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Sports & Entertainment Law Journal

ARTICLES

UNIVERSITY of DENVER
STURM COLLEGE OF LAW

TABLE OF CONTENTS

ARTICLES

EDITOR'S NOTE

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

Volume XXIV features six articles discussing relevant issues and proposing solutions for hotly contested topics we face in the sports and entertainment industries.

The first article, written by Carly Sirota, discusses the recently enacted laws in California and Colorado, which require universities in those states to allow student-athletes to receive compensation for their name, image, or likeness. To further dive into the impacts of the newly enacted laws, the second article, written by Daniela Tenjido, explores Senate Bill 206 or the "Fair Pay to Play Act" and the controversies surrounding its implementation. Remaining in the industry of sports, but on a broader scale, the third article, written by Niko Tsiousvaras, discusses the ability of professional athletes to use their networks to push back on the "jock tax" and the effect of said tax on the professional sports community as a whole.

Shifting our focus from the sports industry, the fourth article, written by Haley McCullough, undertakes a deep analysis into Section 1202 of the Digital Millennium Copyright Act and proposes change for sound recording standards.

The fifth article, written by Graham Quinn, returns to the sports world, but instead of highlighting the athletes, the article discusses the role and authority of the Commissioner of Baseball during the MLB's biggest scandals.

Lastly, due to the nature of current events, it is essential to discuss the pandemic and its effect on the sports and entertainment industries. The final article, written by Samuel Pappert, analyzes the impact of COVID-19 and how the pandemic impacted competing in collegiate championships.

We are truly pleased with Volume XXIV's publication and would like to thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our outstanding dean, Dean Bruce Smith. To the editorial board, non-editorial board, and

staff editors, I appreciate the endless effort and hard work that has perfected Volume XXIV of the Journal. This was an extremely challenging year, having completed the entire journal remotely due to the pandemic, and I am so thankful to have led such a hard-working group!

Lastly, I would like to thank my mother, Lori Marchiafava, for her continuous support throughout law school. I truly could not have achieved my accomplishments without your help!

BRANDON MARCHIAFAVA
EDITOR-IN-CHIEF (ACADEMIC YEAR 2020-2021)
DENVER, COLORADO
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How the States and the NCAA are Changing the Landscape of Collegiate Name, Image, and Likeness Compensation

By: Carly Sirota

Abstract:

This Comment evaluates the recently enacted laws in California and Colorado which require universities in those states to allow student-athletes to receive compensation for their name, image, or likeness. When California first introduced this legislation, there was intense pushback from many in the intercollegiate community. However, less than a year after the bill was enacted, the NCAA's Board of Governors has committed to changing their bylaws in compliance with the law. The Comment discusses some legal implications of the law for many student-athletes, especially female student-athletes, and how the NCAA should go beyond pay-to-play law compliance to create an equal and balanced community for their student-athletes.

Introduction

LeBron James, one of the most successful and well-known basketball players in the history of the National Basketball Association ("NBA"),[1] never played intercollegiate basketball for any university governed by the National College Athletic Association ("NCAA"). James was drafted in 2003, at the age of eighteen, by the Cleveland Cavaliers,[2] after finishing his senior year of high school.

James and the NCAA do not have a positive history—in fact, James has a long history of skirting amateurism rules in high school.[3] While a senior at St. Vincent-St. Mary High School in Akron, Ohio, James was investigated multiple times for violating Ohio High School Athletic Association ("OHSAA") amateur bylaws.[4] The amateur bylaws specifically provided that an amateur's status is forfeited if an athlete capitalizes on athletic fame by receiving money or gifts of monetary value greater than $100.[5]

For James's eighteenth birthday, his mother bought him a Hummer H2 vehicle, which had a retail price of $50,000.[6] The OHSAA was concerned that James had received the car from an agent or outside source.[7] But investigation eventually revealed that James had not violated amateurism rules. Subsequently, James was given two retro sports jerseys, carrying a retail price of $845, from a clothing store.[8] This time, the

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* University of Connecticut School of Law, Juris Doctor Candidate, 2021; University of Massachusetts Amherst, Bachelor of Science, Sport Management, 2017.

[1] *See LeBron James*, BASKETBALL REFERENCE (last visited Mar. 19, 2020), https://www.basketball-reference.com/players/j/jamesle01.html (showing James's statistics over his almost-twenty-year history in the NBA).

[2] *2003 NBA Draft*, BASKETBALL REFERENCE (last visited Mar. 19, 2020), https://www.basketball-reference.com/draft/NBA_2003.html.

[3] *See, e.g.*, Associated Press, *Prep Star James Can Continue Drive for State Title*, ESPN (Jan. 27, 2003), http://static.espn.go.com/nba/news/2003/0127/1499490.html [hereinafter *James Amateur I*]; *James Ruled Ineligible, Plans to Appeal Decision*, ESPN (Jan. 31, 2003), http://static.espn.go.com/nba/news/2003/0131/1502001.html [hereinafter *James Amateur II*] (detailing the multiple amateurism violations by James during his high school tenure, and the NCAA's response to James's conduct).

[4] *James Amateur I*, *supra* note 3.

[5] *James Amateur II*, *supra* note 3.

[6] *James Amateur I*, *supra* note 3.

[7] *Id.*

[8] *James Amateur II*, *supra* note 3.

OHSAA ruled that James could not play his six remaining games in high school, because he had forfeited his amateur status.[9]

James did not have any intention to play for the NCAA after graduating from high school, but the NCAA stated that he would not have been eligible anyway.[10] The NCAA claims that even before the retro jersey infraction, James had received extra benefits regarding lodging and transportation from Nike,[11] in direct violation of its bylaws.[12]

In 2019, many years into his professional career, James spoke publicly in favor of the Fair Pay to Play Act: California's new legislation aimed at compensating student-athletes in the NCAA for their name, image, and likeness ("NIL").[13] In his support for the bill, James stated that, as a high school basketball player, he and his mother "didn't have anything."[14] James did not want to play for the NCAA because he "wouldn't have been able to benefit at all . . . and the university would have been able to capitalize on everything."[15] On Twitter, James called for California residents to "call [their] politicians and tell them to support [the bill]" because it is a "game changer."[16] In September 2019, James had Governor Newsom on his show, *The Shop*, to sign the bill and speak about what the bill would do for student-athletes.[17] James's fight with the NCAA is still far from forgotten.

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-20 NCAA DIVISION I MANUAL art. 16 (2019) [hereinafter NCAA BYLAWS] (defining and explaining what extra benefits are and how receipt of them can cause a forfeiture of NCAA eligibility).
[13] They/Them pronouns will be used to refer to student-athletes in the singular form in an effort to include all student-athletes in this Comment's discussion of compensation reform. When a binary gender is used, it is in reference to data, research, or quotes that directly mention a specific gender.
[14] Khadrice Rollins, *LeBron James Explains How New California Law is 'Personal' to Him*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/nba/2019/09/30/lebron-james-california-fair-pay-to-play-law-personal.
[15] *Id.*
[16] LeBron James (@KingJames), TWITTER (Sept. 5, 2019, 11:21 AM), https://twitter.com/KingJames/status/1169631712009080832 (emphasis omitted).
[17] Uninterrupted, *The Shop: Gavin Newsom Signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter* (HBO television broadcast Sept. 30, 2019), https://www.youtube.com/watch?v=7bfBgjxVgTw.

I. Name, Image, and Likeness Laws and Their Legal Precedent

A. The NCAA Rules and Amateurism

The NCAA was founded in 1906, with a firm commitment to amateurism.[18] In 1922, the NCAA released a statement that an "amateur sportsman is one who engages in sport solely for the physical, mental, or social benefit he derives therefrom, and to whom the sport is nothing more than an avocation."[19] The NCAA believed that no student-athlete should be provided with financial inducements from any source.[20] Today, the NCAA considers student-athletes to be an "integral part of the study body, thus maintaining a clear line of demarcation between college athletics and professional sports."[21]

As amateurs, student-athletes can only receive compensation in the form of scholarships from their university.[22] If a student-athlete receives pay for their athletic ability, that student-athlete "loses amateur status and . . . [is] not . . . eligible for intercollegiate competition."[23]

There are two types of scholarships a student-athlete can receive: a "grant-in-aid" scholarship and a cost-of-attendance stipend. The grant-in-aid is a financial aid award which is meant to cover tuition and fees, room and board, and required course-related books.[24] This is what is commonly known as an athletic scholarship.[25] The cost of attendance is the "amount calculated by [the university's] financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the [university]."[26] The cost of attendance is generally higher than the

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[18] BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA (2012).
[19] PORTO, *supra* note 18, at 25–26 (internal citation omitted).
[20] PORTO, *supra* note 18, at 25.
[21] NCAA BYLAWS, *supra* note 12, § 12.01.2.
[22] Scholarships are formally called "grant-in-aid" by the NCAA and are "not considered to be pay or the promise of pay for athletics skills." NCAA BYLAWS, *supra* note 12, § 12.01.4.
[23] NCAA BYLAWS, *supra* note 12, § 12.1.2(a).
[24] *Id.* § 15.02.6.
[25] Second Amended Complaint at 2, para. 6, In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:14-MD-02541).
[26] NCAA BYLAWS, *supra* note 12, § 15.02.2.

grant-in-aid because it covers the cost of "supplies, transportation, and other expenses," which is not covered by a grant-in-aid.[27]

But the NCAA does not just enumerate the types of scholarships that universities are allowed to give; it also prohibits universities from compensating student-athletes. Generally, the NCAA prohibits student-athletes from receiving compensation from outside sources based on their athletic skills or ability.[28] Student-athletes can hold paid jobs, both on and off campus, but those jobs cannot include any "renumeration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability." [29] There is also a small carve-out for educational expenses paid by the U.S. Olympic Committee or a U.S. national governing body.[30] Otherwise, a student-athlete may only "receive financial aid awarded . . . on bases having no relationship to athletics ability."[31]

Outside of compensation, student-athletes are also limited in how they can use their NIL. Student-athletes cannot use their NIL to "advertise, recommend or promote directly the sale or use of a commercial product or service," [32] nor can they "[r]eceive[] renumeration for endorsing a commercial product or service."[33] There are also many provisions within the NCAA's bylaws which allow the NCAA to use any student-athlete's NIL in conjunction with their marketing efforts.[34]

As, perhaps, a catchall provision, the NCAA also prohibits student-athletes from receiving any "extra benefits."[35] An extra benefit is "any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete . . . a benefit not expressly authorized by NCAA legislation."[36] Examples of prohibited extra benefits include monetary loans, an automobile or use of an automobile, or

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[27] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 971 (N.D. Cal. 2014).
[28] *Id.* at 972.
[29] NCAA BYLAWS, *supra* note 12, § 15.2.7.
[30] *Id.* § 15.2.6.5.
[31] *Id.* § 15.2.6.2.
[32] *Id.* § 12.5.2.1(a).
[33] *Id.* § 12.5.2.1(b).
[34] *See, e.g., id.* § 12.5 (outlining the approved promotional activities for a member-university).
[35] *Id.* § 16.02.3.
[36] *Id.*

other types of transportation that are not related to practice or competition.[37] A benefit that is "generally available to the institution's students or . . . determined on a basis unrelated to athletics ability" is not a violation of this provision.[38]

B. Recent Compensation Reform Litigation

In 2008, Ed O'Bannon—a former All-American basketball player at the University of California Los Angeles ("UCLA")—was at a friend's house when his friend's son told O'Bannon that he was depicted in a college basketball video game produced by EA Sports.[39] When the friend's son turned on the game, O'Bannon saw an avatar of himself playing for the UCLA with his jersey number: 31.[40] O'Bannon had never consented to this use of his likeness, nor had he ever received any compensation for it.[41] O'Bannon became the named plaintiff in a class-action lawsuit against the NCAA, claiming that the NCAA "unreasonably and illegally restrained trade" by using student-athletes' NIL without their consent.[42]

Specifically, the class claimed that the NCAA's conduct was "blatantly anticompetitive … as it wipes out in total the future ownership interests of former student-athletes in their own images—rights that all other members of society enjoy—even long after student-athletes have ceased attending a university."[43]

The District Court for the Northern District of California ruled in favor of the class. It held that the NCAA rules prohibiting a student-athlete's personal use of their NIL "d[id] not promote competitive balance," meaning that these rules preventing student-athlete use of their NIL are anticompetitive.[44] The court enjoined the NCAA from enforcing any of

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[37] *Id.* § 16.11.2.2; *see also id.* § 16.9.1 (stating that an institution may provide "reasonable local transportation to student-athletes on an occasional basis").

[38] *Id.* § 16.02.3. As an example, a diversity scholarship only open to a certain type of student is not an extra benefit, as long as it is available to all students of that type (e.g., Latinx or African American).

[39] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

[40] *Id.*

[41] *Id.*

[42] Class Action Complaint & Demand for Jury Trial at 3, para. 4, Chris Spielman v. The Ohio State University, 2:17-cv-00612 (2017).

[43] *Id.*

[44] *O'Bannon*, 7 F. Supp. 3d at 1007; *O'Bannon*, 802 F.3d at 1079 ("[T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules.").

these "anticompetitive" rules or bylaws against Football Bowl Subdivision ("FBS") and Division I basketball student-athletes.[45] The Court also found a remedy within the plaintiff class's less restrictive means of achieving competition.[46] The Court imposed a trust, funded by the member-universities, which would hold a limited share of licensing revenue,[47] payable to student-athletes upon graduation or eligibility expiration.[48] Student-athletes would be eligible for a total of $5,000 each.[49]

The Ninth Circuit affirmed in part and reversed in part.[50] Specifically, it did not uphold the trust requirement.[51] The Court saw the "difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses" as a "quantum leap."[52] The Court described this "leap" as a slippery slope, worrying that the NCAA would have "surrendered its amateurism principles entirely."[53] The Court also "reasoned that, by allowing colleges to offer student-athletes additional compensation up to the full cost of attendance, the NCAA cures the antitrust harm caused by its otherwise unlawful amateurism rules."[54] Chief Judge Thomas, dissenting, disagreed with the majority's denial of the $5,000 trust for student-athletes.[55] He argued that the trial court made a "factual finding" that the

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[45] *O'Bannon*, 7 F. Supp. 3d at 1008.
[46] *Id.* at 1007.
[47] *Id.* at 1008 (describing the purpose of the trust and the requirements universities must follow when creating and distributing the grants).
[48] *Id.* Student-athletes are eligible for four seasons of competition, to be completed within five calendar years. NCAA BYLAWS, *supra* note 12, § 12.8, 12.8.1.
[49] *Id.*
[50] *O'Bannon*, 802 F.3d at 1053.
[51] *Id.* at 1079 ("We vacate the district court's judgment and permanent injunction insofar as they require the NCAA to allow its member schools to pay student-athletes up to $5,000 per year in deferred compensation."); *see also O'Bannon*, 7 F. Supp. 3d. at 1008 (describing the trust and its requirements for implementation).
[52] *O'Bannon*, 802 F.3d at 1078.
[53] *Id.* at 1079.
[54] Michael McCann, *In Denying* O'Bannon *Case, Supreme Court Leaves Future of Amateurism in Limbo*, SPORTS ILLUSTRATED (Oct. 3, 2019), https://www.si.com/college/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court. The NCAA revised their bylaws on August 7, 2014, and January 17, 2015, (with the provision going into effect on August 1, 2015) to allow for grants up to full cost-of-attendance, a figure determined by each individual university which includes the cost of "tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." NCAA BYLAWS, *supra* note 12, § 15.02.6. Considering the proximity of the date of revision and the date of the *O'Bannon* litigation, the change was presumably in response to the District Court's holding that the NCAA's compensation structure was anticompetitive.
[55] *O'Bannon*, 802 F.3d at 1083 (Thomas, C.J., dissenting).

$5,000 payment "would not significantly reduce consumer demand for college sports," therefore it should have been upheld.[56] Although O'Bannon—and the class he represented—won the appeal, no changes to the NCAA's compensation and scholarship structure had to be changed because the structure in place was already in compliance with antitrust laws, according to the Court.[57]

NIL rights are a relatively new issue in litigation against the NCAA. Since 1984, parties have brought lawsuits focusing on broader antitrust violations by the NCAA. The first case of this kind was *NCAA v. Board of Regents*, in which the Supreme Court held that the NCAA violated the Sherman Act by limiting the number of live televised football games for all member-universities.[58] Then, in 1998, the Tenth Circuit held that a cap on part-time coaches' salaries at $16,000 per year was an unlawful restraint of trade under the Sherman Act.[59] In 2006, the NCAA settled with a class of college football and basketball players who claimed that the grant-in-aid cap suppressed competition in the market for talented student-athletes.[60] Two years later, in 2008, the NCAA settled again with a class of plaintiffs who had to pay $2,500 or more per year to meet basic expenses not covered by their athletic scholarships.[61] Under the settlement, the NCAA agreed to make available $218 million over five years to provide basic expenses not covered by scholarships to over 150,000 Division I student-athletes.[62] The settlement also included a $10 million fund to provide career-development services.[63]

Most recently, in 2017, the NCAA reached another settlement with a class of athletes, in which the class claimed that the "cap on renumeration for the services of athletes . . . ha[s] no pro-competitive purpose and cannot

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[56] *Id.*

[57] *Id.* at 1075 ("A compensation cap set at student-athletes' full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA's legitimate procompetitive purposes . . . [t]he district court's determination['s] . . . injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance was proper."). McCann, *supra* note 53.

[58] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 120 (1984) ("[B]y curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.").

[59] Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998).

[60] Second Amended Complaint, *supra* note 25, at 23 para. 94.

[61] PORTO, *supra* note 18, at 22.

[62] *Id.* at 23.

[63] *Id.*

be justified on any claimed basis that [it] promote[s] 'competitive balance.'"[64]

Compensation of student-athletes has been challenged in means outside of antitrust litigation. In 1981, former NCAA student-athletes Allen Sack and Kermit Alexander created the Center for Athletes Rights and Education ("CARE").[65] CARE proposed a players' union, which would allow student-athletes to bargain over many issues, including the right to share revenue generated by the student-athletes.[66] However, the NLRB assured the NCAA that it would refuse to exert jurisdiction over student-athletes at private universities.[67] The NLRB also refused to certify CARE as a bargaining agent.[68]

Then, in 2014, Northwestern University football players attempted to unionize, so that they could bargain for wages and benefits like other state employees.[69] The class of plaintiffs claimed that the current NCAA model "resembles a dictatorship with the NCAA putting rules and regulations on students without their input."[70] The National Labor Relations Board ("NLRB" or "Board") Regional Director for Chicago held that the plaintiff class could be considered employees with the right to organize and bargain collectively.[71] On appeal, the Board declined to assert jurisdiction over the matter because doing so would "not promote stability in labor relations."[72] Although this is not a decision on the merits, the Board's finding is essentially a decision that student-athletes are not recognized as employees by the federal government, and therefore do not have the right to paid wages or bargaining powers.

O'Bannon is the most recent case to decide in favor of student-athletes. On its face, the *O'Bannon* decision is a win for student-athletes, but when applied, it continues to perpetuate the problem that the *O'Bannon* class wanted to eliminate because it does not require any changes by the NCAA.

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[64] Second Amended Complaint, *supra* note 25, at 23 para. 96.
[65] WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 342 (1995).
[66] *Id.*
[67] *Id.*
[68] HOWARD P. CHUDACOFF, CHANGING THE PLAYBOOK: HOW POWER, PROFIT, AND POLITICS TRANSFORMED COLLEGE SPORTS 147 (2015).
[69] Nw. Univ., 362 N.L.R.B. 167, 1351 (2015).
[70] CHUDACOFF, *supra* note 68, at 144.
[71] CHUDACOFF, *supra* note 68, at 144; *Nw. Univ.*, 362 N.L.R.B. at 1350.
[72] *Nw. Univ.*, *supra* note 69, at 1352.

C. The Fair Pay to Play Act in California and Colorado

On September 30, 2019, California Governor Newsom signed Senate Bill 206, also known as the Fair Pay to Play Act, into law.[73] It will not take effect until January 1, 2023.[74] Senator Nancy Skinner introduced this bill.[75] Skinner recounts that she first became interested in NCAA reform during the 1960s when she listened to a lecture by an esteemed civil rights activist about how many black college athletes (most notably Kareem Abdul-Jabbar) discussed boycotting the 1968 Olympics to protest racism in America.[76] Skinner notes that she originally wanted to pass legislation that would require universities to pay student-athletes, but she saw legislation allowing athletes to profit from their NIL to be much more achievable and cost-effective.[77]

The Fair Pay to Play Act prohibits any "postsecondary educational institution" from upholding any rule, requirement, standard, or other limitation that prevents students participating in intercollegiate athletics from earning compensation as a result of the use of the student's NIL.[78] The law also disallows any athletic association or conference, such as the NCAA, from preventing a student from earning compensation as a result of the use of the student's NIL.[79] It also prevents any postsecondary educational institution from participating in intercollegiate athletics with that athletic association if it does not follow this new law.[80] However, universities will not be allowed to provide the compensation for student's NIL.[81] Instead, students will have to enter the marketplace, on their own, to obtain sponsorship and endorsement deals, using the value of their NIL. Scholarships provided by the university, which cover up to the cost of attendance, are not considered compensation under this statute.[82]

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[73] S.B. 206, 2019 Leg. (Cal. 2019).
[74] *Id.* § 2(h).
[75] S.B. 206.
[76] Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players.
[77] *Id.* ("'I'll be honest, originally I wanted to pay student athletes,' Skinner admits. But allowing athletes to profit from their [NIL], she says, was the most logical achievable, and cost-effective legislative action, and would 'not really have any direct costs on the colleges themselves,' she says.").
[78] CAL. EDUC. CODE § 67456(a)(1) (2020).
[79] *Id.* § 2(a)(2).
[80] *Id.* § 2(a)(3).
[81] *Id.* § 2(b).
[82] *Id.* § 3(d).

Senator Skinner does acknowledge that there was originally a strong opposition to the bill in committee hearings.[83] Athletic directors and administrators attended these hearings and voiced their "displeasure," arguing that "the bill could lead to schools being expelled from the NCAA."[84] Nevertheless, the bill passed both houses of the California legislature almost unanimously.[85]

Following the passing of both houses of the state legislature, Governor Newsom enthusiastically signed the bill into law, explaining his decision on Lebron James's show, *The Shop*.[86] In a tweet prefacing a clip of this show, Governor Newsom called the NCAA's current practice of disallowing any type of student-athlete compensation a "bankrupt model."[87] On the show, Governor Newsom stated that the legislation would "balance[] [the power]" of the "interests . . . of the athletes . . . with the interests of the institutions."[88] Governor Newsom also stated that he wants this bill to "initiate dozens of other states into similar legislation."[89]

About six months later, Colorado followed California's lead. On March 20, 2020, the governor of Colorado, Jared Polis, signed Colorado's own NIL rights law, which would go into effect on the same day as the California law: January 1, 2023.[90] Like the California law, Colorado does not want athletic associations or educational institutions to prevent any student-athletes from earning compensation for the use of their NIL.[91] The law also allows student-athletes to take on representation from a licensed attorney and an "athlete advisor."[92]

Many other states have proposed similar legislation since California passed the Fair Pay to Play Act. As of March 6, 2020, thirty-four states have introduced some type of NIL bill in its legislature.[93] Pay-for-play legislation has also been discussed on a federal level. On March 14, 2019, U.S.

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[83] Tynes, *supra* note 76.
[84] *Id.*
[85] The bill passed the Senate by a 39-0-1 vote and passed the Assembly by a 73-0-6 vote. *Id.*
[86] Uninterrupted, *supra* note 17.
[87] Gavin Newsom (@GavinNewsom), TWITTER (Sept. 30, 2019, 10:06 AM), https://twitter.com/gavinNewsom/status/1178672387136425985?lang=en.
[88] *Id.*
[89] *Id.*
[90] S.B. 20-123, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).
[91] *Id.* § 2(2)(b).
[92] *Id.* § 2(2)(c)(III).
[93] Zach Barnett, *How Many States are Working on Pay-for-Play Laws?*, FOOTBALL SCOOP (Mar. 6, 2020), https://footballscoop.com/news/how-many-states-are-working-on-pay-for-play-laws/.

Representatives Mark Walker and Cedric Richmond—of North Carolina and Louisiana, respectively—proposed the Student-Athlete Equity Act in Congress.[94] This legislation would amend the Internal Revenue Code to disincentivize qualified amateur sports organizations from prohibiting or substantially restricting the personal use of an athlete's name, image, or likeness.[95] The law would remove tax exempt status from any "qualified amateur sports organization" that prohibits or substantially restricts a student-athlete's use of their own NIL.[96] The current definition of a "qualified amateur sports organization" includes any organization which "foster[s] national or international amateur sports competition."[97] The new legislation would amend this definition to *exclude* any "organization that substantially restricts a student athlete from using, or being reasonably compensated for the third party use of, the [NIL] of such student athlete."[98] Therefore, if a university, conference, or governing body, such as the NCAA, does not allow a student-athlete to receive compensation for their use of NIL, then it would lose its tax exempt status.[99]

While this legislation would not make the prohibition of compensation for NIL illegal, it would greatly incentivize sports organizations to change their policies on student compensation. Currently, the NCAA is tax-exempt, even though it earns billions of dollars per year—about $1 billion of which comes solely from the annual March Madness tournament broadcast.[100] A revocation of its tax-exempt status would require the NCAA to pay hundreds of millions of dollars every year,[101] a substantial change to its bottom line, perhaps changing the future of intercollegiate sports forever.

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[94] H.R. 1804, 116th Cong. (2019).
[95] *Id.*
[96] *Id.*
[97] 26 U.S.C. § 501(j)(2) (2020) (including any university with an athletic program, any athletic conference, and any athletic governing body, such as the NCAA).
[98] H.R. 1804, 116th Cong. §2(a) (2019).
[99] *Id.*
[100] Kyle Jahner, *NCAA Tax Status Tied to Athletes' Image Rights Under New Bill*, BLOOMBERG L.: IP Law News (Mar. 14, 2019, 2:38 PM), https://news.bloomberglaw.com/ip-law/ncaa-tax-status-tied-to-athletes-image-rights-under-new-bill.
[101] *Id.*

D. The Response and Subsequent Compliance by the NCAA and Pac-12

On September 11, 2019, before Governor Newsom signed the bill into law but after it passed both California legislative houses, the NCAA issued a statement in opposition to the bill.[102] The NCAA made it clear that it believed this bill "would wipe out the distinction between college and professional athletics and eliminate the element of fairness that supports all of college sports."[103] Specifically, the NCAA worries that California member-schools would gain an unfair advantage over other states' member-schools, because California student-athletes would be able to earn compensation for their NIL, giving them a great benefit as compared to other student-athletes around the country.[104] Instead, the NCAA proposed that California let it handle changes to rules and policies through the "Association's collaborative governance system."[105] The NCAA even claims that it is working on implementing rules that would allow student-athletes to "appropriately use their [NIL] in accordance with [their] values—but not pay [students] to play."[106]

After Governor Newsom signed the bill into law, the NCAA quickly changed its position.[107] On October 29, 2019, the NCAA released a statement providing that the Board of Governors, the NCAA's "top governing board," voted unanimously to "permit students participating in athletics the opportunity to benefit from the use of their [NIL] in a manner consistent with the collegiate model."[108] This vote does not mean that any rules or policies *must* be changed, but rather that the three NCAA divisions *can* "*consider* updates to relevant bylaws and policies."[109] The board also provided "principles and guidelines," which the divisions should follow if they choose to make any changes.[110] These guidelines specifically provide that student-athletes will *never* be compensated for "performance or participation," that student-athletes are "students first, and not employees

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[102] Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Responds to California Senate Bill 206 (Sept. 11, 2019).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Press Release, Nat'l Collegiate Athletic Ass'n, Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities (Oct. 29, 2019).
[108] *Id.*
[109] *Id.* (emphasis added).
[110] *Id.*

of the university," and that there be a "*clear* . . . *distinction* between collegiate and professional opportunities."[111]

It is surprising to see the NCAA attempt to compromise on this issue. The NCAA had fiercely opposed the bill before it became law.[112] Many athletic department officials dissented at hearings on the bill.[113] However, this vote from the Board of Governors is far from being compliant with the California legislation. All three NCAA divisions could easily choose to not change any of their current policies. It is also hard to imagine how the NCAA would be able to match the California legislation without violating one of its "principles," which specifically prohibit any type of compensation or elements of professionalism in intercollegiate athletics.[114] The Fair Pay to Play Act explicitly adds an element of professionalism to the student-athlete experience, completely contradicting the NCAA's continued devotion to its amateurism principles.[115]

On the day Governor Newsom signed the bill, the Pac-12 released its own statement.[116] The Pac-12 stated that it is "disappointed" with the passage of the bill and believes that the legislation will have "very significant negative consequences for . . . student-athletes."[117] The Pac-12 explained that the bill would professionalize college sports, "blur the lines" on how California universities can recruit on a national scale, "reduce resources and opportunities for student-athletes in Olympic sports," and have a "negative disparate impact on female student-athletes."[118] The noted disparate impact on female student-athletes is a cause for concern because of the nature of the sports market. Because many women's sports are not as highly valued as men's sports, women's team athletes will have a harder time earning compensation for their NIL, compared to their male counterparts.[119] So, for most women, this law does not positively affect women's earning potential as student-athletes, if it affects them at all. The

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[111] *Id.* (emphasis added).
[112] Press Release, NCAA, *supra* note 102.
[113] Tynes, *supra* note 76.
[114] Press Release, NCAA, *supra* note 102.
[115] *Id.*
[116] Press Release, Pac-12, Statement from the Pac-12 on the Signing of California SB 206 (Sept. 30, 2019), https://pac-12.com/article/2019/09/30/statement-pac-12-signing-california-sb-206.
[117] *Id.*
[118] *Id.*
[119] *See infra* sec. II.A (discussing why women's team athletes have a more difficult time gaining publicity).

need for compensation reform beyond NIL earnings is evident because only a select few of college athletes will actually benefit from the California law.

Katelyn Ohashi, a recently famous collegiate athlete, has spoken out about fair compensation and opportunities for female athletes.[120] On January 12, 2019, Ohashi's gymnastics floor routine went viral in a video posted by the Twitter account of UCLA Gymnastics.[121] As of January 2020, the video had over 44 million views on Twitter, with 168,000 retweets and over 702,000 likes.[122] Ohashi became a household name after this viral moment, yet she will never make any money directly from this video.[123] After the passage of the Fair Pay to Play Act, Ohashi wrote an op-ed in the *New York Times*, claiming that the Act "would be especially beneficial for women and athletes in sports that lack professional leagues."[124]

Ohashi is correct for the small number of female athletes who gain fame through professional sports, including participation in the Olympics. But that number is minute, and practically nonexistent.[125] Only 2% of NCAA athletes enter major professional leagues—with only one of those being a women's sport league.[126] Someone like Ohashi, who has already gained fame, and has not even played professionally yet, will greatly benefit from the Fair Pay to Play Act. But her teammates—those unable to grasp

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[120] Katelyn Ohashi, *Everyone Made Money Off My NCAA Career, Except Me,* NEW YORK TIMES: OPINION (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html.

[121] UCLA Gymnastics (@UCLAGymnastics), TWITTER (Jan. 13, 2019, 10:44 PM), https://twitter.com/uclagymnastics/status/1084325320935657472.

[122] *Id.*

[123] *See, e.g.*, Allyson Chiu, *'A 10 Isn't Enough': This UCLA Gymnast's Flawless Floor Routine Just Broke the Internet*, WASH. POST: MORNING MIX (Jan. 14, 2019, 6:33 AM), https://www.washingtonpost.com/nation/2019/01/14/isnt-enough-this-ucla-gymnasts-flawless-floor-routine-just-broke-internet/ (describing Ohashi's routine as a "viral" moment).

[124] Ohashi, *supra* note 115.

[125] *Id.*

[126] FREQUENTLY ASKED QUESTIONS: WNBA, WNBA (last visited Mar. 19, 2020), https://www.wnba.com/faq/ (The major professional leagues are the NFL, NBA, WNBA, MLB, NHL, and MLS. The WNBA is the only league in this list that is a women's league.); This reported statistic is based on the number of draft picks made in these six leagues. NCAA RECRUITING FACTS NCAA, (2018), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf; *But see* Chris Ariens, *Here Are the 11 Olympic Sports that Viewers are Most Excited About Watching,* ADWEEK (Aug. 8, 2016), https://www.adweek.com/tv-video/here-are-11-olympic-sports-viewers-are-most-excited-about-watching-172753/ (reporting that Americans were most excited to watch gymnastics, swimming, and other water sports in the 2016 Olympics—sports in which both men and women compete).

the American public's attention—may not ever get the chance to fairly compete in the marketplace for NIL revenue.

After months of public debate on the pay-to-play issue in collegiate athletics, the NCAA announced, on April 29, 2020, that it would be taking "unprecedented steps to allow college athletes to be compensated for their name, image, and likeness."[127] This decision came from the Board of Governors, the NCAA's highest governing body, and will next move to the rules-making structure in each of the three NCAA divisions.[128] The divisions are expected to adopt new NIL rules by January 2021 to affect the 2021–22 academic year.[129] The new rules would allow student-athletes to identify themselves by sport and school, but the use of conference and school logos, trademarks, or other involvement would not be allowed.[130] Universities will still never be able to pay student-athletes for their NIL activities.[131]

The NCAA also proposed steps that Congress should take to allow the NCAA to take meaningful action with these new rules.[132] These steps include ensuring federal preemption over state NIL laws, establishing a "safe harbor" for the NCAA to provide protection against NIL lawsuits; safeguarding the nonemployment status of student-athletes, and maintaining amateurism.[133]

The NCAA could have chosen a more litigious route and could have walked away from that litigation just like they did after *O'Bannon*—with a slap on the wrist from a federal court, but no other obligation to make any changes.[134] One of the more obvious legal issues that comes to mind is the Dormant Commerce Clause. The Dormant Commerce Clause prohibits, per se, states from directly regulating or discriminating against interstate commerce.[135]

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[127] Press Release, NCAA, Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions (Apr. 29, 2020), https://www.ncaa.com/news/ncaa/article/2020-04-29/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] O'Bannon, *supra* note 39.
[135] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

A few decades ago, the NCAA won a Dormant Commerce Clause challenge to a state law.[136] In 1988, the Supreme Court heard *NCAA v. Tarkanian*, a case in which the former head men's basketball coach for the University of Nevada Las Vegas ("UNLV"), Jerry Tarkanian, claimed the NCAA violated his federal due process rights during an internal investigation.[137] The Court held that the NCAA was not a state actor, and therefore did not violate Tarkanian's constitutional rights.[138] In opposition of this decision, twelve states passed legislation requiring the NCAA to comply with federal and state due process principles.[139] The House of Representatives introduced a bill with similar goals, called the Coach and Athlete's Bill of Rights,[140] but it died in the 102nd Congress.[141]

Nevada was one of the twelve states to pass legislation of this kind.[142] Its legislation required that any party who was subject to an enforcement proceeding by the NCAA be "afforded an opportunity for a hearing after reasonable notice," which comports with federal due process standards.[143] After this law was passed, the NCAA believed that the UNLV had violated NCAA rules again and began to investigate the UNLV and Tarkanian for a second time.[144] Relying on Nevada's new statute requiring due process, Tarkanian wrote to the NCAA and requested its compliance.[145] Because the NCAA did not want to comply with the Nevada law and turn over internal documents,[146] it challenged the law's constitutionality in federal court, in *NCAA v. Miller*.[147] The district court granted the NCAA an injunction, holding the Nevada law unconstitutional.[148] On appeal, the

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[136] NCAA v. Tarkanian, 488 U.S. 179 (1988).
[137] *Id.* at 181.
[138] *Id.* at 199 ("It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.").
[139] PAUL C. WEILER, ET AL., SPORTS AND THE LAW 793 (5th ed. 2015); Aidan Middlemiss McCormack, *Seeking Procedural Due Process in NCAA Infractions Procedures; States Take Action*, 2 MARQ. SPORTS L.J. 261, 272 (1992).
[140] Coach and Athlete's Bill of Rights, H.R. 2157, 102nd Cong. (1991).
[141] *H.R. 2157 (102nd): Coach and Athlete's Bill of Rights*, GOVTRACK (last visited Mar. 20, 2020), https://www.govtrack.us/congress/bills/102/hr2157 ("Died in a previous Congress. This bill was introduced on May 1, 1991, in a previous session of Congress, but was not enacted.").
[142] WEILER, *supra* note 139 at 794; NEV. REV. STAT. § 398.155–398.255 (2000), *invalidated by* S.D. Meyers, Inc. v. City and County of S.F., 253 F.3d 461 (9th Cir. 2001).
[143] NEV. REV. STAT. § 398.155. (1991), *invalidated by* S.D. Meyers, Inc. v. City and County of S.F., 253 F.3d 461 (9th Cir. 2001).
[144] WEILER, *supra* note 139 at 795.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] NCAA v. Miller, 795 F. Supp. 1476, 1488 (D. Nev. 1992).

Ninth Circuit affirmed.[149] In *Miller*, the Court found the Nevada statute to be per se unconstitutional and did not "balance the burden on interstate commerce against the local benefit derived from the Statute."[150] The Court stated it was "clear" that the Nevada statute was directed at interstate commerce and *only interstate commerce*.[151] This is because the Court saw the statute as regulating only one organization: the NCAA, which is heavily involved in interstate commerce.[152]

In court, the NCAA could very easily rely on the *Miller* precedent and argue that California and Colorado's new laws would create a "profound effect on the way the NCAA enforces its rules and regulates the integrity of its product" across every other state.[153] The NCAA would be forced to adopt the California and Colorado laws into its nationwide enforcement procedures, or else be in violation of the law of two states.[154]

It is possible that the NCAA has chosen to listen to the public debate on the pay-to-play issue. In a recent Bucknell Institute for Public Policy survey, 47% of Americans supported some form of pay-to-play, with only 20% of Americans opposing.[155] The number of supporters increases to 56% for those under the age of thirty.[156] As societal concerns about wealth inequality and student loan debt increases throughout the country, it is in the NCAA's best interest to not only comply, but collaborate, with states like California and Colorado to improve the student-athlete experience.

II. How NIL Laws Affect the Compensation Landscape

The California and Colorado Fair Pay to Play laws are the first of their kind—where a state government has created affirmative steps to protect student-athletes from the NCAA's concept of amateurism.

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[149] NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993) ("The entire Statute and all of its provisions violate the Commerce Clause because they impermissibly regulate interstate commerce.").
[150] *Id.*
[151] *Id.* at 638 (emphasis added).
[152] *Id.* (citing *Board of Regents*, 468 U.S. at 101–02 (finding by implication that [the] NCAA was engaged in interstate commerce and was subject to antitrust regulation)).
[153] *Id.* at 638.
[154] *Id.* at 639.
[155] Mike Ferlazzo, *Bucknell Poll Finds Polarizing Results in Pay College Athletes*, BUCKNELL INST. FOR PUB. POL'Y, BUCKNELL UNIV., https://forthemedia.blogs.bucknell.edu/bucknell-poll-finds-polarizing-results-in-paying-college-athletes/.
[156] *Id.*

However, the ability of student-athletes to receive NIL compensation only affects a small group of student-athletes, and does not address larger, overarching issues that plague the current NCAA scheme.

A. NIL Laws in Relation to Title IX Compliance

In theory, every student-athlete at every institution that is a member of the NCAA will be able to earn NIL compensation. However, in reality, most student-athletes will never actually earn any NIL compensation. Not only will these Fair Pay to Play laws unequally affect student-athletes, but it could also pose a legal issue in relation to Title IX compliance.

Title IX provides that no person can "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance," on the "basis of sex."[157] Under the authority of Title IX, the Office of Civil Rights ("OCR") enacted federal regulations which provide that this law applies to "interscholastic, intercollegiate, club, or intramural athletics offered by a recipient [of federal financial assistance],"[158] and that these recipients must "provide equal athletic opportunity for members of both sexes."[159] The OCR considers ten factors to determine whether a university provides equal athletic opportunity, including sports offered, equipment, provision of facilities and services, assignment of coaches, travel allowances, and publicity.[160] Universities must make these opportunities available to student-athletes on an equivalent, not identical, basis.[161] Generally, the "governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities."[162]

To evaluate claims arising under this effective accommodation requirement, the OCR uses a three-prong test. If a university is not in compliance with Title IX and does not provide effective accommodations, it may escape liability by showing that it has fulfilled at least one of these prongs. The first prong requires a showing that spaces on existing athletic teams for males and females are substantially proportionate to the

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[157] 20 U.S.C. § 1681(a) (2020).
[158] 34 C.F.R. § 106.41(a); WEILER, *supra* note 139 at 992 (This definition includes "*all* the programs of an educational institution that receive[] *any* federal aid (including grants or loans to its students)") (emphasis added); 20 U.S.C. § 1681(c).
[159] 34 C.F.R. § 106.41(c)(10) (2020).
[160] 34 C.F.R. § 106.41(c)(1)–(10) (2020).
[161] Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 919 (7th Cir. 2012) (quoting 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979)).
[162] 44 Fed. Reg. at 71,413, 71,414 (Dec. 11, 1979).

university's level of full-time undergraduate enrollment.[163] The second prong allows a university to provide evidence of a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of members of that sex.[164] The third prong allows a university to show that students' interests in athletic participation are fully and effectively accommodated by the present program.[165]

Pay-to-play laws do not provide unequal benefits or opportunities on their faces, but they could have that effect when implemented, exacerbating gender inequity issues that already exist in college athletics. Publicity is the dispositive factor in determining whether pay-to-play laws provide student-athletes with equal opportunity. The OCR evaluates compliance in publicity by examining the equivalence of "[a]ccess to . . . publicity resources for men's and women's programs . . . and . . . [q]uantity and quality of publications and other promotional devices featuring men's and women's programs."[166] This regulation "point[s] to the need for equitable promotion [and] marketing for both men's and women's programs."[167] If promotion of men's and women's teams is imbalanced, the amount of earnings received by college athletics for their NIL could be directly influenced.[168] If a team receives more promotion from its university, the individual team members then have the opportunity to receive more sponsorship opportunities to earn money based on their NIL. This creates more benefits and opportunities for certain student-athletes, over and above what others may receive.[169]

Even if a university can meet one of the OCR's prongs of compliance, there are still long-standing attitudes and practices in place that perpetuate an imbalance in publicity. More benefits and opportunities will normally be available to football and men's basketball players because of

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[163] Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993).
[164] *Id.*
[165] *Id.*
[166] 44 Fed. Reg. at 71,417.
[167] Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil,* FORBES (Jan. 21, 2020, 1:22 PM), https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/#11225b9d7625 (quoting Dr. Lindsey Darvin, an assistant professor and gender equity researcher within the Sport Management Department at the State University of New York College at Cortland).
[168] *Id.*
[169] *Id.* ("Those teams with more promotions and higher-level promotions will be in essence providing additional opportunities for those athletes to be recognizable.").

their tendency to generate more revenue, which can be directly linked to the amount of publicity these sports receive.

Football and men's basketball are considered "revenue-generating" sports because they "dominate" the college sports industry.[170] The average Division I football team earns $31.9 million per year in revenue, which is more than the next thirty-five sports combined.[171] Men's basketball programs earn about $8.1 million per year, with a large drop-off after that.[172]

Almost always, the largest revenue generator for any amateur or professional sport is television broadcasting.[173] The NCAA recently signed a new television deal with CBS for $8.8 billion to air the March Madness tournament until 2032.[174] Women's sports don't usually receive such a high level of television coverage. A 2013 PBS documentary about media coverage and female athletes reported that although 40% of all athletes are women, only 4% of athletes represented in the media are women.[175]

A class action suit involving the United States Senior Women's National Soccer Team ("WNT") against the United States Soccer Federation ("USSF") raises similar legal questions to those that the pay-to-play laws address. The WNT is a professional team, but the publicity concerns are the same as those at the collegiate level. Namely, that "marketing resources are typically tied to potential revenue production."[176] The WNT's complaint seeks to end "USSF's discriminatory practices"

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[170] CHRIS MURPHY, MADNESS, INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS—EXCEPT THE PLAYERS 4 (2019), https://www.murphy.senate.gov/newsroom/press-releases/murphy-releases-madness-inc-report-calls-on-ncaa-to-compensate-student-athletes-.

[171] *Id.* at 4-5 (stating that the next thirty-five sports' revenue combined equal $31.7 million).

[172] *Id.* at 5.

[173] TJ Mathewson, *TV is Biggest Driver in Global Sport League Revenue*, GLOBAL SPORT MATTERS: BUSINESS (Mar. 7, 2019), https://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue/.

[174] Frank Pallotta, *NCAA Extends March Madness TV Deal with Turner, CBS Until 2032,* CNN BUSINESS (Apr. 12, 2016, 3:30 PM), https://money.cnn.com/2016/04/12/media/ncaa-march-madness-turner-cbs/index.html.

[175] *Media Coverage & Female Athletes* (PBS Twin Cities broadcast Dec. 1, 2013), https://video.tpt.org/video/tpt-co-productions-media-coverage-female-athletes/.

[176] Dosh, *supra* note 167.

based on gender,[177] including "[un]equal promotion of their games."[178] The complaint provides that the former President of the marketing company used by USSF "acknowledged that the WNT has been under-marketed."[179] WNT goes on to claim that this lack of marketing has a "direct and negative effect . . . on revenue generated by WNT."[180]

If universities do not put equal resources into all sports, especially along gender lines, there will most likely be a discrepancy in NIL earnings. NIL earnings are not directly provided by the universities, [181] but universities are exclusively facilitating the publicity that would lead to an athlete's ability to profit from their NIL. This would place NIL earning potential directly under the responsibility of Title IX.

Publicity facilitation includes communications staff, the mediums used to advertise intercollegiate athletics, and the quantity and quality of promotional devices. [182] After scanning several Division I athletic departments' employee information, one gender equity researcher, Dr. Lindsey Darvin, notes that the highest ranking employees in communications departments are almost always assigned to football and men's basketball.[183] Attorney Julie Roe Lach, a Title IX specialist, also comments on the differences in mediums of promotion: many women's teams are promoted through "free" outlets such as social media, whereas men's sports usually get paid advertisements, such as billboards.[184]

It is evident that most, if not all, women's sports do not receive an equitable amount of publicity from their universities,[185] but that inequity has not had an effect on student-athletes because they are not competing for

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[177] Complaint & Demand for Jury Trial at 5, Morgan v. U.S. Soccer Fed'n, Inc., 2019 WL 1199270 (D.C.D. Cal. Jul. 1, 2019).
[178] *Id.* at 4.
[179] *Id.* at 75.
[180] *Id.* at 76.
[181] *See* Cal. Educ. Code § 67456(b) (West 2020).
[182] *See* Dosh, *supra* note 167; 44 Fed. Reg. at 71,417.
[183] Dosh, *supra* note 167; *See, e.g.*, *Staff Directory*, UCONN, https://uconnhuskies.com/staff-directory (last visited Mar. 20, 2020) (listing the Associate Director of Athletics for Athletic Communications as assigned to football).
[184] *See* Dosh, *supra* note 167 (explaining a situation in which University of Illinois paid $100,000 for a billboard promoting its football team).
[185] *See supra* notes 170–175 and accompanying text (stating the amount of money and publicity earned by football and men's basketball as compared to all other sports).

marketing and promotion opportunities in the marketplace.[186] With the passing of the California and Colorado laws, that changes. Student-athletes now have the opportunity to compete in this marketplace, but women's team athletes are still being let down by their universities' communications departments and cannot fairly compete in the NIL marketplace until universities equalize their promotional efforts across gender lines.

B. Who Should Have the Power to License NIL Property?

NIL laws are a step in the right direction, but they are not the final answer to the question of if universities should compensate their student-athletes in some way for use of their NIL. Many student-athletes would benefit from entering the marketplace on their own with the ability to earn sponsorships and endorsement deals. But the NCAA, conferences, and universities would still have the right to use a student-athlete's NIL for free, in perpetuity.

Instead, these governing organizations should have to pay to license NIL rights from each student-athlete. The NCAA could argue that it is already providing equivalent compensation for student-athlete NIL in the form of scholarships. But every other person with a specific talent or ability gets the chance to earn compensation in the form of wages, which they have bargained for. Even former NCAA executive director, Walter Byers, stated in his memoir that he believes student-athletes should be able to "access the marketplace just as other students exploit their own special talents."[187]

The NCAA has a long history of opposing pay-for-play policies. In 1995, the NCAA annual meeting had a theme of "welfare of student-athletes."[188] Throughout the meeting, the NCAA repeatedly stated that permitting athletes to have equal access to the marketplace was "heresy."[189] Outgoing presidents, commissioners, and university presidents all gave statements in line with the idea that the NCAA was not in the business of

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[186] *See* NCAA BYLAWS, *supra* note 12, § 12.5.2.1(a)–(b). Because student-athletes do not earn compensation, and because scholarship amounts are not generally based upon one's level of skill in their sport, the publicity discrepancy between teams will not affect a student's scholarship.

[187] BYERS, *supra* note 65, at 373–74.

[188] BYERS, *supra* note 65, at 372.

[189] *Id.*

paying players: that was left to the professional leagues.[190] Many defenders of the NCAA stated that the NCAA already "pays" athletes by providing large scholarships, usually with higher amounts than those given to non-student-athletes.[191]

Requiring the NCAA, conferences, and universities to license a student-athlete's NIL gives power to the student-athletes as owners of their NILs. A person's NIL rights, or right of publicity, is a commonly recognized right by courts around the country. "The right of publicity generally applies to situations where the plaintiff's name, reputation or accomplishments are highly publicized and the defendant used that fact to his or her advantage."[192] The "underlying . . . theory" of this right is that a "celebrity has the right to capitalize on his persona, and the unauthorized use of that persona for commercial gain violates fundamental notions of fairness and deprives the celebrity of some economic value in his persona."[193] In essence, student-athletes deserve to exploit their NIL just as much as any other person with a specific talent or ability does.

When a student-athlete agrees to attend an NCAA member-university and play collegiate sports for that university, the parties must come to an agreement of how much the license for the student-athlete's NIL will cost. This cost can be an expense from the university, the conference, the NCAA, or all three organizations. This would apply to all student-athletes, not just those in revenue generating sports. If the university wants to earn any amount of revenue from any team at their university, it must license the individual student-athletes' NILs. After a student-athlete graduates, the three organizations will have the opportunity to start a new negotiation with the student-athlete about licensing their NIL in the future. This would include use of one's NIL for something like a video game—the catalyst of the *O'Bannon* lawsuit.[194]

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[190] *Id.* The 1995 outgoing NCAA president, Joseph N. Crowley, said the "day colleges pay their players would be the day that [universities] would abolish college sports. The head of the NCAA Presidents Commission at the time, Judith E. N. Albino, said "such a bizarre action would force the colleges to change dramatically the way they do business." Jim Delany, the highest paid conference commissioner in 1994 with a salary of $256,500, said that "if the players 'want a living wage . . . let them go to the NBA.'"

[191] *Id.* at 373.

[192] Jarvis v. A&M Records, 827 F. Supp. 282, 297–98 (D.N.J. 1993).

[193] Hart v. Elec. Arts, Inc., 740 F. Supp. 2d 658, 664 (D.N.J. 2010) (internal citations omitted).

[194] O'Bannon v. Nat'l Coll. Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).

To help facilitate bargaining for these licenses, student-athletes should be able to utilize professional sports agents. Many states, like Illinois and Washington, have proposed many changes to the current system, including the allowance of a professional agent.[195] Other states, and Congress, should allow student-athletes to gain representation to help them bargain and negotiate for licensing revenue of their NILs.

C. Reevaluating the Importance of Amateurism

In the 1930s and 1940s, many high school student-athletes were able to attend college, and play a sport, because they had been "adopted" by a local alumnus who paid the young student-athlete's tuition to college after having built a relationship with them and their family.[196] The NCAA called this practice "pay for play" and eventually banned it.[197] In 1956, the NCAA began the grant-in-aid scholarship program, which is still in place today.[198] The term "student-athlete" was also created at this time, and used to replace words such as "players" and "athletes."[199] This term, and the idea of amateurism, was quickly created to combat the notion that student-athletes could be identified as employees, and therefore be entitled to salaries and worker's compensation.[200]

Today, the NCAA defines amateurism as "a bedrock principle of college athletics. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second."[201] But student-athletes are expected to spend forty hours per week as students, and up to sixty hours per week as athletes.[202] One hundred hours per week is a nearly impossible feat for anyone, but especially young adults attempting to keep good grades and stay physically healthy, while balancing any other issues in their lives.

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[195] *See supra* notes 127–133 and accompanying text (describing the provisions allowed by the Washington and Illinois bills that have been introduced).
[196] BYERS, *supra* note 65, at 65.
[197] *Id.*
[198] *Id.*
[199] *Id.* at 69.
[200] *Id.*
[201] CHUDACOFF, *supra* note 68, at 146 (internal citations omitted).
[202] ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 203 (1999) ("The number of hours per week of obligatory practice is set at 20, but everyone knows this is a farce… [A]thletes can spend 50 or 60 hours a week on their sport in season. Out of season in Division I they still practice and train.").

Courts have generally treated NCAA rules designed to preserve amateurism with "considerable deference."[203] For example, in *NCAA v. Banks*, the Court held that "the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." [204] In *Banks*, student-athletes were complaining about a prohibition on entering a professional sports league's draft and hiring a professional sports agent before completing their college athletic eligibility.[205] Before *O'Bannon*, a federal court had never found the NCAA rules on amateurism to be a violation of the Sherman Act.[206]

Walter Byers, the first Executive Director of the NCAA—a self-proclaimed proponent of capitalism—understands the "charges of hypocrisy and exploitation that weigh so heavily on [the NCAA's] reputation."[207] Byers lists what he considers to be hypocrisies perpetuated by the NCAA, including denying that it is engaged in a "dollar-generating business enterprise" for tax purposes, endorsing private initiative on the part of coaches, but not student-athletes, and emphasizing that job security for coaches is important while threatening ineligibility for student-athletes as the main NCAA enforcement tool.[208]

Even though the district court in *O'Bannon* is the only federal court to hold that the practices of the NCAA are in violation of federal anti-trust statutes, it is evident that the NCAA's actions are, at best, hypocritical, and at worse, illegal. Many organizations and powerful individuals have attempted to induce the NCAA to make changes, but the NCAA has stood its ground for over 100 years since its founding.

In 1991, the Knight Commission on Intercollegiate Athletics, a $400 million subsidiary of the Knight Foundation dedicated to promoting education,[209] released a report outlining a series of reforms to "place the well-being of the student-athlete at the forefront of [its] concerns."[210] The Knight Commission expected the NCAA to implement these reforms.[211]

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[203] PORTO, *supra* note 18, at 21; *see also supra* notes 55–64 and accompanying text (describing the antitrust litigation brought against the NCAA in the past few decades).
[204] PORTO, *supra* note 18, at 21.
[205] *Id.*
[206] O'Bannon v. Nat'l Coll. Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).
[207] BYERS, *supra* note 65, at 360–61.
[208] *Id.*
[209] CHUDACOFF, *supra* note 68, at 120.
[210] *Id.*
[211] *Id.* at 120–21.

The reforms touched on three major points: academic integrity, financial integrity, and certification.[212] Most important to this Comment is the financial integrity prong. This prong called for myriad reforms, including a reduction in athletic expenditures, more equitably distributed revenues from basketball television contracts, and control of coaches outside income (e.g. shoe and equipment contracts).[213] The Knight Commission told university athletic directors to "transform the athletics culture on [its] campus . . . from one in which winning is everything to one in which competition is grounded in the [proffered reform model]."[214]

By passing the pay-to-play laws in California and Colorado, the NCAA has finally been forced to make changes to its system and recognize student-athletes as hard-working individuals who deserve to see the fruits of their labor.

[212] *Id.* at 121–22.
[213] *Id.* at 121.
[214] *Id.* at 122.

PAY TO PLAY IS HERE—NCAA'S POWER GRIP LOOSENS.

*By: Daniela Tenjido**

I. INTRODUCTION

On September 30, 2019, California's Governor, Gavin Newsom ("Governor Newsom"), officially made it the law of the state of California that any student participating in intercollegiate athletics at a postsecondary educational institution in the state, with the exclusion of community college athletes, will be allowed to earn compensation from the use of their name, image, and likeness ("NIL") as well as to obtain professional representation.[1]

Senate Bill 206 ("S.B. 206"), also known as the "Fair Pay to Play Act," despite its short existence, has already been the source of a lot of controversy.[2] Those that support it argue that it is an overdue balancing of scales that has, for too long, weighed in favor of the National Collegiate Athletic Association ("NCAA") and kept college athletes from monetizing their NIL, a restriction that only applies to student- athletes, and not any

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[1] *See* S.B. 206, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019) ("[a]pproved by Governor September 30, 2019 … [a] postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness"); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, SENATOR NANCY SKINNER REPRESENTING SENATE DISTRICT 9 (Sept. 30, 2019), https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-'fair-pay-play-act' (stating that Governor Newsom's signing of S.B. 206 "makes California the first state to restore to student-athletes a right everyone else has: the right to earn money from their name, image, and likeness").

[2] *See* Allysia Finley, *California's Dreaming About Paying Student Athletes*, WASH. POST (Sept. 15, 2019, 3:51 PM), https://www.wsj.com/articles/californias-dreaming-about-paying-student-athletes-11568577090 (discussing how while megastar Lebron James and unions such as AFL-CIO, Afscme, United Steelworkers and Teamsters support the bill, colleges in California have sided with the NCAA in opposing the bill); *see also* Dennis Dodd, *NCAA Prez Calls Name, Image, and Likeness Rights an 'Existential Threat' to College Sports*, CBS SPORTS (Sept. 25, 2019, 9:35 AM), https://www.cbssports.com/college-football/news/ncaa-prez-calls-name-image-and-likeness-rights-an-existential-threat-to-college-sports/ (stating that the NCAA's president and board of governors believe the bill is unconstitutional and would "blur the lines between amateurism and professionalism").

other type of student.[3]

On the other side of the argument, the biggest opponent is, of course, the NCAA, whose bylaws strictly forbid student-athletes from doing the very things S.B. 206 allows.[4] The NCAA claims that S.B. 206 is unconstitutional, a violation of the Commerce Clause, and an unfair recruiting advantage to California schools which would eliminate the even playing field between the hundreds of other schools in the NCAA.[5] The NCAA's position, as the bill was headed into Governor Newsom's office, was that they are currently in the process of working on a more dynamic solution to the pay for play preposition, and that states should not take matters into their own hands before the NCAA has had a chance to address the issue themselves.[6]

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[3] *See* Melody Gutierrez & Nathan Fenno, *California Will Allow College Athletes to Profit From Endorsements Under Bill Signed By Newsom*, L.A TIMES (Sept. 30, 2019, 5:00 PM), https://www.latimes.com/california/story/2019-09-30/college-athlete-endorsement-deals-ncaa-california-law (discussing how California's governor explained that although the bill was opposed by some, he felt it was important to address the racial, gender and economic injustices ingrained in college athletics); *see also* Dan Murphy, *What California Bill Means for NCAA Image and Likeness Debate*, ESPN (Oct. 1, 2019), https://www.espn.com/college-football/story/_/id/27585301/what-california-bill-means-ncaa-image-likeness-debate (stating that Senator Skinner, a California state senator and the proponent and co-writer of the bill, "sees her bill as a way to correct a civil rights issue and unfair labor practices that affect all college athletes regardless of their race").

[4] *See* Murphy, *supra* note 3 (stating that one of reasons the NCAA opposes S.B. 206 is because it would make it illegal for California schools to follow the NCAA's rules, forcing schools in California to choose between following state law or NCAA rules); Michael McCann, *What Will Happen If the California 'Fair Pay to Play Act' Gets Signed Into Law?*, SPORTS ILLUSTRATED (Sept. 10, 2019), https://www.si.com/college-football/2019/09/10/california-fair-pay-play-act-law-ncaa-pac-12 (explaining that by enacting S.B. 206, California is essentially taking the choice away from schools as to whether they should follow NCAA bylaws or not); *see also* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 NCAA DIVISION I MANUAL, Const. art. 12.1.2 (2019), https://web3.ncaa.org/lsdbi/reports/getReport/90008 (providing the multiple ways in which an individual can lose amateur status and eligibility to compete in collegiate sports, including but not limited to, retaining an agent and using their athletic ability to receive compensation).

[5] *See* McCann, *supra* note 4 (explaining that S.B. 206 will likely undergo constitutional muster since the NCAA will argue that it violates interstate commerce); *see also* Darryl Coote, *NCAA: California SB 206 Will 'Upend Balance' in College Sports*, UPI (Sept. 12, 2019, 1:09 AM), https://www.upi.com/Sports_News/2019/09/12/NCAA-California-SB-206-will-upend-balance-in-college-sports/3951568263535/ (stating that the NCAA opposes the bill because it "gives the 58 NCAA schools in California an unfair recruiting advantage while making them ineligible to compete in NCAA competitions").

[6] *See* Chris Bumbaca & Steve Berkowitz, *NCAA Sends California Governor Letter Calling Name, Likeness Bill 'Unconstitutional'*, USA TODAY (Sept. 11, 2019, 10:51 AM), https://www.usatoday.com/story/sports/ncaaf/2019/09/11/ncaa-sends-letter-calling-

The NCAA's stagnant and antiquated policies are quickly catching up with the association as many states are now following California in enacting similar laws.[7] This comment addresses the implications of S.B. 206 as it pertains to the future of college sports and the NCAA.[8] Part II provides necessary background on the NCAA, what it is, and what its core values are, in addition to introducing the "Fair Pay to Play Act," what it aims to do, how it aims to do so, and the legislative history that lead to the final bill that was signed into law on September 30, 2019.[9]

Part III is a discussion analyzing the constitutional arguments the NCAA has anticipatorily raised against the law and addresses why the Fair Pay to Play Act will survive constitutional muster if subjected to it.[10] Finally, this comment looks ahead into what the next viable steps are as other states enact similar legislation, how college sports will function

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california-likeness-bill-unconstitutional/2284789001/ (last updated Sept. 11, 2019, 7:31 PM) (discussing the NCAA's letter to Governor Newsom urging him not to sign S.B. 206 into law by arguing that rules governing college sports should be established through the NCAA and should apply to all 50 states, not just one state going rogue); *see also* Mike Chiari, *NCAA Sends Letter to CA Governor over Bill Allowing Athletes to Earn Income*, BLEACHER REPORT (Sept. 11, 2019), https://bleacherreport.com/articles/2853328-ncaa-sends-letter-to-ca-governor-over-bill-allowing-athletes-to-earn-income (stating that NCAA claims to already be working on changing rules for student-athletes to be able to use their NIL in a manner that aligns with NCAA values).

[7] *See* Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college-football/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws (discussing the nine states that have thus far proposed or are planning to propose legislation allowing student-athletes in those states to capitalize their NIL, with some states going even beyond the coverage of S.B. 206); *see also* Lauren Camera, *California Becomes First State to Allow College Athletes to Be Compensated*, U.S. NEWS & WORLD REPORT (Sept. 30, 2019, 1:25 PM), https://www.usnews.com/news/education-news/articles/2019-09-30/california-becomes-first-state-to-allow-college-athletes-to-be-compensated (explaining the NCAA's concern that "[a]s more states consider their own specific legislation related to this topic, it is clear that a patchwork of different laws from different states will make unattainable the [goals of the NCAA]").

[8] S.B. 206, *supra* note 1; *see also* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 NCAA DIVISION I MANUAL, (2019), *supra* note 4 (providing the complete bylaws of the NCAA as of August 2019).

[9] *See What is the NCAA*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Nov. 27, 2019, 8:00 AM) (offering a snapshot of the NCAA's purpose and procedures); S. B. 206, *supra* note 1; Fair Pay to Play Act., 2019 Bill Text CA S.B. 206 (offering a redline of the legislative history of the bill before it was enacted on September 30, 2019).

[10] *See* McCann, *supra* note 4 (explaining that the NCAA is not likely to sit by idly as California changes the future of college sports); *see also* Murphy, *supra* note 3 (explaining that the chief legal counsel for the NCAA told the Associated Press that he believes the bill to be unconstitutional for violating interstate commerce, one of the more probable attacks the NCAA will formulate if it challenges the bill in the upcoming months).

moving forward, and the ways in which the NCAA can moot the issue by stepping up and changing their bylaws.[11]

II. Background

A. The NCAA

The NCAA is a non-profit "voluntary membership association with over 1,300 colleges and universities athletics conferences and sports organizations that administer intercollegiate athletics."[12] The NCAA's main function is to create and enforce the rules that regulate college level athletics and to maintain an even playing field between all the member schools participating.[13]

Amongst the aspects of college athletics regulated by the NCAA, "student-athlete financial aid, employment, and transfer eligibility," are some of the ones highlighted by California legislature in their push for the passing of S.B. 206.[14] The NCAA's constitution states that their main

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[11] *See* McCann, *supra* note 4 (explaining that while different states enacting different laws can offer an advantage to the NCAA who can claim the disorder is bad, their bigger focus should be on fixing their bylaws before a federal statute that unifies all 50 states gets passed); *see also* Gutierrez & Fenno, *supra* note 3 (stating that California's law aims to protect the interest of the student-athletes while continuing to collaborate with the NCAA, a possible outcome according to UCLA head coach who said that the California law does not cost the schools or the NCAA anything in terms of money out of their pocket).

[12] *See S.B. 206: Hearing on Fair Pay to Play Act before the Assemb. Comm. on Arts, Ent., Sports, Tourism & Internet Media*, 2019 Gen. Assemb., Reg. Sess. 1-10. (Cal. 2019) (Committee analysis supplementing the hearing, analyzing S.B. 206's feasibility and policy arguments before it passed to the Assembly Committee on Higher Education); *see also What is the NCAA*, *supra* note 9 ("[t]he National Collegiate Athletic Association is a member-led organization dedicated to the well-being and lifelong success of college athletes").

[13] *See S.B. 206 Hearing*, *supra* note 12, at 3-4 (explaining that although the NCAA promotes college sports, its core job is to create the rules that regulate those the different sports at all the member schools with the help of representatives from the member schools); *see also What is the NCAA*, *supra* note 9 (stating that to make the rules that regulate member institutions, "[m]ember representatives **serve on committees** that propose rules and policies surrounding college sports" and that the NCAA and its employees interpret, enforce, and support those rules).

[14] *See S.B. 206 Hearing*, *supra* note 12, at 3-6 (highlighting that some of the most impactful aspects of a student-athlete's rights and their futures are in the hands of the NCAA); *see also* NCAA DIVISION I MANUAL, Const. art. 12, 14, 15, (2019), *supra* note 4 (stating the NCAA's rules, organized by respective article, on student-athlete's financial aid and its limitations, their transferring eligibility rules, and rules governing any employment held by the student-athletes).

priority is to maintain all athletic programs as an integral part of the academic and educational portion of the university they are a part of while also maintaining the student-athletes as part of the student body, creating a clear demarcation line between college and professional sports.[15]

Lastly, one of the NCAA's main goals is to maintain and uphold that demarcation line between student-athletes and professional athletes by ensuring amateurism is preserved.[16] The NCAA's desire to maintain amateurism, defined as "the practice or participating in a discipline without financial compensation," is the reason the NCAA forbids student-athletes from receiving any type of compensation in connection with their athletic abilities while they play at the college level.[17]

B. Senate Bill 206 – The Fair Pay to Play Act

The Fair Pay to Play Act was introduced for the first time on

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[15] *See S.B. 206 Hearing*, *supra* note 12, at 4 (stating that the NCAA founders "sought to set national standards for all collegiate sports … [and] [that] [f]rom the outset, the organization emphasized education and upholding amateurism"); *but see* John Feinstein, *California Did the Right Thing. Don't Buy Into the NCAA's Propaganda*, WASH. POST (Oct. 2, 2019, 6:07 PM), https://www.washingtonpost.com/opinions/california-did-the-right-thing-dont-buy-into-the-ncaas-propaganda/2019/10/02/21ed7b14-e531-11e9-a331-2df12d56a80b_story.html

> For the record: "Student-athlete" is a redundancy. By rule, one has to be a registered student to be a college athlete. It's like calling someone a "person-man" or "person-woman." The NCAA has employed the term for years to fool people into thinking big-time college athletes are studying advanced calculus in the locker room. I've traveled with college teams often. I can count on one hand the number of "student-athletes" I've seen working at being students.

Id.

[16] *See S.B. 206 Hearing*, *supra* note 12, at 4 (stating that "[o]ne of the NCAA's main goals is to uphold the virtues of amateur sports); *but see* Feinstein, *supra* note 15 (stating that despite the NCAA's contention that student-athletes should not get paid because that will do away with their amateur status, these student-athletes "are professionals in every way — except that they get paid nothing while everyone around them cashes in").

[17] *See S.B. 206 Hearing*, *supra* note 12, at 4 (explaining that enforcing amateurism is what "separates the NCAA from professional leagues where participants are paid to perform"); *but see* Feinstein, *supra* note 15 (highlighting the NCAA's hypocrisy about preserving amateurism and a "student first" model when they sold the rights to its football and basketball games for $6 billion and $1 billion, respectively, which includes the right for the network to decide when games start, often requiring "student-athletes" to start past 10:00 pm).

February 4, 2019.[18] The initiative behind the bill is to balance the scales for student-athletes in California who have been unrepresented by their schools, their state legislatures, and by the NCAA, by finally giving them the same opportunities to earn income from their talent as is afforded to other athletes and students.[19] The law applies to "intercollegiate athletic programs at 4-year private universities or campuses of the University of California or the California State University that receive, as an average, $10 million or more in annual revenue derived from media rights for intercollegiate athletics."[20]

In the first introductory version of S.B. 206, California's legislature, setting the foundation for why passing S.B. 206 was necessary, explained that for the 2010-2011 academic year, full scholarships for Football Bowl Subdivision ("FBS") athletes, the most competitive division in NCAA Division I, fell short in covering an athlete's needs in an average amount of $3,285.[21] Meanwhile, in the 2012 study, the labor of the average football

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[18] *SB-206 Collegiate Athletics: Student Athlete Compensation and Representation*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB206 (last visited Nov. 27, 2019, 8:02 AM) (providing a chronological legislative history of all actions taken pertaining to S.B. 206 ranging from when it was first introduced to when it was approved by Governor Newsom).

[19] *See* Gregg E. Clifton, *UPDATE: California SB 206 – Collegiate Athletics: Fair Pay to Play Act Moves Forward*, NAT'L L. REV. (May 24. 2019), https://www.natlawreview.com/article/update-california-sb-206-collegiate-athletics-fair-pay-to-play-act-moves-forward (stating that the main drive of the bill was to even the scales for student athletes who live below poverty levels while receiving what appear to be glamorous athletic scholarships when in reality, especially for students of color and women, their best years to capitalize their talents were in college); *see also* Gutierrez & Fenno, *supra* note 3 (discussing California Governor's statement that it is wrong for the athlete status in student-athlete to mark the difference in being able to profit off one's own NIL, when regular students everywhere are not faced with those same restrictions).

[20] S.B. 206, *supra* note 1 (highlighting that while S.B. 206 as enacted only applies to certain 4 year institutions that meet the prescribed dollar amount in revenue, the law does require the Chancellor of the California Community Colleges to convene a community college athlete NIL working group, suggesting that the law will be expanded on later); *see also* Adam Beam, *California becomes first state in U.S. to let college athletes make money, defying NCAA*, MERCURY NEWS (Sept. 30, 2019, 8:03 AM), https://www.mercurynews.com/2019/09/30/california-to-let-college-athletes-make-money-defying-ncaa/ (stating that S.B. 206 does not apply to community colleges in the state of California, which means that those institutions are not forbidden from penalizing and restricting their student-athletes for profiting from the use of their NIL).

[21] *See* S.B. 206, Gen. Assemb., Reg. Sess. (Cal. 2019) (introduced version of the bill from Feb. 4, 2019) (finding a shortfall in athletic scholarships as a result of an athlete's out of pocket expenses that are not covered by the amounts of their full athletic scholarships); *see also* Brandon Lilly, *College Football Explained*, GUARDIAN (Oct. 10, 2012, 9:00 AM),

or men's basketball player that competed in the FBS was valued at a fair market value of approximately $137,357 and $289,829, respectively, while the top 10 valued FBS football players had estimated fair market values that ranged from $345,000 to $514,000.[22] For every player whose labor was highly valued and whose scholarship fell short, their head coaches were paid, on average, over $3.5 million each, a value which does not include bonuses.[23] In addition to what the coaches earn, in California alone, the state's postsecondary educational institutions that participate in intercollegiate athletics generate more than $700 million per year, revenue due in part to the student-athletes.[24] Between the universities and the NCAA, billions of dollars are generated in profits from ads, TV deals to air games, and ticket sales for those games, meanwhile, athletes risk losing their scholarships and eligibility to play if they reap the benefits of even signing an autograph.[25]

Senator Skinner, one of the authors of S.B. 206 found that for many student-athletes, college is the only time that young kid has the opportunity to earn from their athletic talents since, as the NCAA has revealed, "less

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https://www.theguardian.com/sport/blog/2012/oct/10/college-football-explained-ncaa ("[t]here are four levels of college football in the National Collegiate Athletic Association (NCAA), but the one that really matters is the Football Bowl Subdivision (FBS)").

[22] *See* S.B. 206, Feb. 4, 2019, *supra* note 21 (highlighting the disparities between what the student-athletes earn versus what they could be earning if they were not restricted by the NCAA's bylaws); *see also* Huma & Staurowsky, *The $6 Billion Heist: Robbing College Athletes under the Guise of Amateurism*. A report collaboratively produced by the NCPA and Drexel Uni. Spt. Mgmt. Available online at http://www.ncpanow.org. ("[n]ationwide, FBS football and men's basketball players were denied over $1.5 billion of their fair market value in 2011-12 … [u]ltimately, football players receive about 17% of their fair market value while men's basketball players receive approximately 8% of theirs").

[23] *See* S.B. 206, Feb. 4, 2019, *supra* note 21 (highlighting the unfairness of not paying student-athletes in order to maintain amateur status but paying their coaches millions of dollars for work that in part comes from the student-athletes); *see also* Huma & Staurowsky, *supra* note 22 (highlighting how Florida State University's former football head coach Jimbo Fisher received a salary increase in 2011 of approximately $950,000 while his entire team's scholarship short fall amount for that year was $351,900).

[24] *See* S.B. 206, Mar. 11, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (first amended version) (showing the disparity between the profits the universities and colleges earn and the scholarships the student-athletes receive, which are not sufficient to cover all of the student-athlete's living expenses); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (stating that college sports generate billions for those involved with the exclusion of those most responsible for the wealth, the student-athletes).

[25] *See* S.B. 206, Sept. 3, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (Committee Report) (findings by the bill's author, Senator Skinner, in support of the bill); *see also* Allen Kim, *California Just Passed a Law That Allows College Athletes to Get Paid*, CNN (Sept. 30, 2019), https://www.cnn.com/2019/09/30/sport/california-sb-206-ncaa-trnd/index.html (updated Sept. 30, 2019, 4:01 PM) (stating that the NCAA reported over $1.1 billion in revenue for the 2017 fiscal year).

than one percent of women's college basketball players will make it to the WNBA and less than two percent of men's college basketball, football, and soccer will ever play professionally."[26] Moreover, it is a myth that all student-athletes receive full-ride scholarships that will cover their tuition and room and board, when in reality, most student-athletes do not.[27]

In addition to the financial disparity that exists for student-athletes, the California legislature found that "[a]ccording to a 2014 report by the College Sport Research Institute at the University of South Carolina, revenue-producing male student- athletes graduate at a rate of 17.5 percentage points below other male students."[28] "Considering the fact that less than 2 percent of college football players get into the National Football League ("NFL"), and only 1.2 percent of college basketball players get drafted into the National Basketball Association ("NBA"), the reality is that

[26] *See* S.B. 206, Apr. 3, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (Committee Report) (emphasizing the need for the passing of S.B. 206 in order to allow student-athletes to earn compensation from the use of their NIL as it will likely be the only opportunity they will have to profit from their athletic abilities); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 ("[t]he new law will allow all college athletes — not just elite ones — to earn money from [their] name, image, and likeness, whether it's a small sponsorship deal with a local business or monetizing a YouTube video, teaching swim lessons, or coaching youth football").

[27] *See* S.B. 206, Apr. 3, 2019, *supra* note 26 (explaining that while not all student-athletes are on scholarship, "[a]thletes receiving a partial scholarship or no athletic scholarship are subject to the same pay prohibitions as those that receive full athletic scholarships"); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (explaining that in addition to some students not having full or any scholarship at all, they also lack the time to go and pursue jobs during their college years because these student-athletes spend up to 40 hours per week training for their sport, in addition to their academic work).

[28] *See* S.B. 206, Feb. 4, 2019, *supra* note 21 (highlighting the flaw in the NCAA's argument that student-athletes are students first and as such, should not be compensated beyond educational expenses, by showing that they are at an academic disadvantage because they are athletes); *see also* Allie Grasgreen, *Gaps in Grad Rates for Athletes*, INSIDE HIGHER ED (Sept. 25, 2012), https://www.insidehighered.com/news/2012/09/25/report-finds-football-players-graduate-rates-lower-full-time-student-peers:

> The NCAA likes to boast that athletes graduate at rates higher than non-athletes – in some cases, significantly higher. But the tool the NCAA uses to make that assertion -- the Graduation Success Rate, or GSR -- follows a unique formula that factors out athletes who transfer in good academic standing, instead counting them as graduates. The GSR is a misleading graduation rate designed to put athletes in the best light.

Id.

many college athletes will never see a payoff in professional sports."[29] But perhaps, "the real tragedy is that — having devoted so much time to sports instead of their studies — they [will] [not] really get to see their college education pay off, either."[30]

The California legislature, in its first amended version of S.B. 206, added a finding that approximately 40 percent of NCAA Division I and Division II athletes stated that they do not have the time required to keep up with their academics during their respective athletic season.[31] Additionally, while the NCAA limits the time a student-athlete can spend on athletic related activities to 20 hours per week, student-athletes spend 32 to 44 hours per week in athletic related activities.[32] More shockingly, many student-athletes are participating in sports without a guaranteed scholarship or at risk of revocation for poor performance or failing to participate in "voluntary" workouts.[33] As a result, one-third of the student-athletes also

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[29] *See* Jasmine Harris, *College Athletes Don't Have Time to be Students*, HOUS. CHRON. (Oct. 15, 2018), https://www.houstonchronicle.com/local/gray-matters/article/college-athletes-academic-performance-graduation-13308008.php (last updated Oct. 15, 2018, 10:42 AM); *see also* S.B. 206, Apr. 3, 2019, *supra* note 27 (explaining that most student-athletes at the college level will never make it professionally in their sport despite the amount of time employed during college).

[30] *See* Harris, *supra* note 30; *see also* Grasgreen, *supra* note 29 (explaining that at one institution, "athletes appear to have clustered in no-show courses in which they received passing grades for doing little work with virtually no faculty oversight").

[31] *See* S.B. 206, Mar. 11, 2019, *supra* note 25 (highlighting the shortcoming of the NCAA's alleged interest in making sure student-athletes are students first by showing how the competitive nature and the high stakes of college sports require student-athletes to invest an amount of time that takes them from student-athletes to athlete-students); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (stating that "SB 206 also could incentivize college athletes to stay in school, finish their degrees, and not succumb to the financial pressure of turning pro" by giving a student-athlete more venues of income other than just their athletic scholarship which puts student-athletes at the mercy of their athletic programs).

[32] *See* Harris, *supra* note 30 (explaining how in her experience as a professor of Sociology at a university with a Division I football team, she noticed that athletics and academics are at odds and most of the students that filled her morning classes were athletes who had no other time available to take classes); *see also* Grasgreen, *supra* note 29 (explaining that while student-athletes have an army of academic resources, including tutors, available to them as part of their scholarships, the problem is that there are not enough hours in a day to fulfill their athletic related responsibilities, attend their classes, and still have any time left to get help with their academics).

[33] *See* S.B. 206, Mar. 11, 2019, *supra* note 25 (highlighting the amount of time consumed in non-academic activities as a result of being an athlete); *see also* B. David Ridpath, *It Is Time To Re-Frame College Athletes' Time Commitments*, FORBES (Jan. 26, 2016, 2:37 PM), https://www.forbes.com/sites/bdavidridpath/2016/01/26/it-is-time-to-re-frame-college-athletes-time-commitments/#5c47539abc62 (reporting that FBS football players spend, on average, 39 hours per week in athletic related activities, spending just as much time in the off-season as they do in season).

reported that athletics prevent them from taking desired classes.[34]

The legislative history also covers the financial repercussions of S.B. 206 in the state of California, highlighting however, that while possible loses could occur, the bill does not require College Athletic Departments to spend any extra money.[35] The University of California indicates that for its six Division I athletic programs and its one Division II athletic program, it requires one additional staff member to supervise compliance related activities, at a salary range of $150,000 to $200,000, for a total of $1 to $1.4 million for all seven athletic departments.[36]

Additionally, penalties estimated by the University of California and the California State University ranging from $175,000 to $5.3 million may be imposed by the NCAA as a result of California schools being forced to violate its bylaws in order to comply with state law.[37] Lastly, the Assembly Appropriation Committee stated that the California State University estimates revenue losses for being out of compliance with the

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[34] *See* S.B. 206, Mar. 11, 2019, *supra* note 25 (highlighting how student-athletes' athletic commitments dictate the courses they will be able to take, logically keeping them from more challenging or time-consuming classes that can ultimately enhance their education); *see also* Grasgreen, *supra* note 29 ("the NCAA is determined to graduate athletes at any cost, regardless of the quality of education they're getting … and that leads to major clustering [of athletes in certain majors] and devalued degrees").

[35] *See* S.B. 206, Apr. 30, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (Committee Report) (addressing potential financial changes that would arise as a result of the implementation of S.B. 206 such as staffing, fines, penalties, forgone revenue, and lost revenue); *see also* S.B. 206, Sept. 3, 2019, *supra* note 25 (Committee Report) ("SB 206 does not require colleges to pay or employ athletes and its provision do not put a cost on colleges); Brady McCollough, *News Analysis: What's Next For NCAA and College Athletics Now That SB 206 is Law?*, L.A TIMES (Sept. 30, 2019 5:40 PM), https://www.latimes.com/sports/story/2019-09-30/what-next-for-ncaa-college-athletics-now-that-sb-206-is-law ("[i]f there's one thing to understand about SB 206, it is this: College athletic departments will not have to spend an extra dime on athlete compensation because of this law").

[36] *See* S.B. 206, Apr. 30, 2019, *supra* note 35 (highlighting the fiscal repercussions of S.B. 206 collected by the Assembly Appropriations Committee); *See also* S.B 206, Sept. 30, 2019, *supra* note 26 (finding "[o]ngoing General Fund cost pressures to the University of California (UC), likely in the hundreds of thousands of dollars, for staff to ensure compliance and to manage procedures related to the bill's conflict of interest provisions").

[37] *See* S.B. 206, July 9, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (stating that "[t]he UC indicates that the total cost of the fines could range from $175,000 to up to $1,800,000, while the CSU estimates total fines from $525,000 to up to $5,300,000); *See also* McCann, *supra* note 4 (stating that the consequences of breaking California's state law are far more impactful and of consequence than breaking the NCAA rules, making it more likely that California schools will be forced to follow California's law, whether they agree with it or not).

NCAA that could go up to $3.3 million for a Division I school as well as systemwide revenue loses anywhere from $9 to $15 million.[38]

Lastly, because S.B. 206 requires that the Chancellor of the California Community Colleges convene a working group to review various athletic association bylaws regarding a student-athletes' use of their NIL for compensation, an additional $500,000 expense is created by this requirement of the statute as enacted.[39]

Due to the fiscal uncertainties to come, Governor Newsom signed S.B. 206 into law but stated that it should not become operative until January 1, 2023, in order to allow "ample time for colleges and the NCAA to prepare for [the] change," once again emphasizing its priority of collaborating with the NCAA.[40] The NCAA requested that California legislators postpone the bill and allow them to conduct their own internal review of the best way to change their bylaws while maintaining the student first model, however, California made it clear that they found it crucial to implement the change now rather than later.[41]

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[38] *See* S.B 206, Apr. 3, 2019, *supra* note 26 (highlighting that any amount of profit loss will vary between Division I and Division II schools); *See also* McCann, *supra* note 4 (highlighting NCAA president Mark Emmert's statement that S.B. 206 can potentially mean that California schools will no longer be allowed to participate in national championships, a restriction which would cost California schools millions of dollars in revenue).

[39] *See* S.B 206, *supra* note 1 (stating that although S.B. 206 as enacted does not apply to community colleges in California, the Chancellor of the community colleges in the state will have to report back to the California legislature on or before January 1, 2021, with its findings and policy recommendations for how community colleges should handle the student-athletes' use of their NIL); *See also* S.B. 206, July 11, 2019, Gen. Assemb., Reg. Sess. (Cal. 2019) (Committee Report) (stating the need for a "[o]ne- time General Fund costs to the CCCCO of about $500,000 to hire two limited-term staff to lead the name, image and likeness working group at the community colleges, convene the working group and write the [policy] report").

[40] *See* S.B. 206, Sept. 3, 2019, *supra* note 25 (Committee Report) ("a team contract of a postsecondary educational institution's athletic program entered into on, or after, January 1, 2023, shall not prevent a student athlete from using the athlete's name, image, or likeness"); S.B. 206, Apr. 3, 2019, *supra* note 36 (recommending that the implementation of S.B. 206 be delayed until January 1, 2023); *See also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (highlighting that California legislators aim to accomplish the success of S.B. 206 by collaborating with the NCAA and its partner schools).

[41] *See* Feinstein, *supra* note 15 (stating that the NCAA president suggested that "lawmakers should mind their own business and let the NCAA's 'rules-making process' work the problem out"); *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 ("the rules and policies of college sports must be established through the Association's collaborative governance system"); *But see Gov. Newsom Signs*

III. DISCUSSION

In the NCAA's letter to Governor Newsom, prior to the enactment of S.B. 206, the organization's Board of Governors alluded to S.B. 206 potentially being unconstitutional.[42] In the letter, the NCAA also attempted to persuade Governor Newsom against signing the bill by stating that California member schools could lose their eligibility to participate in NCAA championships since the bill would give them an unfair recruiting advantage over other member schools.[43] The NCAA's constitutional claims likely allude to a violation of the Commerce Clause of the United States ("U.S.") Constitution.[44] Senator Skinner, as co-writer of the bill, stated that S.B. 206 has been reviewed and deemed constitutional by various legal scholars.[45]

SB 206, the 'Fair Pay to Play Act', *supra* note 1 ("California leads the way [and]… [b]y restoring student athletes' rights, we've sent a clear message to the NCAA, our colleges, and the entire sports industry: Equity must be the overriding value").

[42] *See* Bumbaca & Berkowitz, *supra* note 6 (quoting the NCAA's language in the letter in which they contended that if the bill became law, "'it would result in (schools) being unable to compete in NCAA competitions'" and would be "'unconstitutional'"); *See also* Chiari, *supra* note 6 (explaining that while the NCAA is "working on allowing student-athletes to use their own likeness, it doesn't believe they should be paid to play … express[ing] its belief that the bill is 'unconstitutional'").

[43] *See* Timothy Z. LaComb & Jennifer M. Oliver, *California Fair Pay to Play Act FPTPA Sets off Bout with the NCAA*, NAT'L L. REV. (Oct. 5, 2019), https://www.natlawreview.com/article/california-s-college-athletes-may-profit-their-positions-kicking-national-wave-and (stating that because the enactment of S.B. 206 directly contradicts NCAA rules for amateurism, the NCAA will likely see a ban of California member schools as their solution to the conflicting law of California and the NCAA's own bylaws); *see also* McCann, *supra* note 4 (stating that "the NCAA would severely punish … school[s] [which] [risk] fa[cing] a range of potential sanctions including fines, loss of scholarships and ineligibility from postseason pay.").

[44] *See* S.B. 206, June 25, 2019, *supra* note 12 (acknowledging the Assembly Committee's comment that a "potential NCAA position would be that SB 206 is an unconstitutional interference with interstate trade and violates the First Amendment's Dormant Commerce Clause"); *see also* LaComb & Oliver, *supra* note 43 (stating how the NCAA will likely argue constitutionality issues on Dormant Commerce Clause grounds, a tactic with which they have had success in the past as it pertains to challenging state laws).

[45] *See* Nathan Fenno, *NCAA Warns California Bill That Would Allow College Athletes to be Paid is 'Unconstitutional'*, L.A. TIMES (Sept. 11, 2019, 10:51 AM), https://www.latimes.com/sports/story/2019-09-11/ncaa-fair-pay-bill-college-athletes-gavin-newsom (highlighting how prior to the enactment of S.B. 206, and in spite of the NCAA's threats, Senator Skinner made it clear that S.B. 206 was reviewed by experts and that it passed unanimously in the state's Assembly); *see also* LaComb & Oliver, *supra* note 43 (highlighting the legal challenges from both sides, that are to come, as a result of the enactment of S.B. 206).

A. The Commerce Clause

The U.S. Constitution gives the U.S. Congress the power to "regulate Commerce with foreign nations, and among the several states."[46] It is this power, reserved for Congress, that disallows individual states from improperly burdening or regulating interstate commerce.[47]

While the Commerce Clause only allows the federal government to regulate interstate commerce, "courts have understood a 'negative' or 'dormant' aspect to this restraint," known as the Dormant Commerce Clause.[48] To determine whether a state statute violates the Dormant Commerce Clause, courts apply a two-prong test.[49] The first prong is determining if the law, on its face, discriminates by benefiting in state businesses and burdening out of state businesses.[50]

The second prong asks whether a legitimate local interest exists in

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[46] U.S. CONST. art. I, § 8, cl. 3.

[47] *See* Chris Sagers, *Letter to Gavin Newsom in Reply to the NCAA: Constitutionality of California SB 206, the 'Fair Pay to Play Act'*, (Sept. 24, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460551 (explaining that federal courts with authority to interpret the Constitution have inferred that the language in Article I, Section 8, that states cannot improperly regulate or place a burden on interstate commerce because regulating interstate commerce among the states is reserved for the U.S. Congress); *see also* Larry Kramer, *The Power of Congress to Regulate Interstate Economic Competition*, FED. RSRV. BANK OF MINNEAPOLIS (June 1, 1996), https://www.minneapolisfed.org/publications/the-region/the-power-of-congress-to-regulate-interstate-economic-competition ("Article I, section 8 of the Constitution authorizes Congress to 'regulate Commerce ... among the several States,' and the Supreme Court has interpreted this clause expansively … defin[ing] commerce to include "every species of commercial intercourse.").

[48] *See* Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 95, 98 (1994) (stating that "[t]he Commerce Clause provides that '[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States' [and] … [t]hough phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect" (quoting U.S. CONST. art. I, § 8, cl. 3)); *see also* Andrew F. Adams, *It's Getting Hot in Here: California Senate Bill 1368 and the Dormant Commerce Clause*, 1 SAN DIEGO J. OF CLIMATE & ENERGY L. 287, 292 (2009) ("The dormant Commerce Clause is based on an interpretation of Article I, section 8 of the Constitution, which grants Congress the ability to legislate on interstate commerce.").

[49] *See* Adams, *supra* note 48, at 293 (stating that "Courts generally now apply a two-tiered test and take many relevant factors into the second tier."); *see also* Sagers, *supra* note 47 ("Courts customarily review dormant commerce clause questions in two steps.").

[50] *See* Oregon Waste, 511 U.S. at 99 (stating that discrimination "simply means differential treatment of in-state and out-of-state economic interests . . . ."); *see also* Adams, *supra* note 48 at 293 (explaining that "a court must decide whether a law is facially discriminatory, evidenced by a different standard for in- and out of-state businesses 'that benefits the former and burdens the latter.'").

passing the state law and if that interest outweighs any incidental burden on interstate commerce.[51] To answer this, the state law is put to the balancing test developed in *Pike*, where if "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[52]

Courts applying the *Pike* test examine: (1) whether alternatives exist that would "accomplish the state goal without imposing on interstate commerce," (2) "if it can be shown that there is a cheaper and easier way to remedy the target problem without burdening interstate commerce," and (3) "who the burden falls upon."[53]

The counterbalance to the incidental burdens on interstate commerce caused by the law is the interest to the citizens of the state where the law is passed.[54] As to this, courts ask if the law is "rationally related"

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[51] *See* Adams, *supra* note 48 at 293 (stating that "the court asks a second question, which is whether the law serves a legitimate local purpose and is applied in a rational manner; then the court must rule based on whether the regulation places an 'undue burden' on commerce"); *see also* Ethan Bauer, *Should College Athletes Be Paid for Their Names and Image?*, DESERET NEWS (Oct. 1, 2019, 7:41 PM), https://www.deseret.com/indepth/2019/9/19/20871318/college-athletes-paid-for-their-names-and-images-college-sports-terrelle-pryor-tattoogate ("SB 206 would be unconstitutional only if the burden on interstate commerce outweighs the benefits of the law.").

[52] *See* Pike v. Bruce Church, Inc., 397 U.S. 138, 142 (1970); *see also* Louis Cholden-Brown, *Missouri and Indiana Lay an Egg: Why the Latest Attempt at Invalidating State Factory Farm Regulations Must Fail*, 22 CHAP. L. REV. 161, 164 (2019) (explaining how courts have addressed the "legitimate state interest" aspect of the dormant commerce clause analysis).

[53] *See* Pike, 397 U.S. at 142 ("If a legitimate local purpose is found, the question becomes one of degree . . . the extent of the burden tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."); *see also* Adams, *supra* note 48 at 294 (stating that "In weighing the burden and benefits in the second part of the *Pike* test, courts examine many aspects of the law in question.").

[54] *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 385, 392–94 (1994) (holding that a local ordinance was not sufficiently demonstrated to be a legitimate local interest); *see also* Adams, *supra* note 48 at 296 ("In order give [*sic*] appropriate significance to the benefit, a court looks to whether the goal of the regulation is a 'legitimate local interest.'"); *see generally* Sagers, *supra* note 47 (explaining that if a law does not discriminate against out of state commerce, the next thing to examine is what the state's legitimate interest is and weigh that against the incidental, but non-discriminatory, burdens of the law on interstate commerce).

to the legislature's proclaimed goal in passing the law.[55] Finally, under the *Pike* test, courts examine the extent to which the state law would control or regulate activities that happen in other states as a consequence of the law, this is what is known as the law's "extraterritoriality."[56] It is important to note, as the showdown between the NCAA and California is just getting started, that state statutes frequently survive "the so-called *Pike* balancing test."[57]

In its letter to Governor Newsom, stating that the rules governing college sports should be determined internally by them, the NCAA was presumably alluding to the case *NCAA v. Miller*, where the Ninth Circuit found that a Nevada statute that regulated NCAA disciplinary affairs was in violation of the U.S. Constitution's Dormant Commerce Clause.[58]

1. *NCAA v. Miller* and the Commerce Clause

There, the Nevada statute required that any national collegiate athletic association provide due process to student-athletes or coaches at member schools, as well as to the institutions themselves, in any

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[55] *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352-54 (1977) (where the court found that a North Carolina legislation was not rationally related to its stated goal of promoting health and noted that the effect of the regulation, and likely its true goal, was to protect the in-state apple market and discriminate against the out of state one); *see also* Adams, *supra* note 48, at 296 (explaining that the *Pike* test also looks at how rationally related the state law is to the stated goal of the legislature as to prevent discriminatory regulations disguised as serving another goal like environmental or health needs).

[56] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583–84 (1986) (finding that where a New York law set liquor prices in the state based on the lowest price in a neighbor state, this incidentally affected what the prices were set at in those neighboring states, an impermissible regulation of interstate commerce); *see also* Adams, *supra* note 48, at 297 (explaining how courts looks to see if the state law, even if not discriminatory on its face, reaches beyond state lines and regulates or controls markets in other states, whether intentionally or not).

[57] Kate Konschnik, *Constitutional Issues to Consider in Clean Power Plan Compliance*, HARV. ENV'T L. POL'Y (Aug. 2016), http://eelp.law.harvard.edu/wp-content/uploads/CPP-Constitutional-Issues-Dormant-Commerce-Clause.pdf (explaining that as long as states create "a record establishing the net benefit of the law," then they can pass the *Pike* balancing test); *see also Pike*, 397 U.S. at 142 (creating the *Pike* test applied to balance a state's interest against the burden on interstate commerce).

[58] *See* Sagers, *supra* note 47 ("[w]hile it didn't mention the case by name, the NCAA presumably will rely heavily on a 1993 Ninth Circuit decision called NCAA v. Miller"); *see also* Nellie Drew, *NCAA v. California? There is Some Precedent*, UB L. SPORTS & ENT. F. (Oct. 1, 2019), https://ublawsportsforum.com/2019/10/01/ncaa-v-california-there-is-some-precedent/ ("The NCAA sought a declaratory judgment and injunctive relief on the grounds that the Nevada Due Process statute violated the Commerce Clause and the Contract Clause of the U.S. Constitution. Ultimately, the 9th Circuit agreed in *NCAA v. Miller . . .."*).

disciplinary proceedings.[59] The statute further prohibited any national collegiate athletic association from revoking a school's membership in the association.[60]

When the University of Nevada Las Vegas's ("UNLV") Athletic Department did not suspend coach Jerry Tarkanian as per the NCAA's request, the NCAA charged UNLV with multiple violations and UNLV invoked the Due Process requirements of the Nevada Statute.[61] In response, the NCAA sought a declaratory judgment and injunctive relief on the grounds that the Nevada statute violated the Commerce Clause of the U.S. Constitution, an argument with which the Ninth Circuit agreed, ultimately finding for the NCAA.[62] The Ninth Circuit found that the Nevada statute, at its core, regulated only interstate organizations such as national collegiate athletic organizations whose member schools are throughout the entire country.[63]

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[59] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 637 (9th Cir. 1993) ("In 1991, the Nevada legislature enacted [a] [s]tatute [requiring] any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural Due Process protections during an enforcement proceeding in which sanctions may be imposed."); *see also* Drew, *supra* note 58 (explaining that the Nevada statute was passed after a proceeding in the Nevada state court found that the University of Nevada Las Vegas Athletic "had not delegated power to the NCAA – despite the fact that Jerry's disciplinary process had been conducted by the NCAA" and therefore, the NCAA had not been rendered a state actor subject to due process).

[60] Nat'l Collegiate Athletic Ass'n, 10 F.3d at 637 ("[T]he [Nevada] [s]tatute prohibits an association from impairing the rights or privileges of membership of any institution as a consequence of any rights granted by [the] [statute]. [T]hus, the NCAA cannot avoid complying with the Statute by simply expelling its Nevada members."); *see also* Drew, *supra* note 58 (explaining how the Nevada statute aimed to hold the NCAA accountable by requiring it provide due process and further, it aimed to make sure that the NCAA could not avoid the statute by simply revoking membership to member schools in Nevada).

[61] Nat'l Collegiate Athletic Ass'n, 10 F.3d at 637 ("The [s]tatute provides that a state district court may enjoin any NCAA proceeding that violates the statutory provisions [of the Nevada statute]."); *see also* Drew, *supra* note 58 (explaining that UNLV's basketball program fell under NCAA scrutiny resulting in the issuing of a show cause order and the ordering of suspension of coach Jerry Tarkanian in order to avoid further sanctions, an order which UNLV was not thrilled with since it meant firing an iconic coach).

[62] Nat'l Collegiate Athletic Ass'n, 10 F.3d at 637, 638 ("The NCAA filed a complaint for declaratory judgment and injunctive relief … [they] also sought an order enjoining the application of the Statute to the infractions proceeding … It is clear that the [s]tatute is directed at interstate commerce and only interstate commerce."); *see also* Drew, *supra* note 58.

[63] *See* Nat'l Collegiate Athletic Ass'n, 10 F.3d at 638 ("[T]he [s]tatute regulates only interstate organizations which are engaged in interstate commerce, and it does so directly. In fact, it applies no such panoply of procedural rights to voluntary organizations which

The Ninth Circuit found that the Nevada statute violated the commerce clause in two ways.[64] First of all, the NCAA's goal is to a have a uniform set of rules for all its member schools all across the U.S., a task which the Nevada statute made impossible since the NCAA would have had to apply one set of guidelines in Nevada and a different set of guidelines elsewhere, no longer making their system a "uniformed" one.[65]

Furthermore, if the NCAA wanted to maintain uniformity, it would have had to apply the requirements of the Nevada statute to all member schools in every other state, an act which would have meant that the Nevada statute reached beyond Nevada state lines, and thus, interfered with interstate commerce.[66] The second way in which the Ninth Circuit found that the Nevada statute interfered with interstate commerce was by the way in which it prevented the NCAA from having uniform requirements across all states and from all member schools if more states decided to enact their own Due Process statutes.[67]

2. S.B. 206 and the Commerce Clause

Although the NCAA will likely heavily rely on the holding in *NCAA v. Miller* to say that S.B. 206 is just like the Nevada statute and

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operate wholly within the State of Nevada."); *see also* Drew, *supra* note 58 (explaining that *Miller* was decided based on the fact that the Nevada statute directly regulated conduct outside the state's boundaries).

[64] *See* Drew, *supra* note 58 (explaining the holding of the Ninth Circuit in *NCAA v. Miller*); *see also* Sagers, *supra* note 47 (laying out the elements required to show a violation of the Commerce Clause and providing an analysis of why the Ninth Circuit found in favor of the NCAA).

[65] *See* Nat'l Collegiate Athletic Ass'n, 10 F.3d at 638 ("The [Nevada] statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product."); *see also* Drew, *supra* note 58 (explaining the Ninth Circuit's holding that the Nevada statute impended one of the NCAA's main purpose of providing uniform regulation of intercollegiate athletics).

[66] *See* Nat'l Collegiate Athletic Ass'n, 10 F.3d at 639 (stating that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature" (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 335 (1989)); *see also* Sagers, *supra* note 47 (explaining that the Nevada statute regulated "the NCAA's internal operations, though it did its work in states other than Nevada" making that the reason it was found be in violation of the Commerce Clause).

[67] *See* Nat'l Collegiate Athletic Ass'n, 10 F.3d at 639 (explaining that "Nevada is not the only state that has enacted or could enact legislation that establishes procedural rules for NCAA enforcement proceedings"); *see also* Drew, *supra* note 58 (explaining that it would be impossible for the NCAA to comply with legislation from all different states if they each differed from one another, highlighting how two states had already enacted Due Process statutes that differed from the Nevada statute).

therefore in violation of the Commerce Clause, the two statutes are distinguishable in fundamental ways.[68]

First of all, the Nevada statute, as discussed above, directly regulated conduct outside of the states' boundaries, a direct violation of the Commerce Clause.[69] Contrastingly, S.B. 206 "imposes no obligations on the NCAA except to prohibit an injury it imposes on California persons that California has decided to disallow."[70] More specifically, California is merely just stopping the NCAA from continuing to profit from California athletes, who see none of that money; an injustice the NCAA has maintained for decades in the name of amateurism.[71]

Whereas the Nevada statute regulated the NCAA's procedures for disciplinary cases, forcing the NCAA to either change their entire procedure or create a different procedure for Nevada than for the rest of its member schools in other states,[72] S.B. 206 does not regulate the

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[68] *See* Drew, *supra* note 58 (explaining that the ruling in *NCAA v. Miller* meant that the NCAA, as a private entity, would be insulated from significant review unless federal legislation was passed); *but see* Sagers, *supra* note 47 (highlighting that S.B. 206 differs from the Nevada statute).

[69] *See* Sagers, *supra* note 47 (stating that S.B. 206 and *NCAA v. Miller* are not the same, adding that "SB 206 is consistent with the rest of the commerce clause caselaw"); *see also* Drew, *supra* note 58 (commenting that "the landscape of the current controversy," that is the controversy around S.B. 206, significantly differs from that which occurred in the 1980s with *NCAA v. Miller*, stating that this "may dictate a different result this time around").

[70] *See* Sagers, *supra* note 47; *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1:

> 'For decades, college sports has generated billions for all involved except the very people most responsible for creating the wealth. That's wrong.' Skinner said. 'With SB 206, a student athlete like Katelyn Ohashi will no longer be the only person on the planet denied the right to monetize 60 million YouTube followers.'

Id.

[71] *See* Sagers, *supra* note 47; *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (stating that "[t]he NCAA has known for decades that it operates an exploitative system"); *see also* Jenni Fink, *California Senator Undeterred by NCAA Threat Over Bill Allowing College Athletes to Sign Endorsement Deals*, NEWSWEEK (June 25, 2019, 10:02 AM), https://www.newsweek.com/ncaa-endorsement-deals-fair-pay-play-act-1445725 (explaining that former NCAA vice president and COO Daniel Boggan stated that the "NCAA failed to live up to the bylaw that assures those participating in athletics are treated equally to the rest of the student body").

[72] *See* Drew, *supra* note 58; *see also* Matt Brown, *Is NIL legislation Even Constitutional? What Happens Next? An Interview with Len Simon*, XTRA POINTS (Oct. 30, 2019), https://mattbrown.substack.com/p/is-nil-legislation-even-constitutional

NCAA's procedures in any state outside of California state lines.[73] Moreover, "it does not regulate play or any other rules or conduct outside California."[74] Additionally, the NCAA's argument that its goal of uniformity would be compromised by S.B. 206 and therefore, interstate commerce would be affected by the lack of uniformity in NCAA rules, is not a burden of "plausibly constitutional gravity."[75] This is especially true in light of the fact that college sports are not only regulated by the NCAA but also by many other conferences and sub-national organizations which often times, have rules that either overlap or are completely at odds and yet, the NCAA allows this.[76] Lack of uniformity in scholarship distribution is one of the aspects of college sports that already conflict between schools in different conferences and states.[77]

(explaining that the court in *NCAA v. Miller* ruled that "the Nevada law was so overreaching that, '[t]he NCAA cannot avoid complying with the statute by simply expelling its [Nevada] members'"); *see also* Sagers, *supra* note 47 (explaining that the Nevada statute "subjected the NCAA to a number of specific procedural obligations and provided judicial review for its decisions, wherever they would impose sanctions on persons in Nevada").

[73] *See* Sagers, *supra* note 47 (stating that S.B. 206 "does not regulate how the NCAA does anything in other states"); *but see* LaComb & Oliver, *supra* note 43 (stating that the NCAA will argue that S.B. 206 violates the commerce clause, claiming it will affect "interstate commercial activities that could be negatively affected by the bill, such as interstate game broadcasting, sales and shipping of collegiate apparel across state lines, and interstate travel of collegiate players and coaches").

[74] *See* Sagers, *supra* note 47; *see also* Brown, *supra* note 72 (explaining that Len Simon, who helped Senator Skinner with S.B. 206, stated that "California is not burdening interstate commerce, it is simply protecting its students and requiring its schools to act appropriately toward those students, even if that requires a showdown with the NCAA").

[75] *See* Sagers, *supra* note 47 (highlighting that the NCAA already allows discrepancies in rules amongst different states and different member schools); *see also* Bumbaca & Berkowitz, *supra* note 6 (quoting from the NCAA's letter to Governor Newsom where the NCAA stated that "[a] national model of collegiate sport requires mutually agreed upon rules").

[76] *See* Sagers, *supra* note 47 (explaining that "the NCAA already permits play between teams subject to different rules"); *see also* Chris Isidore, *College Athletes Finally Getting Some Cash*, CNN BUS. (Sept. 4, 2015, 1:43 PM), https://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/index.html (explaining that when the NCAA allowed stipends to be paid to student-athletes, "[t]he stipends, available at most of the country major sports programs, range[d] from about $2,000 to $5,000 a year, although some schools [] reportedly offer[ed] a few thousand more than that").

[77] *See The Difference in the College Division Levels*, NCSA, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last visited Nov. 27, 2019, 8:04 AM) (noting that athletic programs at Ivy League schools do not award academic or athletic scholarships); *see also* Sagers, *supra* note 47:

> [W]hen UC-Berkeley takes on Prairie View A&M in men's basketball this coming November, the Cal athletes will receive cash stipends of

Therefore, while it may very well be that regulating college sports is a 'national' endeavor in some sense, "'just because the economic market . . . is nationwide' does not mean that 'no State has the power to regulate it.'"[78]

In short, California's legislature has the right to do just that – legislate within its state lines[79] – and the NCAA, just the same, has the right to keep enforcing its no-pay scheme in every other state outside of California.[80] Also, the Ninth Circuit, providing binding authority for California which belongs to that circuit, has already recognized and decided that where a state regulates the way a product is produced or sold within that state's boundaries, it does not mean that it regulates, in any way, how that product is made elsewhere.[81] Although the NCAA's likely argument will rely on *NCAA v. Miller* and the Nevada statute at issue therein, that statute is simply not parallel to S.B. 206 because S.B. does not regulate

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> several thousand dollars per year, while the Prairie View athletes will not. Similarly, when the University of San Francisco women's soccer team took on Harvard on September 13th, by Ivy League rules none of the Harvard athletes received an athletic scholarship, while by West Coast Conference rules, the USF women received as many as 14 athletic
> scholarships.

[78] Sagers, *supra* note 47 (explaining that states still have the right to regulate aspects of markets which function on a national level); *see also* Brown, *supra* note 72 (stating Len Simon's opinion that "the states are on exceptionally strong ground with regard to their own state universities, and on pretty strong ground with regard to the privates" in case the NCAA argues that state's regulations of college sports violate the Commerce Clause).

[79] *See* Sagers, *supra* note 47 ("[f]ederal displacement of the state's own regulatory priorities should be especially disfavored where the federal and state goals are in harmony"); *see also* Brown, *supra* note 72 (explaining that if a school in South Carolina wants to allow their students to monetize their NIL and a school in Pennsylvania chose a different approach, although challenging for the NCAA, South Carolina and Pennsylvania both have the right to regulate how students are treated).

[80] *See* Sagers, *supra* note 47 ("[t]he NCAA will be just as free to restrict compensation outside California as it was before adoption of SB 206"); *see also* Brown, *supra* note 72 (stating that California is free to legislate, and the NCAA is equally free to do what it needs in response to state legislation).

[81] *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (stating that a statute is not "invalid merely because it affects in some way the flow of commerce between the States"); *see also* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 949–50 (9th Cir. 2013) (finding that California statute prohibiting sale of force-fed foie gras in California imposed no constraints on production or sale of the product in other states); Bauer, *supra* note 51 (comparing SB 206 to state minimum wage laws where "even if a company operates in multiple states, it still has to follow minimum wage laws state by state").

NCAA's activities in any other state.[82]

Likewise, California's goal, to afford student-athletes in the state the right to use their NIL, reflects a right that every single American citizen has, except student-athletes.[83] This state interest, short of the NCAA changing its bylaws to allow monetizing NIL by the student-athletes (which the NCAA has expressed is not a change it supports) cannot be accomplished in any other way.[84] In conclusion, S.B. 206's impact to the nation-wide regulation of college sports would be, at most, "small and incremental."[85]

IV. SOLUTION

Despite the NCAA's 100-year rhetoric that they hold the student-athlete's best interest in hand, their policies suggest otherwise.[86]

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[82] *See* Bauer, *supra* note 51 (noting that "the Nevada law struck down in Miller was much more extreme in its demands of the NCAA than SB 206"); *see also* Ted Tatos, *College Athletes Should be Able to Earn Money from Their Likeness*, AM. PROSPECT (Sept. 16, 2019), https://prospect.org/education/college-athletes-should-be-able-to-earn-money-from-their-lik/ (explaining that the holding in *Miller* is of small relevance to S.B. 206).

[83] *See Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (stating that "all other college students, from music majors to computer science and engineering students, have the right to make money from their name, image, and likeness … with SB 206 … a California student athlete" will be able to do the same); *see also* Cholden-Brown, *supra* note 51 (explaining that the legitimate government interest claimed need not be explicitly mentioned in the legislation being challenged as a determination of its legitimacy).

[84] *See NCAA Responds to California Senate Bill 206*, *supra* note 42 (highlighting the NCAA's believe that student-athletes should not get paid to play and that "allow[ing] an unrestricted name, image and likeness scheme" would be harmful); *see also* Darren Heitner, *Darren Heitner: Stop Saying That the NCAA is Now Allowing College Athletes to Profit*, SPORTSPRO (Oct. 30, 2019), http://www.sportspromedia.com/opinion/ncaa-nil-fair-pay-to-pay-college-athlete-heitner (explaining that although recently, the NCAA has released a statement that some indicates their approval of pay for play, "[t]here are many … issues with the release and language that signals this will not be a plan to allow college athletes to be compensated whatsoever"); Sagers, *supra* note 47 (explaining that because no federal statute opposes what California's S.B. 206 does, a "federal displacement of the state's own regulatory priorities should be especially disfavored where the federal and state goals are in harmony").

[85] *See* Sagers, *supra* note 47 (explaining that careful thought should be afforded to this question because at first glance, it may seem as if there is a burden but in reality, it is no more than a small and incremental burden which does not outweigh California's legitimate interest); *see also* Bauer, *supra* note 51 (explaining that Erwin Chemerinsky, dean of UC Berkeley School of Law and a renowned Constitutional Law scholar stated that "[t]he benefits are large in allowing athletes to benefit from their name and likeness," and that he "[does] not see the burden on interstate commerce").

[86] *See* Feinstein, *supra* note 15 (explaining that for the NCAA, "the sky *is* falling" after the enactment of S.B. 206 because it "is the beginning of the end for the NCAA's archaic and patently unfair rules on 'amateurism'"); *see also* Brian Rosenberg, *How the N.C.A.A.*

However, California has begun the conversation by enacting S.B. 206 and showing that there could be a way forward that benefits the student-athletes and preserves college athletics.[87] To get ahead of other states enacting their own NIL laws, or in the alternative, to prevent those states from creating their own conferences altogether (a possible result if the NCAA revoked their membership) the NCAA should change its bylaws to allow student-athletes around the country to monetize their NIL and retain agents.[88]

Although the NCAA released an announcement on October 29, 2019, titled "Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities," this 100-year overdue commencement of a "process" is as misleading and underachieving as it sounds.[89] Instead, the NCAA's approach should be to deregulate the student-athletes' use of their NIL altogether because it had no business regulating these rights to begin

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Cheats Student Athletes, N.Y. TIMES (Oct. 3, 2017) (explaining how the NCAA operates an "illegal economy … behind high-level college athletics" and has done so for a long time).

[87] *See Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (explaining that "[w]ith SB 206, California is… blazing a trail nationally, leading a movement to restore the rights of college students"); *see also* Feinstein, *supra* note 15 (explaining that despite the NCAA's rhetoric, the changes S.B. 206 imposes are not the end of college sports and highlights how similar changes have successful occurred in professional sports before).

[88] *See* Drew, *supra* note 58 ([g]iven the exponential increase in the number and value of media platforms since the era of Tark the Shark, it is now very feasible for the Pac-12, or at least the California members of it, to create a separate, independent athletic association"); *see also* Ed O'Bannon & Michael McCann, *The Fair Pay to Play Act and Dignity in College Athletics*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college-basketball/2019/10/02/fair-pay-play-act-ed-obannon-college-athletics (explaining that California's Fair Pay to Play Act is "only radical because it seeks to change the antiquated world of American college sports" but highlighting that it's the right move towards restoring student-athlete's dignity and transparency in college sports).

[89] *See Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (highlighting the NCAA working group's response to the student-athletes use of their NIL); *see also* Heitner, *supra* note 85

> In its first bullet point surrounding 'principles and guidelines', the NCAA originally says that college athletes should be treated similarly to non-athlete students. However, the sentence concludes with, 'unless a compelling reason exists to differentiate'. It is almost as if the NCAA does not think you will read beyond eight words in a sentence. The carve-out makes it so that the entire sentence means nothing, since the NCAA will be able to come up with 'compelling reasons' to differentiate between college athlete rights and non-athlete rights.

with.[90]

As to the unfounded argument that S.B. 206 will destroy the student-first model of collegiate sports: securing student-athletes the same rights as all other students does not make the student-athletes less of students than the athletes are in the current system.[91] Allowing students to benefit from the use of their NIL will likely incentivize student-athletes to stay in school and finish their degrees rather than feel the pressure of going pro or quitting school to provide for themselves and, oftentimes, their families.[92] Moreover, allowing student-athletes to monetize their NIL on a national level does not cost the NCAA or the member schools anything and will create good faith with the student-athletes, who are ultimately essential to the execution of the NCAA's goals.[93]

Also, the NCAA's claim, that the lines between professional and amateur sports will be blurred, is inconsistent with their current treatment of student-athletes who are, for all purposes, treated and expected to

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[90] *See* Feinstein, *supra* note 15 (explaining about the NCAA that "leaving the issue in the hands of college presidents and administrators is a little bit like accepting the word of the fox who says he'll protect the henhouse")*; see also* Heitner, *supra* note 85 (highlighting how despite the NCAA's belief that only it should have a say in the NIL conversation, "states and the federal government should not stop fighting for college athletes to be able to actually profit off of their publicity rights").

[91] *See Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (explaining that "[o]ur colleges and universities should no longer treat student athletes as chattel, but as the valued individuals they are. This measure will afford them the right to control their name, image, and likeness"); *see also* Joseph Nardone, *Gene Smith Admits NCAA Will Have A Problem If States Pass Bills Similar To California SB 206*, FORBES (Sept. 17, 2019, 9:40 AM), https://www.forbes.com/sites/josephnardone/2019/09/27/gene-smith-admits-ncaa-will-have-a-problem-if-states-pass-bills-similar-to-california-sb-206/#13034d531c01 (quoting from Governor Newsom's statement stating that "this notion of student-athlete – give me a break. These guys are full time, expected full-time to sacrifice themselves for athletics").

[92] *See* O'Bannon & McCann, *supra* note 88 (explaining that if student-athletes "sign[] an endorsement deal[s]," they will likely want to attend class and be incentivized to do so because if their grades fall, "they will be kicked off the team and they'll be lose their endorsement deal" and additionally, the mere access to endorsements while in college will further incentivize staying in college); *see also Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, *supra* note 1 (SB 206 will also benefit women athletes, who have far fewer professional sports opportunities than men).

[93] *See* O'Bannon & McCann, *supra* note 88 (explaining that S.B. 206 "wouldn't take a dime away from schools … and instead, [i]t's all about the relationship between college players and companies that would like to pay for their endorsement or sponsorship"); *see also* Gutierrez & Fenno, *supra* note 3 (noting that S.B. 206 does not place any monetary burden on the universities).

perform as unpaid professionals.[94] Compensation of student-athletes under the table has happened for decades,[95] and student-athletes often do not even realize they are breaking NCAA rules because of the absurdity of NCAA restrictions regarding payment of student-athletes.[96] These "under the table" dealings lead to misrepresentation, deceit, distrust, and harm to the integrity of the NCAA, the universities, and the student-athletes themselves.[97] Allowing student-athletes to retain agents and to monetize their NIL would put more power in the student-athletes' hands, enabling them to make educated decisions and be more transparent, while maintaining the integrity of the universities and of college sports.[98]

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[94] *See* Nardone, *supra* note 91 ("[c]oaches … [and] [a]dvertisers make millions and millions of dollars on the likeness of these athletes that give up, in some cases, their bodies and their health for their sports. I guess that's one version of a romanticized system. That's the current system"); *see also* Mario Koran, *'Game Changer': Inside the Fight to End Exploitation of Athletes at US Colleges*, GUARDIAN (Oct. 5, 2019, 1:00 PM), https://www.theguardian.com/sport/2019/oct/04/ncaa-california-law-pay-student-athletes-colleges ("[t]he fact is that college athletics is a professional enterprise in every way except that the athletes aren't getting paid.").

[95] *See* John Feinstein, *The NCAA is Still Whining About Pay to Play. It's Too Late for That*, WASH. POST (Oct. 16, 2019, 12:57 PM), https://www.washingtonpost.com/sports/colleges/the-ncaa-is-still-whining-about-pay-to-play-its-too-late-for-that/2019/10/16/d128a2c8-f01e-11e9-8693-f487e46784aa_story.html ("[L]et's not kid ourselves … [t]hese guys are pros-in-training just like minor league athletes, [e]xcept they aren't getting paid — unless it's under the table"); *see also* Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, RINGER (Oct. 11, 2019, 6:55 AM), https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players (explaining how "[i]n 1929, the Carnegie Foundation published a report about schools providing financial inducements to players through schemes including no-show jobs and disguised booster funds").

[96] *See* Bauer, *supra* note 51 (explaining "Tattoogate," the scandal where Ohio State football players "had exchanged rings, trophies, patches, jerseys and autographs for free/discounted tattoos and cash" because they legitimately thought that those items, which they had earned or created value for, were theirs to do whatever they wished with); *see also* Tynes, *supra* note 95 (explaining that UCLA star linebacker Donnie Edwards stated "I want to stress that I feel I did not do anything wrong" after he was suspended when someone bought him groceries following an interview in which he explained it was hard for student-athletes to buy food with just their scholarship money).

[97] *See* Bauer, *supra* note 51 (explaining the moment when an ex-NCAA rule enforcement agent realized that the NCAA rules on NIL were harmful after interviewing with a player who had received improper compensation and explained that he had done it to be able to make ends meet); *see also* Tynes, *supra* note 95 (explaining a 1995 UCLA linebacker suspension after someone bought him groceries following an interview in which the linebacker stated "how hard it is for student-athletes to buy enough food under the current scholarship system, and because we can't work during the year").

[98] *See* Bauer, *supra* note 51 (explaining that "Newsom also said this law balances the relationship between college athletes and their institutions — a re-calibration, he said, is long overdue"); *see also* Tynes, *supra* note 95 ("When there is a black market, it is

Continuing to deny student-athletes their value does not preserve amateurism, a concept which is arguably no longer exists given the huge value student-athletes create: instead it degrades college sports and this country's core beliefs of civility.[99]

The last issue raised by the NCAA as to why S.B. 206 is harmful is the unfair recruiting advantage schools in California will have over their counterparts in other states that cannot afford to monetize NIL.[100] If the NCAA changed its bylaws, in a meaningful way, to allow the free monetization of NIL, then all schools will be on a more even playing field.[101] An uneven playing field is not a California problem, it is an NCAA problem.[102]

Since the NCAA statement released on October 29th, it's clear that although the NCAA is working towards a solution, that solution will never

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often because the free market is restricted or unjust for those that may need it to work the most.").

[99] *See* Tynes, *supra* note 95 (explaining that the doomsday rhetoric that college sports will be over if student-athletes get paid has been proven untrue); *see also* Feinstein, *supra* note 95 (explaining that "[t]here are plenty of college athletes who get their degrees … [b]ut almost all of the best and most famous are training to be professional athletes," emphasizing why amateurism is not a real concept anymore and that student-athletes only attend college because they are required to by professional leagues).

[100] *See* J. Brady McCollough, *NCAA's Argument Against Fair Pay for Play Has no Merit and Week 3 Mismatches Prove it*, L.A. TIMES (Sept. 14, 2019, 7:33 PM), https://www.latimes.com/sports/story/2019-09-14/ncaa-competitive-balance-argument-fair-pay-to-play-law-california-gavin-newsom ("The NCAA's contention is that if programs or boosters could pay players their free-market value, the top talent would end up at the same schools … [but] [w]hat the NCAA neglected to mention is that there already is no competitive balance in college football"); *see also* Nardone, *supra* note 91 (stating that "[t]he gap between power programs and smaller universities happen to be in the hundreds of millions of dollars, sometimes even stretching into the billions," highlighting the fact that there's already an unfair balance to the NCAA's model).

[101] *See* Tynes, *supra* note 95 ("[t]hey have the power to give this right to every student-athlete across the entire U.S., and they should, and then there would be no arguments around one state having an advantage over another state"); *see also* Bauer, *supra* note 51 (stating that "if the NCAA adjusts its rules appropriately … there's no reason it should create competitive imbalance or alter the spirit of college sports").

[102] *See* Bauer, *supra* note 51 (explaining that "[t]he chorus of backing from athletes and in mainstream media has been deafening in comparison to the opposition"); *see also* McCollough, *supra* note 101 (stating that there has never been competitive balance in college football, as demonstrated by the fact that "just about every weekend of the fall — the best teams in the nation beat the heck out of their opponents" and proposing that removing the constraints from player earning could actually be the catalyst for actually creating the competitive balance).

be what California and many other states want.[103] The NCAA is still holding onto the belief that it should regulate the use of NIL.[104] However, an organization created with student-athletes' best interest in mind should prioritize what's best for student-athletes instead of putting hurdles on them by creating restrictive bylaws that take away the student-athletes' power, dignity, and identity.[105] If the NCAA changes its bylaws and treats student-athletes with basic dignity, fans will still watch games, schools will still make a lot of money, and the scales of justice will tip in the right direction.[106]

V. CONCLUSION

The NCAA's contention that paying student-athletes is not in the student-athletes' best interests is an unsubstantiated and self-serving argument.[107] An organization aimed at protecting student-athletes should

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[103] *See* Bauer, *supra* note 51 (stating that "there's little optimism" as to the NCAA's working group on NIL); *see also* Barry Svrluga, *NCAA Should Hear State Lawmakers' Message on Amateurism Instead of Fighting it*, WASH. POST (Sept. 20, 2019, 4:06 AM), https://www.washingtonpost.com/sports/colleges/ncaa-should-hear-state-lawmakers-message-on-amateurism-instead-of-fighting-it/2019/09/19/128b3ee8-dae8-11e9-a688-303693fb4b0b_story.html (explaining that "the NCAA, in its infinite wisdom, is fundamentally opposed to the idea [of] [paying] [student-athletes] even as it has appointed a panel to study whether it's time to allow athletes to profit from their talents").

[104] *See* Bauer, *supra* note 51 (explaining that the NCAA should take the public's opinion seriously and meaningfully produce change because if it does not, its "inaction when facing a swelling tide of opposition will lead to its demise"); *see also* Nardone, *supra* note 91 (explaining that the NCAA, "currently battling enemies on multiple fronts, including a new bill proposed from a senator in Brooklyn, it's still defiant when discussing any form of evolution to its model").

[105] *See* Bauer, *supra* note 51 (explaining that S.B. 206 restores "a civil right that all other people have [and] goes far beyond big sneaker deals … [it] relates to the way that anyone can use their name, image and likeness, including in generating extra income through social media platforms, through self-employment and a variety of other means"); *see also* Svrluga, *supra* note 103 ("Right now, the NCAA is in complete control, just as it likes to be. But the state legislatures, they're coming. Why not get ahead of this, NCAA? A novel idea: Stay out of court, and just do the right thing.").

[106] O'Bannon & McCann, *supra* note 88; *see also* Feinstein, *supra* note 15 ("All professional sports now have free agency. There are more teams than ever and more money than ever. College sports will continue to thrive. It will just do so in a manner that is finally fair and just to the athletes.").

[107] *See* Koran, *supra* note 94 (stating "[t]wo words … [p]ower and money … that's the entire reason they're trying to obstruct progress … [i]t's as simple as that … [t]heir arguments are completely bogus, unfounded and based on fearmongering" referring to the NCAA's opposition to S.B. 206); *see also* O'Bannon & McCann, *supra* note 88:

not generate billions when some student-athletes go to bed hungry.[108] California is only the first domino to fall in what will be one of the biggest shifting of the scales in this country.[109] The NCAA has had 100 years to care about the student-athletes it is tasked with protecting, and has failed to do so, but California is no longer waiting and others will follow.[110]

> It isn't just black men who stand to gain from the Act. Think of the college athletes, men and women of all races and ethnicities, who play sports where there aren't pro leagues waiting for them. Or those athletes who might be special college players but who won't make it to the next level. Their moment to capitalize is while they're in college. Not later on.

[108] *See* Bauer, *supra* note 51 (stating that "[m]ore than ever, observers are asking questions about how the business model of college sports has evolved without enough regard for sharing the spoils with the athletes"); *see also* Tynes, *supra* note 95 ("Seton Hall University pollsters conducted a national survey of 714 Americans and found that sixty percent of respondents were in favor of athletes being paid for their NIL, with thirty-two percent rejecting it"); Koran *supra* note 94 (explaining that in 2014, a star basketball player from Connecticut told media that he often went to bed hungry).

[109] *See* Tynes, *supra* note 95 (explaining that members of the U.S. Congress and presidential candidates are interested in expanding the conversation on college sports rules to the federal level); *see also* Svrluga, *supra* note 103 (stating that "the current system is broken and outdated; it needs fixing and modernization … [and] State houses are starting to line up to get it done").

[110] *See* Bauer, *supra* note 51 (explaining that S.B. 206 will "initiate dozens of other states to introduce similar legislation [and] [l]awmakers in Florida, Colorado and New York, among others, have [already] proposed or are planning to propose similar laws"); *see also* Tynes, *supra* note 95 (stating that "[i]n the weeks after the passage of SB 206, legislators in at least nine states have started preparing similar bills).

THE BOSTON FEE PARTY: HOW PROFESSIONAL ATHLETES SHOULD USE THEIR NETWORKS TO STAND UP AGAINST THE JOCK TAX

By: Niko Tsiouvaras

Introduction

December 16, 1773 – American colonists symbolically protested against the British tyranny by throwing 342 barrels of tea into the harbor at Griffin's Wharf in Boston, Massachusetts.[1] Britain had enacted a series of taxes on the American colony in the 1760s to offset its large debt, beginning with the Stamp Act and the Townshend Acts and ultimately leading to the Tea Act.[2] Led by John Adams and the Sons of Liberty, the colonists initiated their first major act of defiance against British rule by throwing more than 45 tons of tea overboard, rallying around the slogan "No taxation without representation."[3] Once the British retaliated, all thirteen colonies joined the fun, and the American Revolution was born.[4]

Similarly, today's highest-performing athletes face an abridgment of their natural liberties: taxation without representation through the means of a "jock tax." Jock taxes are a "specific application of the general rule that income is taxed where it is earned."[5] Local governments tax a player's income derived from his service within their district, including salary, performance bonuses, and deferred compensation.[6] This is calculated based on one of two measures: duty days or games played, with nearly all jurisdictions opting for duty days after recent court holdings.[7] However, no two states calculate a duty day the same way.[8] Additionally, some states have reciprocity agreements which can save money on taxes but also

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[1] History.com Editors, *Boston Tea Party*, HISTORY (July 30, 2019), https://www.history.com/topics/american-revolution/boston-tea-party.
[2] *Id.*
[3] *Id.* The demonstration was peaceful, as nobody was hurt and the only property damaged was the tea and a padlock – the rebellions even swept the ships when they were done.
[4] *Id.*
[5] Jared Walczak, *Is Pittsburgh's Jock Tax Discriminatory?*, TAX FOUNDATION (Nov. 8, 2019), https://taxfoundation.org/pittsburgh-jock-tax/.
[6] Nick Overbay, *A Uniform Application of the Jock Tax: The Need for Congressional Action*, 27 MARQ. SPORTS L. REV. 217, 223 (2016).
[7] *Id.* at 223–225. "Duty Days" is calculated by multiplying the player's annual income by the percentage of duty days spent in the jurisdiction, and "Games Played" is calculated by multiplying the player's annual income by the percentage of games played in the jurisdiction.
[8] *Id.* at 237.

require additional money spent on a specialized CPA.[9] Things are more complicated for international athletes with a US-source income, as accountants must determine what is US-source income as well as navigate a complicated network of treaties with foreign countries.[10]

States that have implemented such tax schemes are able to secure substantial sums of income from people who have no power to influence the legislative process in those states.[11] While states do have the right to tax income earned in their state by nonresidents,[12] the jock tax defies economic – and occasionally Constitutional – principles. Jock taxes place an immense burden on players, whose tax returns can be as thick as "a Bible."[13] This is not as big of a problem for the most successful athletes, but it does pose quite a significant burden on lesser-paid and minor league athletes.[14] Additionally, the tax affects coaches, trainers, and other personnel as well.[15] Local governments are also starting to realize that esports is becoming a sizeable industry that can help stuff its coffers, increasing the complexity of compliance in an business with little central governance.[16] As such, the

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[9] K. Sean Packard, *Income Taxes For Pro Athletes Are Reminder Of How Complicated U.S. Tax Code Is*, FORBES (Apr. 18, 2017, 9:20 AM), https://www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/#e78834b411e8; *see infra* note 15.

[10] Robert W. Wood, *Supreme Court Hands Athletes and Entertainers Win Over Jock Tax*, FORBES (Nov. 10, 2015, 11:51 AM), https://www.forbes.com/sites/robertwood/2015/11/10/supreme-court-hands-athletes-and-entertainers-win-over-jock-tax/#15efc05756b6; Internal Rev. Serv., *Publication 515 (2020), Withholding of Tax on Nonresident Aliens and Foreign Entities*, IRS.GOV., https://www.irs.gov/publications/p515.

[11] Vvargas, *"Jock Tax" Hangs Over NBA Finals*, AMERICANS FOR TAX REFORM (June 16, 2016, 10:46 AM), https://www.atr.org/jock-tax-hangs-over-nba-finals?amp.

[12] Overbay, *supra* note 6, at 222.

[13] Steven Kutz, *This is what a pro athlete's tax return looks like*, MARKETWATCH (Aug. 29, 2016, 9:51 AM), https://www.marketwatch.com/story/the-jock-tax-and-why-a-professional-athletes-tax-form-can-be-as-big-as-a-bible-2016-07-27.

[14] Walczak, *supra* note 5.

[15] Ryan Prete, *"Jock Tax" Poses Financial Burden for NFL Non-Players*, BLOOMBERG TAX (Sept. 10, 2019, 2:40 PM), https://news.bloombergtax.com/daily-tax-report-state/jock-tax-poses-financial-burden-for-nfl-non-players. It is estimated that taxes owed to certain states could cost less than $100 while a CPA specializing in multistate filing could cost more than $1500.

[16] Ellen Zavian, *For esports players and leagues, the tax man cometh*, THE WASHINGTON POST (Jan. 24, 2020, 5:27 PM PST), https://www.washingtonpost.com/video-games/esports/2020/01/15/esports-players-tax-man-cometh/. Issues arise related to players competing in person at an event compared to at home, whether advertisement money is taxable, and whether teams should withhold taxes as an entity.

sports world should collectively dump Gatorade into the halls of local governments and the courts in an effort to reach a better system.

This article seeks to provide athletes a guideline on how to best reduce the burden imposed by complying with each state's jock tax. The lens is primarily through the perspective of the NHL but should be applied across the board. Part II provides a background on the creation and implementation of jock taxes. Part III offers solutions for athletes to combat the harmful effects of the jock tax. Part IV provides an outline of how leagues, teams, and agents can work together to mitigate the harmful effects of the jock tax. Lastly, Part V offers a brief conclusion.

History of the Jock Tax

Jock taxes have been around since the 1960s but have experienced a meteoric rise in popularity since 1991 after what became known as "Michael Jordan's revenge."[17] When Michael Jordan's Bulls beat the Lakers in the NBA Finals, the state of California responded by imposing taxes on Jordan and the Bulls for their days spent in California.[18] Illinois in turn retaliated with a bill that levied a tax on any athletes hailing from jurisdictions that taxed its athletes.[19] Currently, twenty-seven states host professional sports teams, and twenty-two of them, along with nine cities, have enacted some form of a jock tax.[20] Cities that have jock taxes include Pittsburgh, Philadelphia, St. Louis, Columbus, and previously Cleveland.[21] Florida, Washington, Nevada, Tennessee, Texas, and Washington D.C. do not have a jock tax.[22]

Jock taxes can take many forms. As a result of efforts of the Federation of Tax Administrators (FTA) in the 1990s, all states have now

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[17] Brittany Benson, *Breaking Down the "Jock Tax"*, H&R BLOCK (Feb. 4, 2016), https://www.hrblock.com/tax-center/income/wages/the-jock-tax/. See also Overbay, *supra* note 6, at 220.
[18] Benson, *supra* note 17.
[19] *Id.*
[20] Jeff Fannell, *Hockey Players Settle Jock Tax Dispute*, JEFF FANNELL & ASSOCIATES (July 7, 2015), http://fannell.com/hockey-players-settle-jock-tax-dispute/ (Las Vegas acquired the Golden Knights after this article was written so the count is adjusted from twenty-six to twenty-seven); *see also* Martin J. Greenberg, *Jock Tax*, THE LAW OFFICE OF MARTIN J. GREENBERG (Mar. 6, 2015), http://www.greenberglawoffice.com/jock-tax/.
[21] Andrew Cohen, *Some Cities Now Charge A 'Jock Tax,'* ATHLETIC BUSINESS (Sept. 2001), https://www.athleticbusiness.com/some-cities-now-charge-a-jock-tax.html; *see also* Fannell, *supra* note 20.
[22] Prete, *supra* note 15; *see also* Greenberg, *supra* note 20.

adopted the duty days method of calculating income, although not all cities followed suit until recently.[23] States may still vary
greatly in how they apply the tax. For instance, in California, resident athletes have their contracts taxed at the state rate while non-residents are taxed based on duty days.[24] This is pretty typical of jock tax regimes, but what is unusual is the marginal rate, topping out at a whopping 13.3%.[25] Athletes on California teams sign up for this when they sign with the team but is an unpleasant surprise for players on other teams. States can also attach special provisions to the tax. For example, Illinois's jock tax is retaliatory in that it only applies to athletes whose jurisdictions tax Illinois athletes.[26] Similarly, Wisconsin imposes a jock tax, but it does not apply it to athletes who are residents of states sharing an income tax reciprocity agreement, which include Illinois, Michigan, Indiana, and Kentucky.[27]

Local governments draw their power to tax nonresidents ultimately from the Constitution but intermediately from a pair of 1920 Supreme Court decisions.[28] Jock taxes have not always experienced smooth sailing. The first major instance came in 2015 as a result of Cleveland's jock tax, which was struck down in two separate cases.[29] In *Hillenmeyer v. Cleveland Board of Review*, the court concluded that the games played model of calculating income violated the Due Process Clause because the method does not properly allocate taxable income in proportion to where it was earned.[30] The court found that a football player would be taxed by

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[23] Overbay, *supra* note 6, at 234. Massachusetts was the last state to switch to the duty days method in 2002.

[24] George Skelton, *Capitol Journal: Bryce Harper will save tens of millions by spurning the Dodgers and Giants*, LOS ANGELES TIMES (Mar. 7, 2019, 12:05 AM), https://www.latimes.com/politics/la-pol-ca-skelton-income-tax-20190307-story.html.

[25] *Id.*

[26] Benson, *supra* note 17.

[27] Greenberg, *supra* note 20.

[28] Overbay, *supra* note 6, at 218–220. .[28] In *Schaffer v. Carter*, an Illinois resident owned property in Oklahoma and was accordingly taxed on the income earned from those properties. 252 U.S. 37, 45 (1920). The tax overcame Constitutional challenges related to due process, the Equal Protection Clause, and the Privileges and Immunities Clause. *Id.* at 52–53, 55–56. .[28] The Court upheld the tax because Oklahoma did not transcend its power to tax derived from its jurisdiction and because the tax did not have a "more onerous effect" on nonresidents compared to residents. *Id.* at 53, 55–57. That same year in *Travis v. Yale & Towne Manufacturing Co.*, the Supreme Court affirmed its *Schaffer* decision that a state which taxes the income of nonresidents "arising from business, trade, profession, or occupation carried on within its borders" is Constitutional so long as it does not violate the Fourteenth Amendment. *Travis*, 252 U.S. at 75 (1920).

[29] Overbay, *supra* note 6, at 234.

[30] 41 N.E.3d 1164, 1176 (Ohio 2015).

Cleveland for 5% of his total income earned under the games played approach but only 1% under the duty days approach, thus not accounting for time spent in practice, studying film, working out, etc.[31] The court re-emphasized the point that the games played method was unconstitutional in *Saturday v. Cleveland Board of Review* but also added that the tax was improper because it applied when Saturday did not even travel to the city of Cleveland for the game while he was rehabilitating an injury.[32] While the court's opinions are limited to football players, Steven Kidder, counsel for the NFLPA on behalf of Hillenmeyer and Saturday, believed that athletes from other professional sports would seek a refund from the city of Cleveland.[33] Additionally, the city of Cleveland determined to fix its jock tax to comply with the holdings.[34] Thus, Cleveland still has a jock tax in place, but the only difference is now it is based on duty days rather than games played, resulting in a lower bill for athletes.[35]

The following year, athletes attacked Tennessee's jock tax. Tennessee had implemented a flat tax of between $2,500–$7,500 per game for NHL and NBA players since 2009.[36] For some players, this meant that they would be paying more in taxes than they earned from playing in the game.[37] The tax did not apply to NFL players or non-player personnel of the Nashville Predators and Memphis Grizzlies.[38] The catch was that the tax, which basically just applied to athletes participating in Predators and Grizzlies games, went directly to the owners of the Predators and the Grizzlies rather than to state coffers.[39] After lobbying from both the NHLPA and the NBPA and staring down the likelihood of the tax being ruled unconstitutional, Tennessee decided to repeal the tax.[40] In a settlement with the unions, NHL players received $3.3 million (about half of the taxes

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[31] *See Id.* at 1176.
[32] 33 Ohio St.3d 528, 533 (2015).
[33] Jeremy Pelzer, *U.S. Supreme Court declines to hear Cleveland's jock tax lawsuit*, CLEVELAND.COM (last updated Jan. 11, 2019), https://www.cleveland.com/open/2015/11/us_supreme_court_declines_to_h.html.
[34] *Id.*
[35] Fannell, *supra* note 20.
[36] *Id.* However, NHL players only paid the tax for the first three years it was in effect because the NHLPA successfully negotiated a provision in the CBA where the league would pay for it. *Id.*
[37] Tim Griffin, *Spurs players among hundreds due for tax windfall with repeal of Memphis 'Jock Tax,'* SAN ANTONIO EXPRESS NEWS (May 31, 2016 11:27 AM), https://www.mysanantonio.com/sports/spurs/article/Spurs-players-among-hundreds-due-for-tax-windfall-7954586.php.
[38] Fannell, *supra* note 20.
[39] *Id*; *see infra* note 52.
[40] Fannell, *supra* note 20.

paid), and NBA players received $2.38 million (about a third of taxes paid).[41] Since then, Tennessee has not instituted another jock tax.

The following section outlines three of the potential remedies that athletes have at their disposal to fight the jock taxes that still stand.

Solutions

With jock taxes still on the books of many states and cities that host professional sports franchises, players can fight them in three ways: petition the courts to invalidate or modify the tax structures, petition Congress to create a uniform law regarding jock taxes, and petition local businesses to put pressure on legislators to reduce the harmful effects of the jock tax.[42]

A) Go to Court

Athletes have been able to successfully air their grievances through the judicial system.[43] Hillenmeyer and Saturday were able to claim a victory for all athletes, as the Cleveland jock tax was struck down and many athletes received refunds.[44] Additionally, athletes threatened a lawsuit in Tennessee before eventually settling for a refund of nearly half of the taxes paid.[45] However, invalidating every jock tax in all twenty-two states and nine cities that employ a jock tax would be time-consuming and expensive. Furthermore, it would create a patchwork solution as there is no guaranty that every state will reach the same conclusion – some may fully repeal, while others might model after Cleveland's court and only modify the existing tax structure.[46]

Once an athlete decides to shoulder the burden for his fellow athletes by bringing forward a lawsuit, he will still have to overcome several Constitutional challenges. The framework for constitutionality revolves around two questions: "[D]oes the Constitution require equal treatment of nonresidents and residents?" and "What is equal protection?"[47] An athlete may challenge equal protection under the Commerce Clause, the Equal

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[41] *Id*; Griffin, *supra* note 37.
[42] Overbay, *supra* note 6, at 231.
[43] *See Hillenmeyer*, *supra* note 30; *Saturday*, *supra* note 32.
[44] Fannell, *supra* note 20.
[45] *Id.*
[46] *See generally Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994).
[47] Overbay, *supra* note 6, at 225.

Protection Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause.[48] The test for determining the constitutionality of a state tax under the Commerce Clause is laid out in *Complete Auto Transit, Inc. v. Brady*,[49] essentially requiring the tax to be fairly apportioned, non-discriminatory, and have a "substantial nexus" to activity within the taxing state.[50] To be successful under the Equal Protection Clause, the athlete must pass the strict scrutiny test, which will likely be based on a the "rational basis" standard.[51] Because most courts will find a rational basis for most jock taxes (i.e. offsetting the costs of hosting the event, help pay for the arena, etc.), athletes will rarely be successful under this argument.[52] Lastly, the Privileges and Immunities Clause also protects against discrimination of nonresidents as opposed to residents.[53]

While not all jock taxes should be taken to court as the costs may outweigh the benefits, one that should is the city of Pittsburgh's.[54] "Pittsburgh applies its 1 percent earned income tax to athletes domiciled in the City of Pittsburgh, but instead of making the jock tax an extension of that tax, the municipal code applies a 3 percent 'nonresident facility usage fee' on nonresident athletes and entertainers. That's textbook discrimination."[55] This discrepancy creates nearly an additional $4 million in revenues for the city.[56] Indeed, two NHL players (Kyle Palmieri and Scott Wilson) along with MLB's Jeff Francoeur and the NHL, NFL, and MLB players' associations brought suit against the city in 2019.[57]

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[48] *Id.* at 226.
[49] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).
[50] Overbay, *supra* note 6, at 227.
[51] *Id.* at 228. Accordingly, the law must be "rationally related" to a "legitimate government interest."
[52] *Id*; *see also* Overbay, *supra* note 6, at 232 (stating that the funds from the Tennessee tax went to arena upgrades and funding other activities in the arena); Greenberg, *supra* note 20 (outlining a plan in Wisconsin to have the proposed tax help the Bucks pay for their own new stadium rather than passing it along to taxpayers).
[53] *Id.* at 229.
[54] Walczak, *supra* note 5.
[55] *Id.*
[56] *Id.*
[57] Michael McCann and Robert Raiola, *Explaining Pittsburgh's 'Jock Tax' as Athletes, Players' Unions Sue City*, SPORTS ILLUSTRATED (Nov. 27, 2019), https://www.si.com/nhl/2019/11/27/pittsburgh-jock-tax-scott-wilson-kyle-palmieri; *see generally* Complaint in Civil Action, Francoeur v. Pittsburgh, Pa. Ct. Com. Pl. (2019) (No. GD-19-015542), 2019 WL 5792747.

B) Go to Congress

Athletes may also seek to have jock taxes repealed by the legislature. Generally, this tactic has been largely ineffective without substantial pressure on the legislature.[58] Legislative action is technically what led to the repeal of Tennessee's jock tax, but that was mostly the result of the threat of a successful lawsuit.[59] Other efforts have not yielded much fruit. This course of action is best applied at the federal level, where a uniform structure would preempt the varying state approaches.[60] Ironically, as a result of the increased administrative burden on states rather than upon the request of athletes, Congress looked into drafting legislation that eased the burden on nonresidents.[61] However, the proposal, The Mobile Workforce State Income Tax Simplification Act of 2015, specifically excluded athletes and entertainers, violating the neutrality principle of taxation and furthering the selective enforcement of taxes against athletes.[62] The bill has been resubmitted several times but has never made it past the Senate.[63] It will not likely benefit athletes unless they win the support of the people and, then by extension, Congress.

All hope is not lost as sports franchises and players' associations have banded together over the issue previously and were successful to a degree.[64] In 1994, upon the request of the franchises and the unions of the major professional leagues, the FTA issued a report detailing the complications athletes face with complying with the different state income taxes.[65] The FTA put forth four alternatives of taxation designed to alleviate the athletes' struggles and requested that each state adopt the duty days method of calculating taxable income.[66] This effort was relatively successful as all states had followed the request by 2002, but it still did not address city jock taxes or substantially alleviate the administrative burden.[67] Lobbying Congress can be an important tool in athletes' arsenal, but it has not yet been properly leveraged.

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[58] Overbay, *supra* note 6, at 231.
[59] *Id.*
[60] *Id.* at 236.
[61] *Id.* at 232.
[62] *Id.* at 233.
[63] *S. 604: Mobile Workforce State Income Tax Simplification Act of 2019*, GOVTRACK (last updated Oct. 31, 2019), https://www.govtrack.us/congress/bills/116/s604/summary.
[64] Overbay, *supra* note 6, at 233.
[65] *Id.*
[66] *Id.* at 233–234.
[67] *Id.*

C) Go to Commerce

According to one professor, "only economic pressure can limit the imposition" of taxes on nonresidents.[68] Otherwise, states will continually shift larger portions of the burden onto nonresidents.[69] Some believe that legislatures will never take action because the income is too substantial.[70] Indeed, California raked in $229 million in 2013 from taxes on athletes.[71] The challenge of this solution lies in the fact that a group of nonresidents must unite and demonstrate that the tax actually causes economic harm to the taxing state.[72] The group must show that the tax is "higher than expected" and that it changes consumers' behavior enough to draw local interest in the tax.[73] This solution has been used in the past when an unusually high tax has been placed on hotels or rental cars.[74]

The sports industry is uniquely situated such that this solution could work. Nonresident groups usually fail because they do not have the economic effectiveness to produce change.[75] Sports, on the other hand, are highly visible and collectively organized as a unit, which makes them easier to tax but also makes it easier for them to show economic harm of the taxes. One study shows the far-reaching impacts of even a minor league hockey franchise on the city.[76] The Springfield Falcons of the American Hockey League have ten full-time employees and twenty-five part-time employees throughout the season.[77] The arena employs 130 part-time people on game nights.[78] The team spends $150,000 on local transportation and another $150,000 on media buys, as well as enlisting the services of numerous local medical providers.[79] Additionally, a local restaurant sees a sixty-five percent increase in sales on game nights and local hotels report 1,500 rooms booked by visiting teams each season.[80] This does not even factor in the

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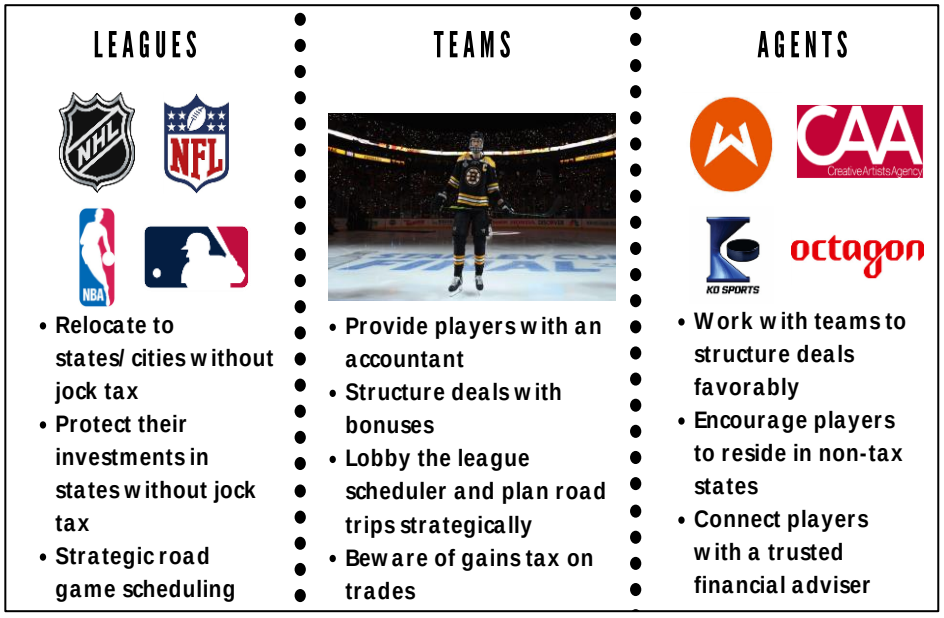
[68] David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 L. REV. MICH. ST. U. DET. C.L. 95, 107.
[69] *Id.*
[70] Overbay, *supra* note 6, at 232.
[71] Stephanie Loh, *Fun Facts About the Jock Tax*, SAN DIEGO UNION-TRIB. (Apr. 20, 2015, 6:30 AM), https://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html.
[72] Schmudde, *supra* note 68, at 109.
[73] *Id.*
[74] Overbay, *supra* note 6, at 232.
[75] Schmudde, *supra* note 68, at 109.
[76] *See generally* Sherianne Walker & Michael Enz, *The Impact of Professional Sports on the Local Economy*, W. NEW ENG. L. REV. 149, 150 (2006).
[77] *Id.* at 151.
[78] *Id.*
[79] *Id.* at 152.
[80] *Id.* at 152.

difficult-to-quantify benefits from press coverage of the city and state, the intangible societal benefits associated with having a fan base, and the benefits corporate partners and local sponsors receive.[81] Thus, the sports industry can use its position as a highly visible and integral part of the local economy to discourage the implementation of jock taxes.

Suggestions for Networks

The courts and Congress are certainly valid avenues for fighting the harmful effects of the jock tax, but athletes should focus primarily on working with the local economy to bring the issue to the attention of local lawmakers. The courts are best suited to provide immediate relief to obvious abuses, such as the Cleveland and Pittsburgh tax schemes, while the economic harm approach is the superior option to achieve a long-term, equitable outcome. Below are suggestions for how various members of athletes' networks can help influence this result.



Leagues

Leagues are in a unique position to work with local legislatures because of their power as an exclusive unit and their immense economic

[81] *Id.* at 151–54.

impact.[82] Leagues can wield that power in franchise relocation or expansion talks, in political lobbying action, and in the creation of the league schedule. While there are other important factors on the list to consider when scouting a new potential city for a franchise, leagues can use their negotiating leverage to extract tax considerations that are favorable to their players and teams.[83] This can apply when teams are looking to relocate or during expansion. An example of a relocation favorable to athletes is the Oakland Raiders moving from the state with the highest marginal tax rate to Las Vegas, where there is not state income tax.[84] Similarly, an example of an expansion team with favorable tax scheme would be the NHL's Vegas Golden Knights.[85] In fact, the tax considerations for players, staff, and investors made Las Vegas a better choice than Quebec, the other most likely candidate.[86] The NHL followed suit with its next expansion in Seattle, again passing over Quebec. Coincidentally or not, neither Seattle nor the state of Washington have a jock tax on the books to date.[87]

Leagues should also lobby other high-jock tax states that host franchises to eliminate their jock taxes to protect their investments.[88] In the case of the Golden Knights and soon to be of the Raiders, the state of Nevada is hurt by their rival states' jock taxes.[89] Watching other states enjoying the revenues of jock taxes, particularly ones that hurt its own citizens, in addition to the high cost of hosting sporting events (a benefit which citizens of rival states enjoy) incentivizes states like Nevada to retaliate with jock taxes of their own,[90] a situation where nobody wins. This effect has broader implications than just the sports world, as Constitutional restraints would require a state income tax on all residents, thereby hurting the local economy even more. It could also hurt Nevada's willingness to

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[82] CHARLES C. EUCHNER, PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM 169 (Johns Hopkins University Press 1993).

[83] Steven Kutz, *Why pro athletes may lose a fortune because of the new tax law*, MARKETWATCH (Dec. 9, 2018, 12:37 PM), https://www.marketwatch.com/story/why-pro-athletes-may-lose-a-fortune-because-of-the-new-tax-law-2018-12-06 [hereinafter MARKETWATCH].

[84] *Compare* Skelton, *supra* note 24 *with* Prete, *supra* note 15.

[85] Derek Helling, *NHL Expansion Made Easier By Tax Laws*, LAST WORD ON SPORTS (June 14, 2016), https://lastwordonsports.com/2016/06/14/nhl-expansion-tax-law-deciding-factor/.

[86] *Id.*

[87] Loh, *supra* note 71.

[88] *See* Helling, *supra* note 85.

[89] *Id.*

[90] Associated Press, *Washington state jumps on 'jock tax' train*, NBC NEWS (Jan. 30, 2006, 7:41 PM), http://www.nbcnews.com/id/11105047/ns/business-us_business/t/washington-state-jumps-jock-tax-train/#.XqB3Ni2ZPwc (quoting Rep. Chris Strow after proposing a jock tax bill as saying, "We have to protect our athletes.").

host a team long-term. This inequity is another reason why leagues should influence states against jock taxes. Another consideration is the effect on the free agent market,[91] potentially altering the parity of the league. While teams in states without a state income tax enjoy a competitive advantage by being able to attract players to their teams with deals that net a larger take-home pay, leagues as a whole are negatively impacted if teams are receiving competitive advantages resulting from a positive externality rather than through their own doing as this undermines the competitive system they have tried to create.

One other action the leagues should take is to strategically schedule road games. If road games in cities and states that levy a jock tax are scheduled with tax implications in mind, teams will be better able to plan their road trips in such a way to mitigate their players' and staff's tax burden. Doing so will also draw the attention of local businesses, such as hotels, restaurants, rental cars, etc., which will in turn make its way to the ears of legislatures.

Teams

Teams should keep jock tax implications in mind when providing services to their players, negotiating contracts with their players, working with the league scheduler, planning road trips, and trading assets with other teams. Teams often boast about amenities such as nice locker rooms, gyms, and facilities, but one extra benefit teams could provide is an accountant. Many athletes have never heard of the jock tax let alone filed a tax return before,[92] so an accountant can reduce a lot of the headache that comes with complying with each state's tax code.

When negotiating contracts with players, teams should help players by structuring the contracts such that they are heavily made up of signing bonuses when possible. The NHL-NHLPA Collective Bargaining Agreement (CBA) allows for signing bonuses,[93] and doing so can dramatically reduce the tax burden for players on teams in states with low

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[91] Stephanie Loh, *How taxes affect free agency in pro sports*, THE SAN DIEGO UNION-TRIBUNE (Apr. 20, 2015, 6:00 AM), https://www.sandiegouniontribune.com/sports/chargers/sdut-jock-tax-effect-free-agency-andrew-gachkar-2015apr20-story.html [hereinafter San Diego Union-Tribune].

[92] Kutz, *supra* note 13.

[93] *See e.g.*, COLLECTIVE BARGAINING AGREEMENT NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, 247 (2013) [hereinafter CBA].

or no state income tax.[94] Teams will only want to do this for players they are committed to and players they do not fear an injury – otherwise, they will be stuck paying deadweight guaranteed money.[95] Teams will also only want to do this when they have the proper cash flow, as salary cap dollars and cash are often dramatically different.[96] However, the more teams are able to give out signing bonus money, the more money players and teams will save in taxes. Teams have been turning to signing bonuses in recent years, particularly in cities where there are high jock taxes, where there is a larger market, and where the team was in a "win-now" mode.[97] Additionally, team negotiators in low- or no-jock tax states play up this fact during negotiations with free agents, highlighting the savings of signing with their team compared to others.[98] While the leagues should try to convince states to repeal their jock taxes, teams in the states lucky enough not to have them should take full advantage of that competitive edge. This will only intensify the discussion in the public and bring attention to the issue.

Teams should lobby league schedulers for more road games to be played in an order such that they can plan road trips to minimize the tax burden.[99] They should familiarize themselves with the tax code for the home states of each opposing team. Teams should strive to be in certain jurisdictions as little as possible.[100] For instance, a team with a three-game road trip from Los Angeles to Las Vegas to San Jose will want to hop on a plane right after the Los Angeles game and stay in Las Vegas as long as possible before heading to San Jose, to minimize its tax burden. This will have a harmful effect on California hotels and restaurants while boosting those in Las Vegas.[101] This is particularly true when traveling in and out of New York, as New York has been known to count a day as being in New York jurisdiction for tax purposes even if the team plane leaves at 12:01

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[94] Overbay, *supra* note 6, at 223.
[95] Travis Yost, *Signing bonus issue lingers over next NHL labour deal*, TSN (Aug. 7, 2018), https://www.tsn.ca/signing-bonus-issue-lingers-over-next-nhl-labour-deal-1.1154204.
[96] *See* Greg Wyshynksi, *Why this will be the 'worst possible offseason' for NHL free agents*, ESPN (Apr. 16, 2020), https://www.espn.com/nhl/story/_/id/29041445/why-the-worst-possible-offseason-nhl-free-agents.
[97] *See* Yost, *supra* note 95.
[98] *See* San Diego Union-Tribune, *supra* note 91.
[99] *Spittin' Chiclets Episode 261: Featuring Brian Burke*, BARSTOOL SPORTS (Apr. 13, 2020) (downloaded using iTunes) (explaining that teams can contact league scheduler to alter the playing schedule in its favor).
[100] *See* Packard, *supra* note 9.
[101] *See* Walker & Enz, *supra* note 76, at 151–52.

AM that day.[102] Teams should study their impact on the local economy, as Mr. Denver and Mr. Nikolis of the Springfield Falcons did, and communicate this information with businesses as well as local politicians.[103] Another impact worth investigating would be the effect on the local housing market, as players may choose where to live based on how the tax code draws its borders.[104]

Teams should consider tax implications when "wheeling and dealing." As a result of the recent tax reform, the scope of "like-kind" transactions exempt from gains taxes has been drastically reduced, meaning trades of players can now be taxable.[105] This raises issues in determining the fair market value of tradeable assets, which teams will have to navigate with the IRS.[106] It may also have an impact on trades of star players for prospects, as fair market value can be calculated based on prior year performance.[107] One such deal is the Arizona Coyotes' trade for Taylor Hall – his fair market value may be calculated as a substantial gain over the prospects and draft picks sent in return, resulting a large tax liability for the Coyotes.[108] However, some wonder how and whether this will be enforced given the law's uneven enforcement of antitrust law in sport.[109]

Agents

Functions of an agent can include negotiating employment contracts, obtaining endorsement contracts and other income opportunities,

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[102] Packard, *supra* note 9; *see also* David M. Kall, *Michigan: Detroit codifies jock tax that includes travel and practice time*, MCDONALD HOPKINS (Mar. 16, 2017), https://mcdonaldhopkins.com/Insights/March-2017/Michigan-Detroit-codifies-jock-tax-that-includes-t (adding that Detroit includes any days spent in the city, making it "unusual" but "fair").

[103] *See generally* Walker & Enz, *supra* note 76.

[104] *See* Kutz, *supra* note 13.

[105] Kari Smoker et al., *Pandora's Box Enters the Batter's Box: How the Tax Cuts and Jobs Act's Unintended Consequence Places MLB, and All North American Leagues, in Tax Chaos*, 26 JEFFREY S. MOORAD SPORTS L.J. 291, 294–95 (2019).

[106] *Id.* at 295.

[107] *Id.*

[108] Adam Gretz, *Devils trade Taylor Hall to Coyotes for draft picks, prospects*, NBC SPORTS (Dec. 16, 2019, 4:50 PM), https://nhl.nbcsports.com/2019/12/16/taylor-hall-trade-devils-coyotes/.

[109] Smoker, *supra* note 103, at 296. *But see* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 266–69, 278 (Carolina Acad. Press 2020) (noting that baseball's exemption that traces back to Justice Holmes' opinion in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), does not apply to other professional leagues operating interstate).

and managing a client's financials.[110] Agents should be aware of jock tax implications in contract negotiations, establishing a client's domicile, and surrounding a client with financial advisors. As the counterpart of team negotiators, agents should always try to bargain for signing bonuses, roster bonuses, or reporting bonuses to make up a majority of a player's salary because most states exempt signing bonuses from the jock tax.[111] For example, Mitch Marner was able to sign a six-year deal with the Toronto Maple Leafs with nearly $61 million of the $65.36 million contract in signing bonuses.[112] Additionally, John Tavares received 92% of his contract in signing bonuses, while Connor McDavid received $86 million, Steven Stamkos received $60 million, and Patrick Kane and Jonathan Toews received $44 million apiece in signing bonuses.[113] Furthermore, agents should warn players of the actual take-home net pay after taxes when a player is contemplating free agent offers. When Steven Stamkos signed his $8.5 million per year deal with the Tampa Bay Lightning in 2016, his take-home pay was nearly the same as a $10 million per year contract with Detroit, St. Louis, or either New York team would have been worth.[114] Agents should also be wary of client egos in seeking a larger contract "sticker price" even if the player's real income is less, and should discuss what the player values more – feeling validated compared to his peers or maximizing income.[115] If a player is not able to or does not want to sign with a team in a low- or no-state income tax state, the next best thing would be to sign with a team in a division whose teams play more games in states with low- or no-state income tax.[116] This will result in playing fewer road games in heavily-taxed jurisdictions, thereby reducing the overall tax burden on the player. One final area of contract negotiations agents should consider taxes in is in relation to performance bonuses. While the NHL does not allow performance bonuses for all players,[117] when negotiating such bonuses, agents should structure bonus provisions such that the wording is interpreted to result in as little tax liability as possible. Most states impose

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[110] RAY YASSER ET AL., *supra* note 109, at 517.
[111] Overbay, *supra* note 6, at 223; *see* CBA, *supra* note 93, at 248-49.
[112] Curtis Rush, *Maple Leafs' Mitch Marner: 'I had 13-Year-Old Kid Screaming At Me For Not Signing'*, FORBES (Sept. 14, 2019, 2:04 PM), https://www.forbes.com/sites/curtisrush/2019/09/14/leafs-mitch-marner-i-had-13-year-old-kid-screaming-at-me-for-not-signing/#2bfb282cb837.
[113] Yost, *supra* note 95.
[114] Times Staff Writer & Joe Smith, *Tax tricks: How an $8.5M Lightning contract keeping Steven Stamkos in Tampa is better than $10.5M to leave*, TAMPA BAY TIMES (Jan. 26, 2016), https://www.tampabay.com/sports/hockey/lightning/inside-the-money-matters-for-steven-stamkos/2262766/.
[115] *See id.*
[116] Loh, *supra* note 71.
[117] CBA, *supra* note 93, at 249.

taxes based on one's service in the jurisdiction.[118] As such, contract drafting could ensure that the bonus reflects all of the games played to achieve the bonus – not merely the game in which the mark is reached – or combining a benchmark bonus with a games-played bonus (*e.g.*, $100,000 if Player scores 20 goals and plays in 90% of the regular season games).[119]

Agents should advise their clients to take up residency in states with low or no state income tax if and when it makes sense for the client.[120] It may make more sense for younger players, but not for veterans concerned about uprooting their families.[121] This may help an athlete pay only marginally less money in taxes on contract-related revenue if he is able to meet the rigid domicile rules of the state,[122] but the major advantage of residing in a low- or no-tax state is that it will reduce the tax burden on endorsement deals and appearances.[123] This endorsement revenue is taxed by the athlete's home state across the board.[124] For clients for whom it does not make sense to do so or who do not wish to do so, an agent could look to set up a corporation that is incorporated in a low- or no-tax state, subject to a cost-benefit analysis of having such a corporation.[125] S-corps can be effective but also come at a high cost.[126] It will also serve as an incentive for states to lower their jock tax as they compete for the fees and taxes associated with businesses registering and incorporating in their state.[127]

Lastly, agents who do not have an accounting background should find a trusted financial advisor to whom to refer their clients.[128] Athletes and coaches are often unable to minimize their tax burden on their own,[129] so a fiduciary is often necessary. An agent should always counsel a client to be fully compliant with the tax code, and every citizen should pay all

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[118] Overbay, *supra* note 6, at 223.
[119] This last construction can also help save a bonus should the season be cut short due to a strike, lockout, pandemic, etc.; *see also* Ind. Code Ann. § 6-3-2-2.7 (West 2020) (noting that signing bonuses will count towards taxable income unless three specific conditions are met). Therefore, it is important to make sure to check for such conditions in the most relevant jurisdictions to the athlete.
[120] *See* MARKETWATCH, *supra* note 83.
[121] *Id.*
[122] *See* Packard, *supra* note 9.
[123] *See* Overbay, *supra* note 6, at 223.
[124] *Id.*
[125] MARKETWATCH, *supra* note 83.
[126] *Id.*
[127] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 6 (Harvard Univ. Press 1991).
[128] *See generally* Times Staff Writer & Smith, *supra* note 114.
[129] Kutz, *supra* note 13.

taxes owed. However, it is generally believed that the cutoff for filing in every state is having an income over $100,000 – less than that and states do not receive enough to justify enforcement.[130]

Conclusion

In the big picture, taxes are but one aspect,[131] but their impact on members of the sporting community is significant. Athletes, coaches, trainers, and staff are all affected by the jock tax. While the courts are a proper venue for immediate relief of obvious abuses as in Cleveland and Pittsburgh and while a uniform tax structure on the national scale would alleviate much of the burden, jock taxes appear to be here to stay until local communities convince their representatives to repeal them. Athletes must use their networks—consisting of their respective leagues, teams, and agents—to mitigate their tax burden, in terms of both dollars and time.[132] Although many citizens will not feel sorry for athletes who make millions, every member of society is entitled to fair treatment.[133] It is also important to remember that not every athlete affected makes more money than the average American, as there are plenty of minor league players and staff at all levels that suffer the consequences of jock taxes.[134] Athletes may not make any friends with local businesses of visiting cities, but working with them to demonstrate sport's impact on the economy is the best way to grab local legislatures' attention. Perhaps then the local businessmen will join in with the athletes in dumping Gatorade in protest of the jock tax regime.

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[130] Prete, *supra* note 15.

[131] MARKETWATCH, *supra* note 83.

[132] *See* Paul Mueller, *Adam Smith on Public Policy: Four Maxims of Taxation*, LIBERTARIANISM.ORG (Jan. 4, 2016), https://www.libertarianism.org/columns/adam-smith-public-policy-four-maxims-taxation (discussing in addition to that policy should be convenient for the taxpayer, it should also be also limit deadweight loss and be proportional to the benefits received from society). Jock taxes go against Adam Smith's maxim in that they cost athletes a lot of time and money to file, they increase society's deadweight cost by hurting local businesses, and they exceed a value proportional the benefits athletes receive from the locales taxing them. *See id.*

[133] Fannell *supra* note 20 (noting that other professionals like salespeople and lawyers are not subject to such taxes). Additionally, one cannot argue that governments should not fund stadiums and then also argue in favor of jock taxes. Such a system would shift all of the cost onto players. One could make an argument now that millionaire players bear much of the cost through jock taxes, giving billionaire owners a substantial break. However, if this were not the case, it would discourage owners from making investments, which in turn would lessen the opportunity for athletes to make a salary as professional athlete in the first place.

[134] *See* MARKETWATCH, *supra* note 83.

CLOSING THE GAP BETWEEN COPYRIGHT MANAGEMENT INFORMATION AND METADATA: A CRITICAL ANALYSIS OF SECTION 1202 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT AND A PROPOSAL FOR SOUND RECORDING STANDARDS

By: Haley Bridget McCullough

Abstract

"Music metadata" is virtually any of type of content electronically embedded in a digital audio file and may include information that identifies various rightsholders of a copyrightable sound recording, such as producer(s) and performer(s). A standardized system for music metadata does not exist, and instead music industry stakeholders devote significant resources to maintain redundant and incongruent databases. As a result, licensees expend significant effort in tracking copyright holders and licensors risk inadequate protection and potential loss of royalties. Music metadata overlaps with copyright management information (CMI), which is information conveyed with a copyrighted work. For example, music metadata includes information about a song such as song title, artist name, and copyright owner, which are all forms of CMI as defined in section 1202(c) of the DMCA. However, the definition of CMI is not tailored to music or sound recordings. As a result, the majority of case law interpreting CMI is in the context of pictorial works such as photographs and drawings. This Article proposes an amendment to section 1202 of the Digital Millennium Copyright Act (DMCA), which protects CMI from falsification, removal, or alteration. The draft legislation seeks to amend section 1202 so that artists can reasonably assert claims against those who willfully falsify, remove, or alter CMI from their digital audio file metadata. The proposed legislation asserts three major principles for regulation: 1) CMI standards for sound recordings in the format of digital audio files; 2) rebuttable presumption of defendant's knowledge and intent under section 1202(a) and 1202(b); 3) registration of payment, ownership, and descriptive metadata for sound recordings with the U.S. Copyright Office.

INTRODUCTION

Under the U.S. Copyright Act, sound recordings and musical compositions are considered two separate works.[1] A sound recording is defined as "works that result from the fixation of a series of musical, spoken, or other sounds but not including sounds accompanying a motion picture or other audiovisual work."[2] For example, an audio recording of a person playing an instrument, singing a song, reading a book, or hosting a podcast are all sound recordings.[3] On the other hand, musical compositions refer to the music (melody, rhythm, and/or harmony expressed in a system of musical notation) and the accompanying words (lyrics) themselves.[4] For copyright purposes, authors of a musical composition can be different than the authors of a sound recording.[5] Composers, lyricists, and songwriters are authors of a musical composition, while performers, producers, and sound engineers are authors of a sound recording.[6] Musical compositions are generally in the form of print or digital sheet music, while sound recordings are strictly fixed in a "phonorecord."[7] A phonorecord is a term that refers to any type of object that may be used to store a sound recording, including digital formats such as MP3 and Waveform Audio File Format (WAVE/WAV) files.[8]

The scope of this Article will address only sound recordings that are derivative works of underlying musical compositions.[9] For example, the sound recording of "We Found Love" by Rihanna refers to the recording itself fixed as an audio file, whether it be in MP3 format in iTunes or WAV format in Spotify.[10] There are at least three "authors" of the sound recording: singer Rihanna (performer), DJ Calvin Harris (producer), and Alejandro Barajas (recording engineer).[11] This information is commonly known as "music metadata," "sound recording metadata," or "song file

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[1] U.S. COPYRIGHT OFFICE, CIRCULAR 56A COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUNDS RECORDINGS 1 (2019).
[2] 17 U.S.C. § 101 (2010).
[3] U.S. COPYRIGHT OFFICE, *supra* note 1.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See* 17 U.S.C. § 101 (2010).
[9] U.S. COPYRIGHT OFFICE, *supra* note 1.
[10] Frequently Asked Questions on *Spotify for Artists*, https://artists.spotify.com/faq/mastering-and-loudness#how-does-spotify-process-my-audio-files (last visited May 26, 2020).
[11] RIHANNA, *We Found Love, on* TALK THAT TALK (Def Jam Recordings 2011).

metadata," and is typically embedded in the code of the audio file. It is essential that this information is properly stored in the file upon creation and distribution, so that authors are recognized, have their rights protected, and receive adequate compensation.

For purposes of this Article, music metadata can generally be divided into three categories: payment, descriptive and ownership. Payment metadata refers to reference numbers that help catalogue and track music so it can be sold or licensed and help track particular songs once they have been sold.[12] Common music identifiers include the International Standard Recording Code (ISRC) and the International Standard Music Work Code (ISWC). ISRCs are unique reference numbers embedded as a digital thumbprint to track royalty payments of sound recordings.[13] ISRCs are applied to the specific and individual sound recordings performed by an artist and are usually imprinted during the mixing/mastering stage. Recent evidence suggests that ISRCs are the most comprehensive set of track-level global identifiers used in the music industry.[14] Each individual track receives its own ISRC, meaning that a new ISRC would be issued for each re-mix, edit, or new version of a recording.[15] On the other hand, ISWCs identify the author of the underlying work and are applied to a single musical work.[16] In the case that a different version of a song is recorded over a number of years, the same ISWC is applied to any sound recording which incorporates the same underlying composition.[17] Descriptive metadata is the information about a file that enables identification and discovery through searching and browsing,[18] and is presented in a variety of levels and detail.[19] It can include various information such as song title, album, release date of the track, musical genre, album art, and lyrics.[20]

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[12] Michael Reed, *Harmonizing the Liner Notes: How the USCO's Adoption of Metadata Standards Will Improve the Efficiency of Licensing Agreements for Audiovisual Works*, 18 CHI.-KENT J. INTELL. PROP. 23, 32 (2019).
[13] *Id.*
[14] Michael D. Barone et al., *GRAIL: Database Linking Music Metadata Across Artist, Release, and Track*, PROCEEDINGS OF THE 4TH INTERNATIONAL WORKSHOP ON DIGITAL LIBRARIES FOR MUSICOLOGY 2 (2017).
[15] Frequently Asked Questions on *ISRC*, CONNECTMUSIC.CA, https://connectmusic.ca/isrc/isrc-application-form/frequently-asked-questions.aspx (last visited May 19, 2020).
[16] Reed, *supra* note 12, at 34.
[17] *Id.*
[18] NATALIA MINIBAYEVA & JOHN W. DUNN, A DIGITAL LIBRARY DATA MODEL FOR MUSIC, 2ND ACM/IEEE-CS JOINT CONFERENCE ON DIGITAL LIBRARIES 154, 154-5 (2002).
[19] Sherry Vellucci, *METADATA FOR MUSIC: Issues and Directions*, 46 FONTES ARTIS MUSICAE 205, 207 (2020).
[20] Reed, *supra* note 12, at 30.

Ownership metadata refers to the authors who contributed to the copyrightable song recording, including producer(s) and performer(s) names. Payment, descriptive, and ownership metadata are essential to identifying rights holders of a sound recording.

Metadata is often entered incorrectly, misplaced, or discarded in the distribution or reselling process– in its simplest terms, this is referred to as what is known as the "metadata problem" currently facing the music industry. [21] Because there is neither a universal standard nor a comprehensive cataloguing system for verification of music metadata, stakeholders in the music industry devote significant resources to maintaining redundant and inconsistent databases for organizing metadata.[22] For example, Apple Music and Spotify each have their own set of rules for storing song file metadata.[23] According to a report issued by the U.S. Copyright Office (USCO), licensees expend significant effort attempting to identify particular sound recordings and tracking down copyright owners. [24] In addition, royalty payments to licensors may be delayed, misdirected, or unpaid.[25]

The metadata problem is relevant to section 1202 of the Digital Millennium Copyright Act (DMCA), which protects the integrity of copyright management information (CMI). CMI, as defined by section 1202(c), is information conveyed with a copyrighted work. [26] Common types of CMI include title, author, and name of the copyright owner of a work. [27] Section 1202 protects CMI from being falsified, removed, or altered without permission of the author. Similarly, music metadata can also include title, author, and name of the copyright owner. Evidently, for this reason, the terms "CMI" and "metadata" overlap. However, these terms are rarely discussed in the same context, whether it be in the music industry or in case law. As a result, discrepancies between metadata in the music

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[21] Dani Deahl, *Metadata is the Biggest Little Problem Plaguing the Music Industry*, THEVERGE.COM, https://www.theverge.com/2019/5/29/18531476/music-industry-song-royalties-metadata-credit-problems (last visited May 19, 2019).
[22] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 124 (2015).
[23] Deahl, *supra* note 21.
[24] U.S. COPYRIGHT OFFICE, *supra* note 22, at 123.
[25] Deahl, *supra* note 21.
[26] Susuk Lim, *A Survey of the DMCA's Copyright Management Information Protections: The DMCA's CMI Lanscape After All Headline News and McClatchey*, 6 WASH J.L. TECH. & ARTS 297, 298 (2011); *see also* 17 U.S.C. § 1202(c) (1999).
[27] 17 U.S.C § 1202 (1999).

industry and CMI in case law have generated two diverging approaches to solving the issue.[28]

The first approach, or the music industry approach, is derived from the perception of metadata as a technical problem. A product of industry pressures, this approach embraces a wide range of technology-driven solutions.[29] The focus of this view is creating a universal database for metadata and setting standards to ensure that artists, mainly independent artists and up-and-coming musicians, are adequately compensated through royalties. This approach emphasizes the importance and transparency of streaming services such as Apple Music and Spotify and collection groups such as SoundExchange, which collect royalties from these streaming services. Music industry stakeholders, from data information scientists to musicians themselves, have contributed to the production of the well-developed literature and discourse addressing the various facets of the metadata problem.[30]

The second approach, or the legal approach, is derived from case law discussing CMI in the context of section 1202 and copyright fraud of creative works.[31] In the majority of cases discussing CMI, sound recordings are not at issue, but rather pictorial works, such as digital photographs and drawings. Because of the lack of case law discussing CMI in the context of sound recordings and music generally, a narrow view of CMI has developed in the courts and precedent has not developed for artists seeking protection for metadata in their sound recordings.

This Article seeks to merge technological solutions with legal protections in solving the metadata issue through an amendment to section 1202 of the DMCA. The goal of this amendment is to establish inherency of CMI in metadata so that artists can reasonably assert claims under section 1202. In addition, the amendment seeks to facilitate licensing transparency, efficiency, and equity. This Article is divided into five sections. The first section will give a brief overview of the two diverging approaches to the metadata problem as described above. The second section will address prior law protecting CMI before the DMCA, and the third section will discuss the

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[28] Stevens v. Corelogic, 899 F.3d 666, 672 (9th Cir. 2018).

[29] *See generally* FRANK LYONS ET AL., THE INTELLECTUAL PROPERTY OFFICE, MUSIC 2025 – THE MUSIC DATA DILEMMA: ISSUES FACING THE MUSIC INDUSTRY IN IMPROVING DATA MANAGEMENT (2019).

[30] *Id.*

[31] Russell W. Jacobs, *Copyright Fraud in the Internet Age: Copyright Management Information for Non-Digital Works Under the Digital Millennium Copyright Act*, 13 COLUM. SCI. & TECH. L. REV. 97, 143 (2012).

DMCA's formation in 1998. The fourth section will analyze the current state of liability under section 1202 and its applicability to sound recordings. Lastly, the fifth section will put forward three major principles of the draft legislation: 1) CMI standards for sound recordings in the format of digital audio files; 2) a rebuttable presumption of defendant's knowledge and intent under section 1202(a) and 1202(b); and 3) registration of payment, descriptive, and ownership metadata for sound recordings with the U.S. Copyright Office.

I. BACKGROUND: TWO DIVERGING APPROACHES

A. *Metadata in the Music Industry*

From a music industry perspective, many stakeholders have devoted significant resources to developing a standardized system of metadata. In an ideal world, a universal system would insure that metadata is distributed and entered accurately, not only for song discoverability, but for royalty purposes every time the song is played, purchased, or licensed.[32] In order to grasp modern technological approaches to fixing music metadata, it is crucial to discuss first the history and evolution of music metadata, along with the technological advances in standardizing music metadata.

i. *Brief History of Music Metadata*

The term "metadata" surfaced in the 1960s and is frequently discussed in literature on databases and library studies.[33] Although different disciplines debate about the definition of "metadata,"[34] the term can be generally defined as information that: 1) describes attributes of a resource; 2) characterizes resource relationships; 3) supports resource discovery management; and 4) exists in an electronic environment.[35] Historically, music metadata remained outside of the actual media (i.e. on the packaging).[36] For example, paratextual information such as artist name, album name, album cover art, production details, lyrics, and liner notes were found on record sleeves, jewel cases, or stamped onto plastic discs or

[32] Deahl, *supra* note 21.
[33] Jeremy Wade Morris, *Making Music Behave: Metadata and the Digital Music Commodity*, 14 NEW MEDIA & SOCIETY 850, 852 (2012).
[34] *Id.*
[35] Vellucci, *supra* note 19, at 207.
[36] Morris, *supra* note 33, at 853.

cassettes.[37] When the CD format was developed in the early 1980s, there was no need for metadata to be automatically embedded in the audio file because it was usually tied to the packaging.[38] However, as users began to convert CDs into digital files through the use of CD burners, technologies such as Compact Disc Database (CDDB) and ID3 tags emerged as practical solutions for music stripped of its paratextual information.[39] The CDDB server, a fully functioning system for ingesting, managing, and remotely replicating metadata, allowed users to essentially look up and download CD information over the Internet including artist name, track titles, etc.[40] If a CD was not recognized by a media player such as iTunes or a CD ripper, it could be manually added by the user. Today, CDDB is now known as Gracenote, which is used by iTunes and Windows Media Player.[41] For example, if CD is ripped into an iTunes library, Gracenote will automatically recognize and auto-fill artist names, track names, and album information; in addition, Gracenote's technology can detect the differences between radio edits and special remixes.[42]

With the expansion of technology in the digital music era, proper identification of metadata became increasingly important as users began using CD ripping technology to repackage downloaded music as if it was an authorized commodity (i.e. personally owned and for private use).[43] MP3 was the most popular file format for digital music offering near CD quality, and allowed sound recordings to be copied virally and perpetually without degradation in quality.[44] Individual users played an active role in copying and trading MP3 files across peer-to-peer (P2P) file sharing networks.[45] Users could easily copy and listen to MP3 files on computers and devices with no playback restrictions and could convert them to any other format without limitation.[46] Because different disc ripping software or bit-rate resulted in different copies of the same song, P2P networks were

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[37] *Id.*
[38] JEREMY WADE MORRIS, SELLING DIGITAL MUSIC, FORMATTING CULTURE 74 (University of California Press 2015).
[39] *Id.* at 67.
[40] *Welcome to the Gracenote Tech Blog*, GRACENOTE.COM, https://www.gracenote.com/welcome/ (last visited May 19, 2020).
[41] *Id.*
[42] *Powering the Apple Music Experience*, GRACENOTE.COM, https://www.gracenote.com/project/apple-music/ (last visited May 19, 2020).
[43] MORRIS, *supra* note 38, at 87.
[44] Ramon Casadesus-Masanell & Andres Hervas-Drane, *Competing against online sharing*, 48 MANAGEMENT DECISION 1247, 1249 (2010).
[45] *Id.*
[46] *Id.*

plagued with slightly different copies of the same file.[47] In addition, song metadata would often be missing and contain spelling ambiguities and mistakes, resulting in the incorrect identification of similar songs.[48] With MP3s shared freely between servers, holders of music copyrights were left uncompensated.[49] Between 1999 and 2005, the music industry claims that its revenues dropped at least 2 billion dollars.[50]

ii. *Evolution of Music Metadata*

The development of digital audio file formats naturally catered to and reflected the tastes of specific users. It is no surprise that these users at the forefront of music technology fell within a specific subset of young, tech-savvy individuals.[51] As a result, CDDB categories and ID3 tags were thus designed with and adapted to specific genres popular with these users, a majority of whom listened to pop, hip-hop, electronic, and rock genres.[52] While technology at the time was flexible enough to meet the needs of other genres, highly sophisticated subsets such as classical music were left behind. For example, classical music presents fundamental information challenges that do not apply to other genres. [53] It requires specific metadata fields like composer, conductor, orchestra, and soloist (as opposed to a standard format of artist, song title, and album).[54] To complicate matters further, unlike other genres, classical music is generally written in movements (collections of smaller compositions), and encompasses hundreds of years' worth of music, many thousands of composers and performers, and very similar titles.[55] As a result, major streaming platforms including Apple Music and Spotify inadequately identify and categorize classical music metadata. In response, other streaming services such as IDIAGO have developed to focus entirely on classical recordings and more

[47] MARIE-FRANCINE MOENS ET AL., MINING USER GENERATED CONTENT 85 (CRC Press 2014).
[48] *Id.*
[49] Casadesus-Masanell, *supra* note 44, at 1249.
[50] Kenneth Long, *The Riaa's Case Against Ripping Cds: When Enough Is Enough*, 11 HOUS. BUS. & TAX L. J. 173, 176 (2011).
[51] MORRIS, *supra* note 38, at 79.
[52] *Id.*
[53] *Id.*
[54] Janelle Varin, *iTunes Metadata and Classical Music: Issues and Solutions for Crowdsourced Metadata in iTunes*, 69 THE SERIALS LIBRARIAN 70 (2015).
[55] Anastasia Tsioulcas, *Why Can't Streaming Services Get Classical Music Right?*, NPR MUSIC, https://www.npr.org/sections/therecord/2015/06/04/411963624/why-cant-streaming-services-get-classical-music-right (last visited May 28, 2020).

complex metadata schemes.[56] With the evolution of metadata catered to specific genres of music, the metadata problem is certainly amplified in some genres over others.

iii. *The Modern "Metadata Problem" and Technological Advances in Standardizing Music Metadata*

With metadata perceived as largely a technical problem, the music industry and technology sector (*i.e.*, information science, computer science, etc.) have collaborated to generate almost entirely technology-driven solutions.[57] These solutions address the recurring issues of inaccurate or missing metadata,[58] separate and redundant databases for storing and maintaining metadata, and the general lack of knowledge of metadata.

Inaccurate or Missing Metadata. In attempt to solve issues of inaccurate or missing metadata, various organizations have created metadata style guides to assist in harmonizing the consistency of metadata standards. The Music Business Association, a non-profit dedicated to the promotion of music commerce nationwide, published a "Music Metadata Style Guide" to ensure that labels and label aggregators conform to a common set of metadata entry rules. The guide provides an approach to the nuances associated with messaging the core components of sound recordings to "digital merchants," a broad term referring to an online/mobile service or e-store that displays and provides digital music content to end-users/fans/consumers.[59] The guide provides the opportunity to work with common naming conventions and data entry standards to avoid past pitfalls.[60] For example, the guide explains that artist name spelling should remain consistent for all content and provides examples of the various ways an artist name can be spelled incorrectly (See Appendix A).[61]

Furthermore, the style guide ensures that users are following the Digital Data Exchange (DDEX) standard to upload and manage their music catalogs on digital retailers.[62] DDEX is an international standards-setting organization that develops digital music delivery standards which enable

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[56] IDAGIO, https://about.idagio.com/ (last visited May 19, 2020).
[57] LYONS, supra note 29, at 120.
[58] Deahl, *supra* note 21.
[59] MUSIC BUSINESS ASSOCIATION, MUSIC METADATA STYLE GUIDE 4 (2015).
[60] *Id.*
[61] *Id.*
[62] *Music Biz and DDEX Offer Metadata Style Guide*, MUSICONNECTION.COM, https://www.musicconnection.com/music-biz-ddex-metadata-guide/ (last visited May 19, 2020).

companies to communicate information along the digital supply chain more efficiently.[63] With a focus on the music industry, the organization is comprised of leading media companies, music licensing organizations, digital service providers, and technical intermediaries.[64] Music streaming services such as Amazon, Apple, Pandora, and Spotify all use a version of the DDEX Release Notification Standard for the receipt of data.[65] The standard ensures that the metadata within music catalogue files is standardized and easily searchable for digital music consumers.[66] The standard provides a suite of messages and file formats (e.g. XML) that enable "release creators" (usually record companies) to inform music streaming platforms about releases in a uniform way.[67] For example, the "DDEX Release Notification Implementation Starter Guide" puts forth a structural overview of the DDEX XML structure (see Appendix B).[68] In this structure, a sound recording is referred to as a "Resource" and would be formatted within the <ResourceList> element.[69] According to the DDEX standard, the duration of the performance and territory-specific metadata (i.e. territory code) are required (see Appendix C).[70] On the other hand, information such as title, artist name (and their role), name of additional contributors, name of the label, remastered date, genre information, and copyright information are not required (see Appendix D).[71] The guide serves as one way music stakeholders can understand and utilize key input fields. However, important identifying information such as title and artist name are not required by the standard, so it is left to the discretion of release creators to include the information as elements in the DDEX XML specification.

Separate and Partially Redundant Databases. Private databases of sound recording metadata maintained by music industry stakeholders, including streaming platforms and collection societies (i.e. American

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[63] *Frequently Asked Questions*, DDEX.NET, https://ddex.net/implementation/frequently-asked-questions/ (last visited May 19, 2020).
[64] *Id.*
[65] DDEX, *Current Members*, DDEX.NET, https://ddex.net/membership/current-members/ (last visited May 19, 2020).
[66] MUSIC BUSINESS ASSOCIATION, DDEX RELEASE NOTIFICATION STANDARD STARTER GUIDE FOR IMPLEMENTATION 5 (2016).
[67] *Electronic Release Notification Message Suite Standard*, KB.DDEX.NET, https://kb.ddex.net/display/ERN37/Electronic+Release+Notification+Message+Suite+Standard (last visited May 19, 2020).
[68] MUSIC BUSINESS ASSOCIATION, *supra* note 59 at 58.
[69] *Id.* at 61.
[70] *Id.* at 62.
[71] *Id.*

Society of Composers, Authors, and Publishers), do not have compatible cataloguing systems due to a lack of standardization and registration.[72] To complicate matters further, works compiled by these private entities are derived from multiple sources – professional licensing agencies, publishers, record labels, and artists themselves, each of which may have unique methods for collecting, organizing, and displaying metadata.[73] The U.S. Copyright Office notes that the independent label community is especially vulnerable to the metadata problem because it is more difficult to identify lesser-known artists without accurate data.[74] In attempt to solve the problem of separate and redundant databases, Congress created SoundExchange, a non-profit organization responsible for administering statutory licenses for sound-recording copyrights.[75] In 2016, the organization launched a search tool database that allows a user to look up an ISRC by artist name, track title, year of recording, and version (e.g. radio edit, acoustic).[76] However, like other databases, it has solved only one facet of the problem. The search tool database does not account for artists who have not registered their song with an ISRC, nor does it have a means of reconciling other recognized codes used to identify sound recordings, such as ISWCs.[77]

General Lack of Knowledge of Metadata. In attempt to solve issues of the general lack of knowledge metadata, startup businesses have created user-friendly applications for artists. For example, SPLITS, a mobile application, tackles the issue from a distribution standpoint by allowing collaborators to generate, sign, and split agreements clarifying individual contributions to a track.[78] Session, a Swedish tech start-up, launched Creator Credits, a platform which enables music creators to assign credits in the studio at the point of creation and automatically supply those credits 'downstream' to managers, record labels, publishers, performing rights

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[72] Reed, *supra* note 12, at 44.
[73] *Id.*
[74] U.S. COPYRIGHT OFFICE, *supra* note 22, at 125.
[75] Eduardo Loret de Mola, *SoundExchange Explained*, MUSIC BUSINESS JOURNAL, http://www.thembj.org/2015/10/soundexchange-explained/ (last visited June 13, 2021).
[76] Glenn Peoples, *SoundExchange Debuts Search Tool for Song Codes*, BILLBOARD.COM (March 8, 2016), https://www.billboard.com/articles/news/6898444/soundexchange-isrc-tool.
[77] U.S. COPYRIGHT OFFICE, *supra* note 22, at 125.
[78] *See* SPLITS, http://splits.createmusicgroup.com/ (last visited May 19, 2020); *see also* Tatiana Cirisano, *New SPLITS App From Create Music Group Aims to Solve Songwriting Disputes*, BILLBOARD.COM (May 8, 2019), https://www.billboard.com/articles/business/8510558/create-music-splits-app-solve-songwriting-disputes.

organization, distributors, and streaming platforms.[79] The metadata travels with the song in DDEX RIN format and is assembled with ISRCs, ISWCs, Interested Party Information (IPI), International Performer Number (IPN), and ISNI identifiers.[80]

While startups and metadata style guides attempt to present a comprehensive and sophisticated solution to challenges in an increasingly complex digital market, they attack different angles of the same underlying problem: lack of a centralized and standardized metadata system.[81] From a legal and policy perspective, courts have addressed the issue by analyzing CMI in relation to section 1202 of the DMCA and interpreting sound recording metadata more generally.

B. *Copyright Management Information Jurisprudence and Court Interpretation of Sound Recording Metadata*

Section 1202(c) protects eight distinct categories of information as CMI, if used in connection with "copies or phonorecords of a work or performances of displays of a work, including in digital form."[82] The categories include: (1) the work's title; (2) its author; (3) its copyright owner; (4) names of performers in non-audiovisual, non-broadcast work; (5) names of writers, performers, and directors in audiovisual, non-broadcast work; (6) terms and conditions for the work's use; (7) links, numbers, or codes referring to CMI; and (8) any additional information the Register of Copyrights may prescribe by regulation.[83] Since the point of CMI is to inform the public that a work is copyrighted and to prevent infringement, the identifying information must be accessible in conjunction with the work.[84] Current law defining CMI and its application in practice is "scant."[85] The majority of case law interprets CMI in the context of pictorial

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[79] Marc Schneider, *Session Partners With Pro Tools to Embed Writing Credits In Recording Files*, BILLBOARD.COM (March 15, 2019), https://www.billboard.com/articles/business/8502662/session-pro-tools-creator-credits-studio-ecosystem-metadata.

[80] John Chapple, *Session Launches Creator Credits, Backed By UMG and AVID*, IQ-MAG.NET (March 18, 2019), https://www.iq-mag.net/2019/03/session-creator-credits-umg-mxm-avid/#.Xo9pAFNKhp8.

[81] Deahl, *supra* note 21.

[82] § 1202(c).

[83] *Id.*

[84] Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc., 975 F. Supp. 2d 920, 928 (N.D. Ill. 2013).

[85] Jacobsen v. Katzer, 609 F. Supp. 2d 925, 934 (N.D. Cal. 2009); *see* SellPoolSuppliesOnline.com LLC v. Ugly Pools Arizona, Inc., 344 F. Supp. 3d 1075,

works, such as digital photographs and drawings, not sound recordings.[86] In determining the scope of CMI, courts have considered watermarks, "gutter credits," and the "©" symbol.[87] These types of CMI would not be applicable to digital audio files. However, some cases have analyzed CMI in the context of digital images, which are more akin in nature to sound recordings.[88] As discussed in later sections of this Article, case law examining digital image CMI is only modestly helpful as sound recording metadata is significantly more complex in composition and structure.[89]

Sound recording metadata does not have an accepted legal standard and is neither mentioned nor defined in section 1202. As a result, case law on sound recording metadata specifically is extremely limited. Case law addressing sound recording metadata is found in standard copyright infringement lawsuits. Courts have generally defined metadata as "data about data," or information stored electronically in a digital audio file format that describes aspects of a file, such as its name, format, size, or other information that can be entered manually.[90] In the context of sound recordings, courts have recognized metadata fields such as artist, album, song title, release date, and other "high-level descriptive information" such as whether the sound recording is owned by a particular record company or whether the copyright owner seeks to have it blocked from a particular website.[91] At least one court has recognized numerical identifiers as a form of metadata.[92] Nonetheless, due to a lack of case law, courts have not explicitly recognized sound recording metadata such as artist and album

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1082 (D. Ariz. 2018) (stating that there has yet to be a Ninth Circuit decision interpreting the definition of CMI in § 1202(c)).

[86] *See generally* Fischer v. Forrest, No. 14 Civ. 1304 (PAE) (AJP), 2017 WL 2992663 (S.D.N.Y. July 14, 2017); BWP Media USA Inc. v. Polyvore, Inc., 922 F.3d 42 (2d Cir. 2019); Agence France Presse v. Morel, 769 F. Supp. 2d 295 (S.D.N.Y. 2011); Hirsch v. CBS Broad. Inc., No. 17 Civ. 1860 (PAE), 2017 WL 3393845 (S.D.N.Y. Aug. 4, 2017).

[87] *See* Michael Grecco Prods., Inc. v. Alamy, Inc., 372 F. Supp. 3d 131 (E.D.N.Y. 2019) (exploring the use of watermarks); *see also* Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 305 (3d Cir. 2011) (explaining the use of gutter credits); *see also* McClatchey v. The Associated Press, No. 3:05-CV-145, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007) (considering the © symbol).

[88] Corelogic, *supra* at note 28, 672.

[89] *See generally* LYONS ET AL., *supra* note 29 at 121.

[90] *See R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13, 44, n. 111 (S.D.N.Y.2010).

[91] *See* Capitol Records, LLC v. Escape Media Grp., Inc., No. 12-CV-6646 (AJN), 2015 WL 1402049, at *31 (S.D.N.Y Mar. 25, 2015) (recognizing artist, album, and song title); *see also* Arista Records LLC v. Myxer Inc., No. CV 08-03935 GAF (JCx), 2011 WL 11660773, at *5 (C.D. Cal. Apr. 1, 2011) (discussing release date and other "high-level descriptive information").

[92] Appalseed Prods., Inc. v. MediaNet Digital, Inc., No. 11 Civ. 5922 (PGG), 2012 WL 2700383, at *1 (S.D.N.Y. July 6, 2012).

title as forms of CMI, even though such fields would clearly fall within the definition. To this day, no case exists in which an artist has successfully brought a claim for electronic falsification, alteration, or removal of their CMI from their sound recording. Before discussing the current body of case law that exists discussing liability under section 1202, it is critical to address how such information was protected before the enactment of the DMCA in 1998.

II. PROTECTION OF COPYRIGHT MANAGEMENT INFORMATION BEFORE THE DMCA

A. *Criminal Offenses under 17 U.S.C. §506*

It is well settled that before the DMCA was enacted in 1998, the Copyright Act of 1976 never adequately addressed advances in technology nor the exponential growth of the Internet.[93] Prior to the enactment of the DMCA, online copyright infringement cases often reached "divergent and sometimes confusing conclusions" in attempt to apply theories of vicarious and contributory liability to traditional copyright principles.[94] Before 1998, the Copyright Act had no civil protections for CMI in any form. "The DMCA was novel in creating civil causes of actions for falsification, removal, and alteration of CMI in section 1202."[95] Prior to the passage of the DMCA, 17 U.S.C. §506, which sets forth criminal offenses for copyright, existed as the only relevant statute as it addressed fraudulent removal of a copyright notice or fraudulent copyright notice.[96] Even though Congress has maintained section 506 in the Copyright Act, the section is still criticized for overlapping with section 1202.[97]

Section 506(a) contains a criminal infringement provision, which can result in prison time and other substantial penalties.[98] Most cases prosecuted under section 506 prior to 1998 were brought under 506(a), which involves a standard copyright infringement analysis; this still stands true today.[99] In addition to criminal copyright infringement, section 506

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[93] Michelle A. Ravn, *Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 759 (1999).
[94] *Id.*
[95] Jacobs, *supra* note 31, at 142.
[96] *Id.* at 141.
[97] *Id.* at 142.
[98] Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1035 (2006).
[99] *Id.* at 1036.

lists four criminal offenses: b) Forfeiture, destruction, and restitution; c) Fraudulent Copyright Notice; d) Fraudulent Removal of Copyright Notice, and e) False Representation.[100] These offenses are not categorized as copyright infringement, and thus do not require the same elements of a standard copyright infringement claim. Compared to section 1202, Section 506 is limited in scope because it only applies to notices of copyright and to statements made in applications for registration.[101] Accordingly, other types of information about a copyrighted work, including title and author, could be modified, or deleted without liability under section 506.[102]

Compared to section 1204 of the DMCA, which establishes criminal penalties for violations of section 1202, section 506 requires a different standard of mens rea and imposes different penalties.[103] Section 506 applies against those who "with fraudulent intent" affix a copyright notice known to be false, or who "with fraudulent intent" remove or alter the copyright notice. On the other hand, section 1204 applies against those who "willfully and for purposes of commercial advantage or private financial gain" violate section 1202 (or 1201).[104] Section 506 imposes fines of up to $2,500, but no imprisonment, while section 1204 imposes fines up to $500,000 and imprisonment of up to five years.[105]

Most importantly, section 506 does not give rise to private actions.[106] Consequently, since the federal government can be the only party initiating legal action in this realm, prosecutions, and convictions under 506(c)-(e) are extremely rare. History reveals that the claims that do make it to court fail on procedural grounds.[107] Prior to 1998, only two cases directly cited to 506(c), no cases cited to 506(d), and only five cases cited to 506(e). In the majority of these cases, a citizen plaintiff attempted to bring a claim against a defendant, and thus many claims were dismissed entirely for this reason. After the DMCA was enacted before the turn of the century, section 1202 brought an entire new realm of case law of civil disputes relating to CMI.

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[100] 17 U.S.C.A. § 506 (West).
[101] *Id.*
[102] Jacobs, *supra* note 31, at 140.
[103] *Id.* at 143.
[104] Jacobs, *supra* note 31, at 143.
[105] *Id.*
[106] Donald Frederick Evans & Assocs., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 913 (11th Cir. 1986).
[107] *See generally,* Ashton-Tate Corp. v. Ross, 728 F. Supp. 597, 602 (N.D. Cal. 1989), aff'd, 916 F.2d 516 (9th Cir. 1990); Donald Frederick Evans & Assocs., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 913 (11th Cir. 1986); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 37 (2d Cir. 1982).

III. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA was enacted in 1998 to adapt copyright law to the digital age.[108] Copyright owners were becoming increasingly concerned that exact copies could be made with virtually no degradation in quality and millions of copies could be distributed within seconds.[109] In response to this concern and in order to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty, the Clinton Administration proposed the DMCA in order to extend copyright protection to digital works.[110] The DMCA is divided into five titles: I) The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998; II) The Online Copyright Infringement Liability Limited Act; III) The Computer Maintenance Competition Assurance Act; IV) the Miscellaneous Provisions; and V) Vessel Hull Design Protection Act.[111] It is important to note that the DMCA did not establish new forms of copyright infringement.[112] Rather, the DMCA created "para-copyright protections to aid copyright owners in the Internet age, addressing 1) technological controls, and 2) the need for adequate and accurate information."[113] Para-copyright protections refer to the legal protections above and beyond traditional copyright. These protections do not protect the works themselves, but rather the digital management systems that protect copyrights.[114]

A. Title I: WIPO Copyright and Performances and Phonograms Treaties Implementation Act

i. *Section 1201: Circumvention of Copyright Protection Systems*

Title I of the DMCA amends U.S. copyright law to conform with the WIPO Copyright Treaty and the Phonograms Treaty.[115] Sections 1201

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[108] 179 A.L.R. Fed. 319 (Originally published in 2002).
[109] Laura J. Robinson, *Anticircumvention Under the Digital Millennium Copyright Act*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 957, 958 (2003).
[110] Herbert J. Hammond et. al., *The Anti-Circumvention Provision of the Digital Millennium Copyright Act*, 8 TEX. WESLEYAN L. REV. 593, 594 (2002).
[111] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).
[112] Jacobs, *supra* note 31, at 146.
[113] *Id.*
[114] TOM W. BELL, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD 30 (Mercatus Center at George Mason University 2014).
[115] Publisher's Editorial Staff, *Corporate Counsel's Primer on the Digital Millennium Copyright Act*, THE LAWYER'S BRIEF ARTICLE I (2009).

and 1202, also known as the anti-circumvention provisions, fall within Title I. Section 1201 addresses individual and commercial efforts to circumvent a copyright owner's use of technological protection.[116] Section 1201(a) protects against circumvention of access controls, while 1201(b) prohibits the circumvention of technologies that protect against copying.[117] For example, a company that manufactures and sells a device that breaks DVD encryption codes and permits copyright of DVDs would violate the trafficking provisions of Section 1201(b).[118] In effect, section 1201 prohibits the manufacture or distribution of technologies or services designed to circumvent copy protection or access control.[119] Section 1201 targets a specific class of devices, while 1202 only imposes liability for certain acts.[120]

ii. *Section 1202: Integrity of Copyright Management Information*

Section 1202 does not address technological controls, like section 1201, but rather the need for accurate information. Section 1202 essentially codifies common-law fraud for CMI.[121] Section 1202(a) imposes liability for individuals providing or distributing false CMI, while section 1202(b) prohibits any individual from removing or altering CMI. Section 1202(c) defines CMI and lists eight categories of information that fall within the definition. Sections 1202(d) and (e) exempt liability in certain situations relating to law enforcement and television transmissions.[122] In the digital age, the rights of integrity as provided by section 1202 can serve as a weapon to limit the widespread dispersion of inauthentic copies.[123]

iii. *Sections 1203 and 1204: Remedies*

Section 1203 sets forth remedies for violations of sections 1202(a) and (b), which including injunctive relief, an order of the impounding,

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[116] YiJun Tian, *Problems of Anti-Circumvention Rules in the DMCA & More Heterogeneous Solutions*, 15
Fordham Intell. Prop. Media & Ent. L.J. 749, 756 (2005).
[117] IAN C. BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS § 4.21[2][A] (2d ed. 2020).
[118] James D. Nguyen, *Code Breaking the Dmca Provides A Powerful Tool for Content Owners to Thwart the Circumvention of Antipiracy Technology*, L.A. LAW. 33, 34 (2004).
[119] Publisher's Editorial Staff , *supra* note 113.
[120] S. Rept. 105-190 - THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, S.Rept.105-190, 105th Cong. (2021), https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1.
[121] Jacobs, *supra* note 31 at 150.
[122] Jacobs, *supra* note 31 at 104.
[123] *Id.* at 147.

modification, or destruction of devices involved in the violation, damages, and costs and attorney's fees.[124] Section 1204 imposes criminal sanctions which can include fines and imprisonment. For purposes of this analysis and proposal, only civil liability under section 1202 will be discussed.

IV. LIABILITY UNDER SECTION 1202 AND APPLICATION TO SOUND RECORDINGS

A. *Scope and Application of Section 1202*

Only eleven cases to date have considered the scope and application of section 1202.[125] The Third Circuit Court of Appeals has agreed with six other federal district courts that CMI should be construed broadly based on the plain terms of the statute – that is, CMI does not have to be part of an "automated copyright protection or management system," and CMI can refer to information expressed in non-digital works.[126] For example, *Murphy v. Millennium Radio Group LLC*, the only circuit court opinion analyzing the scope of CMI, concluded that the legislative history did not justify a narrow reading of section 1202.[127] In the case, the defendant posted online "a version of the plaintiff's photograph, which cropped out the 'gutter' credit," or "the margin line identifying the plaintiff as the author of the photograph."[128] The plaintiff sued under section 1202 alleging that the defendants removed or altered the CMI.[129] The court held that the DMCA contains no "electronic" qualifier, and therefore the gutter credit fell within the scope of section 1202.[130] Many recent decisions have recognized that both the legislation behind the DMCA and the text of the statue support a broader reading of section 1202.

On the other end, four district courts have construed section 1202 narrowly and limited it to the digital sphere, with some courts requiring CMI to require technical measures of automated systems.[131] For example, a digital watermark is an example of CMI involving "automated systems functioning within a computer network environment."[132] According to this

[124] *Id.* at 104.
[125] *Id.* at 106.
[126] *Id.* at 106-08.
[127] Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 303-05 (3d Cir. 2011).
[128] Jacobs, *supra* note 31, at 112.
[129] *Id.*
[130] *Id.* at 113.
[131] *Id.* at 106-07.
[132] *Id.* at 110.

interpretation, the DMCA is intended to apply to "electronic commerce" and the "electronic marketplace."[133] Furthermore, in *Textile Secrets Int'l, Inc. v. Ya-Ya Brand, Inc.*, the court granted summary judgment for the defendant on a claim concerning the defendant's removal of a copyright notice on a peacock feathers fabric design.[134] The court held that section 1202 "was [not] intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated by the DMCA as a whole."[135]

B. *Section 1202(a): False Copyright Management Information*

Section 1202 creates an obligation to protect the integrity of CMI.[136] Under 1202(a), a person is prohibited from knowingly providing, distributing, or importing false CMI with the intent to induce, enable, facilitate, or conceal infringement.[137] Courts have referred to this as the "double scienter requirement."[138] The term "scienter" generally refers to a state of mind and is commonly used in securities cases to refer to guilty knowledge or intent to deceive, manipulate, or defraud.[139] A double scienter requirement essentially means that there are two layers of mens rea: (1) the defendant knowingly provided, distributed, or imported false CMI and (2) the defendant did so with the intent to induce, enable, facilitate, or conceal infringement.[140] Courts have held that in order to bring a claim for false CMI, an alternation to an *original* work must be made.[141] For example, in *Faulkner Press, L.L.C. v. Class Notes, L.L.C*, the defendant, Class Notes, published and sold lecture summaries provided by student note takers.[142] The plaintiff alleged that Class Notes intentionally published false CMI by printing "Einstein's Notes (C)" on its note packages, which included a professor's course information.[143] The court held that Class Notes did not add false CMI because no alteration was made to the professor's product or

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[133] *Id.* at 109-10.
[134] Textile Secrets Int'l v. Ya-Ya Brant Inc., 524 F. Supp. 2d 1184, 1203 (C.D. Cal. 2007).
[135] *Id.* at 1201.
[136] 17 U.S.C. § 1202(a) (1999).
[137] *Id.*
[138] Aaron v. SEC, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611, 1980 U.S. LEXIS 107, Fed. Sec. L. Rep. (CCH) P97, 511.
[139] *Id.*
[140] BALLON, *supra* note 126. (INCORRECT)
[141] Faulkner Press, L.L.C. v. Class Notes, L.L.C., 756 F. Supp. 2d 1352, 1359-60 (N.D. Fla. 2010).
[142] *Id.* at 1355.
[143] *Id.* at 1356.

original work.[144] Rather, information from the professor's courses was copied into a different form and then incorporated into the note packages.[145] It is very likely that the court would have come to a different conclusion if Class Notes had directly copied the professor's original work (i.e. the textbook itself) and removed his name, for example. This case highlights the distinction between traditional copyright infringement and alteration of CMI – what may seem like an obvious case of copyright infringement may not necessarily be a violation of section 1202.

C. *Section 1202(b): Removal or Alteration of Copyright Management Information*

The majority of violations under section 1202 fall under section 1202(b), covering the removal or alteration of CMI. Section 1202(b) states that a person is prohibited from intentionally removing or altering CMI without the authority of the copyright owner.[146] To prevail on a claim for CMI removal or alteration, a plaintiff must show: (1) the existence of CMI on the work at issue; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally, *and* with knowledge or reason to know that it will induce, enable, facilitate, or conceal infringement.[147]

i. *Existence of Copyright Management Information on the Work at Issue*

Section 1202(c) defines CMI as information "conveyed in connection with" a copyrighted work.[148] CMI does not necessarily have to be placed directly upon or affixed to a copyrighted work, but the "location of the information can determine what it refers to or whether an alleged infringer lacked the required intent."[149] A number of courts have held that for CMI to be protected, it must be near, around, or on the original work.[150]

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[144] *Id.* at 1359.
[145] *Id.*
[146] 17 U.S.C. § 1202(b) (1999).
[147] Fischer v. Forrest, No. 14CIV1304PAEAJP, 2015 WL 195822, at *8 (S.D.N.Y. Jan. 13, 2015); Mantel v. Smash.com Inc., No. 19-CV-6113-FPG, 2019 WL 5257571, at *2 (W.D.N.Y. Oct. 17, 2019); *see also* BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 609 (S.D.N.Y. 2010).
[148] 17 U.S.C. § 1202(c) (1999).
[149] Powers v. Caroline's Treasures Inc., 382 F. Supp. 3d 898, 906 (D. Ariz. 2019).
[150] *Powers*, 382 F. Supp. 3d at 904; *see* Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 305 (3d Cir. 2011) (finding that the plaintiff's name constituted CMI with regard to a copyrighted image when the "name appeared in a printed gutter credit near the Image");

The rationale for this rule is to prevent a 'gotcha' system where a picture or piece of text has no CMI near it and the plaintiff relies on a general copyright notice buried elsewhere.[151] For example, in *Schiffer Publishing, LTD. v. Chronicle Books, LLC*, the court held that a notice of copyright that only appeared on the inside cover of a book did not qualify as CMI.[152] Schiffer Publishing created 118 photographs included in thirteen books about fabrics and textiles.[153] Each of the thirteen books included a copyright notice at the beginning of the book, but did not include any copyright notices on or near the individual photographs.[154] The defendant, Chronicle Books, included these photographs in its own book titled *1000 Patterns* without permission or an offer of compensation from Schiffer.[155] The court held that Chronicle Books was not obligated to reproduce notices of copyright on every photograph because the original photographs in Schiffer's books "did not contain any [CMI] whatsoever, either on or near the images themselves."[156] Therefore, since the CMI was not near or around the original individual photographs, the court held that Chronicle Books did not violate 1202(b).[157] Thus, CMI must be "near, around, or on the original work" to be protected.

ii. *Removal or Alteration of Copyright Management Information*

Section 1202(b) requires willful removal or alteration of CMI.[158] Thus, without removal or alteration of CMI, a section 1202(b) claim must fail, regardless of the defendant's mental state. To state a claim for intentional removal under section 1202(b)(1), a plaintiff must allege *removal*. Merely copying information into a different form (such as taking notes of an oral lecture and incorporating them in a note package as discussed above in *Schiffer Publishing*) does not amount to removal. Rather, removal is akin to defacing a title of a book or deleting information

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see also Williams v. Cavalli, No. CV 14–06659–AB (JEMx), 2015 WL 1247065, at *2 (C.D. Cal. Feb. 12, 2015) (stating that signatures that appeared within a mural "necessarily were conveyed in connection the display of the mural" and constituted CMI); Pacific Studios v. West Coast Backing, Inc., No. 2:12-cv-00692-JHN-JCG, 2012 WL 12887637, at *2-3 (C.D. Cal. Apr. 8, 2012) (citing Murphy, 650 F.3d at 302) (concluding that an alphanumeric designation on the border of an online image for purposes of identification was CMI).

[151] BALLON, *supra* note 126.

[152] Schiffer Pub., Ltd. v. Chronicle Books, LLC, No. CIV.A. 03-4962, 2004 WL 2583817, at *14 (E.D. Pa. Nov. 12, 2004).

[153] *Id.* at *1.

[154] *Id.* at *4.

[155] *Id.* at *1.

[156] *Id.* at *14.

[157] *Id.*

[158] 17 U.S.C. § 1202(b) (1999).

accompanying a computer file and is likely to "look like editing or cropping."[159] In *Faulkner v. General Motors,* the plaintiff, an artist, painted an outdoor mural and "placed his pseudonym, 'SMASH 137' on the left side of one of the walls that displayed his mural."[160] The defendant took a photograph of the plaintiff's mural, but the pseudonym was cropped out of the frame.[161] The court held that the defendant neither removed nor altered the plaintiff's signature from the photograph: "The court cannot find...that failure to include copyright management information – merely by the framing of the scene, rather than by any editing or cropping – constitutes removal or alteration."[162] Therefore, the cropping of a photograph frame to remove CMI is not sufficient to show the CMI was either "removed" or "altered," under section 1202(b).

The language of the statute does not expressly define the meaning of "alter."[163] Case law relating to 1202(b) focuses almost entirely on the removal of CMI, not the alteration of CMI.[164] In *Goldstein v. Metropolitan Regional Information Systems, Inc.*, a case analyzing alteration, the court examined the "juxtaposition of two competing CMIs."[165] Goldstein, a professional photographer, took a photograph and displayed it on his website with the watermark "© www.goldsteinphoto.com."[166] Defendant MRIS uploaded Goldstein's photo onto the MRIS database with the additional watermarks "© 2013 MRIS" or "2014 MRIS," depending on the year the image was uploaded.[167] The court held that "particularly where MRIS's copyright mark was placed immediately before Goldstein's copyright mark and used more recent dates, that mark could be construed as trumping, diluting, or superseding, and thus altering, Goldstein's CMI."[168] Thus, under this rule, a defendant adding his/her own CMI to a plaintiff's original CMI would be considered "alteration."

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[159] Falkner v. General Motors L.L.C., 393 F. Supp. 3d 927, 938-39 (C.D. Cal. 2018).
[160] *Id.* at 929.
[161] *Id.*
[162] *Id.* at 938.
[163] *Id.* at 938-39.
[164] Goldstein v. Metro. Reg'l Info. Sys., Inc., No. TDC-15-2400, 2016 WL 4257457, at *9 (D. Md. Aug. 11, 2016).
[165] *Id.*
[166] *Id.* at *1.
[167] *Id.*
[168] *Id.* at *9.

iii. *Defendant's State of Mind under Section 1202(a) and 1202(b)*

"Proving a violation of section 1202(a) and 1202(b) requires proof of intent or actual (and not constructive) knowledge,"[169] which is often inferred from circumstantial evidence because direct proof of wrongful intent is rarely available.[170] Knowledge signifies "a state of mind in which the knower is familiar with a pattern of conduct" or "aware of an established modus operandi that will in the future cause a person to engage in" a certain act.[171]

Case law surrounding the intent requirement of section 1202(b) reveals a somewhat stringent standard for the knowledge requirement. In *Stevens v. Corelogic*, plaintiffs – two photographers who took photos of houses for use in the Multiple Listing Services – claimed that CoreLogic intentionally removed CMI from their photographs.[172] The court held that a plaintiff bringing a claim under section 1202(b) must make an affirmative showing, such as by demonstrating a past "pattern of conduct" or "modus operandi," that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.[173] That is, CMI must have at least a practical significance for the plaintiffs in terms of policing copyright infringement of their work.[174] However, the photographers had never used CMI to prevent or detect copyright infringement as a matter of practice, nor provided evidence of how they would do so.[175] One photographer testified that "he did not even realize you could right-click a picture and get metadata off of it."[176] The court held that the photographers were unable to prove the existence of a pattern of conduct.[177] In other words, because photographers did not provide any evidence of tracking CMI in the first place, there was no way for CoreLogic to have known that its software had a "probability of such a connection to infringement."[178] As a result, CoreLogic was not liable for violating section 1202(b).[179]

D. *Uncertainties: Application of Section 1202 to Sound Recordings*

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[169] Philpot v. WOS, Inc., No. 1:18-CV-339-RP, 2019 WL 1767208, at *8 (W.D. Tex. Apr. 22, 2019).
[170] Friedman v. Live Nation Merch., Inc., 833 F.3d 1180, 1189 (9th Cir. 2016).
[171] Stevens v. Corelogic, 899 F.3d 666, 674 (9th Cir. 2018).
[172] *Id.* at 670-71.
[173] *Id.* at 674.
[174] *Id.* at 675.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 676.

Current case law in the context of pictorial works offers little guidance for how CMI would exist in digital audio files of sound recordings. In analyzing the CMI of a digital audio file, the issue would not be whether the CMI is "near, around, or on the original work" as determined by current case law of pictorial works. This is because audio CMI is either incorporated in the metadata code or it is not.[180] Rather, the relevant question would be whether the CMI is discernable from the metadata.[181] During the mastering phase of a track, metadata is encoded into WAV files and stored as a master audio file or on a master CD.[182] Incorporation of metadata in sound recordings would fall to the stakeholders involved (i.e. mastering engineer), and how they choose to format their descriptive and ownership metadata (i.e. following the recommendations of "Music Metadata Style Guide").

Due to the lack of case law and litigation under 1202 in general, it is unclear how a defendant's state of mind would be analyzed in terms of sound recordings. For example, intentional removal of CMI may not be clear in situations where data can be mismatched between digital music platforms, listed in unique cataloging systems, or lost during reproduction, repurposing, or adaptation depending on the digital product.[183] As described above, *Corelogic* illustrates that a plaintiff's familiarity with CMI is relevant to policing infringement, and to ultimately proving defendant's intent and knowledge. The court insinuated that the photographers themselves should have known, at least, how to find their photo metadata. This holding assumes that a plaintiff understands the significance of CMI and how and where it is disclosed in a highly technical digital environment.

Sound recordings present a more complex case. Independent artists may be unaware of the existence of metadata in their sound recordings and may not understand how it relates to attribution and payment, let alone protection under section 1202.[184] Furthermore, with several stakeholders involved in the music creation process– artist, producer, songwriter, engineer, etc. – it is unclear which parties would be responsible for not only recognizing descriptive and ownership metadata, but understanding how it

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[180] MUSIC BUSINESS ASSOCIATION, *supra* note 59.
[181] *Id.*
[182] Reed, *supra* note 12, at 31.
[183] *See* Reed, *supra* note 12, at 53–54 (explaining that independent artists who own their own publishing and recording rights are most likely to have gaps in the metadata of files submitted for consideration for licensing); *see generally* U.S. COPYRIGHT OFFICE, *supra* note 22, at 123–33.
[184] *See* Deahl, *supra* note 21.

is formatted and distributed to digital retailers. The current state of knowledge under 1202 requires artists and other rights holders to have at least minimal knowledge of the metadata in their sound recordings to recognize how CMI can be falsified, altered, or removed. As a result, the obscure nature of CMI in statutory and case law leaves artists at a disadvantage when bringing claims under 1202(a) and 1202(b).

An error made by large music distributor TuneCore in 2014 reveals the importance of the integrity of CMI when distributed in the digital music market. TuneCore is an independent digital music distribution, publishing, and licensing service that offers musicians and other rights-holders the opportunity to sell and stream their music through retailers such as iTunes and Spotify. When uploading a track onto a TuneCore, a user can manually add the following roles: main artist, featured artist, songwriter, producer, actor (soundtracks/theatrical recordings), composer (classical music), and lyricist (reserved for theatrical performances such as plays and musicals).[185] ISRC codes are optional for TuneCore, meaning that a user does not technically have to register for an identifier with an ISRC agency, such as the Recording Industry Association of America (RIAA) or International Federation of the Phonographic Industry (IFPI) to upload and distribute their sound recordings through TuneCore. If a user has not registered for a code, TuneCore will automatically give a user an ISRC code upon uploading music. In 2014, TuneCore allegedly issued incorrectly formatted ISRCs without permission from the IFPI, the organization responsible for identifying international sound recordings. As a result of the error, hundreds and thousands of songs were incorrectly shown as being created in the Turks and Caicos Islands by using "TC," the prefix before the Turks and Caicos identifiers (the country code is always the first two characters of the identifier).[186] Instead of arbitrarily creating its own code, TuneCore could have communicated and properly registered with IFPI to avoid this error. Given the nature of this issue, it is conceivable that other major distributors like TuneCore could make the same type of error, placing thousands of artists at stake. In light of current case law on section 1202 and the uncertainty of how the section would apply to sound recordings, it is essential that section 1202 is adapted so artists can ensure CMI in their sound recordings is protected.

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[185] *How do I Credit Artists, Songwriters and Other Contributors on my Release*?, SUPPORT.TUNECORE.COM, https://support.tunecore.com/hc/en-us/articles/360001315143-What-are-the-different-roles-and-credits-I-can-give-on-my-release- (last visited May 19, 2020).

[186] U.S. COPYRIGHT OFFICE, *Music Licensing Study Public Roundtable* 303 (2014), https://www.copyright.gov/policy/musiclicensingstudy/transcripts/mls-la-transcript6162014.pdf.

V. PROPOSAL: PROTECTION OF CMI IN SOUND RECORDING METADATA UNDER SECTION 1202

The goal of this amendment is to secure the inherency of CMI in metadata and adapt section 1202 so it can be broadly applied to sound recordings. This draft legislation has three components: A) CMI standards in sound recording metadata embedded in sound recording digital audio files; and B) a rebuttable presumption of defendant's intent and knowledge under section 1202(a) and 1202(b); C) a registration mechanism of payment, descriptive, and ownership metadata with the Copyright Office. Each section will first propose language of the draft legislation and follow with an explanation.

A. *Section A: Copyright Management Information Standards for Metadata Embedded in Sound Recording Digital Audio Files*

i. *Draft Legislation*

This amendment will expand and specify the definition of CMI by stipulating that CMI is a component of metadata. Rather than listing eight categories of information that qualify as CMI in 1202(c), the new definition will be divided into separate sections that are applicable for each copyrightable work (sound recordings, literary works, musical works, dramatic works, etc.).[187] For purposes of this Proposal, only sound recordings will be addressed. A draft of the proposed legislation is included below for sound recordings:

> **(c) Definition.** -- As used in this section, "copyright management information" is a component of sound recording metadata and includes both descriptive and ownership metadata. In order to assert a claim under 1202(a) or 1202(b), the following CMI shall be embedded in the metadata of the final digital audio file ("mastered version") by the date the mastering process is complete ("mastered date"):
>
> 1) Title of the work; and
> 2) Individual legal names of the author(s) of the work, including all authors who contributed copyrightable sound recording authorship; and

[187] 17 U.S.C. § 106(4) (2002).

3) Description of individual author(s) contribution in the work; and
4) The mastered date.

(3) Definitions. --As used in this subsection—

A. The term "descriptive metadata" refers to 1202(c)(1) and 1202(c)(4). While descriptive metadata may include other information that describes the aspects of a track (i.e., album title, genre, lyrics, etc.) only 1202(c)(1) and 1202(c)(4) shall be embedded in the final digital audio file.
B. The term "ownership metadata" refers to 1202(c)(2) and 1202(c)(3). While ownership metadata may include other information that describes aspects of a track (i.e., music identifiers, digital thumbprints, etc.) only 1202(c)(2) and 1202(c)(3) shall be embedded in the final digital audio file.

ii. *Explanation of Draft Legislation*

A plaintiff may allege the existence of all required CMI described above through use of a tagging software compatible with any of the audio file types already accepted with the Copyright Office (*i.e.*, MP3 audio file, Real Audio File, Audio Interchange File Format, etc.) While the forms of metadata provided in new definition above is not exhaustive of all sound recording metadata, it provides a foundation for artists and other music industry stakeholders involved in the process to include identifying information in their files. This will incentivize inclusion of at least four elements of standardized CMI in audio file metadata and ensure protection from falsification, removal, or alteration.

The goal of this section of the amendment is that CMI in 1202(c) as described above will be inherent in metadata once it is embedded in the code. Current law requiring CMI to be "near, around, or on the original work" will not become an issue in sound recordings, because the new legislation requires CMI to be embedded in the metadata so a plaintiff to bring a claim under section 1202. The analysis will turn on whether the specific elements of CMI (as described above) are embedded in the mastered version, which can be evidenced through electronic music tagging. Additionally, definitions of physical removal and alteration will still apply to the new legislation, but a court's analysis will not rely on previous case law regarding cropping or editing of CMI. Rather, a violation

under 1202 will rely on whether or not the sound recording at issue includes the four elements of CMI of the mastered version as listed in 1202(c).

B. *Section B: Rebuttable Presumption of Defendant's Intent and Knowledge under Section 1202(a) and 1202(b)*

i. *Draft Legislation*

The second part of this amendment will resolve issues that have been raised by CMI jurisprudence of pictorial works regarding defendant's state of mind. Given the challenging standard presented in *CoreLogic*, the proposed section provides a rebuttable presumption of defendant's knowledge and intent. For purposes of organization, this legislation will be listed as section 1202(d) following the definition of CMI section in 1202(c). A draft of the proposed legislation is included below:

> (**d) Rebuttable Presumption of Defendant's Intent and Knowledge under this section. --** A defendant (i.e., violator, infringer) will be deemed to have both knowledge and intent to "induce, enable, facilitate, or conceal infringement" under alleged violations of section 1202(a) or 1202(b) if:
>
> 1) The four elements of CMI listed in 1202(c) in the sound recording digital audio file at issue ("version at issue") are not consistent with the CMI of the mastered version; or
> 2) The plaintiff provides direct evidence of unauthorized access of the mastered version.
>
> This presumption of the defendant's intent and knowledge can be rebutted if the defendant provides:
>
> 1) Sufficient and persuasive contradictory evidence of defendant's alleged intentional conduct or knowledge; or
> 2) Invalidity of the mastered version or mastered date; or
> 3) The version at issue contains new, original, and sufficiently creative authorship by the defendant to support a new and separate copyrightable work.

ii. *Explanation of Draft Legislation*

The rebuttable presumption of defendant's state of mind will obviate the need to use the current approach provided by *Corelogic* in sound recordings. In the case that an artist's CMI is falsified, altered, or removed, they will not have to prove they are actively maintaining and monitoring the integrity of their CMI if they have successfully embedded the required CMI in their mastered version. Rather, a defendant will be presumed to have intent and knowledge, unless the defendant can prove otherwise. This legislation is conducive to the current state of the digital music market, in which many artists are unaware of the importance of metadata, let alone how it is embedded in a digital audio file.

C. *Section C: Registration of Payment, Descriptive, and Ownership Metadata with the Copyright Office*

i. *Draft Legislation*

This section of the legislation encourages artists to register their work with the Copyright Office, providing an additional layer of protection for artists with respect to their payment, descriptive, and ownership metadata. Registration of payment metadata, including industry endorsed identifiers such as ISRC, have been proposed by Michael Reed in his article titled, "*Harmonizing the Liner Notes: How the USCO's Adoption of Metadata Standards Will Improve the Efficiency of Licensing Agreements for Audiovisual Works,"* published in the Chicago-Kent Journal of Intellectual Property.[188] In his draft legislation, Reed proposes that the Copyright Office include the application for ISRCs in its registration process through an amendment to 17 U.S.C. § 408.[189] This legislation, which is included below, modifies Reed's original proposal of registration of a sound recording and incorporates his suggestions regarding the registration process. This legislation will not include Reed's section regarding registration of musical works, as musical works is beyond are beyond the scope of this Proposal.

> **(g) Registration of a Sound Recording**
> **(1)** At any time during the subsistence of the term of copyright of any sound recording, following a properly completed registration of copyright with the Copyright Office, the owner of the copyright will be issued and

[188] Reed, *supra* note 12, at 42.
[189] *Id.*

> International Standard Recording Code (ISRC) for each registered sound recording by the Copyright Office. These Codes will be embedded in the metadata of the digital audio file by the Copyright Office itself. In the case that an individual has previously applied for an ISRC code through the US ISRC Agency/Approved ISRC Manager ("original entity"), this code shall be provided by the owner and will be cross-referenced with the original entity, and upon approval of the original entity, supplemented as the official ISRC code.
> **(2)** Owners shall provide the Copyright Office with the descriptive and ownership metadata as defined in section 1202(c).
> **(3)** The Copyright Office shall return a newly registered official master to the rights holder as either an attachment or via a secure cloud application [190] with the following information: the copyright registration, the ISRC, and the descriptive and ownership metadata.
> **(3)** The Copyright Office will provide SoundExchange, and other partners Congress has designated for the receipt of metadata for this purpose, with the copyright registration, the ISRC, and the descriptive and ownership metadata, for inclusion in a database of these Codes to be made available to the public.

ii. *Explanation of Draft Legislation*

Even though registration of a copyright through the Copyright Office is not mandatory, this legislation will encourage artists to register their copyrights, which will put the public on notice of the payment, ownership, and descriptive metadata associated with the mastered version. In the case that CMI of a sound recording is falsified, removed, or altered, an authoritative source exists to verify author information in an audio file as complete and accurate.

CONCLUSION

The metadata problem presents one of the most complex and straining issues the music industry has ever experienced. As a result of widespread technological developments, it is only natural that solutions

[190] *Id.* at 43.

from a legal and policy standpoint have been stymied by the organic growth of private-sector technology. This legislation seeks to lay the foundation for reshaping the sound recording licensing system so that music creators are associated with their contributions and sound recordings can be properly identified as copyrightable works.[191] The goal is that CMI will legally become inherent in sound recording metadata and will form the foundation for an authoritative standard to be relied upon by rightsholders bringing a claim under section 1202. The proposed amendment to section 1202 will expand protection for sound recordings so that CMI is properly, uniformly, and consistently included in digital audio file metadata. While this legislation cannot address the entirety of the metadata problem, it will be a step in the right direction to ensure that there is at least one standard for music metadata and artists will have their rights protected under the law.

APPENDIX A[192]

CORRECT	INCORRECT	ISSUE CAUSING CONFLICT
Jimi Hendrix	Jimi Hendrix (Guitarist)	Includes Instrument
Bob Marley	Marley, Bob	Formatted as Last, First
Outkast	Outcast	Incorrect Spelling
Jimmy Page	Jimmy Page (Of Led Zeppelin)	Includes Band Name
Jim Morrison	Jim Morrison (1943-1971)	Includes Birth And Death Dates

[191] *See* U.S. COPYRIGHT OFFICE, *supra* note 22, at 134-35.
[192] MUSIC BUSINESS ASSOCIATION, *supra* note 59, at 9. The table lists various ways an artist name can be spelled incorrectly and what issues cause the conflict in data entry.

APPENDIX B[193]

```
<NewReleaseMessage>

<MessageHeader>
      {various elements identifying the sender and recipient}
</MessageHeader>

<ResourceList>
      {various elements identifying each file you're sending us}
</ResourceList>

<ReleaseList>
      {various elements identifying how resources combine into
products}
</ReleaseList>

<DealList>
      {various elements describing how and where releases can be
sold}
</DealList>

</NewReleaseMessage>
```

[193] MUSIC BUSINESS ASSOCIATION, *supra* note 66, at 58. This structural overview lists the various sections to be included in the DDEX XML structure. The <ResourceList> element enumerates all the files referenced in the Releases in this message. There are four types of elements that can be included in the list: <SoundRecording>, <Video>, <Image>, and <Text>. The <SoundRecording> element contains metadata about an audio recording.

APPENDIX C[194]

<ResourceList>

The ResourceList element is an enclosing element, enclosing a list of Resources. These Resources may be SoundRecording, Video, Image or Text elements. The four Resource elements (<SoundRecording>, <Video>, <Image>, <Text>) contain elements describing the Resource being delivered. The elements vary slightly by Resource type, in that the element names use the type of Resource (i.e. SoundRecordingId vs. TextId).

ELEMENT NAME	HOW MANY	DESCRIPTION	VALUES
SoundRecordingId, VideoId, ImageId, TextId*	1..n	Contains unique identifiers for this Resource Note: For Resources without standard identifiers, such as images or booklets, you still must send an identifier. You can use the file name as the identifier, but you must specify that you're sending a proprietary identifier, including the Namespace attribute (see example at right).	A composite element that includes ISRC or other user-defined identifiers. If you're sending a proprietary identifier (as suggested), please use the following syntax, substituting your own DDEX ID: <ProprietaryId Namespace="DPID:PADPIDA2012071601U">USAB10701210.jpg</ProprietaryId>
ResourceReference*	1	A reference used throughout the rest of the XML file.	Always begin with the letter A, usually in ascending numerical order, i.e. A1, A2, etc.
ReferenceTitle (for SoundRecording and Video) or Title (for Image and Text	1	The reference title of a Resource.	A composite containing a required TitleText element and an optional SubTitle element. Note: this element is only read if the Release title is omitted from the Release list.
LanguageOfPerformance	0.1	The language used in the performance. (Not applicable for Image Resources.)	The two-letter ISO language code.
Duration *	1	The duration of the performance. (Not applicable for Image or Text Resources.)	A duration in PT[[hhH]mmM]ssS format, where lower case characters indicate variables, upper case characters are part of the string, e.g. two minutes and three seconds would be PT2M3S).
SoundRecordingDetailsByTerritory, VideoDetailsByTerritory, ImageDetailsByTerritory, TextDetailsByTerritory *	1..n	Territory-specific metadata.	A composite containing multiple sub-elements (see next section).

* Required files are marked with an asterisk and in bold.

[194] *Id.* at 61. This table notes the required files with an asterisk in bold. Unique identifiers, resource reference, duration, and territory specific metadata are all required under this standard.

APPENDIX D[195]

Resource Details By Territory

All Resources include territory-specific information, in the <SoundRecordingDetailsByTerritory>, <VideoDetailsByTerritory>, <ImageDetailsByTerritory>, and <TextDetailsByTerritory> elements. They all contain similar sets of sub-elements, with a few minor differences, which are called out in the table below.

ELEMENT NAME	HOW MANY	DESCRIPTION	VALUES
TerritoryCode *	0..1	This element describes where the included Resource is available	Always supply "Worldwide". The other values will fail at the ingestion.
Title (Not required for video resources. Not used with image or text resources.)	1..n	The title(s) associated with this Resource. You may provide multiple titles, using the Type attribute, i.e. FormalTitle, DisplayTitle, etc. DisplayTitle takes precedence over the Format Title	A composite containing a required TitleText element and an optional SubTitle element. **Note:** this element is only read if the Release title is omitted from the Release list.
DisplayArtist (Not used in image or text resources.)	0..n	Contains the artist name and their role.	A composite element containing a PatyName and an optional ArtistRole element.
ResourceContributor	0..n	Contains the name and role of additional contributors.	A composite element containing a PartyName and an optional ResourceContributorRole element.
LabelName (Not used with video, image or text resources.)	0..n	The name(s) of the label(s) under which the Resource is released.	Any string up to 250 characters.
Rightscontroller (Not used with video, image or text resources.)	0..1	The organization(s) controlling the rights to this Resource.	A composite containing the PartyId and/ or PartyName of the organiazation, along with other optional elements.
RemasteredDate (Not used with video, image or text resources.)	0..1	The date the Resource was remastered (usually refers to the digital remastering).	A composite containing date and location of the remastering.
PLine (Not used for video, image, or text resources_	0..1	Contains the year of first release of the Resource followed by the name of the entity that owns the phonographic rights in the Resource.	A composite element containing optional Year and PLineCompany elements, and a required PLineText element.
CLine	0..1	The copyright information.	A composite containing optional Year and CLineCompany elements, as well as a required CLineText element.
CourtesyLine	0..1	Contains text for a courtesy line, i.e. "John Smith appears courtesy of Super Duper Records."	Any string up to 250 characters in length.
OriginalResourceRelease-Date	0..n	The date of the original Release of this Resource (not the original Release of this version).	A date using YYYY-MM-DD syntax
Genre (Not used with image or text resources.)	0..n	Contains genre information.	A composite containing a GenreText element and an optional SubGenre element.
ParentalWarningType	0..1	Whether or not the Resource contains objectionable material.	One of: Explicit, ExplicitContentEdited, NotExplicit, Unknown, UserDefined
AVRating (video resources only)	0..n	The rating and rating agency for the video.	A composite containing the RatingText and RatingAgency elements.

* Required files are marked with an asterisk and in bold.

[195] *Id.* at 62. This table notes the required files with an asterisk in bold. Only the territory code is required by this standard.

FOR THE GOOD OF THE GAME: THE ROLE AND AUTHORITY OF THE COMMISSIONER OF BASEBALL DURING THE SPORT'S BIGGEST SCANDALS

By: Graham P. Quinn
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Introduction

Oh, somewhere in this favored land the sun is shining bright, the band is playing somewhere, and somewhere hearts are light; And somewhere men are laughing, and somewhere children shout, but there is no joy in Mudville—mighty Casey has struck out."[1] Ernest Thayer's poem about a fictional baseball slugger's tough outing has become one of the most famous poems in American literature – just as baseball has been long hailed as America's National Pastime. The sport, believed to have been founded before the Civil War, was professionalized in the mid to late 1800s.[2] Baseball is engrained in American culture and history; many American presidents have thrown ceremonial first pitches since the creation of the game, from Franklin D. Roosevelt's record eleven ceremonial first pitches to George W. Bush's famous World Series first pitch in New York just weeks after the September 11, 2001 attacks.[3] However, for a sport so famous, many fans do not fully understand the role of the leader of the Big Leagues: the Commissioner of Baseball. Those who follow the sport know that there has been no shortage of scandal – cheating, gambling, and drug use, have all plagued the game since its inception. It is the role of the Commissioner to investigate and resolve such issues.[4] So how have Commissioners of past and present handled such scandals? Further, has the current Commissioner managed the most recent scandal consistent with the

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[1] Ernest Thayer, *Casey at the Bat: A Ballad of the Republic Sung in the Year 1888*, THE DAILY EXAMINER, June 3, 1888.

[2] Craig Calcaterra, *Today in Baseball History: A lie about how baseball was invented is born*, NBC SPORTS (Apr. 2, 2020, 1:12 PM), https://mlb.nbcsports.com/2020/04/02/today-in-baseball-history-a-lie-about-how-baseball-was-invented-is-born/ (last visited Nov. 20, 2020).

[3] Marina Watts, *A Brief History of the Ceremonial First Pitch Thrown by U.S. Presidents*, NEWSWEEK (July 28, 2020, 2:03 PM), https://www.newsweek.com/brief-history-ceremonial-first-pitch-thrown-us-presidents-1521094#:~:text=The%20first%20sitting%20president%20to,attendance%20at%20the%20baseball%20games.

[4] Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 533 (7th Cir. 1978) ("The Major League Agreement provides that "(t)he functions of the Commissioner shall be . . . to investigate . . . any act, transaction or practice . . . not in the best interests of the national game of Baseball" and "to determine . . . what preventive, remedial or punitive action is appropriate in the premises, and to take such action . . . ." Art. I, Sec. 2(a) and (b).").

historical role and authority of the Commissioner? In comparing how the sport's leaders throughout history have dealt with scandals, we can better understand the true role and authority of Major League Baseball's chief executive.

I. Say it ain't so, Joe: The 1919 World Series and the Black Sox

October 9, 1919. Game Eight of the best-of-nine World Series featuring the Chicago White Sox and the Cincinnati Reds.[5] The American League Champion White Sox were heavy favorites to win the series, boasting a record of 88-52, and clinching the American League pennant for the second time in three years.[6] Led by superstar slugger "Shoeless" Joe Jackson, the White Sox were poised to win the World Series, just as they had done in 1917.[7] However, things were not going as White Sox fans had hoped. Embarrassingly dominated by the Reds and down four games to three, the Sox needed victories in both game eight and game nine in order to take home their third World Series title.[8] The Sox did not achieve their much-needed game eight victory, and the Reds won the game and brought the first World Series trophy to Cincinnati.[9] The baseball world was shocked. How did a team as dominant as the White Sox lose in such a dramatic fashion?

The cloud surrounding their loss in the World Series still lingered for White Sox players. During the 1920 season, rumors began to swirl that the 1919 World Series was fixed, and the White Sox players had intentionally lost the series.[10] Before the end of the 1920 season, a grand

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[5] *1919 World Series*, BASEBALL REFERENCE, https://www.baseball-reference.com/postseason/1919_WS.shtml (last visited Nov. 17, 2020).
[6] *1919 Chicago White Sox Statistics*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/CHW/1919.shtml (last visited Nov. 17, 2020); *1917 Chicago White Sox Statistics*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/CHW/1917.shtml (last visited Nov. 17, 2020).
[7] *1919 Chicago White Sox Statistics*, *supra* note 6.
[8] Tim Bannon and Kori Rumore, *100 Years ago, White Sox Players conspired to throw the 1919 World Series. Here's how the Chicago Tribune covered the best-of-nine series*, CHICAGO TRIBUNE (Oct. 1, 2019, 1:32 PM), https://www.chicagotribune.com/sports/white-sox/ct-cb-chicago-white-sox-black-sox-world-series-htmlstory.html.
[9] *Id*; *1919 Cincinnati Reds Statistics*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/CIN/1919.shtml (last visited Nov. 17, 2020).
[10] Michael W. Klein, *Rose Is in Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 HASTINGS COMM. & ENT L.J. 551, 572 (1991).

jury convened to investigate the matter.[11] Eddie Cicotte confessed to the grand jury that he had participated in the fix.[12] While the grand jury investigation was still ongoing, White Sox owner Charles Comiskey suspended seven White Sox players with three games left in the season; the Sox went on to lose two of the three, and finished in second place in the American League.[13] On October 22, 1920, over one year after the infamous series, the grand jury implicated eight White Sox players on nine counts of conspiracy to defraud: Eddie Cicotte, Oscar "Happy" Felsch, Arnold "Chick" Gandil, "Shoeless" Joe Jackson, Fred McMullin, Charles "Swede" Risberg, George "Buck" Weaver, and Claude "Lefty" Williams.[14] During the trial, former White Sox player William "Sleepy Bill" Burns, testified that members of the 1919 White Sox had intentionally lost the 1919 World Series as a part of a gambling fix.[15] Despite the testimony of Burns, among other evidence, the jury returned not guilty verdicts for all eight players.[16] Baseball fans across the country were in shock; did these players, now famously dubbed "The Black Sox", just get away with throwing a World Series?

II. From Judge to Executive: The Historical Role of the Commissioner

After the not guilty verdict, the eight players implicated in the Black Sox scandal likely breathed a collective sigh of relief. However, as legendary football broadcaster Lee Corso would say, "Not so fast!" The owners of MLB teams selected Kenesaw Mountain Landis, a federal judge from Chicago, to be Major League Baseball's first Commissioner.[17] Newly appointed Commissioner Landis wasted no time; all eight indicted Black

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[11] *Id.*

[12] *Id* at 573 ("With his name twice mentioned, Cicotte confessed his actions and inspired two other players to do the same. On September 28, in the office of Comiskey's lawyer, Alfred Austrian, Cicotte told Comiskey that he and some of the other players were "crooked." He appeared before the grand jury the next day, signed a waiver of immunity on the advice of a state's attorney, recounted the pressure he received from Risberg, McMullin, and Gandil, and described the meeting at which they planned the fix. He admitted to receiving $10,000 and named Burns and Maharg as the primary gamblers.").

[13] *Id.* ("Comiskey suspended the eight players after these confessions...")

[14] Klein, *supra* at 573-74.

[15] *Id* at 578 ("Burns implicated all of the defendant players except Jackson who, Burns said, was not present at a meeting in Cicotte's room the morning before Game One.").

[16] *Id* at 580 ("The jury deliberated for about two hours in the early evening of August 2, 1921 and found the players and the gamblers not guilty.").

[17] *Id* at 584 ("As has been noted, during the fallout of the controversy generated by the allegations against the Black Sox, the Major Leagues created the office of Commissioner and selected former federal district court judge Kenesaw Mountain Landis to hold the position.").

Sox were soon placed on the ineligible list, and he later made their ineligibility permanent.[18] These eight men would never play professional baseball again for the rest of their lives.[19] This was a monumental decision; Landis' ban not only made a statement expressing the seriousness of the Commissioner's role, but established the Commissioner's authority to outright remove players from the sport entirely. Further, Landis stood firm on his decision and repeatedly refused requests to reinstate the banned players.[20] As the first Commissioner of Major League Baseball, Landis' actions would establish the role of the Commissioner, as well as precedent regarding the extent of the Commissioner's authority. As Commissioner, Landis saw himself as the supreme authoritative figure of the MLB, with authority above all others, especially the team owners.[21] The Major League Baseball Constitution, originally drafted in 1921, does in fact give the Commissioner broad authority to investigate matters within the sport, and hand down punishments. [22] The Commissioner is given seemingly unchecked authority to act for the "best interest of baseball"; what the best interest of baseball is, however, also is entirely within the discretion of commissioner.[23]

In the twenty four years that Landis served as commissioner, he was not afraid to exercise the large authority of his office.[24] Referred to by many players as "Judge" due to his time on the Federal bench, Landis operated with an iron fist.[25] Landis temporarily withheld the World Series share of

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[18] *Id* at 585.
[19] *Id.*
[20] *Id.*
[21] *Kuhn*, 569 F.2d at 532 ("On January 12, 1921, Landis told a meeting of club owners that he had agreed to accept the position upon the clear understanding that the owners had sought "an authority . . . outside of your own business, and that a part of that authority would be a control over whatever and whoever had to do with baseball."").
[22] *Id* ("The Major League Agreement provides that "(t)he functions of the Commissioner shall be . . . to investigate . . . any act, transaction or practice . . . not in the best interests of the national game of Baseball" and "to determine . . . what preventive, remedial or punitive action is appropriate in the premises, and to take such action . . . ." Art. I, Sec. 2(a) and (b).").
[23] Matthew L. Winkel, The Not-So-Artful Dodger: The Mccourt-Selig Battle and the Powers of the Commissioner of Baseball, 31 Cardozo Arts & Ent. L.J. 539, 540 (2013) ("Most of the Commissioner's authority is derived from the "best interests of baseball" clause of the Major League Agreement... The clause is a mandate of almost unlimited power because the determination of what concerns the "best interests of baseball" is vested solely with the Office of the Commissioner.").
[24] Dan Busby, *Kenesaw Mountain Landis*, Society for American Baseball Research, https://sabr.org/bioproj/person/kenesaw-landis/ (last visited Nov. 18, 2020).
[25] *Id.*

three Yankees, including future Hall of Famer Babe Ruth, for barnstorming in the fall of 1921.[26] Landis banned the Giants' Jimmy O'Connell, a player, and Cozy Dolan, a coach, in 1923.[27] O'Connell and Dolan had allegedly offered Phillies player John "Heinie" Sand $500 to throw their last two games of the season in order to secure the Giants a pennant victory.[28] Despite their repeated appeals, Landis refused to reinstate O'Connell and Dolan.[29] Landis further established his power in dealing with game fixing accusations of Ty Cobb and Tris Speaker.[30] American League president Ban Johnson, after getting evidence of a gambling conspiracy involving Cobb and Speaker, desired to quietly remove the two players from the league, and hoped for the Commissioner's rubber stamp approval.[31] Landis, however, had other ideas; instead of simply accepting Johnson's findings and suggestion, Landis conducted his own investigation.[32] After a thorough inquiry session, Landis found both Cobb and Speaker not guilty, much to the chagrin of Johnson; Johnson took a leave of absence and later resigned his post as American League president as a result.[33] Landis' tenure was filled with exercises of power that established the Commissioner's supreme authority over baseball; he reportedly vetoed singer and actor Bing Crosby's bid to buy the Boston Braves because Crosby owed a racing stable.[34] Landis' hatred of gambling was the alleged reason for the denial of Crosby's bid, and this desire to keep baseball free from the taint of gambling was a focal point of his tenure.[35]

Since Landis, Major League Baseball has been led by nine different men, each establishing themselves as a part of baseball history.[36] How have the commissioners acted "in the best interest of baseball" during their tenures? How has the role of Commissioner changed since Landis banned the Black Sox? Each Commissioner has played their own part in establishing how the Commissioner would act within his role; with each decision, the authority of the Commissioner grows to a seemingly uncheckable power within the MLB.

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Jerry Crasnick, *Meet Major League Baseball's new commissioner, Rob Manfred*, ESPN (Jan. 24, 2015), https://www.espn.com/mlb/story/_/id/12212565/meet-major-league-baseball-new-commissioner-rob-manfred.

Some of these men made decisions that would change the MLB forever; "Happy" Chandler, Landis' direct successor, started the racial integration of major league baseball.[37] Prior to holding baseball's highest office, Chandler was a United States Senator from Kentucky.[38] Although he only served as Commissioner for six years, Chandler made his mark on baseball through the sport's most monumental change. Chandler's role in the integration of baseball evidenced the expansive "best interest" power of the Commissioner, showing that the Commissioner can make sweeping changes that alter the nature of the League. Much like his predecessor, Chandler's actions expanded the power of his office by establishing that the Commissioner acts independent of outside influence; baseball was integrated before the U.S. Armed Forces, and before the desegregation of schools.[39]

One of the sport's longest-serving commissioners, Bowie Kuhn, reiterated Landis' belief that the Commissioner's authority is designed to be above baseball team ownership.[40] Kuhn issued fines or suspensions to several team owners; the Yankees' George Steinbrenner, the A's Charles Finley, whom Kuhn often clashed with, and the Braves' Ted Turner, all received punishments from Kuhn.[41] Kuhn made it clear that keeping baseball's ownership in check was well within the authority of the Commissioner. Further, Kuhn fought against the idea of free agency; he even squared off against a player, Curt Flood, in the Supreme Court over the issue.[42] Kuhn did not believe that free agency, essentially players selling themselves to the highest bidder, was in the best interest of baseball.[43] Baseball purists would agree with Kuhn, free agency adds a level of drama and financial motivation to the sport. Kuhn's fears would ultimately come true, free agency and massive player contracts are now a large part of the intrigue and draw of baseball.[44] Kuhn's short-lived victory against free

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[37] Robert Mcg. Thomas Jr., *A.B. (Happy) Chandler, 92, Dies; Led Baseball During Integration*, N.Y. TIMES, (June 16, 1991), at 26.
[38] *Id.*
[39] *Id.*
[40] Richard Goldstein, *Bowie Kuhn, 80, Former Baseball Commissioner, Dies*, N.Y. TIMES, (March 16, 2007), https://www.nytimes.com/2007/03/16/sports/baseball/16kuhn.html.
[41] *Id.*
[42] *See* Flood v. Kuhn, 407 U.S. 258, (1972).
[43] Goldstein, *supra* note 40.
[44] Cody Benjamin, *Mookie Betts joins list of biggest contracts in sports after signing massive 12-year deal with Dodgers*, CBS SPORTS, (July 22, 2020), https://www.cbssports.com/nfl/news/mookie-betts-joins-list-of-biggest-contracts-in-sports-after-signing-massive-12-year-deal-with-dodgers/ (last visited Nov. 19, 2020).

agency in the Supreme Court showed that the Commissioner does have a supreme authority over all aspects of the game.

A controversial exercise of Commissioner authority came with baseball's shortest-tenured Commissioner, A. Bartlett Giamatti.[45] Giamatti, the former President of Yale University as well as the National League, was regarded as a man of integrity who sought the highest ethical standards in baseball. [46] In 1989, allegations were made to Commissioner Peter Ueberroth, Giamatti's predecessor, that Cincinnati Reds manager and former player Pete Rose bet on baseball games during his career in the MLB. [47] Ueberroth and Giamatti, who was still the National League president at the time, but was elected to replace Ueberroth, began to look into the matter; investigator John M. Dowd was hired.[48] This was not the first time Giamatti and Rose had faced off; just one year prior, Giamatti as National League president suspended Rose for 30 days after an altercation with an umpire.[49] Rose's month long suspension was the harshest penalty doled out for on-field behavior.[50] Many called the suspension excessive; Rose especially.[51] Flash forward one year: After receiving a 225-page report from Dowd detailing Rose's gambling and betting activity, Rose was effectively banned for life via a signed agreement to voluntarily leave baseball.[52] Aside from the "voluntary" retirement, the agreement between Giamatti and Rose had another major effect; Rose then dropped his lawsuit against Giamatti.[53] This was another aggrandization of Commissioner power. Not only did Giamatti ban Rose from baseball, with the option to apply for reinstatement, but essentially forced Rose's lawsuit to be dropped. By seeking to further the best interests of baseball, Giamatti established that the far-reaching authority of the Commissioner's office could even touch the American court system.

In 1998, former Milwaukee Brewers owner Bud Selig was named the ninth Commissioner of Baseball, although he had been *de facto* Commissioner since 1992 when he was named Chairman of MLB's

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[45] Robert D. McFadden, *Giamatti, Scholar and Baseball Chief, Dies at 51*, N.Y. TIMES, (Sept. 2, 1989) at 1.
[46] *Id.*
[47] Klein, *supra* at 575.
[48] *Id.*
[49] Murray Chass, *Pete Rose is Suspended 30 Days*, THE NEW YORK TIMES, May 3, 1988.
[50] *Id.*
[51] *Id.*
[52] Klein, *supra* at *576, 586.*
[53] *Id.*

executive council.[54] Selig's tenure as Commissioner saw many positive changes within the sport: interleague play, divisional play, team realignment, the opening of 22 new baseball stadiums, revenue-sharing among teams, the World Baseball Classic, and nearly a generation long uninterrupted labor peace.[55] In terms of his role as Commissioner, and the expansion of the office's authority, Selig's tenure was marked by a problem Selig saw growing in the sport – performance enhancing drugs.[56] Steroids were a notable and discussed problem in baseball as far back as the 1980s; rumors swirled around players like Jose Canseco and Mark McGwire, both huge power hitters.[57] Further, the issue of steroids became a legal problem; Congress passed the Anabolic Steroids Control Act in 1990, which made it a federal crime to possess steroids without a prescription from a doctor.[58] It took nearly thirteen years from the passage of the Act, but Selig did something truly monumental – began a widespread testing program and disciplinary system throughout the MLB for illegal drugs.[59] Selig saw steroid use as a threat to the future of baseball, and was willing to impose harsh punishments for it; in 2013, Selig suspended superstar Alex Rodriguez for a staggering 211 games.[60] Selig's opinion on steroids was firm, believing that more players should have been suspended and those who were using steroids should not be welcome in the Hall of Fame.[61] Selig's tenure as Commissioner, and hard stance on steroids and other illegal drug, use not only improved the integrity of the game, but also further defined the Commissioner's authority to conduct widespread investigations and take any preventative measures he sees fit. There is no doubt that Selig as Commissioner made Major League Baseball better, but Selig established more authoritarian power as Commissioner. Simply put, Selig solidified the idea that the Commissioner can do anything he sees fit to fit his own definition of the "best interest of baseball" and does not have to answer to anyone for his actions.[62]

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[54] Mario Ziino, *Bud Selig*, Society for American Baseball Research, https://sabr.org/bioproj/person/bud-selig/ (last visited Nov. 20, 2020).
[55] *Id.*
[56] *Id.*
[57] BUD SELIG & PHIL ROGERS, FOR THE GOOD OF THE GAME: THE INSIDE STORY OF THE SURPRISING AND DRAMATIC TRANSFORMATION OF MAJOR LEAGUE BASEBALL 193 (HarperCollins Publishers 2019).
[58] *Id.* at 194.
[59] *Id.* at 253.
[60] *Id.* at 273.
[61] *Id.* at 275.
[62] *Id.*

Selig would retire as Commissioner in 2015, after serving for twenty-three years, a tenure only beaten by Kenesaw Mountain Landis.[63] Before Selig's retirement, MLB Chief Operating Officer Rob Manfred was named as his successor.[64] Manfred was familiar with Major League Baseball and the Commissioner's office; prior to being named to baseball's highest office, Manfred worked closely with Selig for sixteen years.[65] Manfred was assuming the helm at a high point in the MLB's history; revenues were growing, player-owner relations were strong, and the steroid issue was dealt with.[66] By all accounts, all Manfred would have to do was keep the baseball ship sailing smooth.[67] But in November 2019, Manfred would be faced with a career-defining moment, and his first true challenge as Commissioner.[68]

III. Cameras, Trash Cans, and Trophies: The Houston Astros' Sign Stealing

On November 1, 2017, the Houston Astros beat the Los Angeles Dodgers in Game 7 of the World Series to bring home the first title in the franchise's fifty-six year history.[69] Just four years prior, the Astros--fresh off a move to the American League--lost a record 111 games.[70] Over the next two seasons, the Astros would win two more American League West Division titles, again reaching the World Series in 2019.[71] Just over two years after their World Series victory, and in the early stages of what appeared to be a baseball dynasty, a bombshell dropped. Former Astros pitcher and 2017 World Series Champion Mike Fiers, through an article by Ken Rosenthal and Evan Drellich, detailed how the Astros utilized cameras, radios, and trash cans to steal signs in order to gain a competitive advantage

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[63] Ziino, *supra* note 55.
[64] Adam Wells, *Rob Manfred Named Bud Selig's Successor as MLB Commissioner*, BLEACHER REPORT (Aug. 14, 2014), https://bleacherreport.com/articles/2138852-rob-manfred-named-bud-seligs-successor-as-mlb-commissioner?m=1.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Ken Rosenthal & Evan Drellich, *The Astros Stole Signs Electronically in 2017 – Part of a Much Broader Issue for Major League Baseball*, THE ATHLETIC (Nov. 12, 2019).
[69] Tracy Ringolsby, *Astros fulfill quest with first World Series Title*, MLB, Nov. 2, 2017, https://www.mlb.com/astros/news/astros-win-first-world-series-after-56-years-c260451456 (last visited Nov. 20, 2020).
[70] *Id.*
[71] *2018 Houston Astros*, https://www.baseball-reference.com/teams/HOU/2018.shtml (last visited Nov. 20, 2020); *2019 Houston Astros*, https://www.baseball-reference.com/teams/HOU/2019.shtml (last visited Nov. 20, 2020).

while batting.[72] Fiers alleged that players, coaches, and front office staffers were all involved in a scheme to electronically steal signs from opposing pitchers, and relay this information to the Astros batter on the plate.[73]

Sign stealing, which is not technically illegal in Major League Baseball, is batting team's efforts to decode signs – i.e., the messages nonverbally relayed typically from the opposing catcher to pitcher – in order to give the batting team a competitive advantage.[74] The practice of sign stealing, described as "old as baseball itself," is an accepted MLB practice.[75] The illegality within the game comes when teams use objects "foreign to the game," such as binoculars, cameras, or smart watches; Commissioner Manfred fined the Boston Red Sox in 2017 for utilizing such practices.[76] Starting in 2017, the Astros took the "foreign objects" method of sign stealing a step further. Utilizing Excel spreadsheets, hi-tech computer applications, and algorithms, the Astros organization's "Dark Arts" department developed a complex system to detect, decode, and transmit an opposing team's signs – aptly named "Codebreaker."[77] The information was relayed to the Astros batters in real time via a less complicated method than Excel sheets and algorithms – a person in the Astros dugout would hit an overturned trash can with a baseball bat, indicating to the Astro at the plate which pitch was about to head his way.[78]

Based on Fiers' allegations, and the growing outcry of MLB players and fans, Commissioner Manfred launched an investigation into the

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[72] Ken Rosenthal and Evan Drellich, *The Astros stole signs electronically in 2017 – part of a much broader issue for Major League Baseball*, The Athletic (Nov. 12, 2019), https://theathletic.com/1363451/2019/11/12/the-astros-stole-signs-electronically-in-2017-part-of-a-much-broader-issue-for-major-league-baseball/.

[73] *Id.*

[74] Jacob Bogage, *What is sign stealing? Making sense of Major League Baseball's latest scandal*, Wash. Post (Feb. 14, 2020, 10:15 AM), https://www.washingtonpost.com/sports/2020/01/14/what-is-sign-stealing-baseball/.

[75] *Id.*

[76] *Id.*

[77] Jared Diamond, *'Dark Arts' and 'Codebreaker': The Origins of the Houston Astros Cheating Scheme*, Wall St. J. (Feb. 7, 2020, 5:09 PM), https://www.wsj.com/articles/houston-astros-cheating-scheme-dark-arts-codebreaker-11581112994.

[78] Jared Diamond, *An Astros Fan Spent 50 Hours Listening for Cheating. He heard a Lot of Cheating*, Wall St. J. (Jan. 30, 2020, 1:50 PM), https://www.wsj.com/articles/an-astros-fan-spent-50-hours-listening-for-banging-he-heard-a-lot-of-banging-11580394165.

specifics of the Astros sign stealing scheme.[79] During the early stages of the investigation, Manfred stated that significant penalties could be coming.[80] Manfred suggested that the League would take the sign stealing issue much more seriously than in the past – Manfred had only levied minor fines to the Boston Red Sox in 2017 for relaying information via smart watches.[81] After a two month investigation, Manfred released a report detailing the Astros' actions – in 2017 and 2018, the Astros utilized electronics to steal signs and relay information in real time.[82] Manfred stated that the scheme was player-driven and executed by lower-level operations employees within the Astros organization.[83] Manfred's findings revealed that many, if not all, players and coaches were aware of the scheme, and "most of the position players" participated in the scheme.[84] Manfred made the decision not to punish any individual players, stating that he made the decision in 2017 that a club's general manager and field manager would be held accountable for "misconduct of this kind."[85] Manfred's punishments were: forfeiture of the Astros' first and second round selections in the next two First-Year Player Drafts, a fine of $5 million (the maximum amount allowable under the Major League Constitution), and one-year suspensions for General Manager Jeff Luhnow, Field Manager A.J. Hinch, and Bench Coach Alex Cora.[86] Manfred deferred to the Astros' management to determine penalties and punishments for lower-level Astros employees.[87] Many were outraged by Manfred's decision, especially players – saying the punishment was insufficient.[88] The two suspended coaches, Hinch and Cora, were not too negatively affected by their suspension. Hinch, although fired by the Astros, was hired to be the manager of the Detroit Tigers just days after his suspension ended.[89] Alex Cora, who had gone on to lead the Boston Red Sox to a World Series victory in 2018, was rehired by the Red Sox soon

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[79] Tyler Kepner, *In Astros Inquiry, Rob Manfred Raises Possibility of Big Penalties,* N.Y. Times (Nov. 19, 2019), https://www.nytimes.com/2019/11/19/sports/baseball/astros-cheating-rob-manfred.html.
[80] *Id.*
[81] *Id.*
[82] Robert D. Manfred, Jr., *Statement of the Commissioner In re Houston Astros,* MLB.com (Jan. 13, 2020), https://img.mlbstatic.com/mlb-images/image/upload/mlb/cglrhmlrwwbkacty27l7.pdf.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Tyler Kepner, *Manfred Says Astros' Shame is Penalty Enough. Opponents Might Disagree*, N.Y. Times (Feb. 16, 2020), https://www.nytimes.com/2020/02/16/sports/baseball/rob-manfred-astros.html.
[89] Jason Beck, *Hinch: 'The good times are coming' to Detroit*, MLB (Oct. 30, 2020), https://www.mlb.com/news/aj-hinch-hired-as-tigers-manager.

after his suspension expired.[90] Manfred's response to critics was that Astros players went unpunished because there had not been player cooperation in the investigation.[91] Baseball legend Hank Aaron felt "the punishment did not fit the crime," and that the players involved should be permanently banned from baseball.[92] The focus here is not whether the punishments imposed by Manfred were "fair" or not – that debate will be left to the baseball fans on Twitter. The question, rather, is whether Commissioner Manfred's actions were consistent with the historical role and actions of his office?

There are two competing and conflicting arguments regarding Commissioner Manfred's actions amid the sign stealing scandal. First, there is an argument that Manfred's punishments were not severe enough in light of the historical actions of his predecessors in dealing with various scandals and rule violations – an argument many Los Angeles Dodgers and New York Yankees fans would agree with. The contrary argument, though, posits that Manfred was well within his authority and power as Commissioner to do as he saw fit; after all, it has been established that the Commissioner acts only to further his own idea and views of the "best interest of baseball." Which argument is valid? Technically, they both are.

IV. What Would Landis Do?

Manfred, when evaluated through the lens of his predecessors' actions, did not impose penalties nearly as harsh as would be consistent with the Commissioner's role. Specifically, two of baseball's most influential Commissioners, Kenesaw Mountain Landis and Bud Selig, would have issued much more severe punishments than those issued by Manfred.

As the first Commissioner of Baseball, former judge Landis made it his mission to root out gambling in Major League Baseball – that was his major focus as Commissioner.[93] Landis was unafraid to punish players for violating the integrity of the game, and conducted his own investigations

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[90] Dan Schlossberg, *Boston Red Sox Hire Popular Alex Cora to be Their Manager Again*, Forbes (Nov. 6, 2020, 10:53 AM), https://www.forbes.com/sites/danschlossberg/2020/11/06/boston-red-sox-hire-popular-alex-cora-to-be-their-manager-again.

[91] *Id.*

[92] Jenna West, *Hank Aaron Says Those Involved in Astros Scandal 'Should Be Out of Baseball'*, Sports Illustrated (Feb. 6, 2020), https://www.si.com/mlb/2020/02/06/hank-aaron-astros-sign-stealing-scandal-banned-punished.

[93] Busby, *supra* note 24.

regardless of findings by others in baseball leadership.[94] Landis' most famous action was the banning of the eight players of the "Black Sox"; men who would never play professional baseball again.[95] Landis permanently banned these eight men the day after a jury found them all not guilty; he ignored the judiciary and imposed his own sentence.[96] In a court of law, nothing these men had done was illegal; but that did not stop Landis.[97] No crime had been committed, no official rule had been broken, yet Landis still ended the baseball careers of eight men. Landis set the precedent that the Commissioner could suspend or ban players at his sole discretion. The Commissioner does not need approval from team ownership, or a guilty verdict from a court to support his decision to impose significant sanctions against coaches and players. Landis' actions established a landmark precedent for players: if they acted in ways not in baseball's best interests, they could be removed from the game entirely. Landis permanently banned a player and a coach, Jimmy O'Connell and Cozy Dolan, for allegedly offering another player $500 to "throw" one game.[98]

How do Landis' actions compare to Manfred's? Were Landis the MLB Commissioner today, how would he have disciplined the players, coaches, and organizational staff involved in the Astros' sign-stealing scheme? There is no question that Hinch and Cora, who were directly implicated in the scheme, would have faced permanent suspensions from Landis. Much like game fixing or gambling, sign stealing via a complex system of electronics and computer programs does not serve the best interests of baseball. Those behind it were actively playing a role in tainting the integrity of the game; Landis did not look kindly on those who did not uphold the integrity of the game.[99] Landis would likely have given Hinch and Cora, and perhaps Luhnow, lifetime bans from baseball. Landis permanently banned two people from baseball for simply making an offer to affect the result of one game; far less impactful than the Astros' scheme, which altered the result of a number of games throughout two seasons.[100] A scheme with such wide-scale repercussions would have warranted more than just a season long suspension from Landis. Unlike Manfred, Landis would not have simply stated that he was unable to gather more information to be able to hand out individual player punishments.[101] On several

[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*; Rosenthal, *supra* note 70.
[101] Manfred, *supra* note 80.

occasions, Landis dug deeper than others. When American League president Ban Johnson presented Landis with his findings and recommendations for the punishments of Ty Cobb and Tris Speaker, Landis disregarded the report and conducted his own investigation.[102] As Commissioner Landis would not have been satisfied with the uncertainty cause by the low level of player involvement which Manfred noted in his report.[103] Landis, being the strong-willed, iron-fisted Commissioner, would have used the fullest scope of his power to fully determine the level of player involvement in the scheme. Landis would not have merely imposed fines or taken away draft picks. A staunch protector of the integrity of baseball, Landis would have imposed more suspensions, many of which would likely be permanent.

Manfred's direct predecessor and mentor, Bud Selig, was also unafraid to impose suspensions. Similar to Landis' battle with gambling, Selig's major battle as Commissioner was against the use of steroids. Between 2005 and 2014, Selig issued fifty-four suspensions, ranging in length from ten games to entire seasons.[104] While Selig's suspensions were not nearly as severe as Landis', Selig did act in accordance with the precedent that those who were not acting within the best interests of baseball would face suspensions. Selig made it clear – if players violated the rules to give themselves a competitive advantage, they would face suspensions. Had Selig been Commissioner when the Astros sign stealing came to light, it is likely that Astros players would have faced year-long suspensions, much like their coaches and GM. Although Astros players were not orchestrating the scheme, many utilized and benefitted from it.[105] From a competitive advantage standpoint, there is effectively no difference between a player using a performance-enhancing drug and a player using a complex sign stealing scheme. Both are a direct violation of the rules of baseball that gives a player a significant competitive advantage over the pitcher he is facing. In fact, the Astros' sign stealing program arguably gave batters a greater competitive advantage than a batter using a performance-enhancing drug. Steroids give batters the ability to hit the ball further and harder; those using steroids still have to determine which pitch is coming towards them. Sign stealing gives a batter the ability to know exactly which pitch they will be facing, taking much of the skill and guesswork out of the challenge of

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[102] Busby, *supra* note 24.
[103] Manfred, *supra* note 80.
[104] *Steroid Suspensions in Major League Baseball*, THE BASEBALL ALMANAC, https://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited Nov. 20, 2020).
[105] Manfred, *supra* note 80.

batting. Given that a complex sign stealing program is--much like steroids--a rule-violating competitive advantage, Selig would have given individual Astros players suspensions – which Manfred refrained from doing.

Further, Manfred's actions were not even consistent with his previous disciplinary choices as Commissioner. In January 2017, St. Louis Cardinals' scouting director Chris Correa was permanently banned from baseball for hacking the Houston Astros email system and analytical scouting database.[106] Correa received a permanent ban for violating the rules of baseball to give a certain team a competitive advantage over others.[107] Unlike the Astros, Correa did violate the law and was sentenced to federal prison: within the confines of the sport, however, Correa's actions were similar to the Astros' sign stealing program.[108] Much like Correa, the Astros' sign stealing program was designed to give a competitive advantage over several seasons, not simply a game or two. Further, Manfred's permanent ban of Correa evidenced that Manfred was willing to issue harsh penalties for what he saw as actions against the best interest of baseball. Although it was for actions differing from database hacking or electronic sign stealing, Manfred permanently banned Atlanta Braves General Manager John Coppolella for circumventing international signing rules.[109] Once again, this evidences that Manfred is willing to issue strong punishments for rule violations.

In summary, Commissioner Manfred's actions and punishments issued regarding the Astros' sign stealing scheme were inconsistent with the historical punishment and investigative actions of the Office of the Commissioner. This does not mean, however, that Manfred's actions were wrong. As discussed, the Commissioner can essentially act however he sees fit in order to work towards what he believes to be in the best interest of baseball.

V. The Commissioner Answers Only to the Commissioner

No matter how comparatively minor Commissioner Manfred's punishments to the Astros and their players are considered relative to the

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[106] Mark Saxon, *After investigation, MLB orders Cardinals to forfeit top two picks, pay $2 million to Astros*, ESPN (Jan. 30, 2017), https://www.espn.com/mlb/story/_/id/18586344/mlb-orders-st-louis-cardinals-forfeit-top-2-2017-draft-picks-pay-2-million-houston-astros.

[107] *Id.*

[108] *Id.*

[109] *Ex-Braves GM John Coppolella permanently banned; team loses prospects*, ESPN (Nov. 21, 2017), https://www.espn.com/mlb/story/_/id/21506598/ex-atlanta-braves-gm-john-coppolella-placed-mlb-banned-list-team-loses-prospects.

likely punishments his predecessors would have levied, he was well within his authority to do exactly as he did. As established, the Commissioner can act as he sees fit to ensure the best interests of the sport are upheld.[110] The Commissioner has seemingly unlimited power: the extent of the Commissioner's power is whatever he wants it to be.[111] For example, Commissioner Chandler's , in integrating baseball, indicated his belief that integration was in the best interest of the sport, even if most of America faced some sort of segregation at the time.[112] To Chandler, it did not matter what was going on around the nation. He decided that integration was best for baseball; nobody could challenge him on his decision. Although it was the right decision from a civil rights standpoint, it was also the right "baseball" decision, solely because the Commissioner made the decision, and deemed it so. Commissioner Bowie Kuhn further established this idea, when he fought the concept of free agency all the way to the Supreme Court.[113] Regardless of the fact that free agency is such a large part of Major League Baseball today, during Kuhn's tenure, free agency was not in the best interest of baseball – simply because Kuhn believed it was not.

Through the Major League Constitution, as well as the actions of past Commissioners, the validity of the acting Commissioner's decisions has been established. Whatever the Commissioner chooses to do is in the best interest of baseball, simply because the Commissioner decides what is in the best interest of baseball. As long as the Commissioner believes his actions will best serve the sport, they are the correct actions. This is one of the few examples of absolute, unchecked authority in this country. So, what does that mean for Manfred's actions and punishment of the Astros?

Manfred's controversial actions in dealing with the Astros' sign stealing scheme served the best interests of baseball. This is simply due to the fact that Manfred believed his actions, and the punishments he handed down, would serve the sport better than any alternative. Critics aside, the only true decider of what is best for the Major Leagues is the Commissioner. Manfred had the full authority to do as he saw fit; that is exactly what he did. Manfred conducted an investigation, revealed his findings, and issued

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[110] Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 533 (7th Cir. 1978) ("The Major League Agreement provides that '(t)he functions of the Commissioner shall be . . . to investigate . . . any act, transaction or practice . . . not in the best interests of the national game of Baseball' and 'to determine . . . what preventive, remedial or punitive action is appropriate in the premises, and to take such action . . . .' Art. I, Sec. 2(a) and (b).").
[111] Winkel, *supra* note 23, at 540.
[112] Thomas Jr., *supra* note 37.
[113] *See generally* Flood v. Kuhn, 407 U.S. 258 (1972).

punishments to the degree he felt punishments were necessary.[114] That is all that is required of the Commissioner. Despite indications seemingly to the contrary, Manfred's job is not to appease players, fans, and journalists. Manfred's job, as has always been the job of the Commissioner, is to determine what is and is not in the best interest of baseball, and to then act upon his beliefs. If Manfred believed that only Luhnow, Hinch, and Cora deserved suspensions, that was the right decision. Manfred believed that assessing individual player discipline would be both difficult and impractical.[115] Manfred felt that punishing the coaches involved, as well as the General Manger, would be the best course of action; he stated that it is their role and duty to ensure adherence to the rules.[116] When the allegations against the Astros came to light, Manfred promptly acted and meted out punishments that he felt were proportional to the violations. He did no less than what was required of his office, and thus his actions were justified and reasonable.

VI. Conclusion

The Commissioner of Baseball has virtually unchecked and unquestionable authority over the Major Leagues. From Kenesaw Mountain Landis to Bud Selig, each Commissioner has played an important role in evolving not only the sport of baseball, but the Office of the Commissioner, into what they are today. Whatever one believes about how Commissioner Manfred handled the Houston Astros sign stealing scandal, two ideas can be drawn from his actions. First, Manfred acted inconsistent with his predecessors in the degree of punishment levied against those who acted against the best interest of baseball. Second, although inconsistent with those who came before him, Manfred's actions were well within his authority as Commissioner, and served the best interests of the sport.

The Commissioner's role is to act for the best interest of baseball, a concept which each Commissioner defines for himself. By looking at the history of the Commissioner position, as well as the decisions made by those who held the office, we can better understand the role of the Commissioner in America's National Pastime. "As an owner, an acting commissioner, and then commissioner, I always tried to think about the good of the game, not just my own interests."[117] Bud Selig's words serve as a poignant summation of the Commissioner's role – the Commissioner answers to the game of baseball, and to baseball alone.

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[114] Manfred, *supra* note 80.
[115] *Id.*
[116] *Id.*
[117] Selig, *supra* note 58.

COMPETING IN COLLEGIATE CHAMPIONSHIPS DURING COVID: CAVEAT OR CALAMITY

By: Samuel K. Pappert

Introduction

Upon the NCAA's attempt to resume athletics in the fall semester of 2020, NCAA president Mark Emmert said "Our (NCAA) decisions place emphasis where it belongs — on the health and safety of college athletes."[1] In a world currently battling the COVID-19 pandemic, the idea of athletes travelling across the country and playing sports, especially high intensity ones, is a dangerous combination.[2] Football players know that every time they put on their pads and helmets, they are playing a dangerous game that could kill them, but they did not expect to practice, travel, and compete in such perilous circumstances.[3] One UCLA football player worried that student-athletes' fears will only be recognized when a player finally dies from COVID-19.[4] However, one student-athlete has already died due to COVID-19 complications.[5] Jamain Stephens, a football player for California University of Pennsylvania, a Division II member of the NCAA, passed away due to a blood clot following being diagnosed with COVID-19.[6]

According to a study done by Ohio State University on 26 student-athletes that had contracted COVID-19, four were found to have developed myocarditis, inflammation of the heart muscle, possibly due to COVID-19, as well as eight additional student-athletes exhibiting lesser but similar heart

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[1] NCAA, *Board directs each division to safeguard student-athlete well-being, scholarships and eligibility*, NCAA.COM (Aug. 5, 2020), https://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility.

[2] Centers for Disease Control, *Playing Sports*, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/playing-sports.html (last visited on Nov. 23, 2020).

[3] J. Brady McCullough, *UCLA football players demand protection from 'injustices' amid pandemic return*, LOS ANGELES TIMES (June 19, 2020).

[4] *Id.*

[5] Tyler Conway, *Jamain Stephens' Family Says He Died of Blood Clot Following COVID-19 Diagnosis*, BLEACHER REPORT (Sept. 13, 2020), https://bleacherreport.com/articles/2909284-jamain-stephens-family-says-he-died-of-blood-clot-following-covid-19-diagnosis.

[6] *Id.*

trauma to myocarditis.[7] Myocarditis has been linked to viral infections previously, and can weaken a person's heart, and potentially leading to death.[8] It is recommended for those with myocarditis is to refrain from participating in strenuous exercise for weeks or months until the inflammation subsides.[9] With the knowledge about myocarditis potentially causing Jamain Stephens' blood clot, the NCAA has yet another warning sign that the virus still poses a risk to student-athletes in peak physical condition.[10] However, the NCAA and its member universities continue to promote and conduct the 2020 college football and basketball seasons despite many outbreaks within teams and the potential for players to further injure themselves with COVID-19 complications. This all came to a head when University of Florida basketball player Keyontae Johnson collapsed on court during a NCAA basketball game.[11] Johnson, player who had previously contracted COVID-19, was cleared by the University of Florida to participate in the game after undergoing tests by the University of Florida including a cardiac evaluation.[12] However, even after all of this testing, the hospital caring for Johnson diagnosed him with myocarditis, the same COVID-19 related heart inflammation that caused Jamain Stephens' death.[13] If a university deems a student-athlete has recovered from COVID-19, it is not the end of the student-athlete's injury and should not be the end of the NCAA's liability. Even if players are deemed to have recovered from COVID-19, doctors are concerned that some college athletes who have recovered from COVID-19 may still suffer long-term impacts from the virus.[14] The NCAA and its member universities continue to put players on

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[7] Nick Bromberg, *Ohio State study: 4 of 26 athletes who tested positive for COVID-19 'had CMR findings suggestive of myocarditis'*, YAHOO SPORTS (Sept. 11, 2020), https://sports.yahoo.com/ohio-state-study-4-of-26-athletes-who-tested-positive-for-covid-19-had-cmr-findings-suggestive-of-myocarditis-184819353.html.

[8] *Id.*

[9] *Id.*

[10] Fnr Tigg, *20-Year-Old College Football Player Jamain Stephens Dies From Coronavirus Complications*, COMPLEX (Sept. 9, 2020), https://www.complex.com/sports/2020/09/college-football-player-jamain-stephens-dies-coronavirus.

[11] Zach Abolverdi, *Florida's Keyontae Johnson diagnosed with heart inflammation following collapse at game*, GATOR SPORTS (Dec. 22, 2020), https://www.gatorsports.com/story/basketball/2020/12/22/florida-gators-keyontae-johnson-has-season-ending-heart-issue/4006117001/.

[12] *Id.*

[13] *Id.*

[14] Brooke Katz, *Some College Athletes Who've Recovered From COVID-19 May Be Suffering Long-Term Impact, Doctors Say*, DFW CBS (Dec. 17, 2020), https://dfw.cbslocal.com/2020/12/17/college-athletes-keyontae-johnson-recovered-covid-19-suffering-long-term-impact/.

the field after a medical failure of such epic proportions that it almost cost Johnson his life and other players their future health.[15]

Johnson and Stephens' cases alone should put the NCAA on notice of the risk they are putting student-athletes in. However, they are failing to take note of a terrifying trend of student-athletes suffering permanent injury or death from COVID-19 complications. Has the NCAA actually fulfilled its promise to its student-athletes to safely conduct the sports for college athletes or is this pandemic beginning to expose the NCAA's flaws in upholding the duties they owe student-athletes and putting them at risk?[16]

NCAA Negligence and Future COVID-19 Complications

The NCAA claims that its main mission is to be dedicated to the well-being and lifelong success of college athletes.[17] The NCAA's main responsibilities are to interpret and support NCAA bylaws and legislation passed by committees made up of member universities, run all championships, and manage programs intended to benefit student-athletes.[18] Therefore, the NCAA and its member universities should be held to the promise they made to its student-athletes to exercise due diligence in its COVID-19 safety procedures and protect them.[19]

In order to hold the NCAA liable, courts would first look to tort law to determine the duty that the NCAA owes its student-athletes and its potential negligence to keep student-athletes safe from COVID-19.[20] In order to successfully bring a negligence cause of action, a plaintiff must show that (1) the defendant owed him a legal duty, (2) the defendant breached that duty, (3) the plaintiff suffered an injury, and (4) the plaintiff's injury was caused by the defendant's breach of duty.[21]

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[15] *Id.*
[16] NCAA, *supra* note 1.
[17] NCAA, *What is the NCAA*, https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Nov. 26, 2020).
[18] *Id.*
[19] Emily Giambalvo, *If college football players have complications from coronavirus, expect lawsuits to follow*, Washington Post (Aug. 17, 2020). https://www.washingtonpost.com/sports/2020/08/17/if-college-football-players-have-complications-coronavirus-expect-lawsuits-follow/.
[20] *Id.*
[21] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

A. Duty

In order for the injured student-athlete to recover for any COVID-19 related injuries, they must prove that the NCAA owes them a legal duty.[22] The NCAA, in its own constitution states that its purpose is to "initiate, stimulate and improve intercollegiate athletics programs for athletes" as well as "uphold the principal of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this association[.]"[23] A student-athlete can plead facts sufficient to establish a negligence claim against the NCAA by asserting that the NCAA "undertook and assumed a duty to protect the physical and mental well-being of all student-athletes participating in intercollegiate sports." [24] In *Bradley v. National Collegiate Athletic Association*, Bradley, a student-athlete at American University, was struck in the head by another player with a field hockey stick during a game between two member NCAA universities.[25] After experiencing symptoms resembling a concussion from being struck with the stick, Bradley continued to participate in team activities and was not advised by American University's medical staff to sit out practices and games while she continued to experience the symptoms.[26] As a member of the NCAA, American University has been trained by an annually published NCAA mandated health and safety guide called the NCAA Sports Medicine Handbook (the "NCAA Medicine Handbook").[27] The NCAA Medicine Handbook informs member universities about the NCAA's official policies and procedures for the treatment and prevention of sports related injuries and return to play guidelines.[28] American University's trainers are required to be fully aware of and were trained to abide by the NCAA Medicine Handbook in treating student-athletes like Bradley.[29] By mismanaging Bradley's injury, American University and by proxy, the NCAA's injury procedures, caused current and future harm to Bradley because the injury procedures that were intended to assist the NCAA and universities to avoid legal liability in fact caused the harm to Bradley.[30] Although the Court in

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[22] *Id.*
[23] NCAA, 2020-2021 Division I Manual, Const. art. 1.2 (a)-(b) (2020) [hereinafter NCAA Manual], https://web3.ncaa.org/lsdbi/reports/getReport/90008.
[24] *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp. 3d 149, 168 (D.D.C. 2017).
[25] *Id.* at 155-56.
[26] *Id.* at 157.
[27] NCAA, *2014-2015 NCAA Sports Medicine Handbook*, 1-6 [hereinafter NCAA Medicine Handbook], http://www.ncaapublications.com/productdownloads/MD15.pdf.
[28] *Id.* at 4.
[29] *Id.*
[30] NCAA Medicine Handbook, *supra* note 27 at 8.

Bradley concluded that American University's use of the NCAA Medicine Handbook does not constitute medical malpractice, by distributing the NCAA Medicine Handbook, the NCAA actually recognized and took action to inform and prescribe correct management of student-athlete injuries and recovery methods.[31]

By creating the NCAA Medicine Handbook and strongly influencing member universities to comply to the guidelines at the risk of punishments from the NCAA, the NCAA has taken the position of an overseeing athletic organization.[32] An overseeing athletic organization is best described as an organization that does not directly oversee sporting events, but instead promotes and endorses the creation of safety rules, regulations, and policies, in order to enhance the quality and safety of games for athletes.[33] Overseeing athletic organizations are most notable when a parent organization or organization with power to control any lesser or member organizations, creates guidelines that the member organizations are influenced to abide by due to the power imbalance between the two parties.[34]

The overseeing athletic organization stems from the voluntary undertaking doctrine of negligence liability. [35] Under the voluntary undertaking doctrine, a party "who undertakes to render services to another which he should recognize as necessary for the protection of a third person" may be held liable for physical harm to the third person for a failure to act reasonably and "has undertaken to perform a duty owed by the other to the third person."[36] Amateur athletics organizations have been considered liable under the voluntary undertaking doctrine.[37] The Ohio High School Athletic Association ("OHSAA"), tasked with overseeing high school sports in the state of Ohio, created and enhanced player safety standards that governed member schools' football equipment to promote the health and safety of the athletes.[38] The Court considered that organizations with rules that govern participation in an athletic event may owe athletes a duty of reasonable care.[39] So, while the OHSAA attempted to avoid liability by

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[31] *Bradley* at 173-75.
[32] Sam C. Ehrlich, *Gratuitous Promises: Overseeing Athletic Organizations and the Duty to Care*, 25 Jeffrey S. Moorad Sports L.J. 1, 2 (2018).
[33] *Id.* (citing *Wissel v. Ohio High Sch. Athletic Ass'n.*, 605 N.E.2d 485, 465 (1992)).
[34] *See generally* Erlich *supra* note 28.
[35] Erlich *supra* note 28 at 2.
[36] *Wissel v. Ohio High Sch. Athletic Assn.*, 605 N.E.2d 458, 466 (1992) (quoting RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965).
[37] *See generally Wissel.*
[38] *Id.* at 465.
[39] *Id.*

stating that its rules were not mandatory for its member high schools to follow, the Court looked to the Second Restatement of Torts Section 324(a) to prevent the OHSAA from escaping liability.[40] In reviewing section 324(a), OHSAA voluntarily undertook a duty to the third party athletes because the member high schools, who were directly liable to the athletes, were essentially pressured to abide by OHSAA guidelines because of the power imbalance.[41] OHSAA holds influential power over the member schools in its annual regulations because it can punish coaches of member schools for a breach of the rules.[42]

The NCAA mirrors the influence and power over its member universities that the OHSAA has over its member high schools under its guidelines.[43] The NCAA states that its purpose is "to protect and enhance the physical well-being of student-athletes" and recognize that it is the responsibility of the member universities to comply by the NCAA's bylaws.[44] The NCAA sets out mandatory health and safety guidelines, including concussion management in its bylaws, and produces the NCAA Medicine Handbook in order to achieve its purpose in protecting student-athletes.[45] Should a member university not follow NCAA guidelines, the NCAA has laid out an extensive list of infractions that it may punish a member university's athletic program or specific sport.[46] Punishments can range anywhere from a fine to the expulsion of a university's program from any NCAA sponsored events for multiple years.[47] With the power to punish or essentially terminate a member university's athletic programs, the NCAA holds an unearthly amount of influence which pressures members into accepting its prescribed health and safety guidelines.[48] Courts should apply the NCAA to the same analysis as OHSAA, the voluntary undertaking doctrine accepted in a majority of states.[49]

In North Carolina, the NCAA's public statements of aspirational goals as well as NCAA rules, policies, and procedures were deemed to not

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[40] *Id.* at 466.
[41] *Id.*
[42] OHIO HIGH SCH. ATHLETIC ASS'N, *OHSAA SPORTS REGULATIONS*, 65-67 (Aug. 1, 2020), https://ohsaaweb.blob.core.windows.net/files/Sports/GeneralSportRegs2020_21.pdf.
[43] Erlich, at 9-10.
[44] NCAA Manual, Const. art. 2.1-2.2
[45] *See generally* NCAA Manual.
[46] NCAA Manual, Const. art. 19
[47] *Id.*
[48] Erlich at 11-12.
[49] *Id.* at 2.

create a voluntary undertaking of a duty to student-athletes.[50] The *McCants* case revolves around the NCAA's public pledges and bylaws that student-athletes are students first and that it will promote sound academic standards.[51] The Court specifically notes that under North Carolina law, the adoption of rules and standards are insufficient to assume a duty under the voluntary undertaking doctrine.[52] In doing so, *McCants* seems to close the door to future student-athletes seeking to find that the NCAA voluntarily undertook a duty to protect its student-athletes through its bylaws.[53] The Court specifically notes that this voluntary undertaking could not occur for safeguarding a student-athlete's educational opportunities.[54] In the state of North Carolina, the negligent breach of a duty is unrecoverable for economic damages, such as the educational opportunities in *McCants*, but may recover under physical injury or property damages.[55] In stark contrast to the *McCants* case, North Carolina has previously held that universities can be held liable for a voluntary undertaking to a student-athletes who suffer physical injury due to their special relationship.[56] The University of North Carolina created a special relationship with its cheerleaders when it advised and educated cheerleaders while encouraging the cheer squad to adopt certain safety guidelines.[57] The Court held that because the University of North Carolina took that extra step to voluntarily advise the cheerleaders on safety practices that it voluntarily undertook the role of rule creator and enforcer.[58] By seeking to enforce the safety rules they created, the University of North Carolina created a special relationship and heightened duty of care.[59] Similarly, the NCAA has voluntarily created rules and guidelines to protect student-athletes from COVID-19 and educate them on its recommended safety precautions.[60] The NCAA essentially took the exact same extra step in adopting and educating its members of the COVID-19 Plan that the University of North Carolina took in educating and adopting rules for its member cheerleaders. Therefore, the

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[50] McCants v. Nat'l Collegiate Athletic Ass'n, 201 F.Supp.3d 732, 738 (M.D.N.C. 2016).
[51] *Id* at 744.
[52] *Id*.
[53] Rae-Anna Sollestre, *Wrongful Death: Does the NCAA Have an Affirmative Duty to Protect Its Student-Athletes?*, 30 MARQ. SPORTS L. REV. 393, 400 (2020).
[54] *McCants* at 744.
[55] *Id*.
[56] Davidson v. Univ. of N. Carolina at Chapel Hill, 543 S.E.2d 920, 930 (N.C. Ct. App. 2001).
[57] *Id* at 929.
[58] *Id* at 929-30.
[59] *Id*.
[60] NCAA, *Resocialization of Collegiate Sport: Developing Standards for Practice and Competition* [hereafter "NCAA COVID-19 Plan"] (Aug. 14, 2020), http://www.ncaa.org/sport-science-institute/resocialization-collegiate-sport-developing-standards-practice-and-competition.

NCAA may have created a special relationship with its student-athletes specific to COVID-19 liability and may owe student-athletes a heightened duty of care in regard to COVID-19 and its long-term side effects. Future courts contemplating NCAA COVID-19 lawsuits, should look to the special relationship created with student-athletes due to a voluntary undertaking to protect those student-athletes from physical harm in *Davidson*, and not the lack of a voluntary undertaking due to general economic harm in *McCants*.

Ohio courts have recognized that a party can assume a duty by way of a section 324(a) voluntary undertaking.[61] The Court recognized the injured student-athlete's claim that the NCAA voluntarily oversees the rules and regulations to promote safe and fair play.[62] Essentially, *Schmitz* follows *Wissel* with more regard to the fact that the Court recognizes the NCAA's voluntary role in creating the rules and regulations that member universities are compelled to follow.[63]

When the facts of COVID-19 are taken as a whole, it simply makes sense to hold the NCAA accountable for creating procedures for student athletes to compete during a pandemic.[64] The NCAA has commissioned a COVID-19 medical advisory group and have been distributing guidelines and policies to inform member universities about COVID-19 procedures they believe the member universities should adhere to.[65] However, as an overseeing athletic organization, the NCAA has a power imbalance over its member universities.[66] Therefore, the NCAA may have created a duty by recommending COVID-19 procedures.[67] The NCAA health and safety guidelines and the resocialization plan should be compared to, and essentially are, the equivalent of the NCAA Medical Handbook.[68] The NCAA is using its resources to create a COVID-19 plan for its member universities to utilize while attempting to defer judgement on the member universities.[69]

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[61] Schmitz v. Natl. Collegiate Athletic Assn., 67 N.E.3d 852, 866 (Ohio Ct. App. 2016).
[62] *Id* at 867.
[63] *Id.*
[64] Nat'l College Players Ass'n, *NCPA Calls on NCAA to Investigate Rampant COVID Safety Violations* (Sept. 23, 2020), https://www.ncpanow.org/news/releases-advisories/ncpa-calls-on-ncaa-to-investigate-rampant-covid-safety-violations.
[65] NCAA, *COVID-19 Coronavirus*, http://www.ncaa.org/sport-science-institute/covid-19-coronavirus (last visited Nov 28, 2020).
[66] Ehrlich *supra* note 32 at 10 (citing *Wissel*).
[67] *Id* at 11.
[68] *Id* at 2.
[69] *See generally* NCAA COVID-19 Plan.

Just because the NCAA has introduced COVID-19 standards and has a duty to protect student-athletes, it does not mean that the standards are subpar or that the NCAA is liable for any and all COVID-19 related injuries.[70] By introducing COVID-19 standards of procedure, the NCAA is attempting to reduce its liability to the student-athletes and maintain a playable season.[71] In order for any negligence claim to progress regarding COVID-19, a student-athlete plaintiff will have to first and foremost show a duty of care. Universities operating under the NCAA have previously been held to hold a special relationship with student-athletes.[72] Universities recruit student-athletes to be a public member of a revenue-generating athletics program; the Pennsylvania Supreme Court determined that athletes are recruited for the benefit of the university.[73] Because the athletes are benefitting the university in school-sponsored activities, the Court deemed it only logical that student-athletes have a special relationship with their universities, and should therefore be afforded a heightened level of care.[74]

Through *Wissel* and the analysis of section 324(a) of the Restatement of Torts, it is possible to show that the NCAA voluntarily undertook duty of care to its student-athletes for its bylaws and medical guidelines imposed on member universities.[75]

B. Breach

After showing that the NCAA owes student-athletes a duty of care for COVID-19, a plaintiff would need to prove that the NCAA breached its duty owed to the student-athlete.[76] This would likely be done by showing the NCAA underemphasized the dangers of COVID-19 and failed to implement adequate COVID-19 protection protocols.[77] It is crucial to determine whether the NCAA acted with a reasonable level of care to prevent COVID-19 related injuries to student-athletes.[78] Under the circumstances, the NCAA must have been able to anticipate and foresee the likelihood of harm stemming from its COVID-19 plan that they owed to the

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[70] *Id.*
[71] *Id.*
[72] Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366-67 (3d Cir. 1993).
[73] *Id* at 1368.
[74] *Id* at 1369.
[75] Ehrlich *supra* note 28 at 2.
[76] KEETON *supra* note 21 at §30.
[77] Jane Coaston, *College Football's Coronavirus Crisis, Explained*, VOX, https://www.vox.com/2020/8/10/21355857/college-football-coronavirus-explained (Aug. 11, 2020, 7:07 PM).
[78] *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367-69 (3d Cir. 1993).

student-athletes.[79] In *Kleinknecht*, a student-athlete died from cardiac arrest while participating on a Division III university's lacrosse team.[80] The university's practice facility did not have any way to contact medical professionals in case of a medical emergency, nor did the facility have any emergency medical kit.[81] The Court determined that the university had a duty to protect its student athletes from foreseeable harm that may occur during school (and NCAA) sponsored athletic events.[82] The university breached its duty by not reasonably outfitting the practice facility with any emergency medical supplies or means of contacting a health professional.[83]

The NCAA may have breached its duty to student-athletes by not fully informing the student-athletes of the danger of COVID-19 and by not implementing safe enough protocols.[84] The NCAA has outlined protocols to its member universities that it believes are the best methods to prevent the spread of COVID-19 between participants in NCAA sponsored activities.[85] As in *Kleinknecht*, NCAA member universities have a duty to protect student-athletes from foreseeable harm that may occur during school sponsored athletic events.[86] So far this NCAA football season, countless practices and over one hundred games have been cancelled because of COVID-19 related outbreaks among member universities.[87] The games have been cancelled due to large outbreaks within the teams.[88] Therefore, it seems only logical to wonder whether the NCAA has failed to exercise reasonable methods to prevent the transmission of the virus.[89]

When imposing liability occurring from the breach of an assumed duty, it is essential to identify the specific services undertaken.[90] Liability will only attach because of a failure to exercise reasonable care in

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[79] *Id* at 1369.
[80] *Id* at 1363.
[81] *Id.*
[82] *Id* at 1370.
[83] *Id* at 1373.
[84] Coaston, *supra* note 77.
[85] *See generally* NCAA COVID-19 Plan, *supra* note 60.
[86] *Kleinknecht*, 989 F.2d at 1369.
[87] David Cobb, Ben Kercheval & Barrett Sallee, *College Football Schedule 2020: The 105 Games Already Postponed or Canceled Due to COVID-19*, CBS SPORTS (Oct. 16, 2020, 12:21 PM) https://www.cbssports.com/college-football/news/college-football-schedule-2020-the-105-games-already-postponed-or-canceled-due-to-covid-19/.
[88] *Id.*
[89] Giambalvo, *supra* note 19.
[90] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 42 (AM. L. INST. 2010).

conducting the undertaking.[91] The NCAA is familiar with liability it has specifically undertaken in concussion litigation with former student-athletes.[92] Courts previously concluded that in order to determine whether the NCAA breached a duty to protect its student-athletes, a fact-intensive determination regarding concussion-related risks is required.[93] Essentially, the nature and the extent of each student-athlete's concussion differs depending on the actions taken by the NCAA as a whole, as well as the concussion protocols employed by each individual member university.[94] Contact sports such as football and basketball require more medical oversight, concussion testing, and protocols focused on addressing head injuries than other sports, particularly non-contact sports.[95]

Similar to the concussion class action, the NCAA will likely face a class action from student-athletes who suffer from COVID-19 complications.[96] The NCAA's COVID-19 protocols refers to the NCAA COVID-19 medical advisory panel, the Centers for Disease Control, American Medical Society for Sports Medicine, and other organizations who are researching and creating safety protocols for COVID-19.[97] Further, the NCAA is attempting to comport with known federal guidelines, and specifically states that its COVID-19 protocols are meant to be consistent with guidelines published by the federal government and its health agencies. [98] The NCAA forewarns athletes with underlying medical conditions of the potential for COVID-19 to cause extreme complications or even death.[99] Despite this warning, the NCAA should still be held under the "eggshell skull" doctrine of liability.[100] The "eggshell skull" doctrine states that a defendant is fully liable for tortious damage caused by the defendant "even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim."[101] The NCAA must take its student-athletes as they come.[102] The NCAA requires that all student-athletes undergo a

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[91] *Id.*
[92] *See generally In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Inj. Litig.*, 314 F.R.D. 580, 595 (N.D. Ill. 2016).
[93] *Id.* at 594-95.
[94] *Id.* at 594-95.
[95] *Id.* at 587.
[96] Xiumei Dong, *The Coming Wave of COVID-19 Class Actions*, Law360 (Apr. 21, 2020), https://www.law360.com/articles/1266062/the-coming-wave-of-covid-19-class-actions.
[97] NCAA COVID-19 Plan, *supra* note 60.
[98] *Id.*
[99] *Id.*
[100] Maurer v. United States, 668 F.2d 98, 99-100 (2d Cir. 1981).
[101] *Id.* at 99-100.
[102] *See generally Maurer*, *supra* note 99.

mandatory medical evaluation by a physician.[103] Because of these required medicals, the NCAA should be aware of the majority of the preexisting conditions in its student-athletes putting them at a higher risk for contracting COVID-19 and, even worse, potentially displaying more severe reactions and side effects.

Considering all of these factors, courts will likely be tasked with the ultimate question of determining whether the NCAA did enough to mitigate the transmission of COVID-19 to avoid breaching its duty of care to student-athletes. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, specifically noted that the frequent and close contact between players in football is "the perfect set up for spreading [COVID]."[104] The NCAA used federal COVID-19 guidelines to encourage player safety,[105] but as a whole, it is possible that the NCAA chose to ignore the reality that football, a high-contact sport, is simply impossible to safely conduct during a pandemic.[106]

C. Causation

It is essential for student-athletes to show that they contracted COVID-19 from a practice or game while representing the member university. Therefore, the student-athlete must satisfy the negligence tort element of causation.[107] When there is a legal duty owed to the injured party, the plaintiff must prove factual cause and proximate cause of the resulting injury because of a breach of that duty.[108] Factual cause, also known as cause-in-fact, asks whether the plaintiff's harm would have occurred if not for the defendant's conduct (or lack thereof) when the defendant owes a duty to the plaintiff.[109] On the other hand, proximate cause asks whether the defendant's conduct (or lack thereof), in light of a duty owed the plaintiff, is a substantial cause of the plaintiff's harm.[110] Proximate cause analysis is a factual inquiry: courts will use the facts to

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[103] NCAA Manual, Const. art. 17.1.5

[104] Peter King, *Dr. Anthony Fauci: Football is 'Perfect Set Up for Spreading' COVID-19 Virus*, NBC Sports (May 11, 2020), https://profootballtalk.nbcsports.com/2020/05/11/nfl-season-dr-fauci-coronavirus-fmia-peter-king/.

[105] NCAA COVID-19 Plan, *supra* note 60.

[106] Jemele Hill, *Denial Isn't Working Out for College Football*, The Atlantic (Nov. 26, 2020), https://www.theatlantic.com/ideas/archive/2020/11/college-football-denial/617225/.

[107] Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (Am. Law Inst. 2010).

[108] *Id.*

[109] *See* Munn v. Hotchkiss Sch., 24 F. Supp. 3d 155, 184 (D. Conn. 2014).

[110] *Id.*

determine whether the injury suffered was reasonably foreseeable in accordance with the potential risks or harms of the activity.[111] The test is not limited to "whether a specific harm could have resulted from the defendant's conduct."[112] Both factual and proximate cause must exist in order to meet the legal standard for causation.[113]

In a case that should inform courts hearing future NCAA COVID-19 cases, it was held that, when participating in a school-sponsored activity where students are owed a duty of care by the Hotchkiss School, the failure to warn students of potential risks will factor heavily into a finding of causation.[114] On a school-sponsored trip to China, a student was bitten by a tick carrying a dangerous and well-known disease.[115] Before the trip, she and her parents were not warned by Hotchkiss or any pamphlet the school sent out about the tick-borne disease, nor were the students warned to apply bug spray or other insect protection before entering a wooded nature area which was potentially infested with fleas carrying the virus.[116] Ten days after the hike, the student became severely ill, and by the time of trial, she had compromised brain functionality that caused difficulty eating and speaking, and limited her muscle control.[117] After the court found that Hotchkiss had a duty to protect the students from insects carrying the disease, and that the school breached this duty when a student got sick, the student still had to prove the causation element.[118]

In determining the factual cause of the student's illness, the jury determined that, but for Hotchkiss' negligence, the student would have applied bug spray and taken precautions to prevent the tick bite that infected her.[119] Second, the student had to prove the proximate cause, or the unbroken sequence of events substantially causing the injuries brought about by the disease.[120] By presenting sufficient evidence proving that the tick bite was directly linked to the trip up the mountain in China, and that Hotchkiss could not show an intervening third party that may have caused the disease, the student put forth an unbroken sequence of events that the disease was contracted from the mountain hike in China.[121] Extremely

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[111] *Id.* at 173-74.
[112] *Id.* at 173.
[113] *Id.* at 184.
[114] *See id.* at 182-85.
[115] *Id.* at 163.
[116] *Id.* at 165.
[117] *Id.* at 166.
[118] *Id.* at 184.
[119] *Id.* at 176.
[120] *Id.* at 184.
[121] *Id.*

pertinent to the proximate cause is the foreseeability of the injury.[122] Foreseeability is not determined simply by whether the specific harm was foreseeable, but instead whether an ordinary person would anticipate that the general nature of the harm at issue was likely to result, knowing what the Defendant knew or should have known.[123] It is, therefore, extremely important that in any action against the NCAA for COVID-19 liability, student-athletes are able to determine not only the factual and proximate cause, but also whether the NCAA had or should have had the foresight of the general nature of the harm COVID-19 might cause student-athletes.

In regard to the NCAA's COVID-19 liability, the causation of COVID-19 to student-athletes can likely be traced to games, practices, and travel, as well as the NCAA's recommended COVID-19 guidelines. Therefore, similar to Hotchkiss being held accountable for causation in the previous *Munn* case, the NCAA should be held accountable for the infection of the student-athletes, and for putting high risk student-athletes in a perilous situation.[124] For factual cause of the COVID-19 related illnesses, student-athletes would likely look towards the NCAA's guidelines, as well as the NCAA allowing football to proceed during such a dangerous pandemic. Similar to the Hotchkiss School in *Munn*, the NCAA COVID-19 guidelines are based upon CDC recommendations.[125] The CDC specifically states that sports teams should minimize contact, limit travel, and reduce player and coach proximity.[126] Unfortunately, while the NCAA created COVID-19 protocols and promised player safety due to those guidelines, a survey of over 1,200 trainers at member universities revealed that over half have stated that the coaches and staff are not fully complying with the NCAA's COVID-19 guidelines.[127] Simply put, the NCAA is not enforcing the guidelines that student-athletes are relying on to protect them from COVID-19. Over 140 student-athletes have decided to sit out the season, and those competing this season trust the NCAA to sufficiently

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[122] *See id.* at 172-73.
[123] *Id.* at 172.
[124] *See generally id.*
[125] *Id.* at 176-77.
[126] CDC, *Playing Sports* (Dec. 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/playing-sports.html.
[127] Paula Lavinge, *Less than half of college trainers say coaches in full compliance with COVID-19 protocols*, ESPN (Sept. 11, 2020), https://www.espn.com/college-sports/story/_/id/29860203/less-half-ncaa-programs-full-compliance-covid-19-protocols-survey-shows.

enforce its guidelines.[128] One main issue in showing factual cause will be how each student-athlete got COVID-19.[129] Many colleges are not allowing student-athletes to socialize with people outside of the team.[130] If the student-athletes can show that the only people they are frequently in close contact with are their teammates and coaches, that showing allows the athletes to prove that, but for the university following the NCAA's COVID-19 guidelines, the student-athlete would not have been infected.[131] It can likely be shown that but for the NCAA's failure to enforce its own COVID-19 guidelines, and its allowing noncompliant member universities to participate in NCAA sanctioned events, COVID-19 and its side effects are harming more student-athletes, to a greater degree, than it should be.

Student-athletes must also be able to prove that their COVID-19 related injuries were proximately caused by the NCAA breaching its duty. In order to prove proximate cause, the student-athlete will need to prove an unbroken chain of foreseeable events that the injuries, both physical and none-physical (such as a loss of future earning capacity), resulted from COVID-19.[132] As studied by the Mayo Clinic, COVID-19 has been linked to long-lasting heart damage, blood clot and blood vessel problems (including the aforementioned myocarditis), scarring of the lungs, and a higher risk of strokes, as well as developing Parkinson's and Alzheimer's.[133] With the CDC, the Mayo Clinic, and many other medical journals citing the long-term health effects of COVID-19, it is not extraordinary to assume that student-athletes that are infected by the COVID-19 virus will suffer from long-term complications—addressing the "reasonable foreseeability" portion of the legal analysis.[134]

It is fair to question whether the NCAA had reasonable foresight at the beginning of the pandemic as to the long-term side effects of COVID-19. However, foreseeability of an injury is determined by whether the injury

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[128] The Athletic College Football, *Tracking college football players who are opting out of the 2020 season*, The Athletic (Dec. 8, 2020), https://theathletic.com/1983461/2020/12/01/tracking-fbs-players-who-are-opting-out-of-the-2020-college-football-season/.

[129] Dong, *supra* note 95.

[130] Audrey Cass, *Student athletes face COVID-19 precautions*, BG Falcon Media (Oct. 10, 2020), https://www.bgfalconmedia.com/sports/student-athletes-face-covid-19-precautions/article_ffbbd5b0-0986-11eb-b6f9-a34eae7a4dbf.html

[131] *See generally Munn*, *supra* note 108, at 184.

[132] *Id.*

[133] Mayo Clinic Staff, *COVID-19 (coronavirus): Long-term effects*, Mayo Clinic (last visited on Dec. 17, 2020), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351.

[134] *Munn*, *supra* note 108, at 173.

suffered is within a "reasonably foreseeable category of potential risks or harms."[135] The NCAA cannot simply deny that it did not know any of the specific long-term health complications and side effects of COVID-19. So long as the student-athletes can provide sufficient evidence to the jury that the NCAA could have foreseen that its conduct in conducting games and practices under the NCAA's watch and guidelines, then student-athletes should be able to prove that the NCAA's actions created a reasonable foreseeability of the type of harm caused by COVID-19.[136]

It will likely be difficult for student-athletes to prove an unbroken sequence of events in which their long-term injuries were directly caused by contracting COVID-19. Similar to *Munn* proving there was no intervening cause of her deterioration, student-athletes must provide evidence that the COVID-19 directly caused their long-term injuries.[137] The decision of the jury would likely hinge upon whether the student-athletes who suffered long-term injuries had any underlying health conditions, took proper precautions in treating themselves, or even initially protected themselves.[138] Unfortunately, the unbroken sequence of events is very difficult to establish in medical cases, especially those with unknown long-term effects. However, the NCAA has previously dealt with long-term unknown damages, in its concussion class action lawsuits and settlements with former players.

The NCAA's concussion cases should inform the courts as to how to handle COVID-19 cases. In a class action suit against the NCAA, former student-athletes were able to hold the NCAA accountable for the long-term effects of concussions because the NCAA had acknowledged the potential harm of concussions to student-athletes.[139] Courts have previously noted that there is a high degree of causation in any given sport, depending on the rules, protocols, equipment, and staff adopted protocols for each sport.[140] Concussions occur due to the high-contact nature of football, and because of the extreme side effects, the NCAA has paid out millions to compensate former student-athletes for their concussion-related injuries. Similarly, with

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[135] *See generally id.* at 173-74.
[136] *See generally id.* at 173-75.
[137] *Id.* at 179.
[138] Christine Lawson, *Palsgraf goes viral: Viruses as the proximate cause of an injury*, Medium (June 23, 2020), https://medium.com/law-meets-science/palsgraf-goes-viral-viruses-as-the-proximate-cause-of-an-injury-1638b348eb97.
[139] *See generally* NCAA Manual, *supra* note 23; NCAA Medicine Handbook, *supra* note 27 (noting that concussions have serious and deadly side effects).
[140] *In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Injury Litig.*, *supra* note 91, at 594-95.

football being "the perfect set up for spreading [COVID]," it only makes sense to allow injured student-athletes to recover damages from the NCAA for their COVID-19 related side effects. The rate of deaths and significant injuries to many American citizens, not to mention the death of an NCAA athlete, Jamain Stephens, arising from COVID-19 complications is startling. and shows the NCAA is (or should be) aware of the dangers stemming from COVID-19.[141] The NCAA has cited CDC guidelines, warnings, and studies noting extreme side effects, which should be enough to show that the NCAA has similar prior knowledge of the COVID-19 side effects as when it discovered and neglected side effects of concussions to student-athletes.

In conclusion, barring any underlying causes that may break the sequence of events, so long as the student-athletes present sufficient evidence on the issue of causation, the NCAA may, and likely should, be held to be both the proximate and factual cause of the student-athletes' COVID-19 injuries.

D. Damages

The final issue of negligence that a student-athlete must prove is that they suffered damages which actually occurred due to the negligence of the NCAA. Damages occurring to the student-athletes will likely be split into three different types of affected parties. First, there will be the student-athletes that have medical complications from the long-term COVID-19 side effects. These student-athletes should be awarded similarly to NCAA concussion class-action lawsuit members. The NCAA reached a settlement with former student-athletes in which a large portion of the $70 million settlement will be paid to set up a medical monitoring system.[142] The medical monitoring system is designed to assess symptoms potentially related to a prior history of concussion or head injury, as well as behavioral and motor problems that may be associated with mid- to late-onset brain diseases and disorders.[143] The program also provides access to free medical screening for members of the lawsuit class.[144] Similarly, the COVID-19

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[141] *See Munn*, *supra* note 108, at 176-77.

[142] Jeremy Bauer-Wolf, *A Verdict That Could Have Changed The Tide*, Inside Higher Ed (June 26, 2018), https://www.insidehighered.com/news/2018/06/26/settlement-highly-anticipated-concussion-lawsuit-against-ncaa#:~:text=The%20NCAA%20already%20agreed%20to,still%20file%20personal%20injury%20claims.

[143] Emily James, *Medical monitoring program launches for NCAA student-athletes*, NCAA (Feb. 19, 2020), http://www.ncaa.org/about/resources/media-center/news/medical-monitoring-program-launches-ncaa-student-athletes.

[144] *Id.*

former student-athletes should be awarded with free medical screenings and a monitoring system to assess symptoms potentially related to COVID-19.

Damages should also be awarded to student-athletes who suffer from a diminished earning capacity and/or loss of value. Student-athletes who may have once been first-round draft picks may go undrafted and suffer due to one of the many COVID-19 long-term side effects, especially long-lasting heart damage and scarring of the lungs permanently harming an athlete's breathing capacity.[145] The easiest portion of future earning capacity that can be determined is a guaranteed signing bonus upon being drafted. If a student-athlete can present evidence from an expert witness showing his or her lost wages due to the COVID-19 side effects damaging their draft position, the student-athlete may recover there. However, after the initial signing bonus, it is very difficult to prove exactly how much money would have been guaranteed salary throughout the athlete's first contract, but for the COVID-19 side effects. Similarly, second and third contract valuations cannot be proven, and even though an athlete may have been the best in his draft class, it would be extremely difficult—if not outright impossible-—to prove that the athlete would have received a sizeable second contract, the value of which the NCAA must pay to the former student-athlete. In sports other than football, basketball, and baseball, student-athletes will likely find proving earning capacity damages very difficult. However, collecting lost earning capacity damages will be most attainable for those in football, basketball, and baseball. This is extremely relevant to the previously mentioned case of Florida basketball player Keyontae Johnson.[146] Johnson was named preseason SEC player of the year for the 2020 season and was projected to be a first-round pick in the 2021 NBA draft.[147] Due to his collapse from myocarditis caused by COVID-19, there are serious questions about whether Johnson will ever be able to participate in basketball ever again, let alone at the performance level

[145] Mayo Clinic, *supra* note 132.
[146] *See generally* Zach Abolverdi, *Florida's Keyontae Johnson diagnosed with heart inflammation following collapse at game*, Gatorsports (Dec. 22 2020), https://www.gatorsports.com/story/basketball/2020/12/22/florida-gators-keyontae-johnson-has-season-ending-heart-issue/4006117001/.
[147] Adam Dubbin, *Here's where SI expects Keyontae Johnson to be taken in 2021 NBA Draft*, USA Today (Dec. 9, 2020), https://gatorswire.usatoday.com/2020/12/09/florida-gators-mens-basketball-forward-keyontae-johnson-nba-draft-selected-19th-by-sports-illustrated/.

of a first-round pick.[148] The NCAA should have to pay damages to those who were promised a safe environment to play sports, but who instead became infected during the season and eventually suffered side effects that will damage their entire professional careers. As a future potential first-round pick, Johnson would have netted a guaranteed amount around $6 million dollars over the first two years.[149] Therefore, the NCAA should be held liable to Johnson for the damages he suffered for lost value and potential earnings after suffering COVID-19 complications, which ended his basketball career. Complications that occurred during an NCAA-sanctioned game, despite Johnson following his university and NCAA's COVID-19 health and safety guidelines.

The third, and final, party seeking to collect damages will be the estates of student-athletes who died due to COVID-19 complications, either during their time as a student-athlete or after graduation. The NCAA has been sued multiple times by the estates of former student-athletes who suffered severe concussions contributing towards their deaths due to a long-term side effect known as CTE.[150] However, all of the concussion and CTE lawsuits brought against the NCAA have settled out of court. Without knowing whether the NCAA was held negligently liable for the future CTE damages, it seems only reasonable to assume that the NCAA settled out of court to prevent an onslaught of former student-athletes and their estates, claiming they have a significant claim due to the long-term effects of concussions and/or CTE. COVID-19 liability for deceased former student-athletes may likely be handled in a similar, hushed, out-of-court manner. The estates of student-athletes who die from COVID-19 should not settle for less compensation than they deserve, because the NCAA decided to risk the lives of its student-athletes in order to put on a season and profit off of the unpaid student-athletes.

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[148] Meredith Cash, *College basketball star who collapsed during a game and was put into a coma has heart condition associated with COVID-19*, Insider (Dec. 23, 2020), https://www.insider.com/florida-gators-keyontae-johnson-covid-19-heart-condition-myocarditis-2020-12.

[149] Luke Adams, *Rookie Scale Salaries For 2020 NBA First-Round Picks*, Hoops Rumors (Nov. 20, 2020), https://www.hoopsrumors.com/2020/11/rookie-scale-salaries-for-2020-nba-first-round-picks.html#:~:text=While%20that%20rule%20theoretically%20affords,of%20their%20rookie%20scale%20amount.

[150] *See generally In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Injury Litig.*, *supra* note 91.

E. Conclusion

During a pandemic, student-athletes were encouraged by their coaches, universities, and the NCAA to take the field to practice and play their sports. Fans were permitted into stadiums wearing only masks as protection. The band still played, and the teams still celebrated touchdowns. While this description sounds like the new normal in the COVID-19 pandemic, it isn't just from 2020, it is also from 1918. It has been over 100 years since the Spanish Influenza pandemic of 1918, and yet the scene still looks the same. Decades have passed, and the NCAA has still not learned its lesson. It is still willing to put student-athletes' lives at risk for revenue and to "promote intercollegiate athletics." The NCAA should be held to a higher standard. They owe student-athletes a duty to protect them in what lay people call "these difficult and trying times." Keyontae Johnson almost died during a NCAA game and Jamain Stephens, a healthy NCAA athlete, actually did die, and yet the NCAA continues to promote and promise "safe" athletic competitions. Playing sports during a pandemic that puts the lives and health of student-athletes at risk is no "collegiate athletic competition" at all. It is a peculiarly perilous, and extremely brainless, money-grab by the NCAA and its member universities, and the NCAA should be held liable under the duty it owes its student-athletes.

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