

Volume 34 Issue 3

Spring 2018

Letter From The Chair

Dear Forum Members,

The Forum has been very busy since our fantastic Annual Meeting at the Cosmopolitan Hotel in Las Vegas in October of last year. Before providing you with an update, I unfortunately have some sad news to share. Richard Rappaport, one of our Governing Committee members, and the founder of our Miami Entertainment Law Symposium, passed away in December of last year. The Forum honoured Richard at this year's Miami Entertainment Law Symposium by establishing the Richard Warren Rappaport Memorial Lecture Series. The inaugural Richard Warren Rappaport Memorial Lecture was delivered by author and associate professor of journalism and writing at the University of Tampa John Capouya on the subject of his newly published book *Florida Soul: From Ray Charles to KC and the Sunshine Band*. Richard's partner, Renee Katz was present for the highly entertaining and informative presentation.

In addition to having a successful Miami Entertainment Law Symposium at the Palms Hotel in April of this year, several members of Forum leadership were at the Grammy Awards in January as a sponsor of the Grammy Foundation's Entertainment Law Initiative Writing Competition, at SXSW in Austin, at our Leadership Meeting in Montreal and at MIDEM in the south of France. In addition, the Forum has been selected to present one of the six ABA CLE Showcase Programs at the 2018 ABA Annual Meeting in Chicago. The panel is entitled "The Right (or not) to take a Knee: Social Activism and Freedom of Speech in Sports and Entertainment." The moderator of the panel will be ESPN's Michelle Steele and confirmed speakers are Big Ten Commissioner Jim Delany, Tampa Bay Buccaneers General Counsel David Cohen and NFLPA Vice President of Business and Legal Affairs Casey Schwab.

The Planning Committee for this year's Annual Meeting in October in Las Vegas has been hard at work. Please save the dates – October 4 to 6, 2018 at The Cosmopolitan Hotel. This year is the Forum's 40th anniversary and to celebrate the occasion, the Forum has invited back all of the living Forum Past Chairs to honour their past contributions to the Forum. I am extremely pleased to report that Jay Cooper, Ed Pierson, Michael Rudell, Pam Lester, Joel Katz, David Given, Ken Abdo, Lon Sobel, Kirk Schroder, Richard Idell and Janine Small

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have all confirmed their attendance at the annual meeting. I am also pleased to announce that one of our featured speakers at the Annual Meeting will be Rachael Denhollander, the first gymnast to go public with sexual assault allegations against Dr. Larry Nassar. It was Rachael's heroic efforts that lead to Dr. Nassar's conviction and a \$500,000,000 class action settlement with Michigan State University. Rachael was recently named by Time Magazine to its 2018 list of the world's 100 Most Influential People. We are hoping to get the registration page for the Annual Meeting up by the end of June.

As always, we welcome your involvement in the Forum. We are always looking for articles for our marquee publication the Entertainment and Sports Lawyer, so ably helmed by our Editor-in-Chief Brian Rosenblatt. Please submit any proposals you have for articles to Brian at brosenblatt@bdlfirm.com. If you have an idea for a webinar for our newly revamped webinar series, please submit it to our Webinar Co-Chairs Bob Pimm (bob@rgpimm.com) and Steve Weizenecker (sweizenecker@btlaw.com). We are always looking to add people to our leadership roster so if you would like to become more involved in the Forum, please reach out to me at the Annual Meeting or otherwise.

If you have any questions, feel free to contact me directly at 416-869-5993 or lglickman@casselsbrock.com or contact our Forum Manager Bernadette Steele at 312-988-5868 or Bernadette.Steele@americanbar.org. Look forward to seeing you in Las Vegas!

Best regards,

Len Glickman

Chair, ABA Forum on the Entertainment and Sports Industries

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Letter from the Editor

“The Future is unwritten.”—Joe Strummer

Dear Forum Members,

Welcome to Issue 34:3 of the *Entertainment and Sports Lawyer*! Yes, we know this issue was a bit delayed, but hey! That’s Rock and Roll! And, I think you’ll agree...the wait was worth it!

This issue features one of our most popular returning writers, John Wendt and his article “The PyeongChang Olympics—The Peace Games?” Nancy Holtz shares with us an in-depth review of *Rentmeester v. Nike, Inc.*, and the Jumpman logo in “Its Jumpman at the Buzzer!”. Peter Dekom shares with us a perspective that we can all appreciate in “Real Fake News”. Michelle Wahl and her team of writers once again has assembled another stellar Litigation Update. Carla Varriale takes a peak at a rather seedy trend and available defenses in “What’s Love Got To Do With It?: Copyright Laws and ‘Revenge Porn’”.

Each year, the *Entertainment and Sports Lawyer* is honored to run the winning paper from the Grammy Foundation’s Entertainment Law Initiative Student Writing Competition. The national ELI competition, open to law students enrolled in an accredited ABA law school, challenges students to research and write a 3,000-word paper on a compelling legal issue facing the music industry. Law students must also provide a proposed solution to the problem they present in their essays. This year, we are running two papers! Rebecca Pollack was the grand prize winner of this year’s Entertainment Law Initiative Student Writing Competition, and hers was truly an exceptional article. A 3L at the time she wrote “Innovation or Exploitation: Is It Time to Update the DMCA Safe Harbors?”, Rebecca recently graduated from Lewis & Clark Law School. The paper addresses the Digital Millennium Copyright Act § 512 Safe Harbors and the current discussion between copyright holders and online service providers regarding whether the safe harbors are effective or need to be updated. We are also fortunate to run Megan Abner’s runner-up paper, “Effects of the FCC’s ‘Internet Freedom’ on the Music Industry and Potential Collaborative Solutions.” At the time she wrote her paper, Megan was a 3L at Cardozo School of Law. Ms. Abner graduated in May 2018.

“Once in a while you get shown the light, In the strangest of places if you look at it right”...one of my favorite lines by Jerry Garcia and Robert Hunter. Every once in a while, we are privileged to receive an article from a law student that poignant and remarkable. In this issue, we are thrilled to share with you Andrew Jenkins’ (3L at University of Oregon School of Law) opinions in “A Law Student’s Perspective: **Seeing Stars: Criminal Liability for Coaches Who Endanger Concussed Athletes**. Some coaches do not remove potentially concussed athletes from games or practices, despite the possibility of a civil suit. It is time to consider criminal sanctions against the coaches who allow possibly concussed players to enter a game or practice without being medically cleared. Prior attempts at legislating have failed to remedy this problem. These athletic coaches are violating a duty they have to their athletes but are not the ones paying the price for it. The athletes are paying the price in the form of permanent brain damage and life-long mental health problems.

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

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The pending deadlines for article submissions are:

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|---|-------------------|
| • Summer 2018 (anticipated July Publishing) | May 15, 2018 |
| • Fall 2018 (anticipated October Publishing) | August 15, 2018 |
| • Winter 2018/2019 (anticipated January Publishing) | November 15, 2018 |
| • Spring 2019 (anticipated April Publishing) | February 15, 2019 |
| • Summer 2019 (anticipated July Publishing) | May 15, 2019 |

Please, come speak with me at the Annual Meeting in Las Vegas, and share with me your ideas for the Journal.

Best,

Brian A. Rosenblatt
Bryce Downey & Lenkov LLC
Editor-in-Chief, Entertainment and Sports Lawyer

The PyeongChang Olympics—The Peace Games?

by John T. Wendt, J.D., M.A

In late 2017, the Democratic People's Republic of Korea (North Korea) conducted several missile launches and a series of nuclear tests that resulted in the imposition of sanctions by the United Nations Security Council and the United States. North Korean leader Kim Jong Un and US President Donald Trump engaged in bellicose saber rattling, traded barbs about destroying each other's nations, and boasted about the "nuclear button" on the desks of their respective offices. Meanwhile in the city of PyeongChang, South Korea, just 50 miles from the Demilitarized Zone, preparations for the XXIII Olympic Games were being finalized. South Korea's President Moon Jae-in said, "We must stop a situation where North Korea miscalculates and threatens us with nuclear weapons or where the United States considers a pre-emptive strike."¹ Moon also stated that, "We are well aware of the concerns the IOC and the whole world have regarding the Korean peninsula. . . . A successful hosting of the Pyeongchang games would erase worries over security and show the world regional peace and stability on the Korean Peninsula."²

The French,³ Austrian,⁴ and German⁵ Olympic Committees all expressed concerns over the potential for danger. The White House administration sent mixed messages about US participation in the Games when UN Ambassador Nikki Haley said that it was an "open question," and yet within a few hours, White House spokesperson Sarah Huckabee Sanders said, "The U.S. looks forward to participating in the Winter Olympics in South Korea."⁶ When asked if the President could prevent US athletes from going, Scott Blackmun, Chief Executive Officer of the United States Olympic Committee (USOC) said, "We'll leave that to the constitutional lawyers. . . . We are going to take a team to PyeongChang unless it's physically impossible or legally impossible to do that. So we are 100

percent committed to our athletes on that but don't want to get into a discussion around what the legalities might be."⁷ Finally, while US alpine skier Julia Mancuso had initial concerns, she later joked about her family joining her at the Games, saying "You could be like, 'If you go down, we're going down together.'" ⁸

Early on, one columnist suggested a different approach, noting that the North Korean figure skating pairs of Ryom Tae-Ok and Kim Ju-Sik performed well enough to qualify for the Games. The suggestion was that if they and other North Korean athletes and coaches were in PyeongChang, the less likely that there would be an attack from the North. Two-time US Olympic gold medalist Ted Ligety said, "It's kind of an insurance policy to have them there . . ." ⁹ Choi Moon-soon, the governor of Gangwon Province in South Korea, which includes the city of PyeongChang, encouraged the idea saying, "North Korea is my biggest worry. . . . It's not because of North Korea making an impact on the Olympics, it's that if North Korea can participate, then it will make a great contribution for our goal of hosting a Peace Olympics, and it will be a great selling point."¹⁰

Surprisingly, in a New Year's speech, Kim Jong Un stated that "[t]he Winter Games to be held in South Korea will be a good occasion for the country. . . . We sincerely hope that the Winter Olympics will be a success. . . . We have readiness to take various steps, including the dispatch of the delegation."¹¹ Yet, the same speech threatened that the entire United States was within range of their nuclear weapons. International Olympic Committee (IOC) President Thomas Bach hailed the announcement about North Korea's possible participation saying, "When the Olympic Winter Games Pyeongchang 2018 begin in just a few weeks it will be the first time that the magic of Olympic sport on snow and ice will come to the Republic of Korea. . . . At the same time, we know about the political tensions on the Korean Peninsula. . . . The Olympic Games are about dialogue. . . . In our troubled times, they are the only event that bring the whole world together in peaceful competition."¹²

Representatives from North and South Korea met several times to discuss participation in the Games. Moon Chung-in, a special advisor on foreign affairs and national security to South Korea's President Moon said, "When the ancient Greeks used to hold the Olympics, they held a truce. . . . We are living in a civilized world. It is the logical choice."¹³ In subsequent meetings with the IOC and the PyeongChang Organizing Committee for the 2018 Olympic & Paralympic Winter Games (POCOG), South and North Korea agreed to march under the name "Korea" with the Korean Unification Flag at the Opening Ceremony, and the IOC granted Games' accreditations to 22 athletes in 3 sports and 5 disciplines from North Korea, as well as 24 officials and 21 media representatives. IOC President Bach talked about the ability of sport to transcend by saying, "The Olympic Games are always about building bridges. They never erect walls. The Olympic spirit is about respect, dialogue and understanding. The Olympic Winter Games PyeongChang 2018 are hopefully opening the door to a brighter future on the Korean peninsula, and inviting the world to join in a celebration of hope."¹⁴

However, not everyone greeted the news so positively. Japanese Foreign Minister Taro Kono warned about North Korea's sudden "charm offensive" saying, "It is not the time to ease pressure, or to reward North Korea. . . . The fact that North Korea is engaging in dialogue could be interpreted as proof that the sanctions are working."¹⁵ Some South Korean lawmakers questioned whether the potential problems were worth the political gains. South Korean parliament member Kim Ki-sun said, "Many people worry that North Korea is taking advantage of the Pyeongchang Olympics to publicize its political propaganda. . . .How long did the peace last after the two Koreas marched together in past games?"¹⁶

Kim Yo Jong, sister of Kim Jong Un, was included in the delegation of officials from North Korea, marking the first time a member of North Korea's ruling family visited South Korea since the end of the Korean War.¹⁷ She also serves

as the Deputy Director of the Propaganda and Agitation Department for North Korea. In addition to attending the Opening Ceremony and other meetings with international officials, Kim Yo Jong also extended an invitation to President Moon to visit to Pyongyang, North Korea, who replied by suggesting the two countries "should work on establishing the right conditions to realize the meeting."¹⁸ Meanwhile, Vice President Mike Pence, representing the United States, stated, "We're traveling to the Olympics to make sure that North Korea doesn't use the powerful symbolism and the backdrop of the Winter Olympics to paper over the truth about their regime."¹⁹

Russia Redux?

Columnist Christine Brennan summed it up succinctly, "Another Olympics is nearly upon us and once again, we're not focusing on the athletes. Of course we're not. We are focusing on Russian doping. It wouldn't be a run-up to a current-day Olympic Games if we weren't."²⁰

In December 2014, ARD, the German television broadcast channel, broadcasted a 60-minute film by journalist Hajo Seppelt entitled, *Top Secret Doping - How Russia Makes Its Winners?*, that alleged a highly sophisticated and successful systematic state-sponsored doping program in Russia.²¹ The film featured Yuliya Stepanova, one of Russia's premier middle-distance runners, and her husband Vitaly Stepanov, a former employee of the Russian Anti-Doping Agency (RUSADA), who turned informants. It also showed secret video and audio recordings showing Russian sports officials, coaches, and athletes discussing the use of banned performance-enhancing drugs.²² The film also featured Dr. Grigory Rodchenkov, the former chief of the Moscow lab and at the heart of the Russian doping scandal who later turned whistleblower. Rodchenkov fled to the United States, and in an interview with *The New York Times* admitted that he helped athletes cheat and was a part of the entire conspiracy.²³ *60 Minutes*, the CBS television show, also reported stories regarding a Russian state-run doping during the 2014 Olympic Games in Sochi, Russia.²⁴

So shocking was this documentary that the World Anti-Doping Agency (WADA) established an Independent Commission (IC) “to conduct an independent investigation into, inter alia, doping practices in Russia, corrupt practices around sample collection and results management, other ineffective administration of anti-doping processes in Russia, the Moscow Laboratory and RUSADA.”²⁶ The IC was comprised of Richard W. Pound, former president of WADA; Professor Richard H. McLaren, longstanding Court of Arbitration (CAS) arbitrator; and Gunter Younger, head of Department Cybercrime with Bavarian Landeskriminalamt (LKA). Their reports lead to the suspension of RUSADA, the Moscow Anti-Doping Laboratory, and the All-Russia Athletic Federation (ARAF). WADA also appointed McLaren to further investigate the allegations against Russia. McLaren’s Report described “a fraudulent, government directed scheme to protect Russian athletes from Anti-Doping Rules Violations (ARDVs), including with respect to disqualification during the Sochi Winter Games.”²⁶ McLaren went on to describe a massive fraud and that “[i]t can’t possibly be done by a couple of rogue individuals, or even a rogue department of an organization.”²⁷

However, because Professor McLaren did not have the authority to bring forward ADRV cases against individual athletes, the IOC also established two commissions: the Oswald Commission (chaired by IOC member Denis Oswald), to investigate alleged doping violations by Russian athletes at the 2014 Games held in Sochi, Russia; and the Schmid Commission (chaired by Samuel Schmid, former President of the Swiss Confederation and member of the IOC Ethics Commission), to look at the allegations of systematic manipulation of the Russia anti-doping system.²⁸ Based on the results of the commissions’ investigations, the IOC would decide during its Executive Board’s session on December 5, 2017, whether the Russian national team would be allowed to take part in the 2018 PyeongChang Olympics.

The Oswald Commission suspended 22 athletes in November 2017,²⁹ and another 21 athletes in December 2017. Investigators relied heavily on

that Rodchenkov was a “truthful witness.”³⁰ The Oswald Commission also annulled results from the Sochi Olympics and gave lifetime bans to several Russian cross-country skiers, skeleton racers, skate racers, and bobsledders.³¹ At the end of 2017, 42 of the 43 athletes filed appeals with the CAS.³² The CAS convened two panels to hear the cases individually.³³

The Schmid Commission confirmed a massive, systematic state-sponsored doping program designed to give Russian athletes an unfair advantage.³⁴ The Schmid Commission recommended to the IOC Executive Board that the Board take appropriate measures to “effectively sanction” Russia, protect the rights of clean, individual Russian athletes, and consider the costs incurred by the commissions, investigations, and re-analysis of samples.³⁵

IOC President Bach called the Russian doping scandal “an unprecedented attack on the integrity of the Olympic Games and sport . . . [and that the] IOC EB, after following due process, has issued proportional sanctions for this systemic manipulation while protecting the clean athletes. This should draw a line under this damaging episode and serve as a catalyst for a more effective anti-doping system led by WADA.”³⁶ That response included the immediate suspension of the Russian Olympic Committee (ROC) and Anti-Doping Lab. Russian Sports Minister Vitaly Mutko was barred from the 2018 Games. ROC President Alexander Zhukov’s membership in the IOC was suspended. No members from the Russian Ministry of Sport for the Olympic Games were given credentials to PyeongChang. The ROC also had to pay a fine of \$15 million in US dollars to the IOC.³⁷

The IOC did create a path for “clean” Russian athletes, but only under the name “Olympic Athletes from Russia (OAR).” If an OAR athlete would win, the Olympic anthem, not the Russian anthem, would be played. Russian athletes would not march under their own flag, but rather the Olympic flag.³⁸ This is the first time the IOC prohibited a country competing under its own flag for doping. Two-time former Olympic champion and member of the Russian Duma Svetlana

Zhurova emphasized how devastating this is by saying, “You feel so proud when you see your flag, it’s very important for yourself and your country. It has to be individual responsibility, not collective.”³⁹ Two-time world champion Russian figure skater Evgenia Medvedeva also emphasized how devastating this is by stating, “I cannot accept the option that I would compete in the Olympic Games without the Russian flag as a neutral athlete. If I perform without a national flag, I will not be able to compete in the team. At the same time, my other rivals will have this opportunity. The Olympic Charter states that all athletes should have equal opportunities. And in this case there can be no question of equality.”⁴⁰ Even former Soviet leader Mikhail Gorbachev said, “This is a disgrace that undermines a very important institution of international cooperation.”⁴¹ Gorbachev also went on to say, “It’s just bad, and that’s it. . . . It’s sports, damn it.”⁴²

To create a path for “clean” Russian athletes the IOC created two special commissions, the Invitation Review Panel (IRP) and the Olympic Athlete from Russia Implementation Group (OARIG), to determine the pool of Russian athletes who could possibly be invited by the IOC to take part at PyeongChang as OARs. Only athletes who met the pre-Games testing requirements would be accredited for the PyeongChang Games. The evidence that the IRP would examine included, among others, evidence of suspicious steroid profile values, DNA inconsistencies and irregularities of the Athlete Biological Passport, evidence provided by the McLaren and Schmid Reports and the Disciplinary Commission, additional confidential information provided by WADA, and intelligence provided by Olympic Winter Sports Federations and the Pre-Games Testing Taskforce.⁴³ Of the approximately 500 names submitted, the Panel cleared 169 Russian athletes.⁴⁴

Surprisingly not among the “cleared” athletes were Sochi gold and silver medalist figure skater Ksenia Stolbova and ice dancer Ivan Bukin—neither of whom were sanctioned for doping at the Sochi Games. The Russian Figure Skating Federation stated that they were “deeply disappointed in this baseless IOC decision which

is reminiscent of a provocation with the aim of forcing Russian athletes by any means possible to decline to participate in the games.”⁴⁵ Viktor Ahn, the world’s most successful short-track skater, was also left off the list despite never being sanctioned. Ahn, who was born in South Korea, but competed for Russia at the 2014 Sochi Games, argued that “[d]uring [his] entire career journey in short track, [he has] never given a reason to doubt [his] honesty and [his] integrity, especially when it comes to [his] victories which [he] achieved with nothing but [his] strength and dedication.”⁴⁶ IOC President Bach noted that “[i]f an athlete is not on the list then the independent panel has serious indications by different sources and by different means. There could be a suspicion, there could even be an ongoing procedure. There could be many factors which did not lead to the satisfaction of the panel. The purpose is to invite clean Russian athletes for which this panel is certain and has not the slightest doubt or suspicion.”⁴⁷

Still, others were concerned that the Russians could compete at all. For the 2016 Summer Olympic Games in Rio de Janeiro, Brazil, instead of a complete ban on Russian athletes, the IOC Executive Board left it to each International Federation to determine the fate of Russian athletes based on a case-by-case individual analysis of each athlete’s own international anti-doping record.⁴⁸ Richard Pound, the IOC’s longest-serving member and first president of WADA said, “Suspending the Russian team was a good start, but the farther down I got in reading the account of all of this, the more I realised [sic] that 99 per cent of what it was dealing with was how to get the Russians back in. . . . They haven’t atoned for or acknowledged, or taken any steps whatsoever, to guarantee that the same sort of thing won’t happen again. It simply looks as if, when you’re dealing with the IOC, if you deny, deny, deny and you happen to be a big country, just keep denying because they’ll find a way to let the athletes from your country participate.”⁴⁹

As previously mentioned, 42 Russian athletes appealed their bans to the CAS. On February 1, 2018, the CAS Panels upheld the appeals of

28 athletes and partially upheld the appeals of 11 others. The CAS Press Release noted that “[the] evidence put forward by the IOC in relation to this matter did not have the same weight in each individual case. In 28 cases, the evidence collected was found to be insufficient to establish that an anti-doping rule violation (ADRV) was committed by the athletes concerned.”⁵⁰ With those 28 athletes, their bans were annulled and their achievements at the Sochi Games were reinstated. For the other 11 athletes, the CAS found that there was enough evidence to establish an ADRV, and their bans were extended only to the 2018 PyeongChang Games, not lifetime. The Panels noted that their mandate was “not to determine generally whether there was an organized scheme allowing the manipulation of doping control samples in the Sochi laboratory but was strictly limited to dealing with 39 individual cases and to assess the evidence applicable to each athlete on an individual basis.”⁵¹

Some saw the decision as a blow to the IOC’s anti-doping efforts. British IOC member Adam Pengilly said it was “a desperate and dark day for sport, with cheats and thieves allowed to triumph.”⁵² Pengilly went on to say that “[w]e need to take a long, hard look at sport’s leading administrators and sport’s legal system when we see the greatest fraud at an Olympic Games and years of institutional doping conspiracy pass by with only minor punishment.”⁵³ WADA Vice-President Linda Helleland of Norway called for an “independent” investigation of the entire process, including the CAS, saying, “Since the McLaren Report was published I have followed the different decisions, and consequences of the decisions, with deep concern. . . . The situation, which we now find ourselves, is very chaotic. Clean athletes and sport fans around the world have lost confidence in the system. . . . The situation is untenable.”⁵⁴

IOC President Bach even said that he found the CAS decision “extremely disappointing and surprising; we never expected this.”⁵⁵ He also criticized the CAS saying that “[w]e feel that this decision shows the urgent need for reforms in the internal structure of CAS.”⁵⁶ Bach also noted

that the IOC Executive Board “is not satisfied at all with the approach” of CAS and that reform is needed for the court.⁵⁷ In fact, Bach proposed changes to the CAS, noting that the IOC created the CAS and that was not only the IOC’s right, but also its obligation saying, “We cannot have a situation of CAS losing its credibility with athletes. . . . We have to do our job to make proposals so trust of the athletes can be restored.”⁵⁸ John Coates, President of the CAS and senior member of the IOC, strongly defended the CAS, “I acknowledge the concerns of the IOC, but I am not in any way critical of the panellists and arbitrators. The IOC has decided not to invite those athletes to the Games and where that goes remains to be seen. But as far as the CAS decisions go, the decisions can’t be changed by us.”⁵⁹ IOC President Bach emphasized that “[t]he result of the C.A.S. decision does not mean that athletes from the group of 28 will be invited to the Games. Not being sanctioned does not automatically confer the privilege of an invitation.”⁶⁰

Since 1996, the CAS has operated Ad Hoc Divisions at every Summer and Winter Olympics at the site of the Games to resolve any issues that arise in a timeframe that is consistent with the competition schedule. On February 6, 2018, Ahn, Stolbova, Bukin, and other Russian athletes appealed their “non-invitation,” arguing that the IOC’s refusal to invite them was “discriminatory by [its] very nature since [it would] only apply to Russian athletes . . . [and constituted] a sanction that is incompatible with the mandatory sanctions framework of the WADA Code.”⁶¹ The IOC responded that the decision to suspend the ROC and the process to allow “clean” Russian athletes to compete was different from the process of handling anti-doping violations. The IOC also argued that the invitation to participate in the Games was not meant to be discriminatory against Russian athletes, but rather to offer a pathway to compete after the suspension of the ROC. Finally, the IOC argued that the process, even though discretionary, was justified and implemented fairly.⁶²

The CAS Panel noted that this was a case of first impression and that it “was faced with evaluating

an unprecedented response to an extraordinary situation, that is, a state-sponsored doping scheme.”⁶³ The Panel reinforced IOC President Bach assertion that the IOC has the sole right to issue invitations to the Olympic Games.⁶⁴ The Panel found that the process that the IOC created for “clean” athletes to earn an invitation (namely the IRP and the OARIG) was designed “to balance the IOC’s interest in the global fight against doping and the interests of individual athletes from Russia.”⁶⁶ The Panel concluded that the two committee process was a “considered and measured response to the confirmed state-sponsored doping scheme.” Most notably, the Panel found that the process was not a sanction, but was rather an eligibility question. Further, the burden was on the Russian athletes to demonstrate that the special panel process was discriminatory, arbitrary, or unfair. The excluded athletes did not present evidence that the panels “improperly exercised their discretion.”⁶⁷ Finally, the Panel made a special point that while these athletes were not invited, they specifically made no finding as to whether these particular athletes committed an ARDV.⁶⁸

IOC spokesperson Mark Adams said, “We welcome this decision which supports the fight against doping and brings clarity for all athletes.”⁶⁹ While Angela Ruggiero of the IOC athletes’ commission said, “The message we’re sending to athletes now is, the decision’s been made, you should be incredibly confident that every athlete, including the Olympic Athletes from Russia, have had to clear incredibly high hurdles to get here.”⁷⁰ Craig Reedie, President of WADA, noted that “[t]he timing of these decisions just before the opening ceremony in PyeongChang is good as it will reassure athletes and others that only Russian athletes, which have met strict anti-doping criteria will be participating in the Games.”⁷¹

Unfortunately, despite 17,000 pre-tests before the Games, there were four cases of doping.⁷² Zig Jeglic, a member of the Slovenian Men’s Hockey Team tested positive for the banned substance fenoterol. Jeglic accepted an ARDV, was suspended from competing for the rest of the Games, and left the Olympic Village;

the CAS Anti-Doping Division will issue a final award after the conclusion of the Games.⁷³ Kei Saito, a Japanese short track speed skater, tested positive for acetazolamide, a diuretic and masking agent, during an “out-of-competition” test. Saito also voluntarily left the Olympic Village, and was provisionally suspended at PyeongChang and at any future International Skating Union competition until resolution of the matter.”⁷⁴

But, the two cases that had the most impact involved Russian athletes. Mixed-doubles Curling bronze medalist Alexander Krushelnitskii tested positive for meldonium, the same banned substance for which Russian tennis player Maria Sharapova was banned. Under the World Anti-Doping Code, there is a strict liability standard, meaning that an athlete is held strictly liable for substances found in their samples. An ARDV automatically occurs if a prohibited substance is found, whether intentional or not, or if an athlete was negligent in its ingestion. An athlete can ask for a reduction in the penalty if they can demonstrate that they were not at fault or at significant fault.⁷⁵ Because of the presence of meldonium in his system, Krushelnitskii was disqualified, lost his bronze medal and accreditation, left the Olympic Village, and accepted a provisional suspension beyond the period of the Games. However, Krushelnitskii reserved his rights to seek the elimination or reduction of any period of his suspension based on “no fault or negligence” following the conclusion of the Games.⁷⁶ Nadezhda Sergeeva, who placed twelfth in Women’s Bobsleigh, tested positive for the banned substance trimetazidine. She too was disqualified, lost her accreditation, left the Olympic Village, and was provisionally suspended. Sergeeva also reserved her “rights to seek the elimination or reduction of the ineligibility period” following the conclusion of the Games.⁷⁷

In the wake of the Sochi scandal, Russia made doping a criminal offense. In an interview with NBC television, IOC President Bach reaffirmed that there will be a criminal investigation into the two Russian doping cases with a special emphasis on investigating the athletes’ entourage. With two Russian doping cases, it

was impossible for the IOC to lift the Russian suspension in order to allow the Russian athletes to walk under the Russian flag at the closing ceremonies. However, shortly after the decision was made to continue the Russian suspension and deny the Russian flag, the OAR won the Men's Hockey Championships 4-3 over Germany. At the ceremony, while the Olympic anthem was being played, the Russian players sang the Russian national anthem.⁸⁰

Conclusion

Regarding Russia, what will be the steps and processes for invitations to the next Olympic Games in Tokyo 2020? The examination will continue. In an understatement, former Russian anti-doping laboratory director Grigory Rodchenkov said, "I am very sorry to all the clean athletes we cheated."⁸¹ This has been the controversial point during the entire Russia investigation, namely the collective responsibility of a National Olympic Committee (NOC) versus the individual justice to which athletes are entitled. IOC President Bach has always defended the rights of athletes and has held out hope for Russia. Recently at an IOC Executive Board meeting Bach stated, "The IOC would have considered lifting the suspension because the OAR delegation has respected the December 5 decision. However, two athletes failed doping tests here in Pyeongchang. This was hugely disappointing and prevented the IOC lifting the suspension...[but] Subject to continued compliance of December 5, the suspension of the ROC is considered to be lifted once it is confirmed there are no additional doping cases by members of the OAR delegation."⁸² Bach also noted how hard it is to eradicate doping from sport saying, "We will always have positive tests with regard to every nation. This fight against doping will never be over. As long as you have human beings in competition with each other you will have some who try to cheat. In society we have laws against theft and robbery for thousands years, but there is still theft or robbery."⁸³ On February 28, 2017, the IOC received a final notification from the Doping-Free Sport Unit that all the remaining testing results for the OAR were negative and according to

the Executive Board decision of February 25, 2018, the suspension of the Russian Olympic Committee was lifted effective immediately.⁸⁴

Regarding Korea, will the Olympic Games in PyeongChang be the "Peace Olympics"? Some commentators have urged viewers to be very cautious of the North Korean "charm offensive."⁸⁵ In an opinion piece, James Robbins, of the conservative think tank American Foreign Policy Council, compared Kim Yo Jong to Leni Riefenstahl, whose film *Olympia* has been seen a propaganda for the Hitler's Third Reich.⁸⁶ Yet, South Korean President Moon argued that the "Peace Olympics" have advanced inter-Korean talks and thawed tensions. Moon noted that, "We believe that the dialogue between the two Koreas will lead to dialogue between the United States and North Korea and eventually denuclearization dialogue."⁸⁷ IOC President Bach even said that he will visit North Korea.⁸⁸

And in his closing remarks at the Games, Bach singled out the athletes of the Korean Peninsula saying, "Dear athletes from the NOCs of the Republic of Korea and the Democratic People's Republic of Korea, with your joint march, you have shared your faith in a peaceful future with all of us. You have shown how sport brings people together in our fragile world; you have shown how sport builds bridges. The IOC will continue this Olympic dialogue, even after we extinguish the Olympic flame. In this, we are driven by our faith in the future."⁸⁹

At the end of the Games, North Korea sent a message that they were open to talks with the United States. However, these overtures have been met with skepticism. It appears that the postponed US and South Korean joint military exercises will resume after the Olympic Games conclude.⁹⁰ President Trump recently announced even tougher sanctions against North Korea. If those sanctions do not work, Trump said that there could be "phase two" and that "[p]hase two may be a very rough thing, may be very unfortunate for the world."⁹¹ Let us hope that instead we are driven by our faith in the future.

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⁸⁹ Thomas Bach, President, Int'l Olympic Comm., Address at the Closing Ceremony of the Olympic Winter Games PyeongChang 2018 (Feb. 25, 2018), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2018/02/closing-ceremony/President-speech-PyeongChang-2018-Closing-Ceremony.pdf#_ga=2.205809683.1666419876.1519613836-1383704932.1517264409.

⁹⁰ Alex Lockie, *The US and North Korea Look Like They'll Get Right Back into a Nuclear Standoff After the Olympics*, BUS. INSIDER (Feb. 20, 2018, 12:32 PM), <http://www.businessinsider.com/us-military-drills-north-korea-after-olympics-missile-test-2018-2>.

⁹¹ *North Korea Condemns New Sanctions but Opens Door to Talks with U.S.*, NBC NEWS (Feb. 25, 2018, 7:54 AM), <https://www.nbcnews.com/news/world/north-korea-condemns-new-u-s-sanctions-says-blockade-would-n851021>.

It's Jumpman at the Buzzer!—

by Nancy Holtz

The United States Court of Appeals for the Ninth Circuit recently delivered a big air ball to a photographer who was suing Nike for copyright infringement of a photograph. In *Rentmeester v. Nike, Inc.*, a well-known photographer claimed that his photograph was infringed by Nike, first in a photograph utilized by Nike in advertising. Then, this Nike photograph was used to create the now iconic “Jumpman” logo adorning every pair of the millions of Air Jordans sold since the inception of this super-brand.

This case is instructive because it contains a helpful discussion on two points, which the court suggests have not always been clear: First, there are two distinct components to establishing copyright infringement: (1) copying and (2) unlawful appropriation. Second, the court has used the same term, “substantial similarity,” to describe the degree of similarity relevant to establish “copying,” as well as when seeking to establish “unlawful appropriation.” Substantial similarity has different meanings in each of these contexts. Substantial similarity for purposes of establishing copying only involves comparing the two works in their entirety and finding similarities which one would not expect if the two works were created independently. Substantial similarity for purposes of establishing unlawful appropriation requires that the similarities be substantial and relates to the protected elements of the original work as objectively compared with the allegedly infringing work.

The Procedural Background.

This copyright infringement claim did not survive Nike’s Motion to Dismiss. A 2-1 panel of the Ninth Circuit agreed with the district court judge that, as a matter of law, the photographer had failed to plead adequate facts to support all of the necessary elements of a copyright infringement claim. In so finding, the court relied on the axiom of copyright law that the protection granted to a copyrighted work extends only to the particular

expression of an idea and never to the idea itself. The court determined that the photographer's claim failed to pass the so-called "extrinsic test," which is part of establishing unlawful appropriation. Utilizing the extrinsic test, the court filtered out the non-protectable elements of the original photograph, engaging in an objective comparison of the selection and arrangement of various components—subject, pose, setting, camera angle, and the like—of the two photographs. The result of this objective comparison was a conclusion that the two photographs were not substantially similar under the extrinsic test; the court further ruled that the silhouetted image copied directly from the Nike-created photograph to create the Jumpman icon was even less similar and also not infringing. An air ball for the photographer's claims.

The Background.

Respected photographer, Jacobus Rentmeester was the creator of a well-known photograph of Michael Jordan, taken while Jordan was a student at the University of North Carolina. The photograph appeared in *Life* magazine as part of a feature on athletes participating in the 1984 Summer Olympics.

The photograph depicted Jordan in a pose not typically adopted in basketball, but well known in ballet as a "grand jeté." In ballet's grand jeté, a dancer leaps with legs extended, one foot forward and the other back, for a highly dramatic effect. The photograph was taken at an angle from below, looking up at the airborne Jordan. In a further original and creative idea, Rentmeester posed his subject outside the traditional confines of a basketball court. He instead chose a somewhat whimsical setting: an outdoor setting on a grassy knoll on which he placed a basketball hoop set at well beyond regulation height. In the photograph, Jordan is seen jumping, attempting to shoot a basket at a hoop set unattainably high. Rentmeester used powerful strobe lights and a fast shutter speed, to create a sharp image of Jordan against the sky, with the sun shining directly into the camera lens. The photograph was a hit and not long after its publication, Nike reached out to Rentmeester and entered into a licensing arrangement to use this photograph "for slide presentation only." About a year later,

inspired by the famous photograph of Jordan taken by Rentmeester, Nike hired its own photographer to produce a similar photograph of Jordan. In the Nike photograph, Jordan is again striking the grand jeté pose and again set outdoors rather than on the basketball court, jumping towards a basketball hoop. The angle of the photograph, taken from the bottom looking up, is also similar to Rentmeester's choice of angle. The backdrop, however, is the Chicago city skyline, in a nod to Jordan's team, the Chicago Bulls. Further, Jordan's positioning, while still a grand jeté, is a bit different. There were also some slight differences in other photographic techniques, discussed at length by the court. This photograph was used in posters and billboards as part of Nike's marketing the emerging Air Jordan brand. Upon learning of this photograph, Rentmeester threatened litigation. This was staved off by an agreement in which Nike was to pay Rentmeester \$15,000 for the right to use its photograph for a period of two years on billboards and posters. Rentmeester claimed that use by Nike continued beyond the use which began in 1984 or early 1985. Nike went further with the highly successful Jordan image, now memorialized in its photograph. In 1987, the Nike photograph was used to create the "Jumpman" logo, a solid black silhouette that tracks the outline of Jordan's figure as it appears in the Nike photograph. The Jordan brand—identifiable by the now iconic Jumpman logo—currently generates about \$3.1 billion of annual revenue for Nike. This logo can fairly be said to be one of Nike's most recognizable trademarks, no doubt second only to the swoosh.

In 2015, Rentmeester brought the present action, alleging that both the Nike photograph and the Jumpman logo infringe upon the copyright of his 1984 photograph of Jordan. Rentmeester claimed copyright infringement and violation of the Digital Millennium Copyright Act. Mindful of the thirty-year delay in bringing suit and no doubt wanting to avoid a likely laches defense being raised, Rentmeester only sought damages for acts of infringement occurring since January 2012.

The Elements of the Copyright Infringement Were Not All Met.

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The Elements of the Copyright Infringement Were Not All Met.

To state his claim, Rentmeester needed to allege that (1) he owned a valid copyright of his photograph of Jordan and (2) Nike copied protected aspects of the photograph's expression.⁵

As to the second element, the copying of protected aspects of the photograph's expression, Rentmeester fell short in establishing the second component of this element, unlawful appropriation. The Ninth Circuit noted that "[a]lthough our cases have not always made this point explicit, the second element has two distinct components: 'copying' **and** 'unlawful appropriation.'"⁶

As to the first component, copying, Rentmeester's allegation that he provided color transparencies of his photograph to Nike's creative director shortly before production of the Nike photograph was sufficient to establish that Nike had access to Rentmeester's photograph. Further, comparison of the two photographs showed substantial similarity between the two. The allegation related to Nike's access to Rentmeester's photograph, combined with the obvious conceptual similarities between the two photographs, were sufficient to create a presumption that the Nike photograph was the product of copying rather than independent creation. The adequacy of the allegations of this copying component did not appear to be a subject of any dispute.

The Second Component: Unlawful Appropriation.

Merely establishing copying, however, is not enough. To infringe, Rentmeester needed to plausibly allege that Nike copied enough of the protected expression from his photograph to establish unlawful appropriation. The United States Copyright Act does not extend protection to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [the copyrighted] work."⁷

Limits have been set to protect the expression of ideas and concepts. These limits are necessary

to strike a balance between the dueling social interests of rewarding an individual's creativity and effort, while at the same time allowing the public to enjoy the benefits and progress from use of the same subject matter. The courts have long recognized that an overly expansive application of copyright laws, and placing ideas under lock and key, will not protect, but rather stifle creativity.

What more is needed beyond alleging copying? Nike must have copied enough of Rentmeester's expression of Rentmeester's ideas or concepts to render the two works "substantially similar."⁸ The challenge for courts is determining what is protected and what is not. The Ninth Circuit relied on the words of Judge Learned Hand in this regard, stating that "[t]he best we can do is borrow from the standard Judge Learned Hand employed in a case involving fabric designs: The two photographs' selection and arrangement of elements must be similar enough that 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them.'"⁹

With the issue of a valid copyright and copying being disposed of, the sole task at hand for the Rentmeester court was to determine substantial similarity for purposes of ascertaining whether or not there has been unlawful appropriation. One might ask: "If substantial similarity has been adequately pled in the copying component of the claim, why isn't this enough?" It is not enough, because while substantial similarity is used as part of establishing copying, it is not the same test for establishing *illicit* copying, that is, unlawful appropriation. The kind of substantial similarity for purposes of establishing copying is not adequate to establish unlawful appropriation. As the court noted, "[u]nfortunately, we have used the same term—'substantial similarity'—to describe both the degree of similarity relevant to the proof of copying and the degree of similarity necessary to establish unlawful appropriation."¹⁰

What Constitutes "Substantial Similarity" to Establish Unlawful Appropriation?

Again, to prove copying, the similarities between the two works need not be extensive. Further,

the similarities do not need to involve only the protected elements of the plaintiff's work. The similarities simply need to be similarities one would not expect to arise if the two works had been created independently. It is a fairly low bar.

However, the Rentmeester court observed that while exact duplication is not necessary, the photographer would need to prove that the Nike photograph contained enough of the Rentmeester photograph's protected expression to render the Nike photograph substantially similar.¹¹

The Ninth Circuit applies a two-part analysis to determine substantial similarity for purposes of unlawful appropriation: the "extrinsic test" and the "intrinsic test." The extrinsic test assesses the objective similarities of the two works, focusing only on the protectable elements of the plaintiff's expression.¹² In order to engage in this extrinsic test, the first step is for the court to "filter out" the unprotectable elements of the plaintiff's work. The unprotectable elements would consist primarily of ideas and concepts, material in the public domain, and *scènes à faire* (stock or standard features that are commonly associated with the treatment of a given subject).¹³

What is left remaining, the protectable elements, are then compared to the allegedly infringing work to assess the similarities in the objective details of the work.

In comparison, the intrinsic test is a subjective comparison, a more "holistic" look in which two works are compared to determine if the entire concept and feel is substantially similar. Rentmeester needed to plead adequate facts to prevail under both tests.¹⁴ This is a question of fact, which is not addressed by the court. But given that both tests, extrinsic and intrinsic, must be met to establish unlawful appropriation, whether or not Rentmeester could establish that the two photographs meet the intrinsic test was irrelevant.

The Extrinsic Test May Be Decided as a Matter of Law.

Because the extrinsic test focuses on similarities in the objective details of the compared works, as opposed to being dependent on the responses of the trier of fact, only the extrinsic test “may often be decided as a matter of law.”¹⁵

While dissenting in part, one member of the Ninth Circuit’s panel took issue with engaging in a comparison of the two photographs as a matter of law. That justice was of the view that there ought to have been an opportunity for discovery and that this decision ought not be made even at summary judgment let alone at such a preliminary stage. This justice opined that the majority had substituted its own judgment for that of a jury. However, on the subject of the Jumpman logo, this justice concurred that the mere image of Jordan engaged in a grand jeté pose was a human pose. As such, *Rentmeester* could not own a broad copyright over the particular pose itself reflected in the Jumpman logo (much like a piggyback pose could not be copyrighted.)

Photographs are Not Dissected as Easily as Novels, Plays, and Motion Pictures.

The court noted that certain types of works, such as novels, plays, and motion pictures lend themselves more readily to being filtered. Items such as ideas, scènes à faire, and the like, are more easily removed in order to see the remaining expression revealed in things like plot, dialogue, mood, setting, pacing, characters, and sequencing. However, with photographs, it is more difficult. Like authors and playwrights, photographers certainly make various creative choices when composing the desired image. These choices can range from subject matter, the lighting, the pose, camera angle, and so on. However, each of these, viewed in isolation, is not subject to copyright protection. Even if a photographer uses a very original camera angle, that photographer does not “own” that angle and cannot prevent other photographers from doing likewise. Another photographer would certainly be free to solicit Jordan to strike the exact same pose and photograph it.

The *Rentmeester* court suggested that for

photographer’s works, the focus should be on the *selection and arrangement* of the photographer’s otherwise unprotected elements. This could include things like the combination of subject matter, camera angle and effects, pose, etc., rather than looking at each individual element standing alone. The *Rentmeester* court suggested that a photograph could be likened to factual compilations. In other words, while the author of a factual compilation cannot own copyright protection for the underlying facts, that author can seek protection if the selection and arrangement of those facts is sufficiently original. So it should be with photographs: the analysis and focus should be on the selection and arrangement of what might otherwise be unprotected. Therefore, a second photographer—in this case, on behalf of Nike—is free to borrow any of the individual elements originally featured in the *Rentmeester* photograph, as long as the new photograph does not copy the selection and arrangement of the elements utilized by the *Rentmeester* photograph.

The Extrinsic Test Applied.

The following are the key factors which supported the court’s ultimate conclusion that *Rentmeester* had not pled plausible facts to establish substantial similarity in this context:

The subject matter: The court noted that both photographs depicted Jordan in a leaping pose, evocative of ballet’s grand jeté. This was a very clever and original idea. But it was just that—an idea, and thus not protectable. Michael Jordan would be free to pose for any other photographer in this grand jeté pose.

Also, on the subject matter, the court noted that in the Nike photograph, the subject was situated differently in the frame of the photograph, and the general “propulsion” of his body is vertical in the Nike photograph rather than horizontal as in the original.

The setting: Here again, the court noted that *Rentmeester* was the originator of the idea of having the basketball hoop situated in an almost fanciful outdoor setting rather than on

a conventional basketball court. But while the Rentmeester photograph made it look as if Jordan is attempting to jump toward an impossibly high basketball hoop, the Nike photograph depicted an in-command Jordan jumping to make what appears to be a very doable basket.

Both photographs utilize an angle in which the viewer is looking up at Jordan. The court noted that this is a fairly standard technique of photographers and can hardly be considered original. While Rentmeester placed the hoop on a grassy knoll against the sky, the Nike photograph depicted Michael Jordan leaping across the backdrop of the Chicago skyline.

Finally, the court determined that the arrangement of the elements within the photographs was also materially different in other further respects: the positioning of Jordan's arms and legs in the frame of the photograph, and the positioning and lighting of the hoops.

In other words, while the idea of a leaping Michael Jordan soaring through the air towards a basket in an unusual pose and setting was that of Rentmeester's, each photographer expressed that idea differently. While kudos properly go to Rentmeester for originating this idea, he does not and cannot own it under copyright law. To permit Rentmeester to claim that he owns the general idea and concept of Michael Jordan attempting to shoot a basket in a ballet inspired grand jeté, outdoors in a silhouetted style against the sky, would mean withdrawing these ideas from the "stock of materials" available to artists.

Utilizing the same reasoning, the court found that the solid black Jumpman logo which merely outlines the Nike photograph is even less similar to the Rentmeester photograph. In concurring on the conclusion that the Jumpman logo was not substantially similar, the justice observed that Rentmeester could no more copyright the Jordan pose than someone could copyright the Vulcan salute of Spock, Fonzi's double thumbs up gesture, or John Travolta's Saturday Night Fever dance pose. These gestures cannot be "owned" by anyone.

The conclusion of the court was that the photographs were not substantially similar because Rentmeester's copyright is limited to the particular selection and arrangement of the elements as expressed in his copyrighted image. This is why the two photographs, when compared with each other, passed the substantial similarity test for purposes of establishing that there was copying. But upon decoding what was protectable under copyright, the Ninth Circuit did not find that the Nike photograph and logo were substantially similar to the particular selection and arrangement of the elements of the Rentmeester photograph.¹⁷

Takeaway Thoughts.

Practitioners should take care not to conflate the two separate concepts of what is substantially similar for purposes of establishing copying as compared to establishing unlawful appropriation. In the former, a comparison may be made of the entire photographs. In the latter, only those protected components will be compared, after unprotected items have been filtered out from consideration. Overall, while specific choices such as angle, lighting, and other techniques might be standard and not protected, when assembled together, that particular selection and arrangement can be protectable. While the two photos are very similar to the casual observer, as a matter of law, the Ninth Circuit concluded that they reflected two expressions of the same idea. And the logo was an even stronger example of "same idea, different expression."

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Real Fake News

by Peter Dekom

Two questions that beat at my mind incessantly: Is the First Amendment an enabler of fake news? Is the First Amendment even able to support a credible challenge to fake news, even when it tears at the fabric of our most basic democratic principles?

Every law student knows that there are limits and conditions placed on free speech. The Constitution itself contradicts itself in granting copyrights, property rights which restrain free speech, while the First Amendment cries for open expression. Likewise, your past speech can be used to turn a serious crime into a heinous offence with vastly more prison time under the notion of a “hate crime.” You cannot falsely scream “fire” in crowded movie theater (*Schenck vs. United States*, 249 U.S. 47, 1919) or incite another to commit a crime without risking your own criminal prosecution. See e.g., *Rice vs Paladin Enterprises*, 120 F. 3rd 233 (4th Circuit, 1997) which should be read within the limits of *Brandenburg vs Ohio*, 395 U.S. 244 (1969, per curium). The fancy con that supports a fraud is not free speech.

But politicians have been lying about their accomplishments and their opponents purported missteps for as long as there have been elections. As illustrated in this old joke: “How can you tell if a politician is lying? His/her lips are moving.” Many believe that John Kerry’s defeat at the hands of George W Bush in the 2004 presidential election lies at the feet of the efforts of a private political group (“Swift Vets and POWs for Truth,” formerly known as the “Swift Boat Veterans for Truth” [SBVT]), financed by major conservative donors. SBVT mounted a completely fabricated smear campaign against Kerry and his military service, but like most “first impressions,” this lie stuck in the minds of too many voters like glue.

Wikipedia takes us back to that era: “Kerry was ‘unfit to serve’ as President based upon

¹ 2018 U.S. App. LEXIS 4817 (9th Cir. Feb. 27, 2018).

² The reader is strongly encouraged to view the three images: the original photograph, Nike’s photograph, and the Jumpman logo, all of which are included at the end of the opinion itself.

³ Jonathan Stempel, *Nike defeats appeal over iconic Michael Jordan photo, Jumpman logo*, REUTERS, Feb. 27, 2018, <https://www.reuters.com/article/us-nike-lawsuit-jordan/nike-defeats-appeal-over-iconic-michael-jordan-photo-jumpman-logo-idUSKCN1GB2R7>.

⁴ 17 U.S.C. § 1202.

⁵ See, e.g. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

⁶ *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164–65 (9th Cir. 1977); *Arnstein v. Porter*, 154 F.2d 464, 468 (2^d Cir. 1946); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] (2017).

⁷ 17 U.S.C. § 102(b).

⁸ *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010).

⁹ See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2^d Cir.1960).

¹⁰ *Rentmeester* at *8. The Ninth Circuit noted that to avoid this ongoing confusion, some other jurisdictions use a different term—“probative similarity”—when determining if copying has been established. See, e.g. *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises, International*, 533 F.3d. 1287, 1301 & n.16 (11th Cir. 2008); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F. 3d 357, 368 & n.7 (5th Cir. 2004); *Laureyssens v. Idea Group Inc.*, 964 F.2d 131, 140 (2^d Cir. 1992).

¹¹ *Rentmeester*, citing *Mattel* at 913-14.

¹² *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

¹³ *Id.* at 822–23.

¹⁴ *Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

¹⁵ *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987).

¹⁶ 4 Nimmer on Copyright § 2A.08[E][3][c]; Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339, 350–51 (2012).

¹⁷ The Ninth Circuit majority took the view that no discovery or further fact finding was necessary for it to engage in an objective analysis of the various features of the two photographs, and to a lesser extent, the Jumpman logo.

his alleged 'willful distortion of the conduct' of American servicemen during that war, and his alleged 'withholding and/or distortion of material facts' as to his own conduct during that war. SBVT stated that "[Kerry's phony war crimes charges, his exaggerated claims about his own service in Vietnam, and his deliberate misrepresentation of the nature and effectiveness of Swift boat operations compel us to step forward.' The group challenged the legitimacy of each of the combat medals awarded to Kerry by the U.S. Navy and the disposition of his discharge. (See John Kerry military service controversy.) Further, SBVT said that Kerry's later criticism of the war was a 'betrayal of trust' with other soldiers, and that by his activism he had caused direct 'harm' to soldiers still at war." But that was a vastly simpler time.

The Kerry debacle is the most cited example of a lie that resonated like truth to bring down a candidate for election to the highest office in the land... until the recent investigation into the now clearly-proven and certainly continuing Russian interference in the 2016 presidential race and the parallel efforts expected for the upcoming mid-term elections. While the Soviet Union, later Russia, have always tried to destabilize their enemies with election meddling, the digital era gave them powerful tools – mostly the same data-scraping available to online markets – to make their efforts incredibly more effective as well as highly and personally targeted... anonymously or pseudonymously, of course.

On February 16th of this year, the Office of the Special Prosecutor (Robert Mueller, III) indicted 13 Russian nationals and three Russian entities (*United States of America vs. Internet Research Agency LLC et al.* filed in the federal District Court for the District of Columbia) in an elaborate alleged scheme where these defendants Russians allegedly came to the U.S. with the intention of undermining the American political and electoral process, including the 2016 presidential election.

Citing violations under U.S.C. §§ 2, 371, 1359 and 1028A, Robert Mueller and his team listed the following charges against these defendants:

- They conducted political intelligence-gathering activities inside the United States;
- They hid their activities by setting up virtual networks in America that cloaked their extra-American communications;
- The defendants influenced the American election by using false personas to organize rallies for Trump, criticizing Muslims and spreading allegations of voter fraud by candidate Hillary Clinton:
- These alleged perpetrators stole American identities to create controlled accounts; and
- And of course, they also destroyed evidence of their activities

There were no charges against any U.S. citizens or statements that these defendants colluded with the President of the United States. The Special Prosecutor and the Deputy Attorney General made it clear that this set of charges represented only part of a continuing investigation.

The Russian system of individual profiling with instantaneous bot-driven postings on or to individual accounts is so automated, so completely operational, that just about any potential polarizing event here in the United States becomes destabilizing fodder for this pernicious propaganda machine: "One hour after news broke about the school shooting in Florida [on February 14th], Twitter accounts suspected of having links to Russia released hundreds of posts taking up the gun control debate.

"The accounts addressed the news with the speed of a cable news network. Some adopted the hashtag #guncontrolnow. Others used #gunreformnow and #Parklandshooting. Earlier... before the mass shooting at Marjory Stoneman Douglas High School in Parkland, Fla., many of those accounts had been focused on the investigation by the special counsel Robert S. Mueller III into Russian meddling in the 2016 presidential election.

"This is pretty typical for them, to hop on breaking news like this,' said Jonathon Morgan, chief executive of New Knowledge, a company that tracks online disinformation campaigns.

'The bots focus on anything that is divisive for Americans. Almost systematically.'

One of the most divisive issues in the nation is how to handle guns, pitting Second Amendment advocates against proponents of gun control. And the messages from these automated accounts, or bots, were designed to widen the divide and make compromise even more difficult.

"Any news event — no matter how tragic — has become fodder to spread inflammatory messages in what is believed to be a far-reaching Russian disinformation campaign. The disinformation comes in various forms: conspiracy videos on YouTube, fake interest groups on Facebook, and armies of bot accounts that can hijack a topic or discussion on Twitter." New York Times, February 19th.

And as nasty as this manipulative extra-territorial force was and continues to be, for the purveyors of false news, the fact that first impressions are incredibly difficult to reverse, especially where they have been crafted to resonate with the recipient's own biases, continues to drive their efforts. That these were sophisticated Russian operatives is deeply concerning, of course, but what if such manipulative techniques were fomented purely by U.S. citizens, effectively a *Swiftboat* upgrade? Where are lines drawn, voter manipulation permitted? Is this simply a bigger part of the courts' uncomfortable struggle with states' rights on issues like gerrymandering or voter registration... or a wholesale reassessment of the First Amendment in a modern democracy? But wait, there's more. Technology has thrown more than one monkey wrench into our democratic engine.

What will make the dissemination of fake news that much more difficult to reverse is the growing technology that can take a still photograph and alter it in such a way, changing faces and adding background and other people, that even sophisticated image analysis now has difficulty separating what's real from the altered image.

Add to that capacity is the ability to use recorded words from a speaker, seamlessly re-edited to quite literally put words in the speaker's mouth that they never spoke, and actually create a full-motion video of events that never took place, using the above photographic techniques combined with some very sophisticated new algorithms to fabricate seemingly real videos. Huh?

David Pierson, writing for the February 19th Los Angeles Times, explains: "All it takes is a single selfie... From that static image, an algorithm can quickly create a moving, lifelike avatar: a video not recorded, but fabricated from whole cloth by software.

"With more time, Pinscreen, the Los Angeles start-up behind the technology, believes its renderings will become so accurate they will defy reality... 'You won't be able to tell,' said Hao Li, a leading researcher on computer-generated video at USC who founded Pinscreen in 2015. 'With further deep-learning advancements, especially on mobile devices, we'll be able to produce completely photoreal avatars in real time.'

"The technology is a triumph of computer science that highlights the gains researchers have made in deep neural networks, complex algorithms that loosely mimic the thinking of the human brain.

"Similar breakthroughs in artificial intelligence allowed University of Washington researchers to move President Obama's mouth to match a made-up script and the chipmaker Nvidia to train computers to imagine what roads would look like in different weather.

"What used to take a Hollywood production company weeks could soon be accomplished in seconds by anyone with a smartphone... Not available for a video chat? Use your lifelike avatar as a stand-in. Want to insert yourself into a virtual reality game? Upload your picture and have the game render your character.

"Those are the benign applications."

“Now imagine a phony video of North Korean dictator Kim Jong Un announcing a missile strike. The White House would have mere minutes to determine whether the clip was genuine and whether it warranted a retaliatory strike... What about video of a presidential candidate admitting to taking foreign cash? Even if the footage proved fake, the damage could prove irreversible... In some corners of the internet, people are using open-source software to swap celebrities’ faces into pornographic videos, a phenomenon called Deep Fakes.” All it takes is money to access or even create these “cool new technologies” that can so easily be adapted for a most sinister purpose.

Indeed, Hillary Clinton, struggling with old-world emails in 2016, and her campaign were woefully digitally ignorant, social media impaired, when compared with a marketing whiz who had spent his entire life figuring out how to sell his real estate, university, vodka, book, television shows, and even an airline to the general public. He didn’t need to discover how to use social media to market; he had been there all along. The power of free political expression, under the First Amendment, seems to have been the accelerant of the creation and dissemination of increasing volumes of fake news, to the delight of our enemies adept at online manipulation.

We do have speech regulations and regulatory bodies that are pervasive in the “commercial” world: For example, the Federal Trade Commission has jurisdiction over false advertising (15 U.S.C. §§ 41-58), the Lanham Act controls false or misleading product/service descriptions and names (15 U.S.C. §§ 1051-1129), the Fair Packing and Labeling Act obviously targets false labeling (15 U.S.C. §§ 1451-1461), the Federal Food, Drug and Cosmetic Act bans false and misleading statements from the labeling of foods, drugs, medical devices, cosmetics, and tobacco (21 U.S.C. §§ 301-399a), the Children’s Online Privacy and Protection Act of 1998 severely limits online data gathering interaction with

children (15 U.S.C. §§ 6501-6506), to name just a few of the many federal legal controls over “commercial” speech. Do these laws provide even the slightest crack into the door of regulating fake news?

Yet even as various social media platforms, particularly Twitter and Facebook/Instagram, struggle with controlling misuse of their platforms to disseminate fake news, hate speech and even criminal incitement, they face more pressure from their advertisers and European regulators than they face under U.S. statutes and regulators. Such user-generated content platforms have found insulation from copyright infringement liability for such content – with provisions for take-downs for certain offending material under the “safe harbor” provisions of the Digital Millennium Copyright Act (17 U.S.C. § 512) – and under the rulings of the newly Trump-reconfigured Federal Communications Commission that seems to be pulling back on federal regulation of online carriers and content providers.

To date and despite massive and highly publicized efforts to the contrary, no online service provider, ISP or purveyor of content, has created an effective barrier to fake news, no matter how impactful such disinformation might be to our most basic political processes. In fact, despite statements that such platforms want to stop such abuse, the courts and the federal regulators seem to be moving in a very different, if not “enabling” direction. The First Amendment just might a “censorship barrier” to taking down fake news.

In recent years, we’ve seen First Amendment decisions attack a free and balanced election process by vitiating statutory attempts to keep elections from being a battle of big money, often anonymous, against bigger money. The *2010 Citizens United vs. Federal Election Commission* (558 U.S. 310) U.S. Supreme Court ruling (and its ilk) used a Constitutional argument against limitations on the amount of campaign contributions corporations and other organizations could spend in political advocacy that they alone control (i.e., not including such

expenditures directly controlled by the relevant candidates for election). Suddenly, U.S. corporations became individuals imbued with First Amendment rights. One has to wonder how much of this decision can endure, or how much backdoor protection this ruling will have for the defendants in the Russia inquiry, in the hyper-accelerating world of digital manipulation.

So we get back to that good old basic view of the First Amendment, that same public-figure-defamation-resistant constitutional provision (the famous “actual malice” standard set forth in the seminal 1964 case: *New York Times Co. vs. Sullivan*, 376 U.S. 254), that even Donald Trump hates, and ask whether there are remedies and restraints against such falsehoods that are even remotely possible under the wide swath of protectable free speech? And if we cannot fashion such limitations with rather quick enforcement, exactly what will voters be voting for? Can democracy survive without such restraints? Can it survive with restraints as they may have to be constructed to be effective?

As advocates for that cutting edge of creativity, the very vanguard of the viability for free speech, how do these trends shape our roles as sports and entertainment lawyers, draw red lines in our beliefs and color our advice to clients? Are we willing to take a knee where our beliefs are strong?

I'm Peter Dekom, and if we do not figure this out fairly quickly, how long will it be before election campaigns, even the results of those campaigns, become completely tainted and meaningless?

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Litigation Update

by Michelle M. Wahl, Partner, Swanson, Martin & Bell, LLP
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A Win for Songwriters – Mechanical Royalties Rise!

On January 29, 2018, the Copyright Royalty Board announced the new royalty rates and terms for the use of musical works in the making and distributing of phonorecords. The Initial Determination of Royalty Rates and Terms issued by the Copyright Royalty Judges determined that from 2018 through 2022, licensees shall pay mechanical royalties, pursuant to Section 115 of the U.S. Copyright Act, whichever is the greater amount of:

- 2018 – 11.4% of revenue or 22% of total content cost
- 2019 – 12.3% of revenue or 23.1% of total content cost
- 2020 – 13.3% of revenue or 24.1% of total content cost
- 2021 – 14.2% of revenue or 25.2% of total content cost
- 2022 – 15.1% of revenue or 26.2% of total content cost

Once confidential information has been redacted from the Initial Determination, the Copyright Royalty Judges will disseminate and post a public version along with the final regulations. The same is scheduled to occur once the Register of Copyright completes a statutory review and the Librarian of Congress approves the Final Determination. Additional details are available at <https://www.crb.gov/>.

The new rates account for a significant increase of mechanical royalties paid to U.S. songwriters over the next five years. In fact, it is the largest rate increase in Copyright Royalty Board history! In addition, the Total Content Cost (“TCC”) cap has been removed with the TCC being increased

so as to provide balance between the record labels and publishers. According to the National Music Publishers Association (“NMPA”) these changes “will give publishers the benefit of a true percentage of what labels are able to negotiate in the free market, resulting in significantly higher royalty rates for songwriters.” Moreover, the Copyright Royalty Board granted a late fee that will force digital music services to timely pay songwriters or be subject to penalty for failing to do so. In a market currently driven by interactive streaming, the new mechanical royalty rate scenario is likely the best it has ever been for songwriters. The decision to increase rates derives years of advocacy and is a huge win for music creators.

The Music Industry and Congressional Initiatives

Although typically the various sectors of the music industry are in direct opposition to one another, there are now three pieces of music legislation maneuvering through Congress thanks to these same sectors banding together to endorse one another’s key initiatives. In endorsing these bills, the respective sectors are hopeful to modernize and create fairness in how music creators are compensated. In other words, the parties agree that century-old laws do not accurately or fairly reflect the value of today’s music and the way creators should be compensated. In pushing these bills through Congress, artists, publishers, songwriters, PROs and the like have come together in hopes of remedying those issues.

First, The Music Modernization Act of 2017, which, in part, creates a blanket license and largely benefits the publishing section and digital service providers. Second, the Classics Act, which will establish a master royalty payment application to pre-1972 sound recordings for digital performance (benefiting labels and sound recording artists). Third, the AMP Act, which would codify into law a producer’s and/or engineer’s right to receive royalties for digital performance, thereby benefiting studio professionals.

These bills are supported by the NMPA, the RIAA, ASCAP, BMI, SoundExchange, AFM, SAG-AFTRA and several others. Mitch Glazier, RIAA President, stated, “we encourage the Judiciary Committees to begin advancing these common-senses provisions that modernize the music licensing system and provide fair, market-based compensation to all music creators for their property and work.”

On a separate, but equally important note, the Fair Play Fair Pay Act is not among the 2018 endorsements jointly made by the music industry sectors. By way of reminder, this Act sought royalties for the performance of master recordings via terrestrial radio. However, the Act also sought payment of royalties for pre-1972 recordings, which is the main component of the Classics Act. The fight for a master recording performance royalty for terrestrial radio may be off the table this year, but it will likely make its return in the near future. For now, we focus our attention on the other three Acts and hope that sooner than later our laws reflect today’s music industry and all those involved are treated and compensated fairly.

Seemingly Simple Ways to Make Money on your Musical Works

The DIY era has its pros and cons. Musicians are able to take initiative, protect their works using seemingly simple/user-friendly instructions to do so, generate royalties from various streams, and do so while keeping more money in their own pockets. The downside, however, is that there is a plethora of music platforms available and unfortunately, managing one’s digital rights is often a fragmented process, opening the door for many mistakes (aka uncollected royalties). To combat some of those issues, musicians are strongly encouraged to familiarize themselves not only with these various revenue streams and differing platforms, but to also educate themselves on the industry itself and the ways in which they can properly protect themselves and their works.

To start, make sure you understand the

copyright laws. This relates not only to your original works of authorship, but also to the extent you incorporate the works of others. This is incredibly important when you go to monetize your works. For example, you cannot debut a cover song if you do not have appropriate permission/license to do so. In the remix space, do not presume that your miniscule sample is not worthy enough for seeking a license to use it in your song. That is a very risky presumption (one that may end up costing you more than you might expect). Get those permissions in place before you go to monetize your works or you are inviting a host of problems. On another note, if there is a dispute as to ownership rights/copyright claims to a work, clear those conflicts and get the resolution in writing before you go to monetize that work. Be proactive.

That takes me to my next point – split sheets. First, properly assess the value of your work. If you are collaborating with others (which is often the case), know the value of their work as well. Capture those values in a split sheet and have all parties privy to that agreement sign it! Remember, without a writing to the contrary, the copyright laws treat co-authors equally (e.g. 4 writers with each taking 25%). However, more often than not, that is not the case. Having a split sheet or equivalent agreement in place at the start generally helps to resolve conflicting ownership claims, should one arise in the future. I presume this goes without saying, but for peace of mind I will reiterate it here – register your works with the U.S. Copyright Office! It is a relatively inexpensive and self-explanatory process (in most instances) and affords you opportunities that might not be available otherwise, should someone infringe your work. Keep in mind, too, that there are two copyrights to a musical work and make sure you are protecting both (e.g. performing arts copyright in the underlying musical composition and a sound recording copyright).

Once your works are properly copyrighted and/or you have obtained the permissions and licenses needed to incorporate other works (to

the extent you do so), you should then focus on providing accurate metadata. Doing so helps to ensure proper and timely payout. In other words, thoroughly prepare and review all information you provide, including appropriate splits, names and contact information and the like. You can also ingest your content and apply protections as needed to avoid piracy and the non-authorized sharing of your content by third parties. You also have the option of ensuring that every instance of User Generated Content that identifies you as the rights holder will monetize that asset/work and redirect earning on that work to you. Doing so with further optimize your earnings.

Finally, keep the works flowing! The more content you have, the more opportunity to monetize that content. Of course, it also keeps your fans happy and eagerly anticipating what is to come next! If you are using your works via YouTube or elsewhere in hopes the use will garner more opportunities (e.g. performance, licensing, etc.), be sure the contact information you provide on all your videos is accurate and easily accessible. Given the volume of material available online, do not risk music users foregoing your works because it is too difficult to track you down. These are just a few things you can be doing as a DIY artist to ensure you are getting the most bang for your buck!

BMG out \$25 Million when the Fourth Circuit Reverses the Decision Against Cox Communications

BMG sued Cox Communications in Virginia federal court after its 1.8 million Notices of Infringement sent to Cox went unanswered. The Notices claimed that Cox subscribers were infringing BMG's copyrighted musical works. In its suit, BMG alleged that Cox failed to implement a policy of terminating repeat infringers and thus, was not eligible for the Digital Millennium Copyright Act's ("DMCA") safe harbor provision. The trial judge agreed and found Cox was ineligible for safe-harbor before the case went to trial on contributory negligence claims alleging Cox subscribers shared over 1000 works without authorization.

BMG alleged that Cox subscribers received and shared BMG's copyrighted music via BitTorrent. Cox argued that it neither stored or shared any infringing material, nor created, sold or controlled the use of peer-to-peer file sharing software. The trial judge found that although Cox had a policy for repeat infringers, it failed to implement it consistently and meaningfully. BMG was awarded over \$8 million in attorney's fees and the \$25 million in damages.

However, on February 1, 2018, the U.S. Court of Appeals for the Fourth Circuit issued its Opinion affirming in part and vacating the judgment entered for \$25 million and then remanded the case for a new trial. The Fourth Circuit agreed that Cox failed to qualify for DMCA safe harbor, but was mindful of "the need to afford ISPs flexibility in crafting repeat infringer policies" and the difficulties in determining the appropriate circumstances to terminate a person's access to the Internet. The Court found that Cox adopted a policy but had "made every effort to avoid reasonably implementing that policy" and that the evidence showed Cox never actually terminated a subscriber indefinitely. The Court warned that ISPs cannot claim the protections of the DMCA safe harbor by terminating customers before indiscriminately reactivating them later. However, the Court held that simple negligence is not enough to establish contributory negligence. Rather, there must be some intent with the ISP. In its ruling, the Fourth Circuit held the trial judge erred in instructing that "proving contributory infringement requires proof of at least willful blindness; negligence is sufficient" and thus remanded the case.

On remand, the focus will likely be on whether the evidence establishes willful blindness and whether the Notices of Infringement can establish direct infringement by Cox's subscribers. For example, BMG may argue that failure to act on the Notices of Infringement in itself constitutes willful blindness, while Cox may claim the Notices lacked the information required to prompt Cox's

investigation. Both parties can seek rehearing or seek certiorari at the Supreme Court.

Making Your Mark in the Music Business

Artists often wonder whether they can seek federal trademark protection on their band name and if so, the costs associated with the same. The simple answer is typically, yes. However, determining how complicated and costly the process is depends on a number of factors. Let us start at the beginning and take a very general approach. Keep in mind, however, that changes in federal trademark laws, as well as your individual circumstances may change the process and information outlined in this article. On that note, it is always helpful to seek counsel from an experienced intellectual property attorney when considering federal trademark protection for your mark(s).

Remember that a trademark serves to identify the source of particular goods and or services with the ultimate goal being to avoid consumer confusion. The idea is for the public to see your mark (e.g. band name) and associate the same with your goods (e.g. downloadable music) and/or services (e.g. live performances). You can start establishing common law rights in your mark by simply using the mark on or in connection with your goods and/or services. Just keep in mind that unless you have a federal trademark registration, your rights in the mark are limited to your geographic location. This is why artists with the same name can exist in multiple states. Granted, there are other considerations in that instance, including the geographic location of each band and the use of the name by the second band being without knowledge of the first band using the same name. For purposes of this article, we will not get into much detail about that scenario, but keep in mind that dual usage of a band name can be highly problematic when one of the bands explodes and starts playing shows in other states, selling records nationally, etc. In other words, it is often helpful to pan out those types of issues sooner than later, especially for bands looking to make their craft their livelihood!

Thus, you will want to determine if your name is already taken and in use by a third party. A great deal of time and attention should be spent on this preliminary investigation and it goes beyond the United States Patent and Trademark Office's ("USPTO") online database. However, that database (the Trademark Electronic Search System or "TESS") is a wonderful starting point. If you familiarize yourself with the ways in which the database can be searched, this can be an excellent tool in helping you determine potential roadblocks for your trademark application. From there, you should also conduct a common law search (e.g. targeted Google searches) to determine if others are using a name identical or similar to yours on or in connection with similar goods and services. A preliminary trademark availability investigation and report by an experienced intellectual property attorney can help tremendously with this aspect of the process as it can provide insight as to potential problems in obtaining federal trademark registration on your mark.

There are a number of protectable forms of marks that can be in standard character form (no claim to font, color, etc.) and special drawing marks (also known as "design marks"), which include some design element. However, there are some limitations relating to geographic descriptions, surnames, etc. In the music space, bands generally cannot register trademark rights in the title of a single song or album or provide others from using it, unless they can establish consumers have come to know the title with the artist (also known as "secondary meaning"), it is being used in connection with ancillary merchandise (e.g. tee-shirts, hats, etc.) and/or it applies to a series of works (e.g. 2-album series).

Now that you have your mark and are ready to apply for federal trademark registration, the application process varies dependent on whether the mark is already in use in interstate commerce (e.g. across state lines) or upon a bona fide good faith intent to use the mark in interstate commerce in the near future. The type of application you file depends on which of

these bases apply to you. In addition, the latter basis will require additional documentation and fees in the future when you actually start using your mark in interstate commerce. Information required in the application includes ownership information, drawing of mark, specimen of mark (for actual use applications), description of goods/services (by Class Number), fees (\$225.00/class if you are able to use a description of goods/services from the USPTO's Acceptable Identification of Goods and Services Manual). Thus, depending on the number of classes involved in your application, your fees can add up quickly (and there are no returns once the application is filed!)

Once the application is filed, it will be assigned to a USPTO trademark Examiner, who will review the application, ensure you met the federal filing requirements, investigate your marks against other marks, and then either approve the mark for publication in the Official Gazette (where third parties can oppose the application for a 30 day period, unless they request an extension to do so) or issue an Office Action (notifying the trademark owner of procedural/substantive issues with the application). If the latter occurs, there are strict deadlines to follow to ensure the application does not abandon. This might also be a good time to employ an intellectual property attorney to assist with responding to an Office Action, particularly if the application is being refused on certain bases (e.g. merely descriptive). Because Office Actions and third-party oppositions can be complex, for purposes of this article, we will presume there was no issue with the application, it was published in the Official Gazette, and there was no opposition filed. From there, the mark will either proceed to registration (if application filed on "actual use in commerce" basis) or the Examiner will issue a Notice of Allowance ("intent to use" applications). With the latter, the applicant then has six months to either use the mark on or in connection with the goods/services identified in the application or seek an extension to do so. Additional time periods and fees apply to "intent to use" applications that applicants must consider to avoid the application abandoning

(requiring the applicant to start the process over, and lose its priority). Remember, an actual registration will not issue until the mark is being used in commerce on/in connection with the goods/services identified in the application.

So why go through all this work and expense? First, it provides nationwide notice to the public that you are claiming rights in the use of the mark with your goods and/or services and makes your rights superior to any third party who begins using the mark after you file your application. Federal registration also affords additional remedies that would otherwise be unavailable to you had you not federally registered the mark (e.g. statutory damages, attorney's fees). Moreover, if you fail to take protective measures with your mark, you open yourself to others using similar marks that weaken or dilute your mark's distinctiveness.

Last, keep in mind as the trademark owner, the burden falls on you to police your mark to ensure others are not infringing on it. Luckily, cease and desist letters and a copy of your mark's registration certificate will help to enforce and protect your rights. In cases where that does not suffice, however, speak to an intellectual property attorney about the proper course of action to ensure the greatest protection of your trademark rights.

For Better or For Worse

The renovations are underway but are they compliant with the American Disabilities Act? Most people like newer and better things; however, most people do not like when newer and better come at a cost to other people. In *Cerda v. Chicago Cubs Baseball Club, LLC*, Plaintiff suffers from Duchenne Muscular Dystrophy and is confined to a wheelchair. For years, Plaintiff attended baseball games at Wrigley Field in the wheelchair accessible sections in the right-field bleachers. After the 2014 renovations, Plaintiff could no longer enjoy the games from that location as the wheelchair accessible seating in the right field was replaced with a special ticketing area featuring a bar. Plaintiff attempted to switch

sides to seating in the left field but was unable to do so given the left field lacked wheelchair seating. Facing limited seating, Plaintiff decided to look at lower box seats. However, the renovations pushed the wheelchair accessible seats behind home plate, back several rows, making it difficult to see the whole field of play when spectators stand in front of that section.

Plaintiff asserts that the Cubs have a duty to comply with ADA and in light of the current renovations, they have failed to do so. Plaintiff requests that the Cubs be required to provide the following: wheelchair seating in the right field bleachers, wheelchair seating in the left field bleachers, wheelchair seating in the lower box seats that is equal to or better than the vertical wheelchair seating that existed prior to the alterations and which otherwise comply with the ADA, and front row wheelchair seating behind home plate.

Cerda v. Chicago Cubs Baseball Club, LLC, Cause No. 1:17-cv-09023, (N.D. IL, filed December 15, 2017).

He Runs! He Leaps! He Hits a Metal Box?

Outfielders are known for running into walls, falling over rails and diving to the ground. In doing so, they put their trust in their team and the opposing teams to keep the field clear of harmful objects in the field of play. On June 29, 2017, Dustin Fowler made his Major-League debut with the New York Yankees against the Chicago White Sox. Typical to outfielders, Fowler was running at high speed attempting to catch a foul ball hit near the wall in foul territory (down the right field line) when his knee came into contact with an exposed box. It is foreseeable that an outfielder is going to run into walls and rails so most teams keep them padded to protect baseball players. However, the White Sox installed an exposed box positioned at knee level in the right field foul territory. The box was recessed behind and between the wall and rail thus hidden from players' views.

Immediately after his collision, Fowler was taken to Rush University Medical for emergency surgery. As a result of such surgery, Fowler missed the remainder of the season and is undergoing rehabilitation for the injuries. Fowler filed suit in Cook County Circuit Court against the Chicago White Sox and the state agency that manages the ballpark (Illinois Sports Facility Authority) claiming the Defendants were negligent in failing to secure the unpadded electrical box he collided with along the right field line, failing to adequately inspect the right field wall and the box, and failing to properly pad or guard the exposed box. The suit claims that these failures amount to an “utter indifference to or conscious disregard” for Fowler’s safety. Moreover, the suit claims the Defendants were aware of the unsafe condition and had time to improve it, but failed to do so. The suit alleges severe and permanent injuries, mental pain and anguish and high medical care costs. Fowler is seeking an unspecified amount of money from Defendants.

(Fowler v. Chicago White Sox)

That is Not Your Trademark

If you are a fan of the National Hockey League, you are undoubtedly familiar with the Vegas Golden Knights. Golden Knights is the first team in NHL history to win eight of its first nine games, and as of January was leading the NHL’s entire Western Conference. Despite their success, the team now faces intellectual property troubles in attempting to secure a federal trademark registration covering the Golden Knights team moniker. In December 2016, the USPTO issued an office action rejecting the team owner’s attempt to register the standard character mark “Vegas Golden Knights,” citing a likelihood of confusion with a trademark registered by the College of Saint Rose (covering the use of “Golden Knights” for use in commerce with intercollegiate sports exhibitions). Then, on January 10, 2018, the USPTO’s Trademark Trial and Appeal Board instituted an opposition proceeding against the “Vegas Golden Knights” mark, which was filed by the U.S. Army. The Golden Knights moniker

was selected in part given the team’s owner graduated from West Point and liked the name used by the institution’s parachute team.

The opposition cites multiple grounds, including priority and likelihood of confusion, false suggestion of a connection with West Point and dilution by blurring. In addition, the U.S. Army is asserting its unregistered trademark rights in “Golden Knights” as used in connection with entertainment exhibition services and public relations. Even though the Vegas Golden Knights are not claiming any particular colors for use with its trademark, they use similar black/gold and/or yellow/white color schemes, similar to those on uniforms and advertisements used by West Point’s hockey team (the Black Knights). Such use, according to the U.S. Army, furthers the likelihood of consumer confusion. If the U.S. Army is successful in blocking the Vegas Golden Knights trademark registration, the team may continue to use the name in commerce, at least for some time. However, continued use under that circumstance could still lead to lawsuits for the Vegas Golden Knights.

(U.S. Army Opposition to Golden Knights Federal trademark Application, No. 87147239, filed January 10, 2018, Proceeding No. 91238885)

You are Infringing, You are Infringing, Everyone is Infringing

Fit Radio is a music streaming service that attracts exercise enthusiasts by using songs by numerous stars, including Beyoncé and Justice Bieber, and helps users create individual playlists to listen to music on demand while exercising.

Sony, Warner Bros., Capitol and others among the biggest companies in the recording industry have banded together and filed a federal lawsuit in Atlanta alleging that Fit Radio is committing “massive scale” copyright infringement. The Complaint alleges that rampant copyright infringement of sound recordings over the internet and through mobile

applications, including the type enabled by Fit Radio, have resulted in significant harm to the music industry and artists who rely on royalties from recorded music as their livelihood. The Complaint alleges that Fit Radio is available through fitradio.com and through an application for mobile devices and that it recruits disc jockeys who copy and then upload popular songs. It is further alleged that Fit Radio further supports its disc jockeys via Facebook and other marketing campaigns and that music is streamed via Apple Music and Spotify, among others, but without a license to do so. Thus, the record companies argue that Fit Radio has achieved its touted success as the “#1 workout music app” given its infringement and facilitation of infringement by others.

The recording companies claim that Fit Radio disc jockeys upload music and then Fit Radio distributes that music to the public for a monthly, yearly or lifetime fee. The application allows users to search for artists, playlists or particular songs that can then be shared via social media. Because Fit Radio is allegedly “interactive”, the record companies argue that Fit Radio cannot rely on a statutory license. Nevertheless, at this time, it is unclear whether Fit Radio has been paying the statutory license fee.

The suit seeks recourse for direct, vicarious and contributory copyright infringement, including copyright inducement. In addition to an injunction, the record companies are seeking statutory damages. In its statement to The Hollywood Reporter, the Recording Industry Association of America stated, “consumers have numerous options for digital music services, including licensed fitness apps that partner with music creators. Fit Radio has failed to obtain the proper licenses for music, denying artists and labels the royalties they deserve. This action demonstrates our commitment to fostering and protecting the legitimate marketplace for both creators and consumers.”

(Sony Music Entertainment et al. v. Fit Radio)

Keeping Secrets is a Risky Business - What is Texas Tech hiding about the Sudden Termination of Head football Coach, Mike Leach?

Texas Tech University (“Texas Tech”) fired head football coach, Mike Leach, on December 29, 2009, one day before Texas Tech was obligated to make a \$2.4 million payment to him, unless he was fired “for cause.” The apparent “cause” against Coach Leach was allegations from Adam James, a Texas Tech football player, stating that, “Coach Leach was verbally abusive to players, hated by the entire team, and had made it a living hell on the receivers.” The Texas Tech community became outraged after their winningest football coach in school history had been fired for claims made by Craig James and father Adam James, which had been disproved in a sham investigation. Subsequently, Coach Leach filed a suit against Texas Tech to retrieve the money he was owed. As a government entity, Texas Tech hid behind their sovereign immunity (a tool used by government entities to avoid lawsuits) in order to avoid honoring their contract with Coach Leach.

Dolcefino Consulting (“Dolcefino”), a domestic limited liability company located in Houston, Texas, filed suit to seek a judgement declaring its rights, status, and legal relations with regard to Texas Tech University (“Texas Tech”). Dolcefino declares that it is entitled to the requested information from Texas Tech under the Texas Public Information Act (“TPIA”).

Dolcefino brings this suit to ensure that the Texas government entities are providing public access to information to properly hold them accountable. Texas Tech has disregarded the TPIA by refusing to produce public records that are associated with the termination of Coach Leach. As a government entity, Texas Tech is alleged to have “had their cake and ate it too” by using their power to hide behind their sovereign immunity to avoid Coach Leach’s contract obligations, but then abusing their power by failing to meet their obligations as a government entity, and not producing records in regard to the termination. In the State of Texas, all government records are

presumed to be public, which would encompass the documents that Texas Tech has relating to Coach Leach and his improper termination. There is little doubt that Texas Tech possesses loads of information regarding Coach Leach's improper firing, including emails, phone records, and documents about the "so-called" investigation of the allegations.

Starting in September of 2017, Dolcefino sent individual record requests to Texas Tech, two of which were:

- Documents surrounding the termination of Coach Leach
- Documents evidencing the conduct and communications of members of the Board of Regents at Texas Tech.

Unsurprisingly, Texas Tech failed to deliver the information to Dolcefino as is required of them pursuant to the TIPA. Texas Tech either completely ignored the requests or partially responded. For example, following the request for information about the termination of Coach Leach, Texas Tech provided records that were incomplete, including emails that were previously produced in earlier litigation by Texas Tech and not produced in this request. In addition, there has been a minimum of 1,785 pages worth of documents relating to Coach Leach's termination, yet Texas Tech has only provided 312 pages of the documents.

Although Texas Tech provided a very pitiful bit of information regarding the termination of Coach Leach, the information provided simply raised more questions to Dolcefino and the public. Some of the substantially questionable actions by Texas Tech include:

- The President of Texas Tech not writing his own own news release to announce the firing of Coach Leach.
- The so-called "investigation" that Texas Tech promised the students and the public has been revealed as a sham and a rush to punish Coach Leach for disputable allegations.

- It instead appears that the firing was a retaliation after Coach Leach attempted to obtain a temporary restraining order to guarantee that he could coach the team in the Alamo Bowl.
- The Texas Tech Board of Regents was not notified of the allegations of misconduct that led to Coach Leach's firing "for cause."
- Texas Tech's manipulation of affidavits of its employees in regard to the allegations against Coach Leach.
- Contradicting statements between the Dallas Morning News, and the internal communications at Texas Tech regarding termination.

The production of incomplete documents have continued to put Texas Tech into a negative spotlight. It continues to raise questions about how a very profound University handles allegations against their employees, including athletic coaches, and how they manipulate their position as a government entity to try and avoid the public from discovering the truth. However, the biggest question from this entire fiasco has been one that the public has had all along:

Why exactly is Texas Tech hiding the truth from the public, and what did the university do that is worthy of deceiving the public of the truth?^{1 2}

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¹ Dolcefino Consulting v. Texas Tech University, www.sportslaw.org

² Mike Leach vs. Texas Tech: Adam James Deposition; www.nytimes.com

What's Love Got To Do With It? Copyright Laws and "Revenge Porn"

by Carla Varriale

So-called "revenge porn", now preferably referred to as "image abuse" receives extensive coverage in the media, particularly when it involves a salacious image of a celebrity that fuels tabloid headlines. However, "image abuse" is not restricted to celebrities: it cuts across gender, gender identity, sexual preference, cultural, and socioeconomic lines. According to a 2017 nationwide study issued by the Cyber Civil Rights Initiative, Inc. (the "CCRI study"), it primarily targets young women.¹ The study was the first study to address the motives for the perpetration of "image abuse", deterrents to perpetration, and health outcomes for its victims. The CCRI study noted that about half of all young adults age 18-26 have sent nude photos of themselves to others and two-third have received sexually explicit photos from others. It is a rogue business powering websites that garner thousands of page views (and significant advertising revenue) based on images that are uploaded without the victim's consent. In contrast, when an unauthorized intimate image is shared without a victim's consent, the victim is violated and can experience shame, emotional distress, and financial damages (including, potentially, a loss of employment). Victims searching for a legal remedy are often left with few choices. Criminal statutes and tort law, for example, do not address the immediate removal of an unauthorized intimate image from public view. Also, the image would necessarily be shared with others in a criminal or a tort action. However, the copyright laws, particularly Title II of the Digital Millennium Copyright Act and the Online Copyright Infringement Liability Limitation Act (collectively, the "DMCA"),² which were enacted by Congress to support intellectual property rights with the advent of the Internet, can provide an immediate and empowering remedy to the victims of so-called "image abuse."

“Image abuse” is a misleading way to characterize the nonconsensual publication of an intimate image, whether for profit or other gratification. However, the term makes for a good sound bite and it has, therefore, gained currency in the media and elsewhere. “Image abuse” connotes some degree of collaboration or consent to the creation and the distribution of the image by the victim and that is not accurate under the circumstances. Describing it as “image abuse” also overlooks that some of the parties involved in the posting of the illicit image are not motivated by “revenge” at all, and may not even know the victim. Because framing the discussion is important and mindful of the rights of the parties involved, the term “non-consensual pornography” (“NCP”) is used here. The CCRI study cited above defined NCP as the distribution of sexually graphic images of individuals without consent. NCP is also a more appropriate description because it underscores a victim’s lack of consent to the use and publication of the image to third parties. It is this absence of consent or permission to use the image that is that significant to an analysis of whether an NCP victim can combat NCP using the copyright laws.

There is presently legislation at the state level targeting NCP, but this legislation may not necessarily address the needs of victims who have an immediate need to remove the illicit image. According to the CCRI study, 38 states and the District of Columbia have statutes criminalizing NCP. There is also a proposed federal law, the “Ending Nonconsensual Online User Graphic Harassment (‘ENOUGH’) Act of 2017”, that would empower the Department of Justice to treat NCP postings as a federal criminal offense. The potential penalties for a violation of ENOUGH include a fine, imprisonment, or both. ENOUGH would make it “unlawful to knowingly distribute a private, visual depiction of an individual’s intimate parts or of an individual engaging in sexually explicit conduct, with reckless disregard for the individual’s lack of consent to the distribution, and for other purposes.” It does not, however, address the removal of NCP from public view. ENOUGH, while a laudable step forward, has not yet been made a federal law and it is unclear if it will.

Tort law, too, is also an imperfect remedy for most victims of NCP. While there are applicable causes of action for invasion of privacy, defamation, and intentional infliction of emotional distress that may address some of the concerns and damages suffered by a victim of NCP, tort law may not address the most pressing concern—the immediate removal of the image or content. Tort law requires, obviously, that an action is brought before a court and, potentially, a jury. The image would necessarily be viewed by third parties. Tort law, like criminal law, offers an unpredictable outcome. Litigating a tort case is also time consuming (and expensive), factors which may deter an NCP victim from pursuing a tort action. There may also be additional challenges, such as acquiring jurisdiction over the responsible party or parties, or meeting a daunting burden of proof. This is particularly true of material posted by an anonymous party. Therefore, litigating a tort claim seeking damages claims for NCP remains an unpalatable choice for many victims.

The copyright laws have emerged as a unique method to remove certain kinds NCP. For example, the NCP victim may have a copyright with regard to the illicit image if the NCP victim created the image himself or herself. The Copyright Act protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³ To the extent the NCP victim is the author or the creator of the image (such as with a “selfie”) the NCP victim possesses a copyright regarding that image and all of the rights that go along with it. The Copyright Act also gives the copyright holder the exclusive right to display or to produce the work and to distribute copies or photo records of the work. Or not to. If the NCP victim is the author or creator of the work” such as with a “selfie” (an important distinction, as this copyright protection will not apply if another person is the author or the creator of the work), publishing the work without the permission of the author or the creator constitutes copyright infringement.

The Communications Decency Act (“CDA”) §230⁴ may generally shield a provider of, among other things, NCP. CDA §230 provides NCP sites and internet service providers with immunity, however, this immunity does not extend to the reproduction and display of copyrighted images (the immunity also does not apply to child pornography or to obscene material, and it does not apply to original information or content that the provider creates). However, the CDA §230 does require a service provider or website to operate in good faith and there is no such CDA immunity for NCP sites or providers in the case of copyright infringement. This is an important distinction for both the NCP victim and the service provider or website that will not be immune from liability for copyright infringement with respect to certain NCP.

Furthermore, under the copyright laws, there is a practical remedy available to and NCP victim when a copyright is infringed. As noted above, the DMCA provides a swift, simple tool to remove an infringing image from a website through its “notice and takedown” protocol.⁵ The DMCA has a built in incentive for a service provider or a website to react promptly to a claim that it is infringing on a valid copyright by displaying copyrighted material.

The DMCA contains “safe harbors” protect service providers from monetary liability based on the allegedly infringing activities of third parties. In order to benefit from the protections allowed by the “safe harbors”, service providers must comply with the conditions set forth in §512, including “notice and takedown” protocols. These protocols give copyright holders a simple way to disable access to allegedly infringing content. §512 also contains provisions allowing a provider or website to challenge improper takedowns. Without these reciprocal protections, the free exchange of ideas and expression that blossomed with the advent of the internet might be diminished. These protections also minimize the risk of potential copyright liability for internet providers and websites hosting and transmitting user-generated content. Thus, the safe harbor provisions of the DMCA are valuable to service providers and websites as well as the victims of copyright infringement or NCP.

The “notice and takedown” request is relatively straightforward. NCP victim can send a request that a website where the NCP image is located must “take down” the infringing image or material along with any information or indexes (such as a hyperlink to the infringing image). An internet service provider is required to register an agent with the United States Copyright Office. This agent can be located and notified through a few clicks of a mouse and the copyright holder, the NCP victim, can use this information to demand that the alleged infringer to “take down” the infringing image. This means the provider or site must remove or disable access to the material that is claimed to be infringing promptly. The elements of the notice are set forth in 17 U.S.C. §512 (c)(3) and are brief, easy to navigate, and do not require an attorney.

Importantly, the DMCA protects both copyright owners and a service provider that inadvertently publishes copyrighted material if it complies with a takedown request (assuming the provider is subject to the DMCA).⁶ A provider can receive safe harbor protection from copyright infringement claims under the DMCA only if it lacked actual knowledge that the material or an activity using the material on the system or network was infringing, if it lacked knowledge of facts and circumstances from which infringing activity is apparent, or, upon obtaining such knowledge acts “expeditiously” to remove, or disable access to, the material. Once the service provider has knowledge or is notified that it is infringing on a copyright, the onus is on the provider to remove the infringing content “expeditiously” in order to avoid liability for damages. However, the service provider may also file a counter-notice to the issuer of the takedown notice in order to explain why it believed it had a right to post the image and is not infringing on a copyright. The DMCA strikes a balance between the rights of an NCP victim and the purportedly infringing party through this safe harbor. A provider or web site that ignores the takedown request does so at the risk of liability for damages to the owner of the copyright. The damages for copyright infringement are statutory and increase substantially where the infringement is willful. There is every incentive, therefore,

for a provider or site to comply with a takedown request.

This “expeditious” removal of the infringing material is what may be most attractive to the victim of NCP. The takedown protocol consists of a simple letter that identifies the purportedly infringing work along with a statement of why the victim believes that the image was not posted by the copyright owner and provides his or her contact information, among other things. The NCP victims need not even register their copyright before sending the notice. The CCRI study, interestingly, noted that the individuals who reported having perpetrated NCP by sharing images without consent, noted that knowing that they could be sued or fined as important deterrents. The copyright laws, to the extent they may create liability for the “sharer” may even provide a deterrent to such nonconsensual posting. The takedown protocol is also empowering for some victims. It does not require intervention of a court, or even an attorney, and it offers an NCP victim a modicum of privacy and self-help. The copyright laws, therefore, offer a unique remedy for some NCP victims as well as providers and sites involved with NCP.

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¹ Dr. Asia A. Eaton, Dr. Hadly Jacobs, and Yanet Ruvalcaba, *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration* (June 2017), www.cybercivilrights.org/wp-content/.../06/CCRI-2017-Research-Report.pdf

² 17 U.S.C. § 512 (2003)

³ 17 U.S.C. §102 (a)

⁴ 47 U.S.C. §230 (1996)

⁵ 17 U.S.C. § 512 (c) (3).

⁶ This obviously becomes more difficult where the provider is located outside of the United States or has not opted to designate an agent for the service of such notices.

2018 ELI Law Student Competition Winning Paper

Innovation or Exploitation: Is it Time to Update the DMCA Safe Harbors?

by Rebecca Pollack

“To stop the flow of music would be like the stopping of time itself, incredible and inconceivable.”¹ What happens when the same technology enabling the flow of music globally simultaneously facilitates the growth of copyright infringement? The Internet is instrumental in providing musicians an inexpensive global platform to reach existing and new audiences and enabling consumers to discover music from across the world.² However, along with these positive outlets, the Internet also developed a platform for illegal online streaming and downloading services.³

In 1998, to help copyright law keep pace with the evolving Internet and rapid technological developments that brought music access to the Internet’s forefront, Congress enacted the Digital Millennium Copyright Act (“DMCA”).⁴ The legislature’s public policy rationale was that the DMCA would benefit both music consumers and copyright holders (“rightsholders”)⁵ by enabling development of Internet technologies, because the DMCA “facilitate[s] making available quickly and conveniently via the Internet...the fruit of American creative genius.”⁶

Unfortunately, while the DMCA succeeded in helping the Internet flourish, the DMCA § 512 safe harbors (“Safe Harbors”) have not struck the

the desired balance between enabling development and protecting rightsholders' interests. Creating a voluntary technical measures ("VTMs") guidance document, in correlation with requiring online service providers ("OSPs") accommodate these measures under § 512(i)(2)(A), can improve balance between OSP and rightsholder⁷ interests.

I. Music, Money & the Internet

The digital environment has become a catalyst for both U.S. economic growth and artists' ability to promote and expose their music to the public. U.S. music industry revenues totaled \$7.7 billion in 2016, an 11.4% increase in just one year.⁸ Such an increase is primarily attributed to the "doubling of paid streaming music subscriptions."⁹ Further, the digital environment composed approximately \$966.2 billion, or 6%, of the U.S.'s \$16.22 trillion real GDP in 2014, significantly enhancing the U.S. economy.¹⁰ From an economic and infrastructural perspective, these financial increases are substantial. However, research suggests "nearly one-quarter of all Internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material,"¹¹ which, from a rightsholder perspective, makes these percentages far less enticing. One-quarter might not sound sizeable until put into perspective. In 2014, over 90% of the U.S. population listened to music for at least 25 hours per week.¹² Of those 90%, 75% listened to music online.¹³ A myriad of user upload service platforms, such as YouTube and SoundCloud, have emerged as the Internet and digital environment progressed. These platforms are now the dominant way consumers listen to music on-demand, with YouTube alone representing 46% of this listening time.¹⁴ 85% of YouTube users, approximately 1.3 billion people, use the platform primarily to listen to music.¹⁵

In 2016, more than 50% of U.S. music industry revenue was from music streaming services,¹⁶ such as Pandora, YouTube, Spotify, and other similar services. In fact, in 2016, music streaming revenues more than doubled from 2015, to \$2.5 billion.¹⁷ This one-year increase not only was greater than any other music

distribution format, it constituted a one-year increase the music industry had not seen since 1998.¹⁸ Such drastic growth is primarily attributed to the rise in new users of these services and the growth of new service providers,¹⁹ both of which can be credited to the Internet sector's expansion. Viewing all digitally-distributed formats, both streaming services and permanent digital downloads, from 2015 to 2016, the music industry's total revenue increased 23% to \$5.8 billion and now accounts for more than 78% of the music industry's value.²⁰

In addition to this increase in music industry revenue, online music services, such as Spotify, Pandora, and Apple Music, have slowly increased royalties paid, causing royalties distributed by BMI to increase by 65% in 2014.²¹ While such significant royalty increases are a step in the right direction for rightsholders, the amount of plays necessary to result in any significant royalty distribution is surprising. For example, in 2015, Spotify paid only .006 to .0084 cents per play, which means that, for 1,000 song plays on Spotify, rightsholders only earned up to \$8.40 in royalties.²² The discrepancy between digital streaming revenues and the royalties rightsholders receive from those revenues, along with stakeholders' competing interests generally, are major components in stakeholders' differing viewpoints regarding the Safe Harbors' effectiveness.

II. The DMCA & the Copyright Office's Effectiveness Study

The DMCA was "designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."²³ In addition to facilitating this worldwide exposure, Congress intended for the DMCA "to ensure [that rightsholders] can protect their work from piracy."²⁴ While drafting the DMCA, Congress recognized that OSPs faced continual danger of copyright infringement liability in their daily work, especially when allowing users to upload content, and that some form of protection was necessary.²⁵ Congress addressed this need for protection by including Safe Harbors in the DMCA

§ 512.

The DMCA § 512 contains four Safe Harbors that afford limited liability protections for OSPs engaging in any of four qualifying activities and meeting the associated eligibility requirements. These four qualifying activities are:

- (a) Serving as a conduit for the automatic online transmission of material as directed by third parties;
- (b) caching (i.e., temporarily storing) material that is being transmitted automatically over the internet from one third party to another;
- (c) storing (i.e., hosting) material at the direction of a user on a service provider's system or network;
- or (d) referring or linking users to online sites using information location tools (e.g., a search engine).²⁶

For purposes of this essay, I focus only on the § 512(c) Safe Harbor qualifying activities: storing material on an OSP's system at a user's request;²⁷ and the associated § 512(c) eligibility requirement contained in § 512(i): an OSP must accommodate the standard technical measures ("STMs") identifying or protecting copyrighted works and developed according to "broad consensus between rightsholders and service providers, to the extent any such measures exist."²⁸ If an OSP engages in § 512(c) activities and meets the associated eligibility requirements, it will not be held liable for monetary relief, and will be subject to very limited injunctive relief for infringing activities.²⁹ This limited injunctive relief and elimination of liability for monetary relief under the § 512(c) Safe Harbor provides OSPs significant incentives to comply with the provision.

B. The Copyright Office's Effectiveness Study

In 1998, Congress could not have reasonably predicted an OSP receiving over one million infringement notices per day or that the volume of infringing material available on the Internet would more than double between just 2010 and 2012.³⁰ On December 31, 2015, the United States Copyright Office undertook "a public study to evaluate the impact and effectiveness of the DMCA safe harbor provisions" in response to extensive technological advancements.³¹ It

published a notice of inquiry in the Federal Register to solicit public comment from stakeholders affected by the Safe Harbors.³²

In response to this notice of inquiry, the Copyright Office received over 92,000 written submissions.³³ Following receipt of these comments, the Copyright Office convened roundtables in May 2016 to provide participants with additional opportunity to share their views on the topics presented in the first notice of inquiry and other issues regarding the Safe Harbors' operation. After reviewing the submissions and roundtable comments, the Copyright Office determined several themes merited additional consideration and, on November 8, 2016, published a second notice of inquiry for comment on these themes.³⁴

While the Copyright Office is still determining its next move, it appears from the themes presented by the Copyright Office that an overarching difficulty with the Safe Harbors is the stringent § 512(i)(2) STM definition. This definition is important because STM accommodation and non-interference is required for an OSP to be eligible for § 512(c) Safe Harbor protections.³⁵ For a technical measure to be an STM, it must:

- (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
- (B) [be] available to any person on reasonable and nondiscriminatory terms;
- and (C) [] not impose substantial costs on service providers or substantial burdens on their systems or networks.³⁶

While Congress intended for STMs to be developed, it is unlikely an STM will ever exist because in practical effect, the § 512(i)(2)(A) "broad consensus" requirement is far too constraining. As more technological advancements develop, the STM definition becomes increasingly burdensome because there are more technologies in the marketplace, which escalates stakeholder confusion about their DMCA responsibilities. Some stakeholders are hesitant to believe technology is the

best approach to address these issues, due to technology's growing price and constant evolution. However, given the current economic climate, music consumption trends, and the growth of digitized content, technology will likely be the most efficient solution because technological trends appear to indicate the music industry's continued reliance on technology. Embracing technological measures is also the most likely solution the majority of stakeholders will agree upon, as most already voluntarily employ at least one technical measure to fulfill their repeat infringer policy obligations.³⁷

III. Standard Technical Measures Problem

When enacting the Safe Harbors, Congress envisioned collaboration between stakeholders when policing infringement, and included the § 512(i) STM requirement to “encourage appropriate technological solutions to protect copyrighted works.”³⁸ For an OSP to comply with the § 512(c) Safe Harbor, it must “accommodate and not interfere with ‘standard technical measures’ used by copyright owners to identify infringing material.”³⁹ The most difficult element to becoming an STM is that a technical measure must be developed through a broad consensus of stakeholders “in an open, fair, voluntary, multi-industry standards process.”⁴⁰ This broad consensus element makes STM designation impossible; nearly twenty years after the DMCA's enactment, zero STMs have been developed. This lack of development results not only from stakeholder inability to come to agreement due to competing interests, but also because “‘standard technical measures’ is ‘notoriously difficult to define’...[because] [r]apid technological development disturbs the very notion of ‘standard.’”⁴¹ Given the wide array of stakeholder sizes, services, and resources, the STM requirement, as presently defined, is unworkable and needs adjustment.

Some OSPs assert that establishing STMs, regardless of the § 512(i)(2) definition, would be a mistake and remove the latitude stakeholders have to innovate new anti-infringement measures.⁴² Other OSPs believe adopting VTMs is possible, but contend that any STM

adoption must include a reciprocal obligation of rightsholders to provide the necessary data to make the STM more effective.⁴³ Rightsholders generally agree that the one-size-fits-all approach to STMs does not work in today's technological environment because the current STM determination process does not consider the availability of different tools offered at various price points, which may work differently for each stakeholder.⁴⁴ OSPs are concerned that providing an STM list will result in immediately outdated STMs because, by the time the list is approved, new, better technology will already exist. Contrastingly, rightsholders believe there are several VTMs currently employed, which could serve as appropriate STMs.⁴⁵ Despite the disagreement about why the DMCA's current STM requirement is flawed, there is no dispute over the fact that it is.

Requiring OSPs to accommodate STMs in order to receive limited liability protections under the Safe Harbors is necessary to protect rightsholder interests. Congress needs to update how STMs are developed under § 512(i)(2)(A) to allow for broad consensus beyond the formal standards process because Congress's inability to establish even one STM in almost twenty years illustrates that this process is a black hole.

IV. The Proposed Solution

There is no question that the Safe Harbors enabled the Internet and digital economy to flourish since the DMCA's enactment; however, they have done so at a significant detriment to rightsholders. Congress believed stakeholders needed to collaborate to successfully fight online piracy, and this sentiment is no less true today. To make any headway in improving the Safe Harbors, stakeholders will have to work together. To address the STM challenges, DMCA § 512(i)(1)(B) should be amended, and a VTMs guidance document (“Guidance Document”) should be created.⁴⁶ The Guidance Document would provide a list of effective VTMs stakeholders could choose to implement. To provide OSPs the same level of incentive to accommodate VTMs as already exists to accommodate STMs, § 512(i)(1)(B) should be amended to read “accommodates

and does not interfere with standard technical measures and at least two voluntary technical measures applicable to that service provider's size classification from the U.S. Copyright Office voluntary technical measures guidance document." Through this amendment, in addition to the Guidance Document, stakeholders have a comprehensive, yet non-exhaustive, list of VTMs proven effective and acceptable by stakeholders, as stakeholders have been utilizing many of them without being statutorily required.

After the Copyright Office's Safe Harbors study, it is apparent that stakeholders consistently use VTMs even though it is not required. For example, Google voluntarily developed technical measures, including search ranking demotions, based on valid takedown notices and proactive measures that detect infringing apps on Google Play's App Store. SoundCloud voluntarily implemented content filtering technology, believing the "investment [in content filtering technology] is necessary for any company that is serious about minimizing instances of online infringement."⁴⁸ Even companies that barely acknowledge that the Safe Harbors could benefit from change have implemented VTMs to supplement their notice-and-takedown process and repeat infringer policies.⁴⁹ Given stakeholders' general willingness to implement VTMs, creating a Guidance Document and incorporating it into § 512(i)(1)(B) is a good first step toward achieving all stakeholders' desired results.

A team designated by the Copyright Office would create the Guidance Document and, to address stakeholder concerns about requiring outdated technical measures, update the Guidance Document annually. This team would contain engineers, OSP representatives, and rightsholder representatives designated to assess newly developed VTMs or those currently used by stakeholders impacted by the Safe Harbors.⁵⁰ The team would meet annually to address and consider technological advancements and industry updates that have led to new technical measures. The Guidance Document will identify qualifying VTMs available to stakeholders. By a majority vote, the team will determine if any

technical measures should be added to or removed from the Guidance Document. To be included in the Guidance Document, a technical measure must, at a minimum: (1) be available to any stakeholder on reasonable or non-discriminatory terms; (2) not impose substantial costs or burdens on stakeholders or their systems; and (3) already be employed by at least one stakeholder at the time of inclusion.

To accommodate differing VTM costs and stakeholder resources, the Guidance Document will divide VTMs into brackets based on stakeholder size. As stated in the proposed statutory language above, OSPs would be required to accommodate or not interfere with at least two VTMs employed by applicable rightsholders. To ensure VTMs are not cost prohibitive, the Guidance Document would be organized similar to fee schedules⁵¹ used in various industries to determine a company's payments based on its size. The brackets would be broken into small, medium, and large entities based on various factors, such as: (1) number of employees, (2) annual gross revenues, (3) average number of daily user uploads, and (4) company resources devoted to handling the notice-and-takedown process and other associated DMCA requirements. Each size bracket would include technical measures that are not cost-prohibitive to entities of that size.

OSP can choose any VTMs to employ or accommodate from the Guidance Document. However, under the proposed statutory language, OSPs would be required to accommodate at least two VTMs from their size bracket to maintain the infringement liability protections. This stipulation ensures that large OSPs do not fulfill this requirement with VTMs that are inadequate to properly address the massive amount of notices received and content uploaded daily. Similarly, these brackets help nullify smaller entities' concerns that some technical measures are cost prohibitive, because the measures listed under small and medium will both be in a price range smaller entities can afford.⁵²

Through annual Guidance Document updates, OSPs would retain the flexibility they currently

enjoy, as the Guidance Document still permits a high level of discretion. OSPs appreciate that, under the DMCA's current language, they can choose which, if any, technical measures to employ, because they are provided the opportunity to innovate and test new technologies to address online infringement.⁵³ Despite the proposed statutory language associated with the Guidance Document, this flexibility is retained because the Guidance Document would be updated annually to account for both new and obsolete technologies. Further, the proposed amendment allows for technical measures within the Guidance Document to be voluntary. As long as an OSP accommodates two technical measures within its size bracket, it has full discretion in which measures it decides to accommodate, allowing OSPs to continue developing new, better technical measures, while simultaneously providing needed stability for both rightsholders and OSPs in understanding their DMCA obligations.

Incorporating the Guidance Document would improve the current system because it applies VTMs stakeholders already embrace and incorporate into their infrastructures, while staying on top of technology's evolving nature. Amending § 512(i), in addition to creating the Guidance Document, provides increased protections for rightsholders, while preserving the Safe Harbors' flexibility, which is attractive to OSPs.

V. Conclusion

There is no doubt that the Safe Harbors would benefit from changes to make the current system more effective and less burdensome on stakeholders. Furthermore, there is no question that achieving agreement on a solution will be tumultuous. To achieve real and beneficial change, solutions must account for stakeholders' varying interests and differences. To address these difficulties, and keeping in mind the substantial stakeholder differences, this essay urges Congress to amend § 512(i)(2)(A) and the Copyright Office to facilitate creating the Guidance Document to clarify stakeholder responsibilities regarding STMs. Unfortunately, finding solutions leaves many questions for

Congress and the Copyright Office. But one thing is clear: both stakeholders and Congress must acknowledge that, even in 1998, Congress was correct: technology will be necessary to enable digital innovation and police copyright infringement.

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¹ Jeff Nilsson, *Aaron Copeland Tries to Put It into Words*, SATURDAY EVENING POST (Nov. 14, 2009), <http://www.saturdayeveningpost.com/2009/11/14/history/post-perspective/aaron-copland-put-words.html>.

² INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY 25 (2017) [hereinafter IFPI GLOBAL MUSIC REP. 2017].

³ *Id.* Some of these illegal platforms include peer-to-peer sharing sites and stream ripping sites.

⁴ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S. Code).

⁵ For purposes of this paper, all reference to rightsholder(s) refer specifically to those within the music industry.

⁶ S. REP. NO. 105-190, at 8 (1998).

⁷ Throughout this essay, OSPs and rightsholders will collectively be referred to as "stakeholder(s)."

⁸ JOSHUA P. FRIEDLANDER, NEWS AND NOTES ON 2016 RIAA SHIPMENT AND REVENUE STATISTICS 1 (2017).

⁹ *Id.*

¹⁰ STEPHEN E. SIWEK, MEASURING THE U.S. INTERNET SECTOR 5 (Internet Ass'n ed., 2015); Google Inc., Comment Letter on Section 512 Study: Notice and Request for Public Comment 17 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90806> [hereinafter Google Comment Letter].

¹¹ Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862, 81862 (Dec. 31, 2015).

¹² SoundCloud Operations, Inc., Comment Letter on Section 512 Study: Notice and Request for Public Comment 21 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90151> [hereinafter SoundCloud Comment Letter].

¹³ *Id.*

¹⁴ INT'L FED'N OF THE PHONOGRAPHIC INDUS., CONNECTING WITH MUSIC: MUSIC CONSUMER INSIGHT REP. 16 (2017).

¹⁵ IFPI GLOBAL MUSIC REP. 2017, *supra* note 2 at 10.

¹⁶ *Id.* at 2. This is a 114% increase from 2015; FRIEDLANDER, *supra* note 8, at 1.

¹⁷ FRIEDLANDER, *supra* note 8, at 2.

¹⁸ *Id.* at 1; IFPI GLOBAL MUSIC REP. 2017, *supra* note 2, at 10.

¹⁹ FRIEDLANDER, *supra* note 8, at 2. 2016 was the first full year for Apple Music and growth of Premium service offerings, such as Spotify Premium. *Id.*

²⁰ *Id.* at 3.

²¹ Parker Hall, *Artists are Getting Paid More for Their Music, but is it Enough?*, DIGITAL TRENDS (Sept. 10, 2015), <https://www.digitaltrends.com/music/bmi-announces-record-royalty-payments-for-digital-music/>.

²² *Id.*

²³ S. REP. NO. 105-190, at 1–2 (1998).

²⁴ H. REP. NO. 105-551, at 23 (1998).

²⁵ S. REP. NO. 105-190, at 2; Tatsuya Adachi, *Did VIMEO Kill the Radio Star? DMCA Safe Harbors, Pre-1972 Sound Recordings & the Future of Digital Music*, 34 CARDOZO ARTS & ENT. L.J. 443, 453 (2016).

²⁶ Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. at 81863.

²⁷ 17 U.S.C. § 512(c) (2012).

²⁸ *Id.*; *Id.* § 512(i)(2)(A).

²⁹ *Id.* §§ 512(a)–(d).

³⁰ Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. at 81862.

³¹ *Id.*

³² *Id.*

³³ Section 512 Study: Request for Additional Comments, 81 Fed. Reg. 78636, 78636 (Nov. 8, 2016).

³⁴ *Id.* at 78637. These themes fit into four general areas: “(1) Characteristics of the current internet ecosystem; (2) operation of the current DMCA safe harbors system; (3) potential future evolution of the DMCA safe harbor system, including possible legislative improvements; and (4) other developments.” *Id.*

³⁵ 17 U.S.C. § 512(i)(1)(B) (2012).

³⁶ *Id.* § 512(i)(2).

³⁷ Lauren G. Gallo, *The (Im)possibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J. OF L. & THE ARTS 283, 283–84 (2011).

³⁸ *Id.* (quoting to S. REP. NO. 105-190 at 52).|

³⁹ Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKLEY TECH. L.J. 363, 375 (2009) (citing 17 U.S.C. § 512(i)(1)(B)).

⁴⁰ 17 U.S.C. § 512(i)(2)(A).

⁴¹ Gallo, *supra* note 37, at 304 (quoting Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 275 (2005)).

⁴² Facebook, Inc., Comment Letter on Section 512 Study: Notice and Request for Public Comment 11 (Apr. 7, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90724> [hereinafter Facebook Comment Letter].

⁴³ SoundCloud Comment Letter, *supra* note 12, at 19.

⁴⁴ American Association of Independent Music et al., Comment letter on Section 512 Study: Notice and Request for Public Comment 43 (Apr. 7, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-89806> [hereinafter Music Community Comment Letter].

⁴⁵ *Id.* Some of these suggested voluntary measures include: (1) search engine demotion; (2) content matching technologies, such as hash-based file identification, implementation of third-party fingerprinting technology, and an OSP’s proprietary matching technology; and (3) financial measures, such as stopping funds flowing from intermediary services like ad networks and payment processors to services engaged in substantial copyright infringement. *Id.* at 28–30.

⁴⁶ This guidance document would not be subject to the Administrative Procedures Act (APA). Congress may include reference to

this DMCA section in APA § 701(e) as an exception to the APA’s notice-and-comment requirement with language similar to “except as provided in 17 U.S.C. § 512(i).” This language is similar to that currently in APA § 701(e) for deposited articles.

⁴⁷ Google Comment Letter, *supra* note 10, at 12–13.

⁴⁸ SoundCloud Comment Letter, *supra* note 12, at 13.|

⁴⁹ For example, Facebook, who throughout its comment submissions insists that the Safe Harbors both work and have achieved Congress’s goals, has implemented its own content matching technology in addition to contracting with Audible Magic, a third-party service database of copyrighted audio and visual content, allowing Facebook to block infringing materials from being uploaded subject to designated criteria. Facebook Comment Letter, *supra* note 42, at 1, 8.

⁵⁰ The Copyright Office, in its second notice of inquiry, outlined some of the suggested and currently implemented voluntary measures submitted by study participants. These suggestions encompass both technological and business infrastructure blueprints. A handful of these voluntary measures are: development of industry best practices guidelines; cooperative arrangements between rightsholders and payment processors and advertisers; search engine demotion; and content ID systems. Section 512 Study: Request for Additional Comment, 81 Fed. Reg. at 78,639, n.40.

⁵¹ See, e.g., WEBSTER BANK, FEE SCHEDULE FOR BUSINESS ACCOUNTS (Nov. 2017), https://public.websteronline.com/sites/default/files/Fee_Schedule_for_Business_Accounts.pdf (providing an example of a fee schedule and how companies of varying sizes are charged differently based on their size).

⁵² It should be noted that, if a smaller stakeholder wants to accommodate a technical measure in a higher bracket, it may do so, and such accommodation will count towards its statutory responsibility.

⁵³ Facebook Comment Letter, *supra* note 42, at 8.

2018 ELI Law Student Competition Runner-Up Paper

Effects of the FCC’s “Internet Freedom” on the Music Industry and Potential Collaborative Solutions

by Megan Abner

Since the launch and popularization of free content distribution services on the Internet, independent artists have relied heavily on the Internet to build their fanbases and distribute their music. In 2018, artists’ access to digital distribution is in jeopardy. Since 2010, their access was secured by the FCC’s Open Internet policy to ensure a neutral Internet for the United States.¹ The FCC declaration “Restoring Internet Freedom” announced on December 14, 2017 effectively destroyed the protections previously ensured to both individual consumers and content distribution services.² In this paper, I will discuss the most prevalent issues to artists and consumers stemming from this order, namely paid prioritization, artist exposure, and user access, and propose various potential solutions that might mitigate the effects of the 2017 order.

(1) Background- Net Neutrality versus Internet Freedom

“Net Neutrality” is the idea that an Internet service provider (“ISP”) should not discriminate against users’ various uses of its network and classifies the Internet as a public service to which all should have access.³ This means that at the Internet’s

most basic, infrastructural level, ISPs should not be permitted to interfere with users’ access because they choose to use one service over another.⁴ Under this scheme, an “Open Internet” is one “open for commerce, innovation, and speech; open for consumers and for the innovation created by applications developers and content companies; and open for expansion and investment by America’s broadband providers.”⁵ Its purpose is to mirror a capitalist economy while maintaining anti-monopolistic consumer protections and enabling free discourse over the Internet.⁶

In 2015, the FCC promulgated net neutrality throughout the United States (the “2015 Order”).⁷ The 2015 Order established standards and bright-line rules that all telecommunications providers, including broadband Internet access service (“BIAS”) providers, must follow.⁸ The bright-line rules established that BIAS providers could not engage in throttling, or slowing down a user’s connection based on what they’re doing on the Internet, blocking, or preventing users access based on which websites and applications they use, or paid prioritization, or allowing users who pay more to utilize “fast lanes” that prioritize their Internet traffic over others’.⁹ The 2015 Order’s “standards” prevented BIAS Providers from (1) unreasonably interfering with users’ ability to use the network or edge providers’ ability to create content, disadvantaging consumers, and from (2) engaging in unreasonable network management practices.¹⁰ Additionally, it adopts “transparency” policies, designed to ensure that consumers can fairly navigate the market by mandating BIAS providers to disclose pricing, other fees, data cap allowances, and more.¹¹

The 2015 Order ensured a neutral structure underlying the Internet, and ISPs operate at the structural level of the Internet.¹² Edge providers, those that provide services via the Internet such as Spotify, and Soundcloud, operate at the less fundamental “applications” layer of the Internet.¹³ Edge-providers are users of the Internet that drive innovation at the “edges” of the network, creating services for users at the center of the network.¹⁴ Both edge-providers and individual users receive Internet services from ISPs.¹⁵

On December 14, 2017, the FCC announced the repeal of the bright-line rules in favor of restoring “Internet freedom” (the “2017 Order”).¹⁶ The FCC found that these rules “[stifle] innovation and [deter] investment,”¹⁷ and sought to “preserve the vibrant and competitive free market that presently exists for the Internet... unfettered by Federal or State regulation.”¹⁸ It accomplished as much by it reclassifying ISPs as “information services” rather than BIAS providers, and are not subject to Open Internet regulations.¹⁹ As a result, high-speed Internet delivery will no longer be regulated as if it were a utility, like phone service,²⁰ and ISPs are free to engage in throttling, blocking, and paid prioritization based on the nature of a consumer’s use.

Moreover, the 2017 Order eliminates the “enhanced transparency” standards implemented by the 2015 Order, instead imposing less “burdensome” requirements, no longer mandating the disclosure of actual pricing including promotional rates, other one-time or recurring fees, and, most importantly, data caps and allowances.²¹ FCC Chairman Ajit Pai reasoned that the “additional obligations [imposed by the 2015 Order] do not benefit consumers, entrepreneurs, or the Commission sufficiently to outweigh the burdens imposed on ISPs.”²²

(2) The Challenge for the Music Industry- User and Artist Access in a “Privatization” Regime

The repeal of Net Neutrality is a pervasive issue for various industries, and it will likely have widespread detrimental effects on artists and fans, as well as on the music industry as a whole. Paid and affiliated prioritization²³ will deny fans access to some streaming services via their desktop and laptop computers, while mobile edge providers may negotiate “zero rating”²⁴ agreements with ISPs that drive mobile-user traffic to their applications. The music industry is specifically vulnerable to suffer financial losses without net neutrality.

(A) Decreased User Access

With the repeal of the 2015 Order, ISPs can upcharge all of its users, individuals and edge providers alike, in order to access content. ISPs are likely to impose paid service packages for

various uses of the Internet by, for example, mandating users pay a \$9.99 monthly subscription fee in order to use its networks to stream music or video.²⁵ These fees could be much higher for institutional users such as performing rights organizations interacting with streaming services in order to track and collect publishing monies. Users with paid subscriptions to streaming services are less likely to continue to pay for higher paid tiers, and freemium users may discontinue use altogether. This could result in great financial losses for an already struggling industry.²⁶ As streaming has become a major source of revenue, the already wavering health of the music industry is threatened by the potential departure of millions of streaming-service subscribers now unable to afford access.

ISPs have ample incentive to impose these additional charges on users. Beyond generating revenue by charging for specific uses of their network, ISPs are more than tangentially connected to the content creation realm. For example, Comcast, through its 2013 acquisition of NBC Universal, owns 30% of Hulu.²⁷ Comcast would have ample incentive to throttle speeds or upcharge users for access to Netflix, for example, while allowing cheaper access to Hulu at faster speeds. There is no apparent reason to think that ISPs would treat music streaming services any differently. Users will likely have fewer services between which to choose, further limiting their access to their desired media. ISPs will have the financial incentive to impose cost-prohibitive fees on new services and prevent them from entering the market, or alternatively may prevent users from seeking out these services because they will be more expensive or slower than those favored by the ISP.

Denying cost-permissive access to quality Internet connections would specifically injure artists as well. If an ISP were to charge unsigned artists cost-prohibitive fees in order to download the requisite software or upload their music to a digital distributor, for example, artists’ use of various digital music platforms would decrease. With less music on free platforms, traffic will be driven to more mainstream and profitable platforms that users and artists must pay to access. Moreover, without the use-discrimination bright line rule, ISPs themselves can charge certain users one

fee to upload and distribute a song, for example, and charge mainstream distributors another rate entirely. This issue is closely tied to the paid prioritization problem. Independent artists, as both content creators without the force of the major industry behind them and users of the Internet as individuals, are highly susceptible to network discrimination.

(B) Paid Prioritization and ISP Favoritism

Forms of paid prioritization are common music industry practice; web-based and desktop streaming services²⁸ generally offer tiered services—ad-supported Internet radio services are usually free, while higher level paid-tiers offer users higher quality streams and superior user experiences.²⁹ ISPs may throttle, or even block, access to free music applications and web-platforms such as YouTube and SoundCloud and prioritize paid services. These platforms are instrumental to independent artists. Not only are these services free to artists, but they also allow users searching for new music to access full-length songs, rather than the thirty-second clips typically available when previewing those songs on paid services such as Spotify, iTunes, Amazon, and Google Play.³⁰ ISPs would have ample incentive to discriminate against uses of the network for uploading and accessing free music. Without prohibitions against use-based discrimination,³¹ paid services are able to pay the ISPs directly in order to prioritize their services.³² This prioritization could mean either creating “fast lanes” for users of their service, meaning higher streaming rates for these paid services than structurally possible for the free services, or alternatively ISPs could throttle those services that pay less.³³ This could, in effect, lead to the decline of edge providers like SoundCloud and YouTube’s free services due to slashed connection speeds, their own speeds seeming to crawl by comparison, or outright ISP blocking.

The decline of free music discovery services would disproportionately injure artists without the force of a major label behind them. Edge providers that are unable to pay for network prioritization will likely either disappear or begin upcharging their users. More famous artists affiliated with major record labels would not face the brunt of

this structural change, for if they are commercially established, the financial losses would be less burdensome. Additionally, their music would be less likely to appear on free platforms in the first place. Independent artists on the other hand rely heavily on free online music platforms to distribute their music while building their fanbase. While any artist may submit their music to most paid music services, it may be more difficult for an artist to build their fanbase using a service like iTunes or Spotify as their primary tool rather than services designed to aggregate and promote independent artists to particularly interested users. With the reversal of the FCC’s 2015 Order, artists may now be left without practical means to distribute their music and music lovers’ access frustrated unless they subscribe to paid streaming services, potentially facing the need to pay ISPs extra to use their networks for streaming.

(C) Special Issues for Mobile Uses

The FCC defines “zero rated” content, applications, and services as “those that end users can access without the data consumed being counted toward the usage allowances or data caps imposed by an operator’s service plans.”³⁴ In 2016, the FCC decided that mobile carriers may allow users access to certain edge providers’ content without counting any data used toward their monthly data cap. These practices have the potential to harm innovation long-term by preventing competitors from entering the market, forcing users to only access certain content,³⁵ especially considering that these “pay-to-play” plans tend to only offer the free services of edge providers who pay ISPs.³⁶ Moreover, mobile Internet providers may still throttle users’ access upon reaching or approaching their data caps, further preventing user access. Given the FCC’s condonance of such practices, the future looks bleak for unpaid streaming services if users are able to have their streaming-needs met by applications that do not count against their data cap. Additionally, major streaming services, already facing financial uncertainty, may be essentially extorted into paying mobile providers to distribute their services as zero rated content.

(3) Potential Collaborative Solutions

Egalitarian Internet access is essential for the overall health of the music industry. By way of example of the importance of open Internet to artists, were it not for YouTube's free music services, "Justin Bieber" would not be a household name, Alessia Cara would not have been *Women in Music's* 2016 "Rule Breaker,"³⁷ and millennials would never have learned to "Crank dat Soulja Boy."³⁸ Naturally, paid streaming services may jump at the chance to pay for prioritization over their free-to-access counterparts. Even if digital distributors are able to keep their heads above water via paid prioritization and zero rating offerings, such a model would not be sustainable over time. With fifty-percent of the global music industry's revenue deriving from digital exploitation,³⁹ the industry cannot afford an exodus from its digital platforms. With less independent artists publishing their music and less users able to access streaming services in a cost-effective manner, the industry will suffer both financially and artistically.

On December 5, 2017, some 150 artists including Tom Morello, Bassnectar, Incubus, and Gramatik signed an "Open letter from artists: we support net neutrality protests and call on Congress to #StopTheFCC."⁴⁰ The star-studded coalition pled for the FCC to uphold net neutrality, because "[w]ithout a free and open Internet, so much music, writing, film, art, culture, passion, and creativity would be lost."⁴¹ SoundCloud CEO Kerry Trainor told *Billboard* that "[n]et neutrality is crucial to keeping the web a vibrant and powerful place that fosters innovation... Eliminating these protections not only reduces consumer choice and accessibility of services, but inhibits the open, creative expression that has flourished on countless Internet communities, including SoundCloud."⁴² The industry is becoming aware that so-called "Internet freedom" could irreparably harm it if ISPs take advantage of their newly-granted permissions.

Coordination and mutual agreement throughout various facets of the industry would help to mitigate any paid prioritization and stifling of artist exposure that might occur. Major labels might be uniquely positioned to effect change. The three major record labels in the United States, Universal Music Group, Sony Music Entertain-

ment, and Warner Music Group, control 68.4% of total music market share.⁴³ Recognizing the potential financial and artistic losses threatening the music industry, the three majors should collectively refuse to distribute their content to edge providers, Spotify and Apple Music included, that engage in paid prioritization with ISPs or discriminate against subscribers by either throttling or blocking. This would hopefully provide streaming services ample incentive to refuse to engage in ISPs' paid prioritization plans and with mobile service providers that would allow for distribution of their zero rating applications. This would maintain a competitive market allowing for the emergence of new artists and competing edge service providers, in turn generating more revenue and incentivizing the continued improvement of existing services. If major labels restrict access to their catalogues, although financially risky, it may likely impose sufficient pressure on edge service providers for them to refuse to take advantage of some of the anticompetitive opportunities afforded to them by the repeal of the 2015 Order.

Due to major labels' overwhelming market shares and the popularity of their catalogues, ISPs are likely to either discount uses of their networks for edge providers to distribute major labels' catalogues, or establish fast lanes for their distribution. As such, major labels are likewise well positioned to aid in the distribution of independent music. Specifically, their distribution arms could help independent artists overcome issues of access and diminished digital exposure by offering digital distribution services to all artists via an Internet platform in order to attach the label's name to the independent artists' music. Under "Internet freedom," ISPs could upcharge for songs distributed by self-serve platforms like Tunecore and CDbaby,⁴⁴ or alternatively throttle download and streaming speeds for songs distributed through these services. If affiliated with major labels, however tangentially, ISPs may not flag uses of its network for exploitation of these songs for throttling or blocking. As additional incentive, the major labels could retain more revenue than do the self-service distributors as a trade-off for affiliation with their name. While this would require the buildup of infrastructure, the major labels and independent artists alike could benefit from this

shift.

Solving problems stemming from decreased user access to particular edge provider services would be more difficult. ISPs may impose fees for users to engage in streaming services independent of the music industry's attitudes and collaboration on the matter. Even if edge provider streaming services were to artificially adjust their pricing to offset increased ISP fees, users are still at the whim of the ISPs to obtain access, unless edge providers are able to contract with ISPs directly. One solution for users could be to shift back to physical ownership of their music rather than mere access to use or conditional downloads. While the digital distribution edge providers would suffer financially, such a shift could ultimately prove profitable for some segments of the industry and remove imperfect access from the realm of users' concern.

Collaboration and lobbying amongst proponents of net neutrality across the music industry, especially by music fans, could be the best manner to ensure users' open access. Various states and organizations have vowed to pursue litigation in order to invalidate the 2017 Order; the industry's financial support of these organizations coupled with users' advocacy could encourage adjudicative resolution.⁴⁵ Additionally, the music industry and fans alike should remain vocal supporters of legislative resolution. On December 19, 2017, Republican Senator Blackburn introduced the Open Internet Preservation Act,⁴⁶ a bill aimed at establishing a bipartisan net neutrality law. Although imperfect, the resolution would protect individuals and edge providers from blocking and throttling by reclassifying ISPs as BIAS providers, thus ensuring access to all users.

In order to further activate consumers, edge service providers should look to the past. On September 10, 2014, some of the Internet's most popular edge providers, such as Tumblr, Reddit, Netflix, and Vimeo, launched a massive awareness and advocacy campaign called the "Internet Slowdown Day."⁴⁸ Various edge providers in support of net neutrality took action to raise awareness to the issues at stake prior to the 2015 Order's approval by throttling or blocking users' access in creative ways and directing them to

take action.⁴⁹ The results were noteworthy, with millions of Americans contacting their representatives and becoming generally aware of the issue of net neutrality. Were edge providers across the music industry, ranging from free independent platforms to Spotify and the like, to display their solidarity against the rejection of net neutrality policies and call their users to action, it may spark another wave of activism, hopefully followed by legislative action. Hopefully, streaming services will resist ISPs' low hanging fruit and adopt net neutral policies in the interest of the financial and artistic health of the industry, and will take advantage of their unique position to increase user awareness and advocacy for net neutrality.

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¹ *Preserving the Open Internet*; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (Dec. 13, 2010) (the "2010 Order"); *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, GN Docket 14-28 (Apr. 13, 2015).

² *In re Restoring Internet Freedom*, Draft Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108 (Dec. 14, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-347927A1.pdf. Although the FCC approved the repeal order on Dec. 14, 2017, this paper is based on the text of the draft order released on Nov. 22, 2017, as well as comments by the FCC commissioners in the FCC open meeting held on Dec. 14, 2017. As of this writing, the FCC has yet to release the approved order.

³ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 141 (2003). |

⁴ *Id.*

⁵ *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd at 5603.

⁶ *Id.*

⁷ *Id.* at 5601-02.

⁸ *Id.*; see also *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016) (confirming the FCC's classification of ISPs as BIAS providers under the 2015 Order). One entity may be both a telecommunications and BIAS provider. For example, Verizon acts as a telecommunications provider when providing access to cable, but it acts as an ISP when providing consumers with Internet access.

⁹ *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd at 5607-08.

¹⁰ A network practice is more likely “unreasonable” if it discriminates against certain uses of the network. *Id.* at 1508-09. For example, if a BIAS provider throttles video game use only, claiming that its necessity to network maintenance, it would likely be unreasonable.

¹¹ *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd at 5610.

¹² See generally Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005).

¹³ See generally 30 FCC Rcd 5601. Those that do not provide others with telecommunication services are considered “information services.” Entities that provide these services, such as Google (Google Music, Gmail, etc), Netflix, and Apple (Apple Music, iTunes), etc., are not subject to the Order’s regulations. *Id.*

¹⁴ *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd at 5603.

¹⁵ *Id.* at 5614.

¹⁶ The FCC now defines “Internet freedom” as incorporating the “freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.” *In re Restoring Internet Freedom*, ¶ 11, citing Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

¹⁷ *In re Restoring Internet Freedom*, ¶ 1.

¹⁸ *In re Restoring Internet Freedom*, FCC Fact Sheet, Draft Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108 (proposed Nov. 22, 2017) (accepted Dec. 14, 2017).

¹⁹ *In re Restoring Internet Freedom*, ¶¶ 25-29.

²⁰ Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, THE N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

²¹ See generally *In re Restoring Internet Freedom*; see also Jon Brodtkin, *ISP disclosures about data caps and fees eliminated by net neutrality repeal*, ARS TECHNICA (Dec. 7, 2017, 3:16 PM), <https://arstechnica.com/tech-policy/2017/12/how-the-net-neutrality-repeal-helps-isps-keep-their-hidden-fees-hidden/> (last visited Jan. 1, 2018). The 2017 Order reestablishes the loose transparency requirements of the 2010 Order, and mobile and terrestrial BIAS providers alike are no longer required to report more than monthly prices, usage-based fees, and fees for early termination or additional network services.

²² *In re Restoring Internet Freedom*, ¶¶ 205-06.

²³ *Id.* at ¶ 216. The 2017 Order defines “Affiliated Prioritization” as any practice that “directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.”

²⁴ See section 2(c), *infra* for a discussion about “zero rating” regimes as they relate to net neutrality, user access, and affiliated prioritization.

²⁵ By way of example, Portugal does not prohibit such practices. In order to access various “messaging” and “music” packages, amongst others, subscribers to Portugal’s MEO mobile services must pay additional monthly fees. *Internet on Mobile*, MEO, <https://www.meo.pt/internet/internet-movel/telemovel/pacotes-com-telemovel> (last visited Jan. 1, 2018).

²⁶ Since the advent of streaming, the music industry had not regained profitability until 2015. Hugh McIntyre, *For The First Time In 20 Years, The Global Music Industry Gained Ground in 2015*, FORBES (Apr. 13, 2016, 8:05 AM) <https://www.forbes.com/sites/hughmcintyre/2016/04/13/for-the-first-time-in-20-years-the-global-music-industry-gained-ground-in-2015/#4322d8fc785c> (discussing the International Federation of the Phonographic Industry 2015 report on the global status of the music industry).

²⁷ Chris Morris, *What the Disney-Fox Deal Could Mean for Hulu*, FORTUNE (Dec. 14, 2017), <http://fortune.com/2017/12/14/disney-fox-hulu/>.

²⁸ Streaming services are edge providers and are treated the same as individual users under the 2010, 2015, and 2017 Orders. See *United States Telecomms.*, 825 F.3d at 690; see also *In Re Restoring Internet Freedom*, ¶ 30.

²⁹ Peter Tshumuck, *is streaming the next big thing? - the business model of music streaming services*, MUSIC BUSINESS RESEARCH (Jun. 6, 2013), <https://musicbusinessresearch.wordpress.com/2013/06/17/is-streaming-the-next-big-thing-the-business-models-of-music-streaming-services/>.

³⁰ See e.g. *Frequently Asked Questions*, SPOTIFY DEVELOPER, <https://developer.spotify.com/developer-terms-of-use/faq/> (last visited Jan. 1, 2018).

³¹ See generally *In re Restoring Internet Freedom*, 30 FCC Rcd 5601.

³² Absent government regulation, ISPs have “powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users.” *Id.* at 5608 (quoting *Verizon v. FCC*, 408 U.S. App. D.C. 92, 114-15 (2014)).

³³ *Id.*

³⁴ Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services (Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf.

³⁵ Klint Finley, *The FCC OKs Streaming for Free-But Net Neutrality Will Pay*, WIRED (Feb. 3, 2017, 8:00 PM), <https://www.wired.com/2017/02/fcc-oks-streaming-free-net-neutrality-will-pay/>.

³⁶ Corynne McSherry, Jeremy Malcon & Kit Walsh, *Zero Rating, What it is and Why You Should Care*, ELECTRONIC FRONTIER FOUNDATION (Feb. 18, 2016), <https://www.eff.org/deeplinks/2016/02/zero-rating-what-it-is-why-you-should-care>.

³⁷ Taylor Weatherby, *Alessia Cara Accepts Rule Breaker Award at Billboard Women in Music 2016: ‘Sometimes Rules Are Meant to Be Broken’*, BILLBOARD (Dec. 9, 2016), <http://www.billboard.com/articles/events/women-in-music/7616943/alessia-cara-rule-breaker-award-women-in-music>.

³⁸ *10 Massive Popstars who can Thank YouTube for their Success*, VH1 MUSIC (Apr. 7, 2014), <http://www.vh1.com/news/52874/10-stars-discovered-on-youtube/>.

³⁹ International Federation of the Phonographic Industry, *Facts and Stats* <http://www.ifpi.org/facts-and-stats.php> (last visited Jan. 1, 2017).

⁴⁰ *Open letter from artists: we support net neutrality protests and call on Congress to #StopTheFCC*, FIGHT FOR THE FUTURE (Dec. 5, 2017 at 5:08 PM), <https://www.fightforthefuture.org/news/2017-12-05-open-letter-from-artists-we-support-net/>.

⁴¹ *Id.*

⁴² Colin Stutz, *Music & Tech Industries Say FCC's Net Neutrality Vote Will 'Negatively Affect Innovation'*, BILLBOARD (Dec. 14, 2017), <https://www.billboard.com/articles/business/8070686/music-tech-fcc-net-neutrality-vote-negatively-affect-innovation>.

⁴³ *Global Market Shares 2016*, MUSIC BUSINESS WORLDWIDE (Feb. 26, 2017), <https://www.musicbusinessworldwide.com/global-market-shares-2016-sony-and-warner-gain-on-universal-as-indies-rule/>.

⁴⁴ Ari Herstand, *CDbaby, TuneCore, Distrokid, AWAL, Ditto...Who is the Best Digital Distribution Company for Music*, ARISTAKE (Aug. 29, 2017), <http://aristake.com/post/cd-baby-tunecore-ditto-mondotunes-zimbalam-or>.

⁴⁵ Various states are beginning to challenge the FCC's comment period to the Internet Freedom proposal as fraudulent on various grounds. See e.g. John Patrick Pullen, *What's Next for Net Neutrality? Lawsuits Against the FCC*, FORTUNE (Dec. 14, 2017), <http://fortune.com/2017/12/14/net-neutrality-fcc-lawsuit-ajit-pai/>; See also A.G. Schneiderman: *I Will Sue To Stop Illegal Rollback Of Net Neutrality*, N.Y. State Office of the Att'y Gen., <https://ag.ny.gov/press-release/ag-schneiderman-i-will-sue-stop-illegal-rollback-net-neutrality>

⁴⁶ Brian Fung, *Days after the FCC repealed its net neutrality rules, the GOP has a bill to replace them*, THE N.Y. TIMES (Dec. 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/19/this-gop-net-neutrality-bill-aims-to-replace-some-but-not-all-of-the-fccs-rules/?utm_term=.a69ac4314842.

⁴⁷ She did not include band against paid prioritization in her proposal, as she hopes the bill will be met with bipartisan approval.

⁴⁸ *Infographic*, BATTLEFORNET, <https://www.battleforthenet.com/sept10th/> (last visited Jan. 1, 2018).

⁴⁹ *Id.*

A Law Student's Perspective: Seeing Stars: Criminal Liability for Coaches Who Endanger Concussed Athletes

by Andrew Jenkins

Introduction

No court or legislative body has addressed criminal sanctions against an athletic coach at the youth¹ or collegiate level for allowing a potentially concussed player to re-enter a game or practice. Current civil damages are not sufficient to deter a coach from allowing a potentially concussed key player to continue playing. This has been shown by the substantial number of reports about players notifying coaches of their injury and the coach telling the athlete to walk it off.² It is time to consider criminal sanctions, because coaches have a duty to keep their athletes safe and the athletes are the ones suffering the consequences.

It is not that athletic coaches have a lack of concern for their athletes. Most coaches care very deeply for their athletes. However, judgment calls that some coaches are being asked to make are being made without adequate training and without a sufficient legal penalty for a failure to refer a possibly concussed player to a medically trained professional.

This essay proposes criminal sanctions of fines and jail time for those coaches who do not refer a potentially concussed athlete to a medically trained professional, given the training that the coach has received. This essay also proposes a statute that requires more training, diligence, and accountability from the coach that should be adopted, in full or in part, by all states. This remedy has not yet been discussed in the mainstream media, legislatures, or courts. With

the substantial number of concussions caused by collision sports, there needs to be some sort of solution.³

Section I discusses the prevalence of concussions in collision sports. Section II discusses attempts from legislatures across the country that have failed to address this problem. Section III will discuss when an omission from one party breaches the duty owed to another person. Section IV will discuss whether athletes and students are owed a duty by those who work at a school. Section V discusses what kind of duty coaches owe their athletes. Section VI is the proposed statute to remedy this problem. Section VII covers a small sample of the potential counter arguments to this essay. Section VIII discusses a very recent development in blood testing that could potentially result in a new way to test for concussions. This essay concludes that coaches are not being held responsible for the actions they are taking and that the prior attempts to reprimand them for their actions have been insufficient.

I. BACKGROUND

The concussion epidemic has been spreading throughout the United States for the last decade and it is not being diagnosed, treated, or managed.⁴ With concussions being so common,⁵ there has never been a larger need for those who are around the athletes daily to receive proper education about detection and consequences of concussions.

University of Michigan quarterback Shane Morris took an enormous hit to the head during a college football game.⁶ While trying to get back to his feet, Morris had trouble balancing and stumbled.⁷ Coach Brady Hoke claimed that there was a miscommunication on the sidelines and that nobody ever saw the hit.⁸ The head neurologist for Michigan said he saw Morris stumble and requested to evaluate the quarterback for a concussion.⁹ Morris was seen by an athletic trainer for an ankle injury, but there was no assessment whether Morris sustained a concussion.¹⁰ Shortly after, Morris returned to the game.¹¹ After the game was over, it was found that Morris had sustained, and continued to play

with, a concussion.¹²

While no conclusive link has been established to concussions (<https://www.npr.org/sections/health-shots/2018/01/18/578355877/repeated-head-hits-not-concussions-may-be-behind-a-type-of-chronic-brain-damage>), chronic traumatic encephalopathy (“CTE”) is a disease of the brain thought to be caused by repeated head trauma.¹³ At twenty-seven years old, Aaron Hernandez committed suicide after being convicted for the murder of Odin Llyod.¹⁴ Hernandez played college football at the University of Florida and was drafted by the New England Patriots in 2010.¹⁵ After his death, Hernandez was found to be suffering from CTE, and the extent of damage done to his brain was unprecedented and never before seen in someone younger than forty-six.¹⁶

Multiple lobes of Hernandez’s brain were significantly damaged.¹⁷ The hippocampus and fornix had shrunk, and these portions of the brain are key in memory.¹⁸ The frontal lobe sustained significant damage, which meant Hernandez’s problem solving, judgement, impulse control, and social behavior were impacted.¹⁹ The amygdala and the temporal lobes were also significantly damaged, and these portions regulate and process emotion and sights and sounds respectively.²⁰

While the conclusive link between concussions and CTE is still lacking, those who do develop CTE have difficulty with impulse control, rage behaviors, decision-making, and aggression.²¹ The conclusive link does not need to be present to recognize that concussions and CTE affect some of the same portions of the brain.

Ensuring that players who are concussed are in fact taken out of the game or practice is paramount in making sure the player receives the treatment that is needed. If Hernandez did not sustain such significant damage to these portions of the brain, then would he have engaged in the conduct that led to his 2015 conviction? This was an athlete that played a couple seasons at the professional level, but the prevalence of athletes playing through concussions reaches far below the professional level.

A 2010 survey by the National Collegiate Athletic Association (“NCAA”), suggested almost half the responding institutions allowed a player to return to a game immediately after being diagnosed with a concussion.²² For example, an assistant athletic trainer for the University of Georgia recalled seeing a player get knocked unconscious and return to the game soon after.²³ It is important to note, that a player will never return to a game or practice without interacting with or being within the sight of at least one coach. A separate study showed more than one-quarter of the 328 collegiate participants were pressured to continue play from some source, including a coach.²⁴ It is unacceptable for a coach to be pressuring an athlete to ignore signs of a head injury, especially with concussion education being such a large emphasis. These coaches are not only willingly ignoring that a player may have sustained an injury, but are encouraging athletes to forego treatment so the athlete can continue playing.

A concussion is a form of a traumatic brain injury that results from the brain moving rapidly inside the skull.²⁵ The symptoms are sometimes difficult to recognize.²⁶ For example, a concussion can change the chemical balance within the portion of the brain that is affected.²⁷ A 2011 study showed that there was a sixteen and a half percent increase in concussions from the 1997-1998 to 2007-2008 school year.²⁸

Head Case, a head health management system used throughout the United States to track concussions, reported that forty-seven percent of all sport-related concussions are attributed to high school football teams.²⁹ Head Case reported there were 3.8 million sport-related concussions reported in 2012, which was doubled from 2002, and there are still between 1.6 and 3.8 million sport-related concussions each year.³⁰ This means, that one in five high school athletes will experience a concussion during a season.³¹ Further, ninety percent of concussions occur without a loss of consciousness.³² These numbers invariably will rise when taking collegiate athletics into account. Coaches are struggling to recognize a player has a concussion, in part, because the coach is not trained in recognizing

the symptoms that are observable. The attempts at legislating a solution for this problem have fallen well short of sufficient.

II. PRIOR ATTEMPTS AT LEGISLATION

Legislative bodies across the country have tried to address this issue, but they have not been able to sufficiently. Coaches, who need the education to recognize the symptoms of a concussion, are not being required to obtain adequate training.³³

Most states have implemented some form of concussion legislation that makes it a requirement for parents of youth athletes to annually review or sign an information sheet that discusses the dangers of a concussion.³⁴ These information sheets are great for parents to have and to reference, but these serve little function to ensure that the coach of the athlete is going to know how to identify a concussion. If the information sheets serve any function, it is to pass liability from the school to the parents to observe their child after the child returns home. Parents already have a duty to their child in regards to getting the child medical care.³⁵ Why would the parent’s duty be raised by another person’s failure to inform the parent of an injury that occurred?

Many statutes require the concussed athlete to be removed from practices and games.³⁶ This portion of each statute is predicated upon the coach, or some other person on the athletic staff, being able to recognize the symptoms of a concussion. The state of Washington adopted the “Zackery Lystedt Law,” one of the first laws for the purposes of keeping concussed players out of games.³⁷ This law is named after a Zackery Lystedt who, unbeknownst to anyone watching the football game, suffered a concussion while making a tackle at the age of thirteen.³⁸ Minutes after being taken off the field, Zackery entered the game again.³⁹ Zackery collapse while walking off the field after the game.⁴⁰ His brain was bleeding so much that the doctors had to remove portions of his skull to remove a blood clot.⁴¹ He spent ninety-three days in a Seattle hospital, and it would take him nine months to regain his ability to speak.⁴² According to Dr. Matthew Daggy, a doctor specializing in sports medicine doctor, this horrific injury could have been prevented had Zackery been removed from the game.⁴³

The Lystedt law provides that any “youth athlete who is suspected of sustaining a concussion or head injury” must be removed from the game or practice immediately.⁴⁴ The law also requires that the athlete, upon a diagnosis of a concussion, be ineligible to participate in any activity relating to the sport until they are cleared by a health care provider.⁴⁵ While this is a very well-intended statute, it is lacking one major piece: there is no legal liability discussed for when this statute is violated by a coach.⁴⁶ It has since been determined that there is an implied right of action against coaches under this statute, allowing for a civil recovery to damages.⁴⁷ However, the person that has allowed this injury to happen may not be the person paying the price for the injury.

Under *respondeat superior*, the school or organization the coach works for may be footing the bill since the injury occurred within the scope of the coach’s job and there was inadequate training.⁴⁸ Additionally, with the harm that is done to the aggrieved party, the person responsible for the harm should be held accountable.

Idaho also has a law that governs concussion and head injury requirements for youth athletes.⁴⁹ The Idaho law applies to any athlete that is eighteen or under and is participating in any school sanctioned sport or league.⁵⁰ The law requires coaches to review relevant guidelines and information that has been approved by the state Board of Education every two years after employment.⁵¹ None of the training is required to occur in-person, with medically trained professionals. The understanding of concussions is rapidly progressing,⁵² and yet, Idaho only requires that this type of training be obtained by coaches every two years. Meanwhile, the athletes and their legal guardians are required to sign papers verifying the athlete and guardian have reviewed concussion safety information every year.⁵³ This means, that the statute is requiring parents and guardians be more informed about concussions than the coaches. A very important step in concussion management is a quick evaluation to know if the athlete is concussed.⁵⁴ If the athlete is injured during a game or practice, then how is a parent being more educated on concussions supposed to be

useful?

Another problem with the Idaho statute is the lack of consequence for not complying with the statute.⁵⁵ There were four drafts of this particular statute, and none of them included a provision addressing the violation of the statute.⁵⁶ However, the statute does specify that if a person or organization complies with the statute, then that individual or organization is granted immunity from civil liability.⁵⁷ While the Idaho law involves the health and well-being of children under the direct care of a school official, the legislature neglected to address what would happen when the school official fails to live up to the standard. Idaho’s law is a clear example of inadequately educating coaches and failing to hold coaches responsible when their action injures an athlete under their care.

Connecticut also has attempted to address the concussion issue, and has done comparatively well. However, there are some significant downfalls with the statute. Connecticut requires coaches to attend an initial training focused on concussions and then subsequently review “current and relevant information regarding concussions” during the years the coach is not required to attend a refresher training course.⁵⁸ These refresher courses are only required every five years after the initial training.⁵⁹ This is incredibly insufficient. As previously stated, medical research on concussions make new discoveries quickly,⁶⁰ and merely requiring coaches to review the current information is virtually useless. If a coach is going to understand this type of complex information well enough to be able to apply the newest findings in concussion research, then it needs to be explained to them, in-person, with an opportunity for the coach to ask a medically trained professional questions. Questions that a coach forms while casually reviewing these new materials will likely be forgotten by the time the coach speaks to a doctor.

Additionally, there is no guarantee that the coach is even reviewing the materials that have been sent to him. Athletic coaches, at least at the high school level, generally have another job

at the the high school level, generally have another job at the school they coach at. Asking a coach to read through medical reports and studies about concussions, on top of their other responsibilities, is not something that can be reasonably expected.

Another significant point to the Connecticut law, is the consequence of failing to comply with the statute. According to subsection (f), the Connecticut “State Board of Education may revoke the coaching permit . . . of any coach found to be in violation of this section.”⁶¹ This revocation happens because the coach is found to either to have persistently failed to perform the duties with the permit was granted, or another sufficient cause.⁶² This Connecticut law is the closest any legislature has come to implementing applicable sanctions against a coach for improperly managing their athletes’ concussions. However, there is nothing that bars the coach from applying for the coaching license again.⁶³ There is nothing preventing the coach from either coaching in Connecticut again, if the coach is able to show rehabilitation and the State Board approves their application, or moving to another state and obtaining the proper credentials to become a coach there. The coach could also move to another state and apply for a license in a new state. Someone that has proven to be a danger to children in this type of setting, should not be allowed to engage in this type of coaching duty again.

These statutes are all well-intentioned and were steps in the right direction. The main problem with them is that and the laws have no consequences for violation, with the exception of the revocation in Connecticut. Legislatures need to address the hole they have left with concussion legislation, or this issue will continue to grow. If they are worried about imposing new liabilities on coaches, then they are mistaken because those duties already exist.

III. BREACH OF DUTY DUE TO OMISSION

“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act

of which he is physically capable of.”⁶⁴ While it is well known that there is often no affirmative duty to intervene on the behalf of another, there are some exceptions that should be noted.⁶⁵ These exceptions include “a duty based on a personal relationship; . . . a duty to control the conduct of others; . . . [or] a duty based on voluntary assumption of care.”⁶⁶

A. Breach Based on Relationship

There are certain duties that are inherent based solely upon the relationship of the parties involved.⁶⁷ One of the most common relationship within this group is the parent-child relationship. This is partly because of “[t]he inherent dependency of a child upon his parent” for aid since the child is unable to help themselves.⁶⁸ A parent has had more experience with life and has a better understanding of what actions to take. It follows that the child, who has a very limited experience with life and its perils, should be able to rely on the parent’s decision making. This is especially important when the decisions being made involve the long-term health or life of the child.

In *Harrington v. State*, a court upheld a conviction of murder when two parents failed to feed their two-year-old child.⁶⁹ This tragic case began when an officer was called to investigate a suspected death at the appellant’s house.⁷⁰ The officer arrived to the house, was directed to the child’s room, checked for vital signs, and noted that the child had been dead for quite a while.⁷¹ An autopsy was performed, and the cause of death was starvation.⁷² There were no other ailments discovered during the autopsy of the child.⁷³ The court stated that “unless . . . one parent has sole and exclusive care, custody, and control of a minor child, both parents may be guilty of an intentional failure to provide sufficient” care for a child.⁷⁴ Since the conduct was continuous and it was not stemming from one parent or the other, the court found it was reasonable to hold both parents liable.⁷⁵

Children, especially when they are very young, rely on their parents for almost everything. This is especially true when the parent is the only

resource available to the child.

These protections for children, and criminal liabilities attached to the protections, have been extended to situations where the child is isolated and is at the mercy of other adults.⁷⁶ The legislatures and courts, as noted above, do not seem to be afraid of imposing criminal liabilities on those who are in positions of power over children and the safety of the children is at issue.

B. Breach Based on Voluntary Assumption

A person owes another a duty if there has been a step taken to begin helping someone in danger.⁷⁷ One example of this is when a person begins CPR, but stops before medical personnel arrive. The person that begins assisting is now obligated to continue. If the person stops, then they could be held liable for a resulting death or impairment. The reasoning is because the person that starts helping could potentially discourage others from stepping in as well.⁷⁸ Preventing others from stepping in could potentially be worse since another person may be more qualified to assist in any given situation.

In *Sickel v. State*, a court found that it was proper to indict Robin Sickel with manslaughter.⁷⁹ A couple, Robin Sickel and Jeff Waldroupe, owned three horses in Alaska.⁸⁰ An Alaskan statute criminalized anyone who failed to care for their animals.⁸¹ The horses were found with frozen food and water, and one horse, which had to be put down, was frozen to the ground.⁸² The defendant argued that a person does not act with criminal negligence if the person fails to prevent a harm.⁸³ The court recognized the statute does not provide “which persons have a duty to care for particular animals.”⁸⁴ The court still concluded that the statute allows the duty to fall to a person that voluntarily assumes the care of the animals.⁸⁵ The court looked back to previous cases that established criminal liability for a failure to act when the statute a person was being prosecuted under did not explicitly state who owed the duty.⁸⁶ The court also noted that the purpose of the Alaskan statute is to protect animals from “people who have assumed responsibility for their care.”⁸⁷ Owners may be

responsible for the daily care of the animals, but those who take voluntary custody of the animals can also be found criminally responsible.⁸⁸

The assumption of care, in some circumstances, could have a higher need for a duty. For example, a parent volunteer that chaperones a field trip with a school class. It would not be unreasonable to say that the parent has assumed a duty to the children and could be held liable if a child was harmed while under the care of the parent volunteer.

C. Breach Based on a Contractual Obligation

An employment contract may give rise to a duty between two parties.⁸⁹ However, the duty can extend to those not within the contract as well.⁹⁰ The foreseeability of harm that can be inflicted on the public seems to be part of a court’s analysis in determining whether a contractual duty can extend to the general public.⁹¹

In *State v. O’Brien*, a court found liability on the part of a railroad watchman whose failure to act resulted in a fatal accident.⁹² A watchman that was employed by a railroad company was tasked with making sure trains were staying on the correct tracks and this job was, in part, to ensure the safety of the public.⁹³ The watchman told the police that he had fallen asleep.⁹⁴ A train was approaching from the West, but he was expecting the train to come from the East.⁹⁵ A passing train that the watchman failed to observe caused a fatal collision.⁹⁶ The court concluded that the watchman’s omission to observe the train and ensure it was on the correct track was sufficient to be indicted on manslaughter.⁹⁷ The court said that the watchman’s actions were “more than mere negligence. It was conduct incompatible with human life and safety . . .”⁹⁸

The watchman’s actions placed other people in danger. The court was willing to allow this man to stand trial for manslaughter because of the harm that was caused by his failure to act. Harm that could have been easily avoided had the watchman simply – watched.

IV. ARE STUDENTS AND ATHLETES OWED A

The courts have begun to lay the foundation to hold coaches responsible in previous cases. For example, a university or college faculty member owes a duty to the students, and that a coach owes a duty to their athletes.

A. Faculty of Colleges and Universities have a Duty to Students

There have been a number of cases that have extended a duty to faculty at a college or university.⁹⁹ When the faculty is in a position of being an advisor to a student, the court has looked to the power imbalance between the faculty member and the student, as well as the amount of control that can be used over the student.¹⁰⁰

In *Davidson v. University of North Carolina at Chapel Hill*, a cheerleader suffered permanent injury when she fell from the top of a human pyramid.¹⁰¹ One reason the court found that University of North Carolina owed a duty to the injured cheerleader was because of the amount of control the University had over the cheerleading program.¹⁰² The court used this in their analysis to say that “the students may have higher expectations with regard to the protection they will receive from the school.”¹⁰³ The court acknowledged that there has been an extension of liability of omissions when social policy and public sentiment called for the courts to find a duty to act. The watchman’s actions placed other people in danger. The court was willing to allow this man to stand trial for manslaughter because of the harm that was caused by his failure to act. Harm that could have been easily avoided had the watchman simply – watched.¹⁰⁴

The public policy and sentiment is widespread. Many people have called for a solution to the concussion problem.¹⁰⁵ It is not a large extension to apply that same reasoning directly to the athletic coach who is in charge of the day-to-day operations of that program.

Also, in *Schneider v. Plymouth State College*, a court held that faculty members of a college owed a fiduciary duty to the students in regards to sexual harassment.¹⁰⁶ This court found that

the relationship existed because students are in a particularly vulnerable state and there was a large power imbalance between that faculty member and the student.¹⁰⁷

Again, this power imbalance is directly relatable to an athletic coach. If a player does not obey a coach’s request, then the coach has the discretion to force that player to sit out of the next game. In a university setting, a coach has the ability to give or take a player’s scholarship.

B. Coaches Owe a Duty to their Players

Courts have also extended a duty specifically to the coach of an athletic team when their conduct is not reasonable under the circumstances.

One case in particular, *Cerny v. Cedar Bluffs Junior/Senior Public School*, applied a “reasonable coach” standard, given the amount of training that the coach had obtained.¹⁰⁸ The coaches in that particular case were required to undergo a college level course in first-aid and a course in athletic injuries.¹⁰⁹ The court further recognized that this training was aimed at the detection of concussion symptoms and to send that player for a full medical evaluation, not a concussion diagnosis itself.¹¹⁰ This was going to be applicable across the entire state and it would not be able to receive any disparate treatment in one area because all coaches must undergo the same training.¹¹¹

This is not a terribly difficult concept to accept. If a coach possesses a particular knowledge, then it should be used when it is within the scope of why the knowledge was obtained. That is why the coach got hired for their position, after all. These coaches went and got college level first-aid and athletic injury training. So why shouldn’t the coaches be held responsible when they are not using this knowledge to protect the players they obtained the knowledge for?

In another case, *Herring v. Bossier Parish School Board*, a court said that “[a] coach or teacher has the duty to protect those under his or her charge” within their specific responsibilities and to “protect them from foreseeable harm.”¹¹² When the coach

has special special knowledge, this foreseeable harm sphere expands. A coach is able to anticipate more consequences when he or she possesses more knowledge. The court also acknowledged that the standard should not be impossibly high, such as requiring constant supervision over every student or athlete.¹¹³ This is an undeniable truth. Nobody can be responsible for every person at every moment. However, when the coach knows or should know an athlete has possibly sustained a traumatic brain injury, and the coach makes the decision to ignore the possible consequences of allowing that athlete to continue to play, there should be consequences.

V. WHAT TYPE OF DUTY IS OWED TO THE PLAYERS

There are two main duties between an athletic coach and player. The first way is establishing a fiduciary duty between them. The second way is deeming the coach and player relationship a special relationship.

A. *Fiduciary Duty*

A fiduciary relationship is difficult to fully conceptualize.¹¹⁴ At a very basic level, a fiduciary is when a person places special trust in someone else and the other person accepts the trust being placed with them.¹¹⁵ A second consideration is when one of the parties is in a position of power or that of an advisor.¹¹⁶ Another piece to look at is one of the parties having special knowledge of a particular subject, and that is why a party would place their trust with the other.¹¹⁷ This is not an exhaustive list, and courts have found that there many duties that would be suitable to fit under the fiduciary duty label.¹¹⁸ A common example of this duty would be that of a financial advisor.¹¹⁹ The court looked to the financial advisor's sacred trust with the clients, the heightened responsibility for the advisor when handling a client's account, and the mutual benefit the parties are working towards.¹²⁰

1. *Analyzing the Fiduciary Duty*

There are two main ways to analyze whether

a fiduciary relationship has been created: a doctrinal approach and an alternative framework developed by Professors Brett Scharffs and John Welch.¹²¹ It should be noted that since these approaches analyze the fiduciary duty differently, one relationship may operate as a fiduciary under one analysis, but not the other.¹²²

The doctrinal approach begins by asking whether a person has accepted the role of a fiduciary and who the beneficiaries of that relationship are.¹²³ After this initial question is answered, the next step is an examination of the relationship to determine if it is a true fiduciary.¹²⁴ The first factors to look to the are the amount and degree of power and control the fiduciary has over the beneficiary.¹²⁵ After that, it must be determined if the fiduciary proactively sets their own interests aside to help pursue and protect the beneficiary's interests.¹²⁶ If the fiduciary relationship does exist, the next questions are what duties are owed to the beneficiary and have those duties been breached.¹²⁷ One difficulty with the doctrinal approach is the inconsistency it has brought the courts.¹²⁸ There are some relationships that the courts will deem a fiduciary and a breach, but then very similar situations are concluded otherwise.¹²⁹

The first portion of the doctrinal fiduciary analysis would work for both a collegiate and high school level coach/player relationship. A football coach, for example, has the power in the relationship. The coach tells the player when to show up for practice, what plays are going to be called during a game, whether any given player will be starting or playing during the game, and even whether that player is eligible to play at all. These are all the interests of the player, or the proposed beneficiary in this scenario.

The second half of the analysis is more difficult to apply to coaches. Coaches are hired to win games. A coach is more likely to forgo player development if their job is dependent upon winning. This creates the problem of putting the fiduciary's interests before the beneficiary. A player is interested in the becoming the best player they can possibly be, and if the coach is not willing to forgo winning in order to help the

players develop, then the interest being served is not the beneficiary's.

The alternative approach, developed by Scharffs and Welch, takes three different steps in determining if there is a fiduciary duty between the parties.¹³⁰ The first step is the magnitude of the fiduciary duty between the parties.¹³¹ The second step is reviewing the degree of the fiduciary's behavior when the duty was breached.¹³² Finally, analyze how the fiduciary did not serve the beneficiary, would it have been difficult to fully serve the duty, and what remedies are currently available for the aggrieved party.¹³³ There are also factors about the beneficiary that are worth considering as well, such as the age of the beneficiary, the vulnerability of the beneficiary, and the experience and sophistication of the beneficiary.¹³⁴

The magnitude of the duty between an athletic coach and a player can be quite high.¹³⁵ At the high school level, this duty would hang more on the coach being an advisor.¹³⁶ Coaches at the high school level are trying to get player to reach their max potential and will be more willing to assist players to get there. A player is relying on a coach to guide the player towards maximizing their potential. This is partially because the coach has some level of special knowledge in regards to player development and management, or else the coach would not have a job. This is a high level of trust between the coach and the player. The athlete is placing their potential future in the coach's hands, and if the coach misguides the player it could cost them an opportunity to be seen by scouts, a scholarship to college, and a large loss in future earnings if their athletic career is eliminated or cut short. This all depends on whether or not the coach breaches their duty.

The degree of harm in this scenario cannot be much higher and requires an equally high standard of conduct from the coach. A young person's brain is at risk of permanent injury, and it is not their choice. A player only assumes the risk of injuries that occur in the ordinary course of the contest.¹³⁷ No coach can prevent a player from getting a concussion. Concussions are going to occur, as long as there are violent collisions in

sports. However, a coach can prevent the long-term damage from a concussion by making sure the injured athlete gets the proper treatment and care for their concussion and not allowing the player to return to the sport too early.

Once a coach ignores the risk of allowing a player back into a game or practice, the coach is no longer within the normal range of play or the obvious or foreseeable injuries safe haven courts have recognized. When the coach has subjected athletes to injuries outside of the obvious and foreseeable, the coach has fallen below the standard of conduct that should be imposed.

Fulfilling a fiduciary duty, such as ensuring that the financial accounts of a client is being well managed, can be a difficult task.¹³⁸ However, when referring an athlete to get medical attention is all it would take to fulfill that duty, it becomes a lot easier. There are many classic signs of a concussion that a coach can witness or be told about that would lead a reasonable coach to know that a medical evaluation is necessary.¹³⁹ All a coach would need to do to fulfill the required duty would be to remove the injured athlete from the game or practice and send the athlete to a medical professional. Other than the coach putting the athlete in a game or practice before being medically cleared, there would be no way to say the coach did not fulfill their duty to the athlete.

However, available remedies are an issue the athlete inevitably runs into when applying a fiduciary duty to an athletic coach. Courts are reluctant to provide remedies for a harm that is speculative and difficult to calculate.¹⁴⁰ While an athlete can be diagnosed with a concussion, not all concussions are equal. The healing process for a concussion hinges on many different factors, and the consequences of the concussion can vary just as easily.¹⁴¹ If a court is not willing to apply a fiduciary to a consequence that does not have a concrete value or an easily recognizable impact, then the court may not find that a fiduciary duty is the best theory to apply. However, if courts have found that there is an available remedy, as a few courts have, the courts may be willing hand down greater

penalties when there is a greater harm and duty.¹⁴² When the long-term health of young adults and minors is involved, the harm cannot get much greater. Therefore, while it may not be the easiest theory to apply to the situation, a court might find a fiduciary relationship between an athlete and their coach.

B. Special Relationship

A separate theory to analyze this coach and athlete dynamic would be under a special relationship. One relevant definition of a special relationship is one who “voluntarily takes custody of another under circumstances such as to deprive the other of his normal opportunities” to protect themselves is under a duty to ensure that the other is not subjected to unreasonable risk of harm.¹⁴³

1. Teachers and Coaches Have a Special Relationship with Students

Many courts have determined that teachers and students do share a special relationship.¹⁴⁴ One Kentucky court, in *Wilson v. Webb*, reasoned that part of the reason teachers share this relationship with their students is because of the inherent power imbalance between a student and the teacher, plus the ability of a teacher to influence various parts of a student’s life.¹⁴⁵

Another court determined that a dance coach had a special relationship with the athletes on the dance team.¹⁴⁶ The court came to this conclusion based on the athletes’ trust placed in the instructor, the amount of guidance that is sought, and that the fact that the dance coach would use their own special training when necessary.¹⁴⁷

An athletic coach is given a job because they know how to make a team successful. A coach must undergo special training to be eligible to coach a team.¹⁴⁸ A special relationship requires the coach to use the knowledge they have obtained to make sure the athlete is duly taken care of. Coaches are required to obtain knowledge of concussions in all states. If the coach is not using the knowledge that was obtained from these concussion trainings, then

the coach is not meeting the standard of care and should be held responsible for it.

2. What Happens When a Breach Occurs

The most common remedy for a breach of a special relationship is monetary damages.¹⁴⁹ However, there are other ways to hold those who have a special relationship responsible. An Iowa statute has made it a misdemeanor for a teacher, or anyone else that falls within the definition of the statute, to knowingly or willfully not report suspected child abuse.¹⁵⁰ This statute does not require the teacher to be positive that there is abuse going on. Teachers are not required to ask the students about suspected child abuse. There is no special training required for the teachers to become familiar with the signs or symptoms of child abuse. This statute requires that if the teacher merely suspects that abuse has or is taking place, then the teacher must report it.¹⁵¹ This statute also makes it a misdemeanor to interfere with anyone else making a report of the alleged abuse.¹⁵²

The Iowa statute is obviously aimed at protecting the child from further abuse. It is also requiring those who would, most likely, qualify as one with a special relationship to report the suspected abuse.¹⁵³ The power dynamic that is held between some of those required to report, such as a counselor and a patient, is very similar to that held by other relationships that have been commonly held as a special relationship. A patient is not going to question much from a counselor because of the amount of specialized training a counselor has undergone to hold their position. The patient is going to believe that the counselor has their best interest at heart and would not intentionally put them in harm’s way. This criminal punishment could pave the way to holding others who breach a special relationship responsible for not maintaining their standard of care.

3. Analyzing the Special Relationship

Looking back to the definition of the special relationship, a coach definitely fits every single requirement. First, a coach takes over a team

voluntarily. In fact, the coach applies to take this team over, in many cases, and wants to have the control over these athletes. The coach wants to be the one that is making the daily decisions about how a team functions.

Second, the coach is depriving the athlete of self-protection. The coach has the power of ordering the athlete to go in the game when the athlete may not otherwise return. The athlete may have a small injury, such as a minor twisted ankle, that the athlete would rather not play through, but the coach can exert his control over the athlete and tell them to return to play. If the athlete fails to listen, then the coach can take action against the athlete in future games or practices.

Third, the coach absolutely knows they have the ability to exercise this power over the athlete and there are many opportunities to exercise this control. The coach exercises this control over their athletes every day by telling the players what plays to run, when they are having practice, and when they are going to be holding team meetings. These are only a few examples of a plethora that could be used to place a coach within the definition of a special relationship.

In addition, an athletic coach acts in many of the same capacities as a teacher, because their function is essentially the same. An athletic coach is hired to educate the athletes how to become the best athlete they can possibly be and to teach the athlete about the game they are playing. Coaches are also hired to win games with the athletes on their team. This is parallel to the role any teacher takes on in their respective subject. Each teacher is trying to shape each student into a well-versed mind on the topic of the class and have the student achieve a high score on some sort of final exam or paper. The biggest difference would be that certain teachers face bigger penalties for not preventing future harm to children. A coach can face a civil suit, but there has never been a criminal sanction against a coach for making an athlete return to practice or a game while they are recovering from an injury to their brain.

There is case law that already establishes a

coach and athlete relationship as a special relationship, but there is nothing that ensures the coach maintains the standard of care owed to their players. There is at least one statute that has criminalized someone breaching what courts have recognized as a special relationship because it keeps children in harm's way. Why should a history teacher that knowingly withholds information about suspected child abuse face a misdemeanor, but an athletic coach who knowingly withholds information about a suspected concussion does not face the same consequence?

VI. PROPOSED STATUTE

States should adopt a statute that imposes a criminal punishment for the breach of a coach's duty to their players. The statute should take into account all of the current regulations in place in that jurisdiction, but it should be modeled after the following:

(i) Any person who is considered to be a coach of an athletic team shall:

(1) Attend a concussion recognition training that is deemed sufficient by the State Board of Education, in consultation with (A) an official from the state Medical Association, (B) an official from the state Athletic Trainer Association, and (C) an official from the organization or entity sanctioning the event. This training shall include, but is not limited to, recognizing the symptoms of concussions, finding the proper medical treatment for a concussion, the long-term consequences of a concussion being untreated, and the possible consequences of an athlete returning to competition or practice before a concussion has fully healed.

(2) Conduct baseline testing to determine each athlete's normal cognitive function prior to any practices using the Standardized Concussion Assessment Tool (SCAT).

(ii) If any athletic coach knowingly or has reason to know that an athlete has sustained a concussion, that athlete shall be removed from competition or practice immediately. This athlete

shall not return to practice or competition for at least ten (10) calendar days and a licensed medical professional, that is not affiliated with the team or school, has determined the athlete is medically cleared to continue competition.

(iii) If it is found that any coach has knowingly failed to report, falsely reported, withheld information, or interfered with the report of an athlete's concussion status, then that coach shall be subject to a simple misdemeanor. For a first offense, the coach shall be subject to a criminal fine not to exceed fifteen percent (15%) of their gross coaching salary and a six (6) game suspension from all coaching duties in any league. For a second offense, the coach shall be subject to a criminal fine not to exceed fifty percent (50%) of their gross coaching salary, five (5) days in jail, and a one (1) year suspension from all coaching duties in any league. Upon a third offense, the coach shall be subject to a criminal fine not to exceed one hundred percent (100%) of their gross coaching salary, ten (10) days in jail, and permanent removal from the coaching position. This shall be noted on all employment records at the school or organization in which the coach is employed, and this coach shall be ineligible to coach in any capacity at any school or organization in any state in the future.

(iv) If an athlete dies as a result of the reckless management or reporting of a concussion, then the coach who was notified of or was managing the concussion shall be charged with involuntary manslaughter, under which the sentence shall not be less than ten (10) months in jail, and shall not exceed twenty-four (24) months in prison.

VII. FORESEEABLE OBJECTIONS

Many concerns can be expressed about this potential legislation. One of which could be, *why would we want to hold a coach to the standard of care of an athletic trainer or a medical professional?* However, this proposed legislation is not trying to hold a coach to the standard of an athletic trainer or doctor. The standard of care being advocated for is not diagnosing a concussion, but rather using the training that coaches are required to obtain for recognizing

when a player is exhibiting signs of a potential concussion and referring them to obtain proper medical attention.

The coach is also not in charge of making a treatment plan or making sure that the athlete is progressing properly. A doctor would have the responsibility of recognizing the symptoms and making the correct diagnosis using their years of intense training that is focused on diagnosing and treating injuries. A coach does not have to diagnose the player with a concussion. The coach only has to refer that player to the proper personnel, depending on the state's chosen definition, and follow the treatment plan given.

What other duties could be created by this kind of legislation? For example, could this duty to act and protect unnecessarily extend to a high school teacher who learns about a party that will have alcohol at it? The short answer is no. This hypothetical teacher has not taken responsibility for the party that the students will be attending. There is no assumption of care for the safety of those who will be attending. While there is still a special relationship with the students during school hours and sanctioned extra-curricular activities, anything that happens outside of the teacher's regular job duties are not going to be implicated by this. The training that a teacher or coach would obtain regarding concussions would not give rise to the special knowledge that would require some sort of action to prevent an under-aged person from drinking.

Wouldn't this type of legislation cause coaches to be more cautious with allowing players to continue playing in a game? This is exactly the point. It may result in the star player being benched for a few plays while they are examined on the sidelines to make sure they did not sustain a concussion, but this is worth the integrity of that player's brain. The consequence of not taking those few days to make sure that the player is truly able to return to play, could mean a lifetime of mental and physical health problems.

Is this punishment too harsh for the coach when they are not a medically trained physician? Again, the coach is not required to diagnose the player

with a concussion. The punishment would be coming from their ignoring a possible symptom of a concussion and the potential consequences of that. This would act as a general deterrent to make sure other coaches are accurately reporting the symptoms of their athletes. If one coach is reprimanded for not reporting a possible concussion, then other coaches will take notice and make sure their players are well documented. This type of punishment also acts as a sort of incapacitation. With an offending coach being removed from their position, the coach would not be able to cause harm to another athlete. Once a pattern of behavior has been well established by a third offense, then the coach will be permanently removed from all possible coaching positions. This is to protect the athletes from a person who has repeatedly shown that there is an indifference towards the health of the athletes.

This is very close to what is required of teachers when they suspect that child abuse is occurring. Teachers must report it and if they do not then there are consequences, sometimes criminal consequences.¹⁵⁴ The potential consequences of brain damage, such as lifelong impairment and death in the most severe cases, are as severe as child abuse and should be treated just as seriously.

Isn't baseline testing expensive to administer?

There are a couple solutions to this problem. The first is that not all baseline testing needs to be top of the line and elaborate. There is a free form that acts as a baseline tester, which is commonly referred to as the Standardized Concussion Assessment Tool (SCAT). This form tests the participants basic cognitive functions such as memory recall, eye movement, speech, balance, and much more.¹⁵⁵ The athlete gives a score of one to six for some questions after they are suspected of having a concussion. These questions relate to vision problems, headache, drowsiness, and other subjective symptoms the athlete must self-report. This sort of baseline testing would be sufficient to establish some sort of gauge for when an athlete is suspected to have a concussion.

A second solution to this problem would be to use a more sophisticated system that teams have already begun to use called ImPACT. ImPACT is a computer program that allows for baseline test results to be stored in a central location that is easy to access and easy to compare the post injury results.¹⁵⁶ The ImPACT test and the SCAT test are very similar in the cognitive functions that they are testing, but the ImPACT test is certainly more convenient for maintaining the results on a computer. These results are reviewed by a licensed health care provider to make sure the athlete gets the proper diagnosis and treatment plan.¹⁵⁷ The cost of this product ranges from \$435 to \$1,300 depending on the number of baseline tests that need to be administered and the number of post injury tests that are allowed in the system.¹⁵⁸

The next question is who would bear the burden of paying this? Obviously one answer would be the school. A school could possibly get grants to cover the costs of this, but grants are so specific in their application that it would be unlikely to qualify. The school could pass the expense along to the athletic department. Schools could cut the pay of the coaches, a small amount per coach, to cover the cost. So, if a school employs 30 coaches and the school wants to purchase the second most expensive package at \$875.00¹⁵⁹, which affords 575 baseline tests and 100 post-injury tests, each coach would have to take a pay cut of \$30.00. This pay cut is modest at best and is only to protect the coaches from a future law suit. A small cut of \$30.00 to protect the athletes that these coaches are supposed to take care of is not too much to ask for.

Another way to cover the cost of this system would be for students to pay for the system when they pay their fees to attend school. This could cause some tension for the parents whose child is not an athlete. The cost could be more particularized and only apply to athletes and those who choose to participate. It would not cost much per athlete to afford the system. Figure that one varsity football team has forty-five members, and the school wants the same \$875.00 package. Each athlete would only have to pay \$20.00 to cover this cost. Plus, this plan would allow for

more teams to utilize the system than just the one forty-five-member varsity team. When the cost is distributed among all the athletes in a school, the cost could very well drop down to a mere \$5 for the safety of their brain. Cost should not be an issue when it comes to protecting the long-term health of anyone, let alone children and young adults.

Some concussions are not going to have any visible signs. Why punish a coach for an athlete that does not self-report the symptoms being experienced? Because coaches perpetuate the atmosphere that encourages athletes to not self-report or to play through the pain.¹⁶⁰ “I’ve seen coaches who tried to be the decision-maker with injuries ... so they will try to override the athletic trainer or manipulate the athlete to get back in the game.”¹⁶¹ This sort of interaction between a coach and an athlete is completely unacceptable. Discouraging an athlete who has attempted to tell a coach about potential concussion symptoms is not only a detriment to that athlete, but all on the team. Why would another athlete tell that coach about symptoms? He is just going to say that the symptoms are nothing and they will go away with time and rest.

Granted, this may not be how all coaches act with their athletes. However, it is the coaches that have created the sort of culture that admires the athlete who absorbs a large amount of contact and jumps right back up into play, despite feeling dizzy and nauseous. If the coaches are forced to change their behavior towards athletes and potential injuries, then the players will be more willing to open up to their coaches and be candid with injuries.

Aren’t the athletes signing up for sports knowing that they could get severely injured? Athletes are assuming some inherent risk when they sign up for sports.¹⁶² There are, however, some risks that are greater than the inherent risk involved that fall outside of the assumption of risk.¹⁶³ The athletes are also not assuming the risk of the reckless, intentional, and unreasonable conduct of the coach.¹⁶⁴ An athlete is assuming the risk to sprain an ankle, and, depending on the sport, possibly even breaking an arm. These types of

injuries are fairly common in sports. A concussion itself is even an expected and assumed risk. What is not expected or assumed is that the coach of the team will conceal information about the status of a player who may have a concussion. It is not expected that the potentially concussed player will be sent back out to the game or practice without the coach first asking a medical professional if the athlete does have a concussion. The increased risk that is caused by this conduct is not being assumed by the players, but it is being assumed by the coach.

Haven’t there been court cases that said an athlete and a university are not in a special relationship? Short answer would be yes.¹⁶⁵ In *Orr v. Brigham Young University* (BYU), the court said that there was not special relationship nor any other duties imposed upon the university.¹⁶⁶ A football player, Vernon Orr, sustained a back injury during a practice and went to see the team’s head athletic trainer.¹⁶⁷ The pain continued, but Orr’s coach told him to continue playing to see if Orr’s back would loosen up.¹⁶⁸ The pain subsided for the most part, but returned a year later.¹⁶⁹ Orr’s coach directed him to see a trainer, which Orr did not do.¹⁷⁰ Orr suffered another injury which resulted in two herniated discs above the pelvis that needed to be surgically repaired.¹⁷¹ A large part of the court’s reasoning was that there is a stark difference between a child in need of care and an adult in college.¹⁷²

The court is not wrong that there is a difference between a twelve-year-old in need of care and a twenty-two-year-old college student. What the court does overlook, though, is that the amount of power that is given up to be able to be on a collegiate football team. College athletes are on an incredibly strict schedule. They are told when to practice, when to go to class, when to be in a weight room, and when to be in team meetings. The free time to think about what would be best for the athlete in this chaotic schedule is minimal. The athlete is incredibly dependent upon the coaching staff and the university for guidance. If the athlete does not like the advice that is being given and goes against the coach or university, then there is a possibility that the athlete will have playing time or financial support taken away.

This alone is sufficient to establish the type of relationship that makes the athlete particularly vulnerable.

VIII. FUTURE RESEARCH

There has been a very exciting development from the Federal Drug Administration (FDA) that could have huge implications in the diagnosis of concussions.¹⁷³ The FDA announced on February 14, 2018, that it was approving a blood test that assisted in diagnosing adults with a traumatic brain injury.¹⁷⁴ This study that led to the approval involved 1,947 adult blood samples.¹⁷⁵ Of these samples, the blood test was able to predict those with lesions with an accuracy rate of 97.5%.¹⁷⁶ The test was also able to predict those who did not have lesions with an accuracy rate of over 99%.¹⁷⁷

This is exciting for many reasons. First, it can prevent a patient from being exposed to unnecessary radiation from the CT scan. Also, this test can give a very accurate prediction of whether a person has a concussion within a few hours.¹⁷⁸ If this test can eventually be administered in a school setting, then a player could know whether he or she is cleared to play the following day. The need for a coach to make the decision to have the blood test administered will still be present, but the answer could come a lot sooner.

As stated in the FDA release, this was only tested on adults.¹⁷⁹ How the proteins measure in children or young adults could vary. More data would be needed to confidently advocate for these tests to be the exclusive method for detecting a concussion in a youth athlete versus sending that athlete to a licensed medical professional for an evaluation, time and rest.

Another drug that has been developed, Prevacus, is aimed at reducing the long-term effects of a concussion by 80%.¹⁸⁰ This drug is taken nasally and is meant to reduce inflammation, swelling, and oxidative stress of the brain.¹⁸¹ Prevacus has gained a lot of momentum, even garnering support from Hall of Fame quarterback Brett Favre.¹⁸² This would also be an exciting

development in the world of concussion management. Having a drug that could severely reduce, and possibly even stop, the brain's swelling after an injury would guarantee less long-term effects and a quicker recovery time.

CONCLUSION

As stated above, no state has instituted a criminal punishment for allowing a concussed player to enter a game or practice through legislation or the courts. There is a duty that athletic coaches have been breaching, whether it be through a fiduciary or a special relationship, and the repercussions have been minimal. Iowa has taken a step in this direction by allowing prosecution for a teacher who has knowingly withheld or failed to report information about suspected child abuse. This prosecution for the breach of a special relationship, and the continuance of harm to children, is no different than when a coach allows an athlete with a brain injury to return to play before receiving medical attention. Civil damages are often not paid by the coach themselves because the school assumes responsibility over the coach. This means the penalty may never reach down to the person committing the harm.

Coaches are not being held to the standard that they should be. The coach is one deciding to gamble that the concussed player will not get injured further. The irresponsible coach is playing roulette with the athlete's brain and should be responsible for the consequences of betting poorly.

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¹The terms “youth” and “high school” when referring to athletes are interchangeable. Both are referring to an athlete that is under the age of eighteen. Some uses of one word or the other make more sense contextually but are not meant to disregard the athletes thought to be in the other category.

²Clay Travis, *Tennessee Investigating If Coaches Kept Player With Concussion In Game*, OUTKICK THE COVERAGE, (Nov. 1, 2017) <https://www.outkickthecoverage.com/tennessee-investigating-coaches-kept-player-concussion-game> (Coach Wells telling Brett Kendrick that despite the possible concussion Kendrick sustained, the team needed him to play).

³E.g., Mike Alessandrini, *NFL Says 281 Concussions Reported in 2017, Highest-ever Total for League*, THE SCORE, (Jan. 26, 2018) <https://www.thescore.com/news/1474404> (NFL reports the highest number of concussions in 2017 since it started collecting the data in 2012).

⁴Tom Udall, *Tackle the Concussion Epidemic*, CNN, (Oct. 5, 2011, 03:39 PM) <http://www.cnn.com/2011/10/05/opinion/udall-football-concussions/index.html> (there are millions of sports related concussions, many of which go undiagnosed. Around 4.5 million football players not eligible for the NFL have experienced a concussion).

⁵*Sports Concussion Statistics*, HEADCASE, http://www.headcasecompany.com/concussion_info/stats_on_concussions_sports. (last visited Feb. 23, 2018). (1 in 5 athletes will get a concussion during the season, 33% of athletes report having two or more concussions in a year.)

⁶Jon Solomon, *Michigan AD Apologizes, Says Shane Morris Has a Concussion*, CBSSPORTS, (Sep. 30, 2014), <https://www.cbssports.com/college-football/news/michigan-ad-apologizes-says-shane-morris-has-a-concussion>.

⁷*Id.* (Morris needed to lean on a teammate to stay on his feet).

⁸*Id.*

⁹*Id.* (After the head neurologist asked that Morris be evaluated for a concussion, Morris was asked to return to the field. He was only evaluated for an ankle injury).

¹⁰*Id.*

¹¹*Id.*

¹²*Id.* (Athletic Director Dave Brandon confirmed that Morris had been diagnosed with a concussion the day after the football game).

¹³Adam Kilgore, *Aaron Hernandez Suffered From Most Severe CTE Ever Found in a Person His Age*, THE WASHINGTON POST, (Nov. 9, 2017), <https://www.washingtonpost.com/sports> (enter “Aaron Hernandez CTE” in the search bar; follow link titled “Aaron Hernandez suffered from most severe CTE ever found in a person his age”) (“In this age group, he’s clearly at the severe end of the spectrum”).

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* (Hernandez had stage three CTE, which had never been seen in someone younger than forty-six years old).

¹⁷*Id.* (noting the numerous parts of the brain that the doctors found damaged).

¹⁸*Id.* (“The hippocampus [and] [t]he fornix . . . also contribute[] to memory function. . .”).

¹⁹*Id.*

²⁰*Id.* (“The amygdala . . . had been severely affected [along with] [t]he temporal lobes . . .”).

²¹*Id.* (noting the specific portions of the brain that doctors found extensively damaged. Also, CTE has been discovered in over one hundred former NFL players, and many have committed suicide).

²²Brad Wolverton, *E-Mails Raise Concerns About How Seriously NCAA Regarded Concussions*, THE CHRONICLE OF HIGHER EDUCATION, (July 22, 2013), <http://www.chronicle.com/article/E-Mails-Raise-Concerns-About/140483>. (“[N]early half of responding institutions said they had allowed athletes to return to play in the same game after a concussion diagnosis.” “[F]ewer than half of respondents said that their institutions required a physician to see every athlete who had had a concussion.”).

²³*Id.* (“I personally have seen an athlete knocked unconscious and return in the same quarter . . .”).

²⁴Tom Jacobs, *Athletes Report Pressure to Keep Playing After a Head Injury*, PACIFIC STANDARD, (Apr. 23, 2015) <https://psmag.com/social-justice/athletes-report-pressure-to-keep-playing-after-a-head-injury> (pressure to continue playing comes from four main sources, and one of those is the coaching staff).

²⁵*What is a Concussion*, BRAIN INJURY RESEARCH INSTITUTE, <http://www.protectthebrain.org/Brain-Injury-Research/What-is-a-Concussion-.aspx> (last visited Feb. 23, 2018).

²⁶See, e.g., CENTER FOR DISEASE CONTROL, *Facts About Concussion and Brain Injury*, 5, (2010), https://www.cdc.gov/headsup/pdfs/providers/facts_about_concussion_tbi-a.pdf (noting the variety of symptoms that are possible and that it is sufficient to seek a doctors assistance if “something is not quite right”); *What is a Concussion*, BRAIN INJURY RESEARCH INSTITUTE, <http://www.protectthebrain.org/Brain-Injury-Research/What-is-a-Concussion-.aspx> (last visited Feb. 23, 2018) (noting that symptoms might not be recognized when the impact happens).

²⁷*What Is a Concussion?*, CENTER FOR DISEASE CONTROL, https://www.cdc.gov/headsup/basics/concussion_what.html (last visited Feb. 23, 2018).

²⁸Lindsey Barton Straus, *Concussions in High School Sports Rising at 15% Annual Rate*, MOMSTEAM, <http://www.momsteam.com/softball/concussion-in-high-school-sports-rising-fifteen-percent-new-study-finds> (last updated Aug. 22, 2011). (“[T]he data revealed an overall increase of 16.5% in annual concussion rates over the past decade . . .”).

²⁹*Supra* note 4.

³⁰*Id.*; *Concussion Rate Doubled in Decade*, PREVACUS, <http://prevacus.com/concussions-101/statistics/> (last visited Feb. 23, 2018).

³¹*Supra* note 4.

³²*Supra* note 4.

³³See *Bill Addressing Youth Sports Concussion OK*, THE MINING JOURNAL, (Oct. 11, 2017), <http://www.miningjournal.net/opinion/editorial/2017/10/bill-addressing-youth-sports-concussions-ok/> (this bill only requires training on concussions every three years); TEX. EDUC. CODE ANN. § 38.158 (West 2017) (coaches must obtain only two hours of concussion training every two years.)

³⁴E.g., WASH. REV. CODE § 28A.600.190(2) (2017); CONN. GEN. STAT. § 10-149b(d)–(e)(2) (2017); IDAHO CODE § 33-1625(4) (2017).

³⁵*Commonwealth v. Konz*, 450 A.2d 638, 641 (Pa. 1982) (parents are responsible to determine whether their child needs to go to the doctor).

³⁶E.g., § 28A.600.190(3); § 10-149c(a)(1); § 33-1625(5).

³⁷§ 28A.600.190(5).

³⁸ *9 Years Later, Zackery Lystedt Law Still Protects Young Athletes*, DAILY HEALTH WIRE, <https://www.trihealth.com/dailyhealth-wire/orthopedics/9-years-later-zackery-lystedt-law-still-protects-young-athletes> (last updated Oct. 4, 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ WASH. REV. CODE § 28A.600.190(3).

⁴⁵ *Id.* at § 28A.600.190(4).

⁴⁶ *Id.* (noting the civil sanctions only apply to the volunteer health care provider if there is gross negligence or willful or wanton conduct).

⁴⁷ See *Swank v. Valley Christian Sch.*, 398 P.3d 1108, 1115 (Wash. 2017).

⁴⁸ See *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁹ IDAHO CODE § 33-1625 (2017).

⁵⁰ *Id.* at § 33-1625(2).

⁵¹ *Id.* at § 33-1625(3).

⁵² CENTER FOR DISEASE CONTROL AND PREVENTION, CONCUSSION AT PLAY, 4, https://www.cdc.gov/headsup/pdfs/resources/concussion_at_play_playbook-a.pdf (“[K]nowledge and awareness of concussion[s] is growing, research shows that there are still important gaps to be filled”).

⁵³ § 33-1625(4).

⁵⁴ See Norberto Andaluz, *Concussion (mild traumatic brain injury)*, MAYFIELD BRAIN & SPINE, <https://www.mayfieldclinic.com/PE-Concussion.htm> (last updated Apr. 2016) (If a concussion is left undiagnosed, it can potentially lead to a fatal injury. “[A] coach, athletic trainer or team physician should immediately perform” an evaluation if a concussion is suspected).

⁵⁵ § 33-1625.

⁵⁶ H.R. 557, 63 Leg., 2d Reg. Sess. (Id. 2016) (This version of the Bill was enacted Mar. 30, 2016.); H.R. 557, 63 Leg., 2d Reg. Sess. (Id. 2016) (This version of the Bill was introduced on Mar. 2, 2016.); H.R. 632, 61 Leg., 2d Reg. Sess. (Id. 2012) (This version of the Bill was enacted on Apr. 3, 2012); H.R. 632, 61 Leg., 2d Reg. Sess. (Id. 2012) (This version of the Bill was introduced Mar. 2, 2012). (noting that all versions of the Bill did not address consequences of someone violating the statute).

⁵⁷ § 33-1625(8)–(9).

⁵⁸ CONN. GEN. STAT. § 10-149b(a)(2).

⁵⁹ *Id.* at § 10-149b(a)(3).

⁶⁰ *Supra* note 50; *Infra* note 158 (the FDA recently approved a new testing method for detecting whether someone has a concussion).

⁶¹ § 10-149b(f).

⁶² CONN. GEN. STAT. § 10-145b(i)(1)(B) (“[T]he holder has persistently neglected to perform the duties for which the certificate . . . was granted”).

⁶³ CONN. GEN. STAT. § 10-145b (noting that the statute does not mention the revocation is permanent nor disqualifies the coach from reapplying for a certificate).

⁶⁴ MODEL PENAL CODE § 2.01(1).

⁶⁵ *State ex rel. Kuntz v. Mont. Thirteenth Judicial Dist. Ct.*, 995 P.2d 951, 955 (Mont. 2000) (establishing exceptions to the bystander rule).

⁶⁶ *Id.*

⁶⁷ LAFAYE, WAYNE, SCOTT, AUSTIN, *SUBSTANTIVE CRIMINAL LAW*, 284 (West publishing co., Vol. 1, 1986).

⁶⁸ *Commonwealth v. Konz*, 450 A.2d 638, 641 (Pa. 1982) (A child is unable to assess their own situation and must rely upon the parent to make a rational decision in whether the child should go to the doctor).

⁶⁹ *Harrington v. State*, 547 S.W.2d 616, 620 (Tex. Crim. App. 1977).

⁷⁰ *Id.* at 618.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 619.

⁷⁴ *Id.*

⁷⁵ *Id.* at 619–20 (This was contrasted with a case that involved a father delivering a fatal blow to the abdomen of a child, but there was no evidence the mother was involved. The current case, however, showed that “the child’s death resulted from a continuous course of conduct, extending over a prolonged period of time.” Accordingly, the court held that “the evidence is sufficient to show that appellant and her husband intentionally killed their child by starvation”).

⁷⁶ IOWA CODE § 232.69(1)(b)(4) (2017) (A teacher, or any other public school employee, is required to report any potential child abuse); IOWA CODE § 232.75(1) (Any qualifying person found guilty of knowingly or willfully failing to report suspected abuse is guilty of a misdemeanor).

⁷⁷ *Supra* note 65 at 287.

⁷⁸ See *Id.*

⁷⁹ *Sickel v. State*, 363 P.3d 115, 119 (ALASKA CT. APP. 2015).

⁸⁰ *Id.* at 116.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 117.

⁸⁵ *Id.* at 119.

⁸⁶ *Id.* at 118–19.

⁸⁷ *Id.* at 118.

⁸⁸ *Id.*

⁸⁹ *Supra* note 65 at 286.

⁹⁰ *State v. O’Brien*, 32 N.J.L. 169, 172 (1867) (holding that a switchman owes a duty of care to the public as well as the contractual duty to the railroad.)

⁹¹ *Id.* at 170.

⁹² *State v. Benton*, 187 A. 609, 618 (Del. Super Ct. 1936) (this case was decided by the Court of Oyer and Terminer of Delaware but it was abolished in 1951 and the responsibilities were assumed by the Superior Court. [https:// archives.delaware.gov/collections/aghist/2825.shtml](https://archives.delaware.gov/collections/aghist/2825.shtml)).

⁹³ *Id.* at 612.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 613.

⁹⁷ *Id.* at 618.

⁹⁸ *Id.* at 613.

⁹⁹ *E.g.*, *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 930 (N.C. Ct. App. 2001) (“[The] defendant voluntarily undertook . . . to advise and educate the JV squad members regarding safety”).

¹⁰⁰ *Id.* at 926; *Schneider v. Plymouth St. Coll.*, 744 A.2d 101, 105 (N.H. 1999).

¹⁰¹ *Davidson*, 543 S.E.2d at 922.

¹⁰² *Id.* at 926.

¹⁰³ *Id.* at 927.

¹⁰⁴ *Id.* at 926.

¹⁰⁵ See e.g. Loren Grush, *The Concussion Epidemic: Should Helmets Be Banned From Football?*, FOX NEWS, (Jan. 9, 2014) <http://www.foxnews.com/health/2014/01/09/concussion-epidemic-should-helmets-be-banned-from-football.html> (calling for helmets to be banned so players do not use their head to make tackles in football); Jim Henry, *A Local Solution for Concussion 'Epidemic': Prevacus Could be a Football Sideline Staple*, TALLAHASSEE DEMOCRAT, (Jan. 13, 2018, 2:00 PM) <https://www.tallahassee.com/story/sports/2018/01/13/local-solution-concussion-epidemic-prevacus-could-football-sideline-staple/1017576001/> (a drug that has been developed to combat the problem of concussions in contact sports); *FDA authorizes marketing of first blood test to aid in the evaluation of concussion in adults*, U.S. FOOD & DRUG ADMIN., (Feb. 14, 2018) <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm596531.htm> (a blood test has been developed to try and detect a concussion more accurately and effectively).

¹⁰⁶ *Schneider*, 744 A.2d at 105.

¹⁰⁷ *Id.*

¹⁰⁸ *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 628 N.W.2d 697, 706 (Neb. 2001).

¹⁰⁹ *Id.* at 705.

¹¹⁰ *Id.* at 706.

¹¹¹ *Id.* (“The record affords no basis . . . to conclude that this standard varies from one Nebraska community to another”).

¹¹² *Herring v. Bossier Parish Sch. Bd.*, 632 So.2d 920, 921 (La. Ct. App. 1994).

¹¹³ *Id.*

¹¹⁴ Sara Young, *Does a Coach Owe Players a Fiduciary Duty: Examining the Relationship between Coach and Team*, 35 J.C. & U.L. 475, 478 (2009).

¹¹⁵ Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, BYU EDUC. & L.J. 159, 164-65 (2005) (“In order for there to be a fiduciary relationship, there must be an element of entrustment by one person . . . to another”); *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 97-98 (D. Conn. 2000) (“Given the collaborative nature of the relationship . . . the Court can envision a situation in which a graduate school . . . may assume a fiduciary duty to the student.”).

¹¹⁶ Young, *supra* note 111 at 479-80 (An advisor holds a fiduciary role, in part, because of the trust and power over the person seeking advice); Scharffs, *supra* note 112 at 165 (“[A]n element of power and control over by the fiduciary over the interests and well-being of the beneficiary”).

¹¹⁷ *Dunham v. Dunham*, 528 A.2d 1123, 1133 (Conn. 1987) (“A fiduciary . . . is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise”).

¹¹⁸ Scharffs, *supra* note 116 at 163 (“Fiduciary duty is a concept that applies to a large variety of relationships”).

¹¹⁹ See, e.g., *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W. 3d 360, 373-74 (Tex. Ct. App. 2007) (noting the factors

already discussed to determine whether a fiduciary exists would be present in every financial advisor situation, and the court found there was a fiduciary duty in this case).

¹²⁰ *Id.*

¹²¹ Scharffs, *supra* note 116 at 164, 166-67.

¹²² Young, *supra* note 111 at 480.

¹²³ Scharffs, *supra* note 116 at 164.

¹²⁴ *Id.*

¹²⁵ *Id.* at 164-65.

¹²⁶ *Id.* at 165.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (Conn. 2000). *But see* *Ho v. U. of Tex. at Arlington*, 984 S.W.2d 672 (Tex. Ct. App. 1998).

¹³⁰ Scharffs, *supra* note 116 at 167.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 175-77.

¹³⁵ See Young, *supra* note 115 at 493 (court[s] may find that because the coach has significant qualifications and expertise, he should be held to a higher standard”).

¹³⁶ *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 126 (Iowa 2001) (“It is advisory in nature and not adversarial.” While this case discusses a counselor, the function of an athletic coach at this level is essentially the same. The coach “does not act for his or her own benefit, but provides information for the benefit of the” athlete).

¹³⁷ *McQuiggan v. Boy Scouts of America*, 536 A.2d 137, 140 (Md. 1988) (A player assumes all risk incidental to the game and injuries that are obvious and foreseeable).

¹³⁸ *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W. 3d 360, 373-74 (Ct. App. Tx. 2007).|

¹³⁹ *Supra* note 26.

¹⁴⁰ Young, *supra* note 115 at 495.

¹⁴¹ *What to Expect After a Concussion*, BEAUMONT, <https://www.beaumont.org/conditions/what-to-expect> (last visited Mar. 1, 2018).

¹⁴² See Scharffs, *supra* note 116 at 218 (“[C]ourts reserve the most severe penalties for instances of high magnitude breaches of high magnitude duties.”).

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).

¹⁴⁴ *E.g.*, *Wilson v. Webb*, 869 F.Supp. 496, 497 (W.D. Ky. 1994).

¹⁴⁵ *Id.*

¹⁴⁶ *E.g.*, *Cope v. Utah Valley State Coll.*, 290 P.3d 314, 322 (Utah Ct. App. 2012).

¹⁴⁷ *Id.*

¹⁴⁸ *E.g.*, CONN. GEN. STAT. § 10-149b(a)(2); IDAHO CODE § 33-1625(3) (2017) (these statutes require that coaches attend concussion trainings to be eligible for a coaching position).

¹⁴⁹ Amended Complaint – Civil Action at ¶ 44, 48, 57, 64, *Gardner v. Luzerne County*, 645 F. Supp. 2d 325 (2009) No. 3:07-CV-1947, 2007 WL 4772871 (M.D.Pa.) (each count requesting “compensatory damages” for the violation of a special relationship).

¹⁵⁰ Iowa Code Ann. § 232.69(1)(b)(4) (West 2017); Iowa Code Ann. § 232.75(1) (West 2017).

¹⁵¹ § 232.75(1).

¹⁵² *Id.* at § 232.75(2).

¹⁵³ *See* § 232.69(1)(b) (teachers and coaches have been found to have a special relationship because of the influence their position holds over the student or athlete. The other persons that are required to report also would have a similar position of power and influence over the person in their care. E.g., psychologist, juvenile detention center employee).

¹⁵⁴ § 232.75(1).

¹⁵⁵ *Sport Concussion Assessment Tool*, BRITISH JOURNAL OF SPORTS MEDICINE, (2013) <http://bjsm.bmj.com/content/bjssports/47/5/259.full.pdf>.

¹⁵⁶ *ImPact for School, Districts, and Teams*, ImPact Applications, <https://www.impacttest.com/audience/?teams-1> (last visited Mar. 3, 2018) (“Test results are compared to baseline scores and/or normative data scores . . .”).

¹⁵⁷ *Id.* (“Results interpreted by a licensed healthcare provider.”)

¹⁵⁸ *School and Team Package Pricing*, ImPact Applications, <https://www.impacttest.com/products/?33> (last visited Mar. 3, 2018).

¹⁵⁹ *Id.*

¹⁶⁰ Jan Hoffman, ‘Don’t Tell Coach’: Playing Through Concussions, New York Times (Nov. 5, 2013, 12:01 PM), <https://well.blogs.nytimes.com/2013/11/05/dont-tell-coach-playing-through-concussions> (“It’s a culture where the idea is to man up, to not let your . . . coach down . . .”).

¹⁶¹ *Id.*

¹⁶² *Morgan v. State*, 685 N.E.2d 202, 204–05 (N.Y. Ct. of App. 1997) (a bobsled competitor filed suit against the state of New York when the bobsled collided with a wall. The suit was dismissed under an assumption of risk.)

¹⁶³ *Id.* at 205–06 (a 60-year-old man playing tennis in a state owned park was known for having a torn net. He became entangled in the net and was injured. This suit was not dismissed because the “injuries are not inherent in the relevant sporting or recreational activity.”)

¹⁶⁴ *Id.* at 208 (assumption of risk does not extend to “reckless or intentional conduct or concealed or unreasonable increased risks.”)

¹⁶⁵ *Orr v. Brigham Young University*, 960 F. Supp. 1522, 1527 (D. Utah 1994) (“A realistic assessment of the nature of the relationship between the parties here precludes our finding that a special relationship existed . . .”).

¹⁶⁷ *Id.* at 1527, 1529 (“The court finds no factual support to impose additional duties upon BYU. . .”).

¹⁶⁷ *Id.* at 1523.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1524.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1527.

¹⁷³ *Supra* note 106 (a blood test that the FDA approved in February 2018 that predicts if a patient has lesions on the brain. These lesions are a predictor of a traumatic brain injury, aka a concussion.)

¹⁷⁴ *Id.* (the blood test measures levels of proteins released by the brain and the level of these proteins can help determine which patient has a traumatic brain injury.)

¹⁷⁵ *Id.* |

¹⁷⁶ *Id.* (“The Brain Trauma Indicator was able to predict the

presence of intracranial lesions on a CT scan 97.5 percent of the time...”)

¹⁷⁷ *Id.* (the Brain Trauma Indicator was 99.6% accurate in predicting those who did not have lesions on a CT scan.)

¹⁷⁸ *Id.* (test results come back within three or four hours.)

¹⁷⁹ *Id.* (the 1,947 samples were all adult samples.)

¹⁸⁰ Henry, *Supra* note 106.

¹⁸¹ *Id.*

¹⁸² *Id.* (“Favre . . . is raising money – for Prevacus and recruiting other NFL greats and dignitaries to join the company’s sports advisory board.”).