society. Or, as Justice Holmes put it, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>19</sup> The second rationale, and most important to the overall function of American democracy, is that free speech is critical for our citizens to have the freedom to propose and debate public issues.<sup>20</sup> Finally, the third rationale speaks to the idea that “[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.”<sup>21</sup> All three rationales focus on the same general proposition: the First Amendment was established to “remove governmental restraints from the arena of public discussion.”<sup>22</sup> Generally speaking, the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>23</sup> However, that is not to say that *all* speech

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<sup>17</sup> *Id.*

<sup>18</sup> See *infra* notes 19-21 and accompanying text.

<sup>19</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>20</sup> See generally Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* 26-27 (1948) (discussing theories of free speech).

<sup>21</sup> Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 233 (1992).

<sup>22</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (“[The First Amendment] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.”).

<sup>23</sup> *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding Chicago city ordinance unconstitutional because it made distinction between peace and non-peaceful picketing based on subject matter).



is protected. Certainly, regulations can be imposed that *implicate or restrict* the First Amendment, but that do not necessarily *violate* the First Amendment.<sup>24</sup>

C. *Content-Neutral vs. Content-Based Restrictions*

When analyzing issues under the First Amendment, it is important to be able to decipher between content-neutral expression and content-based expression.<sup>25</sup> The distinction is important because, arguably, content-based restrictions on student-athletes speech are unconstitutional, whereas content-neutral restrictions on student-athletes may satisfy the First Amendment protections.

Content-based restrictions limit communication based on the subject matter of the message being expressed.<sup>26</sup> Content-based restrictions are typically viewed with skepticism and are held to be unconstitutional unless the restriction is necessary to achieve a compelling government interest.<sup>27</sup> Additionally, content-based restrictions receive the highest level of judicial scrutiny.<sup>28</sup> The social media policies that would fall under content-based expression are those policies that use monitoring software to flag certain words and phrases. This is because only the words and phrases, which make up the subject matter of the message, are being restricted.

Content-neutral restrictions, on the other hand, limit communication without regard to the subject of the message expressed.<sup>29</sup> These types of restrictions will be held unconstitutional unless the restriction is closely related to accomplishing an important governmental interest.<sup>30</sup> The Supreme Court has said that the evaluation of whether a restriction is content-based or content-neutral requires the determination

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<sup>24</sup> *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803-04 (1984).

<sup>25</sup> See generally, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 189 (1983).

<sup>26</sup> *Id.* at 190.

<sup>27</sup> See *id.*

<sup>28</sup> See, e.g., *id.* at 209 (“[L]aws that are content-based on their face require strict scrutiny whether they turn on communicative impact and thus employs the communicative impact concept to expand the class of content-based restrictions.”).

<sup>29</sup> *Id.* at 189.

<sup>30</sup> See generally *id.* at 190-193 (discussing content-neutral restrictions).

of “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>31</sup> The social media restrictions that would fall under the content-neutral category are the outright bans and the season-long bans because athletes’ communication is being restricted regardless of the message being conveyed. (Content-neutral and content-based restrictions will be discussed in greater detail in Part VI where the social media restrictions are analyzed under the time, place, and manner analysis.)

## II. APPLYING SOCIAL MEDIA TO THE FIRST AMENDMENT

Facebook, Twitter, and other social media platforms provide perhaps the most powerful mechanisms available to people to make their voices heard. Today, the ability of social media to serve as a place for direct communication between individuals worldwide is comparable to speech that was previously only attainable for people physically gathered in the same location.<sup>32</sup> Understanding how social media relates to the First Amendment requires a look into how social media platforms operate and what users can share on each platform. Although there are currently many different platforms being used daily, this paper will focus on two platforms in particular that tend to have a larger impact on the younger, collegiate generation – Twitter and Snapchat.

### Twitter

Twitter is a social media platform with more than 300 million active users worldwide.<sup>33</sup> Twitter allows users to post short messages, called tweets, which may be up to 280 characters long. Posts may include text, photographs, videos and links, and are posted to a webpage on Twitter that is linked to the user’s account.<sup>34</sup> A defining feature of Twitter is a user’s ability to repost, also known as “retweeting” others’ posts. Perhaps one of the more complex issues of Twitter is determining what

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<sup>31</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

<sup>32</sup> *Leuthy v. LePage*, No. 1:17-cv-00296, 2018 WL 4134628 at \*2 (D. Me. Aug. 29, 2018).

<sup>33</sup> *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 550 (S.D.N.Y. 2018).

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

constitutes an individuals' speech as it relates to the First Amendment. When a user posts his own original tweet to his Twitter page, that will certainly be defined as "speech" for purposes of the First Amendment. Similarly, when a user "likes" another user's tweet on Twitter, that may also qualify as speech.<sup>35</sup> However, what if a user "retweets" another user's tweet? Does retweeting qualify as speech in the same way that "liking" qualifies?

Twitter's potential impact on a student-athlete or university is illustrated by the Marvin Austin case, but his situation is not an isolated one. Issues actually arise so frequently that Mike and Mike of the ESPN morning show had enough material for a parody about the mistakes players have made on Twitter. The parody employed Carrie Underwood's song "Before He Cheats," as a vehicle and replaced the lyric "maybe next time he'll think before he cheats" to "maybe next time he'll think before he tweets."<sup>36</sup> Nonetheless, Twitter's popularity has increased with more people using Twitter on a daily basis, thereby increasing the exposure and potential repercussions for athletes who decide to use Twitter to vent, rant, and rave about issues of the day.

### **Snapchat**

Snapchat is a temporary-post based social media platform, which means any picture or video a user on Snapchat sends, by default, is made available to the receiver for only a short amount of time before it disappears.<sup>37</sup> This "temporary" aspect of the application was originally designed to encourage a more natural interaction.<sup>38</sup> Snapchat first arrived on the scene in 2011.<sup>39</sup> After only one year of existence, about 50 million "snaps" were being sent per day.<sup>40</sup> Today, Snapchat has 187 million daily

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<sup>35</sup> See *Bland v. Roberts*, 730 F.3d 368, 384-86 (4th Cir. 2013).

<sup>36</sup> Davis Walsh, *All A Twitter: Social Networking, College Athletes, and the First Amendment*, 20 Wm. & Mary Bill Rts. J. 619, 623 (Dec. 2011).

<sup>37</sup> Maggie Tillman & Elyse Batters, *What is Snapchat, how does it work, and what is it used for?*, Pocket-lint (Feb. 8, 2019). <https://www.pocket-lint.com/apps/news/snapchat/131313-what-is-snapchat-how-does-it-work-and-what-is-it-used-for>.

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

<sup>39</sup> See *History of Snapchat: Timeline and Facts*, TheStreet (Feb. 28, 2020), <https://www.thestreet.com/technology/history-of-snapchat>.

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

users.<sup>41</sup> Additionally, studies show that 78% of Snapchat users are between the ages of 18 and 24,<sup>42</sup> which illustrates the popularity of this social media platform on college campuses.

Initially, Snapchat's main benefit was that the content "disappeared" when it was opened and viewed by the recipient. However, in today's world of "screenshotting" and "screen recording," a user would be lucky if a message ever truly disappeared.

Snapchat's potential impact on a student is evidenced in a 2018 case called *Johnson v. Cache County School District*.<sup>43</sup> In that case, a high school student was dismissed from the cheerleading squad when she posted a video to her snapchat story after she had just made the team.<sup>44</sup> The cheerleader is seen in the video singing along to an explicit rap song with other girls who had also just made the team.<sup>45</sup> The student had been instructed to refrain from posting anything about making the team until the formal announcement had been made the following day.<sup>46</sup> In addition to the instruction, the "Cheer Constitution" included a provision that stated that "[m]embers will be dismissed for improper social media usage."<sup>47</sup>

Unfortunately, by the time the cheerleader deleted her post, it was too late. The video had already been screen recorded and disseminated for others to view.<sup>48</sup> A former member of the cheer leading team saw the video and informed the administration, who later dismissed the cheerleader from the team.<sup>49</sup> The school district argued her dismissal was justified because she had been instructed to stay silent on social media until after the official announcement about the cheer leading squad.<sup>50</sup> The

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<sup>41</sup> *123 Amazing Social Media Statistics and Facts*, Brandwatch (Mar. 1, 2019), <https://www.brandwatch.com/blog/amazing-social-media-statistics-and-facts/>.

<sup>42</sup> Aaron Smith & Monica Anderson, *Social Media Use in 2018*, Pew Research Center (Mar. 1, 2018), <https://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>.

<sup>43</sup> See generally *Johnson v. Cache County School Dist.*, 323 F. Supp. 3d 1301 (D. Utah 2018).

<sup>44</sup> *Id.* at 1309-10.

<sup>45</sup> *Id.* at 1309.

<sup>46</sup> *Id.* 1308-1309.

<sup>47</sup> *Id.* at 1308.

<sup>48</sup> *Id.* at 1309.

<sup>49</sup> *Id.* at 1309-10.

<sup>50</sup> *Id.* at 1310.

cheerleader claimed that her dismissal was a violation of her First Amendment rights.<sup>51</sup> In rejecting the cheerleader's First Amendment claim, the court reiterates that the school officials did not prevent the cheerleaders from social media access completely.<sup>52</sup> Rather, the cheerleaders were merely asked not to post anything about making the squad during the small-time frame between the selection of the squad and the announcement about the squad.<sup>53</sup>

The case reinforces the fact that speech on social media constitutes speech for purposes of the First Amendment. But the question remains, when can a public institution restrict that speech without violating a student's First Amendment rights? The answer to this question emanates from precedent dating back to 1943.

### **III. Public Universities are Constitutionally Estopped from Restricting Free Speech**

In 1943, in *West Virginia State Board of Education v. Barnette*, the United States Supreme Court held that school officials who compelled students to salute the American flag and recite the Pledge of Allegiance violated the First Amendment.<sup>54</sup> The Court explained that compelling such behavior "transcends constitutional limitations" and "invades the sphere of intellect and spirit," which the First Amendment is designed to protect from official control.<sup>55</sup>

Later, in 1969, in a case called *Tinker v. Des Moines Independent Community School District*, the Court addressed the issue of student symbolic speech.<sup>56</sup> In that case, students wore black armbands to school to show their opposition to the Vietnam War.<sup>57</sup> The school implemented a policy to suspend students who continued to wear the black armbands.<sup>58</sup>

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<sup>51</sup> *Id.* at 1311.

<sup>52</sup> *Id.* at 1314.

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

<sup>54</sup> See generally *W. Va. State B. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding flag salute law unconstitutional).

<sup>55</sup> *Id.* at 642.

<sup>56</sup> See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding student speech that would obstruct educational process may be regulated).

<sup>57</sup> *Id.* at 504.

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

Justice Fortas held that such a policy violated the students' First Amendment rights and that the wearing of armbands was "closely akin to 'pure speech.'"<sup>59</sup> Justice Fortas also famously explained that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>60</sup> In holding speech cannot be prohibited unless the speech causes a material or substantial disruption or interference with the work of the school, the Court noted that "undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression."<sup>61</sup> Since *Tinker*, the Court has further defined the parameters of students' First Amendment rights.

In 1972, the Supreme Court applied *Tinker* to the college level.<sup>62</sup> In *Healy*, a school refused to recognize a "Democratic Society" formed by students.<sup>63</sup> In its application of *Tinker*, the *Healy* Court recognized that "[w]hile a college has a legitimate interest in preventing disruption on campus, ... a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."<sup>64</sup> The Court made clear that the college in *Healy*, acting as an instrumentality of the State, "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."<sup>65</sup>

In 1988, the Court carved out its first exception to *Tinker* by acknowledging the state's substantial interest in teaching students socially-appropriate behavior.<sup>66</sup> In *Bethel School District Number 403 v. Fraser*, the Court held that a student's sexually explicit and offensive speech at a school assembly was not protected under the First Amendment.<sup>67</sup> Chief Justice Berger made sure to distinguish this speech from the non-disruptive, political speech in *Tinker*.<sup>68</sup> The *Fraser* decision marked a change in students' rights on school grounds by giving great

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<sup>59</sup> *Id.* at 505–06.

<sup>60</sup> *Id.* at 506.

<sup>61</sup> *Id.* at 508.

<sup>62</sup> See generally *Healy v. James*, 408 U.S. 169 (1972) (holding that a college may not restrict a student run society because it finds its views to be abhorrent).

<sup>63</sup> *Id.* at 170.

<sup>64</sup> *Id.* at 184.

<sup>65</sup> *Id.* at 187–88.

<sup>66</sup> See generally *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>67</sup> *Id.* at 685.

<sup>68</sup> *Id.*

deference to the schools in determining what is appropriate behavior in the public school environment.<sup>69</sup>

Then, two years after *Fraser*, *Hazelwood School District v. Kuhlmeier* resulted in another *Tinker* exception.<sup>70</sup> In *Hazelwood*, the Court addressed the issue of “school-sponsored” speech.<sup>71</sup> In that case, a school principal withdrew two articles from the school-sponsored newspaper before the articles were published believing the articles to be against the school’s viewpoints.<sup>72</sup> Justice White’s majority opinion, ruling in favor of the school, reasoned that schools should be afforded greater control over school-sponsored speech because it should be entitled to dissociate itself from speech that is inadequate, inappropriate, profane, etc.<sup>73</sup> Justice Brennan, in writing his dissent, criticized the majority opinion for “abandoning *Tinker*,” creating a new “distinction between personal and school-sponsored speech,” and relying on “the school’s pedagogical message” as a “constitutionally sufficient justification for the suppression of student speech.”<sup>74</sup>

The Court further narrowed *Tinker* in the case of *Morse v. Frederick* in 2007.<sup>75</sup> In *Morse*, the Court answered the question of whether school administrators violated a high school student’s First Amendment rights when they suspended him after he held up a banner with the phrase “BONG HiTS 4 JESUS” at an off-campus event.<sup>76</sup> The Court declined to apply the *Tinker* standard and determined that the speech was unprotected due to the “serious and palpable” danger that the drug use posed to the health and safety of the students.<sup>77</sup> Therefore, the Court held that a school can restrict speech made at a school event which promotes illegal drug behavior.<sup>78</sup>

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<sup>69</sup> See generally *id.*

<sup>70</sup> See generally *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>71</sup> *Id.* at 273.

<sup>72</sup> *Id.* at 263–64.

<sup>73</sup> *Id.* at 271–72.

<sup>74</sup> *Id.* at 280.

<sup>75</sup> See generally *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>76</sup> *Id.* at 396–97.

<sup>77</sup> *Id.* at 408.

<sup>78</sup> *Id.* at 403.

More recently, in 2015, the Fifth Circuit applied the *Tinker* standard to student speech made online.<sup>79</sup> In *Bell v. Itawamba County School Board*, the plaintiff posted a rap recording on his public Facebook page, and later on YouTube, containing threatening language against two high school teachers/coaches.<sup>80</sup> In the recording, the student named the two teachers specifically and described the violent acts to be carried out against them.<sup>81</sup> The court in that case explained that the primary question of the case was whether off-campus speech directed intentionally at the school community, and understood by school officials to be threatening, harassing, and intimidating to a teacher satisfies the fifty-year-old *Tinker* standard, based on a reasonable forecast of substantial disruption.<sup>82</sup> In answering this question in the affirmative, the court noted that although *Tinker* “requires a specific and significant fear of disruption, not just some remote apprehension of disturbance,” speech can be prohibited as long as a substantial disruption reasonably could have been forecast.<sup>83</sup> The court addresses speech on social media specifically by stating, “with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment.”<sup>84</sup> *Bell* was one of the first cases dealing with student speech on social media.

An overview of relevant case law shows that there is certainly no “set in stone” standard. Rather, the standard is constantly evolving with the times. However, it is clear that institutions cannot prohibit speech solely because they disagree with the speech.<sup>85</sup> Colleges and universities are not enclaves immune from the sweep of the First Amendment.<sup>86</sup> Nonetheless, under the holdings of *Tinker* and *Bell*, schools may prohibit speech that causes a substantial disruption or reasonably foreseeable substantial disruption, whether on campus or off campus.<sup>87</sup> Under *Fraser*, speech may be prohibited if it uses profane and vulgar language

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<sup>79</sup> See generally *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015).

<sup>80</sup> *Id.* at 383.

<sup>81</sup> *Id.*

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

<sup>83</sup> *Id.* at 397.

<sup>84</sup> *Id.* at 400.

<sup>85</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>86</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>87</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).



and occurs on school grounds.<sup>88</sup> Similarly, *Hazelwood* tells us that speech, which goes against the pedagogical views of the school, can be prohibited if made at a school-sponsored event.<sup>89</sup> Lastly, the holding in *Morse* permits institutions to restrict speech that promotes illegal drug behavior if made at a school event, even if the speech was made “off campus.”<sup>90</sup> Although schools can restrict speech in certain instances, one thing is for certain – schools do not have the freedom to prohibit speech solely because the school views the speech as abhorrent.<sup>91</sup> Using this interpreted case law, Part IV discusses what, why, and how universities are restricting speech. Then, Part VI applies the relevant case law to analyze which restrictions may or may not be constitutionally permissible.

#### IV. WHAT, WHERE, WHY AND HOW?

##### A. What. What Exactly are the Universities Restricting?

Currently, each university is entitled to implement its own restrictions on social media. The restrictions range from complete outright bans on the use of all social media platforms to restricting only certain words and phrases used on athletes’ accounts.<sup>92</sup> For instance, some schools have implemented complete bans – meaning the athletes cannot participate in any social media activity or maintain any social media accounts while enrolled at the university.<sup>93</sup> Other universities have implemented a less intense ban, in which the athletes are prohibited from using any social media platforms *during* their season.<sup>94</sup>

On the other hand, there are some schools, like Louisville, which *allows* its student-athletes to participate in social media, but closely

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<sup>88</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>89</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

<sup>90</sup> *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

<sup>91</sup> *See generally* Healy, 408 U.S. 169, 187-188 (1972).

<sup>92</sup> *See* Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 596 (2012); *see also* J. Wes Gay, *Hands off Twitter: Are NCAA Student Athlete Social-Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 796 (2012).

<sup>93</sup> *See* Stubblefield, *supra* note 92, at 596.

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

monitors its players' accounts.<sup>95</sup> And, there are a handful of universities that allow athletes to use social media, yet require the athletes to hand over the passwords to their accounts so athletic departments have access to monitor communications that are not publicly visible.<sup>96</sup>

***B. Where. Which Universities Have Implemented Restrictions***

Louisville<sup>97</sup>, Boise State<sup>98</sup>, Florida State<sup>99</sup>, Old Dominion<sup>100</sup>, University of Connecticut<sup>101</sup>, Clemson<sup>102</sup>, University of South

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<sup>95</sup> See Matt Norlander, *The new way Kentucky and Louisville are monitoring athletes' social media behavior*, CBS SPORTS (Aug. 21, 2012, 7:15 PM), <https://www.cbssports.com/college-basketball/news/the-new-way-kentucky-and-louisville-are-monitoring-athletes-social-media-behavior/>.

<sup>96</sup> See Eric Bentley, *Unnecessary Roughness: Why Athletic Departments Need to Rethink Whether to Aggressively Respond to the Use of Social Media by Athletes*, 75 TEX. B. J. 834, 836 (2012).

<sup>97</sup> Norlander, *supra* note 95.

<sup>98</sup> See, e.g., Ken Paulson, *College Athlete Tweet Ban? Free Speech Sacks That Idea*, USA TODAY (Apr. 16, 2012), <https://www.pressreader.com/usa/usa-today-us-edition/20120416/281779921113718> (listing athletic programs at Boise State, South Carolina, Mississippi State and Towson among those that have banned or limited athlete's Twitter usage.).

<sup>99</sup> David M. Hale, *Seminole fine with social media ban*, ESPN (Aug. 1, 2012, 11:58 AM), [http://www.espn.go.com/colleges/fsu/story/\\_/id/8193190/florida-state-seminoles-looking-restrict-social-media-use-players](http://www.espn.go.com/colleges/fsu/story/_/id/8193190/florida-state-seminoles-looking-restrict-social-media-use-players) (reporting that FSU ex-head football coach banned use of Twitter during football season after "ill-advised" postings).

<sup>100</sup> Harry Minium, *ODU football Twitter ban among most restrictive in U.S.*, THE VIRGINIAN-PILOT (Sept. 15, 2012), [https://www.pilotonline.com/sports/college/old-dominion/article\\_a0fcc378-fef6-56cd-8128-3936d1f85b5e.html](https://www.pilotonline.com/sports/college/old-dominion/article_a0fcc378-fef6-56cd-8128-3936d1f85b5e.html).

<sup>101</sup> Tim Casey, *Is There Anything UConn Can't Do? Tweet, for One*, N.Y. TIMES (Mar. 27, 2015), <https://www.nytimes.com/2015/03/27/sports/ncaabasketball/for-uconn-women-twitter-is-off-limits-until-off-season.html>.

<sup>102</sup> Kristi A. Dosh, *Clemson and Florida State Ban Football Teams from Twitter*, OUTKICKTHECOVERAGE.COM (Aug. 11, 2015), <http://www.outkickthecoverage.com/clemson-and-florida-state-ban-football-teams-from-twitter-081115>.

Carolina<sup>103</sup>, New Mexico State<sup>104</sup>, University of Iowa<sup>105</sup>, and University of Kansas<sup>106</sup> are just a few of the schools which have chosen to implement some type of social media restriction on their athletes. Because all schools have discretion in determining how stringent their restrictions will be, this paper will focus on three schools in greater detail – Louisville, Florida State, and Old Dominion – to give examples of how the restrictions vary from school to school.

### 1. Louisville

Since 2011, Louisville has required its athletes to contractually permit UDiligence, a third-party monitoring software, to oversee the activity on their accounts.<sup>107</sup> UDiligence allows universities to create their own list of “flagged” words. Louisville has over 400 “flagged” words.<sup>108</sup> Each of these words will trigger an immediate alert to coaches or other members of the athletic department when used by a player in a social media post.<sup>109</sup> Once alerted, the coaches or administrators can log in with a username and password and see a list of players along with a link or screenshot of the comment that triggered the alert.<sup>110</sup> Most of the

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<sup>103</sup> See David Cloninger, *Spurrier Bans Team from Twitter*, GAMECOCKCENTRAL.COM (Aug. 4, 2011), <http://southcarolina.rivals.com/content.asp?CID=1247470> (discussing University of South Carolina head football coach Steve Spurrier’s team wide ban of social media).

<sup>104</sup> Diamond Leung, *Steve Alford Bans Players from Tweeting*, ESPN (July 19, 2011), [http://espn.go.com/blog/collegebasketballnation/post/\\_id/33080/steve-alford-bans-players-from-tweeting](http://espn.go.com/blog/collegebasketballnation/post/_id/33080/steve-alford-bans-players-from-tweeting).

<sup>105</sup> Chad Leistikow, *Kirk Ferentz open to changing strict Twitter policy*, HAWK CENTRAL (Oct. 6, 2015 3:45 PM), <https://www.hawkcentral.com/story/sports/college/iowa/football/2015/10/06/kirk-ferentz-twitter-policy-facebook-instagram-drew-ott/73471904/>.

<sup>106</sup> Farzin Vousoughian, *Turner Gill Wants Football Players and Gentlemen to Play for His Program*, BLEACHER REPORT (Aug. 8, 2011), <https://bleacherreport.com/articles/796201-turner-gill-wants-football-players-and-gentlemen-to-play-for-his-program>.

<sup>107</sup> See Norlander, *supra* note 95.

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

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

<sup>110</sup> See Ho, *Companies tracking college athletes’ Tweets, Facebook posts go after local universities*, THE WASHINGTON POST (Oct. 16, 2011), [https://www.washingtonpost.com/business/capitalbusiness/companies-tracking-college-athletes-tweets-facebook-posts-go-after-local-universities/2011/10/10/gIQAyHZ9oL\\_story.html?utm\\_term=.244e05e05c48](https://www.washingtonpost.com/business/capitalbusiness/companies-tracking-college-athletes-tweets-facebook-posts-go-after-local-universities/2011/10/10/gIQAyHZ9oL_story.html?utm_term=.244e05e05c48).

flagged words include slang expressions that have to do with drugs, sex, and alcohol.<sup>111</sup> Although an innocent tweet may cause a coach to be woken up in the middle of the night, this risk is one the Louisville coach is willing to take.

## 2. Florida State

Former Florida State head football coach, Jimbo Fisher, implemented a season-long Twitter ban for all of his players beginning in 2011.<sup>112</sup> The ban started after angry players took to Twitter after a loss to Wake Forest.<sup>113</sup> Fisher eventually allowed the players to use Twitter again, but reinstated the ban before the start of the 2012 season due to more problem-causing tweets.<sup>114</sup> In justifying the seasonal ban, Fisher stated, “Right now we’re on a Twitter ban because I think we abused the responsibility... Words are the most powerful thing we have, and as soon as they’re associated with your name – no matter if you retweeted them, if you tweeted them, no matter what happens – that’s stuck to you for life.”<sup>115</sup> Fisher’s statement is a perfect example of why most of these schools have implemented bans, whether indefinitely or only for the duration of the season.

## 3. Old Dominion

In 2011, Bobby Wilder implemented a complete Twitter ban after he learned a couple of his players, who were struggling academically, were tweeting over one hundred times a day.<sup>116</sup> At one time, Wilder’s ban was believed to be the strictest ban among college football programs,

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<sup>111</sup> *Id.*

<sup>112</sup> Corey Clark, *Clark: Social-media ban makes perfect sense*, TALLAHASSEE DEMOCRAT (Aug. 18, 2015, 5:01 PM), <https://www.tallahassee.com/story/sports/college/fsu/football/2015/08/18/clark-social-media-ban-makes-perfect-sense-day-age/31937429/>.

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

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

<sup>115</sup> Sports Radio Interviews, *Jimbo Fisher Uses A Weird Gun Analogy To Explain FSU’s Twitter Ban*, DEADSPIN (Aug. 30, 2012, 3:50 PM), <https://deadspin.com/jimbo-fisher-uses-a-weird-gun-analogy-to-explain-fsus-t-5939358>.

<sup>116</sup> Doug Samuels, *After a four year Twitter ban, Old Dominion HC Bobby Wilder is lifting the social media restriction*, FOOTBALL SCOOP (July 14, 2015), <http://footballscoop.com/news/after-a-four-year-twitter-ban-old-dominion-hc-bobby-wilder-is-lifting-the-social-media-restriction/>.

banning Twitter use completely year round.<sup>117</sup> Wilder once stated, “If you can’t live without Twitter, ODU isn’t the place for you.”<sup>118</sup> On the contrary, Wilder allowed his players to have Facebook pages, yet even that privilege came with a caveat – each player had to be a friend of ODU’s Facebook football page.<sup>119</sup> This way, ODU’s football department could see what each player was posting on their otherwise private accounts. According to Wilder, Facebook and Twitter were different. Facebook was the place to have online relationships with their friends and family, whereas Twitter can be an emotional medium, through which people fire off statements before thinking about the consequences.<sup>120</sup>

As evidenced by each of these universities, colleges implement whatever bans they believe are necessary to prevent harm to their reputations or to their players’ reputations. But the question still remains as to whether such a ban is constitutional. The constitutionality of these bans will be analyzed in parts IV through VII of this paper.

C. *Why. Why have universities taken such drastic measures*

Perhaps the best way to illustrate why certain universities have taken such drastic measures is by storytelling. Former quarterback for Ohio State University, Cardale Jones, is known for his famous tweet: “Why should we have to go to class if we came here to play FOOTBALL, we ain’t come to play SCHOOL, classes are POINTLESS.”<sup>121</sup> As a result of his tweet, Jones was suspended from the following football game against the Nebraska Cornhuskers and had his Twitter account removed.<sup>122</sup> Since then, he has become the poster child for why student-athletes and students in general should be extra cautious of their presence on social media.<sup>123</sup> One year after the scandal, Jones’ tweet appeared in

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

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

<sup>119</sup> Minium, *supra* note 100.

<sup>120</sup> *Id.*

<sup>121</sup> Matt Bonesteel, *Cardale Jones didn’t go to Ohio State to ‘play school.’ Now he’s graduating*, THE WASH. POST (Apr. 15, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/04/15/cardale-jones-didnt-go-to-ohio-state-to-play-school-now-hes-graduating/?noredirect=on&utm\\_term=.b19156a16638](https://www.washingtonpost.com/news/early-lead/wp/2017/04/15/cardale-jones-didnt-go-to-ohio-state-to-play-school-now-hes-graduating/?noredirect=on&utm_term=.b19156a16638).

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

<sup>123</sup> See Tristan Thornburgh, *Textbook Uses Cardale Jones’ Infamous ‘We Ain’t Come to Play School’ Tweet*, BLEACHER REPORT (Oct. 21, 2013), <https://bleacherreport.com>

a textbook at Ole Miss that educates students on how to use social media responsibly.<sup>124</sup>

Although Cardale Jones suffered less consequences than Marvin Austin and UNC, these stories accurately depict what may happen, not only to the players, but also to the universities, when one idiotic tweet is posted in the social media world. Consequently, in order to avoid the backlash and harsh NCAA penalties, universities have enacted policies that restrict the use of their athletes' social media accounts.

*D. **How.** How are colleges carrying out their policies?*

Setting restrictions for student-athletes comes with the challenging task of monitoring all of the athletes' activities in order to ensure that they are abiding by the rules. Some schools do their own monitoring.<sup>125</sup> In those instances, the athletic departments are in charge of monitoring the publicly available information on their players' accounts.<sup>126</sup> In situations where the information is private, schools may require their student-athletes to "friend" the athletic department so their posts are readable.<sup>127</sup> Or, as a more intrusive means, some schools require athletes to provide their passwords so that members of the athletic department can check at any time to see what has been posted.<sup>128</sup> With the players' passwords on hand, the athletic department can also read any private messages sent or received from the players' account, which may trigger additional constitutional violations.<sup>129</sup>

Other schools, that do not want to directly monitor the players, hire outside companies to monitor the school's athletes.<sup>130</sup> Several companies have found a profitable niche in monitoring athletes' social

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/articles/1819804-textbook-uses-cardale-jones-infamous-we-aint-come-to-play-school-tweet.

<sup>124</sup> *Id.*

<sup>125</sup> See Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 2 (2014).

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

<sup>127</sup> See Minium, *supra* note 100.

<sup>128</sup> See Bentley, *supra* note 16, at 836.

<sup>129</sup> See *id.*

<sup>130</sup> See Ho, *supra* note 110.

media accounts for colleges and universities.<sup>131</sup> Two of these companies are UDiligence and Varsity Monitor.<sup>132</sup> These private companies charge universities either a price per school or per individual athlete and, in return, monitor all athletes' Tweets, Facebook posts and other social media activities twenty-four hours a day.<sup>133</sup> The program hones in on specific keywords such as expletives, brands of alcohol, opponents names, common misspellings of racial profanities and more.<sup>134</sup> Each athlete, coach or administrator receives an alert when a questionable post appears online.<sup>135</sup> Some critics of this method of monitoring see a potential violation of free speech, but the companies claim that because players' give their express consent to be monitored, there is absolutely no violation.<sup>136</sup>

## V. Why are Student-Athletes Different?

If precedent makes it clear that schools cannot prohibit speech solely because they disagree with the speech, what makes athletes the exception to the rule? For one, athletes tend to be the most regulated students on campus.<sup>137</sup> Even the Supreme Court has noted that student-athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."<sup>138</sup> Athletes are held to different academic standards, class attendance standards, and character standards than non-athlete students.<sup>139</sup> Many college athletes are even prohibited from smoking or drinking (even if legally of age).<sup>140</sup> In *Vernonia School District 47J v. Acton*, the Supreme Court recognized that

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<sup>131</sup> *Id.*

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

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

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

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

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

<sup>137</sup> See *Lowery v. Euverard*, 497 F.3d 594, 597 (6th Cir. 2007).

<sup>138</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (noting that students participating in school-sponsored athletics have a reduced expectation of privacy than general students.).

<sup>139</sup> See, e.g., Meg Penrose, *Tinkering with Success: College Athletes, Social Media, and the First Amendment*, 35 PACE L. REV. 30, 43 (2014) (student-athletes "often must maintain a particular grade point average to remain on the team. They must attend study hall, have unique access to tutors and tutoring, and find themselves traveling the country, if not the world, in pursuit of athletic competition.").

<sup>140</sup> *Id.*

due to all of the restrictions placed upon them, athletes are constitutionally different and that “[s]omewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>141</sup>

In addition, colleges and universities have provided their own reasons for why they believe they can rightfully prohibit student-athletes from using social media. For one, colleges suggest that student-athletes voluntarily waive their constitutional right when they sign their financial aid contract.<sup>142</sup> Second, universities argue for the need to protect the image of the university and/or the reputation of the athlete.<sup>143</sup> However, these rationales may not hold up in court for a multitude of reasons.

### Voluntary Waiver

The Financial Aid Agreement, the National Letter of Intent and the Student-Athlete Statement are the three documents that NCAA student-athletes sign before competing for a certain university.<sup>144</sup> Several courts have recognized that these documents, along with others, create a contractual relationship between the student-athlete and the university.<sup>145</sup> Of these three documents, the Financial Aid Agreement is the one document that universities have complete discretion in crafting.<sup>146</sup> Per this document, which sets forth the terms of athletes’ athletic scholarships, some university attorneys maintain that athletes may rightfully be required to waive any claims that social media monitoring violates their First Amendment rights.<sup>147</sup>

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<sup>141</sup> *Vernonia*, 515 U.S. at 657.

<sup>142</sup> See Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 598-99 (2012).

<sup>143</sup> J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 796-97 (2012).

<sup>144</sup> Kevin Stangel, *Protecting Universities’ Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS. L. REV. 137, 143 (2000).

<sup>145</sup> See, e.g., *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117 (N.C. App. 1972); see also *Begley v. Corp. of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973).

<sup>146</sup> See Stangel, *supra* note 144, at 144.

<sup>147</sup> See Stubblefield, *supra* note 142, at 596.



It is important to note at the outset that Courts must “indulge every reasonable presumption against a waiver of fundamental rights.”<sup>148</sup> Just recently, in 2019, a case arose in Pennsylvania, which raised the question of whether a public school can lawfully remove a student from an extracurricular activity for her profanity, transmitted off school grounds, on Snapchat, to fellow students.<sup>149</sup> In justifying the student’s removal from the team, the school district claimed that the student had waived her First Amendment rights when she joined the cheerleading squad because both her and her mother signed the “Application for Cheerleading Tryouts,” which conditioned participation on abiding by the Cheerleading Rules.<sup>150</sup> In denying the school district’s claim, the court stated that “the waiver of one’s First Amendment rights must be shown by ‘clear and compelling’ evidence.”<sup>151</sup> The court went on to cite the Third Circuit in explaining that “such volition and understanding ... are present where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contact negotiations.”<sup>152</sup>

In ruling for the cheerleader, the court found none of those factors to be present.<sup>153</sup> Specifically, neither the cheerleader nor her mother had bargaining equality with the coaches or the school; the Cheerleading rules were not subject to negotiation; and the cheerleader and her mother were not represented by counsel when they agreed she would abide by the rules.<sup>154</sup>

Therefore, under the *Mahanoy* holding, the constitutionality of the restrictions on student-athletes’ social media use would hinge on the three aforementioned factors. Because student-athletes typically do not

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<sup>148</sup> Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

<sup>149</sup> See generally B.L. v. Mahanoy Area Sch. Dist., No. 3:17-CV-01734, 2019 WL 1298378 (M.D. Pa. 2019).

<sup>150</sup> *Id.* at \*5.

<sup>151</sup> *Id.*; see also Curtis Publ’g Co. v. Butts, 388 U.S. 130, 145 (1967).

<sup>152</sup> *Mahanoy Area Sch. Dist.*, 2019 WL 1298378, at \*5.

<sup>153</sup> *Id.*

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

have bargaining equality with schools or coaches<sup>155</sup>, and because the Financial Aid Agreements are probably non-negotiable<sup>156</sup>, student-athletes must have competent counsel present upon signing their agreement in order for a school to succeed on a claim that the student *voluntarily* waived their constitutional rights. But, because student-athletes rarely, if ever, have attorneys present upon signing on the dotted line,<sup>157</sup> the voluntary waiver likely will not hold up in court under the *Mahanoy* rationale.

In addition, requiring a student to waive his or her constitutional rights in order to participate in athletics risks running afoul of the “unconstitutional conditions” doctrine. The doctrine arises from the Constitution’s prohibition against penalizing an individual for the exercise of a constitutional right.<sup>158</sup> The doctrine holds that a requirement to waive constitutional rights as a condition of receiving a government benefit will be held unconstitutional if that right “has little or no relationship to the withheld benefit.”<sup>159</sup> In order to answer whether a condition is constitutional, we must ask “whether the condition is within the scope of the government benefit on which it is contingent.”<sup>160</sup> Colleges may argue that the social media restriction is within the scope of participating in athletics because without social media, athletes have less distractions and more focus on the sport. Nonetheless, colleges which completely restrict the use of social media by its athletes for the duration of their enrollment may have a difficult time showing *enough* of a relationship between social media and athletics to permit an outright ban on all social media year-round. This is because, during off-season, social media use has very little correlation to the team’s success in the upcoming season, which may not take place for another 6-8 months. On the other

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<sup>155</sup> See Darren Heitner, *To Sign or Not to Sign, That Is the Question*, BLEACHER REPORT (Feb. 3, 2009), <https://bleacherreport.com/articles/119077-to-sign-or-not-to-sign-that-is-the-question>.

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

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

<sup>158</sup> Thomas R. McCoy, *Unconstitutional Conditions Doctrine*, First Amend. Encyclopedia, <https://www.mtsu.edu/first-amendment/article/1026/unconstitutional-conditions-doctrine> (last visited March 18, 2020).

<sup>159</sup> *Lebron v. Sec’y, Fla. Dept. of Children & Families*, 710 F.3d 1202 (11th Cir. 2013) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (Florida regulators violated the Constitution by requiring welfare recipients to submit to drug screening as a condition for benefits.)).

<sup>160</sup> See *LoMonte*, *supra* note 125, at 41.

hand, those universities that only implement season-long bans run *less* of a risk of violating the unconstitutional conditions doctrine because a short, season-long ban on social media to limit distractions has more of a causal relationship to the successful athletic season taking place at the time, the benefit which the restriction is contingent.

In short, it would be difficult for a university to assert that a student-athlete voluntarily waived his or her constitutional right to free speech upon signing their athletic contracts. To reiterate, conditioning extracurricular participation on a waiver of a constitutional right is coercive and, therefore, involuntary.<sup>161</sup> Not only do the student-athletes lack bargaining equality with their universities, but the universities risk running afoul of the unconstitutional conditions doctrine by requiring athletes to give up their right to free speech as a condition to playing for the school.

### *Protecting Reputations*

Universities are looking to protect their reputations for various reasons, not the least of which is financial. College athletics have become increasingly commercial and highly lucrative.<sup>162</sup> Coaches' salaries have dramatically increased in the more popular college sports, such as basketball and football.<sup>163</sup> Schools are making money through television contracts, licensing apparel, ticket sales, and millions more in alumni donations for the more elite universities.<sup>164</sup> As an example, one of the most lucrative television contracts, held by the University of Texas,

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<sup>161</sup> *B.L. v. Mahanoy Area Sch. Dist.*, No. 3:17-CV-01734, 2019 WL 1298378 at \*5 (M.D. Pa. 2019); see also *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver is involuntary if coerced).

<sup>162</sup> See generally Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; Editorial, *College Sports: Boola Boola vs. Moola Moola*, L.A. TIMES (Oct. 17, 2011), <https://www.latimes.com/sports/la-xpm-2011-oct-17-la-ed-ncaa-20111017-story.html>.

<sup>163</sup> Erik Brady et al., *Salaries for College Football Coaches Back on Rise*, USA TODAY (Nov. 17, 2011, 11:02 AM), <http://www.usatoday.com/sports/college/football/story/2011-1117/cover-college-football-coaches-salaries-rise/51242232/1>.

<sup>164</sup> John Browning, *Universities Monitoring Social Media Accounts of Student Athletes, A Recipe for Disaster*, 75 TEX. B.J. 840, 842 (2012).

called the Longhorn Network, is worth a reported 300 million dollars.<sup>165</sup> With all this money on the line, college athletics have become increasingly more competitive. Coaches will do whatever it takes to keep their players' eyes on the prize, because at the end of the day, a win for the team is a win for the coach and a win for the school. Consequently, the universities will generally support whichever policies the coaches deem important for success, because success means more notoriety, more ticket sales, more alumni donations, and more revenue.<sup>166</sup>

The best way for universities to keep their reputations intact is to keep their players focused and minimize the drama. Steve Spurrier, the former head coach of the South Carolina Gamecocks football team, said it best when he addressed why he had banned his players from social media, "Well, we have some dumb, immature players that put crap on their Twitter, and we don't need that. So, the best thing to do is just ban it . . . ." <sup>167</sup>

However, no matter how enticing it may be for universities to implement policies to keep their teams on the path to success, case law has made clear an institution "cannot censor speech simply because it wishes to avoid "discomfort and unpleasantness."<sup>168</sup> The Supreme Court has declared that in order for an institution to justify a prohibition of a particular expression of opinion, it must be able to show that "its action was caused by more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>169</sup> Under this rationale, the restrictions in place by universities such as the University of South Carolina, who reason their restrictions are to avoid damaging the reputation of the university, are likely unconstitutional.

## VI. How Should the Social Media Restrictions be Analyzed?

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<sup>165</sup> Aaron Kuriloff & David Miltenberg, *ESPN Longhorn Network Cash Tips College Sports into Disarray*, BLOOMBERG BUSINESSWEEK (Nov. 10, 2011), <https://www.bloomberg.com/news/articles/2011-11-03/espn-longhorn-network-cash-tips-u-s-college-sports-leagues-into-disarray>.

<sup>166</sup> J. Wes Gay, *supra* note 143, at 796-97.

<sup>167</sup> David Cloninger, *Spurrier Bans Team from Twitter*, GAMECOCKCENTRAL.COM (Aug. 4, 2011), <https://southcarolina.rivals.com/news/spurrier-bans-team-from-twitter>.

<sup>168</sup> *Tinker*, 393 U.S. 503 at 509.

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

### A. Case Law

Based upon the Supreme Court's student speech precedents, there are four main rules: (1) "Under *Fraser*, a school may categorically prohibit lewd, vulgar, or profane language[;]" (2) "Under *Hazelwood*, a school may regulate school-sponsored speech ... on the basis of any legitimate pedagogical concern[;]" (3) Under *Morse*, a school may prohibit speech that can reasonably be regarded as encouraging illegal drug use; and (4) "Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."<sup>170</sup> And recently, the Fifth Circuit applied the *Tinker* standard to *off campus*, online speech and determined that speech is not protected where it causes a reasonably foreseeable substantial disturbance.<sup>171</sup>

Under *Tinker*, a university can prohibit any speech that causes a substantial disruption or reasonably foreseeable disruption of school operations or interferes with the rights of others.<sup>172</sup> It is my belief that an athlete's speech is unlikely to cause a substantial disruption of school operations unless the athlete were to pose a dangerous threat to the school. But this conclusion applies to all students, not just athletes. Therefore, under *Tinker*, it would be unconstitutional to implement an outright ban on student-athletes' speech without extending the ban to all students in general. Furthermore, a university cannot implement a ban on speech simply because it *may* one day cause a substantial disruption. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.<sup>173</sup> If this were enough, then *all* student speech would be constitutionally prohibited because, in theory, there *could* be a disruption at any time. And if that were the case, schools "would possess absolute authority over their students" and become "enclaves of totalitarianism."<sup>174</sup>

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<sup>170</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); see also *B.L. v. Mahanoy Area Sch. Dist.*, No. 3:17-CV-01734, 2019 WL 1298378 at \*4.

<sup>171</sup> *Bell v. Itawamba County School Board*, 799 F.3d 379, 397-98 (5th Cir. 2015).

<sup>172</sup> *Tinker*, 393 U.S. 503 at 508.

<sup>173</sup> *Id.*

<sup>174</sup> *B.L. v. Mahanoy Area Sch. Dist.*, No. 3:17-CV-01734, 2019 WL 1298378 at \*9 (citing *Tinker* at 511.).

Following the *Fraser* holding, the restrictions on student-athletes' social media would be constitutional if (1) the speech was made at a school event and (2) the speech consisted of lewd, vulgar, or profane language. Under *Fraser*, athletic departments may be entitled to use the current monitoring systems if they are only flagging those words that are lewd, vulgar, or profane. For instance, Louisville's entire list of over 400 flagged words would probably not be permissible, although Louisville could continue to flag words such as, "Rape," "Breasts," "Whore," and "Screw."<sup>175</sup>

Additionally, schools would have to show that the speech made on social media is equivalent to speech made at a school event. However, although a portion of an athlete's follower base is comprised of students at his or her school, an athlete's speech on social media is not given at a school event or made directly to an auditorium full of students on school grounds. Instead, their tweets are publicized to hundreds, and even thousands, of followers, most of which do *not* attend the athlete's university. Therefore, it would be difficult to prove the constitutionality of social media bans under the *Fraser* exception. Furthermore, under *Fraser*, schools likely cannot implement an outright ban on social media, as that would be prohibiting all speech made by athletes, and not just speech considered to be lewd, vulgar, or profane.

Analyzing the social media restrictions under the *Hazelwood* holding would likely permit a similar result of that under *Fraser*. Under *Hazelwood*, schools may be able to monitor their athletes' social media accounts and flag words that are against any pedagogical views of the school, such as "Rape," "Alcohol" and "Doobie." However, to satisfy *Hazelwood*, those words must have been used at a "school-sponsored" event. For instance, if a controversial tweet was posted at a school sponsored event, such as a football game, then the university would have a viable argument as to prohibiting the speech. It also seems plausible that the university can restrict student-athletes' speech if the student-athletes' social media accounts depict a relationship with the university in any way, such as the athlete wearing their school jersey in their profile picture or the athlete including their team name in his biography section of their social media profile. These scenarios may classify an athlete's social media posts as school sponsored. But again, in order for the

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<sup>175</sup> See Norlander, *supra* note 97.

restrictions to be constitutional under *Hazelwood*, the school would only be able to (1) monitor words and phrases, and (2) monitor only those words and phrases that are made in a “school-sponsored” manner.

The *Morse* holding gives essentially the same result as that under *Fraser*. For the restrictions to be constitutional under *Morse*, the university must show that the speech was (1) made at a school event and (2) promotes illegal drug behavior. As mentioned above, content posted by an athlete at a school-sponsored sporting event may constitute school-sponsored speech. Similarly, student-athletes who depict a relationship with their university on their social media accounts may also be posting school-sponsored speech. To satisfy the second prong of the *Morse* test, universities would need only monitor and flag those words that promote illegal drug behavior. For example, Louisville could continue to flag words such as “[b]lunt,” “[d]rugs,” “[e]cstasy,” and “[p]ot.”<sup>176</sup>

Finally, analyzing these social media bans under the newer *Bell* holding would permit a similar result as analyzing the bans under *Tinker*. Although the *Bell* court held that off-campus speech could be regulated, the court noted that only speech which was directed at the school and which posed a reasonably foreseeable disruption could be restricted.<sup>177</sup> Accordingly, even under *Bell*, a university cannot implement restrictions on student-athlete social media accounts without evidence of any real threats. *Bell* may permit a school to monitor flagged words such as “bomb,” “gun,” “shooting,” and “school,” but even this would be a far stretch because any restriction imposed on the use of those words would simply be out of mere apprehension or fear, which the courts have established is not enough.<sup>178</sup>

To summarize, if these restrictions were to be analyzed under the holdings of *Fraser*, *Hazelwood*, or *Morse*, monitoring restrictions on social media may be constitutional as long as the speech is made on school grounds,<sup>179</sup> or the speech is otherwise school-sponsored,<sup>180</sup> and as long as the institutions are prohibiting only those words which are lewd,

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

<sup>177</sup> *Bell*, 799 F.3d at 400.

<sup>178</sup> *See Tinker*, 393 U.S. at 508.

<sup>179</sup> *See generally Fraser*, 478 U.S. 675; *See also Hazelwood*, 484 U.S. 271.

<sup>180</sup> *See generally Morse*, 551 U.S. 393.

vulgar, profane, against pedagogical concerns of the school, or promote illegal drug behavior<sup>181</sup>. Importantly, under these holdings, institutions likely cannot ban the athletes *outright* or *seasonally*. This is because an outright or seasonal ban would restrict speech all together, and not just speech that classifies as lewd, vulgar, profane, against pedagogical concerns of the school, or promoting illegal drug behavior.

In addition, restricting the use of social media year-round or seasonally would contradict Justice Fortas reasoning in *Tinker*. Justice Fortas made clear that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>182</sup> When universities implement year-round or seasonal bans on social media, they do so to avoid damage to the reputation of the university or the athlete.<sup>183</sup> However, under *Tinker*, a school cannot prohibit speech all together simply because it believes that an individual has the potential of damaging a reputation. Therefore, as the Supreme Court has made clear, *monitoring* social media accounts may be ok in certain instances, whereas *outright bans and seasonal bans* are likely unconstitutional.

### *B. Time, Place, and Manner Restrictions*

Justice Holmes first coined the phrase “time, place, and manner” in *Cox v. New Hampshire* in 1941.<sup>184</sup> Since then, the Supreme Court has held in multiple cases that a restriction on the time, place, or manner of expression is justified when it is neutral in content, serves a significant government interest, and leaves open ample alternative channels of communication.<sup>185</sup>

#### *I. Content Neutrality*

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<sup>181</sup> See *Fraser*, 478 U.S. 684–686; see also *Hazelwood*, 484 U.S. 273; see also *Morse*, 551 U.S. 410.

<sup>182</sup> *Tinker*, 393 U.S. at 508.

<sup>183</sup> See, e.g., David Cloninger, *Spurrier Bans Team from Twitter*, GamecockCentral.com (Aug. 4, 2011), <https://southcarolina.rivals.com/news/spurrier-bans-team-from-twitter>.

<sup>184</sup> 312 U.S. 569, 575–576 (1941).

<sup>185</sup> See, e.g., *Penrose*, *supra* note 139, at 55.



“The first prong, requiring content neutrality, will be violated by any regulation that describes permissible expression in terms of its subject matter.”<sup>186</sup> “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>187</sup> As mentioned in Part II of this paper, both seasonal bans and outright bans would likely satisfy the content-neutral requirement because the message being expressed in the communication is not itself being restricted.<sup>188</sup> Rather, all communication is restricted. However, it is my belief that the social media restrictions, which utilize monitoring systems, would fail here. In those cases, the monitoring systems are flagging words that are generally classified as inappropriate and/or send a negative message which the school does not want to be associated with. It appears that this type of restriction is exactly the type of restriction which the time, place, and manner restriction is intended to prohibit. Such a “content-based approach strikes at the heart of the First amendment.”<sup>189</sup>

## 2. *Narrowly Tailored*

Once the content-neutrality prong is satisfied, the next step in the analysis is a showing of a narrow tailoring to serve a significant government interest.<sup>190</sup> To satisfy this test, a university must be able to show: (1) that its social media ban has been properly tailored so as not to excessively impact speech, and (2) proof of a significant government interest.<sup>191</sup> The government interest at hand here is the success of college athletics. In order to attain success in college athletics, universities must keep their athletes focused. One of the best ways to keep the athletes focused is to cut out one of their main distractions – social media.<sup>192</sup> Once

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<sup>186</sup> Kevin Francis O’Neill, *Time, Place, and Manner Restrictions*, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions>.

<sup>187</sup> *Ward*, 491 U.S. 791; see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

<sup>188</sup> See Penrose, *supra* note 139, at 58-59.

<sup>189</sup> *Id.* at 60.

<sup>190</sup> *Ward*, 491 U.S. at 796.

<sup>191</sup> *Id.* at 782.

<sup>192</sup> See, e.g., Mina Kimes, *Social media bans may violate college athletes’ First Amendment rights*, ABC News (Sept. 2, 2015, 12:03 PM), <https://abcnews.go.com/Sports/social-media-bans-violate-college-athletes-amendment-rights/story?id=33482714> (“Spokesman for UConn says Auriemma’s focus is ‘limiting all

a significant government interest is shown, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”<sup>193</sup> This standard would not be difficult for universities to overcome. Simply put, more distraction means less focus. Therefore, without the ban on social media, athletes would be less focused on athletics and the success likely would not be as great. The Supreme Court has stated:

A statute is narrowly tailored if it targets and eliminates no more than the exact source of “evil” it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.<sup>194</sup>

Here, social media and distraction therefrom is the targeted evil which universities seek to remedy. It is this author’s opinion that the substantial government interest – the success of college athletics – would be achieved less effectively absent the restriction on social media. This is because absent the social media restriction, athletes are more likely to focus on their social media, check their profiles, communicate with fans, and deal with “criticism of their play that could impact team chemistry or their own” personal performance.<sup>195</sup> Therefore, seasonal and outright bans on social media are narrowly tailored because the restriction promotes the government interest of successful college athletics, which would not be successful if the athletes were distracted by social media.

### 3. *Alternative Means of Communication*

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potential distractions.”); *See also* Tyreese Ingram, *Clemson Football: Tigers sign off of social media until next year*, Fansided (Feb. 2019), <https://rubbingtherock.com/2018/08/02/clemson-starts-practice-on-fridaycatch-them-on-social-media-next-year/> (discussing how Roderick McDowell, a former Clemson running back, who was there for the inception of the ban, said “[w]e live in a world today where social media has taken over and caused a lot of issues, even when the situation isn’t bad. I feel that it’s focus time and to call it a “ban” maybe shouldn’t be a word that’s used. Let’s call it “The Clemson way aka football focus.”).

<sup>193</sup> *Ward*, 491 U.S. at 799.

<sup>194</sup> *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988).

<sup>195</sup> *See Penrose*, *supra* note 139, at 66.

The final prong of the analysis asks whether alternative means of communication remain open.<sup>196</sup> The basic test for weighing the sufficiency of alternative channels is “whether the speaker is afforded a forum that is accessible and where the intended audience is expected to pass.”<sup>197</sup> Further, a “speech restriction does *not* leave open ample alternative channels if the speaker is left unable to reach the intended audience.”<sup>198</sup> This is where the analysis lands on a slippery slope. Social media is unique in its ability to reach hundreds of thousands, and even millions, of people at once. And yes, student-athletes, who are subject to bans, still have every form of traditional means of communication available – text, email, phone calls, and even video chat. However, these traditional means of communication are incomparable to today’s modern-era modes of communication. The traditional means of communication noted above are incapable of reaching the vast audience that today’s social media platforms allow in one fell swoop. Because student-athletes are unable to reach their intended audience without social media, it is likely that those bans, which ban all social media platforms, would run afoul of the third prong of the time, place, and manner analysis.

Furthermore, it is this author’s opinion that even those schools which only ban *Twitter*, still do not satisfy the third prong of the time, place, and manner analysis. Although there exist many social-media platforms, which may compare in some ways to *Twitter*, *Twitter* is at the forefront of social media platforms with sports stakeholders.<sup>199</sup> Moreover, “*Twitter* currently has a preeminent role in college athletics.”<sup>200</sup> College athletes have explained that they use *Twitter* for a variety of reasons. Some of these reasons are more obvious, such as keeping in contact with friends and family who are back home.<sup>201</sup> Other reasons range from simply keeping up with what their teammates are

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<sup>196</sup> *Frisby*, 487 U.S. 474 at 482.

<sup>197</sup> O’Neill, *supra* note 186.

<sup>198</sup> *Id.*

<sup>199</sup> Blair Browning & Jimmy Sanderson, *The Positives and Negatives of Twitter: Exploring How Student-Athletes Use Twitter and Respond to Critical Tweets*, 5 *Human Kinetics Journal* 503, 503 (2012) ((citing Jimmy Sanderson & Jeffrey Kassing, *Tweets and blogs: Transformative, adversarial, and integrative developments in sports media*, *Sports media: Transformation, integration, consumption*, (2011)).

<sup>200</sup> *Id.* at 518.

<sup>201</sup> *Id.* at 510.

doing, to following their favorite professional sports players, to motivating their follower base, to accessing information about games or their performance.<sup>202</sup> Twitter allows student-athletes to gauge the social “discussion” about themselves and their team, while staying in the loop of happenings with their friends, teammates, and family.<sup>203</sup> On the contrary, student-athletes expressed that Facebook “has grown old and no longer merited their time, while expressing that Twitter was the newest and best social-media platform.”<sup>204</sup> Twitter provides athletes with a multitude of benefits that don’t exist on other social media platforms. Given the uniqueness of Twitter, and social media in general, I believe all bans on social media, whether outright or seasonal, run afoul of the alternative means of communication requirement.

To summarize, it is this author’s position that all student-athlete restrictions would likely run afoul of the time, place, and manner analysis. First, monitoring systems would fail at the first prong, as these bans restrict only “inappropriate” words. The first prong of the time, place, and manner restriction requires content neutrality.<sup>205</sup> This requirement is violated by any regulation that restricts expression in terms of its subject matter.<sup>206</sup> Therefore, regulations that utilize monitoring systems to restrict an athlete’s ability to freely use words which are deemed to be “inappropriate” by the institution are, by definition, content-based. Furthermore, although seasonal and outright bans would likely pass the first and second prong of the analysis, this author believes these bans would fail at the third prong of the analysis because the bans fail to leave open ample alternative means of communication. Moreover, “[a] speech restriction does *not* leave open ample alternative channels if the speaker is left unable to reach the intended audience.”<sup>207</sup> Although student-athletes are still permitted to make phone calls, send and receive text messages and emails, and video chat with their friends and family, social media provides student-athletes with an incomparable means to reach a vast audience with just one post. Without social media, student-athletes are left unable reach their family, friends, fan base, role models, and

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<sup>202</sup> *Id.* at 510, 511.

<sup>203</sup> *Id.* at 515.

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

<sup>205</sup> See O’Neill, *supra* note 186.

<sup>206</sup> *Id.*

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

mentors all in one place. Therefore, banning social media, whether completely or seasonally, does not leave open ample alternative means of communication during the duration of the ban.

## VII. Current Legislation

### A. State-enacted Social Media Legislation

As of 2013, 11 states including Maryland, Michigan, Louisiana, Illinois, Delaware, Arkansas and California have passed legislation prohibiting colleges from installing monitoring software and from requesting or requiring login information from students, like passwords.<sup>208</sup> These laws were partly inspired by similar laws, which prohibit employers from forcing an employee or job applicant to relinquish their Facebook passwords.<sup>209</sup> Although each state's legislation varies to some extent, they all have similar policies defining social media. For example, California defines social media as "an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations."<sup>210</sup> This definition is extremely broad and encompasses almost every facet of modern technology making it difficult for academic institutions or employers to intervene at all.

State statutes have also defined the parties affected and what parties may or may not do involving social networking sites. For example, Arkansas defines an employee at an academic institution as "an individual who provides services or labor for wages or other remuneration for an institution of higher education."<sup>211</sup> Higher education is further defined as "a public or private institution that provides postsecondary education or training to students that is academic, technical, trade-oriented, or in preparation for gaining employment in a recognized occupation."<sup>212</sup> Under Arkansas's statute, student-athletes

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<sup>208</sup> Elizabeth M. Heintzelman, *#NCAA vs. Student Athletes: An Empirical Analysis of NCAA Social Media Policies*, 39 *Hastings Comm. & Ent. L.J.* 43, 55 (2017).

<sup>209</sup> Browning, *supra* note 164, at 843.

<sup>210</sup> Cal. Educ. Code § 99120 (West 2020).

<sup>211</sup> Ark. Code Ann. § 6-60-104(a)(1) (2020).

<sup>212</sup> § 6-60-104(a)(2).

surely fit the bill. Athletes provide postsecondary academic institutions with their athletic services and labor in exchange for scholarships, free food, free housing, etc. Assuming student-athletes fit the Arkansas statute, student-athletes in Arkansas are not required to disclose usernames and passwords, add the athletic department to social media accounts or change their privacy settings associated with their accounts to make their content more easily readable.<sup>213</sup>

Similarly, Delaware's statute requires no password disclosure, no monitoring student devices, no adding students to friends, and no enlisting third parties to monitor social media.<sup>214</sup> This means that monitoring companies, such as UDiligence, are prohibited. Although state legislation is fairly new, as issues regarding speech on social media continue to arise, there is no doubt that universities will have an increasingly harder time implementing social media bans on their student-athletes.

#### B. *SNOPA*

Aside from state legislation, Congress has also been working to implement federal legislation regarding social media policies. In 2013, Congress introduced The Social Networking Online Protection Act (SNOPA) to "prohibit employers from requesting that an employee provide a user name, password, or any other means for accessing a private email account or personal account on a social networking website."<sup>215</sup> SNOPA amends the Higher Education Act of 1965 and the Elementary and Secondary Education Act of 1965 to "prohibit certain institutions of higher education and local educational agencies from requesting such password or account information from students or potential students."<sup>216</sup> SNOPA would also make it illegal to deny admission to, suspend, expel, or otherwise discipline or discriminate against students who refuse to provide such information.<sup>217</sup>

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<sup>213</sup> § 6-60-104(b)(1)-(2).

<sup>214</sup> Del. Code Ann. tit. 14, § 8103 (WEST 2020).

<sup>215</sup> Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

Although SNOPA has not yet been enacted, it is a step in the right direction to protect free speech. However, if this law passes and universities find themselves in the line of fire, universities may attempt to argue that the law only explicitly protects “students” and not “student-athletes” and because the Court has acknowledged that athletes are held to a higher standard than typical students<sup>218</sup>, this law cannot apply to student-athletes in the same way it applies to students. However, given Congress’ intent to protect student privacy and promote freedom of speech, it is unlikely that an academic institution would prevail in upholding social media bans under SNOPA.

### C. Stored Communications Act (SCA)

Like SNOPA, the Stored Communications Act (SCA) is another piece of legislation enacted to protect citizens’ First Amendment rights. The purpose of the SCA is to punish anyone who “(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.”<sup>219</sup>

Courts have recently begun applying the SCA to social media cases. The court in *Ehling v. Monmouth-Ocean Hosp. Service Corp.* breaks down the SCA into four criteria: “(1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public.”<sup>220</sup> If a communication satisfies all four criteria, then it is protected by the SCA and unable to be obtained by another party. The *Ehling* court ruled that Facebook posts, which are private and inaccessible to the general public, are covered as “private” under the SCA.

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<sup>218</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (noting that students participating in school-sponsored athletics have a lower expectation of privacy than general students).

<sup>219</sup> 18 U.S.C. §2701(a) (2018); see also Brett Barocas, *An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student-Athletes’ Password-Protected Social Media Content*, 80 Brook. L. Rev. 1029 (2015).

<sup>220</sup> *Ehling v. Monmouth-Ocean Hosp. Service Corp.*, 961 F.Supp.2d 659, 667 (2013).

Although at first glance the SCA appears promising for student-athletes, the SCA comes with exceptions, such as the authorized user exception. The authorized user exception applies where (1) access to the communication was “authorized,” (2) “by a user of that service,” (3) with respect to a communication ... intended for that user.”<sup>221</sup> This exception may be particularly important for the ability of institutions to *monitor* student-athlete accounts. Student-athletes typically “allow” their university to implement these restrictions by signing a contract,<sup>222</sup> although validity of such authorization is subject to scrutiny. Nonetheless, several courts have recognized that the relationship between a student and his or her college is “contractual” in nature<sup>223</sup> and that certain contracts are binding.<sup>224</sup>

This argument is especially beneficial for universities. If universities can successfully argue the enforceability of their contracts, then under the SCA, universities are *authorized* to access, and in turn, monitor student-athletes’ social media accounts. However, this argument is contingent on the constitutional validity of the authorization within the contract. As previously discussed, social media restrictions within a university’s contract may be invalid. Courts have held that for a student-athlete to voluntarily waive a constitutional right there must be bargaining equality, negotiation of the terms of the contract, and advice from competent counsel.<sup>225</sup> Because student-athletes almost always lack bargaining equality with schools and coaches<sup>226</sup>, and because these contracts are typically non-negotiable<sup>227</sup>, it follows that student-athletes must have competent counsel present upon signing their agreement in order uphold the validity of the voluntary waiver. However, most students

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<sup>221</sup> 18 U.S.C. § 2701(c) (2018).

<sup>222</sup> See Stubblefield, *supra* note 142 at 588-600.

<sup>223</sup> *Reynolds v. Sterling College, Inc.*, 170 Vt. 620, 621 (2000).

<sup>224</sup> See, e.g., *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117, 117 (1972); *Knelman v. Middlebury College.*, 898 F.Supp.2d 697, 708-09 (D. Vermont. 2012).

<sup>225</sup> See *B.L. v. Mahanoy Area Sch. Dist.*, 376 F.Supp.3d 429, 437 (2019).

<sup>226</sup> Darren Heitner, *To Sign or Not to Sign, That Is the Question*, Bleacher Report (Feb. 3, 2009), <https://bleacherreport.com/articles/119077-to-sign-or-not-to-sign-that-is-the-question>.

<sup>227</sup> *Id.*



do not consult attorneys before signing the dotted line<sup>228</sup>, let alone even think about what they're signing.<sup>229</sup>

Accordingly, the provision of the contract, which voluntarily subjects student-athletes to social media oversight, is likely unconstitutional. Therefore, universities lack the requisite authorization to access their players' social media and do not fall under the authorized user exception of the SCA. Consequently, it would appear that the SCA prohibits universities from accessing and monitoring their athletes' social media accounts.

### VIII. Conclusion

Due to the lack of precedent that exists regarding limitations and restrictions on social media, it is not clear how a court would analyze the issue. Typically, universities have placed one of three restrictions on student-athletes, or some combination of the three. The first, most stringent restriction bans student-athletes completely from all social media while enrolled at the institution.<sup>230</sup> The second restriction bans student-athletes from using social media only during the season of his or her respective sport.<sup>231</sup> The third, least intrusive restriction requires student-athletes to have their social media accounts monitored by either the athletic department or an outside monitoring company.<sup>232</sup> Importantly, neither student speech precedent nor state or federal

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<sup>228</sup> *Id.*

<sup>229</sup> John Keilman & Jared S. Hopkins, *College athletes routinely sign away rights to be paid for names, images*, Chicago Tribune (Mar. 26, 2015, 8:23 PM), <https://www.chicagotribune.com/sports/college/ct-ncaa-waivers-met-20150326-story.html> (Former University of Illinois quarterback Nathan Scheelhaase recalling signing his waiver without thinking must about what he was doing and that none of his teammates had questions either.)

<sup>230</sup> Doug Samuels, *After a four year Twitter ban, Old Dominion HC Bobby Wilder is lifting the social media restriction*, Football Scoop (July 14, 2015), <http://footballscoop.com/news/after-a-four-year-twitter-ban-old-dominion-hc-bobby-wilder-is-lifting-the-social-media-restriction/>.

<sup>231</sup> Corey Clark, *Clark: Social-media ban makes perfect sense*, Tallahassee Democrat (Aug. 18, 2015), <https://www.tallahassee.com/story/sports/college/fsu/football/2015/08/18/clark-social-media-ban-makes-perfect-sense-day-age/31937429/>.

<sup>232</sup> Matt Norlander, *The new way Kentucky and Louisville are monitoring athletes' social media behavior*, CBS Sports (Aug. 20, 2012 7:15 PM), <https://www.cbssports.com/college-basketball/news/the-new-way-kentucky-and-louisville-are-monitoring-athletes-social-media-behavior/>.

legislation permits academic institutions to ban speech before it is uttered. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.<sup>233</sup>

This author believes that analyzing these restrictions under case law would permit the conclusion that outright bans as well as seasonal bans are unconstitutional. However, monitoring student-athletes' social media accounts is likely permissible under a case law analysis so long as the speech is "school-sponsored," or otherwise made on school grounds, and the speech is lewd, vulgar, profane, against pedagogical concerns of the school, or promotes illegal drug behavior.

Contrarily, all three restrictions would probably be unconstitutional if analyzed under the time, place and manner analysis. Monitoring social media accounts fails the first prong of the analysis, which requires a regulation to be content-neutral. Similarly, although outright and seasonal bans pass the first and second prong of the analysis, this author believes these types of bans would fail the third prong, which requires the restriction to leave open ample means of alternative communication.

Because it is unclear how a court would rule on the issue of social media restrictions, universities are unsure which restrictions cross the line. However, rather than implementing restrictions, a safe solution for universities is this: implement a specialized course into the athletes' curriculum that teaches them the do's and don'ts of social media. For instance, *do* speak your mind in a respectable manner, *do* interact nicely with your fanbase, *do* portray a responsible image of yourself; but *don't* use lewd, vulgar, or profane language, *don't* threaten people, *don't* promote drugs or alcohol. Although institutions may feel as if they need to look out for their own image, these institutions also need to remember that they cannot take away one's fundamental rights in order to do so. Furthermore, institutions need not forget that athletes rely on their social media to connect with family, friends, fans, role models, and even future employers.

What type of society will we become if we disallow citizen's the opportunity to access certain types of communication solely because we

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<sup>233</sup> *Tinker*, 393 U.S. 503 at 508.

are afraid of the things that they will say or the image that they will portray? Justice Brennan's words in *Keyishian v. Board of Regents* speak volumes:

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, rather than through any kind of authoritative selection.’”

*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). A public educational institution cannot censor speech simply because it wishes to avoid “discomfort and unpleasantness.”<sup>234</sup> Public educational institutions should promote the marketplace of ideas and stop living in fear. It is time institutions start believing in their own pedagogical views and begin teaching to teach instead of punishing to teach.

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<sup>234</sup> *Keyishian*, 385 U.S. 589 at 509.



# AGENTS OF CHANGE: THE ROLE OF THE NFL CONTRACT ADVISOR IN THE 2021 COLLECTIVE BARGAINING AGREEMENT

*By: Emily Staker\**

## INTRODUCTION

Hostilities arose between the NFL Players Association (“NFLPA” or “Association”) and a group of representative agents at the annual NFLPA players national seminar for agents. A session between a group of players and a group of agents ignited tensions between the two groups, prompting the NFLPA to send a post-seminar memorandum to all registered contract advisors explaining the tone and content of the meeting. According to the memorandum, players were “dismayed” at the advice proffered by the agent-representatives, specifically as it related to preparation for the 2021 Collective Bargaining Agreement, and what is projected to be a near certain lockout by the NFL Management Council (“the owners.”)<sup>1</sup> Players were offended after one of the six agents present addressed the upcoming labor relations in a manner that assumed players lacked an understanding of complex CBA and negotiating issues, instead emphasizing the importance of the agent’s role in the process.<sup>2</sup> An integral role of agents in the collective bargaining process, however, is not well supported by history. Most recently, the 2011 CBA was predominantly negotiated behind closed doors between the NFLPA and the NFL Commissioner,<sup>3</sup> and the exclusion left a great deal of players feeling excluded from the process and devoid of meaningful input.<sup>4</sup>

The tension between agents and the NFLPA should trouble all parties with interests across the aisle from owners. The Player’s Association, its members, and its contract advisors all share common

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<sup>1</sup> Pro Football Talk, *Full text of memo from NFLPA to agents regarding March 11 meeting*, March 17, 2019.

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

<sup>3</sup> *AP Source: Goodell, Smith Meeting Without Owners, Players*, ASSOCIATED PRESS, June 28, 2011, adding “‘secret meetings’ between both sides have taken place in suburban Chicago, New York, the Maryland shore and last week in Hull, Mass., south of Boston.”

<sup>4</sup> Interview on File with Authour

interests, but the greater population and varying interests make unity more difficult to obtain compared to the historically unified owners. The results of the past several Collective Bargaining Agreements represent the NFLPA's struggle to holistically represent the interests of its members. The greatest headway made by the NFLPA in the past several decades has been reflected in its ability to increase players' share of profits. The League has steadily increased its revenue through lucrative television deals, and equitable distribution of these funds has been the primary focus of the NFLPA.

The Association has taken a hard stance on revenue sharing, but in nearly a decade, the focus of players has shifted towards more qualitative aspects of their employment. Contemporary players express discontent regarding injuries, player misconduct and discipline, and the integration of rookies into the league.<sup>5</sup> Advocacy on these issues by agents to the NFLPA in preparation for 2021 may result in a more content union. Agents, who often represent multiple players from various ages, backgrounds and talent levels, are exposed to a variety of concerns on behalf of their players. This makes them well suited to serve as an intermediary between their clients and the NFLPA in order to achieve results in 2021 that are democratically representative of player interests.

The lack of input historically has not precluded agents from involving themselves in the preparation and negotiation of the 2021 Collective Bargaining Agreement. Agents are often the first line of defense for a player when an issue arises involving the NFLPA, the team or the League, thus making them well attuned to the most common and troubling aspects of being an NFL player. Using real input from current NFL agents, this paper will highlight the manner in which agents can advance player interests in the upcoming CBA. Proposing meaningful, qualitative change for the players to be effectively advocated for by agents, this article will first highlight the history of the agent in the NFL. Consequently, this article will identify three points of reform that can be urged by agents in behalf of their clients in the bargaining leading up to the 2021 CBA. Finally, the article will introduce language that can be integrated into the 2021 Agreement to integrate the enumerated changes for the material and qualitative improvement of player rights.

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<sup>5</sup> Matt Dorman, *Super Bowl 2020: Richard Sherman slams NFL 'hipocrisy' amid CBA talks*, SPORTING NEWS, January 29, 2020.

## *I. Establishment of the NFL Agent*

### *A. Early Years of Organization*

In 1956, the thirty-seventh regular season of the National Football League<sup>6</sup>, a Players' Association was started by two highly regarded players at the time: Abe Gibrone and Dante Lavelli. The foresightful men of the Cleveland Browns enlisted Creighton Miller, a former player and attorney, to aid them in organizing a trade association.<sup>7</sup> The association was created in the hopes of increasing bargaining power on behalf of the players in the hopes of attaining better working conditions, especially better pay.<sup>8</sup>

Creighton Miller, the former halfback from Notre Dame, became a representative and spokesperson for the players who sought to organize.<sup>9</sup> Serving as a spokesperson and representative of the players in their effort to organize, Miller's role was much more integrated into the association than that of a contemporary agent. The nascent stages of the voluntary trade association rendered the players in need of a staunch advocate like Miller, and his role as the "authorized representative" would serve as a landmark contribution to the role of agents thereafter, in form and substance.<sup>10</sup>

Miller's work began primarily with the Cleveland Browns.<sup>11</sup> After a group of Browns players were committed to the cause, the group began to turn outwards, delegating other players to serve as representatives in regions. Don Shula was to lead Baltimore, Frank Gifford served the New York players, and Norm Van Brocklin led Los Angeles.<sup>12</sup> Within the year, a majority of players across the country had all signed on to be a part of the Association, authorizing Miller as their

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<sup>6</sup> HISTORY OF THE NFLPA, PART 1, <https://web.archive.org/web/20101204220612/http://www.nflplayers.com/articles/cba-news/history-of-the-nflpa-part-1/> (last visited February 3, 2020).

<sup>7</sup> Coenen, Craig R. (2005). *From Sandlots to the Super Bowl: The National Football League, 1920-1967*. Knoxville, TN: University of Tennessee Press.

<sup>8</sup> *Id.*

<sup>9</sup> *Professional Gridders Form an Organization*, THE MILWAUKEE JOURNAL, Nov. 29, 1956, at 19.

<sup>10</sup> *Id.*

<sup>11</sup> HISTORY, <https://www.nflpa.com/about/history> (last visited Sep. 27, 2019).

<sup>12</sup> *Id.*

designated representative.<sup>13</sup> In November of 1956, the first player meeting was held in New York, where players workshopped various proposals to be bargained for.<sup>14</sup> The goals of the nascent stages of association were simple: a pension plan for players, compensation for preseason games that had previously gone uncompensated, and assured payment of salary for players injured by the game.<sup>15</sup>

These early deliberations would also mark the beginning of a complex relationship between veterans, new members of the Association, and rookies who had not yet joined the League. For some veterans, this phase of organization had the potential to drastically improve conditions for players to come. Specifically, some current players believed that ensuring rookie compensation for training camp—even if the player did not make the final roster—was a top priority.<sup>16</sup> The League had not yet achieved the affluence it boasts today, and many players were left choosing between respectable “careers,” and professional football. Compensating rookies for their efforts at training camp was an important step in increasing the talent pool available for rosters throughout the League.

After several failed attempts to arrange a discourse with the various League owners' s well as the Commissioner, the players finally garnered significant attention when they threatened an antitrust lawsuit.<sup>17</sup> The timing could not have been better for the players, who had a great deal of legal leverage in wake of *Radovich v. NFL*. In *Radovich*, a nose-guard sought to relocate due to a family illness. When the League denied his request, Radovich sued the League under antitrust laws, and the case went all the way up to the supreme court. This case began more than a decade before organization efforts, but was decided in 1957. By the time the Association leveraged antitrust law, the Supreme Court had ruled that the NFL was subject to antitrust scrutiny under the antitrust laws.<sup>18</sup>

In wake of the *Radovich* ruling, the owners were finally ready to sit at the bargaining table. The looming threat of an antitrust suit was the key to forcing owner concessions. The owners granted a series of player demands without pushback in order to avoid getting tied up in the courts

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

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

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

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

<sup>17</sup> *Id.*

<sup>18</sup> *Radovich v. National Football League*, 352 U.S. 445, 452 (1957).



once more.<sup>19</sup> The owners, in wake of the significant loss of leverage, still showed reticence to act upon the agreed terms proposed by the players. In 1958, some owners had failed to actually put an injury protection clause into action, and others had come up short on their payment for preseason games.<sup>20</sup> Billy Howton, an end for the Green Bay Packers, again threatened an antitrust lawsuit, prompting payment soon after.

In 1961, the NFL was granted limited antitrust exemption.<sup>21</sup> Unlike other professional leagues, the purpose of the exempt status was to permit the clubs to act together in negotiating television and radio rights.<sup>22</sup> The exemption was granted by federal legislation, signed into law by President Kennedy.<sup>23</sup> The Sports Broadcasting Act of 1961 did not prompt collective bargaining with the Association, however.

The NFL and its players had a new rival in the late 1960's: the American Football League (AFL), and its player's association—the AFLPA<sup>24</sup>. The split in leadership amongst players between the two leagues and their respective Associations stymied progress for both leagues. While the NFL continued to compete with the AFL for talent and market space, it also recognized the NFLPA as the representative of its players, creating the first collective bargaining agreement between the two parties.<sup>25</sup>

In 1966, the two leagues combined spent a staggering seven-million on rookie contracts. When the AFL and NFL realized that they were inflating player contracts at the detriment of themselves in order to compete with one another, a drive for the NFL to absorb its competitor became paramount. In tandem, the players sought to combine their respective Player's Associations<sup>26</sup>, delegating John Mackey of the Baltimore Colts as their president.<sup>27</sup> Alan Miller—an AFL All-Star and

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<sup>19</sup> See HISTORY

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

<sup>21</sup> Cecilia Kang, *How the government helps the NFL maintain its power and profitability*, WASHINGTON POST, (Sep. 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> William B. Anderson, *American v. National Football League: Using public relations to "win" a war against a monopoly*, Public Relations Review 32.1 (2006): 53-57.

<sup>25</sup> Associated Press, NFL labor history since 1968, ESPN (Mar. 2011).

<sup>26</sup> Felser, Larry. *Birth of the New NFL: How the 1966 NFL/AFL Merger Transformed Pro Football*. Rowman & Littlefield, 2008. page 167

<sup>27</sup> See HISTORY

Boston University Law graduate—would serve as general counsel.<sup>28</sup> Two Associations began to act jointly in response to the merger, which was formally announced in June of 1966.<sup>29</sup> The National Labor Relations Board (NLRB) consequently certified the NFLPA as the designated labor organization for professional American football players.<sup>30</sup>

### *B. Agents Take Hold in the NFLPA*

The same year that they were certified as a union by the NLRB—after a back and forth between a lockout from the owners and a short-winded player’s strike—the NFLPA brokered an agreement with ownership to increase the minimum salaries for both rookie and veteran players<sup>31</sup>. The agreement also included certain significant changes to health care benefits, in addition to solidifying the role of the agent in negotiations.<sup>32</sup> This agreement would crystallize the player’s right to representation by an agent.<sup>33</sup>

Unlike the MLBPA, who also negotiated the right for representation of players by agents in their 1970 Collective Bargaining Agreement (CBA)<sup>34</sup>, the NFLPA would be at the forefront of regulating the quality of player representatives through a certification process<sup>35</sup>, particularly under the leadership of former NFLPA president Gene

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<sup>28</sup> Tuttle, Tim, *The unlikely rise and unfathomable fall of Alan Miller*, Sports Illustrated (Mar. 2009).

<sup>29</sup> 1960- *The AFL and NFL Agree to not Tamper with Players’ Contracts*, PRO FOOTBALL HALL OF FAME <https://www.profootballhof.com/football-history/history-of-football/1960-1979/1960-the-afl-and-nfl-agree-to-not-tamper-with-players-contracts/> (Last visited November 23, 2019).

<sup>30</sup> Birren, Genevieve FE. "A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof)." *DePaul J. Sports L. & Contemp. Probs.* 1-29, 10 (2014).

<sup>31</sup> *Id.*

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

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

<sup>34</sup> *Birren*, at 4.

<sup>35</sup> NFLPA Contract Advisor Regulations, §2 detailing the certification process as follows “(A) Application For Certification: To be eligible for certification, the applicant must have received an undergraduate degree from an accredited four year college/university and a post-graduate degree from an accredited college/university...A new applicant shall not be granted Certification...without first attending the NFLPA seminar for new Contract Advisors to be held on an annual basis and passing a written examination.”

Upshaw.<sup>36</sup> By 1984, the NFLPA required certification of player representatives, later adding an exam in addition to a criminal background check.<sup>37</sup> The CBA between the NFL and the NFLPA expressly states that the NFLPA shall regulate the conduct of agents, or contract advisors, who negotiate individual player contracts with clubs.<sup>38</sup>

Modern day requirements have become much more robust including an educational aspect: a player representative must have a graduate degree.<sup>39</sup> The current regulations not only set forth requirements for certification, but also have general requirements for continued good standing—including yearly attendance at NFLPA seminars.<sup>40</sup> Most important, the NFLPA requires that its contract advisors “[a]ct at all times in a fiduciary capacity on behalf of players.”<sup>41</sup>

In the current representation market, a handful of agents represent a vast majority of players. There are over 800 agents currently certified by the NFLPA.<sup>42</sup> This means that for every three players in the NFL, there is one agent, making the representation market fiercely competitive. However, less than ten “super agents” represent around 75% of all players.<sup>43</sup> The result is hundreds of agents outside of the highest echelon left vying to compete for clients.<sup>44</sup> In a highly monopolized industry that has made it nearly impossible to be disruptive, the 2021 CBA provides meaningful opportunity for agents to distinguish themselves to prospective clients.

Change to the makeup of the NFL agents is predicated upon new approaches. Kristen Kuliga, agent to Doug Flutie and pioneer for women in the industry, distinguished herself by her approach.<sup>45</sup> Kuliga approached representation as “a lifetime commitment where the agent becomes an extension of the player and protects their best interests.”<sup>46</sup>

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<sup>36</sup> See HISTORY

<sup>37</sup> NFLPA Contract Advisor Regulations, §2 (A), (C).

<sup>38</sup> NFL Collective Bargaining Agreement, Art. 1 §48

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

<sup>40</sup> *Id.* at §3(A)(4).

<sup>41</sup> *Id.* at §3(17)

<sup>42</sup> Liz Clarke, *‘Super agents’ rep 75 percent of NFL players. It’s a competitive fight to sign the rest.* WASHINGTON POST, April 18, 2018.

<sup>43</sup> *Id.* adding “[Tom] Condon, who represents Drew Brees, Eli Manning, Matthew Stafford and J.J. Watt, among others, accounts for \$1.4 billion in contracts alone.”

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

<sup>45</sup> Nikki Balm, *NFL agency is changing, and it’s because of women*, YAHOO SPORTS, May 10, 2019.

<sup>46</sup> *Id.*

Kelli Masters, another woman agent excelling in the industry believes that the caring, comprehensive approach is what distinguishes herself from the predominantly male competition.<sup>47</sup> Last year, 33 women took the agent certification exam—a record since the exam’s conception in 2001.<sup>48</sup>

In 2019, NFL agent Nicole Lynn became the first black woman to represent a top NFL draft pick.<sup>49</sup> Agent Kelli Masters has negotiated over \$120 million in contract money for her 33 clients.<sup>50</sup> The holistic approach to representation that these women have employed have translated financially. While being an “extension of the player,” may seem intuitive for an agent, this perception of the role is disruptive. Yet, those agents seeking to continue to disrupt the agent market and distinguish themselves from the competition should harness the opportunity to meaningfully change the working conditions for their current and prospective clients.

## II. *Preparing for 2021*

The manner in which the 2011 negotiations took place prior to the ratification of the Agreement alienated a great deal of people whom it directly affected. Not only did the negotiations exclude players from final discussions, but NFLPA Executive Director DeMaurice Smith effectively eliminated any voice that agents may have in the process. The fallout, particularly as it relates to agents and the Player’s Association, has continued to perpetuate discord—most recently elucidated in the Player Meetings in early 2019.

After the heated discussion in one of the various sessions hosted by the NFLPA, a memo was released to all registered contract advisors concluding with the following statement:

“We do believe that agents can play an important role in helping to prepare our men for issues that matter to us, and we will continue to seek input, as we have in the past. We want to emphasize that contract advisors are, above all else, agents of this Player’s Union, and all agents

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Paul Schrodt, An NFL Agent Who Negotiates Multimillion-Dollar Contracts Says This Is the Biggest Money Lesson Everyone Needs to Learn, MONEY, July 10, 2019.

owe a fiduciary duty to their clients and the collective body of players. The invitation extended to the agents to attend the auxiliary meeting was done in the hope of building better relationships and to provide a constructive conversation as we prepare for the expiration of the CBA. However, both the tone and specific statements by some of the agents showed an overall lack of understanding of the role of the elected player leadership and at times specifically demonstrated a lack of respect for the rights of players to represent themselves if they so choose.”<sup>51</sup>

The remarks made by the Association relay an expectation of unity between the union and its agents—contradicting the actions of NFLPA leadership in 2011.

Moving past the 2011 CBA, the invitation extended by the NFLPA to agents—to play an involved role in 2021—should be capitalized upon in order to effectuate the most change for players. Agents offer a unique perspective and relationship to their clients that make them well suited advocates for the upcoming negotiations. When discord occurs between a player and the league, or a player and his respective team, the first call is usually made to his agent. Agents have experienced first-hand the inadequate, and occasionally, unjust policies enforced by the League regarding injury settlements, personal conduct violations, and pension benefits. The experience agents have garnered in handling these various issues make them a powerful ally at the negotiation table. Agent involvement in the 2021 CBA, specifically by way of thoughtful drafting and integration of new language, is the most viable manner in which players can feel that their voices are represented democratically and create an agreement that reflects modern attitudes and player interests.

#### *A. Injury Settlements*

A player’s inevitable experience with injury in the NFL is predominantly determined by his status on the roster. Players who are first on the depth chart have a greater sense of security in wake of an injury. Players with lower status on the team’s depth chart are left in an incredibly vulnerable position in wake of an injury. As elucidated by the lockouts in NFL history, players have continuously battled with the threat of replaceability. Injury puts a player at a much higher risk of being

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<sup>51</sup> See Rosenthal

released, and for players in training camp battling for a roster spot, it results in a great deal of nondisclosure.<sup>52</sup> For many players, the fear of losing a spot on the roster outweighs the long term effects of an injury gone untreated.<sup>53</sup>

When a player refrains from disclosing his injury, it further weakens his rights going forward as it relates to an injury settlement. Ordinarily, if a player discloses his injury, a team can later release the player and negotiate a settlement amount with the player's agent based upon the projected date of recovery.<sup>54</sup> Generally, the general manager or cap manager base this projection off of a team doctor—whose assessments are inescapably driven by the interests of the team. Agents have the right to request a second opinion in negotiating an injury settlement, but oftentimes the recovery period that provides the financial basis for settlement is disputed and often split between the opinion of the team doctor and an independent doctor.<sup>55</sup>

If a player is in a vulnerable position on the team as it relates to making or staying on the roster, job security incentivizes nondisclosure. If a player is later released and continues to struggle with an injury caused by his time with his respective team, he has no recourse for an injury settlement.<sup>56</sup> The player is then financially liable for his own medical care unless picked up by another team.

Agents are almost always aware of injuries their players are experiencing, including some that would otherwise be season-ending had the player disclosed and sought treatment.<sup>57</sup> Because agents have negotiated countless injury settlements and witnessed the fallout of undisclosed injuries firsthand, they are in a strong position to propose an neutral medical entity or doctor that can record injuries at the time they occur without disclosing the injury to the team. This professional could

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<sup>52</sup> Dan Pompei, *Inside the NFL's Secret World of Injuries*, Bleacher Report (Dec. 2017) see quote from Chicago Bears' Olin Kreutz: "You are always afraid to lose your damn job...you create demons to keep going. My job was probably never in jeopardy, but you think that way, so you battle through things."

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

<sup>54</sup> Jack Betcha, *An NFL Agent's Story: Negotiating the Injury Settlement*, (Aug. 2009)

<sup>55</sup> *Id.* See "Sometimes, the spread in medical opinions can be as much as 10 weeks to three months."

<sup>56</sup> Interview on file with author

<sup>57</sup> Pompei, *See* Player agent David Canter says he has clients who are playing with injuries that should have ended their seasons. "One of them doesn't even show up on the injury report," he says.

also record a projected recovery period for the purposes of a future settlement. A neutral medical system protects players in the long run while affording them the autonomy to make their own decisions as it relates to their career. The League has already implemented a similar process for head injuries, requiring an independent neurologist to be present on the field at all times in order to serve as an objective voice during concussion protocol, in addition to the use of neutral physicians after injury grievances are filed.

The 2011 CBA contains a provision for injury grievances, where a player seeks compensation for termination in wake of an injury incurred “in the performance of his services.”<sup>58</sup> When a player files an injury grievance, the player must be seen by what the CBA deems a “neutral physician.”<sup>59</sup> The requirements of a neutral physician for the purposes of this provision require merely that the physician be located in the franchise city, or the city closest to the player’s residence.<sup>60</sup> The neutral physician cannot become the player’s treating physician, and can only submit “a detailed medical report of [his or her] examination.”<sup>61</sup> This language can be mirrored for the purposes of a neutral physician in the documentation process of any existing injuries, with the additional requirement that the documentation remain confidential between the physician and patient unless otherwise later requested for the purposes of filing a grievance. If the League wants to give credibility to the injury settlement process, it must combat the problem of underreporting by implementing practical procedures that protect players from a system that currently incentivizes playing through injury. Affording a neutral physician prior to the filing of an injury grievance gives players the bodily autonomy they want while also ensuring the financial and medical protection they deserve.

### *B. Personal Conduct Violations and Investigative Procedures*

Another contentious issue that has created a great deal of discord in the League and amongst fans is the broad disparity in punishment. In 2015, the star wide receiver of the Cleveland Browns, Josh Gordon, was suspended for the entire season after violating the League’s substance

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<sup>58</sup> 2011 CBA Art. 44 §1.

<sup>59</sup> *Id.* at §4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

abuse policy for a successive alcohol violation.<sup>62</sup> Continuous failed attempts at treating Gordon's addiction problems lead to 45 game suspensions within a period of three seasons.<sup>63</sup> Gordon was yet again suspended indefinitely in 2019 for another banned substance violation.

At the start of the 2019 season, seven players were suspended for violating the substance abuse policy.<sup>64</sup> The banned substance policy is not limited to illegal substances, but also extends to any substance that could be interpreted as a performance enhancer.<sup>65</sup> In 2019, the New York Giants wide receiver Golden Tate III was suspended for four games after testing positive for a banned substance attributed to a fertility treatment he had received earlier in the year.<sup>66</sup> Because the substance abuse policy results in strict liability, Tate had little recourse.<sup>67</sup> The appeals process for the banned substance policy is highly restrictive: a player may appeal his test, but the appeal may only assert that the test itself was mistaken.<sup>68</sup> If a retesting of the sample results in the same positive identification of a banned substance, the violation stands.<sup>69</sup> Players cannot assert a lack of knowledge or negligence defense—no matter the circumstance.<sup>70</sup>

In contrast, violations of the personal conduct policy are not subject to strict liability. The policy states that players suspected of assault, battery, domestic violence or sexual assault may result in a six-game minimum suspension “depending on the nature of the violation.”<sup>71</sup>

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<sup>62</sup> Matt Wilhalme, *Cleveland Browns' Josh Gordon suspended for entire 2015 NFL season*, LA TIMES, (Feb. 2015).

<sup>63</sup> Alaa Abdeldaiem, *A Timeline of Josh Gordon's Highs and Lows as an NFL Wide Receiver*, SPORTS ILLUSTRATED, (Dec. 2018).

<sup>64</sup> NFL Nation, *NFL Week 1: Suspended players for opener (and beyond)*, ESPN (Sep. 2019).

<sup>65</sup> 2018 Policy on Performance-Enhancing Substances, NFLPA

<sup>66</sup> Charlotte Carrol, *Golden Tate loses Appeal, Suspended Four Games for Substance Abuse Violation*, Sports Illustrated (Aug. 2019).

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

<sup>68</sup> Policy and Program on Substances of Abuse, National Football League (2016) See “Appeals”

<sup>69</sup> *Id.* see “The decision of the appointed Appeals Panel member, and any subsequent decision by a third-party arbitrator on remand, will constitute full, final and complete disposition of the Due Process Appeal under this Section and will be binding upon the parties.”

<sup>70</sup> *Id.* see “A Player cannot satisfy his burden merely by denying that he intentionally used a substance on the NFL Drug Panel...or...that he was given the substance by a Player, doctor or trainer; or that he took a mislabeled or contaminated product.”

<sup>71</sup> NFL Personal Conduct Policy (2016).



In reality, the NFL has enforced this six-game suspension policy against three of twenty-nine players arrested for domestic violence, sexual assault or sexual battery since the policy was implemented in 2014.<sup>72</sup> The League's troubled history in handling domestic violence cases is rife with inconsistency, but more current demonstrative examples exist. When Kansas City Chiefs' star wide receiver Tyreek Hill was involved in alleged battery and child abuse, the League declined to enforce a suspension.<sup>73</sup> The League supported its inaction by stating that it had "conducted a comprehensive investigation of the allegations" with a "primary concern...of the child."<sup>74</sup> While the Johnson County District Attorney dropped the criminal investigation, the DA asserted that he believed that the child "had been hurt but...couldn't prove who did what."<sup>75</sup> The 2019 incident was not Hill's first encounter with allegations of domestic assault. In college, Hill pleaded guilty to domestic assault and batter by strangulation.<sup>76</sup> Still, the League concluded that they could not "conclude that Mr. Hill violated the Personal Conduct Policy."<sup>77</sup>

In comparison, 26 players were suspended for violating the substance abuse policy in the 2018 season alone.<sup>78</sup> This disparity reflects an attitude by the NFL that accidental dosage of what may be a performance enhancing drug is more serious than domestic violence. This imbalanced scheme of regulation is not in the best interests of the League or its players, and punishments should be tapered to the severity of the crime in a manner reflective of modern attitudes.

The lack of consistency goes beyond the juxtaposition between substance abuse and domestic violence: in 2016, star quarterback Tom Brady was suspended four games for alleged involvement in a scheme to deflate footballs.<sup>79</sup> After requesting arbitration, Brady received a

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<sup>72</sup> <https://www.usatoday.com/sports/nfl/arrests/>

<sup>73</sup> Around the NFL, *NFL will not suspend Chiefs receiver Tyreek Hill*, NFL (Jul. 2019).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* adding "Our understanding is that the child is safe and that the child's ongoing care is being directed and monitored by the Johnson County District Court and the Johnson County Department for Children and Families."

<sup>76</sup> SI Wire, *Tyreek Hill pleads guilty to domestic abuse, receives three years probation*, Sports Illustrated (Aug. 2015) adding "Hill was booked on probable cause for domestic abuse by strangulation, a felony, for allegedly assaulting his girlfriend."

<sup>77</sup> See Around the NFL

<sup>78</sup> *NFL player suspensions for 2018 season*, USA TODAY (Aug. 2018).

<sup>79</sup> Victor Mather, *Deflategate: What's Happened So Far, and What's Next*, NY Times (Mar. 2016).

confirmation of the suspension by the arbitrator— Roger Goodell.<sup>80</sup> Brady, supported by the NFLPA, took the League to court arguing that the Commissioner deprived him of fundamental fairness.<sup>81</sup> The court upheld Goodell's confirmation, cementing the Commissioner's role as arbitrator so long as he "arguably" construed or applied the wording of the Collective Bargaining Agreement, "within the scope of his authority."<sup>82</sup> The "Deflategate" court remarked that the Commissioner had been authorized to "investigate possible rule violations...impose appropriate sanctions, and...preside at arbitrations challenging his discipline" adding that while this arrangement was "unorthodox" it was the "regime bargained for and agreed upon by the parties."<sup>83</sup>

The Second Circuit court in *NFL Mgmt Council v. NFLPA* identified the central piece of authority in disciplinary protocol: the Collective Bargaining Agreement. Changing the disciplinary process into a more structured and predictable regulatory scheme will give players more clear guidelines to follow, while rehabilitating the credibility of the League and its commissioner. When players are disciplined at greater rates for accidental ingestion of substances than they are for domestic violence, the League becomes a frustrating workplace to navigate. Agents who have represented players suspended for banned substance or substance abuse violations know the frustration experienced by players and their families first-hand. Harnessing these experiences to shape a more independent and objective disciplinary board will benefit all parties involved.

In order to balance the interests between players, the NFLPA and the League, disciplinary hearings should be comprised of a variety of figures within the NFL, with members from the teams as well as the Player's Association. Establishing a disciplinary committee to conduct hearings will remedy the current allegations of abuse of power and unfettered discretion by the League. A ruling set forth by a panel of diverse persons will inherently carry greater respect and finality. A disciplinary committee would also eliminate the need for strict liability for positive drug tests because of its greater legitimacy as a neutral entity. From a deterrence perspective, the committee could continue to enforce

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

<sup>81</sup> *Id.*

<sup>82</sup> *National Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 526, 532 (2d Cir. 2016).

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

all positive drug tests with an exception for defenses in cases similar to Golden Tate. Requiring a showing of intent, proven by the Management Counsel during a hearing, would aid in mitigating unjust punishment caused by strict liability. Accidents cannot be systematically deterred, particularly when professional medical treatment is involved, which is why the intent defense should be available to players.

A greater level of independence for disciplinary processes should be well received by team owners, many of whom have been injured by the severity of banned substance abuse and “conduct detrimental” suspensions. Team representatives will be incentivized to rule fairly in disciplinary proceedings to ensure fair treatment from their counterparts when their respective roster faces scrutiny. Additionally, having representatives from the NFLPA will bolster the legitimacy of disciplinary rulings that involve suspensions, and create a brighter line of what constitutes conduct severe enough to warrant suspension. Clearer disciplinary procedures benefit all parties involved by creating more concise deterring mechanisms and comprehensible standards of conduct. Because League and team interests are often maligned in disciplinary matters, and the NFLPA represents all of its members equally, agents have the credibility and objectivity to propose reform. Agents want clear and concise rules, demonstrated by consistent administration of discipline in order to best prepare and protect their clients from undue discipline.<sup>84</sup> Reform for an independent disciplinary committee would be an effective remedy to the current unfettered and unpredictable discretion of the Commissioner.

### *C. Extended Draft Period*

When an agent is representing one or more draft picks, the prospect of negotiating a contract is given little thought due to the thoroughly constructed compensation tiers for drafted rookies.<sup>85</sup> However, outside of the seven rounds, undrafted rookies are often signed to contracts with material asymmetry in bargaining power. Undrafted rookies are often compensated at the NFL minimum salary (in 2020, the minimum salary for an undrafted rookie will be \$510,000<sup>86</sup>); however, only a fraction of that compensation is required to be guaranteed, and is

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<sup>84</sup> Interview on file with author.

<sup>85</sup> NFL CBA Art. 7

<sup>86</sup> *Id.* Art. 26

often limited to a signing bonus.<sup>87</sup> To elucidate the financial reality of undrafted rookies, quarterback Drew Anderson signed with the Arizona Cardinals as an undrafted free agent in 2019 for three years, \$1,762,000, and a signing bonus of \$7,000.<sup>88</sup> With a base salary of \$495,000 his first year, after Anderson was waived and relegated to the practice squad, he received his guaranteed money—a signing bonus that amounted to .004% of his contract.<sup>89</sup>

The signing bonuses—often the only money undrafted rookies receive—are severely limited. Each year, teams are restricted to a small pooled amount of money to be allocated to UFAs.<sup>90</sup> This pooled amount started at \$75,000 in 2011 and increases each year by the percentage of the Total Rookie Compensation Pool.<sup>91</sup> In 2019, the lowest amount of undrafted rookies signed to a roster was seven (Buffalo Bills) and the highest was twenty-two (Chicago Bears and Los Angeles Rams).<sup>92</sup> Four-hundred and thirty-six players total were signed as undrafted rookie free agents.<sup>93</sup> On average, each team signed thirteen players.<sup>94</sup> Signing bonuses are not required to be prorated equally for all UFA's, meaning that one could be given a large share of the total, and another an infinitesimal percentage. For the three out of twenty-two Rams that signed to a contract, the average signing bonus was \$1,889.<sup>95</sup>

The risk of injury and time dedicated to maintaining a roster spot on any given team for any undrafted rookie warrants reform to their compensation scheme. The opportunity to make a roster spot is, on its

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<sup>87</sup> *Id.* Art. 7 §1(a)(ii) *see* “‘Rookie Salary’ for an Undrafted Rookie means the highest amount of earnable compensation for which such player and Club have contracted in each year of his Rookie Contract that exceeds the then-applicable Minimum Active/Inactive Salary for each League Year of the contract regardless of whether any or all amounts are earned”

<sup>88</sup> OVER THE CAP, *Drew Anderson*, <https://overthecap.com/player/drew-anderson/8339/> (last visited 23 October, 2019).

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

<sup>90</sup> NFL CBA Art. 7 §1(i)

<sup>91</sup> *Id.* *see* the “Undrafted Rookie Reservation”... shall increase each subsequent League Year by the percentage increase of the Total Rookie Compensation Pool. *See also* Art. 7 §1(c)

<sup>92</sup> NFL, Undrafted rookie free agents: Team signing after 2019 NFL Draft, <http://www.nfl.com/news/story/0ap3000001028819/article/undrafted-rookie-free-agents-team-signings-after-2019-nfl-draft> (last visited 23 October 2019).

<sup>93</sup> *Id.*

<sup>94</sup> 436 players, divided by 32 teams averages to 13.6 undrafted rookies per team.

<sup>95</sup> OVER THE CAP, NFL Contracts, <https://overthecap.com/contracts/> (last visited 23 October, 2019).

own, insufficient to compensate for the lack of actual compensation. Agents who represent rookies are well-versed in the material changes in salary dependent upon the round a player is drafted in, but for those players who are not drafted, they are making single digit percentages—or less— of their drafted counterparts.<sup>96</sup> Considering this inequity, agents are well-suited to advocate for an extended draft. If the League on average signs over four-hundred undrafted rookies each year<sup>97</sup>, a draft with an extension of thirteen rounds with a continuation of the rookie wage scale would eliminate the problem of sparse compensation. It would also regulate the amount of rookies a team is able to sign, limiting teams like the Rams and Bears to thirteen additional players. Twenty rounds total for limited roster spots of fifty-three, plus an added ten spots on the practice squad, is sufficient to pair the demands of the teams with the talent available while ensuring just compensation. Agents who represent players on the draft “bubble” can secure livable wages for their clients, the NFLPA can secure a more equitable compensation scheme for all of its members, and teams will avoid characterizations of exploitation and unconscionable business dealings.

## II. Drafting Suggestions for 2021

The changes enumerated in this article ought to be implemented into the 2021 CBA to gain the full force of the rules. Specifically, the implementation of neutral physicians for recordation prior to or in case of injury settlement ought to precede the language regarding injury grievances. The changes to the Personal Conduct Policy, Policy and Program on Substances of Abuse, and the 2011 CBA language in Article 46 should be integrated into one Article for purposes of consistency and legitimacy. Finally, the extension to the draft would implicate Article 6 and 7 of the 2011 CBA, removing all language regarding “undrafted rookies” and integrating the twenty-round system into the relevant verbiage. In consideration of the improvements enumerated above, the following language would effectively integrate the reform of injury settlements, the personal conduct policy, and the draft, respectively:

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

<sup>97</sup> *see* notes 126, 128.

### A. DOCUMENTATION OF INJURY BY NEUTRAL PHYSICIAN<sup>98</sup>

**Section 1. Definition:** A “Documentation of Injury” is a record created, at the player’s sole discretion, by a neutral physician who may not share the results of the examination to anyone but the player unless otherwise directed by the player. The purpose of this documentation is to provide a detailed medical report of the examination for use in any injury grievance thereafter.

**Section 2. Neutral Physician:**

(a) The player must present himself for examination by a neutral physician in the Club city or the Club city closest to the player’s residence at any given time deemed necessary by the player. The neutral physician will not become the treating physician. The neutral physician is required to submit a detailed medical report of his or her examination to the player. The neutral physician is required to retain the confidentiality of a medical professional unless otherwise requested by the player.

(b) In cases in which the player alleges that he suffered a closed head injury or concussion with resulting cognitive deficit, somatic symptoms and/or other concussion symptoms, the player must present himself for cognitive functioning testing and/or other appropriate testing and examination by a neutral neuropsychologist in either the city nearest the player’s residence or the Club city. The neutral neuropsychologist must prepare and submit a detailed report for the player, regarding the examination and the player’s cognitive functioning and other symptoms, if any, of concussion or closed head injury affecting the player’s ability to return to play at the date of the examination. If the neutral neuropsychologist in his sole discretion determines that the player should be examined by another physician of appropriate specialization in order to complete his neutral physician report, the player may obtain an additional examination. The neutral physician is required to retain the confidentiality of a medical professional unless otherwise requested by the player.

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<sup>98</sup> This provision would precede Article 44 of the 2011 CBA

(c) If an injury grievance is filed, the arbitrator will consider the neutral physician's findings conclusive with regard to the physical condition of the player and the extent of an injury at the time of his examination by the neutral physician. The arbitrator will decide the dispute in light of this finding and such other issues or defenses which may have been properly submitted to him. In cases in which the player is alleging that he suffered a closed head injury or concussion with resulting cognitive deficit, somatic symptoms and/or other concussion symptoms the report of the neutral neuropsychologist shall be considered conclusive with regard to the player's cognitive functioning and other objective findings as well as the extent of the injury at the time of the examination.

**Section 3. Neutral Physician List:**

The neutral physicians shall be determined by the same criteria put forth in §5 of Article 44 of this Collective Bargaining Agreement.

**B. DISCIPLINARY STANDARDS FOR VIOLATION OF THE PERSONAL CONDUCT POLICY<sup>99</sup>**

**Section 1. Discipline:** Upon learning of conduct that may give rise to discipline, the League may initiate an investigation to include interviews and information gathered from medical, law enforcement, and other relevant professionals. On matters involving NFL players, the League will timely advise the NFLPA of the investigation and outcome. As appropriate, the player will also have the opportunity, represented by counsel and/or a union official, to address the conduct at issue. Upon conclusion of the investigation, the disciplinary committee may administer discipline as warranted by this agreement.

Discipline may take the form of fines, suspension, or banishment from the League and may include a probationary period and conditions that must be satisfied prior to or following reinstatement. The specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other factors.

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<sup>99</sup> This provision would supersede all relevant sections of Article 46 of the 2011 Collective Bargaining Agreement, §4 of the ??? and ...

**Section 2. Scheduling of Offenses:**Substance Abuse or Banned Substance Abuse Violations*First Offense*

The player shall be given a 3-5 game suspension and may also be fined subject to the disciplinary committee's discretion.

*Recurring Offense*

The player shall be given a 5-10 game suspension and may also be fined subject to the disciplinary committee's discretion. Depending on the nature of the offense, the player may be banished from the League or be given a probationary period and conditions that must be satisfied prior to or following reinstatement.

Domestic Violence*First Offense*

The player shall be given an 8-16 game suspension and may also be fined subject to the disciplinary committee's discretion. Depending on the nature of the offense, the player may be banished from the League or be given a probationary period and conditions that must be satisfied prior to or following reinstatement. The player may be banned from the League entirely based upon the nature of the incident, and the actual or threatened risk to others.

*Second Offense*

The player shall be given a 16 game suspension and may also be fined subject to the disciplinary committee's discretion. Depending on the nature of the offense, the player may be banished from the League or be given a probationary period and conditions that must be satisfied prior to or following reinstatement. The player may be banned from the League entirely based upon the nature of the incident, and the actual or threatened risk to others.

Conduct Detrimental*First Offense*



The player shall be given a 5-16 game suspension and may also be fined subject to the disciplinary committee's discretion.

*Second Offense*

The player shall be given an 8-16 game suspension and may also be fined subject to the disciplinary committee's discretion. Depending on the nature of the offense, the player may be banished from the League or be given a probationary period and conditions that must be satisfied prior to or following reinstatement. The player may be banned from the League entirely based upon the nature of the incident, and the actual or threatened risk to others.

**Section 3. Hearing Rights:** Following the imposition of discipline, the player will have the right to appeal the decision within three business days of the disciplinary committee's decision. Players filing an appeal shall be entitled to a prompt hearing pursuant to the NFL Constitution and Bylaws, to be conducted by the disciplinary committee, unless specifically designated for arbitration by this Agreement.

**Section 4. Burdens and Standards of Proof; Discovery:**

(a) **Burdens of Proving the Violation.** In the case of discipline for a violation of the Policy and Program on Substances of Abuse, the Player shall have the burden of establishing a lack of intent, negligence or knowledge as it relates to using a Prohibited Substance on the Player's part. A showing of a lack of intent shall be a valid defense to an alleged violation of the policy.

**Section 5. Disciplinary Committee:** The disciplinary committee shall be comprised of seven members. There shall be three members representing the Clubs, nominated and selected by a vote of the owners. There shall be three members representing the NFLPA, nominated and selected by a vote of players. There shall be one member representing the League as a whole, nominated and selected by the Commissioner's Office. The panel shall serve terms of one calendar year beginning on January 1, 2022. A member of the committee may be removed by petition of the Clubs or the NFLPA, but the Commissioner's Office may not seek to remove another member. Removal shall require a majority vote within the committee.

### C. COLLEGE DRAFT<sup>100</sup>

**Section 1. Time of Draft:** There shall be an Annual Selection Meeting (the “College Draft” or “Draft”) each League Year during the term of this Agreement and for the year immediately following the expiration or termination of this Agreement, with respect to which the following rules shall apply. In any League Year in which the NFL deems it appropriate, there may also be a Supplemental Draft.

#### **Section 2. Number of Choices and Eligibility**

(a) The Draft shall consist of twenty rounds, with each round consisting of the same number of selection choices as there will be Clubs in the NFL the following League Year, plus a maximum number of additional Compensatory Draft Selections equal to the number of Clubs then in the League, with such Compensatory Draft Selections reserved for Clubs losing certain Unrestricted Free Agents. Each Draft shall be held between February 14 and June 2, on a date which shall be determined by the Commissioner.

(b) No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier. For example, if a player graduated from high school in December 2021, he would not be permitted to apply for special eligibility, and would not otherwise be eligible for selection, until the 2025 Draft.

(c) If a player who was not eligible for the Draft in any League Year becomes eligible after the date of the Draft, he will be eligible to be selected in a Supplemental Draft, if the League elects to conduct such a Draft, on or before the seventh calendar day prior to the opening of the first training camp that League Year. No player may elect to bypass a Draft for which he is eligible to apply for selection in a Supplemental Draft. Any Club that selects a player in a Supplemental Draft must forfeit a choice in the same round in the next succeeding principal Draft.

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<sup>100</sup> This provision would supplant Article 6 of the 2011 Collective Bargaining Agreement, as well as all pertinent provisions of §1 of Article 7.

(d) No player shall be eligible to be employed by an NFL Club until he has been eligible for selection in an NFL Draft.

**Section 3. Rookie Contracts<sup>101</sup>:**

(a) **Contract Length.** Every Rookie Contract shall have a fixed and unalterable contract length: (i) four years for Rookies selected in the first round of the Draft, with a Club option for a fifth year; (ii) four years for Rookies selected in rounds two through seven of the Draft (including any compensatory draft selections); and (iii) three years for Rookies selected in rounds eight through twenty of the Draft (including any compensatory draft selections).

(b) **Rookie Salary.**

(i) “Rookie Salary” for a Drafted Rookie means the highest amount of earnable compensation for which such player and Club have contracted in each year of his Rookie Contract regardless of whether any or all amounts are earned or considered “likely to be earned” as set forth in Article 13, excluding only (A) the Fifth-Year Option Paragraph 5 Salary, (B) the amount by which the player’s Paragraph 5 Salary may increase pursuant to the Proven Performance Escalator, (C) minimum offseason workout per diem as set forth in Article 21, and (D) compensation for community relations/sponsor appearances (subject to the maximum amounts permitted).

(ii) For the purposes of calculating Rookie Salary in each year of a player’s Rookie Contract, signing bonus and amounts treated as signing bonus will be prorated on a straight line basis.

(c) **Total Rookie Compensation Pool.** Pursuant to §2 of Article 7, all rookie contracts shall be subject to the limitations set forth by the compensation pool. The Club may apportion Rookie Salaries as needed dependent upon the amount of total Rookies that year. By way of example, a Club who drafts 15 Rookies in 2022 as compared to a Club who drafts in all 20 rounds shall have a greater amount of money from the Compensation Pool to compensate their Drafted Rookies. All Rookies

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<sup>101</sup> This provision shall modify §3 of Article 7 of the 2011 CBA.

shall be protected by the minimum annual salary as enumerated by this Agreement in Article 26.

### *III. Conclusion*

The role of the agent within the context of the NFL has changed radically from its nascent stages in the mid-20th century. While an agent's active involvement in his or her client's livelihood has expanded meaningfully, their role as an advocate was effectively extinguished in 2011. Continuing to improve the agent's role as an advocate for players is beneficial to both agents seeking to set themselves apart in a hyper-competitive industry, as well as for the players.

In order to attain earnest improvement for players in 2021, agents should harness their experience in order to effectuate reform that works in practicality. Beyond preparing clients for a foreseeable lockout, by drafting and integrating meaningful changes to the CBA language, agents can assist the NFLPA in attaining more qualitative improvements for players, beyond the reapportionment of revenue. Using their first hand experience would be infuse the negotiation process with a greater sense of purpose: to create a League that supports its players physically and financially, while enforcing clear and rules on a consistent basis.

**HOLLYWOOD’S NEWEST LOOPHOLE: PUBLICITY RIGHTS  
ARE *LEAVING NEVERLAND* AS DOCUDRAMAS BECOME  
HOLLYWOOD’S NEW *VICE***

*By: Sophie Edbrooke\**

Abstract

This Comment will examine the many ways that courts struggle to balance the right of publicity and the First Amendment. The main issue is that docudramas are an intermediary production between movies and documentaries, and producers are claiming the protections that exist for those two mediums also protect their works.

There has been only one Supreme Court case on the right of publicity. Since this ruling, however, lower courts have found that precedent to be too narrow and have decided cases individually. This has enabled courts to try docudrama right of publicity cases with a multitude of tests.

This Comment will explain how the tests applied to the right of publicity in docudramas issues are numerous and include trademark, copyright, and economic approaches. Next, this Comment will explain how these tests give significant deference to the First Amendment. Finally, this Comment will propose a new test for courts to implement when deciding the right of publicity in docudramas that provides a proper balance between the First Amendment and the rights of individuals.

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## Table of Contents

<b><i>I. Introduction</i></b> .....	144
<b><i>II. Flying in the Face of Precedent, Courts Have Not Solved the Right of Publicity Loophole</i></b> .....	146
a. The Current State of the Right of Publicity.....	146
b. The Courts Are Overusing Copyright Exceptions .....	149
c. The Trademark Test Applied to the Right of Publicity .....	152
d. Everything but the Kitchen Sink, What Other Tests Have the Courts Applied? .....	154
e. Possible Precedent Changing Cases.....	156
<b><i>III. The Inadequacies of the Present Right of Publicity</i></b> .....	157
a. Different Name, Same Ill-Fitting Test .....	158
b. No Matter the Test, the First Amendment Always Wins.....	161
i. Copyright Fair Use Hybrid Test Applied More Broadly .....	162
ii. Copyright Transformative Use Test Hybrid Applied More Broadly.....	164
iii. Trademark <i>Rogers</i> Test Hybrid Applied More Broadly .....	165
c. What Happens Now? .....	167
<b><i>IV. Conclusion</i></b> .....	171

### I. Introduction

Docudramas are becoming more marketable in Hollywood because of an increased popularity of the genre.<sup>1</sup> A docudrama is a blend of documentary and fiction, often it is a dramatic retelling of an individual's life story.<sup>2</sup> This new genre helps producers find legal loopholes when producing films and using celebrities' images, essentially

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<sup>1</sup> See Saralyn Cruickshank, *True Crime and the Rise of the Docudrama*, JOHNS HOPKINS U. (Jan. 30, 2018), <https://hub.jhu.edu/2018/01/30/true-crime-genre-docudrama/> (attributing the rising success of docudramas to the entertaining way the productions explain real life events).

<sup>2</sup> See Gregory Reed, *Aces – Docudramas: Whose Image is Protected? A Practitioner's Point of View*, 78 MICH. BAR J. 1284 (1999).

violating the celebrities' right of publicity.<sup>3</sup> The right of publicity is the right of an individual to control his or her image or likeness.<sup>4</sup>

When courts decide right of publicity cases, they utilize many tests, including the copyright fair use test, the copyright transformative use test, the trademark *Rogers* test, and more.<sup>5</sup> Since there are so many tests, there is no consistency among courts.<sup>6</sup> Docudramas exploit these tests and their First Amendment exceptions to produce docudramas without proper publicity rights.<sup>7</sup>

For example, the fair use exception is applicable when a production is made for educational purposes; therefore, docudramas, which are produced for entertainment, should not be eligible for the exception.<sup>8</sup> Further, the transformative use test can protect producers when they transform someone's image, but because docudramas rely heavily on the true story of an individual, the transformative use test cannot be applied.<sup>9</sup> This pattern of applying inappropriately tailored tests to right of publicity cases continues with other tests.<sup>10</sup>

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<sup>3</sup> See Stephanie Beach, *Fact & Fiction: Amending Right of Publicity Statutes to Include Life Story and Fictional Character Rights*, 42 SETON HALL LEGIS. J. 131, 132 (2017) (explaining that when the art is a retelling of an individual's life story, the rights of that person are not clearly defined by the law).

<sup>4</sup> Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 1 (1995).

<sup>5</sup> See *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 454 (Cal. 1979) (creating the fair use test as applied to docudramas); *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989) (creating the *Rogers* test); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (defining the transformative use test).

<sup>6</sup> Beach, *supra* note 3, at 142-46.

<sup>7</sup> See *id.* (finding that each of these tests allow exceptions for First Amendment freedom of expression and speech and have been wrongfully applied to docudramas).

<sup>8</sup> See 17 U.S.C.S. § 107 (2019); see also Reed, *supra* note 2, at 1284 (describing the primary purpose of docudramas as entertainment).

<sup>9</sup> *Comedy III Prods.*, 21 P.3d at 797; see also Beach, *supra* note 3, at 140 (acknowledging that docudramas often include fictionalized embellishments of a life story but are based on true events).

<sup>10</sup> See *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (applying and adapting the transformative use for docudramas but providing an inadequate right of publicity); see also *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (applying the *Rogers* test of endorsement to a novel); see also *Doe v. TCI Cablevision*, 110 S.W. 3d 363, 375 (Mo. 2003) (concluding that in three different circuits, the 9th, 5th, and 8th, different courts have applied these various tests, and all of the tests have been a poor fit for the facts before the court and the right of publicity).

The confusion of courts comes from the United States' Supreme Court decision in, *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>11</sup>, the only Supreme Court precedent on the right of publicity.<sup>12</sup> Ideally, this decision should have strengthened the right of publicity for individuals whose image has commercial value, yet courts find it inapplicable.<sup>13</sup>

Part II of this Comment will discuss the current legal tests that courts use to solve the right of publicity and their application to docudramas. Part III of this Comment will show how these tests are inadequate and how the resulting decisions are too deferential to the First Amendment by applying these tests to alternate fact patterns. Part IV will propose a new test for docudramas that enables individuals featured in them to protect their identity because the current tests could diminish the scope of the right of publicity.

## II. Flying in the Face of Precedent, Courts Have Not Solved the Right of Publicity Loophole

The right of publicity “gives a person who has achieved celebrity status or fame the right to market this accomplishment by controlling and licensing the use of his or her image, likeness, or name.”<sup>14</sup> Right of publicity statutes are not nationally codified and are determined by states individually.<sup>15</sup>

### a. The Current State of the Right of Publicity

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<sup>11</sup> 433 U.S. 562, 565 (1977).

<sup>12</sup> *Id.* (deciding the case of Hugo Zacchini's right of publicity based on the “publicity value of his performance”).

<sup>13</sup> Arlen Langvardt, *The Troubling Implications of a Right of Publicity “Wheel” Spun Out of Control*, 45 U. KAN. L. REV. 329, 358 (1997) (explaining that the lower courts have interpreted *Zacchini* narrowly and now use various other tests they find more applicable to their cases individual fact patterns).

<sup>14</sup> Moore, *supra* note 4, at 1.

<sup>15</sup> See Moore, *supra* note 4, at 2 (explaining how right of publicity came to exist within the law); see also Mark Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 Loy. L.A. ENT. L. REV. 471, 478 (2003) (explaining that right of publicity statutes evolved gradually because states wanted individuals to be able to profit off the efforts in creating their images).



Two of the most cited right of publicity statutes come from California and New York.<sup>16</sup> The California Statute protects the “name, voice, signature, photograph, or likeness” in “products, merchandise, or goods, or for purposes of advertising or selling.”<sup>17</sup> California has an inheritable right of publicity.<sup>18</sup> California’s Statute is far more detailed than New York, which has settled on a more succinct right.<sup>19</sup> The New York Right of Publicity is referred to as the right of privacy, and states that the image use must be for “advertising purposes . . . or . . . trade,” and the likeness must be the “name, portrait, or picture” of a living person.<sup>20</sup>

California and New York’s Right of Publicity Statutes are two of the most commonly applied to docudramas.<sup>21</sup> However, courts have difficulty applying these statutes to docudramas because studios take creative liberties with the events in the production, and, therefore, courts are applying First Amendment Freedom of Speech exceptions to the detriment of the right of publicity.<sup>22</sup>

Since docudramas are a newer phenomenon, cases in this niche have not been granted certiorari by the Supreme Court.<sup>23</sup> However, the Supreme Court has heard one right of publicity case in 1977.<sup>24</sup> In

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<sup>16</sup> CAL. CIV. CODE § 3344 (Deering 1984); N.Y. CIV. RIGHTS LAW § 50 (2019); *see also* Moore, *supra* note 4, at 10 (explaining that New York, California, and Tennessee have cities with active entertainment businesses and, consequently, are the states with the most cases about the right of publicity).

<sup>17</sup> CIV. § 3344 (Deering 1984).

<sup>18</sup> *See* Moore, *supra* note 4, at 32 (defining a descendible right of publicity as protecting an individual’s image after his or her death, to the benefit of his or her family or estate).

<sup>19</sup> *Compare* CIV. § 3344 (Deering 1984) (protecting not only name and image but also a much broader likeness standard), *with* CIV. RIGHTS § 50 (limiting the right of publicity to physical representations of the person).

<sup>20</sup> CIV. RIGHTS § 50; *see also* CIV. § 3344 (finding not only the much broader definition of what constituted an identity, but also more ways an individual’s identity could be appropriated, in California’s Code).

<sup>21</sup> *See generally* Lee, *supra* note 15 (citing primarily 2nd and 9th Circuit cases throughout the article which use California and New York Civil Codes).

<sup>22</sup> Reed, *supra* note 2, at 1284.

<sup>23</sup> *See generally* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (noting that this is the most recent Supreme Court case to deal with the right of publicity).

<sup>24</sup> *Id.*; *see* Lee, *supra* note 15, at 490–91 (acknowledging that the *Zacchini* precedent should guide lower courts when deciding right of publicity cases, but instead courts are ignoring the opinion of the Supreme Court).

*Zacchini*, the Plaintiff argued that when a news network broadcast his entire act without his consent, the network violated his “right of publicity value of his performance.”<sup>25</sup> Hugo Zacchini was a human cannonball, shooting himself out of a cannon at a county fair, and later that night, his entire fifteen second act was broadcast without his consent or compensation.<sup>26</sup> The Supreme Court held that the California Statute is far more detailed than the New York statute, which has settled on a more succinct right.<sup>27</sup> The New York Right of Publicity is referred to as “the right of privacy,” and states that the use of the image must be for “advertising purposes . . . or . . . trade,” and the likeness must be the “name, portrait, or picture” of a living person.<sup>28</sup>

The California and New York Right of Publicity Statutes are two of the most commonly applied statutes to docudramas.<sup>29</sup> However, courts have difficulty applying these statutes to docudramas because studios take creative liberties when depicting the events in the production. Therefore, courts apply First Amendment Freedom of Speech exceptions to the detriment of the right of publicity.<sup>30</sup>

Since docudramas are a newer phenomenon, cases in this niche have not been upheld by the Supreme Court.<sup>31</sup> However, the Supreme Court did hear one right of publicity case, *Zacchini v. Scripps-Howard Broad. Co.*, in 1977.<sup>32</sup> In *Zacchini*, the Plaintiff argued that when a news network broadcast his entire act without his consent, the network violated

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<sup>25</sup> See *Zacchini*, 433 U.S. 562 at 565.

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

<sup>27</sup> Compare CAL. CIV. CODE § 3344 (West 1984) (protecting not only name and image but also a much broader likeness standard), with N.Y. CIV. RIGHTS LAW § 50 (limiting the right of publicity to physical representations of the person).

<sup>28</sup> N.Y. CIV. RIGHTS LAW § 50; see CAL. CIV. CODE § 3344 (West 1984) (finding not only the much broader definition of what constituted an identity, but also more ways an individual’s identity could be appropriated, in California’s Code).

<sup>29</sup> See generally Lee, *supra* note 15 (citing primarily 2nd and 9th Circuit cases throughout the article which use California and New York Civil Codes).

<sup>30</sup> Reed, *supra* note 2, at 1284.

<sup>31</sup> See generally *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (noting that this is the most recent Supreme Court case to deal with the right of publicity).

<sup>32</sup> *Id.* at 565; see also Lee, *supra* note 15, at 490–91 (acknowledging that the *Zacchini* precedent should guide lower courts when deciding right of publicity cases, but instead courts are ignoring the opinion of the Supreme Court).

his “right to [the] publicity value of his performance.”<sup>33</sup> In *Zacchini*’s act, he was a human cannonball and shot himself out of a cannon at a county fair. Later that night, after his performance, *Zacchini*’s entire fifteen second act was broadcast without his consent or compensation.<sup>34</sup> The Supreme Court held that the television network could not use the likeness of another for commercial benefit.<sup>35</sup>

The Supreme Court did not consider First Amendment exceptions to the broadcast because it was a clear misappropriation of *Zacchini*’s identity, and the Court wanted to preserve his individual right.<sup>36</sup> All three judges in the Ohio Supreme Court agreed that freedom of speech did not immunize the press and allow them to show *Zacchini*’s act without just compensation, and this decision was affirmed by the United States Supreme Court.<sup>37</sup> Furthermore, the Supreme Court specifically found no newsworthy exception under these circumstances.<sup>38</sup> The newsworthy exception would have allowed the news station to inform the public of important events, but because the news station was a rebroadcasting instead of commenting on *Zacchini*’s performance, it did not apply.<sup>39</sup>

When tasked with weighing First Amendment rights and the right of publicity, the majority opinion considered the intellectual property tests but did not apply the intellectual property exceptions.<sup>40</sup> However, Powell’s Dissent applied the copyright fair use newsworthy exception: Powell stated that because the broadcast was not for commercial exploitation, there was no right of publicity violation.<sup>41</sup>

## b. The Courts Are Overusing Copyright Exceptions

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<sup>33</sup> See *Zacchini*, 433 U.S. at 563–64.

<sup>34</sup> *Id.* at 564.

<sup>35</sup> See *id.* at 565, 573–574 (noting that broadcasting the act posed an economic threat to the performance, into which the petitioner put time, money, and effort).

<sup>36</sup> See *id.* at 576–578 (finding that his act was a part of his identity).

<sup>37</sup> *Id.* at 565, 578.

<sup>38</sup> See *id.* at 569.

<sup>39</sup> *Id.* at 569.

<sup>40</sup> See *id.* at 573–575 (analogizing the economic philosophy behind the right of publicity to the economic philosophy behind protecting trademark and copyright and finding that both are rooted in individual effort but not finding any trademark or copyright exceptions).

<sup>41</sup> See *id.* 579–582 (Powell, J., dissenting) (concluding Powell’s argument to be more in line with more modern opinions).

Because courts find the standard set in *Zacchini* to be inapplicable, there is no standardized test tailored to the right of publicity.<sup>42</sup> Courts are left to decide how to solve these problems, and producers and studios can defend their appropriation in many ways because there is no sufficient precedent.<sup>43</sup> This has led to a consistent deference to producers and the First Amendment, regardless of the test the courts apply.

One way that docudrama producers escape claims of licensing rights for individuals' likeness is by defending their use under the copyright fair use test.<sup>44</sup> The United States Code outlines an exception to copyright appropriation called fair use.<sup>45</sup> There are four factors in the fair use test, best explained in *Harper & Row Publishers, Inc. v. Nation Enterprises*<sup>46</sup>: (1) the purpose and character of the reproduced work, (2) the nature of the copyrighted work, (3) the quantity of the work, and (4) the economic effect of the new work on the market of the old work.<sup>47</sup> In *Harper*, Nation Enterprises published an excerpt of the leaked manuscript of President Gerald Ford's autobiography; Nation Enterprises attempted to claim fair use, but the court held that because it published it for commercial value, not education, and the portion appropriated was of substantial value to the whole, Nation Enterprises infringed on Harper and Row's copyright.<sup>48</sup> When deciding the third factor, the court also included a totality analysis and analyzed whether the portion appropriated was the most important to the whole.<sup>49</sup> The two copyright fair use factors

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<sup>42</sup> See Beach, *supra* note 3 at 135–36 (finding that courts have not followed the *Zacchini* precedent, but instead are following a greatly expanded right of publicity).

<sup>43</sup> See Sarver v. Chartier, 813 F.3d 891, 907 (9th Cir. 2016); Parks v. LaFace Records, 329 F.3d 437, 463 (6th Cir. 2003); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 464 (Cal. 1979) (seeing that while these cases are analyzed differently, they are decided the same way).

<sup>44</sup> See *Guglielmi*, 603 P.2d at 457 (finding the primary argument of the plaintiff to be fair use).

<sup>45</sup> 17 U.S.C.A. § 107 (West 1992) (explaining that fair use is often applied for practical purposes such as reporting and teaching).

<sup>46</sup> 471 U.S. 539 (1985).

<sup>47</sup> *Id.* at 588 (citing Copyright Revision Act of 1976 17 U.S.C. § 107).

<sup>48</sup> *Id.* at 542, 543, 562, 564–66, 568.

<sup>49</sup> *Id.* at 564–66.

best applied to docudramas are the purpose of the reproduced work and the quantity of work appropriated.<sup>50</sup>

Applying the *Harper* decision to cases of producers and individuals' identities, courts evaluated the fair use exception to the right of publicity in *Guglielmi v. Spelling-Goldberg Productions*.<sup>51</sup> In *Guglielmi*, a deceased celebrity, Rudolph Valentino, had his name and likeness used in a film portraying his life.<sup>52</sup> At the time, the right of publicity was not descendible, so when his nephew filed for the rights, he had no real claim to his deceased uncle's image.<sup>53</sup> However, the more significant opinion in *Guglielmi* is Chief Justice Rose Bird's Concurrence, which investigated the right as if the celebrity were alive.<sup>54</sup>

Valentino's nephew argued portions of the fair use test, such as: the film was "(1) a work of fiction, (2) for financial gain, [and] (3) knowing that such film falsely portrayed [the celebrity's] life."<sup>55</sup> The court dismissed these three arguments for various reasons, including that "for profit" is not relevant because the First Amendment protects items for profit or not.<sup>56</sup> By claiming that the line between informing and entertaining is too ambiguous, the court muddled the fair use test when applied to creative works and made it easier for producers to appropriate individuals' images.<sup>57</sup> Further, the court emphasized the cultural importance of Valentino's image and decided that regardless of the fictional versus non-fictional nature of the production, the work was exempt from the right of publicity.<sup>58</sup>

Another copyright test is the transformative use test. The transformative use test is outlined in *Comedy III Productions, Inc. v. Gary*

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<sup>50</sup> See Beach, *supra* note 3, at 145 (acknowledging that these two standards are better fitted to using an individual's image in a docudrama).

<sup>51</sup> 603 P.2d 454 (Cal. 1979).

<sup>52</sup> *Id.* at 455-56 (Bird, C.J., concurring).

<sup>53</sup> *Id.* at 455 (holding that injunctive relief for the Plaintiff was not possible because it was not his image being appropriated).

<sup>54</sup> *Id.* at 455-64; see Robert Zipser, *What's in a Name? Since 2001, The Descendible Right of Publicity of Public Figures Has Overshadowed the First Amendment Rights of Studios*, 27 L.A. LAW. 16, 16 (2014) (finding that *Guglielmi* is useful precedent to lower courts only because of the concurrence).

<sup>55</sup> *Guglielmi*, 603 P.2d at 457.

<sup>56</sup> *Id.* at 459-60.

<sup>57</sup> See *id.* at 459.

<sup>58</sup> *Id.* at 460. (holding that the importance of being able to use historical figures as inspiration for pieces of work).

*Saderup, Inc.*<sup>59</sup> and has two important components: (1) whether the celebrity's image is the "sum and substance" of the work and (2) whether the creator of the work transformed the celebrity's image.<sup>60</sup> In *Comedy III*, the court held that when Gary Saderup created charcoal drawings of the faces of The Three Stooges on t-shirts, he was wrongly appropriating The Three Stooges image because he was merely replicating it for profit without sufficient transformation.<sup>61</sup>

In *Sarver v. Chartier*,<sup>62</sup> Sergeant Jeffrey Sarver, the plaintiff, claimed that the producers of *The Hurt Locker* appropriated his role in the Iraq War in the mid-2000s.<sup>63</sup> Sarver argued that Will James, the main character, was based on Sarver's life and included personal details.<sup>64</sup> Sarver brought a right of publicity claim against the producers and attempted to rebut their transformative use excuse.<sup>65</sup> The court decided that Sarver's identify was sufficiently transformed, even though Sarver pointed out specific characteristics and events in the movie that created the "sum and substance" of *The Hurt Locker*.<sup>66</sup> The transformation was in the "original expressive content" in writing the screenplay and producing the movie, and was deemed greater than the appropriated portions of the plot.<sup>67</sup>

### c. The Trademark Test Applied to the Right of Publicity

Besides copyright tests, some courts have applied the trademark test from *Rogers v. Grimaldi*<sup>68</sup> to docudramas.<sup>69</sup> Ginger Rogers, one half of a Hollywood duo, objected to producers using the title of her duo "Ginger and Fred" as a title for a fictional movie that only slightly related

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<sup>59</sup> 21 P.3d 797 (Cal. 2001).

<sup>60</sup> *See id.* at 809.

<sup>61</sup> *Id.* at 810-11.

<sup>62</sup> 813 F.3d 891 (9th Cir. 2016).

<sup>63</sup> *Id.* at 896.

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

<sup>65</sup> *See id.* at 897 (failing to properly rebut the claim as the district court decided in favor of the producers).

<sup>66</sup> *Id.* at 896.

<sup>67</sup> *See id.* at 897.

<sup>68</sup> *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

<sup>69</sup> *See id.* at 996 (finding that the *Rogers* endorsement test has been used on life stories). *See generally* *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (noting that a major argument by the plaintiff was the *Rogers* test).

to her story.<sup>70</sup> Ginger Rogers was an international celebrity for over half a decade at the time the movie was produced, and her name had extreme clout in the entertainment world.<sup>71</sup> The *Rogers* test created by the Second Circuit Court evaluates the similarity between the title of the production to the content of the work; the court holds that if the title is “wholly unrelated” to the content or is a “disguised commercial advertisement then there is no wrongful endorsement.”<sup>72</sup>

An important part of the *Rogers* test is the commercial value of the appropriated name.<sup>73</sup> The *Rogers* court held that because the movie title at issue was not commercial speech or advertisement, there was no confusion of Rogers’ endorsement of the film, and her right of publicity was not violated.<sup>74</sup>

Shortly after the *Rogers* test was created, the Fifth Circuit heard *Matthews v. Wozencraft*,<sup>75</sup> where two undercover police officers were romantically involved and began using drugs during their investigation.<sup>76</sup> They lied about the extent of their criminal activity, were incarcerated, and Kim Wozencraft then wrote a book about their experiences.<sup>77</sup> The Fifth Circuit Court applied the same elevated commercial advertising standard as in *Rogers*, and held that because Wozencraft was not using Creig Matthews’ name to market the book, she was not “cashing in” on his image and did not violate his right of publicity.<sup>78</sup>

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<sup>70</sup> *Rogers*, 875 F.2d at 996.

<sup>71</sup> *See id.* (acknowledging that her name would add celebrity status to the movie).

<sup>72</sup> *See id.* at 1004 (finding that the *Rogers* test is borne out of the trademark likelihood of confusion test because both are concerned with false endorsement). *But see id.* at 1004 (delineating the difference between the likelihood of confusion Lanham Act test and the *Rogers* test is that *Rogers* is more expansive because the right of publicity is narrower than trademark protections).

<sup>73</sup> *Id.* at 996 (noting that if the person’s name being used is not profitable, the claim is weaker).

<sup>74</sup> *See id.* at 998–99 (limiting very narrowly what the court would consider commercial speech).

<sup>75</sup> *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994).

<sup>76</sup> *Id.* at 435.

<sup>77</sup> *Id.* at 436.

<sup>78</sup> *Compare id.* at 437 (observing that the Fifth Circuit focused more on the commercial value of the name than the connection between the content of the work and the title), *with Rogers*, 875 F.2d at 998–99 (observing that the Second Circuit placed more emphasis on the relationship between the content and the title).

d. Everything but the Kitchen Sink, What Other Tests Have the Courts Applied?

In addition to the intellectual property tests, some courts craft arguments solely based on creative productions' being protected under Freedom of Speech.<sup>79</sup> For example, in *Parks v. LaFace Records*,<sup>80</sup> Rosa Parks, known for her efforts during the civil rights movement, claimed the band OutKast violated her right to publicity by releasing a song entitled "Rosa Parks;" presumably to capitalize on Rosa Parks' efforts in Montgomery, Alabama after she refused to move to the back of the bus and was a big name in the Civil Rights' Movement.<sup>81</sup> Parks argued that the use of her name as the title of the song created a likelihood of confusion she endorsed the song.<sup>82</sup> However, the court ignored Parks' argument and held that regardless of any likelihood of confusion, OutKast would win the case because the First Amendment protections for the actual song extended to protect OutKast's choice of title.<sup>83</sup>

Another approach that California courts used is a test of public interest.<sup>84</sup> The California Civil Code states that to defeat a right of publicity claim, the defendants must show their art concerned a public issue or of public interest.<sup>85</sup> In *Doe v. Gangland*,<sup>86</sup> a police informant was featured on the television show *Gangland* to talk about a white supremacist gang.<sup>87</sup> The producers did not conceal the informant's identity, even after the informant attempted to wear a bandana to conceal his face, so Doe asserted that they violated his right of publicity.<sup>88</sup> The court held there was no issue of right of publicity because the information

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<sup>79</sup> See, e.g., *Matthews*, 15 F.3d at 439 (concluding that some courts refuse to consider right of publicity arguments if the production is in some way creative).

<sup>80</sup> *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

<sup>81</sup> See *id.* at 442–43.

<sup>82</sup> See *Id.* at 446 (implying that Rosa Parks was trying to argue that according to the *Rogers* test there was not a sufficient connection between the content of the song and using her name as title).

<sup>83</sup> *Id.* at 447.

<sup>84</sup> See *Doe v. Gangland Prods.*, 730 F.3d 946, 955 (9th Cir. 2013) (holding that the Defendant's primary argument is based on public interest).

<sup>85</sup> CAL. CIV. CODE § 3344 (Deering 1984); see *Doe*, 730 F.3d at 955 (construing public interest in a very broad manner).

<sup>86</sup> *Doe*, 730 F.3d 946 (9th Cir. 2013).

<sup>87</sup> *Id.* at 951.

<sup>88</sup> See *Id.* at 952.



the informant gave in *Gangland* was of public interest due to the criminal nature of the activities reported.<sup>89</sup> This is a similar argument to the one the producers in *The Hurt Locker* used, where the producers claimed the movie and its content should be subject to the public interest exception because the Iraq War was of public interest.<sup>90</sup>

This test applies to current docudramas because many now concern stories of public interest, such as *Vice*, a docudrama that told the story of Dick Cheney's Vice Presidency.<sup>91</sup> Docudrama producers that portray negative news stories benefit from the current public interest test because there are no liabilities to producers and far fewer instances that require licensing rights when telling stories of public interest.<sup>92</sup>

Finally, because the right of publicity's economic nature, courts also use a commercial use or economic standard of review.<sup>93</sup> The commercial standard is considered to be profiting from the sale of goods or services, providing the example of advertising, but not media or entertainment.<sup>94</sup> The right of publicity's legislative purpose was to give people the ability to sell their image, and the Supreme Court decided in line with this ideology in *Zacchini*.<sup>95</sup> In *Doe v. TCI Cablevision*,<sup>96</sup> Missouri's Supreme Court analyzed the circumstances surrounding a former professional hockey player's image and name used in a comic book.<sup>97</sup> Tony Twist worked to create a reputation as an "enforcer" within the league, and he filed a right of publicity suit against the creator of the

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<sup>89</sup> *Id.* at 955.

<sup>90</sup> *Sarver v. Chartier*, 813 F.3d 891, 896, 902 (9th Cir. 2016) (using the public interest exception to get a blanket protection for a whole movie because the Iraq War was of public interest).

<sup>91</sup> INTERNATIONAL MOVIE DATABASE, *VICE* (2018), <https://www.imdb.com/title/tt6266538/> (last visited Nov. 22, 2019).

<sup>92</sup> *See* *Gangland Prods.*, 730 F.3d at 955 (explaining that the broad public interest exception to the right of publicity would shield producers from liability when producing newsworthy stories such as *Vice*).

<sup>93</sup> *See* *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

<sup>94</sup> *See Id.* (finding this a high bar to meet when arguing right of publicity).

<sup>95</sup> *See* *O'Grady v. Twentieth Century Fox Film Corp.*, No. 5:02CV173, 2003 U.S. Dist. LEXIS 24936, at \*31 (E.D. Tex. Dec. 19, 2003) (finding that the right of publicity is founded in the right to profit off one's own image).

<sup>96</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

<sup>97</sup> *Id.* at 366.

comic book that appropriated his image.<sup>98</sup> The Supreme Court of Missouri held that if the producer received a commercial benefit from using Twist's identity, Twist had a right of publicity claim.<sup>99</sup> Twist's case was remanded to be heard again through this commercial benefit standard.<sup>100</sup> Throughout all of the previous cases, the courts apply multiple tests, and all of these tests hold for the producers, contrary to the Supreme Court's sole right of publicity holding.<sup>101</sup>

e. Possible Precedent Changing Cases

As docudramas become more popular, courts are wavering on deference to the First Amendment.<sup>102</sup> *De Havilland v. FX Networks, LLC* is the first right of publicity case appealed to the Supreme Court since *Zacchini*.<sup>103</sup> However, it was denied a writ of certiorari.<sup>104</sup> Olivia de Havilland sued FX Network after using her image in *Feud: Bette and Joan* without her consent.<sup>105</sup> The mini-series portrayed the Hollywood feud between Joan Crawford and Bette Davis.<sup>106</sup> The trial court held for de Havilland, despite her minor role, but the court of appeals reversed the trial court's decision, ultimately following the trend of deference to the First Amendment.<sup>107</sup> If this case had been heard by the United States' Supreme Court, it would have set a more applicable precedent for Hollywood producers because the fact pattern is much more applicable than *Zacchini*.<sup>108</sup>

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<sup>98</sup> See *Id.* at 366–67 (defining an enforcer as someone whose “responsibility was to protect goal scorers from physical assaults by opponents”).

<sup>99</sup> *Id.* at 374.

<sup>100</sup> *Id.* at 375.

<sup>101</sup> *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 636–37 (Cal. Ct. App. 2018).

<sup>102</sup> *Id.* at 647.

<sup>103</sup> *Id.* at 636–37.

<sup>104</sup> *De Havilland v. FX Networks, LLC*, 139 S. Ct. 800, 800 (2019).

<sup>105</sup> See *De Havilland*, 230 Cal. Rptr. 3d at 630.

<sup>106</sup> *Id.*

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

<sup>108</sup> See generally Saul S. Rostamian, Diana Hughes Leiden & Lev Tsukerman, *Based on True Events*, 41 L.A. LAW. 16, 17 (2018) (observing that Hollywood producers were closely watching this lawsuit because of its implications).

Another case currently being litigated is *Porco v. Lifetime Entertainment Services, LLC*.<sup>109</sup> The plaintiff was convicted of murdering his father and claimed that Lifetime had appropriated his image in *Romeo Killer: The Christopher Porco Story*.<sup>110</sup> The trial court granted a temporary injunction, but later dismissed the Complaint.<sup>111</sup> The case is proceeding to hearings after an Amended Complaint was submitted, naming Joan Porco as a second plaintiff.<sup>112</sup>

### III. The Inadequacies of the Present Right of Publicity

The current right of publicity statutes further confuse courts in creating a sufficient balancing test between the First Amendment and the rights of individuals.<sup>113</sup> The California Right of Publicity Statute uses the advertising or commercial sponsorship standard.<sup>114</sup> The New York Right of Publicity Statute also relies solely on the commercial advertising or trade standard.<sup>115</sup> Furthermore, both statutes are limited to the rights of individuals as their name, portrait, or picture, and not their story or life events, which people also spend time, effort, and money to create.<sup>116</sup>

Further, the right of publicity case law is also confusing courts; for example, lower courts have not applied the *Zacchini* precedent<sup>117</sup> to modern docudrama cases because docudramas are inherently factually different<sup>118</sup> since they are not strict rebroadcasts of individual's lives. The lower courts found that the Supreme Court did not mention likeness, and

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<sup>109</sup> *Porco v. Lifetime Entm't Servs. LLC*, 147 A.D.3d 1253, 1253 (N.Y. App. Div. 2017).

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

<sup>111</sup> *Id.* at 1253-54.

<sup>112</sup> *Porco v. Lifetime Entm't Servs. LLC*, 109 N.Y.S. 3d 516, 518 (N.Y. App. Div. 2019).

<sup>113</sup> *See* CAL. CIV. CODE § 3344 (Deering 1984); N.Y. CIV. RIGHTS LAW § 50 (LexisNexis 1909).

<sup>114</sup> CIV. § 3344.

<sup>115</sup> CIV. RIGHTS § 50 (working similarly to the California right of publicity statute but also being applied to merchandise).

<sup>116</sup> *See id.*

<sup>117</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-64 (1977) (explaining that the entire performance was recorded and rebroadcast).

<sup>118</sup> *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 152 (3d Cir. 2013) (implying that *Zacchini* has the strongest possible case for right of publicity because it was a whole performance).

only decided the case on the strict rebroadcasting of the video, which is too high of a threshold to apply to docudramas since most docudramas fictionalize some events.<sup>119</sup>

a. Different Name, Same Ill-Fitting Test

Regardless of which one of the six tests the courts use, they are ultimately relying on the three intellectual property analyses.<sup>120</sup> When considering the *Zacchini* case, the Supreme Court set a precedent of upholding the legislative purpose of the right of publicity to balance the First Amendment properly and did not apply intellectual property analysis.<sup>121</sup> However, since lower courts find the *Zacchini* precedent inapplicable to most fact patterns, judges have reverted to copyright and trademark tests to decide these issues.<sup>122</sup>

First, the copyright fair use test and the public interest tests both rely on the content of the production and the purpose of producing the work.<sup>123</sup> When the court decided *Harper & Row, Publishers*, it emphasized both the facts within the work and the purpose of reproducing the work.<sup>124</sup> This test morphed to benefit producers by focusing more so on the content of the work being appropriated and blurring the line of the purpose of the reproduced work.<sup>125</sup>

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<sup>119</sup> See *id.* (explaining how lower courts' attempt to follow the balancing test set forth in *Zacchini* but cannot because it is the ideal right of publicity case).

<sup>120</sup> See generally, e.g., *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979) (adapting the fair use test to docudramas); *Doe v. Gangland Prods.*, 730 F.3d 946 (9th Cir. 2013) (analyzing that the copyright fair use test as applied to docudramas and public interest test used in these cases are based in the same reasoning).

<sup>121</sup> See *Langvardt*, *supra* note 13, at 358, 360 (explaining that even though *Zacchini* was based in legislative purpose, the opinion cannot be used as a comprehensive balancing test).

<sup>122</sup> See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 459–60 (6th Cir. 2003) (finding emphasis on intellectual property in the Lanham Act and a *Rogers* interpretation while discussing applicable right of publicity law). See generally *Zacchini*, 433 U.S. (finding no intellectual property discussion).

<sup>123</sup> See *Harper & Row, Publ'rs v. Nation Enters.*, 471 U.S. 539, 545 (1985); see also *Doe*, 730 F.3d at 955-56 (deciding both cases on these same factors despite calling them different tests).

<sup>124</sup> *Harper & Row, Publ'rs.*, 471 U.S. at 545.

<sup>125</sup> See *Guglielmi*, 603 P.2d at 459 (reiterating that when analyzing docudramas, courts have decided the line between fiction and non-fiction is too hard to determine).

Once courts adapted the fair use test to focus on the “use” prong, it evolved into the public importance test because both of these tests focus on the content of the work — whether it is informative and *could be* beneficial to the public — and disregard the purpose of the reproduced work — whether it is truly for educational purposes or economic gain.<sup>126</sup> For example, the information in *Gangland*, while interesting to many viewers, is unnecessary to warn people of the dangers of an isolated gang because it will never affect the majority of the public.<sup>127</sup> This can also be seen in Clinton County Court’s reasoning when concluding *The Romeo Killer* is of public interest, even though the public need not be informed about Christopher Porco’s situation.<sup>128</sup> Furthermore, in *The Hurt Locker*, the court found that the Iraq War and improvised explosive devices (IEDs) were matters of “sustained public attention,”<sup>129</sup> which is a stretching of public importance, and granted the movie a public interest exception.

Furthermore, the copyright transformative use test and the First Amendment bar to right of publicity both turn on the amount of creative labor put into the production: in transformative use, courts ask whether the creative labor transformed the work, and in First Amendment, courts ask whether that creative labor created speech or expression.<sup>130</sup> The transformative use test provides protections to creative works that do more than just retell a story; these are similar to the First Amendment protections afforded to speech.<sup>131</sup> However, most docudramas’ plotlines are a retelling of a large majority, if not an entirety, of a life or marketable

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<sup>126</sup> See *id.* at 460–61 (explaining that Valentino’s life is so important to culture that the purpose of the work no longer matters, disregarding a large factor of the *Harper and Row* fair use test).

<sup>127</sup> Doe, 730 F.3d at 955.

<sup>128</sup> Porco v. Lifetime Entm’t Servs., LLC., 147 A.D.3d 1253, 1253 (N.Y. Sup. Ct. 2017) (explaining why the court dismissed the first Complaint).

<sup>129</sup> See *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016) (attempting to explain that a public interest in IEDs can be a matter of public concern).

<sup>130</sup> See *generally* *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (discovering that both cases are decided on whether the product is creative).

<sup>131</sup> See *Comedy III Prods., Inc.*, 21 P.3d at 811 (explaining that the Plaintiff lost the case because he did not sufficiently transform the Three Stooges).

event.<sup>132</sup> Thus, when courts apply the transformative use test to docudramas, they are forced to lower the transformation threshold because the “sum and substance” portion of the test will always be violated.<sup>133</sup> In *Sarver*, the court ignored that the main character was based on Sarver’s life, and instead stated that the minimal transformation was sufficient and decided that the “sum and substance” of the film was not based on Sarver’s life.<sup>134</sup>

This lowered threshold demonstrates the courts’ overuse of the First Amendment to deny plaintiffs the chance to argue a violation of their right of publicity.<sup>135</sup> *Parks v. LaFace* and *Sarver v. Chartier* are both examples of courts scrutinizing creative works.<sup>136</sup> In *Parks*, Rosa Parks was denied the ability to argue that her name was improperly used.<sup>137</sup> In *Sarver*, Sarver’s arguments were heard, but they did not prevail because *The Hurt Locker* was a work of creative labor.<sup>138</sup> The court was more concerned with safeguarding “the storytellers and artists who take the raw materials of life . . . and transform them into art” with the First Amendment, than protecting individuals’ images.<sup>139</sup> Therefore, as long as the work is creative, regardless of whose image is appropriated, the courts are permitting a First Amendment exception.<sup>140</sup>

Finally, the trademark *Rogers* test and the economic test are both reliant on the effort by the individual to create his or her image, and the

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<sup>132</sup> Matthew Stohl, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must Be Solved*, 35 AKRON L. REV. 251, 255–56 (2002) (detailing popular examples such as *Schindler’s List* and *JFK*).

<sup>133</sup> See *Sarver*, 813 F.3d 891 at 896.

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

<sup>135</sup> See *id.* at 902 (disregarding Sarver’s transformative use argument because the work was ultimately creative and protected by the First Amendment).

<sup>136</sup> See *id.*; See also *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (deciding also in favor of the producers because the works were creative and so the plaintiffs’ arguments were not considered).

<sup>137</sup> See *Parks*, 329 F.3d at 449 (explaining that when the court was faced with three options on how to decide this case, they chose the test with the most deference to the First Amendment).

<sup>138</sup> See *Sarver*, 813 F.3d at 905–06.

<sup>139</sup> *Id.* at 905.

<sup>140</sup> See *id.* at 905–06 (implying that First Amendment exceptions are nearly impossible to overcome).

profit that the studio gains from using his or her likeness.<sup>141</sup> Both of these tests also emphasize the fame of the individual, understanding that when plaintiffs are well-known in their fields, they are more profitable to defendants.<sup>142</sup> The court in *Rogers* admittedly adapted the trademark test to remove the likelihood of confusion and focus on the relationship between the film and the name of the film.<sup>143</sup> Unfortunately, by changing the test, courts ignore the labor that went into creating a recognizable identity and allows others to profit off that effort with minimal restriction.<sup>144</sup> Further, by adapting these tests, courts make it almost impossible for a plaintiff to win a right of publicity claim against a producer.<sup>145</sup>

Because studios can profit off someone's labor and reputation for all productions except commercials and other advertising, courts are directly undermining the legislative purpose of the right of publicity.<sup>146</sup> The existing right of publicity is ever narrower because it focuses on products such as tee shirts and posters but not media that sells itself, such as movies or television shows.<sup>147</sup> The limited commercial standard used by *Rogers* is the same limitation put on economic benefit in *Doe v. TCI Cablevision*.<sup>148</sup> Lower courts are directly contradicting Supreme Court precedent by ignoring the economic arguments the Court put forth in *Zacchini*.<sup>149</sup>

#### b. No Matter the Test, the First Amendment Always Wins

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<sup>141</sup> See *Rogers v. Grimaldi*, 875 F.2d 994, 996, 1003 (2d Cir. 1989); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 370 (Mo. 2003) (finding that both courts use similar arguments just with different languages).

<sup>142</sup> *Rogers*, 875 F.2d at 996.

<sup>143</sup> *Id.* at 1004.

<sup>144</sup> See *id.* at 996.

<sup>145</sup> *Id.* at 1004.

<sup>146</sup> See Lee, *supra* note 15, at 478 (pointing to the legislative purpose of right of publicity statutes to be a right to profit off your own image).

<sup>147</sup> Darren F. Farrington, *Should the First Amendment Protect Against Right of Publicity Infringement Actions Where the Media is Merchandiser? Say it ain't so, Joe*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 779, 779, 802-03 (1997).

<sup>148</sup> See *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (redefining commercial value to be strictly advertisement and not just profit).

<sup>149</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (relying heavily on legislative history and economic arguments when ruling in favor of Hugo Zacchini).

The problem with having a multitude of tests is not only the inconsistency of application but also that each of the tests decides for the First Amendment.<sup>150</sup> Individuals have a very minimal chance under the current right of publicity tests to claim misappropriation by producers.<sup>151</sup>

i. Copyright Fair Use Hybrid Test Applied More Broadly

For example, if the courts in the previously mentioned cases applied the copyright fair use and public interest combination test, the plaintiffs would still have no claim to their image. When the Ninth Circuit decided *Sarver v. Chartier*, it emphasized the importance of public interest, denying that Sarver had any claim to Will James' story even though it was Sarver's story.<sup>152</sup> *The Hurt Locker* appropriated Sarver's story to craft a movie about the Iraq War, and the court decided that because the war was important to the public, Sarver's claim failed the first prong of the modified fair use test.<sup>153</sup> However, applying the traditional fair use factors to the case, Sarver likely would have prevailed on his right of publicity claim because: (1) the purpose of the use was to produce *The Hurt Locker* for entertainment; (2) the amount of work appropriated was substantial for the main character; (3) the type of information used was non-fiction; and (4) *The Hurt Locker* substantially harmed Sarver's chance of profiting off his own image later.<sup>154</sup> Unfortunately, because courts have adapted a more lenient fair use test, the Ninth Circuit would disregard that the movie was made for

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<sup>150</sup> See Beach, *supra* note 3, at 142–46 (accepting that the only consistency amongst courts is in the deference to the First Amendment).

<sup>151</sup> See Reed, *supra* note 2, at 1284 (analyzing that the ambiguity in docudrama right of publicity cases often finds in favor of the producers).

<sup>152</sup> *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016) (expanding the public interest test from just the substance of the war to also include the characteristics of Sarver's person).

<sup>153</sup> See *id.* (finding that construing public interest broadly, *The Hurt Locker* is protected because the Iraq War was a matter of sustained public attention).

<sup>154</sup> See *id.* at 896 (concluding that the traditional *Harper and Row Publishers* fair use factors would hold in favor of Sarver owning the right to his own image).



entertainment purposes and explain that the amount of work taken was insubstantial compared to the whole.<sup>155</sup>

Next, if the same lenient copyright test is applied to the *Parks* case, where Rosa Parks' name was also the title of an OutKast song, the court would likely have still held for the defendant.<sup>156</sup> The docudrama fair use test would have found that Rosa Parks' name was insubstantial, that use of her name did not inhibit her future marketability, and that her name was a fact and not a creative work.<sup>157</sup> The only factor that courts may find in favor of Parks is that the song is purely entertainment, but once again, this is a line blurred by the *Guglielmi* court.<sup>158</sup>

Furthermore, the copyright fair use test also fails in cases decided using the *Rogers* trademark and economic tests.<sup>159</sup> The *Rogers* case would likely have had a very similar application of the fair use test as *Sarver* would have had because the production was a fictional movie.<sup>160</sup> The biggest difference between *Rogers* and *Sarver* is that Sarver's real name was not used within the production, but this would likely not change the application of the fair use test to *Rogers*.<sup>161</sup> The final case previously discussed, *Doe v. TCI Cablevision*, would have the same outcome as the others if put through the fair use test.<sup>162</sup> However, in *Doe*, the court might be slightly more hesitant to find for the Defendant because the purpose of using the Plaintiff's image was to sell a character.<sup>163</sup> Nevertheless, the court would observe the similarities between *Sarver* and *Doe v. TCI Cablevision* where both producers based

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<sup>155</sup> See *Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454, 459 (Cal. 1979) (Bird, C.J., concurring) (finding the line between education and entertainment too hard to define and ultimately minimizing that factor of fair use).

<sup>156</sup> See generally *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (understanding that the test is so deferential to the First Amendment that this plaintiff would not succeed).

<sup>157</sup> See *id.* at 442.

<sup>158</sup> *Id.* at 452-53 (attempting to apply the fair use test to Rosa Parks' case).

<sup>159</sup> See generally *Guglielmi*, 603 P.2d at 454, 464 (utilizing the lenient fair use test); *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989) (employing the *Guglielmi* test to solve the *Rogers* case and seeing that it would be decided in favor of the defendant).

<sup>160</sup> *Rogers*, 875 F.2d at 996 (finding the production to be similar to *Sarver*).

<sup>161</sup> *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016).

<sup>162</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-75 (Mo. 2003).

<sup>163</sup> See generally *id.*

their characters off of real-life stories, but still held for the First Amendment.<sup>164</sup>

ii. Copyright Transformative Use Test Hybrid Applied More Broadly

The next test discussed in this Comment is the copyright transformative use test in conjunction with the First Amendment threshold. This test can also be applied to other fact patterns and continue to provide undue deference to the First Amendment.<sup>165</sup>

When applying the transformative use test to docudramas, courts will likely continue to apply the lower threshold standard of transformation that they have applied in movies.<sup>166</sup> First, applying *Sarver's* test to *Guglielmi*, the court would likely find sufficient transformation in turning Valentino's life story into a script and would find the movie eligible for First Amendment protections.<sup>167</sup> This is because the *Sarver* court set the precedent that the creative labor of writing a script and producing a movie about someone's life was sufficiently transformative.<sup>168</sup>

A case that might encounter more difficulty in applying the transformative use test is *Doe v. Gangland*.<sup>169</sup> It is more difficult because it was an interview of the individual, with no attempts to obscure or transform his identity.<sup>170</sup> However, since *Gangland* is not a fictional account, there is less room for transformation of individuals' images, yet there are still production choices that courts who abide by the lenient transformative use test would find to be sufficient.<sup>171</sup> Further, producers would most probably still argue that because it was a television series,

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<sup>164</sup> Cf. *Sarver*, 813 F.3d at 906-907.

<sup>165</sup> See *Beach*, *supra* note 3, at 142-47 (noting that the structure of current right of publicity tests will consistently rule against the individual).

<sup>166</sup> See *Sarver*, 813 F.3d at 897 (explaining that appropriating an individual's life can be considered transformative when in a movie, and so it will likely be determined the same in docudramas).

<sup>167</sup> See *Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454, 455, 459 (Cal. 1979); *Sarver*, 813 F.3d at 897.

<sup>168</sup> See *Sarver*, 813 F.3d at 897, 905.

<sup>169</sup> *Doe v. Gangland Prods.*, 730 F.3d 946, 950 (9th Cir. 2013).

<sup>170</sup> See *id.* at 951 (finding that the plaintiff entered the room wearing a bandana across his face to conceal his identity, and the producers informed him it was unnecessary).

<sup>171</sup> *Id.*

there were creative decisions through production that enable First Amendment protections.<sup>172</sup>

The producers of *Rogers* and *Doe v. TCI Cablevision* would also succeed under the transformative use test. A court deciding *Rogers* would allege that the movie is a creative work, and there was creativity in producing it, therefore, the First Amendment would take precedence over the right of publicity.<sup>173</sup> This creativity in script-writing and production standard comes from *Sarver*.<sup>174</sup> Finally, *Doe v. TCI Cablevision* may have the easiest case for a First Amendment exception through the transformative use test because Twist was turned into a new character for a fictional story, and this case has the most creativity in its fact pattern.<sup>175</sup> All of the cases mentioned previously would still hold for the defendant if the transformative use test was applied instead.<sup>176</sup>

### iii. Trademark *Rogers* Test Hybrid Applied More Broadly

The final intellectual property test combination is the *Rogers* test in conjunction with the economic argument. Most creative works are sold for a profit, but because courts employ a commercial or advertising economic standard, the creative works qualify for the First Amendment exceptions.<sup>177</sup>

When applying *Rogers* to *Guglielmi*, a court would look into Valentino's relation to the movie to determine endorsement; however, because Valentino was deceased when the movie was made, there would be no possible confusion of his endorsement of the movie.<sup>178</sup> Now that California has a descendible right of publicity, a court would have to decide whether descendants or estates are being confused with endorsing a movie or denied the right to profit off an individual's image.<sup>179</sup>

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<sup>172</sup> *See id.*

<sup>173</sup> *See Rogers v. Grimaldi*, 875 F.2d 994, 996–97 (2d Cir. 1989) (telling the fictionalized story of two Italian cabaret performers imitating Rogers).

<sup>174</sup> *Sarver*, 813 F.3d at 896.

<sup>175</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 366 (Mo. 2003).

<sup>176</sup> *See generally Doe v. Gangland Prods.*, 730 F.3d 946 (concluding that the lenient transformative use test provides too much deference to the First Amendment).

<sup>177</sup> *See Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (defining commercial standards as strictly profiting from the sale of goods).

<sup>178</sup> *See Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 455 (Cal. 1979).

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

In the second case, *Doe v. Gangland*, the Plaintiff would also fail to prevail under the *Rogers* test.<sup>180</sup> This test would also be easily applied to *Gangland* because the informant was not named, so there was no chance of using his identity for endorsement.<sup>181</sup> Further, a singular interview is unlikely to be considered an endorsement, even if the informant were named.<sup>182</sup> However, if the court applied a strictly economic test, as used in *Matthews*, and did not include the *Rogers* endorsement test, Doe might have a case for the producers of *Gangland* profiting off his information.<sup>183</sup>

Two cases where plaintiffs may have succeeded under the *Rogers* test with economic rationale are *Sarver* and *Parks*. In *Sarver*, the *Rogers* endorsement test would fail because Sarver's name was changed to Will James, but he would have a better case for economic exploitation since the plot is heavily based on his life.<sup>184</sup> Unfortunately, since the economic rationale is limited to advertisement and commercial purposes, a court will still likely find a First Amendment exception to *The Hurt Locker*.<sup>185</sup> Finally, in *Parks*, Rosa Parks has a good argument under the *Rogers* test because her name is the title of the song.<sup>186</sup> However, the courts' narrow definition of "economic benefit" would be superseded by the defendants' First Amendment protections and not allow Rosa Parks to protect her right of publicity.<sup>187</sup>

After applying these tests to different fact patterns, different types of appropriation, and different types of works, the tests consistently find for the defendant.<sup>188</sup> This shows that the tests, as they are currently

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<sup>180</sup> See *Doe*, 730 F.3d at 950.

<sup>181</sup> See *id.* at 951 (requiring an identity in order for endorsement).

<sup>182</sup> See *id.* at 950.

<sup>183</sup> See *id.* (understanding that a first-hand account added value and marketability to a docuseries).

<sup>184</sup> *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016).

<sup>185</sup> See *id.*; *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (finding the Fifth Circuit's definition of economic exploitation would not apply to *The Hurt Locker*).

<sup>186</sup> *Parks v. LaFace Records*, 329 F.3d 437, 442–43 (6th Cir. 2003).

<sup>187</sup> See *id.* (acknowledging the economic benefit test is so narrow that even using Parks name in the title would not qualify as economic exploitation).

<sup>188</sup> See *Reed*, *supra* note 2, at 1284 (saying that because docudramas have a certain amount of fictionalization, the First Amendment freedom of speech must be protected and find in favor of defendants).

developed, are inadequate to protect the rights of individuals and are too deferential to the First Amendment.

c. What Happens Now?

The *de Havilland* and *Porco* cases are important because they show a willingness of courts to consider alternative ways of deciding problems with right of publicity in docudramas. Despite being denied certiorari, *de Havilland* created a legal conversation about the possibility of producers having to change their ways of appropriation.<sup>189</sup> This suit had “far-reaching implications for both networks and studios involved in the production of docudramas, and actors and other public figures seeing to control who can profit from the commercialization of their identities.”<sup>190</sup> Further, the Court could “un-muddy” the First Amendment confusion set in *Zacchini*.<sup>191</sup> To maintain the dominant position of the studios, and avoid the “un-muddying,” studios submitted amici curiae briefs focusing on which films would not have been produced if the right of publicity were enforced.<sup>192</sup> These studios were ignoring that even if *de Havilland* succeeded, they could still produce these stories with consent from and just compensation to the individual whose identity is being appropriated.<sup>193</sup> Unfortunately, the appellate court reversed the trial court’s decision and dismissed *de Havilland*’s right of publicity claim.<sup>194</sup>

In *Porco*, the procedural steps by Clinton County Supreme Court show a hesitancy to routinely decide for the First Amendment.<sup>195</sup> The

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<sup>189</sup> See Rostamian *supra* note 108, at 16.

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

<sup>191</sup> See *id.* at 20 (acknowledging either way this case would be decided would impact one party greatly); see also Stohl, *supra* note 125 at 261 (reaffirming that courts, including the Supreme Court, are hesitant to apply the right of publicity to life-stories).

<sup>192</sup> See Rostamian *supra* note 108, at 19.

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

<sup>194</sup> See *id.* at 20 (doubling down on the *Guglielmi* concurrence and affirming that there was no difference in the First Amendment protections for factual or fictional works); *But see* Harper & Row, Publ’rs v. Nation Enter., 471 U.S. 539, 562 (1985) (reading the Supreme Court’s interpretation of fair use where there is a clear delineation of fair use between factual, educational works and fictional, commercial entertainment works).

<sup>195</sup> See Amended Complaint at 16, *Porco and Porco v. Lifetime Entm’t Servs.*, No. 2013–0190, (July 31, 2017) (acknowledging the Amendment Complaint not being

original Complaint was denied on the newsworthy test, which is in line with the public interest and public importance test because Christopher's image was integral to the newsworthy story.<sup>196</sup> However, the Amended Complaint, which added Joan Porco, was not immediately dismissed based on First Amendment protections.<sup>197</sup> As the case continues, Joan Porco could claim that the appropriation of her image is unnecessary to the newsworthy aspects of the docudrama.<sup>198</sup> This is the same argument the court saw in *Sarver*.<sup>199</sup> Regardless of the outcome, the Clinton County Supreme Court allowing Joan Porco's Amended Complaint to proceed to a hearing shows a willingness to reconsider deference to the First Amendment.<sup>200</sup>

Both *Porco* and *Sarver* show that courts are more closely considering the right of publicity in recent years.<sup>201</sup> These are examples of the struggle courts face while attempting to regain a fair balance between the First Amendment and the right of publicity.

#### IV. Revising an Old Test for a New Genre

As courts have not been able to correctly balance the right of publicity and the First Amendment, there needs to be a new test that can protect the rights of individuals within docudramas and the free speech of those producing them.

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immediately dismissed based on the First Amendment has a beneficial effect on the right of publicity conversation).

<sup>196</sup> Affirmation of David A. Schulz at 10, *Porco and Porco v. Lifetime Entm't Servs.*, No. 2013–190, (Aug. 24, 2017).

<sup>197</sup> *Id.*

<sup>198</sup> See Amended Complaint at 16, *Porco and Porco v. Lifetime Entm't Servs.*, No. 2013–0190, (July 31, 2017).

<sup>199</sup> Compare Amended Complaint at 16, *Porco and Porco v. Lifetime Entm't Servs.*, No. 2013–0190, (July 31, 2017) (finding that Joan Porco's image is not of integral newsworthy value to the *Romeo Killer* story), with *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016) (recalling that *Sarver* understood the newsworthy value of the Iraq war, but arguing that his specific life story is not essential).

<sup>200</sup> See generally Amended Complaint, *Porco and Porco v. Lifetime Entm't Servs.*, No. 2013–0190, (July 31, 2017) (acknowledging that the Plaintiffs were allowed to argue their case after the Amended Complaint).

<sup>201</sup> See Rostamian *supra* note 108, at 20; Affirmation of David A. Schulz at 10, *Porco and Porco v. Lifetime Entm't Servs.*, No. 2013–190, (Aug. 24, 2017) (understanding that these cases have been closer to a *Zacchini* balance than most others).

The fact that there are two standards — commercial advertising and educational use — to define the purpose of a docudrama, is the first problem with the current test. These two standards are not easily differentiated, and judges can choose and explain either position.<sup>202</sup> Therefore, courts need a third standard that producers cannot escape when defending their docudramas, such as a “commercial entertainment” or “public entertainment” standard. If the court stands by the legislative intent of the right of publicity and protects the economic right of an individual, a commercial entertainment standard will stop allowing producers to profit off an individual’s reputation without compensation or consent.<sup>203</sup>

This commercial entertainment standard would resolve the issues in *Matthews* because, while the court did not find that the author appropriated Matthews’ image because his name was not in the process of marketing the book, under the new test a court likely would.<sup>204</sup> Also, in *Doe v. TCI Cablevision*, there is a similar problem when the court had to remand the case to decide whether the broad commercial standard did apply.<sup>205</sup> If this case were remanded consistent to this new test, the comic book author would be liable for damages because he did monetarily benefit from Twist’s image.<sup>206</sup>

Another change that needs to be made is using a combination of the fair use “proportion of the material used” standard and the transformative use tests. Currently, courts have lowered the threshold of transformation to justify applying the *Comedy III* transformative use test.<sup>207</sup> Furthermore, studios are trying to appropriate the fair use test used by documentaries because they wrongly claim that fictionalized motion pictures are not commercial, but instead informative.<sup>208</sup>

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<sup>202</sup> *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 459 (Cal. 1979) (Bird, C.J., concurring) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948) (claiming that “[w]hat is one man’s amusement, teachers another doctrine.”)).

<sup>203</sup> *Lee*, *supra* note 15, at 478.

<sup>204</sup> *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

<sup>205</sup> *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 367, 370–71 (Mo. 2003).

<sup>206</sup> *See id.* at 370.

<sup>207</sup> *See Beach*, *supra* note 3, at 145 (finding a difference between true transformation and slight fictionalization).

<sup>208</sup> *See Application for Leave to File Amicus Curiae Brief* at 41, *De Havilland v. FX Networks, LLC.*, 230 Cal. Rptr. 3d 625, No. B285629 (ignoring that large movie studios are producing life stories to be broadcast for profit and including fictionalized accounts to make docudramas more entertaining).

However, courts would be better at determining “commercial fair use” if the amount of the work transformed was balanced with the “proportion of the material used.” If this standard was applied in *Sarver*, the court would not grant *The Hurt Locker* First Amendment protections because a large portion of Sarver’s untransformed life events were used, and the purpose was primarily commercial entertainment.<sup>209</sup> Further, applying the new test to *Parks* and finding that while it is not her life story, the appropriation of her name is still a large part of her image, and the purpose of the song is not anything except commercial; therefore, it would fail under the new test.<sup>210</sup>

Unfortunately, a new test could “chill” free speech.<sup>211</sup> Studios are so concerned with the possibility of losing the freedom of speech that when *de Havilland* was appealed to the Supreme Court, a large amount of amici briefs were submitted.<sup>212</sup> There are other options for studios to convey important and newsworthy stories, such as documentaries, and if a studio insisted on creating a commercial docudrama the studios could acquire licensing rights.<sup>213</sup>

Courts could also create a public importance right of exception to the right of publicity because public interest is a valid concern for producers. However, this exception needs to be far more limited than what courts are currently applying.<sup>214</sup> The current test extends public importance to include an entire production instead of the parts of public importance, and it is harming individuals whose images are being appropriated.<sup>215</sup> Furthermore, courts should not ignore the alternative ways to tell stories of public importance, such as producing

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<sup>209</sup> See *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016).

<sup>210</sup> *Parks v. Laface*, 329 F.3d 437, 442–43 (6th Cir. 2003).

<sup>211</sup> See *Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring).

<sup>212</sup> Rostamian, *supra* note 108, at 19 (citing that they fear a quelling of creativity in docudramas).

<sup>213</sup> See Zipser, *supra* note 46, at 20 (explaining that if the films were “primarily publications of factual data,” they would be covered by the purpose factor in the fair use exception and not require consent); see also Rostamian, *supra* note 101, at 20 (outlining that it is possible to create docudramas if a studio got consent and compensated the individual).

<sup>214</sup> See *Doe v. Gangland Prods.*, 730 F.3d 946, 955 (9th Cir. 2013).

<sup>215</sup> See *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016).



documentaries.<sup>216</sup> If this new test was applied, courts would be closer to a *Zacchini* precedent, and they would find a suitable balance between the First Amendment and the right of publicity.

#### IV. Conclusion

The current standards that courts are using to judge the right of publicity in docudramas are creating too many legal loopholes for movie studios. The current tests being used are allowing courts to consistently side with the First Amendment and diminish the right of publicity. Courts have not been able to implement a standard test and have decided right of publicity cases with approximately six analyses, none of which has provided enough protection for individuals' rights.

Courts need to implement a new standard for the right of publicity in docudramas because the right of publicity is being infringed upon by the First Amendment. A new "commercial entertainment" or "public entertainment" standard needs to be utilized. Furthermore, there needs to be a combination of the fair use "proportion of the material used" and the trademark "transformative use" test to handle the dramatized plots of docudramas. Finally, this new standard can handle the free speech argument because there are alternatives to docudramas if studios do not wish to license individuals' likeness.

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<sup>216</sup> See Zipser, *supra* note 46, at 20 (applying the idea that documentaries are covered by fair use to the docudrama *Vice*, so the producers would still be able to tell Cheney's story without consent).