Letter From The Editor

“The Future is unwritten.”
—Joe Strummer

Dear Forum Members,

Welcome to Issue 33:4 of the Entertainment and Sports Lawyer! We hope everyone is enjoying their Summer! As of this writing, the Cubs have reclaimed first place in their division (Go Cubs!), the outdoor festival season is in full swing, sports teams are on the move to new locales, and training camp is just opening for the NFL. Leaving political commentary (and jokes) to others, our entire Forum is reminded that what we do—the business of Sports and Entertainment—allows people an opportunity to escape from the world around them. Let's not lose sight of the notion that what we do allows those around us to enjoy life...despite the strife that surrounds us, despite recent military actions...what we do is what makes life worth living.

This issue sees a few new authors, and a few returning one. We open with Carol Bass' most relevant article on estate planning for athletes—an absolute must read for anyone working with athletes or performers! Jeremy Evans returns with part III in a series of articles, this time addressing where and how sports franchises derive their revenue. Scott Sisun, a new author for the Journal, provides an update on the use, and protection of Trademarks and Copyrights in Sports. Michelle Wahl and Ken Freundlich have one again compiled, with the help of a few student authors, another incredible Litigation Update which everyone in the Forum should find most useful. Honorable Michael Panter (Ret.’d) shares with the Forum an interview with Ted Burzynski from Paramount’s lot.

Expanding our international coverage, Zehra Betul Ayranci returns with her article comparing Rights of Publicity for Athletes in the United States and Europe, while first-time author Zia Akhtar provides a detailed look at gambling and ethics in South Asian Cricket.
Karim Popatia, a 3L at Northwestern University's Pritzker School of Law provides us with a Law Student’s perspective on the differences between the NHL and MLB Collective Bargaining Agreements.

We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf.

The pending deadlines for article submissions are:

- Fall 2017 *(anticipated October Publishing)*
- August 15, 2017
- Winter 2017/2018 *(anticipated January Publishing)*
- November 15, 2017
- Spring 2018 *(anticipated April Publishing)*
- February 15, 2018
- Summer 2018 *(anticipated July Publishing)*
- May 15, 2018

And…as the new ABA Year begins, I want to personally thank Janine Small for her service as the Chair of our Forum. Under her stewardship, the Forum has grown, our finances have increased, and the Forum has expanded exponentially both in terms of leadership, substance, and membership! Janine’s guidance will be sorely missed…BUT…at the same time, we welcome our new Chair—Len Glickman. Len has been a member of our Governing Committee for several years, and is looking forward leading the Forum!

Best Wishes for a Happy, Health, and Successful New (ABA) Year!

**Brian A. Rosenblatt**  
Bryce Downey & Lenkov LLC  
*Editor-in-Chief, Entertainment and Sports Lawyer*
Don’t Drop the Ball: Estate Planning for Professional Athletes

by Carole M. Bass

“If you have everything under control, you’re not moving fast enough.”
–Mario Andretti

While the financial and estate planning needs that professional athletes face are similar in many ways to the needs of other high net worth clients, they are, in other ways, quite different. Most professional athletes have a high earning, but highly compressed career span, accumulating wealth over a short period of time at a relatively young age. The arrogance of youth coupled with the social pressures that many professional athletes face to live beyond their means can be a disastrous combination.

The compensation stream of a professional athlete is also typically different from other high net worth clients—athletes have to deal with deferred compensation, endorsement deals, rights of publicity and income taxation in multiple jurisdictions. Professional athletes also often face external pressures, including unique family situations, higher incidences of divorce and out of wedlock children, financial demands from family and friends, risk of disabling injury, lawsuits, and a greater need for privacy.

Many professional athletes experience large amounts of wealth in the first few years of a contract. They are young and typically inexperienced in dealing with finances. Their money can quickly evaporate. Couple this with an earnings period that is far shorter than for any other group of professionals; there is a phenomenon of financial hardship and bankruptcy among retired athletes that is as tragic as it is common. It has been reported that within two years of retirement, 78% of former NFL players are bankrupt or under financial stress and that within five years of retirement, 60% of former NBA players are in similar financial distress.¹

The average NFL career is 3.2 years and the average NBA career is 4.8 years.² In that short period, these athletes are earning large sums, but the money needs to last over the player’s lifetime. Bad investments, misplaced trust and lack of proper planning all add to the risk of financial ruin.

A professional athlete needs a solid team of independent advisors, including a financial advisor to give investment, budgeting and wealth preservation advice and to discourage wild investment schemes, an accountant to deal with the complex income tax issues that athletes face, an insurance professional, and an estate planner to help protect wealth, plan for lifetime gifting, if appropriate, and arrange for the orderly disposition of assets upon the athlete’s death.

Basic Estate Planning

“You’ve got to be very careful if you don’t know where you are going, because you might not get there.”
–Yogi Berra

As with any client, the starting point for professional athletes is a solid, basic estate plan. Despite a bevy of advisors on other legal issues, this fundamental need often goes unaddressed even for those with substantial wealth and star power. Whether it is fear of dying, superstition, immortality of youth or some other reason, most Americans do not have a will; athletes are no exception.

Failing to plan is simply the biggest mistake that people make. What most people often do not realize is that if they die without a will or revocable trust, their state legislature has written an estate plan for them—and the way in which their assets will be divvied up based on state law seldom represents their wishes, especially for those who are young, unmarried and/or in complex family situations.

Consider the tragic case of Jose Fernandez, pitcher for the Miami Marlins, who died in a
boating accident last year at the age of 24. Fernandez left behind a pregnant girlfriend who gave birth to his only child five months after his death. Fernandez died without a will such that everything passes to the child under Florida law. Further complicating matters is the fact that Fernandez’s estate, estimated to be valued between $2 – $3 million dollars, is being sued by the estates of the two individuals who died with him in the boating accident with each reportedly seeking $2 million dollars in damages for negligence and personal injury.

In 2000, when Hall of Fame linebacker Derrick Thomas died at the age of 33 from a pulmonary embolism two weeks after being paralyzed in a car accident, he left no will and an estate that was reportedly barely solvent despite Thomas’ 11 year NFL career during which he earned $34 million dollars. Thomas left seven children by five women, none of whom he married. Taxes, child support, failed investments and uncontrolled spending left little to cover creditors’ claims and the expenses of administering Thomas’ estate.

Professional athletes tend to be young and to have young children. Individuals with minor children may want to dictate the age at which their children will have control over property they inherit and may also want to select the person who manages the property. Setting up a trust for minor children as part of an estate plan is almost always preferable to a court guardianship, which is inflexible and which terminates when the child reaches the age of 18 or 21, depending on state law.

Many athletes have complicated or non-traditional family situations. For those who are cohabitating or otherwise in a non-marital relationship, a non-marital partner does not have rights under state inheritance law. Furthermore, many athletes are supporting other family members who, likewise, would not inherit under applicable state law. By having an estate plan in place, an athlete can make desired arrangements to take care of his loved ones.

Married couples may believe that if one of them were to die without a will everything would pass to the other. However, only a small minority of states provide for this outcome under intestacy law. In New York, for example, the surviving spouse would receive $50,000 and one-half of the estate, but the remaining one-half would pass directly to the deceased spouse’s children. This would include non-marital children as well as children of the marriage.

At a minimum, professional athletes need a will or revocable trust, health care directive and power of attorney, as well as life and disability insurance. This core estate plan can provide for the management of assets and for the athlete’s well-being during the athlete’s life and in the event of disability and for the smooth transition of assets, tax efficiency and family well-being in the event of the athlete’s death.

For professional athletes a revocable trust (which functions as a “will substitute”) offers the same advantages of a will plus some additional ones that are especially relevant. First, a revocable trust is a private document that can avoid the need for probate, a process by which a will is filed with the court and becomes a public document. A revocable trust also allows the athlete to either maintain sole control as the trustee during his lifetime or to appoint an independent professional trustee or co-trustee. One advantage to a professional corporate trustee in the context of professional athletes is that it can provide a buffer between an athlete and the friends and family members asking the athlete for money and with wild investment proposals. It is a lot easier to say no when the athlete seemingly does not have sole authority to make distributions and investments. Of course with a revocable trust, the athlete could change the trustee or revoke the trust at any time while he has capacity. Since a revocable trust becomes effective immediately upon creation and funding, it also provides for smooth transition of financial management in the event of the athlete’s incapacity.

Asset Protection

“There are a lot of guys who are successful, they make a lot of big money, I mean millions overnight with a contract, and they don’t understand the evaporation. It evaporates. You’re always back to
square one. I found that out, so integrity is how I do business. That’s my main asset.”
–George Foreman

Asset protection is also a concern for high-profile, high earning individuals, like professional athletes. Whether due to life in the public eye, lifestyle choices and/or risky investment choices, professional athletes tend to be more susceptible to lawsuits than the average client.

While in many cases irrevocably transferring assets to a trust for estate tax planning purposes may not be the right play for an athlete because of the short duration of high earning years and the need to make that income stretch over the athlete’s lifetime, a self-settled asset protection trust with an independent trustee, of which the athlete is a discretionary beneficiary, may be advisable. While most states do not afford protection to assets placed in trust by an individual for his own benefit (commonly referred to as "self-settled trusts") an increasing number of states (currently 16) do have some form of domestic asset protection legislation for self-settled trusts, commonly referred to as domestic asset protection trusts (“DAPTs”).

A DAPT is not an estate tax savings technique, but given the financial situation of many athletes over time, estate tax planning is often not the primary concern. Rather, this type of trust is funded with incomplete gifts, meaning that the transferred assets are not removed from the athlete’s estate for estate tax purposes; however, the athlete’s potential future creditors should not be able to reach the trust assets. A caveat is that the transfer to the trust must not constitute a fraudulent conveyance.4

Placing each of the athlete’s business investments in a separate, multi-member limited liability company (LLC) can provide two directional creditor protection for the athlete. First, use of a multi-member LLC can limit an individual member’s liability exposure to his investment in the LLC itself, meaning that a creditor cannot reach the member’s personal assets to satisfy its claim against the LLC. Further, forming the LLC in a state with protective laws that provide for a charging order as a creditor’s sole remedy against the LLC limits the creditor’s rights to that of a transferee of the membership interest. Thus, the creditor is only entitled to receive the distributions that the member would have received from the LLC. Second, just as a multi-member LLC protects personal assets from creditors of the LLC, it also protects the LLC interest from personal creditors, which means that a personal creditor of a member will not be able to reach the assets of the LLC.

Premarital Planning and Child Support

“All I remember about my wedding day in 1967 is that the Cubs lost a doubleheader.”
–George F. Will

One of the most fundamental aspects of asset protection planning for professional athletes is premarital planning. In the general population, approximately 40% to 50% percent of first marriages and more than 50% of second marriages end in divorce. For professional athletes, the divorce rate is even higher.

Without a prenuptial agreement, a spouse would typically receive half of the marital assets, including half of the income earned during the marriage. For athletes with a short career span, this can be particularly devastating as they have virtually no opportunity to recoup the loss. It is estimated that Tiger Woods paid his former spouse, Elin Nordegren, a settlement of $100 million dollars when they divorced after six years of marriage. Michael Jordan reportedly paid $168 million dollars to his ex-wife, Juanita Jordan, when they divorced after 17 years of marriage. While athletes at the level of Woods and Jordan can absorb these huge settlements, other professional athletes divorce cannot absorb those losses and it can lead to financial ruin.

A prenuptial agreement is advisable for an athlete at any level. Many athletes marry young and have their peak earnings during the marriage, leading a lifestyle that cannot be maintained after retirement. Prenuptial agreements allow couples, when they are in a more reasonable and
amicable mindset, to limit the issues in the event of a divorce. Prenuptial agreements may address various topics, such as property division upon divorce, financial responsibilities during marriage, spousal support, and estate rights upon death. Through prenuptial agreements, couples may opt out of statutory provisions that would otherwise apply in the event of death or divorce.

In most states, a prenuptial agreement can define the parameters of spousal support in the event of a divorce or waive such support entirely. Some states, however, do not permit a waiver of spousal support. Thus, athletes and their counsel need to be aware of applicable state law with regard to modification or waiver of spousal support.

In the era of Facebook, Twitter and Instagram, the use of confidentiality clauses in prenuptial agreements has become more common, especially for high profile clients such as professional athletes. A prenuptial agreement can define what information shall remain confidential—it may be only the provisions of the prenuptial agreement itself and the related financial disclosure, or it may encompass other financial and non-financial aspects of the parties' relationship. A prenuptial agreement may require a party to obtain prior approval from the other party before disclosing information, photographs or videos, or to remove internet postings within a certain time period upon demand by the other party. In this day and age, protecting one’s image and reputation can be essential to an athlete’s career and especially to his endorsement contracts. Player contracts and endorsement contracts often contain morality clauses. Conduct off the field can have a significant impact on a player’s career and earnings. Consider that the NFL standard player contract provides that “if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.” Likewise, the MLB uniform player’s contract provides that the Club may terminate the contract “if the Player shall at any time fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship.” For this reason, the prenuptial agreement may prohibit the disclosure of information that would be reasonably likely to adversely impact the athlete’s reputation or endanger his employment.

In addition to premarital planning, there is the issue of out of wedlock children. Enormous child support obligations may be a drain on the athlete’s financial security. Stories of athletes with large numbers of children by multiple women abound. In fact, it is so prevalent that Sports Illustrated did a cover story on the phenomenon in 1998.5

Athletes may also be inundated by family and friends that seek to take advantage of the athlete’s financial success. Education and independent advisors are the key to helping athletes navigate these social and emotional pressures and to make choices that will help preserve their long-term financial security. Some of the leagues, most notably the NFL and the NBA, are taking proactive steps to help their players with these issues, offering workshops on financial literacy, second career training, social media training and how to identify the types of girlfriends to avoid.6

Additional Estate Planning

“My motto has always been that you can’t say, ‘Oh, it won't happen to me.’ You have to say, ‘That can happen to me.’ So always be aware that things can happen.”

–Venus Williams7

In addition to the basic estate planning and asset protection planning discussed above, additional estate planning techniques may be warranted for some athletes. These include gifts or sales to trusts for the benefit of family members designed to remove future appreciation on assets from the athlete’s estate.

For certain athletes who have adequate financial security, an irrevocable dynasty trust created in a DAPT state and funded with a completed gift in an amount equal to or less than the federal estate tax exemption ($5.49 million in 2017) can provide not only creditor protection, but also can remove
future appreciation on the transferred assets from the athlete’s gross estate for estate tax purposes and ensure that the transferred property can pass down innumerable generations of the athlete’s descendants without the imposition of transfer taxes when each generation passes away. For an individual in his 20s, 30s or 40s, removing future appreciation can provide tremendous estate tax savings.

To the extent that an individual wishes to fund the dynasty trust in an amount in excess of the estate tax exemption, he can sell additional assets to the trust at fair market value in exchange for the trust’s promissory note. All appreciation on the assets after the sale would escape estate tax. As we are currently in a low interest rate environment, any appreciation in excess of the applicable federal rate (AFR) would inure to the benefit of the trust without any gift tax consequences. Since the trust would be structured as a grantor trust, the sale would have no income tax consequences.

Irrevocable life insurance trusts (ILITs) are also frequently utilized. An ILIT can provide financial security for the athlete’s family in the event of his death even if the athlete has little or nothing left in his estate.

Disability Planning

“A good hockey player plays where the puck is. A great hockey players plays where the puck is going to be.”

–Wayne Gretzky

Estate planning for professional athletes also includes advance planning to provide for a smooth transition of control from the athlete to one or more designated agents when and if the client becomes unable to make decisions. This involves both health care decision-making and property management.

The need for an agent to assume control of health care and/or property management may arise in a short term situation, such as when a person is under general anesthesia or is otherwise temporarily unconscious, or may arise in a more long term context where a person is suffering from cognitive impairment or mental incapacity. While potential incapacity is a risk for all clients, certain sports carry with them an increased risk of cognitive impairment. The NFL has stated in federal court documents that it expects nearly one-third of retired players to develop long-term cognitive problems and that those conditions are likely to emerge at “notably younger ages” than in the general population.

Laws vary by state, but generally a health care directive permits an individual to designate another individual to make health care decisions for him when he is unable to communicate his own decisions. Without a health care directive, state law will determine who makes those decisions. For example, in 2010 New York passed the Family Health Care Decision Act, which allows certain family members and others to make decisions regarding medical treatment when a patient is incapacitated and did not sign a health care directive. However, the law still provides an order of priority among family members and friends, which may not reflect an individual’s wishes. For this reason, the best course is for an athlete to sign a health care directive appointing the person whom he wants to make those decisions on his behalf. In addition to a health care directive, an athlete may wish to sign a living will that provides written instructions about his wishes, typically about end-of-life care and life sustaining treatment.

A durable power of attorney permits a person to designate an agent to act in his place with respect to financial and property management. This can be useful for an athlete who is traveling and who does not have the time to manage his wealth personally during the season. However, the power of attorney is a powerful document by which the principal gives the agent authority to spend the principal’s money and to sell or dispose of the principal’s property during his lifetime without notice. The agent is a fiduciary and must exercise this authority according to the instructions provided by the principal, or, if no specific instructions were provided, in the principal’s best interest. That said, it is important
to designate an agent that will act honestly and who will honor his fiduciary responsibility. Often, it is prudent to name two independent agents who will need to act together, so that they can serve as a check and balance on one another.

As discussed above, a revocable trust can also provide for a smooth transfer of control in the event of incapacity of the athlete.

For former players who are already dealing with incapacity, additional planning may be warranted. This type of planning will become especially relevant for former NFL players who receive monetary awards from the NFL concussion litigation settlement fund.

Much of the NFL concussion litigation centered on chronic traumatic encephalopathy ("CTE"), a progressive degenerative disease of the brain found in individuals with a history of repetitive brain trauma, including some athletes. Researchers have discovered that this repetitive brain trauma can cause an abnormal type of protein called tau to build up, slowly killing brain cells and continuing to progress even after exposure to brain trauma has ended. Symptoms of CTE include memory loss, confusion, impaired judgment, paranoia, impulse control problems, aggression, depression, and eventually progressive dementia. Symptoms of CTE may begin to appear months, years, or even decades after the brain trauma has ended. Unfortunately, for now, CTE can only be diagnosed after death by brain tissue analysis.

The settlement pool includes monetary awards for diagnoses of death with CTE, as well as diagnoses of amyotrophic lateral sclerosis ("ALS" or "Lou Gehrig’s disease"), Parkinson’s, Alzheimer’s, and some forms of neurocognitive impairment or dementia. Some estimate that the settlement awards may aggregate to $1 billion dollars.

Kevin Turner, one of the lead plaintiffs in the NFL concussion litigation, died in March 2016 at the age of 46. Turner suffered from ALS, but was diagnosed post-death with severe CTE. Reports estimate that his estate may ultimately receive as much as $5 million dollars once the settlement fund begins paying out.10

For retired players who receive a settlement award it will be important to structure receipt in an efficient manner. The claimant may be eligible to have his settlement award paid to a supplemental needs trust ("SNT") rather than to him directly. Paying the settlement award to an SNT can preserve Medicaid and SSI benefits that the claimant is receiving or may receive in the future.

In addition, whether the settlement award is being paid to an SNT or directly to the claimant, paying a large, single lump sum may carry too much of a risk that the award will be squandered for many of the same reasons discussed earlier. Damages (other than punitive damages) received for physical personal injury, including concussive or traumatic brain injury, are excluded from income under the Internal Revenue Code and a structured settlement paying out the award over time may be the best option.11

It is important to keep in mind that while compensatory damages for personal injury are exempt from income tax, they are includable in a decedent’s gross estate for estate tax purposes, as are compensatory damages for wrongful death. Thus, the present value of any remaining payments in a structured settlement annuity would be included in the decedent’s gross estate if he were to die during the term of the annuity.

In addition to the disability planning discussed above, professional athletes also have a risk of career ending physical injury without mental incapacity. This type of injury cuts a player’s already short career span even further.

Disability insurance is an important consideration for professional athletes. This includes permanent disability insurance to protect the athlete in the event of career ending injury, as well as loss of value insurance to protect college athletes against a drop in draft status due to injury and to protect pros against a decline in value in the final year of a contract or before becoming a free agent. In addition, athletes should consider loss of endorsement policies to protect endorsement
income in the event the athlete becomes embroiled in a controversy, scandal or criminal investigation. Examples abound, including Tiger Woods, who reportedly lost endorsement deals with Gillette, Gatorade, Tag Heuer and others following his 2009 personal scandal, and Lance Armstrong, who lost his endorsement deals with Nike, Anheuser-Busch and others following his doping scandal in 2012.

Income Tax Planning and Domicile

“When we played, World Series checks meant something. Now all they do is screw up your taxes.”
—Don Drysdale

Professional athletes need an accountant well acquainted with the so-called “jock tax” by which states generally tax athletes based on “duty days” — the number of workdays (including games, practices and other team-related activities) spent in each particular state. This means that athletes must file income tax returns in every state in which they play that imposes the jock tax (as well as separate returns for certain cities and foreign jurisdictions). Most states take the number of duty days spent in the state and divide it by the number of workdays from pre-season through post-season play. This formula provides the percentage of the athlete’s salary earned and, thus, taxable in the state. Some athletes can pay close to half of their salary in income taxes and they need to be educated about keeping a reserve for taxes so they don’t get into trouble come tax day when the checks that need to be cut can be daunting.

Being domiciled in a low-tax state can sometimes shelter endorsement and investment income from income tax in a higher tax state. However, this is not always possible due to “statutory residency” rules by which some states tax individuals as state residents (regardless of domicile) if they spend more than half the year (i.e., 183 days or more) in the state.

While in colloquial terms “residence” and “domicile” are often used interchangeably, they are distinct concepts. While an individual can have more than one residence, he can have only one domicile. Residence requires physical presence as an inhabitant of a certain place, but domicile requires both physical presence in a place and an intention by the individual to make such place his fixed and permanent home.

Since a person can have only one domicile, his domicile cannot change from one place to another until the person has established that he has abandoned his former domicile, and established a new, permanent domicile. This is a subjective analysis based on the totality of the circumstances and the burden is not easy to meet. It is not likely to get any easier—according to one commentator audits of change of domicile of former New Yorkers result in approximately $125 million annually in additional revenue to New York State.  

Domicile will generally be analyzed based on a number of primary factors and, in close cases, a number of “other” factors. First, is the place of residence. When an individual has residences in multiple jurisdictions and is asserting a change of domicile, authorities in the alleged former domicile will look at whether there has been an attempt to sell the residence there. If the residence will be retained, those authorities will compare its size, value and nature of use to that of the individual’s other residence(s).

The tax authorities will also look at the location of the individuals’ employment and business interests; where he spends his time during the tax year; the location of items which an individual holds “near and dear,” including those that have significant sentimental value, such as family heirlooms, artwork, collections and photographs, as well as the location of pets; and the location of the taxpayer’s immediate family. Other factors may include where an individual has his driver’s license and vehicle registrations, voter registration, church and club memberships and other community involvement.

This can be more complicated for professional athletes than for other professionals because they may have homes in several states (or countries) and may spend substantial time in
multiple jurisdictions because of games, training, promotional events and mid-season trades.

In addition to its importance for income tax purposes, domicile is important in the context of estate taxes because a domiciliary of a state with a state estate tax will generally be subject to that state’s estate tax on his worldwide property, with the exception of real and tangible personal property located in another jurisdiction. For this reason, many high net worth individuals choose to change their domicile to a no or low estate tax state, such as Florida, rather than remaining domiciled in a higher estate tax jurisdiction such as New York.

Domicile can be an important non-tax consideration for professional athletes and other celebrities as well. One of the most well-known examples demonstrating the importance of domicile planning involved the estate of Marilyn Monroe. While the executor of Ms. Monroe’s estate successfully argued that the actress was domiciled in New York at the time of her death, decades later the beneficiaries of the late actress’ estate claimed that she was domiciled in California. The reason? At the time of Monroe’s death, California law would have resulted in higher state estate taxes than New York law and, so, the executor successfully established that Ms. Monroe’s was domiciled in New York even though she was living in California. However, California subsequently adopted a “right of publicity” law which would have given the beneficiaries of the Monroe estate more control over the sale and distribution of Monroe’s image and greater revenue from the use of her image. New York does not recognize a postmortem right of publicity. Because the estate had already established New York as the actress’ domicile for estate tax purposes, the court would not permit the beneficiaries to claim a different domicile for non-tax purposes.

**Cross-Border Issues**

“I see great things in baseball. It’s our game—the American game.”
–Walt Whitman

Additional planning considerations need to be taken into account when an athlete is not a U.S. person. All of the major U.S. sports have seen an influx of players from foreign countries.

For tax purposes a U.S. person is someone who is either (i) a U.S. citizen or (ii) a U.S. resident. U.S. persons are subject to U.S. income tax on their worldwide income. By contrast, non-U.S. persons are subject to U.S. income tax only on their U.S. source income. For income tax purposes, there is a clear objective test under Section 7701(b) of the Internal Revenue Code for determining if an individual is a U.S. resident—an individual must satisfy either (i) the green card test, or (ii) the substantial presence test (which is a formula measuring the number of days present in the U.S. in the current year and two prior years).

For estate, gift and generation-skipping transfer tax purposes, determining if an individual is a U.S. resident is a subjective test of domicile. U.S. persons are subject to transfer tax on worldwide assets while non-U.S. persons are subject to transfer tax only on U.S. situs assets. In addition, non-resident aliens only have a U.S. estate tax exemption of $60,000, rather than the $5.49 million available to U.S. citizens and resident aliens.

If a decedent’s surviving spouse is a U.S. citizen, the estate tax marital deduction is unlimited, but if the spouse is a non-citizen (even if the spouse is a green card holder), then only the exemption amount can be transferred to the spouse free of U.S. estate tax. For amounts above that, the marital deduction is only available if either: (i) the surviving spouse becomes a U.S. citizen before the estate tax return is filed and has been a U.S. resident since the decedent’s death, or (ii) the property passes to a special type of trust, known as a qualified domestic trust (“QDOT”) for the spouse’s benefit. Furthermore, for gift tax purposes, a U.S. person can transfer unlimited amounts to a U.S. citizen spouse free from gift tax, but only $149,000 annually (in 2017) to a non-citizen spouse.

Non-citizens who come to the U.S. to play professional sports need to take care in deciding whether to become a citizen or green card holder.
The U.S. applies an “exit tax” to certain citizens and long-term green card holders expatriating from the U.S. if any of the following apply: (i) the individual’s net worth is $2 million dollars or more; (ii) the individual’s average annual net income tax for the five years ending before the date of expatriation is more than a specified amount ($162,000 in 2017); or (iii) the individual fails to certify to the Internal Revenue Service that he has complied with all U.S. federal tax obligations for the five years preceding the date of expatriation. If any of these apply, the individual is a “covered expatriate” and is subject to the exit tax, which is a tax on the unrealized gain in the individual’s assets computed as if all of the assets were sold at fair market value on the date before he expatriated. Net capital gains are currently taxed at the rate of up to 23.8%. Note that the first $699,000 of gain is shielded from the exit tax in 2017.

Conclusion

Estate planning for professional athletes presents many challenges, but also many opportunities to help the athlete preserve his financial future and protect his family. The first step is education so that professional athletes understand and appreciate the need to plan for the future.

About the Author

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2 Cork Gaines, Chart: The Average NBA Player Will Make A Lot More In His Career Than The Other Major Sports, Business Insider, October 10, 2013.

3 Florida Statutes §732.103.

4 All states prohibit fraudulent conveyances, and such transfers are voidable. Most frequently, a fraudulent conveyance is one made with the intent to hinder, delay or defraud a creditor. For an excellent detailed discussion of fraudulent conveyance law, see Rothschild and Rubin, 810-3rd T.M. Asset Protection Planning.


6 The author wishes to thank Spyros Arsenis, Esq. of Gerard Fox Law for his insights on the programs offered by the leagues. In addition, the author wishes to thank Boris Gluzberg of City National Bank and Bobby Sewall of Merrill Lynch for sharing their insights on planning for professional athletes.

7 While the author has used male pronouns throughout the article she wishes to acknowledge the many extraordinarily talented female professional athletes to whom this article also applies.


9 NY Public Health Law §§2994 et seq.


11 Internal Revenue Code §104(a).

12 Michael P. Stafford, Helping Clients to Change Domicile Correctly – Avoiding the Tax Reach of “Former” States, ActionLine, Spring 2009.
We Have Come Full Circle: Where Sports Franchises Derive Their Revenue
by Jeremy M. Evans

In our third article of the sports stadium and franchise series, we now move to discussing professional sports franchise revenues. Professional sports franchises derive their revenues from many different areas. In general, sports franchise revenue comes from television broadcasting contracts, merchandise sales, and third party sponsorship agreements. However, what this article will explore is the complete picture—all the recognized areas where revenue is derived and how they work together to build more revenues.

We begin with maybe one of the more obvious, but somewhat “newer,” revenue sources, revenue from broadcasting deals.

1. Broadcasting Revenue: Television, Radio, and Internet Contracts

The television was invented in the 1920s, but it took until the 2000s for the large television contracts that we know today to really start making money for sports leagues and the franchises within them. The standard for television contracts changed when, in 2008, TNT (owned by Turner Broadcasting) bought the rights to air National Basketball Association (NBA) games for $445 million USD per year. TNT eventually went on to pay close to $70 million a year for the rights to air NBA games after that first contract ended in 1990. The value of its contract has expanded dramatically ever since. Today TNT has the rights to air one conference final as well as festivities for the All-Star Game, outside of the actual game itself.

By comparison, Fox pays $500 million per year to air Major League Baseball (MLB) games, while ESPN pays $1.9 billion per year to air Monday Night Football games with the National Football League (NFL). In case you are counting, that is seventeen games per year for $1.9 billion. MLB’s contract is worth $4 billion over an eight-year period and the agreement ends in 2021. The NFL’s contract is the same length as MLB’s (2014–2021), but it is worth $14 – 15 billion over the life of the contract. Across the pond in the Premier League, SkySports pays $1.22 billion per year to air soccer games.

Of course, the above figures do not paint the entire picture. The NFL still has other contracts with CBS for the American Football Conference (AFC) and with Fox Sports for National Football Conference (NFC) games. Among MLB teams, we also have regional and local television contracts. For example, the Los Angeles Dodgers have an $8.3 billion, twenty-five-year contract with Time Warner Cable (TWC) (later purchased by Charter Communications) that airs most of its baseball games with additional supportive and complimentary Dodger programming. Why is this happening?

Per the New York Times:

There is a good reason for all this: With a few exceptions, regional sports networks are money-printing operations that heavily promote the teams they carry and play on the loyalties and wallets of local fans.

Interestingly, what once was secondary revenue has now become the primary source of revenue for professional sports franchises and their
leagues. Furthermore, colleges have cashed in as well with lucrative television contracts, like the Pac-12 and other major conferences. Some television deals are worth more than others based on the team, league, and geography, but the bottom-line has grown since television became a primary source of income for sports franchises. These revenues will likely only grow as Internet television outlets like YouTube, Netflix, Hulu, and social media outlets like Twitter and Facebook are invited to the party. All of the above and we did not discuss radio, which still brings in additional revenue for sports teams.

2. Merchandise Revenue: Sales, Royalties, and Licensing Agreements

Where television revenue may be the more obvious source of revenue for teams, because we see our favorite professional sports teams playing on, well, television, there is actually much more to the story. Let us pose a question with that thought in mind. What is the most likely thing you are going to see while watching a professional sports team on television, besides the on-the-field action? Without reservation, we are going to see merchandise of the team being worn by the fans in the stands (e.g., jerseys of the fans favorite player). Merchandise sales are by far one of the top sources of revenue for many professional sports franchises.

Some teams are much more successful at merchandise sales for three reasons. First, the significance and extent of the team brand, its marketing efforts, and sponsorship partners. Second, the existence of star players on the team. Third, whether the team is successful on the field. We will explore the third point in more detail at the end of this article.

The team brand comes down to marketing and reaching fans.

Per HALO branded solutions:

A sports franchise is more than a group of players putting a ball through a hoop or kicking one into a net. A professional sports team is an institution, defined by its history and its cultural impact on the world. It’s more than the sum of its parts. The power of a popular team name and logo is nearly limitless. Some of the most well-known teams, such as the Dallas Cowboys, are famous all across the world. Even people who aren’t familiar with American football know the Dallas Cowboys.

How do these teams reach such wide and varied audiences? One way is through the power of merchandise and branded products.

As a baseline, consider that, in 2014, the total merchandise sales figure was $12.8 billion among American sports fans. The $12.8 billion figure does not include other royalty and licensing agreements among the various professional sports leagues, teams, and third party companies. We explore those later under sponsorships.

Prime examples of large merchandise revenue are the jersey sales of LeBron James of the Cleveland Cavaliers and Tom Brady of the New England Patriots. It is not any surprise that the sports teams with the most merchandise sales have the biggest star athletes in their respective sports and their teams have had the most success on the field. Unsurprisingly, fans and their city government’s reward their professional sports teams with loyalty in sales, stadium money, and tax-free land in exchange for the team’s consistent success.

3. Game Day Revenue: Ticket and Concession Sales

In thinking about professional sports stadium revenue, not all teams and their home fields are the equal. Some teams own their stadiums. Others share their stadiums with other sports teams. Others share revenues with the city where the team is located. However, the difference in revenue-sharing agreements does not discount
the revenue source. Teams are making great money from ticket and concession sales.

According to the *Boston Globe*, Fenway Park, the home of the Boston Red Sox, made roughly $75.2 million in 2011 from concessions and souvenirs (merchandise), not including ticket sales. More specifically, the Dallas Cowboys of the NFL again set the standard in terms of dollars for “personal seat licenses,” which allow a person to purchase season tickets, for, you guessed it, another fee. For example, the Cowboys brought in $369 million in total stadium revenue in 2009 for Cowboys Stadium, a.k.a., AT&T Stadium.

While attendance may change from year to year and sport to sport for various reasons, it is certain that professional sports teams and their leagues will find new ways to reach fans through mediums like social media and virtual reality. Furthermore, as with merchandise sales, ticket sales are directly related to success on field. In addition, the more ticket sales (fan game attendance), the more likely a team will sell merchandise and concession products, and the professional sports franchise business model comes full circle.

4. Special Events Revenue: All-Star Games, Super Bowls, Concerts, and Conventions

If the 1960s, 70s, and 80s were about building domes and multi-purpose stadiums, with the 90s and early 2000s about revitalizing downtown areas and making new stadiums look retro, then from 2017 and into the future stadiums will be more about fan experience and off-season events. In other words, stadiums are now more than just venues, but destinations.

According to Forbes:

Stadiums are now viewed as a separate entertainment hub and business model. With premium concessions and dining options, giant high-definition video boards, expanded Wi-Fi access, and various promotions and other activities, stadiums are now a destination for the entire family. Faced with this new normal, smart owners with second-rate venues can either evolve—by renovating or building a brand new one—or struggle to remain financially competitive within their leagues.

Where we have additional events, we have additional revenues. In some sense, sports owners and leagues have gotten smarter over the years in terms of capitalizing on their venues as sources of revenue, as opposed to simply using their stadiums as places to compete in sport. Venues have become like Disneyland, as the “happiest place[s] on earth.” Sports teams may not share stadiums much anymore, unless you are the New England Patriots and Revolution (Major League Soccer) or the Oakland Raiders and Athletics, but where teams have separated homes, other entertainment opportunities have taken their place.

While team revenues from special events are hard to come by, we can determine ballpark estimates, pun intended. According to the *San Diego Union Tribune*, when discussing the San Diego Padres and their home of Petco Park, and the City of San Diego that owns the ballpark:

Big events are key, as they have brought in the bulk of non-baseball revenue over five years. Last year, those [special] events provided more than 90 percent of the city’s $1.4 million in non-baseball revenue. The problem is, such events can’t be counted on every year.

Similarly, West Virginia’s College of Physical Activity and Sport Sciences concluded in a recent study that the Super Bowl brought in roughly $5 million in tax revenue to Houston, Texas for Super Bowl 51 in 2017, while Major League Baseball and its All-Star Game possibly brought in less, closer to $1 million. However, other sources dispute the revenues that special events from a sport bring into a city. In the end, even if a team is splitting revenue with a city, another team, or entertainment company for special events, there are profits being made that are going back into a team’s revenue stream. As some sports analysts
have questioned rhetorically: sports venue or convention center? Currently, it is both, a sports and entertainment convention with revenues growing every year.

5. Revenue Sharing: League, Luxury Tax, and More

Where sports teams are built on competition, league offices are seemingly built more and more on parity. Leagues want to see a fair playing field in spending money, so that the product on the field has the same opportunity to be good and to win. In some sense, the money being equal, the responsibility is laid on the front office to bring in the talent, while the talent on the field and sidelines must perform to be successful. League revenue sharing agreements are an example of this intentional equity.

For example, long gone are the days when the Kansas City Athletics (now the Oakland Athletics) were considered a farm team of the New York Yankees.36 Leagues, sports franchise owners, and players unions now want parity when it comes to winning, which means success being spread around the teams winning percentages from year to year (e.g., competitive balance).37 Therefore, league offices have instituted revenue sharing agreements, a seemingly liberal policy in the capitalistic and competitive setting of sports.

For numerical context, in the NFL, all thirty-two (32) teams receive $27 million per year in national broadcasting revenue.38 In the MLB, each team is required to share thirty-four percent (34%) of its regional television revenue evenly with the other twenty-nine (29) teams.39 You can imagine that the actual contributions from each team vary because, for example, the New York Yankees ($191 million per year), Los Angeles Dodgers ($140 million per year), and San Diego Padres ($50 million per year) have different television deals in terms of total value.40 Over in the NBA, the Los Angeles Lakers took home a league best $122 million in the 2013–2014 season.41 Even the National Hockey League (NHL) and Major League Soccer (MLS) have revenue sharing, although the financial figures are harder to determine.42

It is important to note that the NFL secures its television broadcasting deals on a national level for all teams, resulting in even financial input and output splits among the teams. In the MLB, however, teams receive the same overall split, but the teams have the ability to secure their own regional television agreements in addition to whatever national games are sold by the MLB office to ESPN, Fox, etc. This means that the contribution (the 34% contribution) from the Dodgers differs from the Padres because the Dodgers television deal is nearly triple the value of the Padres. Therefore, the Dodgers are putting out more revenue to be distributed than the Padres, but the Dodgers are also making more from their television deal. Right or wrong, in some sense, if you make more, you are taxed more, which should sound familiar to all taxpayers.

The Dodgers and other high-spending teams43 also contribute to the revenue sharing pie through the MLB’s luxury tax and from the previous international spending pool fines44 before the MLB’s 2017–2021 collective bargaining agreement. Of course, leagues and their teams also split playoff revenue45 and revenue with the players, some a 50% split.46 Again, not all revenue sharing is equal among the leagues and teams, but it is another source of significant revenue for professional sports franchises.

6. Third Party Revenue: Advertising and Sponsorships

In what may be unsurprising, sports leagues and franchises derive most of their revenue from sources other than ticket sales on game day. Similar to athletes who make most of their money from endorsement deals,47 as opposed to team salary, or tournament and match winnings,48 professional sports franchises cash in, literally, from sponsorship deals as opposed to ticket sales.
Per Forbes:

[W]hat separates the Dallas Cowboys ($2.3 billion value) and Oakland Raiders ($825 million) is their stadiums and the revenue derived from each venue. Sponsorship revenue plays a huge part in this. The Cowboys earned $100 million from sponsorships and advertising signage last season, and this was before owner Jerry Jones inked his 25-year, $500 million naming rights deal with AT&T. Teams like the Raiders and Buffalo Bills generate less than $20 million in sponsor revenue.49

In breaking that down, we can see where the NFL derived its sponsorship revenue.

Per CNBC:

According to IEG . . . [Microsoft and the NFL] agreed on a $400 million deal that secures the exclusive right for Surface tablets and other Microsoft technologies on the sidelines for all 32 teams . . .

Another major money maker for the NFL is its four-year $4 billion partnership ($1 billion per season) with DirecTV—a service that allows viewers to watch every football broadcast on several channels.50

In the MLB, the league reached $695 million and $778 million in sponsorship revenue for 2014 and 2015, respectively. Since 2011, sponsorship revenue has gone up every year.53 The most common sponsors among the league’s team were New Era, DraftKings, and Anheuser-Busch InBev, covering the three essentials of sports—sincerely, hats/merch, gambling, and beer. Interestingly, as with television broadcasts, the NFL mostly negotiates from a national/thirty-two team level, while the MLB allows its thirty teams to negotiate individual team and ballpark advertisements and sponsorships. There are various reasons for that, but the common result is that the NFL has a better chance to bring in large corporate sponsors like Microsoft because the sponsor is paying one fee for an entire league and its teams, as opposed to thirty individual deals. Regardless, leagues and teams are bringing in significant sponsorship dollars as a source of their revenue.

7. Foundational and Loyalty Revenue: Private Investment and Winning!

Coming full circle—with revenues, there are expenditures and expenses. A sports franchise must spend money and invest resources (money or otherwise) to win. Actor Charlie Sheen was right, “Winning” matters.54 However, there has to be a cash flowing business that supports the team during the downturns (e.g., losing seasons). If you were to survey the types of owners and their current companies (not the sports franchises, but their actual corporations), one thing is certain: sports team owners are millionaires and billionaires in successful and profitable industries.

Per Investopedia, we can see a list of who’s who in terms of professional sports franchise owners and their companies:

- **Miami Heat**—The Heat’s owner is Mickey Arison, CEO of Carnival Corporation, the world’s largest cruise ship operator.
- **Seattle Mariners**—The Mariners’ owner is Nintendo of America, one of the world’s largest videogame manufacturers.
- **Chicago Cubs**—The Cubs are owned by a family trust established by TD Ameritrade founder Joe Ricketts.
- **Toronto Blue Jays**—The Jays’ owner is the Rogers Blue Jays Baseball Partnership, a division of Rogers Communications.
- **New York Knicks & New York Rangers**—Both teams are owned by Madison Square Garden, Inc., a spin-off of Cablevision.
- **Atlanta Braves**—The Braves are owned by Liberty Capital Group, a division of Liberty Media Corporation.
- **Philadelphia Flyers**—The Flyers’ owner is Comcast-Spectacor, a Philadelphia-based sports and entertainment firm.55
Other owners may rank higher in individual wealth, but the Los Angeles Dodgers owner Mark Walter of Guggenheim Partners and Guggenheim Baseball Management, is Chief Executive Officer of a $260 billion asset management company. Not all investments are successful, however.

Per The Sports Advisory Group:

Donald Watkins, a lawyer-turned-dealmaker, has made multiple attempts to buy a major league baseball team. He lodged back-to-back failed bids for the Minnesota Twins and Anaheim Angels in 2002 and 2003, respectively. Despite his interest, however, he warns that an investment in the wide world of sports is no sure thing. ‘You have to have the right team, in the right market, under the right terms and conditions. If you don’t have all three of those factors in perfect alignment at the same time, you will be upside down in the investment.’

We wrote about this previously in Presenting the Case to Build and Maintain a Successful Sports Franchise: A Great Venue, Lease, Market, and Personnel. Again, professional sports franchises must have a positive cash flowing business as the backer of the team. Without private investment, a great venue, lease, market, and personnel, it will be hard to succeed. It is possible that private investors and their companies will transition to eSports in the future, as the barriers and cost to entry continue to increase in traditional professional team sports.

In conclusion, where a professional sports franchise has a wealthy team owner backed by a successful company bringing in investment dollars, and having accumulated revenue from its broadcasting contracts, merchandise sales, ticket sales, special events, league revenue sharing, advertisers, and sponsors, the team must still win to be and to stay successful. Why is this? It is because fans, sponsors, league offices, athletes, coaches, and other team owners will not allow mediocrity for too long. Losing can only go on for so long before changes are made in geographic location, team personnel, and/or team leadership. And yes, you guessed it, it takes financial investment to develop, trade, invest, and build the best athletes, coaches, and venues to win and to win consistently. Is it any surprise that the most successful professional sports franchises in the world have the most recognized brands, most wins, most championships, and highest value? Indeed, we have come full circle when revenues result in success and increased success results in increased revenue.

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3 Ryan Murray, TV Contacts and Broadcasting in Sports, TIMETOAST, https://www.timetoast.com/timelines/91498


5 Id.
6 Id.

7 Id.

8 Id.

9 Id.

10 See Murray, *surpa* note 3.


16 Chris Mills, *‘Netflix for sports’ is finally here, but there’s a catch*, BGR (Aug. 10, 2016), http://bgr.com/2016/08/10/netflix-for-sports-dazn-stream-nfl-nba-premier-league-how-to-us/.


23 Id.


39 Id.


entertainment&sportslaw
christinasettimi/2014/01/22/the-nbas-richest-local-television-deals/#1b3a097fa46c.


46 See All leagues share, supra note 38.


53 Id.


I. Introduction

“MAKE VINC\E GREAT AGAIN,” “THAT’S A CLOWN QUESTION BRO,” “VEGAS GOLDEN KNIGHTS,” blue football fields, announcer sounds, and hand gestures, are some “traditional” and “non-traditional” source-identifying trademarks and trade dress that are used by athletes, teams, merchandisers, announcers, and others in the multi-billion dollar sports industry. A review of current trademark, trade dress, and copyright matters reveal that individuals and entities, from quarterbacks to franchises to boxing announcers (online, off the field, and virtually), are becoming more creative in protecting, monetizing, and enforcing their brands and copyrights.

II. Team Names and Other “Traditional” Trademarks

As a bit of background, Section 43(a) of the Lanham Act defines protectable trademarks as “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”

The protectability of trademarks and trade dress depends on distinctiveness and consumer recognition. Marks are classified along a spectrum of distinctiveness and are classified as either generic, descriptive, suggestive, arbitrary or fanciful—with generic marks on the...
non-distinctive side and fanciful on the most distinctive end of the spectrum. Marks inherently distinctive by their nature are (1) fanciful, having no known meaning and relation to the goods or services being sold; (2) arbitrary, having a known term with a dictionary meaning not related to the goods or services being sold; and (3) suggestive, needing imagination to reach a conclusion of the nature of the goods or services. These marks “identify a particular source of a product” and are almost always inherently distinctive.

In contrast, descriptive marks are common terms that are used to describe the goods or services. While not inherently distinctive, descriptive marks can acquire distinctiveness and trademark protection through establishing secondary meaning—evidence that consumers identify the source of the product or service with the mark.

Last on the spectrum are generic marks, which are terms that are too common to describe the product or its source. Generic marks are not inherently distinctive and cannot acquire trademark protection by acquiring distinctiveness through secondary meaning.

A. Vegas Golden Knights and Washington Redskins

In the past five or so years, teams, players, and coaches have attempted to achieve federal trademark registrations and enforcement for new team names, slogans, and phrases, while others have found themselves losing long-held federal registrations for their sports franchises.

i. Vegas Golden Knights

On the trademark spectrum, “VEGAS GOLDEN KNIGHTS” appears to be a distinctive mark, but with four months before the start of the professional hockey season, the team still had no federal trademark registration for their name.

With the NHL preparing to expand in the 2017-2018 season, Black Knight Sports and Entertainment, LLC, the consortium that owns the new Las Vegas NHL franchise, applied for various trademarks for their new team name with the United States Patent and Trademark Office (“USPTO”).

Federal registration of a trademark provides substantive and procedural rights not necessarily afforded to unregistered marks. These rights include the right to use the registered trademark symbol, ®; receive monetary remedies in lawsuits, including treble damages and attorneys’ fees; serve as the priority basis for an international trademark application; and the right to the exclusive ownership rights, including constructive notice, nationwide priority, and incontestability after five years of use. It goes without saying that it is in a team and player’s interest to file and acquire federal trademark registration.

On August 23, 2016, Black Knight Sports applied for trademarks for their team name, “VEGAS GOLDEN KNIGHTS” and “LAS VEGAS GOLDEN KNIGHTS,” based on an intent to use the marks in commerce for the following goods and services: “Clothing, namely, bandanas, beach cover-ups, belts, body suits, boxer shorts, caps, cloth bibs, coats, dresses, footwear, ear muffs, gloves, hats, headbands, hosiery, housecoats, jackets, jerseys, leggings, leotards, mittens, nightshirts, pajamas, pants, rain coats, rain wear, robes, scarves, shirts, shorts, skirts, socks, suits, sun visors, suspenders, sweaters, sweatpants, sweatshirts, swimsuits, swim trunks, t-shirts, ties, toques, underwear, vests, warm-up suits and wristbands,” and “Entertainment services, namely, professional ice hockey exhibitions.”

After reviewing the “VEGAS GOLDEN KNIGHTS” and “LAS VEGAS GOLDEN KNIGHTS” trademark applications, the USPTO responded with Office actions based on, among other things, a likelihood of confusion with a registration owned by The College of Saint Rose in Albany, New York, for “GOLDEN KNIGHTS THE COLLEGE OF SAINT ROSE,” and design.

The College of Saint Rose’s wording and design trademark registration features a stylized knight above the wording “GOLDEN KNIGHTS” in large letters and “THE COLLEGE OF SAINT ROSE” in smaller letters, and is registered since 2002 for...
“clothing, namely shirts, t-shirts, jackets, shorts, pants, caps, hats, baseball hats, sweatshirts, and golf shirts,” “decorative metal ornamental novelty pins,” and “educational services, namely providing courses of instruction at the college level; Entertainment services in the form of intercollegiate sports exhibitions.”

The College of Saint Rose does not have a hockey team, but it does have various other collegiate sports teams. With approximately four months before the start of the 101st NHL season, the Vegas franchise had only until June 7, 2017, to file responses to the Office Actions. In a statement sent to SInow in December of 2016, the Las Vegas Golden Knights noted that other professional and collegiate teams share sports names, including “Vegas Golden Knights and Clarkson Golden Knights, UCLA Bruins and Boston Bruins, U of Miami Hurricanes and Carolina Hurricanes, etc.” In the meantime, the Las Vegas Golden Knights may have to start the season without a federal trademark registration for their team name. However, they are not without all trademark rights. The Las Vegas Golden Knights will still receive common law protection for the use of their trademark in commerce, even without the federal registration.

ii. Washington Redskins Update

It is also the case that a well-known professional team name’s federal registration may be canceled for various reasons, including, that it has been found to be disparaging under section 2(a) of the Lanham Act.

The disparagement provision of the Lanham Act, provides that no trademark shall be refused registration on account of its nature unless, inter alia, it “[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

In Blackhorse, et al. v. Pro-Football, Inc., the USPTO’s Trademark Trial and Appeal Board (“TTAB”) canceled six of the Washington Redskins federal registrations containing the mark “REDSKINS,” finding the word to be disparaging. The team appealed the TTAB’s decision to the district court, which upheld the decision, explaining that “the marks consisted of matter that ‘may disparage’ a substantial composite of Native Americans and bring them into contempt or disrepute.” The court noted, however, that although the marks were canceled, the franchise was free to continue to use the marks. The Supreme Court denied the team’s request for appeal.

However, on January 18, 2017, the Supreme Court heard arguments in the case of Matal v. Tam, which addressed the issue of whether the disparagement provision of the Lanham Act should ultimately remain valid or whether it is invalid under the Free Speech Clause of the First Amendment. The Court has not yet issued its opinion. (Editor’s Note—At the time of writing and editing, the decision was still pending; it has since been released.)

Is this the end of the Redskins team name, and its apparel, merchandise and other fan gear bearing the mark? Will Tam open a new door for the Redskins or will they choose to rebrand? If the Redskins do go through with a name change and rebrand, it is estimated that a rebrand of the Redskins team name could cost upwards of $15 million.

Meanwhile, likely attempting to stay ahead of the game, third-parties have filed marks presumably in anticipation of a bidding battle for the new team name. Prospective team name marks filed to date include, “WASHINGTON WARRIORS” and “WASHINGTON BRAVEHEARTS.” Since 2014, Washington Brave Hearts, LLC, applied for “WASHINGTON BRAVEHEARTS” for football game entertainment services and various printed matter, and successfully cancelled two prior “WASHINGTON BRAVEHEARTS” registrations.

B. “MAKE VINCE GREAT AGAIN”—Player and Coach Names and Slogans

Federal protection of names, nicknames, and slogans are frequently sought by players, coaches, and teams. For example, Pat Riley famously registered variations of “THREE-PEAT”
and “3-PEAT” under the owner name Riles & Company, Inc., for various goods including jewelry, clothing, and bumper stickers. Riley’s marks have held up numerous applications for similar marks including “THREE-PETE,” which was rumored to be applied-for by University of Southern California fans in honor of their football coach Pete Carroll. Moreover, the free-agent Darrelle Revis, owns a federal registration of “REVIS ISLAND” for clothing and related goods after his success as cornerback for a number of years with the New York Jets. Additionally, the Patriots worked hard on the field in an attempt to achieve a perfect season, and ultimately did achieve … registration for the marks, “19-0” and “PERFECT SEASON.”

While athletes of all types have sought federal trademark protection for their own names, including “LEBRON” and “JORDAN,” eSports athletes are likely to be the next wave of athletes to protect their personal brands. eSports consist of multiplayer video game competitions between professional players. In 2015, it was estimated that eSports was reportedly worth $748 million and was projected to reach $1.8 billion by 2018. When participating in an eSports competition, eSports athletes typically use nicknames called “gamertags” to identify themselves to their fans and their competitors. Nicknames, like personal names, are protectable under trademark law. eSports athletes are likely to be among the more popular players in sports and will see value associated with their names, gamertags, and slogans in the future.

Athletes known for their creative statements or non-statements (think Marshawn Lynch), have generally sought federal protection for off-hand quotes. For example, New York Jets linebacker Bart Scott obtained registration for “CAN’T WAIT” for clothing, retail services, including “automotive accessories,” fan clubs, and football camps, after making the comment “can’t wait” during an interview with reporter Sal Paolantonio following the Jets playoff upset of the Patriots. Similarly, following a reporter’s question regarding whether Bryce Harper would partake in a beer following a win in Toronto in 2012, Washington Nationals MVP Bryce Harper attempted to register “THAT’S A CLOWN QUESTION, BRO,” but ultimately allowed the application to abandon.

Shawne Merriman, through his company Lights Out Holdings, LLC, is the owner of a series of federal registrations for “LIGHTS OUT” for various goods and services, including footballs, clothing, retail services, and others. In February 2017, Lights Out filed a lawsuit against Baltimore-based retailer Under Armour for trademark infringement of “LIGHTS OUT.” Lights Out alleged that Under Armour infringed trademark rights in the mark “LIGHTS OUT” via use of the “LIGHTS OUT” wording in a new Stephen Curry sneaker named “CURRY 3 LIGHTS OUT,” and use in an associated mobile application game under the mark “LIGHTS OUT.” The matter is still active and pending before the court, but according to court papers, Merriman and Under Armour have a history of matters concerning the disputed mark.

Unrelated to the Lights Out case, in 2015 Under Armour obtained a consent judgment against the owner of the brand ASS ARMOR for protective shorts. The owner of the trademark “ASS ARMOR” brought a declaratory judgment action asking that its mark did not infringe Under Armour’s trademark and requested the cancellation of various Under Armour registrations. Under Armour subsequently filed a counterclaim for trademark infringement and trademark dilution, among other claims, based on the tarnishment of its brand. Making matters worse, Ass Armor also promoted its brand via the slogan “PROTECT YOUR ASSETS,” which was alleged to also be confusingly similar to Under Armour’s “WE MUST PROTECT THIS HOUSE” mark. The parties ultimately settled, with Ass Armor conceding that its marks infringed the trademark rights of Under Armour and agreed to stop using or registering any trademark, logo or name with either “armor” or “armour.”

III. Non-Traditional Marks—Team Colors, Hand and Arm Symbols, Poses, Sounds, and Beyond

As trademark law has evolved, so has the protection and definition of “source-identifier.” Such matter was held not to be limited to merely
conventional or “traditional” trademarks and the theory of trade dress was formed. The Supreme Court in Two Pesos addressed a case involving competing interior design schemes between two Mexican restaurants and held that section 43(a) also provides protections and claims for trade dress. Trade dress, it was found, “involves the total image of a product and may include features such as size, shape, color, or color combinations, texture, graphics, or even particular sales techniques.” However, only those elements of a design that are nonfunctional are protectable and the design must be either inherently distinctive or have acquired secondary meaning.

Acquiring distinctiveness through secondary meaning is only present when, “in the minds of the public, the primary significance of [a mark] is to identify the source of the product rather than the product itself.” In other words, secondary meaning arises when the public comes to associate the design with the source of that design’s product or service.

A. Color

Of the non-traditional trademarks, colors lead the list of source-identifying matter that sports institutions, fans, and companies utilize most often. Following the Supreme Court decisions in Two Pesos and the subsequent Wal-Mart case, courts have extended the protection of team colors as trade dress for athletic team services and related goods.

For example in 2008, the Fifth Circuit held that school colors are protectable trademarks as long as the colors have the associated secondary meaning and are nonfunctional. Louisiana State University, University of Oklahoma, The Ohio State University, and the University of Southern California, brought suit against Smack Apparel for the sale of unlicensed t-shirts bearing an association to the school. Smack Apparel, presumably having enough understanding of trademark law to be dangerous, creatively used team color schemes on apparel without mentioning the schools themselves. Both the district court and the Fifth Circuit found that the school colors, especially when used in connection with other indicia identifying or suggesting the schools, had acquired distinctiveness through secondary meaning. The factors considered by the Fifth Circuit for a finding of secondary meaning in the school colors, included the duration of use of the colors as source-identifying, the sales and advertising amounts associated with the colors, and the defendant’s bad faith intent. The court ultimately found Smack’s design to infringe the schools’ trademark rights in the colors and held that confusion was likely.

i. Boise State and its Blue Football Field

Taking color to the field, Boise State University registered the color blue on its football field on the Principal Register based on acquired distinctiveness the trade dress for “Entertainment services, namely, the presentation of intercollegiate sporting events and sports exhibitions rendered in a stadium, and through the media of radio and television broadcasts and the global communications network.” The description of the mark, as identified in the federal trademark registration, is as follows: “The color(s) blue is/are claimed as a feature of the mark. The mark consists of the color blue used on the artificial turf in the stadium. The matter shown in broken lines on the drawing shows positioning of the mark and is not claimed as a feature of the mark.” Capitalizing on the creativity of its field color, Boise State has noted that they review requests for non-green fields and generally considers the requests “as long as it doesn’t prevent Boise State from getting the best students and the best student-athletes that [they’re] looking for.”

B. Arm Symbols, Hand Symbols, Poses and Mascots

Fans have also come to associate motions, movements, poses, and hand symbols with their favorite teams and players. In 2013, The Ohio State University acquired design trademark registrations via assignment that featured human silhouettes spelling out O H I O with their arms for apparel, stickers and other related items. In 2016, The Ohio State University sued Café
Press, a successful manufacturer and seller of t-shirts online, before the U.S. federal court district southern district of Ohio based *inter alia* on trademark infringement for making and selling t-shirts bearing the O H I O human arm silhouette. Café Press has since countered with a cancellation action against The Ohio State University’s silhouette registrations before the USPTO’s Trademark Trial and Appeal Board. The TTAB actions are currently suspended pending the disposition of the underlying federal court action.

Hand symbols are frequently used by fans of a school’s athletic team to show recognition and devotion to the team. Schools, in turn, have registered those hand symbols. For example, the University of Texas and its well-known “hook ‘em horns” hand symbol is registered with the USPTO on the Principal Register based on a claim of acquired distinctiveness for various goods and services, including clothing and decals.

The description associated with the University of Texas registration is: “The mark consists of the representation of a human hand with the index and small fingers extended upward and the thumb closed over the middle and ring fingers.”

Designs of team mascots, presumably with humans posing inside, have been considered inherently distinctive and registrable on the Principal Register as source-identifying indicia for years. Design featuring humans posing (without costumes) are also protectable trademarks. Of note is Usain Bolt’s registration for his signature Bolt pose, which Bolt registered for various goods and services including clothing, beers, bags and entertainment services.

Whether one can enforce rights in a design pose against fans or others simulating the pose pushes the limits of trademark law. However, Tim Tebow did capitalize on his famous pose and the misuse of the term “TEBOWING” for a prayer pose on the field by registering numerous TEBOWING marks with the USPTO for various goods and services.

C. Sound

Among some of the non-traditional marks, sound is often used to associate a connection with the team, player, or sports announcer. Sound marks are registrable with the USPTO and are protectable form of trade dress, provided there is a showing of acquired distinctiveness through secondary meaning. To register a sound mark, one must include a digital copy of the sound in its application. Two of the more popular sounds registered to announcers, for example, are “ONIONS!” by Bill Raftery, and “LET’S GET READY TO RUMBLE,” the famous catchphrase by the boxing announcer Michael Buffer to Ready to Rumble, LLC. At least one collegiate sports team, the University of Arkansas, has registered its fan call “WOOOOOOOO. PIG. SOOIE! WOOOOOOOO. PIG. SOOIE! WOOOOOOOO. PIG. SOOIE! RAZORBACKS!” for “Providing collegiate athletic and sporting events.”

D. Scents

Scent marks are also registrable in the U.S. under a similar theory provided the mark is non-functional and has acquired distinctiveness through secondary meaning. A bottled scent is not required for registration, but instead a detailed written description must be included.

The well-known scent case in the U.S. involved the smell of Plumeria blossoms for “sewing thread and embroidery yarn.” On our last review, no scent mark in the sports capacity has
been registered to date in the U.S. However in 1999, the scent of grass for tennis balls was sought before the former Community Trade Mark Office (CTM) which refused the application, but ultimately resulted in an appeal allowing registration after it determined the scent of fresh cut grass to be distinct and recognizable for tennis balls.

IV. Copyright—Team Uniforms—Varsity Sports

The Supreme Court’s recent decision regarding the protection of cheerleading uniform designs in Star Athletica, LLC v. Varsity Brands, Inc., posed the question as to whether Varsity Brands, the largest U.S. manufacturer of cheerleading uniforms, had a protectable interest in its uniforms’ stripes and chevrons that were allegedly copied by Star Athletica. Star Athletica claimed that the uniforms’ designs are functional because they identify the wearer as a cheerleader and help make them look slimmer and taller. In its counterargument, Varsity Sports maintained that because the patterns on the uniforms are capable of existing in their own tangible medium, they are “conceptually separable” and thus not a functional requirement of the uniform.

Justice Sotomayor’s line of questioning in particular focused on the impact that would be felt by the sports teams that contract with Varsity Sports for their uniforms: “[D]o the universities that contract with you know that they have to buy their uniform from you for 99 years plus whatever? Every university that you sell these cheerleading uniforms to, do they know that under your copyright they are stuck with you forever?”

Establishing a test for determining the copyrightability of designs, the majority opinion ultimately narrowly held that the chevron graphics on the cheerleading uniforms at issue were copyrightable.

“A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.”

According to the Court, Varsity Sports’ uniforms satisfied both criteria of the test and thus were capable of copyright protection.

V. Domain Names and Social Media

ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”) is a faster and cheaper way to resolve a domain name dispute. Social media entities like Facebook and Twitter generally have trademark infringement policies to assist in the suspension and take-down or transfer of a social media name or “handle,” especially where the handle is confusingly similar to an existing mark and a federal registration is present.

To prevail in a UDRP dispute, the Complainant is required to prove the following three elements: (1) the domain is identical or confusingly similar to the Complainant’s mark; (2) registrant has no legitimate interest or rights in the domain name; and (3) the domain name was registered in bad faith. Evidence of “Bad faith” can include acquiring the domain name for the purpose of sale or transfer of the domain, prevention or blocking of the owner from acquiring the domain, and a pattern of similar conduct in the past, disrupting the business or attracting others to the domain for financial gain.

One important UDRP case involves the domain name dispute with the soccer player Freddy Adu for the domain name “freddyadu.com.” Here, the infringing registrant repeatedly contacted Adu’s people in an attempt to sell or to offer the creation of a fan site in exchange for monetary and non-monetary contributions. Even though Adu reached out to registrant for the domain name, the registrant’s ransom techniques were found to be black hat methods in the eyes of the
WIPO Panelists, and the Panelists held in favor of Adu.\textsuperscript{68,69}

In the social media landscape, registration of a username does not present the same financial barriers as seeking federal trademark registration, which can lead to individuals quickly scooping up identical or confusingly similar handles before the player or team. Most social media sites, including Twitter, allow usernames on a first-come, first-served basis. In 2009 during the early days of Twitter, Tony La Russa brought suit against Twitter in the District Court for the Northern District of California, in which he claimed that the fake Twitter page using the handle “Tony LaRussa,” constituted trademark infringement and dilution, and cybersquatting.\textsuperscript{70} The case was ultimately settled and Twitter’s policies have made takedown of infringing member names to be more swift, especially where there is a federally registered trademark, but attempting to remove a member name is not without its hurdles.

Twitter’s current rules read that the following is not a violation of Twitter’s policy: “using a trademark in a way that is outside the scope of the trademark registration (e.g. territory, or goods and services identified in the registration)... Nominative and other fair uses of trademarks are protected uses under our trademark policy, so long as the account is clearly distinguished from the trademark owner. This includes use by resellers in certain regions and accounts engaging in parody, commentary, or news.”\textsuperscript{71} However, Twitter policies do allow that “[u]sing another’s trademark in a manner that may mislead or confuse others about your brand affiliation may be a violation of our trademark policy” is a violation of their policy.\textsuperscript{72}

Having a federally registered trademark is typically the first helpful step in taking down or transferring a member name that is misleading or confusingly similar.

VI. Conclusion

From field colors, uniforms, sounds, slogans and poses to social media handles, domain names, gTLDs and beyond, entities and individuals in the sports world have protected and monetized, enforced and defended, the icons, words and symbols that serve to identify the source with their fans and consumers. Regardless of the sports industry players, all will likely continue to find ways to push the boundaries of trademark and copyright law in unpredictable ways.

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\textsuperscript{1} Special thanks to Cameron Meindl of the Benjamin N. Cardozo School of Law, Class of 2018, for all of his help on this article.


\textsuperscript{3} Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976).

\textsuperscript{4} Id. at 10-11.

\textsuperscript{5} Id. at 10.

\textsuperscript{6} Id.

\textsuperscript{7} Id. at 9.

\textsuperscript{8} Id.

\textsuperscript{9} Lanham Act, 15 U.S.C. §§ 1051 et seq.

\textsuperscript{10} VEGAS GOLDEN KNIGHTS and LAS VEGAS GOLDEN KNIGHTS, Registration Nos. 87147236, 87147239, 87147269, and 87147265.

\textsuperscript{11} GOLDEN KNIGHTS THE COLLEGE OF SAINT ROSE, Registration No. 3188463.


14 Id.


17 Id. at 490.


20 WASHINGTON BRAVEHARTS, Registration Nos. 86113300 and 86094004.

21 Variations of THREE PLEAT and 3-PLEAT, Registration Nos. 1552980, 1878690, 1886018, 1977620, 2831367, 4051757, 4139135, 4758665, and 4758666.

22 REVIS ISLAND, Registration No. 4407286.

23 19-0, Registration No. 5100521; and PERFECT SEASON, Registration No. 5095619.

24 Jeff Grub, Esports is already worth $748M, but it’ll reach $1.9B by 2018, VENTURE BEAT (Oct. 28, 2015, 8:00 AM), https://venturebeat.com/2015/10/28/analyst-esports-is-already-worth-748m-but-itll-reach-1-9b-by-2018/.

25 CANT WAIT, Registration No. 4247527.

26 THAT’S A CLOWN QUESTION, BRO, Application Serial No. 85651210.

27 LIGHTS OUT, Registration Nos. 2885212 (terminated), 3990916, and 4242170; Application Serial Nos. 85968807, 85968815, 86613418, 86705594, 86743803, and 86888080.


29 Id.


31 Id.


33 Id. at Footnote 1.

34 Id. at 766.

35 Id.


37 Board of Supervisors for LA St. Univ., et al. v. Smack Apparel Co., et al., 550 F.3d 465 (5th Cir. 2008).

38 Id.

39 Id.

40 Id.

41 Id.

42 Id.

43 Boise St. Univ. Image trademark for the color blue on a football field, Registration No. 3707623.

44 Id.


46 O H I O arm silhouettes, Registration Nos. 4104956 (cancellation pending) and 4297349 (cancellation pending).


48 Design Trademark for Hook 'em Horns Hand gesture, Registration No. 4535612.

49 Id.

50 Bolt Pose Design, Registration Nos. 3895896 and 4177904.

51 TEBOWING, Registration No. (U.S. Reg. No. 4263370).


53 “ONIONS!” sound mark, Registration No. 4839818.

54 “LETS GET READY TO RUMBLE” sound mark, Registration No. 4775241.

55 Univ. of Ark. Fan Call sound mark, Registration No. 4558864.


57 CTM is now the European Union Intellectual Property Office.


59 Id.

60 Id.


62 Star Athletica, 137 S. Ct. at 1007.

63 Id.

64 Id.

65 Unif. Domain Name Dispute Resolution Policy §§ 4(a) and (b) (ICANN 1999) (hereinafter, “UDRP Policy”).


67 Id.

68 Id.

69 Sports venues, teams, players, fans and the like may also be interested in the new gTLDs launched and soon-to-be-released, including .SPORTS. TEAM, .SURF, .CRICKET and .GOLF.

70 La Russa v. Twitter Inc., No. 3:09-cv-02503-EMC (N.D. Cal. 2009)

71 Trademark Policy, TWITTER HELP CENTER (June 30, 2016), https://support.twitter.com/articles/18367.
SUMMER 2017 LITIGATION UPDATE

ASCAP and BMI Consent Decrees—Update

In 2014, ASCAP, BMI and various music publishers asked the Department of Justice (“DOJ”) to modify provisions of their respective Consent Decree to allow, among other things, publishers and Performing Rights Societies (“PRO”) to agree that the PROs would not license to certain classes of music users (e.g. a partial withdrawal of what were called “new media” rights from the PROs to force Internet music services to negotiate with publishers directly while continuing to allow PROs to license to all other types of music buyers).

After a lengthy review of the Consent Decrees, the DOJ decided against any changes proposed by the PROs and instead interpreted the Consent Decrees as requiring ASCAP and BMI to execute 100% licensing or “full-work” licensing. In other words, the PROs would not be able to continue licensing the fractional interests in the musical compositions owned by the songwriters they represent, even though the same has been a longstanding practice of the music industry.

In songs where there are multiple writers, fractionalized licensing requires a licensee to get a license from every rights owner in a song. Under 100% licensing, a user needs only a license from one of the rights holders. Publishers have long maintained that it is the industry’s practice to exercise fractionalized licensing while licensees like radio and digital services have long maintained that they only need a license from one rights-holder of a song.

Judge Stanton, the BMI Rate Court Judge, disagreed with the DOJ’s interpretation of BMI’s Consent Decree and ruled that the Consent Decree neither barred fractional licensing nor required full-work licensing, which is the exact opposite of what the DOJ argued when it gave ASCAP and BMI one year to employ the 100% licensing scheme.

In November 2016, the DOJ filed its much-anticipated appeal to the Second Circuit. The DOJ’s opening brief to the Second Circuit is scheduled for May 18.

Paul McCartney Refuses to “Let it Be”—Taking Back Copyrights in Some of The Beatles’ Most Iconic Tunes

In January 2017, Paul McCartney, formerly of The Beatles, filed a lawsuit against Sony/ATV, seeking to reclaim his copyright ownership in some of The Beatles’ most famous songs. By virtue of the U.S. Copyright Act’s copyright termination provision, McCartney asserts grounds to reclaim copyright ownership in “Love Me Do,” “I Want to Hold Your Hand,” “Let it Be,” and other monumental Beatles’ tunes.

In 1985, Michael Jackson bought ATV, which owned Northern Songs, the publishing company that owned the copyright for nearly the entire Beatles catalogue. Jackson later sold half of the rights in ATV to Sony, creating one of the world’s largest music publishers, Sony/ATV. Sometime thereafter, Sony/ATV acquired the remaining rights to several Beatles songs from Jackson’s estate.

It has been presumed that McCartney seeks to invoke the U.S. Copyright Act’s termination clause since copyright termination is unavailable under British law. The 1909 Copyright Act entitled authors to an initial 28 year copyright term which could then be renewed for an additional 28 years (e.g. total of 56 years). Congress revised the 1909 U.S. Copyright Act in 1976, extending the copyright term for works created before January 1, 1978 to 75 years from the date the copyright was initially secured. The term was extended by another 20 years (for a total of 95 years), by virtue of the Copyright Term Extension Act of 1998. In enacting the Copyright Act of 1976 however, Congress recognized that the term extension might provide a windfall for grantees who had negotiated transfers before
the copyright term was extended. To address that predicament, Congress provided language allowing for the termination of transfers and licenses covering extended renewal terms. Specifically, works created before 1978 can be reclaimed by authors after 35 years.

Songs written by McCartney and former Beatle, John Lennon, were written between 1962 and 1971. In other words, in 2018, the Lennon-McCartney catalog reaches the 56-year mark. To reclaim ownership of the publishing rights, the author is required to file notice with the U.S. Copyright Office, terminating said publishing from 2 to 10 years before the 56 years elapse. In December 2016, McCartney filed his notice of termination of grant for 32 songs, pursuant to 17 U.S.C. § 304(C).

In addition to the termination, McCartney is seeking a declaratory judgment that he is not committing breach of contract by asserting his termination rights. On the other side of the table is Sony/ATV, who has openly shared its disappointment over the suit, stating that the same is both unnecessary and premature, particularly in light of the relationship they have shared with McCartney. The result of this litigation is yet to be seen, but many anxiously await what effect the result will have on the music publishing industry.

Dru Hill Suit Against Sony and EMI—Dismissed

In 2015, members of the R&B Group, Dru Hill (“Plaintiffs”), sued Sony/ATV Music Publishing LLC, EMI April Music Inc., EMI Blackwood Music Inc., and others (collectively, “EMI”) for unpaid royalties in excess of $600,000. The suit alleged breach of contract, breach of fiduciary duty and conversion. Specifically, the complaint alleged that in 1996, members of Dru Hill entered into individual publishing and administration agreements with Art of War Publishing (a non-party to the suit). It further alleged that in 2002, Art of War Publishing entered into an exclusive administration agreement with EMI, providing that EMI would pay royalties directly to Plaintiffs, but that Plaintiffs were not intended third-party beneficiaries.

In 2005, Mark Andrews, a member of Dru Hill, contracted with 27 Red Music Publishing LLC (“27 Red”) to collect from EMI unpaid royalties dating between 1996 and 2005. However, Plaintiffs alleged that they never received any such royalties. In their complaint, Plaintiffs allege that they were the intended beneficiaries under EMI’s administration agreement with Art of War, and asserted that Sony’s payments to 27 Red of post-2005 royalties amounted to a breach of that agreement.

In their second amended complaint, Plaintiffs alleged that the original EMI agreement terminated automatically after three years, but in light of EMI’s continued administration of the Art of War catalog and collection of royalties therefrom, an implied contract was created between EMI/Sony and the Plaintiffs. Thus, Plaintiffs allege Defendants breached that implied contract when they failed to pay Plaintiffs the royalties directly.

In its ruling, the District Court held that “Plaintiffs made one substantive allegation in support of their implied contract claim: that, following the purported termination of the EMI administration agreement, EMI ‘continued to administer the Art of War catalog’ and ‘collect royalties due Plaintiffs.’” As such, the Court held the same was insufficient to establish an implied contract and explained that Plaintiffs failed to allege any of the circumstances giving rise to the alleged implied contract, or any facts that would allow the court to infer the parties’ intention to be bound. The Court further held that any such implied contract would have nevertheless been bound by the New York Statute of Fraud’s, which requires contracts to be performed in excess of one year to be in writing. Given that the royalties sought dated from 2005 to the present, the Court held that the alleged implied contract would fall within that statute. Alternatively, even if Plaintiffs argued that the implied contract was to last less than one year, Plaintiffs’ claims would be barred by New York’s six-year statute of limitations. The District Court’s decision did not resolve Plaintiffs’
remaining claims against 27 Red, but stated that Plaintiffs could move for default judgment against 27 Red on their breach of contract, breach of fiduciary duty and conversion claims.

Pre-1972 Recordings—No NY Common Law Right of Performance

On February 16, 2017, the U.S. Court of Appeals for the Second Circuit held that there is no New York common law right of public performance for pre-1972 sound recordings that is equivalent to protections afforded by the U.S. Copyright Act. Flo & Eddie v. Sirius XM Radio, Inc. et al., Case No. 15-1164 (3d Cir., Feb. 16, 2017). The Court also found that no issues remained as to liability for copies of the sound recordings made during digital transmissions or on any unfair competition claim. Rather, the Court held that copies made during the digital transmission process constituted fair use required to engage in a legal performance. The case was then sent back to the U.S. District Court with instructions that it be dismissed.

Flo & Eddie own the copyrights to recordings by The Turtles, a 1960s musical group. A class action suit was filed in the Southern District of New York alleging that Sirius XM Radio infringed Flo & Eddie’s common law copyright protections through the digital transmission of songs recorded before 1972. The suit sought past and future royalties to the tune of millions, for songs recorded prior to February 15, 1972, when legislation was amended to establish federal copyright protection for future sound recordings. Throughout the litigation, Flo & Eddie alleged that even in the absence of federal copyright protection for pre-1972 sound recordings, New York common law provided a right of public performance and these protections should afford Flo & Eddie with royalties from digital transmissions for songs recorded prior to 1972. However, the District Court held that no clear answer existed under New York law as to whether the exclusive right of sound recordings included a right of public performance. Thus, the question was certified for interlocutory appeal to the Second Circuit, who in turn, certified it to the New York Court of Appeals. The state’s highest court was asked whether New York had “a right of public performance for creators of sound recordings under New York law and, if so, what was the nature and scope of that right.”

In reaching its decision, the New York Court of Appeals reviewed the history of common law copyright protection in sound recordings and concluded that public performance of songs recorded prior to 1972 were not protected by virtue of common law. Rather, New York law only protected against unauthorized reproductions of a work until that work was published, thereby triggering federal copyright protection. The Court also considered the judiciary and legislative roles and thus declined to create a common law right of public performance in pre-1972 sound recordings. Thus, the Second Circuit decision provides that radio broadcast companies need not pay royalties when playing pre-1972 sound recordings.

Resolution of this issue in other states, including California and Florida where similar issues are pending, may vary. As pre-1972 sound recordings are not protected by federal law, each state may reach a different conclusion as to whether performance rights exist in pre-1972 sound recordings. However, as New York tends to lead the pack on matters involving the entertainment industry, this decision may forecast the future of public performance rights, or lack thereof, for pre-1972 sound recordings.

Another Shot at Obtaining Compensation for Use of Pre-1972 Sound Recordings—Shot Down

After yet another innovative attempt to obtain compensation for the use of pre-1972 sound recordings, the Georgia Supreme Court held that iHeart Media’s streaming of pre-1972 sound recordings did not violate state criminal statutes against the transfer of recorded sounds without the permission of the owner in the master recording. Unlike the often-associated cases of Flo & Eddie against Sirius XM radio, this case actually argued an entirely different issue—whether unauthorized transfer of pre-1972 sound recordings violated criminal law, thereby
giving rise to a claim of civil liability under state racketeering statutes.

The Georgia statute at the heart of this controversy prohibits unauthorized transfer of various recordings, including those recorded before 1972, without first seeking permission from the owner of the sound recording. The statute was intended to prevent the unauthorized duplication and sale of pre-1972 sound recordings. However, the statute excludes the transfer of sounds “in connection with radio… broadcast transmissions or related uses.”

Here, Plaintiffs argued that iHeart Media’s illegal transfer via streaming violated criminal law, leading to civil liability under state racketeering statutes that provide civil recovery against defendants engaged in multiple criminal activities. However, the Georgia Supreme Court found that iHeart Media engaged in no such criminal activity and shot down Plaintiffs’ racketeering claim. The Court further found that iHeart’s online music experience was similar to the experience a user encounters by virtue of over-the-air radio. Thus, streaming constituted a “related use” covered by the statute’s exception and iHeart Media did not violate the state criminal statute.

The Fly v. Nae Slappin—Signature Elements and Copyright Infringement

On February 27, 2017, Paul Rose filed suit against U2 in the District Court of Manhattan alleging the band’s song, “The Fly,” copied signature elements of Rose’s song “Nae Slappin.” The complaint alleges that U2 lifted the industrial-style percussion and elaborate and distinctive guitar solo and seeks $5 million in damages from U2 and their label, Island Records. This case is yet another example of musicians testing the boundaries between works of original authorship and creativity. Recent cases have addressed similar issues, including Led Zeppelin’s “Stairway to Heaven,” where Led Zeppelin successfully defended a claim that the song’s intro was taken from “Taurus,” a 1968 song by Spirit (on March 15, 2017 an appeal was filed in the Ninth Circuit claiming the lower court made substantial errors).

Pharell and Robin Thicke, however, failed to achieve a favorable result when the estate of Marvin Gaye sued them over the hit song, “Blurred Lines,” alleging the song infringed Marvin Gaye’s 1978 tune, “Got to Give it Up.”

It would seem that there is no clear-cut, black and white test, to determine when a work exhibits permissible inspiration versus unauthorized copyrighting. However, copyright infringement is generally found where there is a substantial similarity between the original and alleged infringing work and can be based on copying that portion of the work that is deemed the heart or core of the work.

Here, Rose argues similarly to the Gaye estate, focusing primarily on style, groove and feel, in light of the differences in melody, harmony, rhythm and lyrics between the two songs. There appears to be no direct sampling of Rose’s song in U2’s song either. To establish copying, Rose points to his song being on regular rotation at Island Records’ during the time U2 was recording their album featuring “The Fly.” However, Rose has another hurdle to overcome—the three-year statute of limitations period. Rose appears to argue exceptional circumstances to overcome the statute of limitations defense, by contending that bringing the action earlier might have been damaging to his career. He further relies on evidence that has only become known recently, as a reason for the delay in filing suit.

The issues Rose must overcome to prevail on this suit appear challenging. Stay tuned.

VidAngel Hit with Copyright Infringement

VidAngel holds itself to be a family-friendly video streamer, allowing users to filter movie and television content. Customers can purchase new movies for $20, filter out content (e.g. language, nudity and/or violence), and then sell the content back for $19. However, unlike Netflix, VidAngel does not obtain licenses from the studios that hold the copyrights in the content.
In June 2016, Disney, Warner Bros., and 20th Century Fox filed suit against VidAngel alleging they were operating as an “unlicensed [video on demand] streaming service” and seeking an injunction disallowing VidAngel to stream Plaintiffs’ films. VidAngel counterclaimed alleging Plaintiffs were violating anti-trust laws. A preliminary injunction was issued following a ruling in favor of the Plaintiffs, pending the outcome of Plaintiffs’ copyright infringement trial. In that regard, Judge Birotte of the Central District of California wrote that VidAngel had failed to offer evidence, explicitly or implicitly, that it was authorized by Plaintiffs to allow DVD buyers to circumvent encryption technology in order to view the DVD on a platform such as VidAngel’s streaming service. Shortly thereafter, VidAngel sought an emergency stay of the injunction, but the U.S. Court of Appeals for the Ninth Circuit declined.

This case exhibits issues in reconciling various federal laws, including The Family Movies Act, the Digital Millennium Copyright Act, and the U.S. Copyright Act. The former allows users to filter unacceptable content from films, while the latter two afford federal copyright protections. For example, VidAngel argues that the service it provides (e.g. providing its users authorized copies to be filtered by a “member of the private household”), is covered by The Family Movies Act. VidAngel also argues that there is an exemption to the anti-circumvention provisions of the Digital Millennium Copyright Act, arguing that its action in decrypting content amounted to “space shifting.” However, the Court held the purchase of a DVD grants only the ability to view it, not decrypt it. The Court further rejected VidAngel’s argument that there was an exemption to the anti-circumvention provisions of the Digital Millennium Copyright Act included in The Family Movies Act. Rather, the Court stated that the statute “clearly requires that a performance or transmission of filtered content must come from an ‘authorized copy’ of the motion picture and that the content VidAngel was streaming, was not from an authorized copy.” Further, the Court sided with Plaintiffs in concluding that VidAngel violated Plaintiffs’ exclusive rights to reproduce and publicly perform their copyrighted works.

In light of the preliminary injunction and finding that Plaintiffs’ DMCA and copyright claims have a strong likelihood of success on the merits, VidAngel may have an uphill battle at trial.

Fyre Festival Under Fire: Hit With $100 Million Lawsuit

Pitched as “the next Coachella,” the Fyre Festival stirred up promotional buzz across social media. Now, it is stirring up buzz for a completely different reason. Festival organizers have been accused of fraud, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing, and sued for $100 million. The lawsuit was filed by Mark J. Geragos, a celebrity lawyer, on behalf of Daniel Jung, a Los Angeles man, who, according to the suit, paid $2,000 for a ticket and airfare to the festival. The suit alleges that Fyre Festival, which was organized by Ja Rule and technology entrepreneur Billy McFarland, was promoted as a luxurious island festival with first-class experiences. It was backed by top influencers like Kendall Jenner, Bella Hadid, and Nick Bateman, and reportedly featured top acts like Blink-182 and Major Lazer. However, when guests arrived they were not greeted with luxury, but rather what media outlets have referred to as “mass chaos.” The suit alleges, “The festival’s lack of adequate food, water, shelter, and medical care created a dangerous and panicked situation.” The suit even goes as far as comparing the festival to The Hunger Games. The suit claims that festival-goers were given minimal food and were forced to seek shelter in soaking wet “FEMA tents,” a stark contrast to the five-star cuisine and posh villas the festival websites promised. Festival-goers’ plight was further exacerbated by the fact that they had to rely on event organizers for transportation and were expressly told the festival was a “cashless” event and all funds should be uploaded to a wristband. With no cash and a now-valueless wristband, attendees could not pay for local transportation and were locked inside a nearby building as they waited to be rescued. The suit claims that the conditions caused at least one festival-goer to suffer a medical emergency and lose consciousness.
Not only does the lawsuit allege that the festival was dangerous and disastrous, it alleges that the organizers “had been aware for months that their festival was dangerously under-equipped and posed a serious danger to anyone in attendance.” Individuals working for the festival have allegedly acknowledged that the food and accommodations were not in place as of a month prior to the festival and that hired contractors were not being paid and had stopped work. The lawsuit claims that despite the clear evidence that the festival was not prepared, the organizers continued to promote the event and sell ticket packages, which ranged from $1,200 to over $100,000. On top of that, the lawsuit claims that organizers personally reached out to the celebrities who had planned on attending and told them not to attend, while still not informing festival-goers of the conditions. The event was ultimately cancelled, but only after thousands of festival-goers had flown to the island and were stranded. Organizers issued a statement saying, “The Fyre Festival is a dream and a vision that we regrettably did not see come to life how we imagined in 2017, but our main priority now is rectifying the situation and helping all affected guests.” Refunds are being issued, but the lawsuit claims that attendees damages in “being lured to a deserted island and left to fend for themselves, . . . exceed the face value of their ticket packages by many orders of magnitude.”

As well over 1,000 people purchased tickets to the festival; the lawsuit is set up as a class action for all of those affected. The first cause of action, fraud and intentional misrepresentation, alleges that organizers knew their representations about the festival were false, or at a minimum, made the representations with reckless disregard for the truth. Furthermore, these representations were made solely to promote the event and increase the number of attendees and the revenue. Plaintiff and the class members also bring a breach of contract action, alleging that they entered into a contract with the event organizers to provide a luxury festival experience, which included lavish accommodations, world-class cuisine, and top music talent, in exchange for payment, and the organizers breached the contract by providing barely livable conditions and no musical talent.

With the rise in popularity of luxury festivals, like Coachella, it comes as no surprise that others want a piece of the action. This lawsuit will likely serve as a warning not only to those who are thinking of organizing a festival, but also to those influencers who are involved in the promotion.

Student Athletes Agree To $208 Million Settlement Against NCAA, Challenging NCAA Rules Limiting Athletic Scholarships

On February 3, 2017, the National Collegiate Athletic Association and 11 athletic conferences agreed to pay $208.7 Million to settle claims that they colluded to suppress athletes’ scholarships. A motion for preliminary settlement approval has been filed in the case, In re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation, N.D. Cal., No. 4:14-md-02541.

This lawsuit is one of many cases where athletes are challenging the status quo and are asserting that they are not being compensated correctly or fairly at colleges and universities across the United States. In this case, several student athletes raised an antitrust claim and filed separate class actions challenging the National Collegiate Athletic Association’s (“NCAA”) by-laws limiting athletic grants-in-aid to tuition and fees, room and board, and books. The cost of attendance refers to the overall costs to go to college each year, including tuition and fees, room and board, books, transportation and other expenses. The Plaintiffs further claimed that the grant-in-aid scholarships did not cover the full cost of attending college and that the NCAA collectively shares “monopoly” power over college athletes.

Although this case did not go to trial, the outcome is newsworthy just the same. The parties agreed to a settlement of approximately $208 million to end the lawsuits. The proposed settlement, which requires court approval, follows a U.S. Court of Appeals for the Ninth Circuit decision (O’Bannon
**Former Linebacker Blitzes NCAA with Lawsuit Alleging Fair Labor Standards Act (FLSA) Violation**

The debate on whether student athletes should be included in an expansive definition of “employee” continues. Lamar Dawson, a former linebacker who played for USC from June 2011 through December 2015, filed a class action lawsuit accusing the NCAA and Pac-12 of breaching the Fair Labor Standards Act (“FLSA”) and California law by not paying football players minimum wage or overtime. Dawson alleges that he was paid a substandard wage, denied full pay for all hours worked including overtime pay, and was frequently permitted to work without receiving required minimum wage payments.

Dawson argues he and other potential class members are employees under federal and state law due to the strict control and ability of the NCAA and Pac-12 to regulate Dawson as a student athlete. Dawson alleges that the NCAA and Pac-12 “…prohibit him from 1) rendering himself ineligible, 2) engaging in serious misconduct, 3) engaging in conduct resulting in criminal charges, 4) abusing team rules as determined by the coaches and/or athletic administrators, 5) voluntarily withdrawing from the sport at any time for any reason, 6) accepting compensation for participating in athletic contests in his sport, and 7) agreeing to be represented by an agent.”

Other conduct that Dawson identifies to further prove the control and reach of the NCAA and Pac-12 include training, game schedules, academic schedules, collegiate activities, and student athletes’ conduct on and off campus.

Although Dawson and other collegiate athletes have raised claims pertaining to the compensation of student athletes, the NCAA has remained consistent with its positon. The NCAA repeatedly has denied and disagreed with the notion that college students participating in athletics are employees. In fact, the NCAA’s chief legal officer, Donald Remy stated, “…college students like their non-athlete colleagues are focused on their academic endeavors and that having a passion for their sport and a commitment to their teammates cannot be equated to punching a time clock.”

Recently, the 7th Circuit ruled against three track and field athletes who sued the University of Pennsylvania and the NCAA alleging that the students were employees and did not receive fair compensation under the FLSA. The decision in this case marks another victory for the NCAA and the issue of whether student athletes are employees. Although this case is very similar to the Dawson case, the opinion provides a silver lining to the Dawson case. The court in the University of Pennsylvania case said that because the student athletes were not under scholarship and that they were not part of a revenue generating sport; their theory was too broad and was mistaken. However, the court also indicated that it was not confident that this reasoning could be applied to students who received scholarships in revenue generating sports like Division I men’s basketball and football.
More cases are likely to come forward to address the issues of compensation for student athletes.

**NFL Agent Sues Roc Nation and Former Protégé for Intentional Interference**

On October 26, 2016, Joby Branion, certified agent by the National Football Players Association (“NFLPA”) to represent the National Football League (“NFL”), filed suit against Carmen Wallace and Roc Nation sports alleging defamation and intentional interference with prospective economic advantage. The Complaint was later amended to allege only intentional interference. Branion, a certified agent since 1997, represents several NFL football players and has mentored up and coming agents such as Carmen Wallace.

According to Branion’s Complaint, Wallace was Branion’s former assistant. In September 2014, Branion created his own agency, Vanguard Sports Group, and brought many of his clients with him, including Denver Broncos linebacker Von Miller. Branion offered to add Wallace’s name to the Standard Representation Agreement (“SRA”) he had with Miller, on the condition that Wallace would not be entitled to any agent fees based on Miller’s team contract, but could state for advertising purposes he had Miller as a client.

Branion then alleges that Wallace contacted Miller with the intent of convincing Miller to pay 50% of the fee to him, in violation of Branion’s agreement with Wallace. Moreover, after Miller instructed Wallace to take heed from Branion during contract negotiations, Wallace repeatedly disregarded the instructions. The parties ultimately agreed to adhere to what Miller decided, as it related to the commission and Miller decided to pay Branion 100% of the commission. As a result, Wallace allegedly misled Miller and at least one other person in believing that Branion was at risk for sanctions by NFLPA and potential suspension. To further complicate things, after NFL player Melvin Ingram fired Wallace as his agent, Ingram sought representation by Branion. Branion alleges that Wallace then induced Ingram to sign a deal with Roc Nation Sports where Wallace was paid a finder’s fee to help get Ingram to sign with Roc Nation Sports. On January 18, 2017, the court ruled on Wallace’s Motion to Dismiss or to Compel Arbitration. Roc Nation Sports also filed a Motion to Dismiss for failure to state a claim and joined Wallace’s Motion to Compel Arbitration. The Court found that because the dispute arises from the activities of Wallace, a registered agent under the NFLPA, that the dispute must be arbitrated in accordance with the NFLPA regulations. The Court also stated that Wallace and Roc Nation Sports allegedly conspired together to induce Ingram into signing a representation agreement with Roc Nation Sports and that this inducement is connected to the NFLPA Regulations that this issue must still be arbitrated.


**Eagles Offensive Tackle, Lane Johnson, Filed a Complaint Against the NFL and the NFL Players Association in Federal Court**

In early August Lane Johnson, offensive tackle for the Philadelphia Eagles, was suspended for his second violation of the National Football League’s Policy on Performance-Enhancing Substances (the “Policy”). According to the Policy, “the second time a player tests for positive for a prohibited substance, he is automatically suspended for ten regular and/or postseason games without pay, and the suspension begins when the player accepts discipline or when the appeal becomes final.” Johnson, believing that his due process and contractual rights had been violated, filed a complaint against both the NFL and the NFL Players Association (“NFLPA”) in federal court with a Motion to Vacate Arbitration Award relating to a 10 game suspension. Johnson states that the NFL and NFLPA deprived
him of rights granted under the Policy and violated federal labor law by substantive and procedural defects during the arbitration process. Johnson states that prior to his arbitration hearing, he sought information directly related to his appeal, including information about the arbitration selection and the collection procedures. Virtually all of the requests for information were denied by management.”

Johnson alleges that the arbitration that yielded his ten game suspension was faulty because the NFL did not comply with the terms of the 2015 Policy. In reviewing the arbitrator’s decisions, the federal court is not allowed to hear claims of factual or legal error, and is instead tasked to review the procedural soundness of the arbitrator’s decision. The vacating of an arbitrator’s decision is appropriate: (1) when the arbitrator goes outside the bounds of the collective bargaining agreement and is found to be dispensing his own brand of justice; (2) where the arbitrator’s decision is based on extraneous issues; (3) when the decision goes against public policy; (4) when the decision is the result of fraud; or (5) when the arbitrator expresses a manifest disregard of the law.

Johnson supports his allegations by stating that the arbitration process itself was flawed, because the policy stated that a minimum of three arbitrators are required and that they could not have any relationship to the NFL or the NFLPA. Here, the arbitration only contained two arbitrators and one of the arbitrators was involved with the Ray Rice decision. Moreover, Johnson and his attorney sought information relating to the drug testing collection and procedures. These requests were denied even though the policy indicates that players have the right to information to defend themselves. It appears that Johnson had his due process rights violated when the NFL decided not to provide Johnson information that would aid in his defense. Nonetheless, it is unlikely that the case will be overturned just because a different outcome could have been reached. The prevailing party in arbitration usually has the upper hand when awards are challenged. Although this issue has not yet been addressed by the courts, this issue will be a hot topic in the next round of collective bargaining in light of the NFL Commissioner’s power.

**Fans, DMCA, and the Decision of Mavrix v. LiveJournal**

For years, copyright holders and fans have been in conflict—butting heads over where to draw the line in the sand. Fans push at the boundaries of the fair use doctrine with the fan community transitioning from subculture to mainstream; riding in on the prolific wave of social media and other similar platforms that allow them to share their works—noncommercial art, literature, and films dedicated to a copyrighted work—faster and farther than ever. On the other hand, copyright holders assert their dominance via DMCA takedown notices and threats of infringement suits. All the while the middleman, Internet service providers, sit quietly on the sidelines protected under the safe harbor provisions of the DMCA. The safe harbor provisions allow service providers like YouTube, Tumblr, and others to escape liability from infringing content if they can demonstrate “beyond controversy” that “the infringing material was posted at the direction of the user.” As of April, however, hosting sites can no longer sit on the neutral sidelines. The decision in *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 853 F.3d. 1020 (2017), effectively gave hosting sites a horse in this copyright race, by putting their protection under the DMCA safe harbor provisions into jeopardy.

In 2014, Mavrix initiated a copyright infringement suit when a LiveJournal site, “Oh No They Didn’t!” (“ONTD”), posted photographs of popular celebrities to its community page. The site “features up-to-date celebrity news [in which] users submit posts containing photographs, videos, links, and gossip about celebrities’ lives.” After users submit the photos, moderators review them before the photos are posted to the public page; to ensure that the site only features posts “relevant to new and exciting celebrity news.” This screening by moderators is what gave rise to the question of agency. According to the Court, this process raised a genuine question of fact as to whether the moderators’ actions...
could be attributed to LiveJournal because the moderators were given instructions and direction by LiveJournal and were overseen by a paid LiveJournal employee. Therefore, the Court held it is a question for a trier of fact to determine how much control LiveJournal exercised over the moderators and whether that control rose to the level of an agent-principal relationship. The Court attempted to narrow the holding by referring to LiveJournal’s business model as the key factor in opening the door to the analysis of agency, but these small holes in what was once considered to be an almost absolute protection could be the start of a slippery slope towards dismantling the DMCA safe harbor protections.

One major concern was how the Court addressed the secondary issue of knowledge in an attempt to provide guidance for the lower court when deciding the case on remand. The Court held that even if LiveJournal met the basic threshold of the safe harbor provision (i.e., that the post was at the direction of the user), it must then demonstrate that “it lacked both actual and red flag knowledge about the infringements.” The Court held that while LiveJournal may prevail on demonstrating lack of actual knowledge given that Mavrix did not go through the proper DMCA takedown procedures before filing suit, there might be an issue when it comes to red-flag knowledge. Red-flag knowledge is infringement that is apparent to a non-expert, in this case the red-flag is the watermark bearing Mavrix’s name and website on the posted photographs. It based on this red-flag knowledge that Mavrix filed motions to compel responses to the interrogatories in which they sought the names of the ONTD moderators—motions that were initially denied under the First Amendment by the lower court. The Maverix court granted the motions holding that the importance of determining the moderators’ role in the agency analysis outweighed “the moderators’ interest in anonymous Internet speech.”

While LiveJournal’s business model is shared only by a handful of forum-like sites, human moderators are not a foreign concept in many of today’s most popular social media sites. A quick check of the user and community guidelines on sites like Tumblr, reveals that claims of infringement are not handled by an algorithm, but rather “each claim is reviewed by a trained member of [a] Trust and Safety team.” According to the Maverix court, these teams may still be protected under the DMCA Safe Harbor provisions under 17 U.S.C. §512(m), which does not attach liability to “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” However, it is now up to service providers to prove at the summary judgment phase, that their teams are part of an accessibility-enhancing process and not agents like LiveJournal’s moderators potentially are. This extra hurdle, combined with the slippery slope of scaling back safe harbor protections, seemingly forces service providers and hosting sites to take a stance in the ongoing copyright conflict, rather than merely resting under their DMCA shield. This will be a tricky stance to navigate, as a service provider like Tumblr currently has 550 million monthly users and 280.4 million blogs, a large portion of which are fan blogs that share creations (i.e., fan fiction, fan videos, or GIFs) that include some portion of copyrighted content. Whatever stance these service providers choose will have to be one that does not alienate the large corporate copyright holders, nor the fans that have found a home for their creative expression in this digital age.

Spotify IPO

Earlier this year, Snap, Inc., the parent company of the popular app Snapchat, went public. Unlike previous tech companies’ initial public offerings (“IPO”), everyone watched the Snap opening with bated breath because, like a rebellious teenager, Snap ignored traditional conventions and wisdom of an IPO. Snap went public with high costs of revenue and selling stock with no voting rights attached—leaving investors unable to have a say in future business decisions of the young app-company. After the first day of trading, Snap’s stock dropped from $27 a share to a fluctuating number in the teens. After the first quarter, analysts are now predicting a loss of $0.21 per share. Today, Snap’s stock is trading for around $23 a share. Snap going
public, for better or worse, has opened the door to speculation as to which app will be next—apps like Spotify, the largest music streaming service on the market. But Spotify has several hurdles to overcome before we can start owning a piece of the streaming giant, including loans that come with a ticking clock, tensions between the company and artists, and still to be decided licensing deals with the major record labels. Despite these hurdles, it is likely that Spotify will go public later this year.

In early 2016, Spotify raised $1 billion through loans from several Swedish companies and investment groups such as TPG, Dragoneer, and Goldman Sachs. These loans were in the form of convertible debt, a debt "whose security may be changed by a creditor into another form of security." The loans allow investors to convert their debt into a 20% discount of Spotify’s share price. If Spotify does not go public within a year of the loans, the discount increases by 2.5% every additional six months. These convertible debt investors also get the advantage of selling their shares within 90 days of the IPO—half the time of the traditional lockup that Spotify’s other investors are subject to.

Spotify is also no stranger to conflict or litigation. They faced backlash from several artists, notably Taylor Swift, for their free ad-based service, which allows non-paying users to gain access to the same content as paid subscribers for the small inconvenience of listening to advertisements and having no offline listening capability. Additionally, Spotify recently settled a potential $200 million lawsuit with the National Music Publishers Association (“NMPA”) regarding the unlicensed streaming of over 150,000 copyrighted songs. The settlement, which also stemmed a possible class action with artist advocate, David Lowery, forced Spotify to cough up $5 million in damages.

However, Spotify is a valuable asset for the major record labels, as evidenced by the recent long-term deal between Spotify and Universal Music Group (“UMG”). Not only does Spotify boast over 100 million users including 40 million paid users, but Spotify is a music streaming service first. Unlike its primary competition—Apple Music and Amazon Prime—Spotify is not a subset of larger corporation and can more readily agree to strong and ambitious growth targets by record labels. These targets allow Spotify to reduce its payments to UMG if “it hits certain revenue targets” within a specified time. The UMG deal also begins to make Spotify appear more like its complex video streaming service cousins, than a simple popular app like Snapchat. This is because the deal also opens the door, or window, to “windowing”—a process that releases content in phases. Newly released albums will be available to paid Spotify subscribers several weeks before free ad-based users. Spotify is hoping that this will lead to an increase in paid subscribers by working the same way that digital releases of movies do. Fans who want access to content right away will want to subscribe to Spotify’s paid services, so fans can get their hands on several new albums at once and sample to their heart’s content.

According to market insiders, Spotify can possibly have their cake and eat it too in terms of entering public trading. Instead of taking the route of a traditional IPO, which is heavily regulated by the New York Stock Exchange and comes with hefty underwriting fees, the music streaming service might instead do a direct listing, or direct public offering. A direct listing would put Spotify on the market immediately with shares available to both institutional and everyday investors. Like the Snapchat IPO, this would be breaking new ground, as direct listings are rare and are usually done by small companies with small valuations. Spotify’s current valuation is $8.5 billion and is projected to be valued at $10 billion when it finally goes public. However, a direct listing might allow Spotify to retain the most earning from a public offering, as many say that it might not trigger the provisions of those convertible debt loans the company has hanging over their heads. Come fall, when Spotify is expected to make its IPO, all eyes will be on the music streaming service to see if follows the path forged by Snapchat or if it will make its own way.
Ticket Bot Laws

It seems nowadays that getting tickets to popular events and shows is almost impossible. Tickets to the latest concert sell out within minutes, leaving fans subject to digital waiting lines only to find the show sold out immediately. The massive success of the Broadway musical, Hamilton, brought with it the running joke of no one—not even the rich and famous—can secure a ticket. Sure these events are popular, but popularity is not the only thing causing this phenomenon. Online ticket sales have been plagued by rampant scalping through the use of ticket bots. Ticket bots are software programs that allow users to skip to the “front of the line” and purchase event tickets before and faster than a human user. Bots can purchase large quantities of tickets in milliseconds. They are able to circumvent what we used to think of as strong defenses like CAPTCHA and purchase amount limits. The bots create an artificial high demand when the event quickly sells out and then turn a profit by reselling the tickets for exorbitant prices. Not only are fans ripped off—many paying the high prices in order to secure a ticket—but so are the artists and vendors. The money made from resale goes directly into the pockets of scalpers, with artists and vendors never seeing a dime of it. Moreover, with bot software constantly updating, each new technological defense that online ticketing websites put in place is easily adapted to and no more protective against aggressive scalping than a sheet of paper.

Without the help of technological defenses, artists and vendors have had to come up with other solutions to stem the tide of bots and scalpers. One notable attempt has been to cancel or prohibit secondary sales of tickets on websites like LiveNation and StubHub. Sports teams, artists, and Broadway shows alike, have stopped secondary sales in an effort to make sure that tickets are ending up in the hands of fans for a reasonable price. Another measure, used by artists like Adele, Jack Johnson and Metallica, is to sell their tickets on a website like SongKick. SongKick is an independent artist-ticketing service that claims to “empower artists to take control of their ticketing” by using proprietary technology. Comic book conventions have taken a similar approach to combatting bots by reaching out to their fans directly. In 2016, New York Comic Con (“NYCC”)—one of the largest comic book conventions in the country—introduced fan verification. The fan verification, which opens before tickets go on sale, asks fans who want to attend (even those whose ticket is being purchased by a friend or relative) to input basic demographic data and get a verification code sent to their cell phone. NYCC hopes that this effort, which is now in its second year, will stop ticket scalpers and resellers.

In addition to the combat by vendors, state and federal legislatures are also attempting to crackdown on ticket bots. In November 2016, New York Governor Andrew Cuomo passed a bill that classifies the operation of ticket bot software as a misdemeanor and imposes a fine of up to $1,000, or double the ticket value. The bill also comes with the threat of up to one-year in jail for anyone who knowingly resells tickets that were purchased using ticket bot software. It amends an existing law that imposed fines for ticket scalping by attempting to cut deeper into the resellers’ profit margin. In a similar fashion, President Obama signed the BOTS Act into law late December. The Act prohibits unfair and deceptive acts that attempt to circumvent ticket access control measures or otherwise affect the integrity of online ticket purchasing rules. Violations of the act can result in criminal penalties under the Federal Trade Commission Act. Both the New York law and the federal law went in effect earlier this year, but it remains unclear whether any actual enforcement has occurred under the new laws.

Even with the federal and state laws, there are still concerns over scalping and the factors that feed the problem. One of the biggest concerns for advocates pushing for more protection of consumers and vendors is that resale platforms have very little incentive to actively engage in the process of finding solutions to ticket bots. The ticket resale business is a $8 billion market and companies like LiveNation make money both on the initial sale through its subsidiary, TicketMaster, and then again on the resale. The other major
concern is that bot software continues to advance and remains readily accessible. Enforcement of ticket bot laws and other regulations is a game of cat and mouse that takes places amidst lines and lines of code. However, the hope is that these laws will be a step forward into stopping ticket scalping and making the ticket purchasing market once again fair for fans and artists alike.

#VisasSoWhite: The Challenges of Artist Visas in the Current Political Climate

We do not live in temporary societies. There is no way to temporarily pause global progress. Yet, that is what the current O-1 visa system and its numerous hurdles, capricious requirements and increasing fees is effectually doing. Together with the tumultuous current political climate, what once was a thriving cross-cultural exchange of arts, music, film, and the like, has slowed to a crawl—inhibited by an insular American society and a system that has become inefficient.

As part of the Immigration Act of 1990, Congress created the separate O-1 visa categories for those non-immigrants who could demonstrate “extraordinary ability in the sciences, arts, education, business, or athletics or . . . a record of extraordinary achievement in the motion picture or television industry.” The petitioner must demonstrate the beneficiary’s “extraordinary ability” by producing evidence of the beneficiary’s “receipt of a significant or international award” in the particular field. The petitioner can also meet their burden by satisfying at least three of an eight-part list that may include evidence of major or critical commercial success, critical reviews, or evidence that the beneficiary will be in a starring or lead role in a production of some sort.

After the events of 9/11, Congress passed several pieces of legislation in order to reform the non-immigrant visa system, enhance security, and prevent future terrorist attacks. The new requirements included detailed background checks, mandatory biometric data, and interviews, but as an unfortunate side effect, the requirements increased profiling of Muslim and Middle-Eastern artists. Artists, in order to attain an O-1 visa, must personally visit his or her consulate for interviews, and provide fingerprints and photographs. Because US consulates are often located in centralized cities, travel times from outer regions and countries without US consulates can be time-consuming and expensive, especially for larger groups such as orchestras. Currently, there are no exceptions to these requirements to allow for video interviews of large groups or waivers for artists who have toured regularly to the United States.

Another piece of post-9/11 legislation, the Enhanced Border Security and Visa Entry Reform Act, prohibits the issuance of a non-immigrant visa, including an O-1 visa, to a citizen “from a country that is a state sponsor of terrorism unless the Secretary of State determines that said alien does not pose a threat to the safety or national security of the United States.” This act passed in 2002, fifteen years before President Trump’s January 2017 executive order, but the language seems to serve as a clear foundation for the infamous travel ban.

Artists from these seven countries are subject to not only the extensive in-person checks that are required of every O-1 and P-1 visa beneficiary, but they must also go through “Visa Condor” security checks. This security check involves the beneficiary’s name being sent through the FBI’s Universal Indices to seek “all instances of the individual’s name and close date of birth, whether a main file name or reference.” A “hit” in the system triggers further review that must be done by an FBI agent and resulting in further delays or possible denial of the O-1 visa petition. These hurdles and profiling that Muslim and Middle Eastern artists face, continue to widen the divide between America and the Muslim world and hamper any efforts for cross-cultural dialogue and diplomacy.

However, nothing hampered these efforts more than when, on January 27, 2017, President Trump signed an executive order prohibiting the citizens from seven predominately Muslim countries from entering the United States. Although the “ban” varies in length from country
to country, the backlash from organizations, including the art community, was swift. Many arts organizations spoke out against the travel ban including OPERA America, which stated in part, that such restrictions denied the American public the opportunity to experience unique virtuosity and could potentially cost Americans important employment opportunities when scheduled performances must be cancelled. Cancellation of events was perhaps the most visible and immediate effect on the arts community, not only by artists who were prevented from entering the country, but also from artists who refused to travel in a show of solidarity with those affected by the travel ban.

Muslim artists and performers, even those who had previously approved visas or permanent residency, felt significant ripple effects that went far beyond simply being disallowed into the United States. For example, Iranian musician and producer Mahdyar Aghajani had a documentary, album, and sponsors fall through when he was forced to cancel the American stretch of a world tour in the wake of the travel ban. Even before the travel ban was implemented Syrian singer, Omar Souleyman, was set to perform in Austin at a New Year’s Eve event. He was detained by border security, even though he already had his O-1 visa approved. While in custody, Souleyman underwent extensive questioning by officers and was told, via his translator, that it was the border police officer alone who had the power to grant or deny Souleyman entry despite the valid visa in his passport. Like Souleymann, Palestinian-Canadian comedian, Eman El-Husseini, was “detained for roughly an hour, had her fingerprints taken and was then released.” In the wake of the travel ban, she had to suspend all her social media accounts because border control officers are vetting the social media accounts of those detained.

Although the ban was halted by a decision from the 4th Circuit, things remain in flux. Artists affected by the ban are hesitant to leave the country on world tours for fear of not being re-admitted or they are hesitant to enter the country, even with an O-1 visa, for fear of being detained when they arrive. US promoters and employers, unsure of whether the travel ban will be reinstated, are cautious about entering into agreements with artists and entertainers from the seven countries affected because they may face a financial loss from cancelation. All of this hesitancy on both sides does nothing to ease tensions and only further slows the channels of cultural diplomacy.


In 2003, Petitioners SCA Hygiene Products (“SCA”) notified Respondents First Quality Baby Products (“First Quality”) that certain First Quality products infringed SCA’s patent. First Quality responded that its own patent antedated SCA’s patent and made it invalid. In response, SCA sought reexamination of its patent and in 2007, the Patent and Trademark Office confirmed the validity of the SCA patent. In 2010, SCA sued First Quality for patent infringement. The District Court granted summary judgment to First Quality on the grounds of equitable estoppel and laches. SCA appealed, but before the Federal Circuit court issued a decision, the Supreme Court decided Petrella v. Metro-Goldwyn-Mayer. Nevertheless, the court still held that SCA’s claims were barred by laches. The Federal Circuit reheard the case en banc to consider the impact of Petrella, but affirmed the holding, concluding that the Patent Act had “codified a laches defense” that “barred recovery of legal remedies.” The case went to the U.S. Supreme Court, which issued an opinion on March 21, 2017. The Court relied heavily on Petrella when holding that the equitable defense of laches cannot be invoked against claims for infringement occurring during the statutory period. This holding may have a significant impact on future patent litigation, as it has effectively impaired the equitable doctrine of laches from being used as a defense, even if there have been unreasonable delays in asserting a claim if the delay occurs within six years. This holding appears to provide plaintiffs with an incentive to wait to file their patent suits until damages are higher. The decision favors patent holders, but benefits both

Copyright law dictates that copyright protection is for works of art, but not industrial design. However, this line has proved to be a challenge to draw, especially when industrial design incorporates artistic elements. The Supreme Court granted certiorari in Star Athletica to resolve widespread disagreement over the proper test for implementing section 101’s separate-identification and independent-existence requirements.

Respondent Varsity Brands, Inc., designs, makes, and sells cheerleading uniforms. Varsity Brands has obtained more than 200 U.S. Copyright registrations for 2D designs that appear on the surface of the uniforms. These designs are primarily arrangements of elements that include chevrons, lines, curves, shapes, or stripes. Petitioner Star Athletica, LLC, also markets and sells cheerleading uniforms. Varsity Brands sued Star Athletica for copyright infringement, alleging that Star Athletica had violated the copyright of five designs.

The District Court entered summary judgment for Star Athletica on the grounds that the designs were not protectable, but rather served a useful, utilitarian function. On appeal, the Court of Appeals for the Sixth Circuit reversed, reasoning that the graphic designs were separately identifiable and were capable of existing independently because they could be incorporated into other garments or used outside of garments as art.

The Supreme Court addressed the issue solely as a matter of statutory interpretation and gave the statute broad protection to industrial design. The Court reasons that the Copyright Act “makes clear that copyright protection extends to pictorial, graphic, and sculptural works regardless of whether they were created as free-standing art or as features of useful articles.” This led the Court to the ultimate question: whether these particular designs would have been eligible for copyright protection had they been originally fixed in some tangible medium before being applied to a useful article. The Court applied this test and found that the designs were protectable. The level of expression necessary for copyright protection is quite low, unlike other intellectual property fields, such as patents. Now that the Supreme Court has said that any design can be protected by copyright if it would be protectable if first placed in a tangible medium, it has effectively determined that the vast majority of graphic designs will be able to get copyright protection.

Although the Court’s ruling may seem to create a simple rule, the impacts are yet to be seen. Industries like the fashion industry will have to wait and see exactly how much protection this ruling will give designers. It is certainly not a blanket statement that will protect designers from knockoffs and copying, but it opens the door for designers to make their case that their designs, or at least certain parts of their designs, can be protected by the Copyright Act. Even without further litigation, it seems likely that this ruling will discourage designers from copying, an issue that courts have been facing in suits between high fashion and fast fashion retailers.

GS Media v. Sanoma

Dutch website GeenStijl published an article related to a Dutch television star. The article included hyperlinks to leaked photographs from a Playboy photo-shoot that were located on a third-party website. Sanoma, the company that publishes Playboy, requested that GS Media remove the hyperlink from the article. GS Media did not respond to the request. Subsequently, GeenStijl published another article that linked to the photos on a different third-party site. Sanoma filed suit against GS Media alleging copyright infringement.

Under Article 3(1) of the Copyright Directive, authors have the exclusive right to authorize or prohibit any communication to the public of their work. Therefore, if the posting of a hyperlink
constitutes a communication to the public, then it will constitute copyright infringement. The Supreme Court of the Netherlands requested clarification from the Court of Justice of the European Union ("CJEU"). The CJEU held that in order to determine whether the posting of a hyperlink is communication to the public, the court needs to determine whether the poster of the link knew, or should have known, that the linked works were posted without the consent of the copyright holder. CJEU also held that “ordinary” internet users should not be expected to examine the linked content for infringement. However, if the user is posting the link for profit, that user is expected to examine the link for infringement. If the user does not examine the link and the link directs viewers to infringement, the user may be liable for copyright infringement.

This case is in contrast to the Court’s previous decision in Svensson. The Court distinguished the two cases, noting that in Svensson the copyrighted content was available on the third-party website with the copyright holder’s consent. In this case, the copyright holder had not authorized his copyrighted photos to be posted on the third-party website. This holding will have little to no impact on consumers and “ordinary” internet users, as they have no burden to examine links for infringement. Commercial users, namely those posting for profit, will now need to evaluate whether the site being linked to has copyright protected content and whether that content is posted with the permission of the copyright holder. The holding seems to favor copyright holders and gives them another way to protect copyrighted works by taking action against those who hyperlink to the infringing sites. It is unclear how much this ruling will affect US based businesses, but with many sites operating internationally, it is likely US businesses will need to increase scrutiny of hyperlinks to avoid a potential lawsuit.

Fox Television Stations, Inc. v. Aereokiller LLC: 851 F.3d 1002, 9th Cir. (Cal.), Mar. 21, 2017

Broadcast television networks including NBC Universal, CBS Broadcasting, Telemundo Network Group, and Fox Broadcasting, sued FilmOn X, LLC, an internet service that uses antennas to capture broadcast television signals and streams the content over the Internet to paying subscribers. Much of the content is copyrighted, and FilmOn is transmitting without the consent of the copyright holder. In response to the copyright infringement suit, FilmOn claims that it is a cable system.

Under § 111 of the Copyright Act, a “cable system” is eligible for a compulsory license that allows it to retransmit “a performance or display of a work” that had originally been broadcast by someone else—even if such material is copyrighted—without having to secure the consent of the copyright holder. The main question is whether FilmOn qualifies as a “cable system” under the definition in the Copyright Act.

The District Court agreed with FilmOn that it qualifies as a cable system and was therefore potentially entitled to a compulsory license. The District Court based that conclusion on what it interpreted as the plain meaning of § 111 combined with a previous Supreme Court decision, American Broadcasting Cos. v. Aereo Inc. In ABC v Aereo, the Court analogized internet-based retransmission services to cable companies to decide that internet retransmissions count as “performances” under the Copyright Act’s Transmit Clause.

On appeal to the Ninth Circuit, Fox and other broadcast television networks argued that FilmOn does not qualify as a “cable system” because it does not have ownership or control of the Internet channels through which it retransmits the broadcast signals and control is required under the Copyright Act. In response, FilmOn argued that the Copyright Act should be read to make compulsory licenses available to any facility that retransmits broadcast signals, no matter what technology is used to do so. Before
making a decision, the Ninth Circuit looked to the Copyright Office’s interpretation, finding that the office has taken the position that internet-based retransmission services like FilmOn, are not classified as “cable systems” under the Copyright Act. Based on this information, the Ninth Circuit reversed the District Court and held that FilmOn is not a cable system and therefore is ineligible for the compulsory license under § 111.

As technology advances, it is likely that courts will continue to face these interpretation-style questions. The decision to not extend the definition of “cable system” favors copyright holders, namely the networks, and may affect how other Internet-based streaming services operate in the future.

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7 Complaint, John Marshall Branion III v. Carmen Wallace et al., 2:16-CV-07992-SVW-JC (CD Cal., October 27, 2016)/

8 Id.

9 Id. at 9.


13 Id.

14 Id.


16 See Matthew Lynley, Five Burning Questions That Snap’s IPO is About to Answer, TECHCRUNCH (Mar. 1, 2017), https://techcrunch.com/2017/03/01/five-burning-questions-that-snaps-ipo-is-about-to-answer/.


24 See Lori Phillips, “Build Bridges Over These Walls”: How Trump’s Travel Ban Impacts Touring Musicians, CONSEQUENCE OF SOUND (Feb. 2, 2017, 1:00 PM), https://consequenceofsound.net/2017/02/build-bridges-over-these-walls-how-trumps-travel-ban-impacts-touring-musicians/.

25 8 C.F.R. § 214.2(o)((1)(i).


29 Biometric data in this case usually consists of fingerprints and photographs that are another portion of the application required to be done in person at a US consulate.

30 On April 4, 2006, world-renowned cellist, Yo-Yo Ma testified before the House Committee on Government Reform. He gave an account of two Iranian musicians who were traveling to the US as part of his Silk Road Project. Although they had traveled to the US ten times in a span of six years, they were still required to appear in-person at the US Consulate in Dubai, United Arab Emirates, for interviews and biometric data gathering, and a second time to pick up their...
visas. The whole ordeal cost them over $5,000 in travel expenses alone. See Fang, supra n. 28, at 216.

31 Fang, supra n. 28, at 218.

32 Id.


37 Phillips, supra n. 24.


A Law Student’s Perspective: For the Love of the Game: Looking at the Differences in the NHL and MLB Collective Bargaining Agreements

By Karim Popatia

The two teams sit on their respective benches before the start of game seven. The regular season has been grueling for both teams and the intensity within games have been significantly higher in playoffs thus far. The two teams left standing are hurt, drained, and hungrier than ever for a championship. As the game progresses, the battle rages. The game’s momentum swings in one team’s favor and then another team’s favor in turns. With the score still close in the game’s closing moments, viewers see players digging deeper than even the players ever knew to be possible—hits are that much harder, defense is that much tighter, offensive efforts are that much more aggressive. Suddenly the game ends and the season is over. A champion has emerged. History is written. One team celebrates while the other allows the lost effort to sink in, players vowing to never let themselves feel this losing feeling again. While the city revels in the glory of its team winning a championship and the players get some well-deserved rest before the start the next season, the front office gets to work almost immediately. The free agency period will begin soon and the front office needs to evaluate its options and pending free agents. Which players will stay with the team? Which players can be replaced? How does the Collective Bargaining Agreement factor into such decisions? These are just some of the questions a professional sports team’s front office has to grapple with
on a regular basis within the span of a few months before the next season begins. While the Collective Bargaining Agreement governing a given sport is something that is not common knowledge for many fans, it is one of the single most important documents for a front office and what governs many of their decisions. This paper will take a look at the Collective Bargaining Agreements for two sports, hockey and baseball, and look at changes in these documents over the past few years.

Despite their differences, the sports of hockey and baseball are similar in how the respective businesses are set up to run. The sports industry, both leagues, and individual teams in both sports are twice subject to seasonality demands: once when the sport is not being played versus when it is and again during some more exciting phases of the season versus less exciting times of the season. Both businesses must constantly fight these seasonality demands.

Teams in both sports are subject to external and internal salary caps, which is to say that owners of some teams refuse to pay more than a certain amount of money to sign athletes to play for them. This was famously characterized by the movie *Moneyball*, where the audience can see a baseball team’s General Manager (“GM”) make deft roster decisions in an attempt to maximize the team’s chances to make the playoffs and win the World Series despite the team’s owner not being willing or able to match the financial backing other teams take for granted.

This paper will discuss one more similarity between the sports of hockey and baseball—both the Major League Baseball (“MLB”) and the National Hockey League (“NHL”) are also subject to a Collective Bargaining Agreement (“CBA”) that was negotiated between the Player’s Association (“PA”) and the sport’s respective league office. Both leagues are bound to the agreed-upon CBA for the duration of the time the CBA covers. Both sports recently negotiated new CBAs for their respective sport. The NHL signed its most recent CBA in 2013 whereas the MLB signed its most recent CBA earlier this year. But while the MLB’s most recent CBA was agreed to by both sides with relative ease and did not result in a lockout or cut into any regular season games, the NHL CBA resulted in a highly publicized lockout, resulting in 40 fewer regular season games at the start of the season. The question then becomes why the NHL experienced this lockout while the new MLB CBA was agreed to within a span of 48 hours. While there may be many reasons as to why the length of time it took to negotiate the CBAs of the two sports are so different, one of the most plausible and likeliest explanations is that the problems each league faced while negotiating their most recent CBA were drastically different. One league sought to find solutions to the problem of growing the sport in a non-native market that may already have been saturated by native sports. The other league sought to adapt to the change in viewer demographics so as to address recent issues that plagued both, the league and the sport, overall.

This paper will first look at the histories and the fundamental workings of the two sports. It will then move on to the business similarities between the sports of baseball and hockey. Having discussed the similarities between the two sports, the paper will then analyze the Collective Bargaining Agreement in baseball and then analyze the Collective Bargaining Agreement in hockey. Having looked at the governing documents for both sports, the subsequent section will discuss the differences between the governing documents and the league’s approaches in discussing the amendments to their own Collective Bargaining Agreements.

**Building It So They Come**

Over time, the games of baseball and hockey evolved into what they are today—sports that are played and enjoyed on professional, amateur, and recreational levels, have international followings, and represent a multibillion dollar industry. However, before analyzing the differences in the CBA negotiations both leagues faced, a reader must first understand the history of the sports themselves.
Baseball first originated centuries ago and eventually made its way to the United States by the late 1790s. By the mid 19th century, the game had established itself as the nation’s pastime. Today, baseball is a summer sport that is played in an open-roof stadium between two teams. Each team has 25 people on a roster that fills nine positions in the field. An average game has nine innings and each team takes turns at accumulating runs while the other team gears its efforts towards run prevention. One team sends one representative at a time to hit the ball so as to score a run or further that effort while nine individuals take the field in an attempt to prevent the other team from scoring runs. After three failed attempts to score runs or move further in that direction, the teams switch roles. A regular season lasts 162 games over a course of six months with an All-Star break, a midseason hiatus on the regular season that features an exhibition game with some of the most popular names and biggest stars in the sport playing the exhibition game. Once the regular season ends, playoffs commence. Ten teams in total from both leagues play each other in a series of games ranging from a play-in game to a best-of-seven in an elimination-style setup until one team is crowned the champion and presented the Commissioner’s Trophy.

To contrast, ice hockey started off as a winter game that originated in a time and place that is still unclear, though many guess that the game was created in Scandinavia. With precursors pre-dating Christianity, hockey is a game that has been played for centuries, originating around 1800. Today, ice hockey is a sport that is often played in a closed arena between two teams. As the name of the sport suggests, it is played on a sheet of ice. Each team has approximately 22 individuals on a roster, but only a maximum of six players are on the ice at any given time. An average game has three periods of twenty minutes each during which both teams play defense and try to score based on which team possesses the puck. The team that possesses the puck tries to attack and score while the team that does not tries to defend and steal the puck. A regular season lasts 82 games over a course of six months and also features an All-Star break featuring an exhibition game played by the game’s most popular stars with additional festivities like the Skills Competition. Once the regular season ends, elimination-style playoffs begin with sixteen teams playing four rounds of best-of-seven hockey until one team is left—that team is awarded the Stanley Cup. While the logistics, rules, and objectives of the games are drastically different, there are many similarities between the two sports and their business operations.

Leagues of Extraordinary Athletes: Business Similarities Between the MLB and the NHL

Teams in both the MLB and NHL are subject to seasonality demands. Both businesses must constantly fight these seasonality demands in different ways. For the past few years, the NHL has been trying to take advantage of its growing popularity while the season continues since this is the only time the league can sell its product—professional hockey. The NHL’s earliest strategy, the Winter Classic, was met with wild success. Accordingly, the NHL decided to expand this phenomenon and created the Heritage Classic and the Stadium Series games. This helped the league attract more fans—growing the fan base to include new fans, increase interest in current, more casual fans, and allow more devoted fans more opportunities to participate in league activities as the sport continues to develop a stronger following in the United States. Note how this may lead to issues between the NHL and the NHLPA over how to divide this emerging and developing market and revenue source. Meanwhile, the MLB has had a little more trouble with maximizing revenue in-season and is considering changing aspects of the game in response to customer demand because there is very little left that they can do to adjust the game to customer taste while still maintaining the identity of the game. However, the MLB has taken some steps to fight the offseason seasonality by setting up instructional leagues in warmer locations like the Arizona Fall League, Caribbean Leagues, and the Australian Baseball League. These leagues allow the MLB to tap into the international fan base, thereby
increasing revenue, and allows baseball fans to watch potential future stars of the game up close without leaving the country via products such as MLB TV.

Teams in both sports are subject to internal and external salary caps. An important distinction here is that the MLB’s external salary cap is not a salary cap, but a pseudo salary cap in the form of a luxury tax threshold. This means that if a team aggregates more money on its players than the luxury tax threshold, the MLB will force the team to pay a luxury tax penalty.

Meanwhile, if a team signs a player to a contract that results in the team surpassing the NHL’s external hard salary cap, the team can lose draft picks, pay a hefty monetary fine, and even negate certain player contracts. Teams in both sports also have owners that refuse to allow their team’s payroll to exceed a certain dollar amount for any reason. These reasons can include owners simply being unable to afford a higher payroll cost, a higher payroll cost negatively impacting the team’s profitability, or because the owner simply refuses to invest more money in the team. While movies like Moneyball romanticize such an underdog story, such situations may represent a unique set of challenges for their respective league and other teams in their league.

### America’s Pastime: Baseball

Before understanding the differences between the CBAs of both sports, the reader must first understand the CBAs of each sport. This is best accomplished by looking at the previous CBA and looking at the changes between the the previous CBA and the current one. The current MLB CBA has fairly straightforward guidelines. For the All-Star Game, players will first be elected by popular poll administered and conducted by the league office, after which the Commissioner’s Office will select 7 players in the National League and 5 players in the American League to participate in the game. The Commissioner’s Office does not have to take the poll results into account. Of these 12 selected players, 8 will be pitchers.

This process helps in adding fairness to the game because the popular vote rewards athletes that are famous and does not necessarily reward athletes for stellar performances through the first half of the regular season. This change is important to note, because while the change itself is not necessarily crucial to the operation of the sport or an individual regular season game, it was a response to a growing customer demands for more offense and more balanced rosters between the National League and the American League. There is currently a growing faction of baseball fans that want to add more offense to the game in response to growing customer demands for more offense by removing the pitcher from the hitting lineup and requiring the National League and the American League to use a Designated Hitter in their hitting lineups.

The MLB is also plagued by a well-publicized problem with Performance Enhancing Drugs (PEDs). Accordingly, the new CBA requires 4,800 random in-season urine tests to be conducted along with 1,550 offseason random urine tests. This is to ensure that all 40-man roster players will be subject to at least one random off-season test.

The MLB CBA also features a competitive balance mechanism that relates to the amateur draft. As of the enactment of the new CBA, if a team gets revenue sharing and signs a player who received the qualifying offer, they forfeit their third-highest draft pick. However, teams that pay into the revenue-sharing pool will lose their second and fifth highest picks and also see the international signing bonus cap decrease by $1 million. The medium-market teams—one that neither receive nor pay revenue-sharing money— forfeit their second-highest pick and see their international signing bonus cap decrease by $500,000. A team that loses a player who declines the qualifying offer before signing for $50 million or more will receive a draft choice between the first and second round while teams that lose players signing for less than $50 million will receive a draft pick after round B of the competitive-balance round, which is after the second round. If a team is over the luxury tax threshold, those teams will still receive a pick...
for losing a top free agent, but it will be after the fourth full round of the amateur draft.\textsuperscript{46}

Another way the MLB CBA adds to the competitive balance in the game is the international bonus pool. Currently, once an MLB player’s contract with a team expires after 6 years of service time, the player is deemed to be a free agent.\textsuperscript{47} However, there are also players who are not yet in the league. These international players are players that play baseball in other countries and other leagues and are not yet drafted by an MLB team. These international players are allowed to file to become international free agents ("IFAs") and sign with an MLB team. In order to entice IFAs to sign with them and not another team, teams can offer a signing bonus to IFAs. Such a signing bonus is referred to as an international signing bonus. IFAs are often very young and frequently need to spend time in the minor league system to develop before playing in the major leagues. Because not capping the amount of money teams could use as international signing bonuses would allow for potential inequity by wealthier teams buying out IFAs, the international signing bonus cap is an interesting way to add competitive balance to the system. However, the new CBA takes it one step further by setting the cap to be a sliding scale instead of a flat cap.\textsuperscript{48} Such a sliding scale for international signing bonuses favors smaller market teams, teams that receive a share from the league’s revenue-sharing plan and are not generally considered to be primarily-preferred locations for free agents. These teams also generally struggle to retain players once players are eligible to file for free agency status. This sliding scale should allow smaller market teams to compete with larger market teams on the IFA front, thereby adding parity to rosters, another response to customer demand.

However, because the difference in the maximum amount of money teams can spend on the signing bonus for international free agents is not that significant, it may still not be enough for these smaller market teams to compete with their wealthier counterparts. This is because larger market teams are more well-known and their players are more popular and influential in the United States and abroad. It is not difficult to imagine a young and impressionable prospect being persuaded by a fellow countryman and former superstar to take $1 million less in a signing bonus so that the kid can play for a particular team and follow in the steps of the hero he looked up to while growing up.

The final aspect that a careful reader will pick up on in the MLB CBA is the idea of the luxury tax threshold. The luxury tax threshold is pseudo salary cap past which teams cannot consistently spend lest they be taxed the overage amount. The luxury threshold cap is now set at $195M.\textsuperscript{49} Going past the threshold for the first time comes with a 20% tax, increases to 30% for a second year and to 50% if the team spends more money than the luxury cap threshold for a third consecutive year.\textsuperscript{50} There is an additional 12% charged to the team when the team exceeds the mark by between $20MM to $40MM, while going past $40MM triggers the maximum penalty— which can reach a 90% tax on overages.\textsuperscript{51} Teams that go $40MM over the luxury tax line will see their top draft pick fall by ten spots, as well.\textsuperscript{52} These heavy penalties should serve to detract teams from spending obscenely large amounts of money in the hopes that they can purchase a World Series championship. The concept of “megateams” that try to assemble what amounts to a fantasy team by signing marquee free agent players year after year in order to win would be significantly dissuaded from awarding eye-popping contracts.\textsuperscript{53} However, the most creative and cutting-edge front offices in the league manage to sign marquee free agents and still not surpass the luxury cap threshold in consecutive years, avoiding the heavy penalties associated with spending large amounts of money.

It is important to remember that this CBA was negotiated in a small window of time, notably 48 hours and caused no lockouts and not a day missed by the teams or players.\textsuperscript{54} No baseball-related revenue was lost. By contrast, the NHL’s CBA was significantly more contentious, causing half of the 2012-2013 season to be forfeited as a result of the lockout which was incidental to the gridlock that parties were in while they were negotiating the NHL CBA. Whether this element
of added contention is because the NHL faced an entirely different set of challenges when negotiating its CBA with the NHLPA is certainly a possibility.

Canada’s Passion: Hockey

The NHL CBA that was agreed to in the beginning of 2013 was significantly more contentious than its more recent MLB counterpart. Teams missed a total of 40 games each as a result of the lockout that was caused by the lack of an agreement. This came on the tail of a thrilling performance in the 2012 Olympics in Vancouver that saw the popularity of ice hockey rise. Star-studded talent from the NHL that was on the brink of retirement and the rising stars of the NHL were on full display during this time while staying within North America, giving the NHL’s customer base prime access to the game’s stars by way of a quasi-exhibition tournament on the world’s biggest stage.

Unlike the MLB, the NHL may have wanted to showcase its superstars, which would lead to the league being content with the All-Star game voting being more of a popularity contest. The NHL CBA focuses significantly more on adding competitive balance to the game across teams. It is important to view the NHL CBA’s changes in this context.

The first main point in the NHL CBA is the revenue sharing plan. Subject to a few conditions, the NHL will take the league-wide Hockey Related Revenue (“HRR”) figure and multiply it by 0.06055 to determine the Redistribution Commitment for that season. Using the 2011-2012 HRR of $3.3 billion as an example would yield $200 million going into the revenue sharing plan.

Under the new setup, there are three funding stages which comprise the revenue sharing pot. First, a maximum of 50% of the Redistribution Commitment is drawn from the Top 10 highest-grossing teams based on pre-season and regular season revenue. Each team’s contribution is based on how much the team earns over and above the 11th-ranked team. Accordingly, the teams that were the 8th, 9th, and 10th highest grossing revenue teams paid significantly less into the revenue sharing pot compared to the three teams that were the highest revenue-grossing teams in the league for the year. The second part of the funding stage is comprised of playoff teams. Those teams participating in the Stanley Cup playoffs regardless of their earning power during the regular season contribute 35% of gate receipts from home playoff games. Because playoffs are a more exciting time in the course of a full season than most regular season games, ticket prices tend to increase significantly during the playoffs. This means that in an ideal world, the NHL’s top revenue-grossing teams would make the playoffs and contribute 35% of the increased gross revenue that is associated with achieving a berth in the Stanley Cup playoffs. These teams tend to be larger-market teams.

The third portion of the Revenue Sharing plan is contingent. If, after the first two phases the Redistribution Commitment has not been raised, the NHL league office can also contribute to the revenue-sharing pool with centrally generated revenues, such as leftover player escrow funds.

Another aspect of the NHL CBA is how the NHL will deal with international free agents signing entry-level contracts. According to the CBA, any forward or defenseman 25 or older with at least three professional seasons who has not played in at least 80 NHL games—or goalie that has not played in at least 28 NHL games—becomes an Unrestricted Free Agent (“UFA”) at the end of his contract. The definition of a professional season is fairly lenient and the bright line standard for it is 11 games for athletes ages 18 and 19 and just a single game played anywhere professionally counts for athletes ages 20 and above.

In the previous CBA, the NHL allowed teams a two-year window in which they could retain the exclusive rights to sign a non-North American player that they had previously drafted. In the most recent CBA, the NHL extended this period to be a four-year window. Currently, when an NHL team drafts a player who has played
professionally for a non-North American team, the NHL team will have the exclusive rights to that player for a period of four years regardless of whether the NHL team extends an offer to the player.\(^{65}\)

While the NHL team would retain the exclusive rights for that player in the NHL, the player may still be able to play for other professional teams in other leagues.\(^{66}\) Often, players who are drafted by NHL teams are not ready to compete at the NHL level.\(^{67}\) Accordingly, it would be sensible for NHL teams to allow their players to play for a different league to help develop the player’s skills. From a business perspective, this is a wise asset development and investment management decision. However, NHL teams often require that the contract a player signs with a non-NHL team in a league such as the KHL, Swiss leagues, Swedish leagues, or other European leagues to include a termination clause, which would trigger immediately once the player and the NHL team agree to a contract.\(^{58}\)

This extended period of time would seem to benefit the European leagues and the NHL teams since the player will be able to stay in the European league for a longer period of time before the NHL team is required to either offer the athlete a contract or lose their exclusive rights to the player. This also allows the European leagues a larger window of time to pitch themselves to the player as a great place to work and play hockey permanently as opposed to a backup option to playing in the NHL. While rare, some players such as Cam Barker and Joel Lundqvist have remained in non-NHL hockey leagues, while other players such as Ilya Kovalchuk and Pavel Datsyuk proactively left the NHL to play in the KHL.\(^{69}\) However, the longer period of time also reduces the chances that a drafted European player actually receives an offer from an NHL team. During the four-year period the player may sustain injuries or prove to be a less attractive asset for NHL teams to further invest in, develop, and sign than previously anticipated. Because of the increased risk that prospective NHL players are forced to internalize and the lack of commitment from the NHL team, many agents are advising young talented Europeans to move to North America before they enter the draft. This is because if a European player moves to the United States or Canada to play junior hockey, NHL teams are required to sign the player to a contract within a two-year window or lose their exclusive right to do so.\(^{70}\)

A third aspect of the NHL CBA and the NHL in general is the salary cap. The salary cap is a hard limit on the maximum amount of money that a team can spend on an individual player and the entirety of their roster.\(^{71}\) This includes the base salary and any performance bonuses that a player may earn.\(^{72}\) While a team can spend more money aggregately on player salaries than the salary cap itself, the total cap hit of the team’s rostered players, which is the sum of the average annual value of each rostered player’s contract, must be below the salary cap.\(^{73}\) This is important because a player’s cap hit is calculated using the average annual value of his salary, allowing a team to front-load or back-load a deal.\(^{74}\) This effectively allowed a team to front-load a deal with the implicit mutual understanding that the player would retire closer to the end of the contract, letting the team recuperate the salary cap space that was previously tied up by the player. The new CBA eliminated this loophole by forcing such teams to forfeit any cap space that they would recover as a benefit of a player retiring with a front-loaded contract that the player signed and would last beyond his age-35 season.\(^{75}\)

**Different CBAs, Different Approaches**

From just looking at the most recent CBAs, we see a stark difference in the approach the two leagues took. Some may suggest that the MLB looked at how the league could generate more interest in the game, bringing in more fans and revenue. In the recent past, the game of baseball was marred by PED investigations and stars confessing to impure production. The game of baseball has also been perceived as “slow” or “boring” by members of the younger generation.\(^{76}\) Accordingly, the league decided to do something about it and focused its changes in the new CBA on increasing random PED testing for players
and increasing the pace of play to make the game go faster by shortening the time between innings and implementing a pitch clock in Minor League Baseball as a test balloon.77

The MLB also noticed that many of the teams in the league were taking advantage of their financial flexibility and ability to spend more money by buying out free agents to the detriment of smaller market, budget-strapped teams. In order to facilitate star players staying with a single team and continuing to foster the relationship they built with their fans and the community earlier in their career, while also continuing to provide star presence to smaller-market teams and serving as an attractive draw for fans, the MLB instituted a structure whereby teams pursuing free agents would have to think twice about signing a marquee free agent from a different team during the offseason.78

The NHL recognized that ice hockey is already a fast-paced game and did not need to do anything to make the pace of play faster. The league also recognized that there was no widespread problem that plagued the league with respect to PEDs—or at least, recognized that there was no such problem that was sufficiently well-publicized so as to paint the perception of the sport as one that cheats.79 Accordingly, the league did not need additional or random testing mechanisms. The NHL did recognize that there was very little parity in the game—teams that could afford the superstar players would build megateams while teams could not would be forced to perpetually build their teams through the draft and develop younger players for the first few years of their career only to watch them sign a lucrative contract with a team that can afford such contracts.

The NHL also recognized that it can attempt to overcome its seasonality issues in non-traditional markets, expanding the customer base for the product: hockey. This may be a rather bold strategy. While a traditional market for hockey may be a city that experiences cold winters and snow such as Seattle and Quebec City, the NHL decided to expand the sport to cities with warmer climates and no snow such as Phoenix and Las Vegas. This is interesting to see, because since the Los Angeles Kings acquired Wayne Gretzky, southern California has noticed a marked uptick in hockey fans and even hockey players reaching the NHL and playing for prominent teams, for instance Gardena, California’s Beau Bennett playing for the Pittsburgh Penguins and winning a Stanley Cup. Given the increasing surge of hockey fans and the advent of outdoor rinks allowing cities and local municipalities to promote ice skating as a fun activity, an NHL team would likely increase the enthusiasm for hockey in such non-traditional markets. While simply having more NHL teams itself does not solve for the seasonality issue the league faces, the presence of an NHL team in such markets would lead the general public to think that hockey is not just a winter game.80 This encourages fans to buy jerseys, memorabilia, fan gear, and other products, as well as staying generally engaged with the sport during the offseason. It also encourages fans to get caught up in the hockey hype and purchase products such as the NHL Center Ice package, the NHL.tv package, and buy premium television channels such as The NHL Network. Products such as these help the NHL in trying to overcome its seasonality issues. Expanding its footprint in non-traditional hockey markets allows the NHL to expand its number of potential customers who will assist the league in overcoming its seasonality problem. It is important to note that while such products are relatively new for the NHL, the MLB had already debuted these types of products and successfully sustained these products for years before their most recent CBA negotiations.

A third difference between the leagues is in the way the two sports address the parity and inequity issue that has been previously discussed in the form of international prospects and free agents. The NHL decided to give incumbent teams more bargaining power by extending the window of control that the incumbent team has with respect to a given player.81 While the MLB currently has a system to address the issue of teams having too much control over a player that is not currently on a team’s roster by way of the Rule 5 Draft, the NHL does not have such a system. In fact, athletes who get drafted can
Currently enroll in college or play in a non-NHL league and wait to sign with any team until after the four-year window expires, effectively making them a free agent and granting them more bargaining power instead of simply signing with the team that drafted them. It is important to note that this is a loophole to a player being forced to play for the team that drafted him and can only be used by players that did not previously play in the NHL.

Because both leagues have been adept at recognizing the problems the leagues face and were able to come to a solution in their most recent CBAs, the question becomes why the MLB CBA took two days to negotiate whereas the NHL CBA cost everyone half a season. One possible reason could be that Donald Fehr negotiated the most recent NHL CBA that resulted in the lockout whereas he did not negotiate the most recent MLB CBA. Fehr’s negotiating style can be very contentious and hard-nosed, which can lead to a contentious and position-centric negotiation. Interestingly, Donald Fehr did negotiate the previous MLB CBA that led to a lockout resulting in the 1994 World Series being cancelled on September 14 of that year due to an ongoing strike by the MLBPA that began on August 12, 1994.

Another reason why there may be a difference between the length it took to negotiate the two CBAs could be that one league’s changes to the CBA were focused on drawing fans to the game and increasing interest in the game whereas the other was responding to customer demands. The idea is that the additional fans will lead to additional revenue for the league and the individual teams. Because the changes were geared towards increasing the quality of the product by addressing complaints that customers had about the product, the league and the Player’s Association would presumably be more inclined to oblige and agree to these changes more quickly and not fight as much about these changes. Because more fans lead to more tickets sold, more jerseys sold, more interest in the game, and more revenue for the league, it is in the league’s interest to continue agree to not fighting the MLBPA on every single issue and ensure that there are no work stoppages. From the PA’s perspective, more money to the teams and owners and current spending patterns for baseball athletes could lead to higher average salaries overall and labor peace, allowing the players to do what they love—play the game of baseball. Therefore, it is also in the PA’s interest to adapt in a way that addresses customer criticism and helps sell the product. While the old adage “a rising tide raises all boats” may hold true for the MLB negotiation, dividing the pie between the Player’s Association and the league and its constituent teams is a matter that is a bit more contentious. While both parties may want a larger share of the Hockey Related Revenue and a higher salary cap leading to larger salaries for the players, it may lead to a lengthier discussion as to how exactly the parties should divide this pool of revenue. Because this discussion could logically last longer, it is more understandable if an extended discussion on such issues could result in a lockout.

Conclusion

The games we love to play and see have developed into being something that are more than just games. This is a truth that very few people realize. While the game itself is still just a game, there is a business aspect to the sport, as well. This business aspect includes how to refine the product, bringing in more customers and revenue, and how to share the revenues between the league, its constituent teams, and the players those constituent teams employ.

The leagues negotiate their own CBAs between themselves and the PAs of their respective leagues. Accordingly, because some issues are more important than others to parties in a given negotiation, and because the parties in both negotiations were negotiating entirely different issues, it is reasonable that one negotiation took longer than the other. While the MLB league office and the MLBPA may have been satisfied with the current revenue split and all other monetary issues, the NHL league office and the NHLPA were decidedly not in agreement over such issues. On the other hand, while the MLB and the MLBPA were negotiating matters related
to pace of play and PED testing, the NHL had no such issues to begin with and therefore did not need any changes regarding these points. There is also a slight possibility that the negotiators and their personalities played a role in the length of the negotiation itself, as well. However, it is unlikely that this factor played a major role in determining how long the negotiation lasted.

At the end of the day, it may be a fair to make the assumption that the league, the Player’s Association of the league, and the fans of the sport were happy that the sport continued or resumed its core operation and that games would continue to be played. After all, the league regulates, fans pay to view, and players play the sports we love—all for the love of the game.

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1 These phases within the regular season often coincide with the beginning of the season, around All Star break, the trade deadline, and near the end of the season. The playoffs in both sports are seen as an exciting time as a whole with national coverage given to each playoff matchup in every round.


3 COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, Art. 50.5, 257 (2012); 2012-2016 BASIC AGREEMENT, Art. XXIII(B), 98 (2012).

4 An internal salary cap is when the owner of the group refuses to pay more than a certain amount for athletes on the team’s payroll. This hamstring the team’s General Manager in the types of moves he can make and the number of transactions he can make in order to better the team.

5 See e.g., MONEYBALL (2011).


7 Id.


13 See generally OFFICIAL BASEBALL RULES 2016 EDITION.

14 See generally OFFICIAL BASEBALL RULES 2016 EDITION

15 Id.

16 2012-2016 BASIC AGREEMENT, Art. XV(O), 70 (2012).


18 Gidén, Carl; Houda, Patrick; Martel, Jean-Patrice, ON THE ORIGIN OF HOCKEY (2014).


21 Id.


24 See supra, at 1.

25 The Winter Classic is a hockey game between two marquee teams in an outdoor setting, usually on January 1. The NHL also streams a live view of the outdoor rink as it is being built and maintained. An Alumni Game also typically accompanies the Winter Classic where famous former players from each team dress in uniform and play each other in a game of hockey. This event is less popular, but is an attempt to connect the older generation and younger generations of hockey fans.

26 The Heritage Classic is an outdoor hockey game played between two of the six Canadian teams and serves as a counterpart to the Winter Classic that has only twice featured teams from Canada.

27 The Stadium Series is the NHL’s response to high demand for outdoor hockey games by the fans. There are often multiple games that are part of the Stadium Series in a given season and often feature teams that have a rivalry between them.


29 Changes currently being discussed include, but are not limited to, putting a time limit on a pitcher between each pitch, a time limit between innings, and a runner on second base to start the inning in every inning after the ninth.


31 Instructional leagues are similar to training academies in soccer. Professional teams send athletes that need more seasoning and experience to such leagues to continue developing.

32 See e.g., MLB.MLB.com/dr/


34 2012-2016 BASIC AGREEMENT, Article 23, 97 (2012).


36 These owners include John Fisher of the Oakland Athletics in the MLB, the team that was the basis of the historic movie, Moneyball, and Henry Samueli of the Anaheim Ducks.

While there is no minimum threshold requirement for a contract to be considered an “eye-popping contract”, these are the contracts that are often seen on the headlines of ESPN and other news and media outlets. The contract term lasts five years or beyond and the dollar value of the contract exceeds a large multiple of the term length. A subjective descriptor, contracts such as that of CC Sabathia (9 years, $202MM signed in 2009) certainly fit this description. Aroldis Chapman signed a 5-year contract worth $86MM last December, which also may fit this subjective description according to some. Ultimately, because of the lengthy term and high dollar value, these contracts carry with them a disproportionately higher risk than other contracts to which teams may sign a player.
While there is no set rule as to whether a hockey prospect requires experience and seasoning in the American Hockey League, very few prospects go straight to the NHL and produce at a rate at which the coaches are satisfied. This is because the game at the NHL level is generally seen as faster, tougher, and harder at the NHL level than any other league due to the skill level of NHL players. See also, AHL IS ONE STEP AWAY FROM NHL, Gary Blockus, The Morning Call, Apr. 15, 2017, found at http://www.mcall.com/sports/hockey/phantoms/mc-phantoms-minor-league-explanation-10172014-20140927-story.html.

See e.g., AS N.H.L. LOCKOUT BEGINS, SO DOES A LIKELY EXODUS OF PLAYERS TO EUROPE, Jeff Klein, New York Times, Sept. 16, 2012, found at http://www.nytimes.com/2012/09/17/sports/hockey/nhl-lockout-comes-as-some-players-go-to-skate-in-european-leagues.html; see also SIGNING PROSPECTS & THE 50 CONTRACT LIMIT, Earl McKinley, May 4, 2014, found at http://www.milehighhockey.com/2014/5/4/5680318/signing-prospects-the-50-contract-limit. While there is no rule that requires players to only sign contracts with such an opt-out clause, in contexts that are not lockouts, it is a universally accepted norm in the sport that the NHL team that owns the rights to the player will be able to recall a player either at will or once the season of the team that the player signs with is complete if the NHL team so chooses.


ARE NHL PLAYERS USING PEDS?
JONATHAN TOEWS SAYS NAIVE TO SAY NO,

While some may point to the Phoenix Coyotes and their lengthy bankruptcy saga as a counterexample, it is important to remember that there are more factors at play in this instance than to simply call the team a failed experiment. These additional factors include the owner’s personal financial situation, costs incurred in association with moving from Winnipeg to Arizona, political tensions between the team and the city, and finding funding for the stadium. See HAMILTON COYOTES? PHOENIX FILES FOR BANKRUPTCY ... JIM BALSILLIE READY TO ‘MAKE IT SEVEN’, George Richards, Sports Writer, On the Pond, Miami Herald, May 5, 2009, found at http://miamiherald.typepad.com/flapanthers/2009/05/hamilton-coyotes-phoenix-files-for-bankruptcy.html. It is also important to remember that this is simply one example of hockey failing in a warmer climate. Successful teams include the Stanley Cup winning Los Angeles Kings, Anaheim Ducks, Tampa Bay Lightning, Dallas Stars, and the Florida Panthers.

COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, Art. 8.6, 17 (2012).

While some may point to greedy owners as a reason for this inability to agree, it can also be because of the negotiating tactics of the NHL and NHLPA, an unprecedented level of revenue being recognized by the league, and unprecedented player contracts that the league saw in the years leading up to the most recent lockout.

I. INTRODUCTION

It has been four decades since the United States Supreme Court issued its only decision involving right of publicity claims: the Zacchini decision. Since this case, which was by all accounts an unusual one, the popularity of this right as well as the morass between right of publicity and free speech has significantly increased in the United States. Europe, on the other hand, is no stranger to this hot topic. “Image rights,” the preferred term in Europe, is of constant interest, especially in relation to the recent tax fraud allegations against the soccer player Lionel Messi and other world-famous athletes.

The right of publicity has attracted the interest of many scholars and practitioners around the world. Some argue in favor of increased uniformity, stressing the need for a federal law pertaining to the right of publicity in the United States, or protection to one’s persona for the entire European Union. Others argue the scope of the right of publicity is too broad and ambiguous, and emphasize that overprotecting one’s persona invites disaster. Regardless of one’s position regarding right of publicity, the sports industry deserves a specific focus due to its beyond-borders nature and large commercial market welcoming million-dollar sponsorships and endorsement deals for athletes. This Article surveys the legal landscape regarding right of publicity by focusing on the similarities in the United States and Europe. Further, it highlights major issues specific to sports industry. It concludes with suggesting a general consensus and set of rules applicable worldwide that would help eliminate the issues stemming from the disjointed applications by different states and countries.
II. WHAT IS RIGHT OF PUBLICITY?

Generally, the right of publicity protects any recognizable aspects of one’s persona, such as one’s name, photo or likeness, and prevents the unauthorized commercial use thereof. It has developed with and in response to developments in advertising and commercial markets created by the association of celebrity image and product, although the right of publicity is available to anyone—famous or not.

The right of publicity is not defined or mentioned in the United States Constitution or federal laws. Instead, it is rooted in state laws. Today, it is recognized in some form by almost all state courts and the statutes of a significant number of states. The European Union also lacks a unified regulation. Nevertheless, most of the countries in Europe recognize “image rights” of some type, usually as a part of personality rights.

Then and Now

The contemporary right of publicity has two underlying bases: privacy and economic exploitation. The right of privacy constitutes the primitive foundation of the right of publicity. In the United States, the privacy aspect of the right of publicity was rooted in the famous 1890 article “the Right of Privacy”. The authors, Warren and Brandeis, analyzed a number of cases related to the right of privacy and highlighted the necessity for the development of law to protect persons from public intrusion of their privacy. Although the authors did not refer to this right as one of publicity, their article is credited with being the birthplace for the doctrine and this laid the groundwork for both the recognition of privacy law and the initial ideas embedded in publicity rights. Eventually, with developments in advertising and commercial market, celebrity image started to be associated with products. Such an association reflects an economic exploitation aspect of the right of publicity, which differentiates it from the right of privacy. Thus, the right of publicity has developed as a separate, property-like right as compared to the right of privacy, yet the right of privacy has also remained as one of the rationales of the right of publicity.

Europe has experienced a similar path in development of the right of publicity. Classical Roman law, for example, recognized personality as one’s name and reputation, and their manifestations in intangible values such as honor and chastity. These traits, however, were deemed without pecuniary value. This view of personality has had a strong influence in the civil law tradition, and continued in the pre-modern world lacking communications technology necessary to commoditize and commercialize one’s image. With post-industrial modernity introducing the means of reproduction and dissemination, one’s image has become a significantly more valuable asset. Civil law seems to have tangled the legal issues accompanying these developments, much as the United States tangled issues of privacy and economic exploitation in the early stages of the right of publicity.

In parallel with, even perhaps influenced by, the 1890 article by Warren and Brandeis, French scholar E.H. Perrau’s 1909 article and the Swiss Civil Code of 1910 are among the earliest discussions of personality rights, collectively including privacy, image, voice, name and reputation. Today, some European countries conceive of image rights as a type of personality right, whereas others put more emphasis on the economic aspect to such right, similar to the contemporary right of publicity in the United States.

Having one of the largest sports-related economies, Spain, for example, regulates the rights to one’s own image and to honor similar to the scope of the common law right of publicity in the United States. Spanish law broadly prohibits taking, reproducing or publishing by photography, film, or any other process, one’s image captured in places or moments of his private life or outside of those settings. It also prohibits the use of the name, voice, or picture of a person for purposes of advertising, business, or of a similar nature. The exception is where there is predominant and relevant historical, scientific, or cultural interest. Despite such a broad protection, Spanish law considers the rights to one’s own image and
to honor as personality rights, and excludes protection of the economic aspect of the right. The commercial aspect of one’s image could be protected under contracts, trademark law or unfair competition law. Spain also recognizes a post-mortem image rights for up to 80 years after one’s death.  

The United Kingdom, on the other hand, does not have an established right of publicity, which is striking considering that the United Kingdom has the second largest sport-related gross value added to economy, and similarly large employment numbers.  

English courts have nonetheless found solutions for celebrities to protect their persona and image—in copyright law, trademark law or the tort of passing off (for which one must establish that the alleged infringer’s unauthorized use of his image creates a likelihood of confusion as to the source of the goods or services, and damages his established goodwill or reputation).  

Although European countries and the United States have varying treatments of right of publicity, they also have many similarities in the key points of this right, and the interest protected thereby.

Scope of “Image”

As the right of publicity protects a proprietary interest in one’s marketable image, it matters to demarcate the scope of “image.” In the United States, the Restatement (Third) of Unfair Competition describes it as “the person’s name, likeness, or other indicia of identity.”  

In parallel with this definition, many courts and commentators both in the United States and in Europe support a broad concept of image, by suggesting the test for violation of one’s right of publicity should be whether he is identifiable from the total context of the use. Such indicia that identify a particular individual might be anything that evokes identity such as look-alikes, sound-alikes, a nickname, a phrase associated with a celebrity, or even a robot dressed like the celebrity.  

Scope of “Commercial Use” and Limitations to Right of Publicity

The right of publicity generally protects a proprietary interest in one’s marketable image from unauthorized use for commercial purposes. It is, however, not easy to clearly mark the scope of what is “commercial.” Instead, it is less challenging to point out what is not commercial—for instance, one’s image used in news reporting, commentary, entertainment, works of fiction or nonfiction.

The line between what constitutes commercial use and what does not also sheds light on the limitation to the right of publicity. Although there is no federally granted right of publicity, the limitation to this right is drawn from the First Amendment United States Constitution, as well as federal trademark and copyright laws.
Further, because there is no clear standard for analyzing right of publicity claims brought under state-specific statutory or common law, courts in the United States have developed various tests to evaluate whether defendant’s particular use constitutes infringement of claimant’s right of publicity. Amongst various tests are the newsworthiness/public interest test, the four-factor test of copyright law and the transformative use test. Europe takes a similar approach and considers freedom of speech and freedom of press as main limitations to image rights.

Nevertheless, both American and European courts have yet to reach a consensus and provide a clear and general rule for drawing the metes and bounds of right of publicity. The reason why there is no judicial consensus on one convenient legal format, but many balancing tests, is perhaps that the principles or values protected by the right of publicity are vague, therefore it is not easy to contour the scope.

First Amendment

First Amendment appears to be the major limitation to this right in the United States. The Supreme Court of the United States has held that the First Amendment protection, providing for freedom of speech and freedom of press, applies with equal force to the states through the Fourteenth Amendment addressing citizenship rights and equal protection of the laws.

The morass between freedom of speech and right of publicity has been an ever-lasting discussion for the past four decades. The Zacchini case of 1977 is the first and only one to date the Supreme Court of the United States has heard regarding right of publicity and its limitations. The Zacchini case seemed to create more confusion than it resolved regarding the tension between the First Amendment and right of publicity, as it did not provide guidance to creators of expressive works on what uses of names, likenesses, and other indicia of identity are permissible in their works. Although other courts have consistently held that the right of publicity must be balanced against the First Amendment rights, the clash between the First Amendment and right of publicity does not seem to end until the Supreme Court of the United States takes up the issue.

The newsworthiness/public interest doctrine

The newsworthiness/public interest approach appears as another traditional standard of review. It reflects the idea that the right of publicity is “fundamentally constrained by public and constitutional interest in freedom of expression” and analyzes the context of the usage of the image. An example of the newsworthiness/public interest exception is found in California Civil Code stating “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required.”

Courts interpreting this exception cast a wide net when determining the newsworthiness, holding, for example, that entertainment itself can be important news. With this, one might think that all sporting events can be considered as important news, or a matter of public interest. One must balance, however, the individual’s interest against unauthorized commercial use of his image and the public’s interest in such use or the newsworthiness thereof. Courts have not deemed void the “commercial use” component of right of publicity. The Ninth Circuit, for example, stated “the defense is not absolute; we must find a proper accommodation between the competing concerns of freedom of speech and the right of publicity.”

Europe seems to have a similar limitation to image rights. In European countries, the public’s right to information has been included either in constitutions, or recognized by other legal provisions or by case law. In Germany, for example, the use of the attributes of a person without his consent can be justified by the freedom of speech or the freedom of artistic expression. Although this general limitation is very vague and broad, and reminiscent of the uncertainty in the United States regarding
the First Amendment against right of publicity, specific provisions of the German copyright law draw a clear border. Nevertheless, as in many courts in Europe, German courts also uphold the public’s right to information over the commercial interests of the person depicted, without addressing the freedom of speech limitation.

**Transformative Use Test**

Another test courts widely use is the transformative use test, derived from the fair use doctrine in copyright law. In copyright law, fair use is determined by evaluating four factors: (i) the purpose and character of use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion taken, and (iv) the effect of the use upon the potential market. Transformative use test derives from the first factor, and focuses on the degree of transformation of the work, whether in its creative component itself or in how the work is presented or used.

The transformative use test is used especially in recent disputes involving the use of athletes’ images in video games. In the *Hart* case, for example, brought according to New Jersey law, involving the use of student-athletes’ images in video games, the Third Circuit considered all the tests since *Zacchini* (balancing the right of publicity and the First Amendment rights) and adopted the copyright-based transformative use test as being “the most appropriate balancing test to be applied.” Here, Third Circuit quoted the frequently cited *Comedy III* case, where California Supreme Court had evaluated “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation” instead of drawing a dispositive distinction between commercial merchandise and expressive works.

The approach of balancing the interests served by the right of publicity against free expression (and the test itself) widely raises concerns. Looking for “significant transformative or creative contribution” requires courts to make ill-considered aesthetic judgments about artistic value, aesthetic merit, purpose, creativity, and degree of transformation. It is also questionable whether judges and juries should be invested with such responsibility. Further, it is doubtful whether objective and neutral constitutional protection can be turned to such subjective direction. Such judgments seem only acceptable when the Congress has expressly directed courts to make them, as in Copyright Act and the four-factor test. Otherwise, it would create a murky process and body of right of publicity law.

**A Recent Development: Guernsey**

In 2012, Guernsey, one of the British Crown dependencies in the English Channel, offered a universal protection, through registration, to the image associated with a personality, on condition that the image is distinctive and have actual or potential value. According to the relevant Ordinance, protection continues forever, as long as the personality and associated images are registered and renewed every 10 years for the personality and every 3 years for the image. The scope of personality that the image is associated with is also very broad as to include all individuals, deceased or alive, and also existing or ceased-to-exist legal persons, joint personalities where more than one natural or legal persons are intrinsically and publicly linked, such as twins, groups where more than one natural or legal persons who are linked for a common purpose and together form a collective group or team, such as the Manchester United football club, and fictional characters, such as Tsubasa, the football player cartoon character.

Guernsey seems to adopt a similar scope of “image” as the contemporary interpretation by the United States and some European courts, inclusive of photos, illustrations, names, nicknames, voice, signature, likeness, personal attributes and distinctive characteristics such as logo, jersey number, or any indicia associated with the personality. Ownership of this right is also parallel to the United States and Europe. The rights owner may be the person himself, the image rights company, the estate of a deceased
star, or any other person or entity that has lawfully acquired the rights.

The registered personality’s image rights are a form of property that can be exploited, licensed, assigned or used as security. Infringement is when an image identical or similar to a protected image is used for a commercial purpose or a financial or economic benefit without the proprietor’s consent. The use must create a likelihood of confusion or association with the registered personality, or must take unfair advantage of, or be detrimental to the repute or economic value of the personality, without due cause. In this respect, the Guernsey legislature seems to borrow from trademark law as a model for image right legislation.

The limitations are also very broad as to include the use of the personality in crowd shots where the personality is not singled out; in news reporting, commentary and satire; for education; in comparative advertising; and for the purposes of the arts. The use of an image is also allowed when it is merely descriptive and used fairly and in good faith only to identify or describe something other than the personality. This is reminiscent of the fair use exception in United States trademark law allowing the use of a descriptive mark to describe some other thing than the trademarked goods or service.

An illustrative hypothetical of permitted descriptive use might be an advertisement of a hotel in Manchester with the motto “Home to Manchester United Football Club” along with other features of the city of Manchester. However, if such an advertisement prominently used pictures of the team and players of the Manchester United Football Club, it would not be considered fair use of the image of the club and players. Assuming that Manchester United Football Club and the players have their images registered in Guernsey, the use of their images in the latter example would not seem merely to describe the advertised hotel, but rather to seek unfair benefit from the potential or actual value of the football club’s and the players’ images. The Guernsey approach to image rights is still very young and it is unclear in various aspects, including the interpretation of exceptions and the extent of damages likely to be awarded in case of infringement. Further, the enforceability of any Guernsey decision outside the island is questionable. Nevertheless, the registered image rights regime seems to provide greater certainty especially when licensing or assigning rights, which are highly problematic in the sports industry since it is not always easy to identify the proprietor of the right.

III. PRACTICAL ISSUES SPECIFIC TO THE SPORTS INDUSTRY

Jurisdictional differences in treatment of right of publicity make it a complex matter. There are also practical issues specific to the sports industry that merit attention. One of the major issues involving right of publicity in sports stems from merchandising, endorsement and sponsorship deals with athletes, where athletes are not the sole owners of their image rights. This can be because athletes often are members of professional leagues and players associations, for example, which have their own internal rules. Student-athletics is another major concern in the United States, where students have amateur status under the National Collegiate Athletic Association’s (“NCAA”) Constitution. The amateurism rule requires student-athletes to sign a statement giving permission to the NCAA to profit from their images for an indefinite term and without sharing the revenue, even after they are no longer students. This practice and the amateurism rule have been recently challenged in major lawsuits brought by former and current student-athletes, yet these lawsuits were either settled or the outcome did not bar the NCAA from requiring assignments of rights to the NCAA as a condition for playing collegiate sports.

Right of publicity treatment also differs for team players and for individual athletes. Team players, as sui generis employees of sports clubs, are bound by their sui generis employment contracts providing for a specific use of their images by their clubs. Individual athletes, on the other hand, may be less restricted regarding the ownership of their right of publicity. Nevertheless,
individual athletes, when they are members of national teams, for example, may still be subject to specific rules regarding their international appearances and associations with certain brands or products. This complicated structure involving several parties in addition to athletes themselves gives rise to special issues in sports.

**Role of Players Associations**

Players Associations have been a big part of sports in the United States since 1966, when the Major League Baseball Players Association hired Marvin Miller as its full-time director. Since then, with the help of the players union, the salaries and other working conditions, as well as the value of image rights of the players, have significantly improved. For example, before the union, the trading card company Topps paid each player $5 to sign with them and $125 each year they used his photo on a card, whereas by 1968, with the union acting as the agent for the players, Topps had agreed to pay each player $250 annually, plus 8% of sales up to $4 million, and 10% above $4 million, which resulted in an additional $320,000 per year for the players. Such significant improvement reflects the help of the union’s group-licensing program. Through group licensing programs, unions control all the member players’ image rights and act as the non-exclusive assignee of individual publicity rights for all active players without preventing the players from marketing their images individually.

Another example is FIFPro, which is the leading representative organization for all professional soccer players. Established in 1965 in the Netherlands and recognized by international football federation, FIFA, as the sole representative of soccer players, it now has 58 member soccer players’ associations including Major League Soccer Players Union of the United States, and more than 65,000 soccer players. FIFPro explicitly “respects and protects both the individual and collective image rights of players.” What is striking about FIFPro is that it is subject to Dutch law, whereas FIFA is subject to Swiss law.

In Europe, there are also recent endeavors to form associations representing athletes regardless of the branch of sports. Founded in 2007, European Elite Athletes Association (“EU Athletes”) is a federation of European players associations representing more than 35 national associations and 25,000 individual athletes across Europe and across sport disciplines from rugby and cricket to cycling and basketball. EU Athletes expressly acknowledges the athletes’ right to their images and reputation, data and intellectual property rights resulting from their individual performances on the playing field, as well as athletes’ reservation of the right to protect and exploit these rights. Players associations, having collective bargaining power, represent the collective image rights of their individual members more effectively than every individual athlete would be able to do against clubs, federations, leagues or the Olympic movement. It is no secret that clubs, federations, leagues, and the Olympic movement often pressure athletes, economic or otherwise, to assign their image rights in order to be allowed to compete. In such cases, when athletes find themselves in a position to not be able to negotiate the terms of such assignment, players associations might be helpful with its collective bargaining power. Negotiating with players associations for the image rights of all the athletes would also be time-and-cost-effective for clubs, federations, leagues or the Olympic movement, than communicating with each athlete individually.

While group-licensing programs may make it easier to secure certain rights in relation to the images of a group of players, they can have their downsides. When a player’s association enters into an exclusive and general collective bargaining agreement with a league, such agreement generally also covers non-organized players. However, when the agreement is more specific, such as licensing its members’ image rights to a commercial company, such license agreement does not extend to including non-member players. Therefore video game companies, for example, ought to be prudent
and meticulous when identifying the right owner and negotiate with the true right holder.

Recent years show that athletes in Europe increasingly fight for their own marketing, although players associations in the European sports scene are not as adopted and internalized by athletes. On the contrary, the culture of unionization seems more evident and natural amongst athletes in the United States. Nevertheless, through associations, athletes would gain more negotiation power, and ability to react and negate the pressure by the federations, leagues and the Olympic movement regarding the transfer of their image rights. Therefore educating athletes on the role of unions and encouraging unionization endeavors worldwide, in this respect, might create a more balanced dialogue between all stakeholders and downscale the image right issues.

The Role of Sports Clubs

Although players associations typically control the athletes’ image rights, the teams and leagues also have rights to an athlete’s images as a result of the standard player contracts, which is essentially the professional service contract. Apart from the individual image of the athlete, there is also the collective image right. Collective image rights exploitation involves an entity, such as a club, federation, league, national team or an event organizer pooling together the image rights of a particular set of individuals. In France, for instance, although the right to image has an individual and exclusive character, the clubs and federations use images of their athletes by making such difference between the athlete's individual image and the team’s collective image. The team’s collective image can be described as anything bearing the club’s colors, emblems, logos, badges, strips that players wear which are provided by their clubs, and the players’ appearance within the scope of their employment in the team, most commonly during matches, trainings and club’s media/press days.

By all means, the role of unions, or teams or leagues in controlling or exploiting the image rights of athletes is a question of ownership of the right or a license thereof. In a longstanding dispute in the United States, the Seventh Circuit was asked to answer the question of who owned the rights to the players’ performances during league games—the league or the players’ association.⁴⁰ Although this was primarily a matter of copyright law, the Court found that an individual’s right of publicity “in a particular performance” distinguishable from a right to commercial exploitation of one’s own identity. Therefore, the Court held that the players are at liberty to attempt to negotiate a contractual limitation excluding performances before broadcast audiences from their scope of employment. Further the Court noted that a player’s right of publicity in his name or likeness would prevail if the club commercially exploited the player’s identity without his consent.

One might question what happens if a player does not grant the rights of exploitation of his image to the club. In such cases, the repeated jurisprudence holds in Spain, for example, that, when a worker integrates into a business organization, they can find their fundamental rights modified if the object of the work contract requires it. The object of the work contract basically means the scope of the player’s employment. Therefore, it is understood in such a case that the use of players’ images during the course of matches, for instance, is an inherent part of their labor contract.

It is often held in Italy that football clubs acquire the rights almost automatically through the convention in force on the regulation of advertising and promotional activities, which was executed between the Italian Footballers Association (“AIC”) and professional leagues. It states that footballers who wish to join are obliged to assign to the association, without any temporal limits, “the rights to use their likenesses in the case in which the likeness is displayed, reproduced or sold together with or in concurrence with that of other footballers and, in any case, within the ambit of the commercial exploitation that refers to the entire category.”⁴¹
One problem with such a structure is that not every player is registered with AIC, especially if they come from foreign federations. Further the Convention does not prevent football players from exploiting their images individually. These issues raise doubts about the efficacy of the Convention towards individual players. It is also very striking that, on the basis of this convention, the players would be collectively entitled to a part of all the profits derived from the promotional and advertising activities of the club, as parts of the total team image. This would include broadcasting deals, sales of TV rights and data transmission through Internet and new means of media, which amount millions of Euros, if not billions. Despite the explosive effect of such potential distribution of the club’s income amongst players, by virtue of being members of the club, this issue has never been raised, to date.

**Individual Athletes**

The freedom to manage image rights is limited by agreements between the athlete and the club in an employment contracts for team players, whereas individual athletes seem to have more liberty to decide to whom they wish to grant rights to use their images. In reality, individual athletes are also bound by membership relationships with at least national sports federations, or the Olympic movement.

It is not always clear to athletes what obligations arise from such membership relationships. Conversely, it is not always clear to sports federations how far their rights extend regarding the use of “image rights” of the affiliated athletes. As a result, one of the most frequently faced issues regarding individual athletes is conflicting sponsorships, where the athletes’ individual sponsors and the sponsors of the federations the athletes are affiliated with have conflicting interest over the athletes’ image rights.

When team players are in question, contractual agreements with sports clubs about the use of athletes’ image rights based on negotiations might be required; whereas in the case of an individual athlete, the membership relationship with a federation, association, league, national team or the Olympic movement would be sufficient to reach the same result. An athlete may be held obliged to fulfill a federation’s sponsorship obligations without having entered into contractual agreements. In order to avoid complex issues and conflicting interests, federations should effectively communicate and inform athletes of present and possible future obligations related to exploitation of their images as well as limitations regarding endorsement and sponsorship deals athletes might wish to execute.

**Image Rights Companies**

As the importance of right of publicity has increased, it has also become popular to distinguish the athlete’s athletic performance and image and to have contracts specifically concerning image rights and separate than the standard players contract. Image rights agreements allowed sports clubs to separate the payment to athlete for his athletic performances under his sui generis employment agreements, which is his salary, from payment for the use of his image. With athletes starting to incorporate companies to own and manage their image rights, the payments made by sports clubs to such companies became payments for the services provided in relation to image rights. As such payment was not treated as salary to athlete, it saved income tax for the athlete, and National Insurance, for example in the United Kingdom, for both the athlete and the club.

Such saving for athletes and clubs also means tax loss for governments. The fact that athletes can be mobile between the teams and countries all around the world affects the country to which they would pay taxes. On the other hand, when an athlete’s image rights are owned and managed by the image right company, the company would pay the relevant corporate tax in the jurisdiction it was incorporated. It means tax loss for the country the athlete actually plays and makes money out of, especially when it is different than the registered address of the image rights company.
A further predicament arises when image rights companies are incorporated in tax havens. Spain, for example, has been rigorously looking into the structure of image rights companies that the athletes in Spain are involved in. In an ongoing case brought by prosecutors, a Barcelona court has found Barcelona Football Club’s Argentinian international Lionel Messi guilty of three counts of tax fraud and has a verdict of a prison sentence, due to using tax havens in Belize and Uruguay as well as shell companies in the United Kingdom and Switzerland to avoid paying taxes amounting to 4.1 million Euros on earnings from image rights from 2007 to 2009.\textsuperscript{44}

Such cases shed light on how serious the right of publicity related issues are, especially regarding the value of image. When the athlete transfers image rights to a company, the impact on tax on the value of the image can be significant. The image therefore has to be valued properly. When independent valuation companies, or new technologies,\textsuperscript{45} undertake such responsibility, it would provide greater certainty to the estimated tax to be paid, and therefore athletes and shareholders of image rights companies would less likely face tax fraud allegations.

\textbf{Amateurism}

While tax issues associated with image rights are a major concern in Europe, the United States has been busy dealing with the amateurism rule of the NCAA recently challenged by several class actions brought by student-athletes whose images and likenesses are used in video games. Amateurism has been one of the fundamental principles of collegiate athletics and the NCAA since its founding in 1906. It is defined in the NCAA Constitution:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

For more than a century, the NCAA has upheld the amateurism rule, originally derived from the belief that coaches should pick their athletes from among members of the student body instead of recruiting them by offering financial assistance, and opposed the notion of member colleges providing athletes with financial inducements from any source, including the faculty and financial aid committees.

Although such approach seemed plausible in the early 1900s, it seems ludicrous in today’s sports-related economy amounting to billion dollars during March Madness alone.\textsuperscript{46} It seems unfair by all accounts that the building block of such economy is student-athletes, yet they are not allowed to accept any payment or financial assistance for their contribution.

Amateurism, in the right of publicity context, prohibits student athletes from using their athletic skills for pay, accepting a promise of pay, signing a contract to commit to a professional athletic team or receiving salary or other financial assistance based on athletic skill or participation. In cases of failure to comply with this rule, student athletes are not eligible for participation in an intercollegiate sport. In order to be eligible to participate in a collegiate athletic program, student-athletes sign an agreement\textsuperscript{47} authorizing the NCAA or a third party acting on behalf of the NCAA to use student-athletes’ names or pictures to promote NCAA events, activities or programs. After becoming a student-athlete, the individual shall also not accept any remuneration for or permit the use of his name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or receive remuneration for endorsing a commercial product or service through the individual’s use of such product or service, in order to remain eligible for participation in intercollegiate athletics. Further, in order to retain his eligibility, the student-athlete, or the institution acting on his behalf, is obliged to take steps to stop any activity using his name or picture on commercial items or in any way to promote a commercial product sold
by an individual or agency without the student-athlete’s knowledge or permission.

The legal status of the Student-Athlete Statement is controversial. It is not certain whether such a release is a perpetual exclusive license or even the assignment of rights of publicity of student athletes. Although the compliance with the amateurism rule seems to affect the eligibility to compete in collegiate athletics only, the fact that there is no time limitation in assigning or exclusively licensing the right of publicity appears to prevent student-athletes from profiting from their student-athlete images even after their eligibility has ended. It seems only rational to allow athletes to profit from such business transactions once their eligibility has ended—meaning when they are no longer students competing in collegiate athletics.

The irrelevance of the amateurism rule in today’s economy is so obvious that even the first executive director of the NCAA proposes changing this rule and advocates that student-athletes deserve the same access to the free market as the coaches enjoy. Although this rule was recently challenged in a primarily-antitrust case, the Ninth Circuit’s decision left universities to continue to license and profit from student-athletes’ names and likenesses, and did not bar the NCAA from requiring assignments of rights to the NCAA as a pre-condition for competing in collegiate sports.

In Europe, there is no counterpart to either the amateurism rule or the huge market created by collegiate athletics. Yet, the European countries have been following the discussions in the United States regarding amateurism, because there are in fact Europeans coming to the United States to study and compete in intercollegiate athletics. As international students must also follow NCAA amateurism rules, if they wish to be eligible to compete in intercollegiate athletics, they are also required to provide extensive written proof that they have not received benefits beyond expense reimbursement from club teams. American college sports seem to attract increasing numbers of international student-athletes, some of whom played in professional clubs, or related developmental club programs prior to their admissions to American colleges. In such cases, where the prospective student-athlete received money, compensation or financial aid for his athletic performance, albeit prior to coming to the United States as a student, he would face ineligibility because of violating the amateurism rule. This consequence is appalling to the young European athletes, considering that the European athletic system is mostly organized as professional clubs and related junior developmental teams, which might also be considered professional by the United States athletic culture.

IV. CONCLUSION AND FUTURE IMPLICATIONS

The right of publicity in the United States has evolved from the right of privacy to a dualist structure. European countries generally seem to have experienced a similar evolution but at a much slower pace. Some countries, such as Spain, have a contemporary right of publicity concept more similar to the United States. In fact, the United States and many European countries seem to have similarities one way or another in terms of scope of the subject matter, limitations, ownership, transferability and survival of the right after the death of individual. While the United States has a more categorical approach, European countries are more inclined to case-by-case analysis.

Guernsey, as a recent development, offers a wider protection of image rights. The scope of personality that the image is associated with, and the limitations to the image rights, are broader than both the United States and the European countries. The scope of image and ownership, however, appear to be in line with the contemporary interpretation by the United States and some European courts. Infringement is also reminiscent of the laws of United States and European countries. Duration of the right also seems to be borrowed from the United States trademark law.
Although the enforceability of any Guernsey decision outside the island is questionable, the registered image rights regime seems to provide greater certainty to identify the proprietor of the right especially when licensing or assigning rights. Further, the Guernsey approach may lead the international sports community to adopt a general consensus regarding the treatment of right of publicity in sports. Considering the beyond-borders nature of sports, a set of rules applicable worldwide, as World Anti-Doping Code for example, would help eliminate the issues stemming from the disjointed applications by different states and countries. A similar route might be followed to overcome the issues specific to the sports industry involving players associations, image rights companies, sports clubs, individual athletes and student-athletes. All stakeholders in the international sports community would greatly benefit from global guidelines providing clarity to various applications of right of publicity in sports industry.

About the Author
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1 Samuel D. Warren & William Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) at 195.


3 See, e.g., O’Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (articulating, in dissenting opinion, an early vision of a publicity right distinct from the right of privacy, stating: “The right of privacy is distinct from the right to use one’s name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.”).


7 See Article 18.1 of the Spanish Constitution, guaranteeing the right to honor, to personal and family privacy and to one’s own image, as fundamental rights. See also the Spanish Organic Act 1/1982 of 5 May, providing civil protection for these same rights stated in the Spanish Constitution.

8 Article 4 of the Spanish Organic Act 1/1982 of 5 May.


10 See e.g. [2002] EWHC 539 (Ch), Irvine v. Talksport Ltd (ruling for the plaintiff and awarding damages based on imputing a reasonable endorsement fee for the promotional use, when the famous Formula 1 racer Eddie Irvine sued Talksport Radio after the broadcaster used his photograph holding a mobile phone altered to appear as if he was holding a radio with the words “Talk Radio” on it, claiming that such manipulation of the photo created false
endorsement that affected his goodwill and reputation.)


13 See, e.g., Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (concerning the use of gravel-voiced singer in commercial); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (concerning a Betty Midler sound-alike used in a commercial).


15 See, e.g., Carson v. Here’s Johnny Portable Toilets, Inc., 698 F. 2d 831, 837 (6th Cir. 1983) (concerning the use of phrase “Here’s Johnny”, which was associated with the talk-show host Johnny Carson, by a company marketing “Here’s Johnny Portable Toilets”).

16 See, e.g., Vanna White v. Samsung Elecs. Am., Inc., 971 F. 2d 1395 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993) (concerning an advertisement with a robot dressed like the TV show hostess Vanna White, turning letters on set similar to as that of the “Wheel of Fortune” show).

17 District Court the Landgericht Munchen I, 5 March 2003, docket No. 7 O 16812/02.


19 BGH GRUR 1979, 733 – Fußballtor.

20 Id.


22 JOHN H. MINAN, THE LITTLE BOOK OF GOLF LAW, 162, American Bar Association (2014) (acknowledging that most of the provisions of the Bill of Rights are now enforceable against state or local government action by virtue of the incorporation doctrine, this doctrine states that provisions of the Bill of Rights that are fundamental to the United States’ system of civil liberties, such as the First Amendment, apply to and limit state and local government through the Due Process clause of the Fourteenth Amendment).

23 See Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409 (2001) (holding the common law right of publicity must be balanced against the public interest in dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and the press).

24 Supra note 11 at 47 Comment (c).


26 See Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980) (holding “the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of entertainment and amusement, concerning interesting phases of human activity in general”). See also, e.g. Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 543-46 (1993) (ruling against plaintiff, reasoning its decision that “the point of the program” is the Dora’s contribution to the development of the sport, when Mickey Dora, a famous surfer, brought a right of publicity claim against the defendant, the producer of a surfing documentary, due to unauthorized use of his name, voice and likeness in a video documentary chronicling the beginning of surfing in Malibu.).

27 See, e.g., Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003-03 (9th Cir. 2001) (holding the defendant’s “illustrative use” of the plaintiff’s
photograph in the defendant’s clothing catalogue with surfing theme was not entitled to First Amendment protection since it was more commercial than newsworthy/public interest, despite recognizing the existence of a broad newsworthiness exception and taking the Dora case into account.).

28 Ryan Hart v. Electronic Arts, Inc., 717 F.3d 141, 145 (2013) (concerning former student-athlete Ryan Hart brought a class action alleging the violation of his right of publicity under New Jersey law due to video game company Electronic Arts’ use of his likeness and biographical information in NCAA Football series of videogames. The Court concluded “the creative components of NCAA Football contain sufficient expressive transformation to merit First Amendment protection.).

29 See Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 n.11 (Cal. 2001) (concerning the defendant selling lithographs and t-shirts bearing the likeness of the Three Stooges reproduced from a charcoal drawing he had made without securing the plaintiff’s consent.).

30 See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (holding Hustler’s parody was protected by First Amendment, even if it was low-brow and offensive, by stressing the impossibility of drawing a principled distinction between a parody and other satire).

31 See THE IMAGE RIGHTS (BAILIWICK OF GUERNSEY) ORDINANCE, 2012.


33 Supra note 28. See also, e.g., O’Bannon v. National Collegiate Athletic Association, 7 F.Supp.3d 955 (N.D.Cal. 2014) (concerning former UCLA college basketball star, Ed O’Bannon, filing a class action against the NCAA and video game company Electronic Arts Sports, alleging that the use of his image and likeness in an NCAA licensed video game violated his right of publicity and constituted a conspiracy between the NCAA and Electronic Arts to prevent student-athletes from licensing their names and images in violation of antitrust law.).

34 John Wolohan, United States, IN SPORTS IMAGE RIGHTS IN EUROPE 348 (Ian S. Blackshaw, Robert C.R. Siekmann eds., T.M.C. Asser Press, 2005).


39 A related example is Oliver Kahn, the goalkeeper of Bayern Munich and German national football teams, who sued EA Sports over the use of his image in their FIFA 2002 game. This case, in which the permissibility of marketing athletes in computer games was ruled on for the first time, EA argued that they had a license to use Kahn’s image from FIFPro, which he refuted by stating he had never actually granted those rights to FIFPro. Kahn was a member of Professional Football Players Union (“VdV”), but VdV is not a member of FIFPro. The Hamburg District Court ruled that it was not substantiated that VdV assigned the rights to FIFPro, therefore there was no consent given although the international players’ union, FIFPro, had entered into a license agreement with EA Sports. See Andrew Warshaw, Kahn Fights Computer Battle, February 14, 2003, UEFA, available at http://www.uefa.com/news/newsid=54226.html.
40 *Baltimore Orioles, Inc. et al. v. Major League Baseball Players Association*, 805 F.2d 663. (7th Cir. 1986) (ruling that the telecasts of Major League Baseball games constituted copyrighted “work for hire,” owned exclusively by the clubs; and that federal copyright law preempts the players’ state right of publicity claims and the players have no rights to such broadcasts, despite the fact that Major League Baseball Players Association argued that although the clubs owned the copyright to the telecasted games, the broadcasting of those games without the consent of the players violated their right of publicity in their performances.). Interestingly, the Court noted that a player’s right of publicity in his name or likeness would not be preempted if the club commercially exploited the player’s identity without his consent.


42 This possibility is provided by Section 46, Book 2 of the Dutch Civil Code (CC), based on which, associations and sports federations can also impose obligations on their members (sports persons) vis-à-vis third parties. The related article states “[t]o the extent that the contrary does not follow from the articles, the association may stipulate rights for and on behalf of its members and, in so far as this has been explicitly provided by the articles, enter into obligations for the same and on their behalf. It may take legal action for and on behalf of the members to enforce such stipulated rights, including the right to claim damages.”

43 See, e.g., *Sports Club Plc v Inspector of Taxes [2000] STC (SCD) 443* (holding in favor of international players Denis Bergkamp and David Platt, when they are transferred by Arsenal Football Club, with their existing image rights companies and contracts outside the United Kingdom, thus Arsenal entered into playing contracts with players personally, and image rights contracts with the image rights companies of the players in order to secure the players’ commitment to the club’s commercial projects, therefore United Kingdom tax authorities enquired into the image rights arrangements due to the tax loss caused by such payments falling outside the charge to income tax.).


47 Section IV of Form 12-3a, the Student-Athlete Statement reads “You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”


Match Fixing, Illegal Gambling, and Cricket in the Indian Subcontinent

By Zia Akhtar

Introduction

The gambling industry is now a perennial part of the international sports events. It exists worldwide, and has the status of a de facto entertainment industry in South Asia, where the English game of cricket has traditionally been recognized as the country’s main sport. The reincarnation of cricket, in its T20 format, in India and Pakistan has borrowed from the American model of Major League Baseball, and has sprung the trappings of a gambling industry. This has become a source of inducement and corruption of players through the fixing of matches and spot fixing, which impacts the duration of play. This needs an evaluation of the origins of gambling in cricket, the framework of Indian Premier League, the personnel involved, disciplinary bodies, and court rulings to determine if there is a possible remedy that can eradicate the scams that exist in its shadows.

There has been an incremental growth in gambling in cricket since the dawn of the 21st century. This has cast doubt over the result of matches in which international teams have been involved. The common denominator in this process is the onset of a betting infrastructure that is unlicensed and the vital facts that (i) the gambling syndicates emanate from the Indian subcontinent and are unlicensed, and (ii) they predominate the tournaments where cricket is restricted by a certain number of overs, which primarily concerns T20 Cricket—which has become a global phenomenon in cricket playing nations since it was launched by the England and Wales Cricket Board (ECB) in 2003.

The T20 format differs from the conventional form of cricket, which has the test match played over five days and each team has two innings. There is another version, which is based on the shorter format of sixty overs each, which was the traditional one day cricket. While test cricket has retained its followers as a traditional form of the sport, the one day format is now largely monopolized by the T20 format. It draws its popular appeal from short timescales of each team batting for twenty overs in an inning, with a game completed in about three hours with just a ten- to twenty-minute interval. There is a “dugout” or a bench, rather than a dressing room in a pavilion, for players to retreat after fielding on the pitch.

The T20 cricket tournaments were inaugurated in India after the victory of the Indian team in its inaugural World Cup in 2007. The Indian Premier League (IPL) was inspired by the National Basketball Association (NBA) in the United States. It functioned on a franchise-system based on hiring, and transferring players to other teams in the same competition. These franchises were auctioned, where the highest bidder won the rights to own the team representing each city as their franchise. This invited the corporations, which provided the finance, and it possible for international players to be contracted to play for these teams. The teams were labelled in the glorified manner of major sports leagues in the United States. The players were renumerated by the sponsors for short periods of playing in the rounds of the competition. The entertainment industry profited from the venture and served as a drawing card, and the unlicensed gamblers found a niche in the service and hospitality sector.

The conversion of cricket into a global brand has been described by the Cambridge Companion to Cricket as part of “a global awareness that has helped cricket to refashion itself with the injection of ideas and methods taken from other sports and from the world of business.” This has led to cricket emulating “a business orientated path similar to that of American baseball.” It charts the history of gambling “to a habit that had been prominent in cricket during the phase of aristocratic dominance and patronage in the 18th century, when matches were often the subject of wagers between rival patrons.” Thereafter, in “the 1970s, rules were relaxed to allow betting...
on grounds, and the intensified commercialism that the game was experiencing by the end of the 20th century attracted a new betting craze. It was at its height among the millions of cricket followers in South Asia."

The contemporary gambling patterns in cricket are reflected in the deliberate fixing of match results, but also because “its episodic structure provides further opportunities for corrupt behaviour through more subtle forms of spot fixing, in which players might conspire to affect certain passages of play (runs scored in a session, for example, or the number of no balls delivered) in order to make money by betting in leagues with outside agents and against the bookmakers odds.”

The advent of cricket as a form of mass entertainment has been conspicuous by the number of scandals that have happened in its aftermath, and it points to how the objectives of the South Asian cricket administrators have been driven by the profit motive. In surrounding themselves with enterpreneurial paraphernalia, the ethics has been jettisoned. A notable instance is the Pakistan test series against England in 2010, when allegations of spot fixing were raised in court, which led to three players convicted for spot fixing. In India, the chief executive of the Indian Premier League, Lalit Modi, had his employment terminated because of his association with illegal gambling. The preponderance of the corruption at the highest-level needs examination by reference to the way it has been addressed by the Commission of Inquiry, sport regulators, and judges when the issue of bribery has been raised in the courts.

I. Outreach of gamblers from the Subcontinent

The gambling syndicates have profilerated the environment of cricket in India, despite the fact that gambling is illegal in the country. The legislative framework that forbids the practice of gambling is based around two statutes, one being the Public Gambling Act (PGA) of 1867, enacted during British rule making operating a gambling house, assisting in the operation of a gambling house, visiting a gambling house (whether gambling or not), financing gambling, and being in possession of gambling devices a crime. The penalty is a fine not exceeding 200 rupees or up to three months in prison. The second is the Indian Contract Act 1872, which treats an agreement that is based on wager (or chance) as void, and allowing betting or gambling must mean amending the provisions of the statute.

The gambling cartels in India originated in Mumbai and they have become national due to the government not expressly banning unlicensed gambling. The Indian consortiums accept wagers from Pakistani syndicates based in Karachi and Lahore, whose representatives can organize the betting scams by the avenues available to place bets in the country. This was the process that allowed the illegal gambling infrastructure to establish itself and begin the process of conversion of players internationally to spot fix cricket matches.

Unlike in India, Pakistan has a prohibition on gambling, which was reinforced when the General Zia ulHaque staged his military coup de tat in 1977. The Prevention of Gambling Act of 1977 was enacted with penalties for breach up to a 1000 PKR fine, and a year in prison for its breach. In 1979, very shortly after the implementation of this Act, there was a formula devised for placing bets on Horse Racing. This facilitated the arrival of unofficial betting and it entered cricket, which is the country’s most popular sport.

The initial ripples of corruption started from Pakistan, when Australians Shane Warne and Mark Waugh claimed that they had been offered bribes to throw a “test match” by Pakistan’s captain, Salim Malik, in 1994–1995. This information was leaked when the Pakistani team was on its tour to South Africa and Zimbabwe, which brought Malik under immense pressure. The Pakistan Cricket Board (PCB) acted fretfully, echoing their regimented public school ethos that afflicts all Pakistani colonial institutions, including cricket, and disciplined the cricketers by suspending them without a hearing. They banned Malik after he had rescued Pakistan from behind to win the series in Zimbabwe 2–1, and charged
his predecessor, Wasim Akram, and batsman Ijaz Ahmed.

In 1995, there was an inquiry set up under Justice Quyyum to investigate the allegations under the Commission of Inquiry Act 1956. The terms of reference defined match fixing as "deciding the outcome of the match before it is played and then playing oneself or having others play below one’s their ability to influence the outcome and to be in accordance with the predecided outcome." The Quyyum Report stated in its preamble: “While the Commission is also aware in cases of bribery and match fixing direct evidence is hard to come by, and one has to draw inferences and rely on expert opinion.” The recommendation was for a life ban and a hefty fine on the former Pakistan captain, Salim Malik, which is still effective.

While the Pakistani cricket authorities were initially acting on hearsay, there was no disclosure at the time that Warne and Waugh themselves had accepted money from an Indian illegal betting syndicate, based in Sri Lanka, before they arrived on their scheduled visit to Pakistan. This was apparent when some years later, the Australian Cricket Board (ACB) revealed it had fined them for providing information to an Indian bookmaker with the euphemism “John” in Columbo in 1994, from which they had gained pecuniary advantage.

The ACB had not disclosed their involvement for nearly four years, since the players were fined in early 1995. The ACB imposed moderate fines after the two players admitted having supplied the bookmaker with information about match conditions and possible team selection. There were reports that the sum varied between $2,500 to $15,000. The chief executive of the ACB, Malcolm Speed, mitigated the charges by stating there was no suggestion that Waugh and Warne had been involved in anything other than providing information and had not been involved in match fixing.

However, when the affair became public knowledge, it brought charges of hypocracy on the ACB for not sufficiently disciplining their senior players. It later became known that the ACB appointed Rob O'Regan, QC to conduct an independent Player Conduct Inquiry into the matter. He concluded that the fines were inadequate and wrote that a suspension for a “significant time” would have been a more appropriate penalty. He recommended that every new player should be warned of the dangers of becoming involved with bookmakers and the penalties that it entails.

The ACB chairman and chief executive officer then proceeded to deal with the matter, after receiving approval from the directors, and determined that details of the inquiry should be provided to the International Cricket Council (ICC) on a private and confidential basis. This decision was not unanimous and some members conveyed their disapproval of how it was managed to the ICC. The governing body of international sports “had agreed at the time of the ACB’s request to keep the details of the players’ actions and penalties confidential.” They took no action against Waugh and Warne and did not reprimand them when the affair became public.

In India, match fixing surfaced when it was alleged that the South African captain, Hans Cronje, had accepted bribes on the tour to India in 1999–2000. Cronje, who had led his team to win the test series, was accused of accepting bribes in the one day series, which came after the test rubber. In Delhi, the police charged Cronje with fixing South Africa One Day Internationals (ODIs) against India for monetary enrichment in March 2000. They also released transcripts of an alleged conversation on April 7, 2000 between Cronje and an Indian businessman suggested to be the unlicensed bookie, Sanjay Chawla. The issues discussed in the transcript were: who was playing, who was on the “deal,” the amount alleged to be paid to Cronje, and the involvement of his accomplice teammates Herschelle Gibbs, Pieter Strydom, and Nicky Boje. While Cronje denied his involvement in the matter, the South African Cricket Board ended his tenure as captain.

The South Africans appointed the King Commission to hold an inquiry into the allegations against Hans Cronje and his maligned colleagues.
allegations included the highly dubious decision by Cronje to forfeit the first innings of the deciding fifth test between South Africa and England in Centurion in January 2000, which led to success in the test series victory for England. There was circumstantial evidence that Cronje had been in receipt of funds for allowing an unfavourable outcome in the match.\(^2^2\)

On June 15, 2000, Cronje confessed to accepting about $100,000 in bribes from gambling syndicates since 1996, but he claimed that he had never fixed a match. He also announced his retirement from cricket. Prior to his admission of guilt, he had received an assurance that it was contingent on an immunity from prosecution and extradition to India to face a criminal trial.\(^2^3\) However, in his own mitigation, he accused the former India captain, Mohammad Azharuddin, of introducing him to a bookie who offered him money to “fix” a 1996 test match during South Africa’s tour of India, when both players were captains of their national teams.\(^2^4\)

The Indian Cricket Board (BCCI) ordered the Central Bureau of Investigation (CBI) to investigate the match fixing allegations and to disclose whether any Indian cricketer or official was involved. There were tax raids across the country of the cricketing elite by the Inland Revenue, including those of then national coach Kapil Dev and former players Mohammed Azharuddin, Ajay Jadeja, Nayan Mongia, and Nikhil Chopra. Kapil Dev resigned as coach on September 12, 2000, but stated that this was “not an admission of guilt.” The CBI report was most damaging to the former captain, Mohammad Azharuddin, who it alleged was fixing games with the help of his colleagues, Ajay Jadeja and Nayan Mongia. This led to a life ban on the three cricketers which were enforced by the BCCI. The players escaped legal punishment, as there was no law related to match fixing or betting in the Indian Penal Code of 1861 (as amended). There were no criminal charges for cheating under the Public Gambling Act of 1867 that were filed against anyone because of the ambiguous position of law in this regard, and the improbability of an investigating agency being able to obtain sufficient legal evidence.\(^2^5\)

The bans imposed by the BCCI on the former Indian captain Mohammad Azharuddin were eventually overturned, and what added an element of frivolity to the proceedings was that the court stated that there was “not sufficient evidence” of the players being involved in match fixing.\(^2^6\) The question is why these were players proscribed in the first place if there was no convincing evidence that they had accepted offers of the betting syndicates?

It was not the disclosures against the cricketers that were so damning in the CBI report, as was the charge that the BCCI had not done enough to prevent the tentacles of the illegal gambling industry sinking into cricket’s domain that provided the opportunities for match fixing. The 75-page report titled *Match Fixing and Related Malpractices*, prepared after a detailed investigation and questioning of several players, stated that the Board had not failed to ethically monitor the players. The report stated:

> It is obvious that in spite of their public posturing, the BCCI over the past decade or so was negligent in spite of indications of this malaise making inroads into Indian cricket. The natural corollary to the fact that disclosures during the CBI enquiry have revealed a thriving player-bookie nexus in India for nearly a decade, begs the question: What was the BCCI doing all these years? CBI has enquired into the role and function of BCCI to evaluate whether it could have prevented the malpractices.\(^2^7\)

However, the CBI enquiry exonerated the officials by stating that “the affairs of the BCCI has not disclosed any direct evidence of nexus of any past or present office bearers of BCCI with the betting syndicate.” Indian cricket was imputed to have knowledge of insider dealings and was not “ignorant of the match fixing and related malpractices that were happening in cricket.”\(^2^8\) The lack of action against senior players and their later exoneration pointed to an admission that it was an accepted part of the entertainment industry and the administration could not take any contradictory action against its involvement in the sport. It also showed a complacency by the
cricket hierarchy in India that would have given the cricket administrators in England, who were then framing the rules of cricket at Lords, some cause for reflection.

II. Quasi legal gambling and pitch-side betting
The gambling industry, although illegal, is flourishing in India because of the advent of the T20 format that has allowed enormous amount of capital to be injected into cricket tournaments. The players are immediately accessible to the betting syndicates and there has been the creation of the Hawala (transfer of money or information between two persons using a third person) system in India. It gained notoriety in the 1990s, when several of the politicians were apprehended using this mechanism for the conversion of money and transferred them illegally to avoid the payment of taxes. The funds are channelled through the purchase and sale of investment instruments, such as bonds, stocks, and traveller’s cheques, or the wiring of the funds through a series of accounts at various banks across the globe. It seems that the betting scams have been able to transfer their funds according to this device to enable the illegal gambling consortiums and avoid legal sanctions.

The illegal funds are channelled by the Hawala transactions, which is a form of money laundering that the cartels have utilized to deposit the money from illegal gambling into offshore accounts. There was $700 million recently transferred from India circumventing the country’s banking system either as advance remittance for import of goods or by using forged import documents submitted to banks. In the three cases investigated by the Enforcement Directorate, an economic crimes investigation agency, the money was laundered to trading hubs, such as Dubai, in the last six months of 2016. The laundered funds were carried out when the “accused took advantage of lacuna in the banking system to commit the fraud and there is no strong law to deal with the matter. Calling it a sophisticated hawala-like operation, he said money, most often obtained illegally, is being sent abroad through normal banking channels.”

Ed Hawkins, who has conducted empirical research on the unlicensed gambling syndicates in India, estimates that “there are 70,000 gambling syndicates in India” and despite being unlicensed, are highly organized and function “like a legalised system.” He states that in England, “the big four bookmakers [are] William Hill, Ladbrokes, Bet365 and Coral,” each of whom “sets their own odds, and supplies them to the managers of their shops,” while in India there are “four big bookmakers, known as the syndicates,” wherein “two have their roots in Delhi and the others in Mumbai and Nagpur. Each of those bookies sets their own odds and supplies them to managers around the country. These ‘managers’ act as bookmakers themselves who receive bets from their customers and are ranked by the size of their customer base. The first-tier bookmakers have up to or more than 1000. A fourth-tier bookmaker might have only 20 or 30. Like a franchise arrangement, the ‘managers’ pay for the goods supplied.”

Hawkins highlights the “two significant differences between the English and Indian models. The first is that whereas Hill’s and Ladbrokes might offer a wide variety of bets, in India you can only bet on four outcomes: the match result, the innings runs, brackets (a certain number of runs to be scored in a certain number of overs), and what is known as the lunch’ favourite. This is where the customer is offered a bet on placing a bet on the team that is favoured on the lunch break or innings break.”

This is illustrated by “each of these four syndicates having their own area of expertise. The top Delhi syndicate will look after betting before a ball has been bowled, providing odds pre-match. When the game starts, its work generally stops. The other syndicate connected to Delhi, known as the Shibu, operates the brackets odds. The Mumbai syndicate will take care of the ball-by-ball betting for match odds and
innings runs. The fourth, the Nagpur syndicate, is a rival to the Mumbai operation.” This implies that, in effect, there are a cartel of bookmakers all using the “same odds” and this leads to the exact circumstances “for corruption.” Hawkins underlines the fact that there is an “anatomy of fixes and the perpetrators can differ.” This is exemplified by the personnel involved, such as “Vinay, who is a first-tier bookmaker and close to the syndicate kingpins, estimates that half of all fixes are organised by bookmakers, the rest by run-of-the-mill punters—any Tom, Dick, or Hari who has a relationship with a player.”

The study shows that there is an ingrained culture of illegal betting which involves the Indian bookmakers, and their approach to cricketers stems from “opportunism” rather than a “tendency for violence, that plays a part in fixes.” If the players are not obliging in keeping to their “bargain,” then the “threats and intimidation follow.” The issue is the access to the cricketer and if that can be achieved by the syndicate, who can then act as the agent for the gambling organization in the scam.

The betting industry has been developing ingenious methods by which it can conduct its procedures and avoid law enforcement agencies from intervening. The traditional method to gamble was to visit a bookie operating incognito in a retail outlet until cellphones arrived in the late 1990s; it is now spread by means of an awareness of action on the pitch that is conveyed to the bookies. This has been accompanied by a devolution from Mumbai as the epicentre of illegal betting in cricket into regional hubs where the major syndicates are spreading their tentacles. They have utilized the interval between events on a cricket pitch to enable the bookies and punters to stay informed in advance of events through pitch-siders (cricket’s equivalent of court-siders in tennis) on cell phones at the ground to be informed by clients on the pitch what has transpired on the field several seconds before the event is broadcast on television.

The action on the field and its replay on a screen should not be delayed by five or six seconds, even if the picture has to go via satellite. The TV broadcasters may suspend that further to seven seconds if there is an off/camera accident or bad words are uttered on the pitch that may require a delay to excise that from transmission. However, according to The Telegraph in India, a delay of eleven or twelve seconds is common and in 2015, there was a delay of twelve seconds in the IPL T20 game of that year. This interval occurred again in the fourth test match between India and England in Mumbai in 2016, when it was timed between the event occurring on the field and its appearance on television screens around the ground at eleven-and-a-half seconds.

The information is transmitted through a “high-frequency antennae [which a syndicate, bookie or punter use to] tap into the live-feed and find out what has happened several seconds before anyone watching on television.” The delay is the essence of the betting scam, the pitch-siders are the culprits in the information that they convey, and the interval is to facilitate the illegal conveyance of this compromising information.

The technological innovations of the IPL are facilitating the gambling syndicates who are adjusting to the changes. The development of the methods should be known to the authorities and the information is in the public domain. However, with the demand for T20 and the involvement of the cricket board, the capital investment, the media, and the betting industry has adapted to the various forms of cricket that are played in India. It has involved the gambling industry and lucrative returns in the T20 has given the various sectors of the unregulated economy a stakeholder status.

III. Laissez faire approach to disciplining players
There is evidence that has emerged of how underground bookies operate in setting up the contracts with the players who agree to be part of the conspiracy to spot fix matches. In one of the T20 matches in the IPL, there were criminal proceedings against three Rajasthan Royal cricketers (case no. PIL Case No.55 (2013)), Shanthakumaran Sreesanth, Ajit Chandila, and AnkeetChavan, who were accused of spot fixing and cheating by the Delhi police. There were
eleven bookies arrested under the Maharashtra Control of Organised Crime Act (MCOCA) of 1999, and the subsequent investigation of accused bookie Ashwani Aggarwal revealed that he possessed a master account on betfair.com, an online betting site registered in the United Kingdom and Australia. He then sold sub-passwords to purchasers who obtained a pre-paid facility for holding an account with him by offering him a certain amount in Indian currency. Aggarwal would transfer the money to an offshore bank account using Hawala channels and open a sub-account on the betting site for the purchaser that would allow him to bet freely, without carrying out transactions in foreign currency directly, which would have brought him to the attention of the Reserve Bank of India.

Aggarwal’s account was used to channel large amounts of funds procured through betting that was fixed by the syndicate. The encrypted technology used was by “handsets, SIM cards, television sets, dish antennas, decoders etc. after taking place on rent. Farmhouses were preferred; they used to install their electronic gadgets in one room for receiving live telecasts on the ongoing matches, that for cricket betting they were using special decoders which gives them live streaming without any breakup on account of advertisements and they were able to have advantage of around 5 to 10 seconds; the annual payment for the three special decoders which were being used by them was Rs. 65,000. . . .” It is possible to hack into a live feed with some insider information about encryption frequencies and codes, azimuth of the dish used by the feed producer to uplink, and the right decoders.

The court acquitted the three cricketers on technical grounds because their incriminating conversations with the bookies had been intercepted in violation of Section 5 of the Telegraph Act, which made them inadmissible as evidence in the court under the ruling in State of UP vs. Singhara Sinh & Ors. AIR1964 SC 358. The court also pointed out that the intercepted conversations were not “state substantive evidence,” but only corroborative in nature. These legal technicalities and the absence of a legal framework, specifically targeting match and spot fixing, leaves an escape clause for those involved to escape without punishment.

However, the Supreme Court of India has taken steps to oversee the corruption in the IPL and has appointed a panel composed of three justices to be headed by former Chief Justice Lodha. The panel had the task of investigating the betting and spot fixing scandal in 2015, which led to the acquittal of Sreesanth and his colleagues in the Delhi High Court. Their findings led to the suspension of the Chennai Super Kings and Rajasthan Royals teams for two years. Gurunath Meiyappan, the former team principal of Chennai, and Raj Kundra, the former co-owner of the Rajasthan Royals, were banned from all of cricket for organizing betting and bringing the game into disrepute. The Lodha Panel stated that there should be legislation in India to promote ethics and fair play, and effect a regeneration of the game.

It drew a sharp distinction between “betting and fixing, favouring the legalising of the former and criminalising the latter,” and it suggests that players, team officials, members and employees be prohibited from both activities. However, it acknowledges that merely prohibiting gambling will not be enough without effective legislation and recommends a “broad law” that allows betting, but prohibits fixing in India. The report stated:

There is a fundamental difference between betting and match/spot-fixing. The latter interferes with the integrity of the game and attempts to change the course of the match. On the other hand, betting is a general malaise indulged by different sections of society. While the issue of betting can be effectively dealt with by providing a legal framework, match/spot-fixing is neither pardonable nor a matter for regulation.

The Lodha report also recommends a “broad law” that ensures the prevention of sporting fraud in India, stating: “With only horse racing legally permissible in India, those interested in betting have gone underground, with illegal bookies managing affairs. As is inevitable, the hawala
system has awakened to these channels and money laundering has also become an inevitable outcome.” The Supreme Court of India, in its recent judgment, endorsed its findings of the IPL corruption and stated that the report should serve as the basis for legislation.

The elastic approach towards disciplining players when there is prima facie evidence will not eliminate illegal gambling in the Indian subcontinent, nor will it regulate the activity which is firmly part of the underworld. The ICC amended its rules against corruption in 2000 following the match fixing allegations that implicated the national team captains. The ICC now has an anti-corruption code that applies to cricketers and is geared towards investigation, education, and prevention. The code purports to equalize the field for match fixing, contriving, or otherwise improperly influencing “the result, progress, conduct, or any other aspect of any international match or ICC event.”

The illegal betting is included in remit of the Anti-Corruption Code of 2016 for players and player support personnel. The betting practices, such as spot fixing or match fixing are covered under the Code, and whether the player involved in betting wins or loses the match is immaterial to the illegality of the betting practice. The allegations of corruption from any source are reported to the Anti-Corruption and Security Unit (ACSU). This body then enforces these rules and coordinates with the criminal or judicial entities of a country to investigate allegations made against any cricket players suspected of betting.

The ACSU process recently came up for scrutiny when Pakistani players Sharjeel Khan and Khalid Latif were suspended after it was reported to the ACSU that they had taken bribes from gambling syndicates to influence the course of a Pakistan Super League (PSL) match in Dubai. They were then charged by the PCB for breaching various articles under Clause 2 of the Anti Corruption Code, attempting to corrupt a game, and for general misdemeanours of failing to disclose suspect approaches. If the players contest the charges, then an independent tribunal will be invested to hear the arguments of both sides under the ICC Code of Conduct Commission. This Commission appoints three members from the Anti-Corruption Tribunal, which determines whether an offense has been committed. The players will remain suspended while the Tribunal makes a determination regarding the offense.

In February 2017, the Chief Executives’ Committee (CEC) of the ICC authorized the global cricket body’s top management to initiate the process for an amendment to the ICC’s Anti-Corruption Code that would permit extraction of data from mobile phones of players during the duration of international matches, using specialized data extraction equipment and software. If the proposed amendment is accepted by cricket’s governing body, the anti-corruption unit will have full access to data stored in the phones of players. This could be a decisive step in eliminating corruption. The ASCU also needs to ensure watertight security of the extracted data, due to the social media based personal information that is stored in mobile phones.

IV. Increasing the regulatory powers of bodies

The issue is what steps can be taken to eradicate illegal gambling in cricket. The players can be tempted by syndicates, match fixing is prevalent in the sport, and it is the remedy they have suggested which is the problem—their great belief that they can address the problem by setting up the anti-corruption units to monitor any illegal gambling activities. The anti-corruption units are mostly staffed by high profile ex-policemen, but they neither have the power to investigate the allegations in detail nor the legal ability to name and expose those who may have been guilty of match fixing. They do not have the ability to prosecute the wrongdoers without the ability to verify and the ability to prove the allegations.

The first Chairman of the IPL, Lalit Modi, who was in office from 2007–2010 was a convicted felon in the United States before he returned to India to run his family business and inaugurated the T20. He was able to organize the tournament
for three years before being removed for embezzlement based on rigging the “auctioning of players.” He was the Vice President of the BCCI before his employment was terminated for “misconduct and indiscipline” and he was banned from taking any administrative positions in Indian cricket three years later. Among the charges against him was that he had breached the Prevention of Money Laundering Act (PMCA) of 2002 and the Foreign Exchange Management Act (FEMA) of 1999 by laundering up to Rs 1,206 crore ($163,000 USD) abroad. The Indian government seems to have been oblivious to the transactions of the IPL in the period of Modi as its commissioner. There is a possibility that the political hierarchy in India has placed the personal interest above that of the judicial process, despite Modi being subject to a non-bailable warrant and the forfeiture of his passport had the government intervened to facilitate documentation for his stay in the United Kingdom. The government faced opposition attacks in Parliament and was accused of helping Modi, with the implication that there is corruption in the corridors of power. The Indian government seems to have been oblivious to the transactions of the IPL in the period of Modi as its commissioner. There is a possibility that the political hierarchy in India has placed the personal interest above that of the judicial process, despite Modi being subject to a non-bailable warrant and the forfeiture of his passport had the government intervened to facilitate documentation for his stay in the United Kingdom. The government faced opposition attacks in Parliament and was accused of helping Modi, with the implication that there is corruption in the corridors of power.

The government should deal with corruption traced to illegal betting by keeping sport autonomous and delegated to the departments, such as the Attorney General’s Office, or in India, the CBI to police betting in sport. Sportswriter Mihir Bose argues that “it will serve no purpose appointing integrity units which are part of the disciplinary body of a particular sport if the executive will act on its discretion and overrule the court’s declaration. The Anti-Corruption units are stand-alone bodies which are part of the judicial system of the country and to maintain them under the jurisdiction of the sport is to perpetuate their existence as meaningless bodies with no real powers to prevent corruption or to offer redress.” This implies that sports authorities internationally have become more aware that without the proper supervised support from the central government, they will not be able to deal with the plague of illegal betting and match fixing. It points to an effort from the legislature and law enforcement agencies who should coordinate their activities in apprehending the criminals, but also ensure that the framework that they put in place has an ethical foundation. The results can be achieved if the sports disciplinary bodies are able to implement a sanctions regime which is effective and serves to deter the sportsmen from participating in spot fixing of matches.

The illegal gambling and betting scams afflicting sport have to be viewed in a universal context in order to draw upon international sanctions. The ICC and the criminal courts in England have been forthright in enforcing the Anti Corruption Code of Conduct, regulations, and the criminal law against cricketers who have been involved in spot fixing. There is corruption at the international level, as the documentary evidence shows that has exposed international cricketers who have been involved in match fixing. There is an environment of bribery and corruption that has spread globally, and it is necessary to address the problem in a grand strategy to prevent match fixing in the sport. The inception of a national programm to erase illegal betting and match fixing should be launched by the ICC to eradicate cricket corruption.

The gambling syndicates now part of the entertainment industry in both India and Pakistan have become accepted in the mainstream society and are woven into the cultural fabric of the communities who follow sport. The pecuniary enrichment of players underpins the modern game, which ferments a greed that is inherent in “auctioning” players and considering them as commodities. This is the reason why the potential exists for further match fixing and that it will persist because of the framework of cricket and the illegal betting industry. Peter Osborne states that there has been “a degradation of the sport” in the way it has brought the betting industry into its domain, and cites the example of the attempt to ban gambling in Pakistan and India to “Prohibition in the US,” where millions of people generated opportunities for criminals, who were assisted by the growth of mobile phones. He quotes from the Times of India report, which in 2000, estimated that the value of betting on each day of the match in India “was $227 million, and gave a range of US $6–9 billion for the value of
total betting in Indian cricket matches in a year. In short enormous sums of money were involved.\textsuperscript{63}

This contention is supported by Kevin Carpenter who blames the temptation of monetary awards as the reason for moral debasement of cricketers. He draws a parallel with “Italian football as a prime example” of players being “the likely targets for match-fixing as in end-of-season games, where neither team needs to win (in essence a ‘dead rubber’) they agree to play out a draw, so match-fixing is more prevalent where the contest does not affect the final outcome of a competition.” This is similar to “where match-fixing does not involve losing but only securing that certain actions take place, more commonly known as ‘spot fixing’ (which also encompasses so-called ‘point sharing’), as in the case of the three Pakistani cricketers, then the feeling of guilt in a player/official and risk involved is far less therefore they are more likely to be open to offers made to them.”\textsuperscript{64}

The prospect of an international treaty on prohibiting illegal gambling is not on the horizon because the enforcement powers will not be available transnationally to apprehend the criminals who operate as a quasi-legal body in India. The Chairman of Interpol’s Joint Steering Group, John Abbot, has stated that poor regulation and governance present problems in the world of sport corruption. He has suggested “a global legal pact,” but casts doubt that an international legislation could be achieved. This is because “countries tend to be very protective of their sovereignty, especially when it comes to criminal law.” He has encouraged countries to promulgate “legislation, the right powers, and resources” and suggested sport contracts should include “a clause relating to education about match fixing” that also prevents the conveying of “information about matches and players.”\textsuperscript{65}

The match fixing allegations have surfaced in sports in the United States, where there is also the issue of match fixing/spot fixing that involves individual participants in various teams. In the United States, the Professional and Amateur Sports Protection Act of 1992 has confined legal sports betting to Nevada, Oregan, Montana, and Delaware. There is considerable pressure for legalization because of the practice of sports betting that exists unchecked and untaxed by the authorities. The American sports gambling prohibition has created the problem of money laundering that shows “nearly $4 billion is bet on sports legally in Las Vegas yearly, and an estimated $80 billion to $380 billion is wagered illegally through a shadow industry of offshore online betting houses, office pools and neighborhood bookmakers.”\textsuperscript{66} There have been ingenious methods that promote match fixing adopted to aid and abet the illegal betting by participants.\textsuperscript{67}

The essential difference is that the establishment of the IPL has not been able to legislate effectively or confer the power of enforcement to its administrative bodies to combat illegal gambling in India. It has reacted very slowly and allowed the sport to become corrupted by not maintaining ethics in the organization of sport. The entire process has been driven by monetary considerations, and the T20 cricket structure was laden with fraud which has contaminated the players and its executive alike. This has tainted the image of cricket in the Indian subcontinent, which despite its fine tradition of unearthing talented cricketers, has been compromised by allowing the illegal betting cartels free rein to become established in their infrastructure. It has cast doubts in the result of matches and permitted the players to indulge in dishonest practices.

Conclusion

The legalization of sports betting is a controversial topic across the world because sport is an honorable activity and is premised on fair play. Gambling has long been part of the sports and entertainment industry, and it is accepted as part of the public involvement in a competitive event. It has evolved over time and it is regulated in the United Kingdom as a commercial activity, and this is reflected in the expenditure spent and the revenue collected. The licensing allows for checks and balances, taxation, and the sanctions of criminal law to preclude bribes or unfair
advantages gained by betting on spot fixing in cricket.

This has not happened in the illegal betting industry that has spawned in the Indian subcontinent. Gambling is still banned by the archaic PGA of 1867, and after the arrival of “global” cricket, the environment of T20 has become the “wild west” of the cricket calendar. In India, cricket is the favorite sport, and the unsavory elements connected to its structure threaten the credibility of the sport and lowers the estimation of the cricketers for the general public. This is because they have facilitated the illegal gambling industry that has assumed an institutionalized status by the IPL, and its turnover has increased incrementally with the tournaments becoming fixtures.

The wagers placed on cricket matches have been spread on betting through the syndicates and there has been no legislative intervention against the organizations that have sustained the illegal gambling rackets. The illegal betting cartels need to be controlled with the government showing “clean hands” and proactively dealing through the Attorney General, District Attorney, or the CBI in India, to investigate the alleged scams and prosecute the individuals. The courts should not facilitate the spot fixers by acquitting when there is evidence, even if they are public heroes.

The government needs to be proactive, rather than expect the solution to come from the anti-corruption units affiliated with the international governing bodies of the sport. This is because in cricket, the ICC, which has the disciplining powers, is not sufficiently involved in the administration of the sport, and on the national level it will be regulators and law enforcement who can deal with the betting organizations, which at present are quasi-legal. There must be a firm resolve to eradicate the Godfathers of illicit gambling from cricket’s landscape.

1 LLB (Lon) LLM (Lon) Grays Inn

2 npower to sponsor Twenty20 Cup, ESPNCRICINFO (Mar. 12, 2003), http://www.espncricinfo.com/england/content/story/130383.html.


4 According to Cristina Ledra and Pat Pickens, “choosing a name is one of the most important steps for any new franchise. National Hockey League (NHL) team nicknames have a variety of origins: Many were selected through a fan vote or the owner’s choice, some reflect a city’s geography and others are a nod to history or nature.” Cristina Ledra & Pat Pickens, NHL team nicknames explained, NHL (Nov. 22, 2016), http://www.nhl.com/news/nhl-team-nickname-origin-explained/c-283976168.


7 Id. at 7.

8 The Public Gambling Act 1867, enacted during British rule, is still effective in India. This makes operating a gambling house, assisting in the operation of a gambling house, visiting a gambling house (whether gambling or not), financing gambling, and being in possession of gambling devices a crime. The penalty is a fine not exceeding 200 rupees or up to three months in prison.

9 Section 12 states “nothing in this Act shall apply to games of mere skill wherever played” which means, in absence of other laws against them, wagering on games of skill is legal.

10 The Indian Constitution framed, in 1949 allows states the right to legislate and make policies related to “gambling and betting.” It is quite clear in the Seventh Schedule, Entry 34, List II
that states could legalize gambling should they choose to do so. To date most states have only made laws against gambling, while thirteen states have legalized lottery, and two states (Goa and Sikkim) have legalized many other forms of gambling.


12 Under the system, racehorse owners received payment only when their horses finished in the top three in a race, and the politician owners wagered their best thoroughbred horses. The owners, working with race club stewards and jockeys, would introduce a horse of winning hereditary lineage and wait for it to establish a winning record. These horses would become favourites among punters, attracting heavy betting. In some races, these favorites would inexplicably falter, reaping a windfall for bookmakers and the owners who conspired with them. Tom Hussein, How gambling made Pakistan’s national game a disgrace, THE NATIONAL (Oct. 25, 2010), http://www.thenational.ae/news/world/how-gambling-made-pakistans-national-game-a-disgrace.

13 Parah 4

14 Parah 10


16 It should be noted that this CEO was not involved in the original inappropriate conduct of the ACB and inherited the coverup from his predecessor. The Warne/Waugh affair is reflected in the memoirs of Malcolm Speed. MALCOM SPEED, STICKY WICKET: A DECADE OF CHANGE ON THE WORLD OF CRICKET 23–42 (Harper Sports 2011).


18 Gideon Haigh & David Firth, Inside Story: Unlocking Australian Cricket’s Archives 284 (The Herald and Weekly Times Limited 2007).


20 Hans Cronje admitted to the board’s managing director, Ali Bacher, that he “had been dishonest” about his activities in India and acknowledged receiving $10,000 to 15,000 for “providing information and forecast but not match-fixing” during the one-day series in India. Justice E. L. King, Commission of Inquiry into Cricket Match Fixing and Related Matters, June 15, 2000 (statement of Hansie Cronje), http://static.espncricinfo.com/db/NATIONAL/RSA/KING-COMM/.

21 Id.


23 The UCBSA imposed a life ban on Cronje on cricket activities, as well as that of its affiliates. After the UCBSA banned Hansie Cronje for life, he appealed against this ruling by taking the board to the High Court of Transvaal. In Cronje v. Cricket Board of SOUTH AFRICA 2001 (4) SA1361, he relied on Section 18 of the Constitution Act: “everyone has the right to freedom of association”; the Board had exercised its right in this regard to not associate with Cronje. Id. at 1371. He claimed that the board’s resolution had infringed his “personal rights of liberty, privacy, dignity and the right to pursue his life and interests freely in society without interference; and . . . commercial rights to pursue a trade, profession or calling of his own choice without interference” and sought injunctions to remedy these alleged infringements. Id. at 1384. The court appeared to take these assertions very seriously and did lift some injunctions on the respondent. The effects of these were that Cronje
could coach at some schools, seek employment, and could enter a cricket ground as a spectator for journalism work. *Id.* at 1387.


26 It was not possible to prosecute anyone under the Public Gambling Act 1867 due to the restrictions imposed as per Sec. 468 of Chapter XXXVI of the Criminal Code because of the limitation periods involved. There could be no charges levied under the Prevention of Corruption Act 1988 because the players were not “Public Servants” as defined in Section 2(c) of the Act. That necessarily means that those who offered money to them also cannot be prosecuted under Section 12 of the Act for abetment.

27 *High Court strikes down Azharuddin’s life ban*, ESPNCRICINFO (Nov. 8, 2012), http://www.espncricinfo.com/india/content/story/590339.html.


33 ED HAWKINS, BOOKIE GAMBLER FIXER SPY: A JOURNEY TO THE HEART OF CRICKET’S UNDERWORLD 43 (Bloomsbury Publishing 2012).

34 *Id.* at 55.

35 *Id.* at 67.


37 *Id.*

38 The major source of income for the IPL is the media rights. Other sources of income are title sponsorship, sale of franchises, and licensed merchandise and products. This amounts to $1.75 billion in TV rights and franchise in sale figures. Kaustubh Barve, *Project Report on Indian Premier League (IPL)*, UNIVERSITY OF MUMBAI BIRLA COLLEGE OF ARTS, SCIENCE & COMMERCE, at 56–57 (2012–2013), https://www.slideshare.net/kaustubhbarve/project-report-on-ipl-indian-premier-league.


40 Jasvinder Sidhu, *Law Enforcement is Having a


42 *Id.* at 60.

43 *Id.* at 61.

44 Sudipto Ganguly, ICC anti-corruption unit seek to monitor players’ messages, REUTERS (Nov. 16, 2016), http://uk.reuters.com/article/uk-cricket-global-corruption-idUKKBN13B0MV.


46 *The Supreme Court in the Board of Control for Cricket in India (BCCI) v. Cricket Association of Bihar & Ors*, NO.4236 OF 2014 (July 18, 2016). While reflecting on the verdict on the Lodha Committee’s recommendations, the Law Commission of India was asked to float a proposal among the various stakeholders for exploring the legislative framework and ramifications of legalising betting in sports in India. *Id.* at 69.

47 Parah 1.3.

48 Parah 2.11.

49 Parah 2.2.

50 Parah 2.61–6.3.

51 Parah 4.1.


53 Parah 5.12.

54 Parah 4.61.

55 Parah 4.64.

56 *Ganguly, supra* note 43.

57 Modi was convicted by a federal court in Durham, South Carolina for possessing cocaine, false imprisonment, and assault. He pleaded guilty on March 1, 1985 and was given a two-year suspended sentence. Sycld Berry, *Drugs and ‘kidnap’ charges could bring down Indian Premier League chief, Lalit Modi*, TELEGRAPH (June 15, 2008), http://www.telegraph.co.uk/sport/cricket/international/england/2303250/Drugs-and-kidnap-charges-could-bring-down-Indian-Premier-League-chief-Lalit-Modi.html.


of conspiracy to obtain and accept corrupt payments under Section 1(1) of the Prevention of Corruption Act of 1906 (UK). The second charge was conspiracy to cheat under Section 42 of the Gambling Act of 2005 (UK). The conspiracy charge was proven and the jury decided that the cricketers were all involved in an agreement, with the intention to make money from it. They were found guilty of conspiracy to defraud. The relevant law under which the players and the agent were charged were Section 1(1) (the offence of conspiracy) and Section 3(3) (penalties for conspiracy) of the Criminal Law Act of 1977 (UK), the parties to an agreement having the intention to carry out a plan. At their appeal in R v Amir [2011] EWCA Crim 2914, Justice Cooke, when sentencing held that "your motive was greed, despite the high legitimate rewards available in earnings and prize money" and "...the effect of what you were seeking to do was to defraud bookmakers, whether licensed or unlicensed. ...If other fixes were to be done on less esoteric events than no balls, such as brackets [periods of play, measured in overs bowled], then it is certain that they would affect lawful betting." Id. at 3–4.

62 Lou Vincent, the former New Zealand batsman, was banned for life by the ECB in 2014, after he admitted breaching the ECB’s anti-corruption regulations on three separate occasions. Hours before the penalty was announced, Vincent released a statement saying that he was a cheat and that he had accepted money to under-perform. Vincent banned for life by ECB, ESPNCRICINFO (July 1, 2014), http://www.espncricinfo.com/ci-icc/content/story/756809.html. Maurice Odumbe of Kenya was found to have received payments from a bookmaker and was banned for five years by the Kenyan Cricket Association, in conjunction with the ICC. Maurice Odumbe banned for five years, ESPNCRICINFO (Aug. 17, 2004), http://www.espncricinfo.com/ci/content/story/135253.html. Similarly, the West Indies player Marlon Samuels received a two-year sentence from a West Indies Cricket Board Disciplinary Panel for breaching provision C4 of the ICC Code of Conduct Regulations for conveying match related information to an individual who subsequently organised bets on that match. The ICC Code of Conduct Commission conducted an inquiry and upheld the ban, finding that the punishment and process were appropriate. ICC commission to review Samuels’ ban, ESPNCRICINFO (June 12, 2008), http://www.espncricinfo.com/westindies/content/story/354449.html; Samuels’ two-year suspension upheld, ESPNCRICINFO (July 3, 2008), http://www.espncricinfo.com/icc-ci/content/story/359530.html.

63 PETER OSBORNE, A WOUNDED TIGER: A HISTORY OF CRICKET IN PAKISTAN 378 (Simon and Schuster 2014).

64 Kevin Carpenter, Match Fixing—The Biggest Threat to Sport in the 21st Century? Part I, LAWINSPORT (June 5, 2011), http://www.lawinsport.com/articles/anti-corruption/item/match-fixing-the-biggest-threat-to-sport-in-the-21st-century-part-1.; See also Tom Serby, The Council of Europe Convention on Manipulation of Sports Competitions: the best bet for the global fight against match-fixing?, 15 INT’L SPORTS LAW J. 83 (2015). Serby argues for a new international treaty on match fixing because of the recent growth of this phenomenon and its links with organized crime. The conclusion he reaches is that the sport-specific criminal match fixing law in the fight against corruption would make “little difference,” despite the different form the “dialogue and cooperation [between the stakeholders] at national and international levels” between these stakeholders (ie the betting operators), sports governing bodies, and national regulators.


66 Will Hobson, Sports gambling in the U.S.: Too prevalent to remain illegal?, THE WASH. POST (Feb 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-
In the 1990s, bookmakers from Las Vegas unearthed a point shaving scheme (point shaving is a form of match fixing where players of a team agree not to cover a published point spread in a game), which involved basketball players from the Arizona State University. The suspicion was raised when large wagers were made repeatedly over the Arizona state Point shaving scandal hits Arizona scandal. Point-Shaving Scandal Hits Arizona State, LATIMES (Dec. 6, 1997), http://articles.latimes.com/1997/dec/06/sports/sp-61336. There was also a report that stated ten people, some of whom had ties with the basketball team of the University of San Diego, were indicted by the U.S. federal grand jury over charges of point shaving. Ex-San Diego star charged in scheme, ESPN (Apr. 12, 2011), http://espn.go.com/mens-college-basketball/news/story?id=6330566.

Back On the Paramount Lot: An Interview with Ted Burzynski
by Hon. Michael Panter (Ret.’d)

Hon. Michael J. Panter, sat down with Ted Burzynski to talk about his work with Paramount Pictures and negotiating acting and production credits for motion pictures. Burzynski is now a Chicago-based agent with King Thaddeus Group which provides business affairs and development assistance to those in the entertainment industry and has his own law practice, Burzynski Firm. Panter is a recently retired judge of the Circuit Court of Cook County, IL. Here is an excerpt from their conversation:

How’d you get interested in [the entertainment business]?

It goes back to high school. I was a musician in high school. Our high school jazz band was good enough to perform and make money and I started recording and working in recording studios. I had my own little sound company, so I provided recording and live sound assistance to bands. I went to Columbia College in Chicago, and I took sound engineering, film, and music theory. And then I decided to go to law school.

What did you do after law school?

About a year after law school, I landed at Paramount Pictures. I applied as a secretary. I had my law degree, and quickly moved up in the department, called Credit, Title, and Production Legal.

Basically we were responsible for managing and preparing the credits for the motion picture. They’re called the main title (which is the front end of the picture) and the end title (all the credits that everybody walks out on most of the time), all of the paid advertising, billboards, the one sheets or posters, radio spots, TV spots. It evolved as I was there into doing all the location agreements,
aircraft agreements, all the support, everything except the A-list talent. That was done by the project attorneys.

There’s plenty of stories. Some of the stories involving credit always dealt with someone wanting to give a credit that the studio had a policy not giving it. Our goal was to give credit to people who had a creative input into the production.

One time a producer had come in and asked to have a credit given for the honeywagon driver. The honeywagon is the truck that is basically the port-a-potty. The port-a-potty driver happened to be a nephew, a relative of the producer . . . I included it because that was one of those things and it was actually Dick Zanuck, Richard Zanuck, who asked for that credit on a motion picture slate. I obliged.

Talk a little bit about credits. How does it work?

Basically, [credits] are negotiated and they’re also guided by the various guilds, so you have the Directors Guild, you have the Writers Guild at that time. Now there’s a Producers Guild. The director and the writer, they’re kind of tied together. When the director’s given credit, a writer has to be given credit. There’s situations that involve [the writer getting credit if the director is] and then it’s all controlled by the size, style, and type. [Writer and Director credits] has to match.

We had a situation where on one of the motion pictures, the credits expanded. They started real small and then they expanded into something big and then they dissolved. The Directors Guild had objected to it because they said on some of the credits the writer’s credit and the director’s credit weren’t matching up.

We had to find point in time when the credit was at its maximum and brightest and the then measure that compared to the other credit. They found out that they were even because the companies that create the titles were very respectful about [matching director and writer’s credits] and they knew that we would have these challenges to credits and have to resolve these credits. Those are some of the things that would pop up in creating the main titles and the end titles.

How do credits get negotiated?

Well, it’s really based on how big the talent is at that time, okay? Who gets first, who gets second, it’s all negotiated. Sometimes it can get heated.

Some prominent performers that you can’t give top billing will ask for an “and,” so “and so and so” is involved in the picture. Basically once they negotiate [credits with an “and”], the Guild and the rules and the regulations will guide size so that nobody gets something bigger than the other person.

Some of the other talent, they’ll negotiate [and] try to get what’s known as a single card credit, which means that image of the person’s name is all by itself on the screen. That would be even though [the credits] might be rolling, if you watch in the end titles, sometimes there’s a big gap between a credit like a visual effects supervisor or a unit production manager. That’s considered a single card even though it’s rolling all the way through. . . . Sometimes you would negotiate for [a single card credit]. They were always able to resolve it because they already knew . . . who’s walking in who’s going to get what at what point and then you had the people with two names on one card and that type of thing.

The biggest issue? All the producers. There were so many people involved in a picture that they would sometimes hand out producer credits, associate producer credits. You would have nine, ten producers. They really, all they did was attach themselves to the project. They weren’t really the person who actually managed and produced the picture.

That’s kind of settled down a little bit because now the Producers Guild of America has negotiated and tried to control how many producer credits there are. They weren’t regulated [before the Producers Guild], so they were handing them out based on someone
introducing someone or bringing something into the picture.

When it goes to negotiation about credits, what are the terms? What do people say? What are the arguments?

A lot of times they want to restrict how their name is used or they want to tie it to another performer. For example, you can’t put their name on any feminine products or any type of cigarettes or any type of a vice type product that they wouldn’t want to be associated with. They’ll limit the scope of their use of their names.

Or they might try to have [their name] tied with another performer so that [their name is associated with the] other one person’s likeness. Which can actually cause problems, if they’re all tied together. Let’s say an actor wants to tie their likeness, so their image, to another actor and then that actor has it tied to the third actor. You have a daisy chain of actors, they’ll all tied together, so you couldn’t use all three on the billboard. You’d have a hard time putting it on a poster, let’s say.

What is a negotiation? How does it go? Does somebody come and say, “I want X type size?”

It’s controlled by the Guild rules. The Directors Guild and the Writers Guild have their rules. You can have a credit as big as you want, but what ends up happening is then you’d have to have all the other credits as big.

So they’re based on the proportion to each other?

Yes. For example, a Director of Photography has a credit provision, so their credit cannot be any smaller than another person’s credit in the agreement. They don’t have a guild that controls it, so they’ll negotiate to say, it’s not to be less than the director’s credit or they’ll tie it to production designer, they’ll tie it to a producer. It all depends on the contract.

Not all studios or production companies were tied to the guilds. They weren’t signatories.

You would have independent pictures who their credits were all over the place. Those are just individually negotiated based on that producer for that independent picture and how they wanted-

How do they figure it out?

That’s up to the producer and how much money and how much influence and how much they want that talent to be in there. On an independent picture, it’s the one thing you can give is a credit. You don’t want to screw that up because they’re not taking all the money—you’re saying, “Oh, I can’t pay you six million for this picture.”

“But I would give you more prominent credit...”?

Yeah. “I’ll give you more credit” or “I’ll give you first position” or single card or something of that nature. And then you can tie them to the director on the posters and the billboards. You can tie the likeness to another person. That’s why sometimes when you see an ad, at least during the time I was there, the marketing department would do an ad saying, “From the director that brought you Titanic,” right? Well, it doesn’t trigger anything because you don’t use the director’s name, but everybody knows who directed Titanic.

If they had said Cameron, then that-?

Then that triggers the writer’s credit and that triggers probably the director of photography, it triggers . . . Basically, that block on the bottom of the posters that you see? That is triggered based on the use of the name or the use of a title or something that happens.

The “Titanic” block, the joke was that it was a barcode. There were so many names and so many people tied to it that from a distance, that I remember the person I had to deal with at the Directors Guild, he said, “This is just a barcode.”

[The barcodes] were so thin and they were trying to pack it all in because they wanted the artwork to be prominent. They were pretty impressive. . . . Posters were called one sheets.
and the billboards were called thirty sheets. They were larger. They didn’t want the names on [the billboard]. It took from it, but they wanted to have certain names in there so when you mention DiCaprio and Winslet and you got to put the block in.

There were so many people tied to the credits that it was sometimes you couldn’t read it from the car. In fact, I remember the representative from the Directors Guild calling and saying, “I’m driving down Melrose and I can’t read that.” That’s the type of thing that happens with those.

**What about above the title?**

That was special. That was negotiated specifically for certain really A-list actors.

[The A-list actors] walk in. John Travolta or Jim Carrey or anybody else will say, “We need above the title.” That also has to get approved by the Directors Guild. They tended to hesitate to do that. They actually also controlled the main titles at the end of the picture. It’s kind of funny because in the end, you’ll have above the title credit at the end of the picture. You have the names of the performers, then you have the title, and then you go through all the regular credits again.

**Will the actors say, “I want X amount of dollars and I want above the title?”**

Well, they’re always arguing about the dollars first. And then they’ll say, “Oh, and I want above title credit.”

[Besides credit above the title]There are certain perks that they get in their contracts. You might be able to do something with the trailer or food service. Some performers had three trailers. They would make a compound for themselves during shoots. You might be able to give daycare service or something like that.

**Is it common that the actor gets not only the fee, but he gets a percentage?**

Yes. The deals are structured. Your A-list performers will usually get their compensation for the movie and then they’ll get a participation on the adjusted gross. It’s called **back end participation**, so they might get ten percent, five percent higher if they’re giving up more on the front end. You can have a fifteen million dollar payday for the performer and then they might have ten percent on what’s known as the adjusted gross.

Nobody really has ten percent on the gross number. This past weekend, “The Magnificent Seven” came out and they made thirty-five million dollars. Well, that’s a gross number. Nobody makes ten percent of the gross. There’s certain expenses that the studio will take out of that.

The writers at the time tended to get what’s known as net participation and the joke is that net participation is zero because you back out all of the expenses and then you back out all these other deductions and you never see the money. There have been films that had made a lot of money too fast where people have sat in meetings saying, “We’re going to have to pay out net because we can’t calculate interest enough to pay it down.”

There’s always these discussions about they’re cooking the books and [net participation]. On the top level, the bigger studios don’t cook them. They can’t. They can’t afford to. They answer to shareholders and they just don’t need that type of problem. Smaller productions, it happens all the time. Someone just decides that, “This is an expense and I’m not going to pay you anything.”

That’s unfortunate because it leaves a sour taste in everybody’s mouth, especially when people are trying to do things. **They see a small independent movie and they want to make some money and get some exposure, but they should be fairly compensated.** Sometimes the producers just decide, “Well, I’m making pretty good money. I just won’t let them know how much I make.”

**It becomes a struggle with accounting.** There’s been some discrepancies in how they describe certain compensation with the talent.
Tommy Lee Jones recently won a victory against a studio because of the way the language was worded. It ended up being a scrivener’s error on the part of the project attorney and it cost the studio some money. . . The studio would have tax attorneys who would look at it and structure the deals in such a way so that it was advantageous to the studio, but also provided a benefit to the performers.

Before the guilds, how did actors and studios negotiate credits?

If you look at the old movies, it’s interesting. Everything was at the front end, but there weren’t a lot of credits. You really had a limited amount of credits. Obviously you had the title of the movie, then you had the stars you wanted to have in there and then there’d be a whole card of just all of the support characters.

You never see any of the real background characters who had maybe a couple lines of dialogue. There’d be a couple cards of that and then they’d have another card with the costume designer. You’d always see Edith Head, who was a big costume designer. You’d see the photographer, you’d see an associate producer, and then, the picture. At the end of the movie is “The End” and everybody walked away.

At Paramount we tried to keep the credits within three minutes at the end. That was kind of the challenge too because we had partnership deals with other smaller production houses and they would want to give a lot more credit. I would say, “Well, we’ve got a three minute rule.” At the time, you couldn’t roll it too fast because it could cause vertigo. We had to be careful about time and it’d cost money for every foot of film and then you’d duplicate that: 3500 theaters you were releasing in. That is a lot of money when you add another minute of film.

Now it’s digital, distribution is a lot easier. You don’t have to worry about producing the actual film, but I used to have a lot of discussions about adding credits. I’d have to say, “No, we can’t add all those because we’re at the top end of our time limit.” [People] would get angry and they’d probably go and they’d have to try to validate it with my superiors. Most of the time, we were able to push back. It was the bigger companies, the bigger directors, that wanted to add credit and the co-productions. There was a time when Steven Spielberg’s office asked me to give credits to the truck drivers. Well, if Steven Spielberg says something, you kind of jump and do it. You’d have those situations.

Are you always hearing, “Well, you did it in this case, so why won’t you…”?

Correct. You try to explain that it’s always different. At some point, someone says, “Well, you gave credit on this.” I’d say, “No, we didn’t because that was a co-production and we had to work with the other studio on the other production company and that’s why we gave it.” . . . Usually what they’re arguing is for people who don’t have an agreement for that. A lot of people work hard on these pictures and there are a lot of people who work on them. Sometimes it gets really excessive.

Is there any rule about how fast the credits can roll?

Just fast enough so it doesn’t cause you to get sick.

When you see them on TV? [The speed is] ridiculous.

That’s because if you look, actually those credits are cut most of the time. They’re cut down to the contractual obligations. It’s a good question.

Let’s say a visual effects company is on a motion picture. They’ll have a provision that says you have to put these people in. There’s other people who you can cut. This is how they edit it, but they do that for time. There’s no requirement.

If you look, if a company has all end title credits, meaning all the main titles are at the back end, the main titles will flash a little quicker, but they’ll be full screen. Once they get to the end title credits which would be on the back, those things
scroll super-fast and then they'll squeeze the picture box down and you can't really read it. They're fulfilling the obligation on those credits at that point. . . . Once the end titles run and
we fulfill our contractual obligations, we can do anything we want after that [like outtakes].

Any other thoughts or stories about negotiating these credit disputes or perks or other things?

Titles of motion pictures, you cannot trademark them. They're not trademarked, they're not protected unless they establish their own independent significance like “Star Trek,” or “Star Wars.”

Basically, the major studios are signatories to the Motion Picture Association of America. There was a sheet that was put out that “Such and such studio was looking to use this title.” Now other people would have registered their titles, other studios, and so there's this positioning for titles and then there's a negotiation for the title.

There were people who didn’t make motion pictures, but they signed up to be signatories and all they would do is read the trades and find out that something would come up and they’d register the title before, let’s say, Paramount did. They’d hold that title hostage and make money by saying, “Pay me X amount of dollars and I’ll let you use this title for your picture.” They had no intention of ever using it, they just basically were squatting on these titles.

You said you couldn’t trademark titles?

You cannot. As a signatory to the Motion Picture Association of America, they had this process in order to negotiate and work out the title issues.

I could not trademark a title “The Story of Ted Burzynski” and then if you want to make your picture, you have to buy it from me.

If you had a trademarked name, what I would end up doing is there would be basically a search done. This is another aspect of the business affairs department. That search would look at all actually names of people in it and titles and other things that would generate a report. It would say, “Here’s a name of a business here. Here’s a name of a person” to avoid that type of conflict.

We’d have to look at the strength of the mark and whether the mark would be, in what category is it, are we going to end up being in a conflict with that mark? It actually happened recently. “Empire,” the TV show on Fox, had an issue where someone who had a record company called Empire filed a lawsuit. I’m not sure if that’s been resolved. It might have been to the studio’s favor at that point, but that’s the type of thing that you have to watch out for. **If you have a particular mark and we’re going to use it for the motion picture, that would be a concern of ours.** Now we could go in and negotiate, say we want permission to use this, we’ll pay you X amount of dollars to do it. That's happened, too.

The other problem I wasn’t involved in but I would hear from other people in the company is the translations of titles in other countries, especially in Asia. It’d come out to be something really rude or something really bad, so we’d had to change the entire name in another country. . . . [Titles can be different in another country] because it either conflicts with somebody else like in certain countries—they look at trademarks and copyrights and things like that a lot differently. The other thing is, it translates into something that's offensive, odd, or doesn't make any sense. That happens quite often.

What about writers credits?

There’s a difference between writers credits when there’s an ampersand and then “and.” Sometimes you have a motion picture where a writer starts the first draft and that’s it. They get paid and that’s why they have net participation because they get paid and maybe somebody decides, “Ah, I want to have a rewrite.” It could go through several writers. There could be writers that get paid a lot of money just to punch up women’s dialogue. It’ll go through different hands before you get a draft that’s the shooting draft.
Even during the shoot of the motion picture, it changes. There could be fifty different revisions. On the top of the script, it’ll go through different color schemes, have a date when these changes were made. Those changes could be made because dialogue, they say, “I don’t like that” and the actor says, “I want to do that” and they’ll make the change. In the end, they have to submit a final draft to the Writers Guild.

That’ll be the draft. That’s the draft the Writers Guild then approves the credit for the writers. When you see a writers credit and it has an ampersand, that’s a team. When you see an “and,” that means two different writers contributed a certain percentage, a significant portion to that picture. They didn’t write it together, but he wrote and he has enough according to the Guild, and this other writer too since she [contributed] enough. The Writers Guild would actually have to have a team of writers that were members to review it and make a decision on that.

I have seen where writers, even people like Leonard Nimoy, would submit, “Here’s sixteen pages I wrote that should be submitted for your arbitration for the decision to be made.” The Writers Guild would make that decision. Directors would get credit and they’d go, “I don’t want the credit.” “Well, yeah, but you contributed X amount of pages.” “Well, I don’t want it.”

Sometimes a director didn’t want to have his name associated with [the film], there’s been history to that. There’s a credit that they give out. It’s an “Alan Smithee film.” It’s a generic name they give out for that, too. I’ve had situations where I had to go with one of the labor attorneys and we had to get rid of a director right in the middle of the production.

Do you go to all the movies?

[After I left Paramount] I didn’t see a movie for years. I stopped. I just couldn’t. It was very difficult for me.

To be [in Paramount’s] theater, in a respectful theater, people weren’t eating, people weren’t talking, cell phones weren’t on, they were actually watching the show and it was quiet. The movie would finish and people would stay to the very end and then clap. It was a great, great environment. I really felt blessed working on the lot at Paramount. It was a lot of fun.

I’m a big Star Trek fan. At the time, we had several TV shows going and we had the movie Insurrection going. I got to walk the lot and see people. I would go have lunch at the roach coach, which is the food wagon, and I would be standing in line with Klingons and aliens. These were extras who were shooting. There’s a blue face guy here, there’s a Klingon over here. The Klingons, you had to be over six feet tall to be a Klingon, so they’re menacing looking.

We had a perk. We would get to see pictures on the lot for free and the studios would share their motion pictures with each other. Not before they were released, but after, so I really didn’t pay to see anything. We came out and it was late. The TV shows had to shoot so many pages of their script a day in order to make the broadcast. We were walking down this street, there’s a truck parked and it’s dark, and there are just street lamps on the studio buildings. We come around, and—I don’t know if you’re familiar with Star Trek—there’s an enemy called the Borg. They’re Cyborgs and they have laser lights. We turned a corner and I saw this massive darkness and there were all these extras. They all turned and they had their red lights on and they all pointed at me. I literally jumped and they all laughed because it looked like an attack from the TV show. The best thing in the world is that they were just laughing and we had a good time. That’s the type of thing you saw on the lot. Those are special moments. You really got a sense of what you were doing and I’ve always liked the ability to give people an opportunity to escape to.

That’s something that I want to do is to have that same feeling when I saw Star Trek, or Star Wars the first time back in ‘77. I’m still chasing that dream.
LETTER FROM THE CHAIR

Dear Forum Members

I am pleased to present the summer issue of the Entertainment and Sports Lawyer. A special thanks to our Editor in Chief, Brian Rosenblatt, and his staff of editors, authors and contributors for their continual hard work in providing another great collection of innovative articles and topics.

This issue marks the end of my term as your chair and I am forever grateful for the opportunity to serve all of you and look forward to continuing with the Forum for many years to come. I am also very excited for what is in store for the Forum under the aegis of my successor, Len Glickman.

Registration is now open for our Annual Meeting at the University of Nevada and Cosmopolitan Hotel in Las Vegas on October 5-7, 2017 at https://www.americanbar.org/groups/entertainment_sports.html and the board has put together another excellent program. In addition to the amazing array of esteemed panelists, bleeding edge topics and specially curated private tours, we are proud to have three amazing keynote speakers this year, including former Senator Harry Reid, CEO of Broadway Video (producers of Saturday Night Live) and Travis Tygart, CEO of the U.S. Anti-Doping Agency. I hope to see you at this special event and suggest that you book your rooms early as October is a busy time in Vegas.

Our various divisions are continuing to roll out webinars and other events throughout the year including the “The Past, Present, and Future of Sports” in Orlando in October and “The Rules of The Road—Current Issues in Touring in the Entertainment Industry” at the ABA Annual Meeting (not to be confused with the Forum Annual Meeting) in New York on August 11th which can be attended as a stand-alone panel for local members.

We appreciate your continued support of the Forum and are always happy to hear any feedback as to how we can better serve your needs. Should you have any questions about your Forum membership or our initiatives moving forward, please do not hesitate to contact the forum staff at ABAESForum@americanbar.org.

Best regards,
Janine Small