Entertainment and Sports Lawyer Fall 2015 Table of Contents

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Letter from the Editor

Change is the law of life. And those who look only to the past or present are certain to miss the future.—John F. Kennedy
The Future is unwritten.—Joe Strummer

Change. Is it good? Is it bad? Or is it just what JFK said... “the law of life”? Personally, I tend to believe that change is a constant; that is, everything changes. Be it evolution or devolution, be it transformation, regression, advancement, or merely alteration—everything changes.

Changing of the guard! The ABA Forum on the Entertainment and Sports Industries has a new Chair: welcome to Janine Small! Although, “welcome” does not really sound quite right. Janine has been a long time member of the Forum and has spent countless hours serving on our Governing Committee, fostering relationships, engendering ideas, selflessly promoting the Forum’s goals and objectives, and earning the trust of her colleagues. And while our future is bright with Janine at the helm, the path on which we are about to embark was laid by Janine’s immediate predecessor, Richard Idell. Under Richard’s stewardship, the Forum expanded its platform with new, cutting-edge conferences and symposia, a plethora of webinars that vastly increased opportunities for members to partake in CLE presented by true experts and leaders in the industry, and guided this newsletter into its new digital platform. We look to Richard’s past leadership to see where we are today, and we look to the future with Janine.

This is our second issue published in the digital platform. In the short time since the first issue, we have already seen drastic changes. Our beloved Teresa Ucok departed the ABA for other opportunities; she will be dearly missed. Change can be good... we welcome as the new Forums Manager, Carol Simmons. With recent changes at the ABA as to publishing guidelines for the Sections and Forums, Carol has already proven herself an incredible asset. She has developed a financial platform that will allow the Forum to thrive for years to come and worked tirelessly to ensure a seamless transition. Please be sure to thank Carol when you see her at the annual meeting in Washington, D.C. October 8 to 10, 2015 at the Grand Hyatt.

Change can only be witnessed from perspective. That is, it would be impossible to tell if something has changed if you do not know what it was previously, as compared to the present, or what it may become in the future. Fortunately, this issue contains several outstanding articles that lay out the past, the present, and the future...

In April 2015, Congress introduced the Fair Play, Fair Pay Act of 2015, a bill designed to fix “the antiquated and broken” broadcast systems allowing certain radio companies to avoid paying any fee to music rights holders. Is the United States Copyright Act about to change? Attorney Jeff Becker, law student William Shields, and attorney/artist manager Stephen Hutton provide an in-depth history of the musical landscape, explain the current concerns being faced by both broadcasters and music rights holders, and look to the future ramifications if the Act is passed.

Esteemed professor Emmett Gill presents a riveting evaluation of the UNC Football Investigation, which resulted in the football program at the University of North Carolina at Chapel Hill being punished for multiple violations of National Collegiate Athletic Association (NCAA) rules and regulations. Dr. Gill’s assessment addresses the underlying investigation with an eye toward student-athlete due process, how investigations have been conducted in the past, the current legal and public policy landscapes, and the social justice implications moving forward.
For the soccer fans amongst us, I have to ask...who really understands the UEFA Transfer system for European Football? Mark Hovell and Tiran Gunawardena tackle the complex financial system that governs UEFA transfers; they walk us through the history and development of the platform, in comparison to free agency and trade schemes in American sports leagues, and the future of the system as the “beautiful game” continues to expand its global reach.

We are proud to feature the final chapter of Peter Dekom’s opus: “The Television Wars (Part 3): The Real Muscles of Sports Programming.” This installment completes his in-depth coverage, albeit with his typical dose of sardonic wit, of a changing paradigm amidst what has been, and what continues to be, a tumultuous year for the television industry.

Richard Giller takes a fascinating look at an emerging trend in college sports involving high profile athletes purchasing disability insurance protection (loss of value insurance) as a hedge against the potential impact an injury suffered in college might have on the value of their first professional contract.

Michael Donaldson and Lisa Callif shed a little light, and just a bit of humor, on the distinction between parody, satire, and jokes in the excerpt from their the fourth edition of Copyright & Clearance.

And finally, keeping with the theme of change and evolving, in this issue we introduce a new feature: A Practitioner’s Column. In an effort to focus on the practical applications of law our Forum members experience on a daily basis, fashion attorney Brittany Rawlings has provided us with an initial guide to FTC Endorsement Guidelines for brand application. Future issues will include attorneys discussing film funding and financing, trends in music industry contracts, and anything that you, our Forum members, want to see.

In the words of Margaret Mead, “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.” How would you like to see the Forum and this publication evolve? What do you need from this Forum for you to get more out of it? What articles and topics are relevant to you and your practice? What change do you want?

**The Fair Play, Fair Pay Act of 2015: What’s At Stake and For Whom?**

**BY JEFFREY S. BECKER, WILLIAM W. SHIELDS, STEPHEN HUTTON**

The United States Copyright Act is primed to take center stage during this current legislative session, as several members of Congress introduced comprehensive legislation earlier this year known as the Fair Play, Fair Pay Act of 2015 (FPFPA). This bill seeks to modify the Copyright Act in three key ways. First, it would create a terrestrial public performance right for recording artists and owners of master sound recordings. Second, it would eliminate the Copyright Act’s exemption against federal copyright protection for sound recordings fixed prior to February 15, 1972. Third, it would establish a process designed to allow for the setting of consistent fair market royalty rates paid in consideration of the public performance of all sound recordings.
The FPFPA was introduced in April 2015 by four members of Congress: House Democrats Jerrold Nadler, John Conyers Jr., and Ted Deutch, and Republican House member Marsha Blackburn. According to Nadler, ranking member of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, the bill was created to fix the “antiquated and broken” broadcast systems allowing certain radio companies to avoid paying any fee to music rights holders.[1]

There is no question that this bill will create a great deal of debate, as have all prior legislative attempts to rectify areas of inequity within the Copyright Act. Regardless of which side of the argument you may find yourself on, it is essential to understand the fundamental ways in which the FPFPA would alter the current musical landscape.

THE CURRENT MUSICAL LANDSCAPE

In order to appreciate the impact the FPFPA would have on the music industry, one should understand the industry’s present state. Thus, as a preliminary matter, we must distinguish between the two distinct copyrights created when one writes and performs a new song.

First, there is the musical composition, which is comprised of a composer’s music and a lyricist’s accompanying words, if any. Separate and apart from the composition is the sound recording, which is the fixation of a performance of the composition into a material and audible format. Simply put, the composition is what you see when you purchase sheet music for the song, and the sound recording is what you listen to when you hear that same song on the radio.

Take, for example, the song “White Christmas,” which was written by Irving Berlin around 1940. The first public performance and recording of that song was by Bing Crosby in 1941. When you listen to “White Christmas” as performed by Bing Crosby, the sounds you hear—the voices and instruments—emanate from the sound recording, which is owned by Bing Crosby’s estate. The musical composition underlying that sound recording (the lyrics and composed music), however, remains a separate asset owned instead by Irving Berlin’s estate. To date, there have been more than 500 different versions of “White Christmas” recorded, and each of them constitutes a new and distinct sound recording owned by the performer(s), whereas Irving Berlin remains the sole author and owner of the composition itself.

No Right to a Terrestrial Public Performance in Sound Recordings

Section 106 of the Copyright Act provides owners of compositions with an unrestricted right to “perform the copyrighted work publicly.”[2] This “performance right” includes the public broadcast of compositions on the radio. To administer these public performance rights[3] throughout the United States, nationally based performance rights organizations (PROs), including ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Inc.), and SESAC (Society of European Stage Authors and Composers), issue blanket license agreements to terrestrial radio stations in exchange for payment of standard licensing fees, which allow the stations to publicly broadcast any compositions in the PRO’s catalogue.[4]

There exists a long history in the United States of paying the authors of compositions for the public performance of their works on the radio, which has generated hundreds of millions of dollars in public performance royalties for songwriters and publishers. Yet, there has never been a corresponding terrestrial public performance right for owners of the sound recordings in which these compositions are embodied, nor the recording artists that perform on the sound recordings, when used by radio companies. Many countries around the world (at least 75 of them) do provide laws enabling payment to sound recording copyright owners and recording artists for the public performance of sound recordings by radio (as well as television, clubs, venues, and a variety of other public businesses). Other than the United States, only a handful of countries, including China, Iran, and North Korea, refuse to pay performers for the public performance of their sound recordings.

In 1995, the Digital Performance Right in Sound Recordings Act (DPRA) amended § 106 of the Copyright Act to provide a right of public performance in sound recordings, but limited that right to “non-interactive digital audio” transmissions.[5] The Digital Millennium Copyright Act (DMCA) thereafter modified the DPRA by incorporating a list of specific types of services that are required to pay for the public performance of sound recordings. Thus, satellite radio broadcasters such as SiriusXM and Internet radio providers like Pandora are now required to pay a public performance royalty in connection with their public broadcast of sound recordings. It remains the case,
According to its court filings, SiriusXM is “the largest radio broadcaster in the United States, measured by revenue, [with] over 27.3 million paying subscribers.” It features decade-specific channels such as “60s on 6,” where the Turtles’ songs are frequently aired. According to Legrand:

“[O]nly 1 percent of SoundExchange’s revenues come from sister societies around the world, which does not reflect the real strength of the United States repertoire. It is over 20 percent for the United Kingdom’s Phonographic Performance Limited (PPL). The simple reason is that societies tell SoundExchange: “join the club first, give us terrestrial rights, and then we’ll discuss.” Meanwhile, they all go to SoundExchange to collect the rights for their local performers and labels.”

**No Federal Copyright Protection in Pre-1972 Sound Recordings**

As discussed above, the DPRA and DMCA provide both performers and labels a public performance right in digital audio transmissions. As a result, music services like SiriusXM, Pandora, and Spotify have generated significant revenue for the recording industry. There remains one notable group, however, who has been deprived this revenue stream—our musical forefathers.

Sound recordings fixed before February 15, 1972 (pre-1972 sound recordings) are not protected under current federal copyright laws that compel those who digitally transmit sound recordings to pay performance royalties for such use. Rather, when Congress passed the Sound Recording Act of 1971, which first provided copyright protection over sound recordings, it did so only with respect to recordings fixed on or after February 15, 1972.[8] According to § 301 of the Copyright Act, pre-1972 sound recordings are afforded no protection under the federal statute and are protected only by state common law. Digital radio services have thus refused to pay performers and owners of these recordings for their public performance.

In February 2015, the United States Copyright Office issued its report on *Copyright and the Music Marketplace*, which highlights the aim of federal copyright laws to provide stability for markets and eliminate uncertainty in the law for businesses, new and old.[9] The Copyright Office reaffirmed its position with respect to the federalization of pre-1972 sound recordings, and its belief that the patchwork legal system of state laws confronted by broadcasters and artists is unsustainable.[10]

This issue highlighted in the Copyright Office report is best exemplified in a series of lawsuits filed throughout the country by owners of copyrights in pre-1972 sound recordings. In these cases, the copyright owners allege state law claims as the basis for the right to be compensated for the public transmission of their recordings. These lawsuits have resulted in a variety of rulings and settlements, highlighting the need for consistent federal regulation. Among these cases are those initiated by Flo & Eddie Inc., which controls music belonging to former members of the American rock group, the Turtles.[11]

Flo & Eddie first filed class action lawsuits against SiriusXM satellite radio in Florida, California, and New York. According to its court filings, SiriusXM is “the largest radio broadcaster in the United States, measured by revenue, [with] over 27.3 million paying subscribers.” It features decade-specific channels such as “60s on 6,” where the Turtles’ songs are frequently aired.[12] Flo & Eddie filed these lawsuits on behalf of themselves and all other "owners of sound recordings fixed prior to February 15, 1972," alleging that by failing to license or otherwise compensate artists for the right to "perform" digitally broadcast pre-1972 sound recordings, SiriusXM infringed their public performance rights in violation of pertinent state copyright and misappropriation laws.[13] SiriusXM denied that the respective state statutes provided for, or otherwise allowed the inference of, a public performance right in pre-1972 sound recordings.
The United States District Court for the Central District of California granted summary judgment in favor of Flo & Eddie, rejecting SiriusXM’s argument that “the bundle of rights that attaches to copyright ownership of a pre-1972 sound recording does not include the exclusive right to publicly perform the recording.”[14] The court held that, pursuant to California statute,[15] copyright ownership of a pre-1972 sound recording includes the exclusive right to publicly perform the recording. Accordingly, if anyone wishes to publicly perform such a recording, he or she must first seek authorization from the recording’s owner.

In a corresponding case, the United States District Court for the Southern District of New York also held that Flo & Eddie do have the right to exclusively perform their sound recordings, and denied SiriusXM’s motion for summary judgment on the issue.[16] In February 2015, however, the court granted SiriusXM’s motion to certify an interlocutory appeal, and that lawsuit is now stayed pending a decision by the Second Circuit as to whether, under New York law, the holders of common law copyrights in pre-1972 sound recordings have an exclusive right of public performance in their recordings.[17]

The United States District Court for the Southern District of Florida, however, held that Florida common law does not provide Flo & Eddie with an exclusive right to the public performance of their sound recordings. In granting summary judgment for SiriusXM,[18] the court recognized that another Florida federal court held that the state does recognize common law copyrights in sound recordings,[19] but it had not decided whether these common law rights in sound recordings extended to their public performance. The court noted that while California maintains a statute that provides artists with exclusive ownership interests in their sound recordings, and New York has binding precedent addressing these issues, Florida does not. It declined to be the first to rule on the issue, stating: “whether copyright protection for pre-1972 recordings should include the exclusive right to public performance is for the Florida legislature.”[20]

Of note, several major record labels, including Sony, Warner, UMG, Capitol, and ABKCO, filed a similar lawsuit against SiriusXM in California. In July 2015, SiriusXM reached a settlement with the labels, in which SiriusXM agreed to pay the labels $210 million to resolve all claims, and to allow the continued transmitting of music owned or controlled by the labels through 2017, at which time SiriusXM and the labels will renegotiate licenses for use of this music.[21]

The Legendary Soul Man, Sam Moore of Sam & Dave fame, who turns 80 on October 12 of this year, was one of the first artist witnesses to testify in Congress about the still unresolved terrestrial radio issue. He has also been outspoken on digital and satellite radio’s unwillingness to pay any of the legacy artists for broadcast of their pre-1972 recordings. Moore noted:

The hits I recorded such as “Soul Man” are still enjoyed daily by radio listeners around the world. There’s no excuse for any business which makes millions and billions of dollars annually to skirt paying royalties to legacy artists such as myself. Aren’t we entitled and shouldn’t we be able to enjoy that important income from the fruits of our souls, especially as we reach our twilights?

Lack of Parity in Standards Applied in Determining Fair Market Royalty Rates for Public Performance of Sound Recordings

The Copyright Act is comprised of a complex web of statutory provisions and rules that determine what must be paid, and to whom, when a sound recording is publicly broadcast. Upon careful dissection of these provisions, we find that four considerably different outcomes result from public consumption of the same sound recording.

On one end of the spectrum is terrestrial radio, otherwise referred to as AM/FM, or the radio your grandfather listens to in the car. As discussed above, no right to a terrestrial public performance in sound recordings currently exists. Consequently, terrestrial radio broadcasters are permitted to publicly transmit sound recordings without any obligation to pay the performer or owner of these recordings. Thus, the standard applied in determining the royalty rates and payments to be made in exchange for use of sound recordings on terrestrial radio is therefore rather simple: $0.00.

At the other end of the spectrum are interactive music services like Spotify, TIDAL, or Apple Music. These service providers generally allow consumers to choose the music they want to listen to on demand, and negotiate directly with owners of the sound recordings they wish to broadcast.[22] In the event the service provider and the copyright owner cannot reach an agreement, the artist can refuse to license his or her
recordings to the service provider, which will then be unable to broadcast that music. This is precisely what occurred this past year when Taylor Swift refused to allow Spotify to play her music for its consumers after discussions broke down between the parties concerning the terms of use for Swift’s newest album, *1989.*[23] A few months later, Swift famously wrote an open letter to tech giant, Apple, announcing her intent to withhold *1989* from Apple’s new streaming service because it did not plan to pay writers, producers, or artists any royalties for music streamed during the three-month free trial it offered to consumers.[24] Within hours, Apple quickly changed course and responded via Twitter that it would indeed pay artists for streaming their music, even during the customer’s free trial period.[25] Examples like this demonstrate the significant control artists maintain over the use of their music during negotiations with even the largest interactive streaming services.

Somewhere in the middle of the spectrum we find noninteractive digital music services, like SiriusXM and Pandora. Unlike terrestrial radio, these platforms must pay a public performance royalty to the owners of sound recordings they publicly broadcast. And unlike interactive music services, these platforms *may* negotiate directly with owners of the sound recordings, but they *do not* do so. Rather, noninteractive digital music services may take advantage of the compulsory license mechanism provided for in §§ 114 and 801 of the Copyright Act, which allows broadcasters to legally play an artist’s music without his or her permission so long as the service pays a reasonable royalty rate as determined by the Copyright Royalty Board (CRB). In determining this “reasonable royalty rate,” however, the CRB does not treat all platforms equally.

Generally speaking, the CRB sets rates every five years as required by the Copyright Act.[26] Of note, the Copyright Act requires the CRB to apply a different set of standards when establishing rates for subscription services and satellite digital audio radio services that were in existence as of July 31, 1998 (pre-1998 services)[27] as compared to those services that came into existence after July 31, 1998.[28]

For example, proceedings instituted to establish royalty rates for pre-1998 services are conducted in accordance with the standards set forth in § 801(b) of the Copyright Act (801(b) rate-setting standard).[29] In these proceedings, the CRB is required to consider the following primary objectives in its rate-setting proceedings:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[30]

These four objectives are intended to provide the CRB a variety of factors to consider in establishing a royalty rate that emulates what a copyright owner and service provider would agree to in direct free-market negotiations. The objectives have been criticized, however, as causing suppression of royalty rates such that owners of sound recordings are prevented from receiving a truly fair market royalty payment in consideration for the use of their music.

In particular, critics of the 801(b) rate-setting standard have pointed to the CRB’s consideration of the “disruptive impact” factor as unfairly suppressing implementation of a truly fair market royalty rate. In one such proceeding, for example, the CRB determined that a fair market royalty rate for noninteractive subscription services would be approximately “13% on a percentage of subscriber revenue basis,” but ultimately ordered payment of between 6 and 8 percent of revenue because payment of a royalty rate at the 13 percent market rate would be too “disruptive” given SiriusXM’s current financial condition.[31] As a result, the recording industry has taken issue with the CRB implementing a royalty rate that is approximately half of what was acknowledged to be the fair market rate.

In contrast, proceedings instituted to establish royalty rates for all other services are conducted in accordance with a willing buyer/willing seller standard, which imposes upon the CRB an obligation to set rates “that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing
buyer and a willing seller.”[32] This standard (willing buyer/willing seller standard) requires the CRB to base its determinations on “economic, competitive and programming information presented by the parties,” including:

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[33]

Because most digital music services have come into existence after July 31, 1998, the willing buyer/willing seller standard is utilized in rate-setting proceedings for most digital platforms in existence today, including Pandora.[34]

Advocates of this standard argue that it most accurately replicates the royalty rate that would be agreed to in the open market. Others argue, however, that this standard is flawed, but for wholly different reasons. For example, music services subject to the willing buyer/willing seller standard argue that it results in unreasonably high royalty rates and should be replaced with the 801(b) rate-setting standard.[35]

Many on the recording industry side of this coin, however, argue that even the willing buyer/willing seller standard does not go far enough in allowing for a truly fair market royalty rate, and advocate for complete eradication of the compulsory license scheme so that every service platform is required to engage in direct negotiations with the artists and labels in the same manner as interactive music services. Jay Rosenthal, a partner at Mitchell Silberberg & Knupp and a former general counsel for the National Music Publishers’ Association and the Recording Artists’ Coalition, says:

In hindsight, there might never have been any need for establishing rate-setting preferences like the 801(b) rate-setting standards. And in any event, at this point, the Googles and other online services are doing fine. They don’t need any more help. In today’s online environment, it is the author and owner of music that is the aggrieved party. And there is no longer any justification to allow their property rights to be devalued in a way that threatens their professional existence.

For the time being, however, substantially different rate-setting standards are applied when determining what amount of royalties, if any, will be paid to the performers and owners of sound recordings when their music is publicly transmitted.

**PRIOR LEGISLATIVE ATTEMPTS TO ESTABLISH PLATFORM PARITY**

The FPFPA is not the first congressional attempt to bring parity to the treatment of sound recordings. Prior iterations of the bill were submitted to the House, but never became law. In 2009, for example, the Performance Rights Act was introduced with music industry support in an attempt to secure terrestrial radio royalties.[36] The bill recognized the need to properly compensate creators of sound recordings under a direct licensing mechanism for the public performance of their music.[37] In hearings held before the Senate Judiciary Committee concerning the Performance Rights Act, a number of artists voiced their support for the bill. Among them was Grammy-nominated artist Sheila E., a former national trustee of the Recording Academy, who testified that "being paid for one’s work is a basic American right. Whether your workplace is an office, a classroom, a factory, or a recording studio, every American worker deserves to be compensated for his or her labor. And any business that profits from another’s work should share some of that profit.”[38] In 2013, the Free Market Royalty Act was presented in a similar attempt to provide a public performance right for all audio transmissions of sound recordings, which would have required terrestrial radio stations to pay royalties for nondigital audio transmissions.[39]
If either of the above bills had passed, a statutory mechanism would exist to compensate recording artists, while simultaneously allowing broadcasters to negotiate rates with rights holders in the open market, outside of the statutory rate-setting process. Both bills received heavy criticism from broadcasters, who argued that direct licensing would arbitrarily increase operating costs, thereby resulting in the destruction of small public radio stations. The broadcasters also argued that a performance right in sound recordings was unnecessary because private market deals are sufficient to resolve this issue.

Most recently, the RESPECT Act of 2014 sought to provide royalty payments with respect to pre-1972 sound recordings, but without providing them full copyright protection. This bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet in July 2014. No further activity has taken place with respect to this bill since that time.

THE FPFPA SEEKS TO IMPLEMENT COMPREHENSIVE REFORM

The FPFPA adopts several features of the bills that came before it, while incorporating additional provisions intended to avoid much of the criticism suffered by its predecessors. If passed, the FPFPA will resolve several parity issues affecting the public performance of sound recordings in one comprehensive act.

Establish a Terrestrial Public Performance Right for Sound Recordings

One of the primary objectives of the FPFPA is to eliminate the distinction between terrestrial and digital radio transmissions in such a manner that all broadcasters would be required to pay for their public performance of sound recordings. As discussed above, satellite, cable, and Internet radio services are currently required to pay a public performance royalty for their use of sound recordings, while traditional terrestrial radio broadcasters pay nothing.

Section 2 of the bill, aptly titled “Equitable Treatment for Terrestrial Broadcasts and Internet Services,” amends the Copyright Act to eliminate language contained within § 106 limiting this right to digital audio transmissions. Specifically, the bill does so by redefining “audio transmission” to include the transmission of any sound recording, regardless of its audio format. The bill also strikes references to “digital audio transmissions” found in §§ 106(6) and 114(d)(1) of the Act, so as to provide for a much broader and unlimited right in the public performance of sound recordings by means of any “audio transmission.” Thus, if the FPFPA is passed, terrestrial broadcast radio stations will be required to pay royalties for both digital and nondigital transmissions of copyrighted sound recordings.

Provide Payment for the Public Performance Royalties of Pre-1972 Sound Recordings

Another purpose behind the FPFPA is to create an avenue by which owners of pre-1972 sound recordings are compensated for the public performance of their recordings. Section 7 of the FPFPA, titled “Equitable Treatment of Legacy Sound Recordings,” would amend § 114(f)(3) of the Copyright Act by adding the following language at the end of the provision:

Any person publicly performing sound recordings protected under this title by means of transmissions under a statutory license under this section, or making reproductions of such sound recordings under section 112(e), shall make royalty payments for transmissions that person makes of sound recordings that were fixed before February 15, 1972, and reproductions that person makes of those sound recordings under the circumstances described in section 112(e)(1), in the same manner as such person does for sound recordings that are protected under this title.

The bill also preempts equivalent state law claims emanating from the use of pre-1972 sound recordings in ephemeral recordings establishes a civil right of action that may be pursued by those whose recordings are used without compensation. This provides a substantial benefit to the owners of some of the most prolific and valuable recordings of the twenty-first century, including Elvis Presley, the Rolling Stones, and the Beatles. In addition, this amendment would help subsidize income for many legacy acts that are otherwise receiving very little income presently.
Establish Consistent Rate-Setting Standards for the Public Performance of Sound Recordings

Central to the FPFPA is the elimination of the disparate standards applied by the CRB when setting royalty rates. To level the playing field across various music platforms, section 4 of the FPFPA removes the § 801(b) rate-setting standard currently used to determine royalty rates for pre-1998 services, and replaces this standard with the willing buyer/willing seller standard.[43] When considered alongside its implementation of a terrestrial public performance right, the FPFPA would amend the Copyright Act to allow the CRB to apply the willing buyer/willing seller standard in all proceedings where a compulsory rate is being established for a public performance of sound recordings, regardless of the platform in which the performance is being transmitted.[44]

The FPFPA would also extend the practice of "minimum fees," which digital music services pay for all broadcast services. Under the current statutory requirements, an annual minimum fee—$500 per station or channel and with a maximum of $50,000 per year—is paid by digital audio services like SiriusXM and iHeart Radio to record labels and recording artists for public performance rights.[45] These minimum fees would be determined "based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of [records] by consumers."[46]

Provide for Direct Royalty Payments to Producers and Others

Another component of the FPFPA is to secure payment rights for producers, mixers, engineers, and those who participate in production of sound recordings, but who do not themselves hold an ownership interest in the recording’s copyright. Section 9 of the bill requires implementation of a policy that will allow producers and others involved in the creative process to submit letters of direction to third-party collection societies (e.g., Sound Exchange) that would entitle these individuals to receive their royalty payments directly from the collection society.

This amendment would make it unnecessary for producers to continually monitor receipt of payments from the artists and labels, and provide an alternative revenue stream while production imbursement continues to sink, a problem faced by music producers just as much as recording artists and labels. According to Andrew Brightman, whose Brightman Music management company represents a number of producers and engineers, "as producer fees decline and record sale royalties become almost nonexistent, the payment of master performance income is more vital than ever. For American producers to stay competitive with their foreign contemporaries and to continue to attract top talent to their ranks—this income is a necessity."

Protect Small Broadcasters, Public and Educational Radio

A primary argument raised in opposition to the Free Market Royalty Act was that requiring terrestrial broadcasters to pay a public performance royalty for use of sound recordings would be cost-prohibitive for local, public radio stations, which would be unable to afford this additional, substantial operating expense, and could be forced to shut down.[47]

The FPFPA seeks to address this issue by placing specific limits on the royalty rate charged to small broadcasters, public and educational radio, and religious services. Specifically, section 5 of the bill incorporates the following protections into § 114(f)(1) of the Copyright Act:

Notwithstanding the provisions of subparagraphs (A) through (C), the royalty rate for nonsubscription broadcast transmissions by each individual terrestrial broadcast station licensed as such by the Federal Communications Commission that is not a public broadcasting entity as defined in section 118(f) and that has revenues in any calendar year of less than $1,000,000 shall be $500 per year for any such year. For purposes of such determination, such revenues shall include all revenues from the operation of the station, calculated in accordance with generally accepted accounting principles in the United States. In the case of affiliated broadcast stations, revenues shall be allocated reasonably to individual stations associated with those revenues.
Similarly, the royalty rate charged to college radio stations and public broadcasters would be set at $100 per year, and religious services would be completely exempt from paying any royalty whatsoever.

According to the bill’s sponsor, this clause is intended to prevent “large radio conglomerates” from hiding behind “truly smaller and public stations.”[48] Indeed, this is a step toward striking a balance between the interests of recording artists being paid for use of their content and small broadcasters being able to remain in business.

**Preclude Harmful Impact on Songwriter Royalties**

Finally, the FPFPA prohibits parties from using newly designated license fees paid on account of sound recordings as a basis to lower public performance royalties payable to songwriters for use of their compositions. Section 8 of the bill states:

License fees payable for the public performance of sound recordings . . . shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding . . . to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of reducing or adversely affecting such license fees.[49]

**ADVOCACY IN SUPPORT OF THE FPFPA**

Supporters of the FPFPA believe that the bill addresses longstanding equity issues that broadcasters have circumvented for decades. SAG-AFTRA President Ken Howard has said that the FPFPA brings music licensing for sound recordings into the 21st century. AM/FM stations will finally pay royalties on the sound recordings they broadcast. Right now, performers receive nothing—no royalties at all—for use of their recordings on AM/FM radio. This is something our members, including the late and great "Chairman of the Board" Frank Sinatra, have fought for decades to establish.[50]

"Performers like Bing Crosby and Frank Sinatra pushed for artist compensation from radio in the ‘40s and ‘50s," noted Daryl P. Friedman of the Recording Academy. "More attention has been focused on the issue recently because digital delivery systems, such as streaming services, do compensate performers, leaving AM/FM radio as the only holdout, and the U.S. the only remaining country in the developed world without this right."[51]

Neil Portnow, president and CEO of the Recording Academy, sees the bill as a remedy to the age-old property issues resulting from a lack of performance rights by artists. According to Portnow, "terrestrial radio is the only industry in America that is built on using another’s intellectual property without permission or compensation."[52] Portnow believes that opponents of the FPFPA, including the National Association of Broadcasters (NAB), have crafted a number of myths in an effort to promote broadcasters’ interests—the greatest of myths being that the promotional support provided to artists by radio broadcasters creates a "symbiotic relationship" between the artists and the radio industry.

Mike Mowery, a manager with Outerloop Management, agrees:

As a manager of many international recording artists, it is always a bit mind-boggling to me how the United States has abstained from paying our artists for the airplay of their masters. In 2015, artist survival is about capturing revenue from any and every possible stream of income. I have spent a lot of time, energy, and effort getting creative on behalf of our artists to provide them with a chance of generating revenue from emerging technologies and income streams, which would be immensely assisted by the receipt of public performance royalties from terrestrial radio airplay.
According to Portnow:

Even by the NAB’s own (dubious) study, the benefit to radio outpaces the benefit to artists by 10 to 1. And any promotional effect would be taken into account by the rate-setting body. Internet and satellite radio also provide promotion, but pay a royalty. Further, a GAO study found “no consistent pattern between the cumulative broadcast radio airplay and the cumulative number of digital single sales.” Even Clear Channel CEO Bob Pittman admitted that, “clearly [promotion] is not enough, or there wouldn’t be a decades-long battle over [performance royalties].”[53]

ADVOCACY IN OPPOSITION TO THE FPFPA

Although its sponsors sought to preempt a number of arguments in opposition to the bill, the FPFPA is not without its challengers. Opponents of the FPFPA continue to take issue with the financial burden the law would have on the broadcasting industry, arguing that payment of a “performance” fee or tax will detrimentally impact local and public radio stations.[54] Dennis Wharton, executive vice president of communications at the NAB, has made clear: “Radio stations, especially in mid-to-smaller markets, operate with very thin profit margins. Imposing a performance fee on them could force them to lay off employees or otherwise downsize their operations in order to afford paying new fees.”[55] According to Wharton, “Policymakers are smart enough to know that assessing hundreds of millions of dollars in new fees against radio stations would kill jobs, hurt local commerce, and force music-playing radio stations to consider switching to all-talk formats.”[56]

In response to the FPFPA’s specific attempt to cap the royalties that would be paid by small and local radio stations, the bill’s opponents argue that the bill draws an “arbitrary line” between “small” and “not-small” broadcasters “at $1 million in annual revenues [that] . . . disincentive[s] these stations to grow and earn annual revenues that would trigger higher performance taxes.”[57] Thus, these small stations remain at risk—perhaps not a risk of being shut down, but rather a risk of being prevented from growing.

Generally speaking, opponents view the FPFPA and bills that preceded it as an effort to recoup earnings lost due to a decline in music sales. “Record labels have seen a steep drop in their revenues since their heyday and they want to make that up by instituting a performance fee on broadcasters,” said Wharton. “What the record labels are failing to grasp is that imposing a performance royalty on radio stations will make it harder for the public to hear artists,” he added. “The Fair Play, Fair Pay Act would do little to help the musicians that are truly struggling. Under the bill, 50% of royalties from radio stations would go to the records labels, 45% would go to millionaire artists like Katy Perry and Justin Timberlake, and the scraps would go to the ‘struggling artists.’”[58]

Thus, broadcasters contend that a performance royalty fee would effectively force them to subsidize the recording industry.[59] In response, representatives of recording artists and record labels argue that they are the ones that have been subsidizing the broadcast radio industry for years, because they have been prohibited from exercising their property rights.[60]

Opponents of the bill also point to differences between terrestrial radio and digital radio: (1) terrestrial radio has a longstanding relationship with the recording industry spanning decades, while digital audio services do not; (2) sound quality of terrestrial radio is worse than digital audio services; and (3) interactivity with terrestrial radio does not exist. Because of the lack of options, terrestrial audio supporters argue they should not have to pay a premium “performance tax.”[61]

What is the answer? According to Wharton:

We believe the private marketplace should be where a solution is found. Broadcasters are already working towards that. In the past few years, some broadcasters such as iHeartMedia, Entercom and Beasley have reached agreements with record labels to pay a performance royalty in exchange for reduced streaming rates. This is a solution that we believe works best rather than impose government intervention. A better rate structure would make streaming profitable and encourage more radio stations to stream, which in turn would help expose more artists to more listeners, and generate more revenues for the record industry.”[62]
WHAT DOES THE FUTURE HOLD FOR THE FPFPA IN CONGRESS?

Jay Rosenthal explains that

while efforts to pass the FPFPA, the Songwriter Equity Act (which is strongly supported by the songwriter and music publishing community, and the National Music Publishers Association), or any of the numerous bills aimed at enhancing the value of the property owned by the authors or their distribution companies, may seem misplaced in the era of big government gridlock, these efforts are essential as placeholders and constant reminders that there is no longer any justification to offer special assistance to online or wireless distributors of music.

Nevertheless, Congress has steadfastly refused to implement a system of parity to protect those who create and perform music, and do away with antiquated distinctions in the treatment of digital and terrestrial transmissions. When first confronted with this issue in the 1990s, the Senate reasoned that analog over-the-air stations should be excluded from protection because "the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting." The "symbiotic relationship" between terrestrial radio and recording industries is something to be preserved in its current state. Thus, in passing the DMCA, Congress required only digital radio, and not analog transmissions, to pay a public performance royalty.

Of course, the robust and resilient lobbying efforts of the broadcasting industry help assure that their interests are protected on Capitol Hill. According to the Center for Responsive Politics, last year alone, the NAB spent $18.4 million in lobbying efforts, compared with less than $500,000 by the Recording Academy. Even in considering the lobbying efforts of other music industry groups (in 2014, the RIAA spent $4.14 million, UMG spent nearly $3 million, and Sony spent $1.2 million), the NAB alone outspent the combined efforts of the recording industry by a ratio of more than 2 to 1. And this does not account for substantial lobbying efforts of other broadcasting groups, including CBS ($4.97 million in 2014) and iHeartMedia ($4.4 million in 2014).

As part of the broadcast industry’s lobbying efforts, the Local Radio Freedom Act was introduced in February 2013. This bill calls for Congress to refrain from imposing "any new performance fee, tax, royalty, or other charge related to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for such public performance of sound recordings." This blanket resolution to eliminate broadcast fees has been defeated in the past but it currently has over 200 cosponsors.

The FPFPA was introduced in April 2015. Given the substantial support received thus far in Congress for the Local Radio Freedom Act, which is essentially the antithesis of the FPFPA, expect that the FPFPA will have an uphill battle in its journey through the legislature. Says Rosenthal:

The powers lined up against the authors and owners of copyright are immense, but slowly these bills gain more sponsors and supporters on Capitol Hill. And that is the important thing. It might still take many years—and it is certainly doubtful that any of the bills will pass in an election year. But the effort should still continue, and full support should be given to those organizations and authors who commit their time and resources to this incredibly important fight for copyright.

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ENDNOTES
[3]. Id. § 101 (defining public performance as "perform[ing] . . . at a place open to the public or at any place where a substantial number of persons . . . is gathered; or . . . transmit[ting] or otherwise communicat[ing] a performance . . . of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times").
[4]. A “blanket license” is a license that allows the music user to perform any or all of the millions of songs in the PRO’s repertory in exchange for payment of an annual fee. See, e.g., Common Music Licensing Terms, ASCAP, http://www.ascap.com/licensing/termsdefined.aspx (last visited Sept. 14, 2015).
[10]. The Turtles rose to fame with their cover version of Bob Dylan’s “It Ain’t Me Babe” and the 1967 hit “Happy Together.”
[12]. 17 U.S.C. §§ 101 et seq. do not apply to pre-1972 sound recordings. In particular, the U.S. Copyright Act carves out certain areas of copyright law for state regulation, including rights related to sound recordings fixed before February 15, 1972. Id. § 301(c).
[23]. See Hugh McIntyre, Taylor Swift vs. Spotify: Should Artists Be Allowed to Opt Out of Free Streaming?, Forbes Media & Ent. (Aug. 8, 2015), http://www.forbes.com/sites/hughmcintyre/2015/08/08/taylor-swift-vs-spotify-should-artists-be-allowed-to-opt-out-of-free-streaming/. Swift had requested that Spotify stagger the release of her 1989 album so that only paying subscribers to Spotify’s premium service would initially have the ability to stream it, with access being made available to nonpaying consumers of Spotify’s “freemium” model being provided sometime thereafter. Spotify refused to window Swift’s content in this manner, and Swift therefore refused to allow Spotify to broadcast any of her music.


[27]. These pre-1998 services generally include “satellite digital audio radio services” (SDARS) such as SiriusXM, “business establishment services” (BES) such as Muzak, “cable/satellite services” (CABSAT) such as Music Choice, and preexisting subscription services in existence prior to July 31, 1998 (PES).

[28]. If we dig even deeper on this issue, rates will also vary depending on the service provider.


[30]. Id. § 801(b)(1); see also id. § 114(f)(1)(B) (specifying that Copyright Royalty Judges (CRJs) shall consider factors set forth in § 801(b)(1) in establishing rates for PES and SDARS).


[33]. Id.

[34]. To complicate matters ever so slightly, Congress also passed the Webcaster Settlement Act in 2008, which allows for the private negotiation of rates for webcasting. Thus, industry groups have been able to opt for the rates set by the CRB or the rates negotiated under the Webcaster Settlement Act.


[37]. “Direct licensing” refers to a license to use music that is secured directly from the owner of that song or music recording.

[38]. The Performance Rights Act and Parity among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 5 (2009) (testimony of Sheila Escovedo (Sheila E.)).


[44]. This would, however, not include royalties established for the use of sound recordings through interactive music services, which would remain obligated to directly negotiate rates with owners of the sound recordings.


[54]. In opposition to this argument, the recording industry has sought to make clear that the payments from this performance right do not constitute a “tax,” as they are not payments made to the government, but rather constitute royalties paid to the owners of the music being transmitted.

[55]. O’Brien, supra note 51.


[58]. O’Brien, supra note 51.

[59]. A Performance Tax Puts Local Jobs at Risk, supra note 41.


[70]. See Peterson, supra note 56.

**Lawsuits Involving Former USC Football Stars Shine a Light on the Murky World of Loss-of-Value Insurance**

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BY RICHARD C. GILLER

There is an emerging trend in college sports involving high-profile athletes purchasing disability insurance protection as a hedge against the potential impact an injury suffered in college might have on the value of their first professional contract. At least eight players in this year’s NFL draft purchased disability policies while they were in college that included loss-of-value (LOV) coverage,[1] including Jameis Winston and Marcus Mariota, the first two players selected. This type of insurance is not cheap, costing between $6,000 and $8,000 for every $1 million of combined total disability and LOV coverage purchased, but the potential payouts could be in the millions of dollars if an injury results in a precipitous drop in a player’s draft position. Unfortunately, obtaining policy benefits under the LOV coverage has not been easy.

While some athletes have successfully collected permanent total disability payouts to compensate them for never playing professionally, there does not appear to be any reported case of an athlete collecting under the LOV portion of those policies. That anomaly could soon change depending on the outcome of several lawsuits involving two former University of Southern California (USC) football players, Marqise Lee and Morgan Breslin, which were recently filed both by and against the insurance market commonly known as Lloyd’s of London. As this author correctly predicted in an article published last year, Lloyd’s has denied the LOV claims submitted by Lee and Breslin on the very bases forecasted in that article: (1) by disclaiming coverage because of allegedly undisclosed preexisting conditions; and (2) by rescinding the policies, and returning to the athletes the premiums paid, based on purported material misrepresentations by both players on the applications they submitted.[2]

On the same day that Lloyd’s issued its denial letters, it also filed separate lawsuits in U.S. district court in New Jersey against Lee and Breslin seeking a declaration from the court that the claims were not covered.[3] In turn, Lee and Breslin sued Lloyd’s in federal court in Los Angeles, claiming that coverage exists under their policies and seeking a determination that Lloyd’s acted in bad faith by denying the claims.[4] These dueling insurance coverage actions provide a rare glimpse into the often murky world of LOV insurance protection for athletes. Indeed, it is only because of these lawsuits that the public is privy to some of the relevant documents at issue in these types of disputes, such as the applications for coverage, the insurance policies themselves, and the proof of loss statements submitted by the players.

This article will analyze several issues, including the coverages provided under the LOV portion of a disability policy; whether the claims submitted by Lee and Breslin are or should be covered; the coverage positions being staked out by Lloyd’s; and the potential ramifications the outcomes of these lawsuits might have on the future viability of LOV insurance. The article will also provide some suggestions as to how to avoid similar coverage denials in the future.

A BRIEF SUMMARY OF THE CLAIMANTS

Marqise Lee is a wide receiver for the Jacksonville Jaguars who played three years at USC before declaring himself eligible for the 2014 NFL draft. As a true freshman in 2011, Lee finished the season with 73 receptions for over 1,100 yards and 11 touchdowns. The following year, Lee had 118 catches for over 1,700 yards and 14 touchdowns. Following his breakout sophomore year, Lee was not eligible to enter the 2013 NFL draft following his sophomore season because he had not been “out of high school for at least three years” at the time. Had he been eligible that year, many pundits projected that he could have been a high- to mid-first round draft pick.

As a junior in 2013, Lee was hampered by injuries, a new quarterback, and unexpected coaching changes. He suffered an MCL sprain in his left knee during USC’s fifth game of the season against Arizona State University (ASU) on September 28, and his production dropped off significantly after his injury. Lee finished the 2013 season with 57 receptions, 791 yards, and four touchdowns, well below both his sophomore and freshman years.
seasons. Despite his injury and reduced production, some draft experts predicted that Lee could be selected between the 15th[5] and the 21st[6] overall selection, while others believed he would fall out of the first round entirely.[7]

According to a draft profile prepared by the NFL, Lee was projected to be a first round draft pick even with his injured knee. That assessment noted: “Very good athletic ability. Is a nifty runner after the catch—can navigate through traffic and create with the ball in his hands. Can shift into top gear and run by tacklers—terrific acceleration and short-area burst.”[8] The NFL profile also noted: “An extremely motivated, dynamic, playmaking receiver, Lee’s junior season was plagued by shoulder, knee and leg injuries and a revolving door at head coach, where he cycled through three. Showed all the traits desired in a No. 1 receiver early in his career and has overcome a lot of adversity in his life to get to this point.”[9]

On January 3, 2014, Marqise Lee announced that he would forgo his senior season at USC and enter the 2014 NFL draft. At that draft, Lee fell to the second round before being selected by the Jaguars with the seventh pick of the second round (the 39th pick overall). He was the sixth wide receiver drafted that year.

Morgan Breslin is a linebacker who is not currently on the roster of a NFL team. He transferred to USC in 2012 after playing two seasons at a junior college. During his first year at USC, Breslin started all 12 games at defensive end and recorded 62 tackles, including a team-high 19 and a half tackles for losses along with a team-best 13 sacks. Those statistics tied him for fifth nationally in sacks and 15th in the country for tackles for loss; they were also the most recorded by a Trojan in nearly a decade. He was among six finalists for the Hendricks Award, given to the nation’s top defensive end, and he was named USC’s Defensive Lineman of the Year in 2012 as well as made the CBS Sports All-Pac-12 first team. Breslin was viewed by many as one of the premier pass rushers in the country, and he was projected to be a mid- to late-first round pick, or an early second round pick, in the 2013 NFL draft. However, Breslin decided to stay at USC for his senior year and did not declare himself eligible for the 2013 NFL draft.

As a senior in 2013, he moved to outside linebacker and, like Lee, suffered through coaching changes and injuries. Breslin suffered a significant injury to his hip that later required surgery, coincidentally during the same game where Lee injured his knee. Breslin underwent hip surgery in November 2013 and, instead of being selected on the first or second day of the 2014 NFL draft, Morgan Breslin went undrafted. He later signed a free-agent deal with the San Francisco 49ers, but was released by the team and is currently not playing in the NFL.[10]

THE DISABILITY INSURANCE POLICIES PURCHASED BY LEE AND BRESLIN

The Applications

Both Lee and Breslin filled out a Hanleigh Sports Insurance Proposal Form consisting of three parts: (1) a two-page personal information section, (2) a six-page “Personal Medical History Form,” and (3) a single-page medical authorization release form.[11] The medical history form includes a number of questions which, on their face, seem incredibly broad and somewhat inapplicable considering that the questions are directed to star collegiate athletes:

- “During the past twelve months, have you suffered any injury, sickness or discomfort for which you have not sought . . . a) medical advice, b) diagnosis, or c) treatment?”
- “Are you at present free of injury, illness or discomfort?”
- “Have you missed any playing time during the last 24 months, as a result of injury, illness, discomfort or for any other reason (including personal reasons)?”
- “Have you ever injured or suffered pain or discomfort, or had surgery to any of the following [21 body parts including the head, neck, shoulders, knees, and ankles]?”
- “Have you suffered any other injuries, discomfort or conditions to a) bones, b) joints, c) muscles, or d) nerves?”[12]
While these questions may appear innocuous and easily answered, the failure to provide complete answers could have disastrous consequences, as evidenced by the actions taken by Lloyd’s in rescinding the Lee and Breslin policies based on alleged misrepresentations in the applications. For example, the oft-used term “discomfort” is not defined by Lloyd’s. A common dictionary definition for “discomfort” is “an uncomfortable or painful feeling in the body.” In light of that definition, nearly every college athlete, and most high school athletes, would have to answer “yes” to every question asking if they had ever experienced an uncomfortable or painful feeling anywhere on their body, and Lloyd’s should be well aware of that fact.

Indeed, red flags should immediately go off when an athlete fills in a LOV application by answering “no” to all or nearly all of the broad questions. This is true because, if the questions are interpreted literally, there is no conceivable set of circumstances under which a high-profile athlete applying for this type of coverage has not, on a regular or even a daily basis, experienced aches, pains, and discomfort because of his or her athletic endeavors. Additionally, whoever is advising or assisting athletes as to how to answer these broad questions may need to counsel them to check “yes” to nearly every one, with explanations or, at the very least, with a standard disclaimer at the beginning of the application responses describing the normal aches and pains associated with the sport or sports played. With only one or two exceptions, Marqise Lee and Morgan Breslin answered “no” to every question concerning prior injuries, pain, or discomfort.[13]

The generality of the application questions is perhaps best illustrated by the following inquiry: “Have you, within the last 24 months, taken any pain reducing or anti-inflammatory medication?” This question is not limited to prescription medications and, therefore, could conceivably require the applicant to list every over-the-counter pain reducing or anti-inflammatory medication that he or she has taken in two years. This would include ibuprofen, the so-called original nonsteroidal anti-inflammatory drug. What college athlete or weekend warrior has not taken Advil or Motrin in the last 24 months?

By signing the application, the player attests that he or she read the answers and, to the best of his or her knowledge, the answers are “true and complete and correctly recorded.” The applicant also acknowledges that “[u]nderwriters will rely on this information in making their determinations.” Further, the application advises the players that the “Insurance applied for will not take effect unless the health of the proposed Insured remains as stated in the Application on the inception date of the proposed policy.”[14] The term “inception” is not defined in the policy and, according to Lloyd’s own glossary of terms, it simply means “commencement or beginning (eg of cover).”[15] The timing of these events is discussed more fully below.

**The Specifics of the LOV Coverages Purchased**

Excluding fees and taxes, Lee paid $90,000 for his policy and Breslin paid $26,000 in premiums to secure his protection. The certificates of insurance[16] issued to Lee and Breslin are identical except for certain information on the declarations pages and on the schedules of coverage for each policy. Both policies are eight pages long; they both utilize the “Hanleigh LOV wording—08.11”; both policies contain the identical 13 exclusions and the identical 15 conditions; and both policies include the same attachments and amendments.[17]

The effective date listed on the Lee policy was from August 15, 2013, to August 1, 2014, and Breslin’s policy was effective from August 27, 2013, to August 1, 2014. LOV protection is provided under coverage B of both policies and protects against Lee or Breslin receiving a four-year NFL contract that is less than the insured contract value listed in the policy so long as the difference between the two is “solely and directly as a result of Injury or Illness occurring during the period of Insurance.” In such a situation, the policy will pay the difference between the insured amount and the amount of the four-year contract signed. For example, Lee’s insured contract amount was $9.6 million and Breslin’s was $3.6 million.

After being drafted 39th overall, Lee signed a four-year deal with the Jaguars that is reportedly worth $5,175,016. Thus, Lee’s claim under the LOV portion of his policy is for $4,424,984, which represents the difference between the amount of the contract he signed with the Jaguars and the $9.6 million insured contract amount. Going undrafted and having not yet signed a contract with an NFL team, Breslin’s claim is for the full $3.6 million provided by his policy. If a court concludes that Lloyd’s incorrectly denied coverage, Lee and Breslin...
would still be required to establish that their inability to sign a $9.6 or $3.6 million contract was "solely and directly as a result of injury."[18]

As is the case with most insurance coverage disputes, the language of the policy will control the outcome, and the terms and language set out above may present significant issues.

ANALYZING THE DENIALS OF COVERAGE ISSUED BY LLOYD’S

According to the pending lawsuits, Lloyd’s denied both claims on virtually identical grounds. First, Lloyd’s contends that the health of both Lee and Breslin changed between the dates they submitted their respective applications and “the date the policy was issued”—November 13, 2013, for Lee and November 1, 2013, for Breslin—and because neither player informed Lloyd’s of the change “as required by the policy,” coverage is precluded. Second, Lloyd’s contends that the players made “material misrepresentations, and/or concealments” in their applications and, because of that, Lloyd’s rescinded the policies and returned the respective premiums to each player. These two grounds are discussed below.

Delay between Submission of the Applications and Issuance of the Policies

One of the themes in the bad faith lawsuits filed by Lee and Breslin against Lloyd’s is unnecessary delays in adjusting their claims. Interestingly, there also appears to have been a substantial delay by Lloyd’s in “issuing” the respective policies to each player. For example, Lee signed his application on August 23, 2013 (six days before USC’s opening game that season), and Breslin signed his on September 3, 2013 (four days before USC’s second game of the season). However, Lloyd’s did not sign and return Lee’s policy until 12 weeks later on November 15, with an effective date of August 15, 2013, to August 1, 2014.[19] Breslin’s policy was similarly delayed; he signed his application eight and a half weeks before Lloyd’s signed and returned his policy.

The position staked out by Lloyd’s in its declination letters is that because both players were injured between the date of their applications and the date on which Lloyd’s signed and returned their policies, such injuries changed the health of Lee and Breslin as stated on their applications, which, according to Lloyd’s, required the players to advise the carrier of the change in health. Lloyd’s candidly admits in the New Jersey lawsuits that if Lee and Breslin had advised the carrier of their September 28 injuries, “coverage would not have been offered” to either player. What this argument fails to take into account, however, is the illusory nature of the LOV coverage provided.

Lee and Breslin clearly had a desire to obtain insurance coverage to protect them during the entirety of their final season of college football. They sought to protect their potential professional earnings against a significant injury that might take place during that final collegiate season. A review of the USC football schedule is illuminating in this regard (see tbl. 1).

Table 1. 2013 USC Trojans Football Schedule

<table>
<thead>
<tr>
<th>Date</th>
<th>Opponent</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 29, 2013</td>
<td>University of Hawaii</td>
<td>Honolulu, HI</td>
</tr>
<tr>
<td>September 7, 2013</td>
<td>Washington State</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>September 14, 2013</td>
<td>Boston College</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>Date</td>
<td>Team</td>
<td>Location</td>
</tr>
<tr>
<td>----------------</td>
<td>-----------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>September 21, 2013</td>
<td>Utah State</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td><strong>September 28, 2013</strong></td>
<td><strong>Arizona State</strong></td>
<td><strong>Tempe, AZ</strong></td>
</tr>
<tr>
<td>October 10, 2013</td>
<td>University of Arizona</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>October 19, 2013</td>
<td>Notre Dame</td>
<td>South Bend, IN</td>
</tr>
<tr>
<td>October 26, 2013</td>
<td>University of Utah</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>November 1, 2013</td>
<td>Oregon State</td>
<td>Corvallis, OR</td>
</tr>
<tr>
<td>November 9, 2013</td>
<td>University of California</td>
<td>Berkeley, CA</td>
</tr>
<tr>
<td>November 16, 2013</td>
<td>Stanford</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>November 23, 2013</td>
<td>University of Colorado</td>
<td>Boulder, CO</td>
</tr>
<tr>
<td>November 30, 2013</td>
<td>UCLA</td>
<td>Los Angeles, CA</td>
</tr>
<tr>
<td>December 21, 2013</td>
<td>Las Vegas Bowl vs. Fresno State</td>
<td>Las Vegas, NV</td>
</tr>
</tbody>
</table>

Taken to its logical extreme, the argument proffered by Lloyd’s that the insurance protection Lee and Breslin paid for in September 2013 did not exist for either player until November when Lloyd’s signed and returned the respective policies would result in Lee playing the first 10 games of USC’s season without any insurance protection and Breslin being uninsured for eight games. In other words, Lloyd’s would have collected $90,000 in premiums from Lee to provide insurance for one-third of his season (or $22,500 per game), and Breslin would have paid $24,000 to be covered for just five games (or about $4,800 per game).[20] California law “does not countenance such a nullity, for to do so would disappoint the reasonable expectations of the insured [and] violate the general rules of construing insurance contracts.” [21] These timing issues raise several other questions.

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First, if Lloyd’s is correct in its claim that coverage does not attach until months after submission of an application, then the athletes need to be advised of this fact or, at a minimum, understand the significance of a conditional binder of coverage. Second, the argument that there is a difference between the “effective date” listed in the policies and the “inception date” of those policies is belied by the wording of the policies themselves. For example, the policies define the term “injury” as “accidental bodily injury sustained . . . during the period of this insurance.” It is noteworthy that the definition does not limit coverage to bodily injuries sustained after the inception date of the policy but, instead, employs the more general phrase “during the period of insurance.”

Lloyd’s contends that, regardless of the listed “effective dates,” coverage did not attach until the insurer signed and returned the policies on November 15 for Lee and November 1 for Breslin. These November dates are, according to Lloyd’s, the “inception dates” of the respective policies, and prior to November, “the Policy never took effect.”[22] Lloyd’s does not define either term—effective date or inception date.

Under paragraph 2 of the conditions section of both policies, premium payments were required to be paid "within thirty days from inception.”[23] The declarations page attached to Lee’s policy lists his premium due date as September 16, 2013—30 days after the listed effective date of the policy; Breslin’s premium due date (September 27, 2013) is also 30 days after the listed effective date of his policy. In light of the condition requiring premium payments to be made “within thirty days from inception” and the premium due dates listed on the declarations page as being 30 days after the policies became effective, an athlete could reasonably understand that the terms “inception date” and “effective date” were synonymous and interchangeable. To conclude otherwise would render the language of the conditions section requiring premium payments to be made “within thirty days from inception” as surplusage, and California law does not permit such an interpretation.[24] Nevertheless, the timing of when the applications were signed by the athletes and when Lloyd’s issued the respective policies appears to be a significant issue in the pending lawsuits.

**Decision by Lloyd’s to Rescind the Lee and Breslin Policies**

According to the complaints filed by Lloyd’s in New Jersey, the insurer rescinded both policies and returned the premiums collected based on the contention that both players made "material misrepresentations, omissions, and/or concealments” on their applications.[25] Unlike other types of policies, the Lloyd’s policies did not warn the players that a misrepresentation on their applications might result in rescission of their policies. For example, most property and casualty insurance policies include a provision that alerts an applicant about the possibility that coverage could be rescinded based on a misrepresentation in the application, noting that the policy is “issued in reliance upon the truth of representations made by the insured” and warning that it might be “void if the insured intentionally conceals or misrepresents a material fact.” Similarly, it is not uncommon for life insurance policies to “strongly urge” the applicant to “to review the completed application closely for accuracy” while warning that “a claim may be denied, the policy may be void or your coverage may be lost if the application is incomplete or if it contains false statements or material misrepresentations.”

Here, neither Lee nor Breslin were advised in writing that a material misrepresentation made on their applications could, in fact, void coverage altogether. Instead, the applications simply warned, in bold capital letters, that if any questions were not “answered satisfactorily,” the underwriters reserved the right to either (1) return the form for more answers, or (2) “impose any restriction, or pre-existing conditions exclusion[26] on the coverage.”[27]

Lloyd’s will be required to satisfy three factors to be successful on its rescission claim: (1) Lee and Breslin misrepresented or concealed information in their applications; (2) the misrepresented or concealed information was material; and (3) the players knew that they had made the material misrepresentation or concealment.[28] In other words, Lloyd’s has the burden of establishing both that there was a misrepresentation and that the misrepresentation was material to its decision to issue the policy. Establishing materiality often turns on the subjective question of whether such information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms, had the true facts been known. A number of courts have concluded that the issue of materiality may be a question of fact depending on the nature of the information sought such that the specificity or vagueness of the application questions may become relevant.[29]
Finally, Lloyd’s contends that it was justified in rescinding the policies regardless of any causal connection between the purported preexisting conditions and the injuries both players later suffered.

Without knowing the claimed misrepresentations upon which Lloyd’s based its decision to rescind the Lee and Breslin policies, it is difficult to determine the materiality of the misrepresentation or even if a misrepresentation occurred.

**Pre-Existing Injuries**

In its declaratory relief complaints, Lloyd’s alludes to undisclosed preexisting conditions for both players and refers to a “preexisting conditions exclusion” despite the fact that it does not appear such an exclusion is included in either policy. Regardless, Lloyd’s may nevertheless contend that the failure of either or both players to disclose a preexisting injury or injuries in their applications could serve as an independent basis for rescinding the policies. An unanswered question remains as to whether the broker and/or underwriters have an independent duty or obligation to investigate the injury history of an athlete applying for LOV protection.

Anyone who has played competitive sports beyond middle school is well aware that aches, strains, bumps, and bruises are part of every sporting endeavor. It is also well known that the higher the level of athletic excellence, the greater and more frequent the pain and discomfort. In fact, professional athletes often complain that the only time they feel pain-free is the time between the end of one season and the first practice of the next season. It is also equally true that any college athlete who is a potential professional draft pick has, at one point or another, suffered some type of pull, strain, discomfort, or injury. The underwriters who write LOV coverage should be aware of these axioms and should question any application submitted by a high-profile athlete who provides “no” answers to all or nearly all questions.

A simple Internet search about injuries sustained by Marqise Lee reveals several reports that predate his application. For example, it was reported in December 2012 that, during practices before the Sun Bowl, "Lee twisted awkwardly" and "stayed on the turf for several minutes, holding his left knee.”[30] Lee played in the Sun Bowl and most likely believed that the pain in his knee was just another ache, like hundreds of other aches he had experienced during his football career. In March 2013, it was also reported that Lee suffered a knee injury before spring practice and that the injury sidelined him for over a month.[31] In subsequent interviews, Lee expressed his belief that his coach had kept him out of practice out of an overabundance of caution and that he felt fine. It is not clear whether Lee consulted with a physician regarding either knee incident.

As part of his proof of loss, Lee was asked if he had, with respect to the September 28, 2013, injury, “ever had this or a similar condition in the past.” Lee responded “yes” and listed a “posterior capsule sprain 03/09/2013–04/06/2013.” He also listed another “posterior capsule sprain” that apparently took place the week before the ASU game, indicating the dates as "09/21/2013–09/25/2013.” These knee injuries were not listed in Lee’s application for disability coverage, but both would have been readily ascertainable through medical records or an Internet search had Lloyd’s done either. Finally, in early August 2013 before USC’s first game against Hawaii, it was widely reported that Lee injured his left shoulder in practice.[32] It appears that this may have been the only injury Lee listed on his application for LOV insurance.

The only injury listed on Morgan Breslin’s application appears to relate to a foot or ankle injury he purportedly sustained prior to USC’s opening game of the 2013 season against Hawaii. He did not play in that game, but whatever that injury was it appears to have been before Breslin submitted his application to Lloyd’s given that Breslin played in the game against Washington State the following week. Like his teammate, Breslin likely believed that the pain in his foot or ankle was just another ache, like hundreds of other aches he had experienced over the years.

The chronology of these events further supports the idea that players who are seeking LOV protection must be counseled as to how best to respond to the questions in the insurance applications.

**THE FUTURE OF LOSS-OF-VALUE INSURANCE: CONCLUSIONS AND SUGGESTIONS**

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One of the inherent problems with LOV insurance is that the policies are being sold to young star athletes at Division I schools who have little to no life experience regarding insurance policies, or securing a loan, or most other financial issues. These athletes have dreamed about playing professionally since they were little kids, and they are focused on both the dream of becoming a professional athlete and the financial security a professional contract might afford the player and his or her family. With the advent of 24-hour sports television, these same athletes have also watched in horror as future draft picks suffered devastating injuries, some of which ended their careers while other injuries simply affected the player’s draft position.

To protect against such unforeseen circumstances, many athletes are counseled that LOV insurance is the answer. When asked about purchasing LOV insurance, Marqise Lee commented to a reporter that he “didn’t really do much of anything. All I did was just sign the paper and that was it. I mean, it’s cool. It’s just something I did to protect my body.”[33] Some people believe that LOV insurance is a waste of money, while others insist on the importance of securing coverage for an injury causing a drop in one’s draft position. For example, Richard Salgado, the president of Coastal Advisors LLC, has been quoted as saying that he does not recommend LOV coverage for his clients because: “Out of 100 players, maybe two or three will collect. What these guys are not understanding is that this is not a lottery ticket.”[34]

Others believe in the product. According to one Lloyd’s underwriter, “Loss-of-value insurance is the Holy Grail for college athletes. It’s the broadest coverage you could expect or hope for as a prospective future professional athlete.”[35] Regardless of one’s opinion, the outcome of the Lee and Breslin litigations could have a significant impact on to what degree, if any, LOV insurance will be recommended to or purchased by other athletes. Indeed, the pending lawsuits could play a significant role in the continued viability of paying tens of thousands of dollars for insurance that may not be there when an athlete needs it the most.

As discussed throughout this article, a number of steps could help prevent the issues raised in the Lee and Breslin lawsuits from ever arising. For example, athletes should be counseled about the insurance application process and how to answer the questions presented. One solution may be to craft a standard disclaimer to be included with every application that sets out the realities of the aches and pains experienced by high-profile college athletes in their given sport. Athletes may also want to be over-inclusive in the medical information they submit with their applications. Additionally, if insurers are going to rescind policies after-the-fact, then it would seem fair that the applications should, at the very least, include an express written warning that coverage could be voided if there are any material misrepresentations on the application. Finally, the standard application form should be revised to include more specific questions related to injuries and surgeries rather than vague questions concerning discomfort or physician consultation.

Without these changes, the issues currently being vigorously litigated in the dueling insurance coverage cases involving Marqise Lee and Morgan Breslin will repeat themselves, and high-profile athletes may find themselves without the insurance protection they were led to believe they had purchased.

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[1]. LOV protection covers the gap between the estimated value of what an athlete’s initial professional contract could or should have been, but for an injury suffered in college, and the actual value of the contract ultimately signed. The NCAA offers Exceptional Student-Athlete Disability Insurance protection for certain athletes in designated sports. As part of that program, qualifying athletes can purchase permanent total disability (PTD) insurance to protect against an injury that precludes them from playing professionally. LOV protection is sometimes offered as an additional coverage under the PTD policy.
[2]. See Richard C. Giller, Insuring against a Drop in an Athlete’s Draft Position, Law360 (May 15, 2014), http://www.law360.com/articles/538393/insuring-against-a-drop-in-an-athlete-s-draft-position ("Submitting a [LOV] claim [based on] the diminished value of a rookie contract because of a drop in draft position is likely to evoke a negative reaction from the insurance company. This is especially true because the insurer may be asked to pay out millions of dollars on a policy where the carrier only charged tens of thousands of dollars in premiums. In other words, these types of claims could and likely will generate an inevitable battle with the insurers that could result in litigation. . . . [W]hen other avenues for denying a claim under a personal lines policy (life, disability, loss of value) are foreclosed, insurance companies often seek to rescind the policy based upon a claim that the policyholder either concealed a material fact or misrepresented a material fact on the application for such a policy.").


[6]. See Charles Davis, Davis’ Draft Board: Ranking Top 32 Prospects in 2014 NFL Draft, NFL.com (Apr. 23, 2014), http://www.nfl.com/news/story/0ap2000000342973/article/davis-draft-board-ranking-top-32-prospects-in-2014-nfl-draft ("In 2012, Lee was seen as the best WR in the country. He was a threat from anywhere on the field, and in the return game, too. But injuries and a new QB hurt his production in 2013, so there is heavy discussion about which player is the one that teams will buy into. At his best, Lee is silky smooth, and I thought he improved in 2013 despite the setbacks. He’s explosive even though he lacks blazing speed.").


[9]. Id.

[10]. As a result, Breslin may ultimately have a claim under the permanent total disability portion of his Lloyd’s policy instead of pursuing his LOV claim.


[12]. Id. at 3–5. What college athlete has not experienced muscle discomfort? Another vague question in the application is whether the athlete “consulted” the team physician, or any other physician, in the last 24 months “other than for a routine examination or team physical.” Again, neither the term “consulted” nor the phrase “routine examination” is defined by Lloyd’s. Under a common dictionary definition of “consulted,” the question would apply to any instance where the player asked any doctor a question. Under that definition, it would appear that a player would have to list every discussion he or she had with a doctor regardless of whether it took place during an office visit or simply in passing. Additionally, it is not clear whether this question includes every time a team doctor speaks to a player on the sideline during a game or at practice. If so, the attachments to the application could well require dozens of additional pages.
Lee listed a prior condition relating to his right shoulder, and Breslin listed a 2009 "lisfranc surgery," which is a procedure relating to a ligament in the foot.

Hanleigh Sports Insurance Form, supra note 11, at 8.


The terms “certificate” and “policy” are used interchangeably in this article.

Because of an error in the listed date of birth for Marqise Lee in his application, his policy includes an amendment that is not part of Morgan Breslin’s policy.

To reinforce this limiting language, exclusion 9 of the policy precludes coverage for the failure of Lee or Breslin to receive a $9.6 or $3.6 million contract “for any reason, other than due to Injury or Illness as defined herein.”

As a general practice, brokers often bind coverage for these types of policies under what is known in the industry as a “conditional binder,” which has the practical effect of binding Lloyd’s to providing the listed insurance coverage between the time the application is received and the time the policy is officially in place. These conditional binders usually have an expiration date (sometimes remaining valid for 10 days or two weeks) and, if coverage is not accepted within that time period, the binder expires and no coverage attaches. Based on the pleadings and documents submitted in the Lee and Breslin cases, it is unclear whether the broker they used issued a conditional binder and, if he did, for how long the binder was effective and/or whether it expired prior to the issuance of the policies.

Lloyd’s may have avoided providing any coverage whatsoever for the players if it had delayed further in signing and returning the respective policies.


According to the complaint for declaratory judgment filed by Lloyd’s, “Lee was notified that, due to his failure to advise the plaintiff of the changes in his health from the time of his submission of his Application for disability coverage and the time that his coverage incepted, the Policy never took effect.”

The terms “incepted” and “inception” are not defined in the certificate of insurance. In fact, versions of those terms are only found in two places in the certificate: (1) under the cancellation provision, and (2) in Part Four—Conditions and Other Provisions. The second states: “It is understood and agreed that this Insurance is subject to receipt and approval by Underwriters of a copy of the Insured Person’s most recent team physical, a satisfactory Medical History Questionnaire completed by the Insured Person and premium payment within thirty days from inception.” Interestingly, the declarations pages of the certificates issued to both Lee and Breslin list the premium due date 30 days after the “effective” date of each policy, as opposed to the “inception” date.


Lloyd’s does not detail the “specific misrepresentations made concerning [the] health history . . . in order to protect [the player’s] privacy.”

A review of the policies issued to Lee and Breslin reveals no “preexisting conditions exclusion” or any other restrictions on coverage relating to how the application was filled out.

Hanleigh Sports Insurance Form, supra note 11, at 3.


[31]. Euno Lee, Trojans Return to Limited Contact as Lee Practices, Daily Trojan (Apr. 9, 2013), http://dailyn Trojan.com/2013/04/09/trojans-return-to-limited-contact-as-lee-practices/ (“Tuesday also marked the first time since the beginning of spring practices that junior wide receiver Marqise Lee participated in full. After being sidelined and limited for almost four weeks with a knee injury, Lee virtually had his way with the depleted Trojan secondary. Lee routinely got open and made difficult catches, including a beautiful leaping grab down the right sideline during coverage drills.”).

[32]. See USC’s Marqise Lee Day-to-Day with Bone Bruise Injury, Greenville Online (Aug. 11, 2013), http://archive.greenvilleonline.com/usatoday/article/2639937 (“Southern California coach Lane Kiffin says wide receiver Marqise Lee has a bone bruise in the area around his right shoulder and is considered day-to-day. The All-American was banged up Friday at practice and missed the Trojans’ morning practice Saturday. He was back for the evening session, though without pads. Kiffin told reporters Saturday he expected Lee back in action soon and was relieved that it turned out to be not as serious as it looked.”).


[34]. Id.

[35]. Id.

The Television Wars Part III: Sports – The Final Chapter

BY PETER J. DEKOM

In the first two segments of this series, we looked at the new world of television through the twisted eyes of the Aereo debacle and tangled viciously with FCC battles wrapping into merger mania, local municipalities muscling out cable competitors, and the ugliest of the vile, the net neutrality wars. Which brings us to what may be a very critical, if not determining, television content segment: Sports programming may just be the ultimate decider of the future of “television.”

The Real Muscles of Sports Programming

NBC got $4.5 million per 30-second spot (sold out!) for the 2015 Super Bowl. They got halftime performers to pay them for the exposure. Thank you Katy Perry! Sports! NBC Universal agreed “to pay $7.75 billion for the exclusive broadcast rights to the six Olympic Games from 2022 to 2032, highlighting with that staggering sum the supreme value that media companies are placing on live event programming in a market disrupted by modern viewing habits.”[1] A third of consumer cable dollars come from sports. One-third!

“NBC’s ‘Sunday Night Football’ remains the champion of ‘C3,’ but CBS’s new ‘NFL Thursday Night’—eight weeks of NFL games that are new to the Eye—is projected to be the second-most fertile ground for ad viewers in the 2014–2015 TV season[.]”[2] The sports industry was stunned in early October when the NBA basically doubled its former license fees in new deals with Time Warner Cable (TWC) and Disney’s ESPN.

March Madness, which rolled well into April this year, pretty much tells you that not only are sports the driver of so much television, but unlike Oscar telecast ratings (which dropped 18 percent in 2015 from 2014), more people are watching athletic events than ever. The April 6, 2015, NCAA basketball championship game between
Duke and Wisconsin “delivered the event’s top overnight rating in 18 years, surging more than 30% above last year’s number and dominating the primetime ratings race for CBS.”[3] Overall, “the 2015 NCAA Tournament coverage across CBS, TBS, TNT and truTV averaged a 7.8/16 in the overnights, up 13% from last year and the best in 22 years (7.9/17 in 1993 [when there were a tiny fraction of the viable channels we have today]).”[4]

What’s going on here?

Sports may be the real “decider” as to the future of just about any form of “television.” “For many many consumers, the decision whether to become or remain a pay-television subscriber indeed may largely turn on high-value sports programming,” said Jeffrey Silva, a telecom and media analyst. “It’s gold, just huge.”[5] Sports is immediate, television in the now, in real time, where a recording isn’t remotely as exciting as watching the competition live. Most competitive sports consume hours of continuous programming, the easy button for too many telecasters. Entire channels are devoted to a single sport or even a single league.

And even if the individual sports don’t pay for themselves in terms of ad sales, the ability to promote the rest of a network’s programming within popular sports event programming cannot be underestimated. After all, skipping commercials and recording for later viewing simply are not issues: 98 percent of all sports are watched live! Bathroom and snack breaks maybe . . . but not so much!

No sports and you might expect cable/satellite services to lose customers faster than the Titanic took on water. Sports are the glue that holds a huge pile of customers to their angry world of outrageous monthly cable bills. For years, the major college and professional sports teams—and their leagues and conferences—entered into television licensing agreements with all kinds of telecasters. Local teams were usually available (but not always) on basic cable services or broadcast stations, but out-of-market games required specific subscription from consumers who wanted that extra. And license fees, generally renegotiated every three or four years, generally rose at the top end of inflation numbers plus a bit.

You can see how important sports are today in AT&T’s requirement that DirecTV lock down NFL rights as a condition to their proposed merger, a combination that was finally approved by the FCC in late July 2015. And while the NFL cannot currently step on its contractual telecasting/streaming rights to present entire games live online to consumers (including deals with CBS, Fox, NBC, ESPN, and even its own network), like many leagues, it is tiptoeing toward web-delivered content, which may eventually include the games themselves. The NFL has “taken to the digital field” with the kickoff of NFL Now, “an Internet-video service offering gridiron fans hundreds of hours of free content and a $1.99-per-month premium package with access to even more. But while NFL Now will include highlights from in-progress games, it won’t stream live broadcasts over the Internet.”[6]

And make no mistake, while NBA (yeah, the league that doubled its license fees!) and NHL ratings are not remotely this competitive, the fall 2014 broadcast ratings were dominated by Monday and Thursday night NFL games, taking nine out of the 10 highest spots over the initial weeks of the season. What’s that worth to advertisers and a network trying to promote its entire fall premiere season?

Traditional telecasters have to balance the huge costs that sports franchises are demanding for carriage against the harsh reality that without sports, their grip on content delivery to the American public would slip quickly away. But so far, with the exception of battles like the one over the Los Angeles Dodgers discussed below, the incumbents are still writing the big checks, and some (but not all) of the biggest major sport franchises are staying put. For now. The NFL won’t go for more than online “highlights” as noted above, but why are they being so limited?

With the start of the NFL regular season, television gets back its biggest audience. But don’t expect to see any live games online, without having to pay for cable or satellite, anytime soon.

Even as traditional television adapts to the Internet, the NFL doesn’t feel the rush. They don’t have to: their biggest audience is on broadcast, cable and satellite TV, and they are making around $9 billion each year to license the rights to broadcast their games. That figure could reach $25 billion by 2027, predicts NFL.
Commissioner Roger Goodell. The league has contracts with cable and broadcasters, worth billions of dollars, that will last the next seven years.

Still, NFL executives are trying to figure out how to grow their digital business. They’ve made trips to Silicon Valley where they’ve met with Google chief executive Larry Page and other industry executives. Some tech execs have expressed interest in partnerships to bring games online direct to consumers, similar to Major League Baseball’s MLB.TV [or the National Hockey League’s NHL.TV].[7]

Does the fact that even the NFL is talking to the digital alternative providers suggest that it knows that the web is likely the long-term winner? Fox Sports has even figured out how to make local market games available over the web . . . with a huge catch: "Gridiron fans must subscribe to a participating cable or telco TV provider to access the Fox Sports Go service; DirecTV and Dish Network customers are, for now, out of luck. Moreover, because of the league’s exclusive rights deal with Verizon Wireless the Fox Sports service won’t be available on mobile phones.”[8]

Not to mention a few bumps along the road that the NFL doesn’t seem to have addressed sufficiently in the eyes of too many actual and potential viewers. How do league reactions to player spousal abuse and Super Bowl deflategate impact consumer loyalty? The NFL has already begun to detect a slow disconnect with younger viewers that does not augur well for the longer term.

And what about other new sports leagues that have formed in response to the obvious increase in the value of sports programming or existing teams? Are they smelling the blood money in the water?

It’s pretty obvious that teams, leagues, and conferences (notice that there are few more college conferences these days making deals!) have now figured out that they are necessities for cable systems to survive. Knowing the value of sports today, their “asks” for going-forward renewals or new licenses are now multiples of their old license fees. Double and triple even. For DirecTV viewers, wonder why there are no Los Angeles Dodgers games even if you live in LA? Think this is the fate for Clippers fans as well? Both franchises sold for record-shattering prices at or over $2 billion each, which pretty much mandates huge chargebacks to consumers. Here’s the trend: “American sports teams in general, since the 2012, have sold, on average, for 55% more than the most recent Forbes franchise valuation of the team.”[9]

Will this backfire, force consumers to buy these sports packages à la carte from the web, and kill the cablecasters who don’t, forgive the expression, step up to the plate? For those cable providers who have accepted these new license fees, to moderate the cost impact on their overstretched customers, they have dropped marginal networks, lessening the diversity of choices as predicted. TWC, which paid $8.35 billion for a 25-year hold on Dodgers telecasting rights, is finding a lot of resistance from other carriers to paying the associated license fee.

Responding to pressure from Rep. Brad Sherman (D-Cal.) and five other congresspeople, TWC even offered to submit to binding arbitration, knowing that the arbitrator would have to take into consideration that huge payment, but it is precisely that perceived overpayment that the other content providers (like DirecTV) object to. They easily rejected the arbitration offer. Sherman then suggested that the arbitrators also be able to “take into consideration all relevant data regarding regional sports networks not only in Los Angeles but across the country.”[10] This might lift DirecTV over top and into a resolution? Hmmm!

FCC chairman Tom Wheeler, in a strongly worded letter to Time Warner Cable CEO Rob Marcus, said that the agency “will intervene as appropriate” to resolve the dispute that has kept the Dodgers unavailable to some 70% of viewers in the Los Angeles region.

His letter on [July 29] follows calls from members of Congress for the FCC to mediate the dispute between Time Warner Cable and other multichannel providers, including DirecTV. . . .

But Wheeler’s letter to Marcus appeared to pin the blame on TWC for letting the dispute linger for so long.[11]
At the very tail end of the 2014 regular season, with a trickle of games remaining, suddenly an almost meaningless deal was made with a local television station—KDOC—to carry those few regular season Dodger games. There is a war going on out there, and the combatants want to send their signals loud and clear. Are you listening to the noise? If no one agrees to take this huge cost to those consumers, what is going to happen? With the FCC extending the time period for the Comcast/TWC merger review, the 2015 baseball season began with the Dodgers sitting in the same narrow/expensive TWC cable niche—which still excluded DirecTV—as when the 2014 season ended. Would conditions permitting a merger, should that occur, require an end to this misery? Hah! What merger?!

Sensing that FCC scrutiny would never allow TWC and Comcast to merge, in April 2015, the companies simply called off their deal. By late May, another, smaller suiter stepped into the fray as Charter Communications (which was working out a deal with Bright House) and TWC announced a merger of their operations. A TWC press release stated: “The combination of Charter, Time Warner Cable and Bright House will create a leading broadband services and technology company serving 23.9 million customers in 41 states.”[12] Not as big as the Comcast combination, but big . . . and Dodger games were clearly part of this mix.

But with all of these combinations, FCC scrutiny, and consumer resistance to rising cable rates, exactly where is this freight train heading? Are their countervailing forces that might actually reduce the value of sport franchises? Remember the Aereo case?

National Football League games have become some of the most popular programming on television; last fall, 34 of the 35 most-watched TV shows were NFL games. But the league tightly controls its games, collecting hefty fees from broadcasters, cable and satellite companies. If you’re a football fan who wants to watch games live-streamed to your device, good luck finding a way without paying for cable or satellite.

. . .

If Aereo prevails in the ruling [but they didn’t!], the foundation of the NFL’s television business could crumble. The league has already signed billions of dollars worth of contracts with broadcasters and cable companies for the rights to air its games for the next seven years. But a thriving Aereo could help fans bypass the broadcasters, devaluing their expensive contracts with the NFL.

If Aereo loses [Oh boy, did it! It wound up selling customer lists!], the NFL will be able to continue charging cable and broadcast companies billions of dollars for exclusive rights, and the options for consumers who love watching football will remain largely the same.[13]

And that’s just the NFL, a scandal-plagued league that still remains the most popular sport on American television. With Aereo’s loss, it’s still as nasty as ever for consumers out there. They are shelling out more and more to get sports.

Stability and predictability in the U.S. major league sports industry is anything but static or stable. In early September 2014, FCC Chair Tom Wheeler announced plans to reconsider the 1975 FCC-approved rights of professional sports teams to require local telecasting blackouts when the physical events were not sold out—he believed these blackout rules were obsolete. After all, the era of stadia with 40 percent of the seats filled is long past. When sellouts do not occur, the seat capacity is usually substantially filled anyway. Local businesses had taken to buying out small numbers of remaining seats to prevent the blackout, but today, that rule is simply not serving the general public while only creating a very minor benefit to the local teams. As September 2014 came to a close, the FCC formerly killed the blackout rules. It seems a lot that what once was sacred in professional sports . . . just isn’t anymore.

But wait . . . one more fly in the ointment (pot of honey?) that, this time at least, might augur in favor of consumers and against unilateral league-mandated pricing structures for sports consumers in search of better television economics. It seems that these television pricing structures are themselves under an entirely new
attack by angry fans who have had enough with high costs in buying big “packages” of unwanted sporting events just to see specific out-of-market teams play.

Some fans were so angry that they took their case (a class action—Garber v. Office of the Commissioner of Baseball[14]) to a New York federal district court. The dispute involves MLB and NHL fans who contend that they are "forced to pay high out-of-market package fees to watch their favored teams and that leagues’ teams are an "illegal cartel" that make ‘agreements to eliminate competition in the distribution of games over the Internet and television.’"[15] The lawsuit looks at “how clubs contract with regional sports networks (RSNs), who then provide telecasts to the league free of charge for out-of-market packages with in-market online territorial restrictions.”[16]

Fox Sports executive Robert Hacker restates the issues with a lot more clarity:

The central allegations in Garber are as follows: With the exception of nationally televised games, a multichannel video programming distributor (MVPD) subscriber gets access to their local RSN which only televises local ”in-market” games. For a consumer to obtain “out-of-market” games, they must purchase a league package (such as NHL Center Ice and MLB Extra Innings) that includes all out-of-market games. The leagues (NHL, MLB) control those rights and license them directly to the MVPDs. The agreements between the RSNs and the teams include the same in-market/out-of-market restrictions, as do the agreements between the RSNs and the MVPDs. Plaintiffs allege this is anti-competitive and constitutes an antitrust violation.[17] The leagues’ response? Antitrust exemption they cried. Huh?

For most sports leagues to function, everyone had assumed that they needed strict rules to control not only the participating teams but also the players themselves. But that degree of league-desired market control—to assure that the teams within a league were athletically balanced (think draft picks, for example, and bans on simply buying better players without restriction) to keep the sport interesting—could easily have been viewed as violative of antitrust laws. Courts sympathized with the problem and granted the desired antitrust exemption, and the notion of that exemption has been a basic tenet of American sports, especially baseball, for a very, very long time.

The antitrust exemption dates back to a 1922 Supreme Court ruling, Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, which dealt with a former competitor to the American and National Leagues.[18] The Court held that baseball was “purely state affairs” and not interstate commerce, even if players traveled, which was ""a mere incident, not the essential thing.""[19] The Supreme Court had more opportunities to address the antitrust exemption in its 1953 decision in Toolson v. New York Yankees, Inc.[20] and 1972 decision in Flood v. Kuhn,[21] which dealt with the restriction on player movement and compensation. "Since then, there’s been debate about the scope of the exemption—whether it covers labor matters or more—and faced with a challenge to its television territory rights system [in the Garber case], MLB invoked the antitrust exemption to bar the plaintiffs’ claims."[22] Surely, thought the leagues involved in Garber, we are not going to be forced to change a damned thing.

Okay, there had been a little erosion in the courts, but nothing to worry about or so the owners thought. A 2010 Supreme Court decision, American Needle, Inc. v. National Football League,[23] took a whack at that sports industry’s antitrust-exempt status, striking down an NFL attempt to centralize and control commercial vendor licensing across the 32-team league. But American Needle was not about viewing the games themselves, so most pro-league execs didn’t lose a whole lot of sleep about their “exemption.”

Folks have been taking shots at that exemption ever since, however, and now the sports industry is facing some serious assaults. But that Garber case, well, it was the beginning of the biggest headache for pro-sports leagues. On August 8, 2014, major leagues were stunned by a preliminary ruling in the Garber litigation: District Judge Shira Scheindlin (Judge Judy’s husband!) rejected summary judgment motions brought by the MLB, NHL, Comcast, and DirecTV based on the historical exemption case. “And in the process, the judge decided that MLB’s nearly century-old antitrust exemption doesn’t apply ‘to a subject that is not central to the business of baseball, and that Congress did not intend to exempt—namely, baseball’s contracts for television broadcasting rights.’”[24] Uh oh! Think about the broader ramifications of that statement.

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Relying on the antitrust argument that had prevailed almost a century earlier, major leagues have argued that controlling and equalizing revenues across teams is the only way to maximize competitive balance, preventing one team from accumulating the power to buy more “better players” than the rest. The thought of losing that antitrust exemption is and was terrifying to the big economic incumbents. Still, the trial roamed down that dangerous path.

In early 2015, in a “short” order denying the MLB’s petition for a writ of mandamus, “an appellate panel rejected the MLB’s argument that it must intervene because a New York federal judge erroneously refused to apply the well-settled baseball antitrust exemption.”[25] On May 16, 2015, Judge Scheindlin certified the case to continue as a class action but limited the plaintiffs to injunctive relief (not money damages).

The Garber case will now move forward towards a trial to be held at a yet-to-be-determined date (likely sometime in 2016 or 2017). The legality of MLB’s television practices will be judged under the so-called “rule of reason,” a balancing test in which the court will determine whether MLB’s restrictions are, on balance, pro- or anti-competitive, and thus legal or illegal. While the plaintiffs will argue that the policies are clearly anti-competitive . . . MLB has several credible arguments it can assert in defense of the existing rules. Ultimately, then, it is still too early to predict who will prevail at trial.”[26]

I guess we can see this battle wending its way back up the federal appellate structure for years to come, but the ultimate decision could reconfigure the economics of sports telecasting (digital and traditional) forever.

Seems that Garber (just based on those preliminary rulings) has been scaring folks and inspiring both litigation and even some settlements. DirecTV settled with consumers in a class action over out-of-market NHL games where consumers only wanted to follow one team.[27] Now it’s the NFL deal with DirecTV that is drawing particular interest from consumers over its Sunday Ticket pro-football package.[28] Same issues. Full package vs. single out-of-market teams.

Even owners of sports bars and other commercial establishments find the exclusive relationship between the NFL and DirecTV abhorrent.[29] The $12 billion class action complaint alleges:

DirecTV’s arrangement with the NFL allows the Defendants to restrict the output of, and raise the prices for, the live broadcast of NFL Sunday afternoon out of market games . . . Of the 4 major professional sports in this country—baseball, basketball, hockey, and football—the only one with an exclusive out of market broadcasting arrangement is the NFL/DirecTV Sunday Ticket. Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”) all distribute live out of market games through multiple MVPDs, including, for example, DirecTV, Dish Network, Comcast, Cox Cable and Time Warner. As a result, DirecTV does not charge nearly as much for access to MLB Extra Innings, NBA League Pass, and NHL Center Ice, which provide access to more games per week over a longer season than the NFL.

Have the floodgates opened?

Even municipalities are swinging at the sports antitrust exemption piñata. There is one more action before the federal Ninth Circuit where the City of San Jose is attempting to lure baseball’s Oakland Athletics a bit farther south, but MLB stands firmly in the way.[30] “The city of San Jose steps up to the plate to challenge the baseball industry’s 92-year-old exemption from the antitrust laws, [Ninth] Circuit Judge Alex Kozinski began. ‘It joins a long line of litigants that have sought to overturn one of federal law’s most enduring anomalies.’”[31] It’s a longshot, but longshots have defined our appellate decisions since this nation began.

Even as trends are pushing back against the seeming monolithic “bigness” and domination of professional sports, there are new combinations that are moving in the opposite direction. With the cost and sophistication of digital telecasting rising, the NHL seems to have thrown in the towel on keeping up with the digital “Joneses.”

The National Hockey League and Major League Baseball Advanced Media are now teammates, announcing a “groundbreaking” digital media rights partnership between the two organizations. The six-year deal will look to launch a fully integrated global hub of digital content that includes video, live game streaming, social media,
fantasy, apps, along with statistical and analytical content. In addition it hands MLBAM the rights to distribute live out-of-market games, including through the NHL GameCenter LIVE and NHL Center Ice subscription services. Through the agreement, MLBAM will now take over NHL.com, including the League’s seven native language sites, Club websites and operate NHL apps. On the TV front, MLB Network will now offer studio space and production resources for the NHL Network for distribution in the United States and certain international markets. MLBAM expects to fully launch its NHL presence in January 2016.[32]

Any antitrust ramifications? Hmmm.

But as much as companies, courts, and regulators think they are controlling this new digital content universe, it really is consumer behavior that sets the pace . . . and if consumers don’t like a ruling, it seems that they simply will ignore it.

CONCLUSION OR ONLY THE BEGINNING?

In the end, everything in the morass of competing interests and overwhelming complexity is completely linked to every other part. Go lawyers!

Where does this all end? It doesn’t! Where will the little guys go to reach an audience? Everywhere. What will television look like in five years? Not remotely what it looks like now. And exactly how much will consumers bear as the biggest baddest boyz turn them upside down to shake every nickel and dime they can? It seems they know that consumers are stuck on content; the delivery platform may change, but the addiction to “connectivity” continues to grow. Especially sports. The priority of the “stuff” that consumers cannot live without has changed radically and augurs well for those bad boyz. According to a Pew study released on February 27, 2014:

- 53% of internet users say the internet would be, at minimum, “very hard” to give up, compared with 38% in 2006. That amounts to 46% of all adults who now say the internet would be very hard to give up.
- 49% of cell phone owners say the same thing about their cell, up from to 43% in 2006. That amounts to 44% of all adults who now say cell phones would be very hard to give up.
- Overall, 35% of all adults say their television would be very hard to give up, a share that has dipped from 44% who said that in 2006.
- 28% of landline telephone owners say their phone would be very hard to give up, a major drop from 2006 when 48% of landline owners said it would be very hard to give up their wired phone. That amounts to 17% of all adults who now say their landline phones would be very hard to give up.[33]

Read dem tea leaves! Oops, gotta go. My home NHL team, the Los Angeles Kings, are on television right now . . . and I don’t want to miss the game. Oh, but one more little story as they warm up:

I’d like to end this seemingly endless series of articles with the story of one New Mexico cable TV consumer who may just be the most angry of the lot: “Unanticipated Comcast fees made one Albuquerque woman so angry she pulled a gun on a worker for the cable company . . . . Gloria Baca-Lucero, 48, was charged with aggravated assault with a deadly weapon [on July 28, 2104] and booked into jail. She was released later that day.”[34] Is there a cable-industry equivalent to “stand your ground” or “justifiable homicide”? Will our addiction to sports make the pain feel any better?

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ENDNOTES


[4]. Id.


[16]. Id.


[19]. Id. at 208–09.


[22]. Gardner, supra note 15.
UEFA’s Financial Fair Play Regulations: Saving Football from Itself?

BY MARK HOVELL, TIRAN GUNAWARDENA

The incredible growth in popularity of European football leagues has seen a dramatic change in the commercial profile of European football clubs. For example, the English Premier League is now broadcast in 212 territories around the world, working with 80 different broadcasters, and reaches a potential TV audience of 4.7 billion people, making it the most watched football league in the world. As a result of this ever increasing popularity, TV broadcast revenues are today worth billions (e.g., the English Premier League recently signed a £5 billion domestic TV rights deal for a three-year period) and commercial revenues for successful clubs are skyrocketing, meaning that merely participating in the highest echelons of the game today can be a highly lucrative business for football clubs.

However, unlike in American sports, which have long had cost control mechanisms such as salary caps, there were no such mechanisms in place in European football to limit spending. As such, in the last decade, while revenues were increasing exponentially, the money spent by football clubs on wages and transfer fees increased at a similar or faster rate, and numerous clubs around Europe faced financial difficulty as a result of unrestrained overspending. The situation became so critical that UEFA (the governing body of European football) decided to step in and introduced its Financial Fair Play Regulations in 2011–12 to sit alongside its existing Club Licensing Regulations. Despite its name, in the authors’ opinion, the regulations were not so much about “fair play” in the traditional sense of the term, but rather were designed to improve the overall financial health of European club...
football. Over the last few seasons, there have been a number of matters involving the regulations that have been dealt with internally by UEFA, and some affected parties have utilized their right of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

This article looks at why UEFA put these regulations forward, what the regulations are, reviews some of the cases involving the regulations that have been heard to date at the CAS, and makes some general observations about the impact of these regulations.

**THE NEED FOR FINANCIAL REGULATION IN EUROPEAN FOOTBALL**

The authors, based in England, will start at home. Within the English game there have been around 40 formal insolvencies of professional football clubs in the last 13 years. In addition, there have been many other cases of informal insolvencies of professional clubs that have managed to stave off the formal administration process by securing “time to pay arrangements” (or deferred payment arrangements) with players, other clubs, and creditors including the tax authorities.

In the authors’ opinion, in the majority of cases the reason for this high number of insolvencies is “gambling” by the clubs. Many clubs have been guilty of short-term speculating on the pitch to try and achieve greater success. This has involved them acquiring players and incurring transfer fees and salaries that they could not afford from their revenues. Some clubs have wealthy benefactors who would allow the clubs to live beyond their means by injecting additional revenues, be it by way of equity or by way of loans. However, in many instances the benefactors could no longer continue to support the additional costs of their clubs, leaving the clubs facing an insolvency situation. The clubs simply spent more than they earned in the hope that the success on the pitch would increase their revenues in the future.

In the 2009–10 and the 2010–11 seasons, as was evidenced by the Deloitte reports,[1] it was clear that nearly two-thirds of the clubs in the Premier League and the Championship (the top two divisions of the English professional game) were spending in excess of 70 percent of their revenues on player wages alone. To put this in perspective, most American professional sports franchises would ordinarily operate closer to the 50 percent mark. A frightening number were spending in excess of 100 percent of their revenues on wages with, at the highest extreme, Queens Park Rangers in the 2010–11 season spending 183 percent of their revenues on player wages. During those seasons there was no licensing system in place within the English game, and while there were a set of rules dealing with insolvency that all clubs had to follow, these only applied after a club had entered into an insolvency procedure.

Unlike American professional sports leagues, which contain the same franchises every year, European football leagues such as the Premier League operate with a system of promotion and relegation where the three lowest-placed teams in the league get demoted to the Championship while the three highest-placed teams in the Championship gain promotion to the Premier League. However, the increased broadcasting revenues referred to earlier are generally shared among only the teams in the Premier League, although some revenue does filter down the pyramid. Accordingly, in the last few seasons we witnessed a huge gap between the share of broadcasting revenues that Premier League clubs enjoy compared to those of a Championship club, and this is where the “gambling” has come in.

Some clubs have gambled by spending on short-term player investments to stay in the Premier League while others have gambled in trying to gain promotion to it. Further, clubs in the Premier League gamble to finish high in the league table in order to qualify for UEFA’s lucrative Champions League and Europa League tournaments in the following season. The result of all this gambling has been the administration (a procedure under the insolvency laws of the United Kingdom) of many clubs, but it has also resulted in the nonpayment of millions of pounds to creditors who deal with football clubs, the nonpayment of millions of pounds of taxes to the tax authorities, and the severe delay in repaying sums due to other clubs and players in the English game.

The situation was not too different across Europe. As illustrated in figure 1, a UEFA Benchmarking Survey that looked at the increase in expenditure of all the clubs playing in the top divisions of all 53 members of UEFA...
between 2007–08 and 2011–12 showed the critical situation across Europe, where in the 2009–10 season the aggregate losses across those divisions was running at €1.6 billion. In the 2010–11 season it had hit €1.7 billion. Clearly some of the losses were supported by benefactors and owners of clubs, but the difference represents sums that were lost to creditors by the insolvency of many clubs right across Europe.

![Figure 1: UEFA’s European Club Licensing Benchmarking Report: Financial Year 2011][2]

Ultimately, UEFA decided that it was critical to add the Financial Fair Play Regulations to its Club Licensing Regulations, perhaps to save football from itself. These regulations together are aimed at improving the economic and financial capability of clubs, to protect creditors, to introduce more discipline and rationality in football club finances, to encourage clubs to operate on the basis of their own revenues, and to encourage long-term investment in football, ultimately protecting the long-term viability and sustainability of European Club football.

Few ever criticize these objectives, but many debate the detail of the regulations themselves, whether it be lawyers or the media, and many look for loopholes in the regulations. To date, a number of the questions raised by lawyers and the press have been answered by the jurisprudence and by the settlement agreements entered into between certain clubs and UEFA. However, a number of the questions and potential loopholes remain that will undoubtedly be debated and litigated upon in the coming years.

**UEFA’s Club Licensing and Financial Fair Play Regulations**

UEFA’s original club licensing manual was issued in the 2004–05 season, but it was only in the 2011–12 season that we saw the first introduction of the regulations. Within the regulations there are 36 criteria split over five sections. The five sections are:

1. **Sporting:** It is important that clubs focus on youth development, have a youth team, have proper contracts in place for their players, medical cover for them, etc.;
2. **Infrastructure:** There are certain minimum standards for stadia and training;
3. **Personnel and administrative:** Clubs need to have personnel in place for key roles such as finance director, club secretary, general manager, coaches, youth development, doctors, etc.;

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Legal: All clubs need to sign up and follow both FIFA’s and UEFA’s regulations and statutes and need to provide copies of their own articles and regulations for review; and

Financial.

It is important to note therefore that the regulations are not just about the financial state of clubs that play in UEFA’s flagship competitions (the Champions League and the Europa League). They also look to encourage the training and care of young players, adequate levels of management and organization, and investment in clubs’ sporting infrastructure. That said, this article will focus on the financial criteria and the jurisprudence that has come from that.

Each year, there are just under 300 clubs that qualify for UEFA’s competitions. Rather than UEFA carry out all the initial compliance checks on the clubs that have qualified on sporting merit (usually by attaining a top finish in each association’s professional league or winning the association’s cup competitions), under the regulations UEFA delegates the initial review process to its member associations/federations, which then determine whether or not to grant the UEFA license to their member clubs. Under the regulations, it’s possible for this task to be delegated to the domestic leagues.

The leagues then request a large amount of information from the qualifying clubs, including, on the financial side, details of the corporate structure; balance sheets; profit and loss accounts; budgets and cash flow forecasts; details of any overdue payments to other clubs, players, or tax authorities; and details of any event that may have a major economic impact after the balance sheet date. The leagues therefore need to have established the proper administrative bodies to undertake this work and, in addition, must have an internal appeal procedure. It is, however, for each to decide whether or not that appeal procedure extends as far as allowing clubs the right to go to the CAS.

UEFA has established its Club Financial Control Body (CFCB) that oversees the information that is given to it by the leagues and ensures that all clubs that ultimately qualify for its competitions continue to comply with the regulations. It is split into the Investigatory Chamber, which deals with the monitoring and investigations in the main, and the Adjudicatory Chamber, which deals with any breaches and sanctions. The CFCB looks to see whether any of the following four indicators are breached:

- **Going Concern**
  Have the auditors of any club made any comments or reservations regarding the going concern basis of the clubs?

- **Negative Equity**
  Put simply, if all the assets of a club were to be realized, would there be sufficient funds to meet its liabilities? If not, then it has negative equity.

- **The Break-Even Result**
  Can a club live within its footballing means? Does its footballing expenditure exceed its footballing income?

  Importantly, not all income and expenditure are taken into account. On the usual match day, broadcasting and commercial income are taken into account, as are other operating incomes such as rent or the profit on disposable or tangible assets and players. However, income from nonfootballing operations (along with the related expenditure) is ignored, as are donations by related parties or revaluations of assets, such as players or the stadia. The CFCB has the ability to review payments from related parties that are above “fair value.” This enables the CFCB to review related party sponsorship agreements, for example.

  On the expenditure side, the usual costs of sales, wages, costs for acquiring players, etc., are all taken into account, as are payments made by related third parties on behalf of the club. But depreciation of fixed assets and the costs of nonfootballing operations are ignored. In addition, expenditure on youth development or community projects or certain costs relating to the construction of stadia are also ignored, as these are seen by
UEFA as investments in the long-term future of football and for its benefit. There is also an exemption in the first couple of seasons for clubs that can show an improving record of profitability, where some of their pre-2010 salary costs are ignored.

UEFA acknowledges that there have been many clubs living beyond their means and to suddenly introduce a regulation to stop would be impractical. As such, after the first year (where it looks at two years of accounts) UEFA aggregates three years of accounts, applying surpluses against deficits, and allows in any year an aggregate acceptable deviation (or loss) of €5 million. That deviation can be exceeded if the owners of the business introduce fresh equity that covers additional losses in the first two seasons (2013–14 and 2014–15) of €45 million. In the two seasons after, that level drops to €30 million and will be lower thereafter until eventually clubs may be expected to live within the €5 million deviation. The monitoring periods are illustrated in figure 2.

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* Wages for players signed before 1 June 2010 excluded for 2011/12 season only
** Max deficit is €5m per Monitoring Period if equity not injected into club

Figure 2: Regulations Monitoring Periods

**Overdue Payables**

According to the regulations, payables are considered as “overdue” if they are not paid according to the agreed terms. It is important that there are no overdue payables to other clubs and none to players or tax authorities. However, there are certain exceptions. If clubs are able to show that on the relevant reporting or monitoring dates they have paid or they will be able to pay by the subsequent monitoring date, then they may still be allowed their license, subject to being monitored by the CFCB. Alternatively, clubs can procure a written agreement from any creditor giving them time to pay and thereby extending the payment date. Clubs can also attempt to demonstrate that there is a legitimate dispute regarding the overdue payable. They would need to demonstrate that there is a legal claim and that it is being contested.

**MAIN OFFENSES APPEALABLE TO THE CAS**

Once a club has been sanctioned for breaching the regulations, it has an option to appeal to the CAS. To date, these appeals broadly fall into three categories: (1) the refusal by a domestic league or association to grant a club a license to participate in a UEFA competition; (2) a breach of the overdue payables indicator (this came into force in June 2011); and (3) a breach of the break-even indicator (the first assessment for this was in the 2013–14 season, but it utilized information from the 2011–12 and 2012–13 seasons).

**CAS Jurisprudence: Refusal of License**

To date, there have been three procedures at the CAS in this area:

The Rayo Vallecano de Madrid SAD v. Real Federación Española de Fútbol (RFEF) case involved a club that had overdue payables to tax authorities, players, and other clubs.[4] Despite the club’s finishing eighth in the Spanish League, which enabled it to qualify for the UEFA Europa League the following season, the Spanish
League refused to issue it with a license. The club appealed this to the CAS, but the CAS rejected the appeal on the grounds of lack of jurisdiction. This case highlights the fact that not all UEFA member associations/leagues have taken on board an appeal procedure that would extend as far as the CAS.

Jurisdiction was not, however, an issue in the second case to arrive at the CAS. The *JSC PFC Rostov v. Russian Football Union (RFU)* case had no jurisdictional issues, as the RFU had included the right of a final appeal to the CAS.[5] In this instance, the RFU sought to refuse the license on a number of grounds, one of which was the fact that there were overdue payables to the RFU itself. However, under the regulations the overdue payables have to be to other clubs, players, or the tax authorities. Associations and federations are not included. Further, there were overdue payables to the national pension fund and toward the tax authorities, but it appeared that both had agreed to such payments being deferred. As such, the CAS panel allowed the appeal, and Rostov was able to participate in the UEFA Europa League.

The third case to arrive at the CAS was *Parma F.C. S.p.A. v. Federazione Italiana Giuoco Calcio (FIGC).*[6] Parma owed €300,000 to the tax authorities, and the Italian League denied the UEFA license to Parma on the basis of these overdue payables. As with the *Rayo Vallecano* decision above, the CAS determined that it lacked jurisdiction. The place in the Europa League has been given to the next team in the ladder, Torino. Its striker is undoubtedly a big supporter of these regulations, as he missed a penalty in the last minute of the last league game that would have secured the club’s automatic place in the Europa League! The regulations provided Torino with a second chance.

**Overdue Payables**

To date, there have been seven main awards. Most of these are published cases, and we have analyzed a couple of them below.

The first to appear at the CAS was the *Győri* appeal.[7] This related to unpaid transfer fees in the sum of €50,000. The club defended itself by stating that the form of invoice from the selling club was unacceptable, and until the correct form of invoice was received the installment was not payable. UEFA disagreed and determined that the club knew when the installment was due to be paid regardless of the form of the invoice that was being used. UEFA banned the club from the next two competitions it qualified for and gave a third competition ban, although this was suspended. Finally, there was a €50,000 fine.

It has been quite common to see the use of suspended bans and fines by UEFA. Part of the sanction is to punish offenders and part is to encourage them to fall into line with the regulations in future seasons. While this ban may look severe in light of the cases that have been to the CAS since, it was upheld by the CAS panel. The likely reason is that if the club had disclosed the true situation when applying for its UEFA license, then it would not have been granted the license. However, as the true situation was concealed, the club was able to compete in the Europa League 2010–11 and received €360,000 in prize money that some would say it should never have received.

The *Beşiktas* case was a classic example of what is sometimes referred to as the “FIFA loan.”[8] If one could imagine a club (or franchise in the United States) going to its bank and asking for a multimillion euro loan, without offering any security, at a 5 percent interest rate, with the ability to use that loan to speculate on any players as it saw fit and to pay back as and when it wanted over the next few years, no bank would sign on to those terms, even before the recession! However, many clubs buy players off their rivals, then don’t pay the transfer fees or associated costs and wait until the selling/training clubs have pursued them through FIFA and the CAS, and only then, when facing further disciplinary procedures, do they either pay or usually agree to a repayment schedule with the other club. This can involve them enjoying the credit from these clubs for many years and having to only pay the monies they owed in the first place together with the standard 5 percent interest rate applied by FIFA.

This is exactly Beşiktas’s case. Its former management, when applying for a license to participate in Europe, claimed that all monies due in this way were “disputed.” The reality was that the other clubs were pursuing them through FIFA, and Beşiktas was not taking any proactive steps in defending such cases. It occasionally appealed such decisions to the CAS, but after lodging the appeal took no further part in the procedure again.

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just delaying the inevitable judgment against them that would eventually be enforced by FIFA. The CAS panel had no hesitation in dismissing the appeal against the ban that UEFA had placed on Beşiktaş. It was banned for the next two competitions it qualified for in five years, with the second of those being suspended, and fined €200,000, half of which was suspended. The club had clearly misled UEFA and obtained a license it wouldn’t have otherwise been granted.

These cases now offer some good jurisprudence for other clubs going forward.[9] The bigger the amounts that are overdue or the more debts there are, if these have been concealed in some way and if a club has received a license already and profited from that, then the more likely the club is to get a ban.

**Break-Even Cases**

The authors could end this part of the article now! Since the 2013–14 season, the CFCB has charged 13 clubs[10] with breaching this indicator; however, all 13 utilized the settlement procedure that was introduced in the 2014 procedural rules and none of the disputes have yet come to the CAS. The ones that attracted the most press were the Manchester City FC (MCFC) and the Paris Saint-Germain settlements, as part of the agreed sanctions were €60 million fines for both clubs.

Certainly, compared with the sanctions for overdue payables these fines look huge, and yet the break-even offending clubs were allowed to stay in the next season’s competitions and none of them faced bans at all. There were other sanctions such as restrictions on squad salaries, limits on transfer spending, reductions in the acceptable deviations, reductions in squad sizes for the next year’s Champions League, etc., but no bans.

This drew criticism from some of MCFC’s and Paris Saint-Germain’s biggest competitors—Chelsea FC manager José Mourinho was extremely public in calling for offending clubs to be banned or to have their titles stripped from them. Further, at the time of writing this article, UEFA faces numerous legal challenges in various European courts, whereby it is claimed that the break-even regulation itself is in breach of EU laws.

Time will tell whether clubs next season receive bans, and time will tell whether the legal challenges succeed, but one way of looking at the break-even sanctions is by comparing them with U.S. sports associations/leagues, such as the National Basketball Association and Major League Baseball. In these sports, salary caps exist that restrict the amount any club can spend on players’ wages. However, it is acknowledged that some clubs will want to invest and spend beyond that cap, and if they do so then they must bear a "luxury tax." This involves a set percentage of every dollar they spend over that cap being charged to those clubs and then distributed among the other clubs in their league. At the time of writing, we don’t know exactly where the fines under the regulations will go, but it may well be that they are aggregated with the other fines in those seasons and distributed among the participating clubs in the same way that a luxury tax operates.

The difficulty with the settlement agreements is that only UEFA and MCFC know exactly what the alleged breaches were, and we are left to speculate as to what they were. Likewise, one cannot see from the settlement agreements how the magnitude of the fine was determined. The regulations themselves give great discretion and flexibility to the Investigatory Chamber and Adjudicatory Chamber to set the level of fines they see fit. There is no prescriptive formula to calculate the fine as in other sports.

The result of the 2013–14 season was that there were no appeals on the break-even indicator to the Adjudicatory Chamber and therefore no appeals to the CAS. Further, there were no appeals by “affected third parties.” For example, Everton FC—which could have participated in the UEFA Champions League if MCFC were banned—could have appealed MCFC’s settlement but unsurprisingly did not, as Everton would have been litigating in the blind because it would have had no idea what MCFC’s alleged breaches were and whether or not UEFA’s sanctions were disproportionate or too lenient.

**SUMMARY**

Due to widespread uncontrolled spending and “gambling” by many clubs in Europe, the financial landscape of European football reached a point at which UEFA felt it had no choice but to intervene and implement its
regulations. By just putting these regulations on the table we have already seen huge improvements in the health of European football. The 2012 UEFA Benchmarking Survey[11] has seen a 36 percent decrease in club losses from €1.7 billion in 2011 to just over €1 billion in 2012. One would expect to see a further improvement when the latest results are published.

Some clubs have fallen foul of the regulations, which not only confirms that the regulations have teeth, but also subsequent appeals have given rise to some useful CAS precedents going forward. Moreover, we have even seen clubs like MCFC (an offending club) embrace the regulations and invest huge sums of money in its youth facilities and its stadia with a long-term approach to try and discover the next £50 million superstar,[12] Thus, the regulations appear to be encouraging clubs to spend responsibly in order to make themselves self-sustainable, which is the behavior that UEFA is keen to promote.

It is also interesting to note that while these regulations only affect clubs that qualify for UEFA’s flagship competitions, many of UEFA’s own member associations have introduced domestic regulations, including England where the Premier League has introduced its own regulations and, in fact, has gone even further by introducing a form of salary capping.[13]

To date, we have seen a confederation that has been willing to punish clubs with overdue payables to maintain the integrity of its competition, and also implement the creative use of settlements to maintain the status quo of these regulations. Critics of the regulations argue that they entrench the status quo of European football and prevent smaller clubs from ever competing with clubs that are already successful. It is largely on this basis that the regulations are being challenged under EU law.

We note that in response to these legal challenges and criticism from clubs, UEFA has recently announced that the regulations will be “eased” at the end of the 2014–15 season.[14] Exact details about how they will be eased are still to be confirmed at the time of writing. However, whether these changes will satisfy the aggrieved parties and how they will impact the current legal challenges and case law going forward will remain of interest.

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ENDNOTES


The UNC Football Investigation and Student-Athlete Due Process

BY EMMETT GILL

During the summer leading up to the 2010 college football season, the University of North Carolina (UNC) football program was preparing for a breakout season. The Tar Heels possessed a highly ranked defense that included two student-athletes projected as first-round NFL draft picks and four All-Atlantic Coast Conference (ACC) football student-athletes. However, when the Tar Heels faced the Louisiana State University (LSU) Tigers for their season opener on September 4, 2010, the UNC athletic department withheld 12 UNC student-athletes from the game. The suspensions were in reaction to allegations that some UNC football student-athletes broke NCAA bylaws because they engaged in improper contact with sports agents and received improper benefits. The UNC athletic department withheld six football student-athletes because, after consultation with the NCAA, it was determined that they were ineligible. Another six student-athletes were withheld by UNC because of concerns their participation could lead to the forfeiture of the game.[1] None of the student-athletes were afforded an attorney or a procedural hearing prior to being declared ineligible by the NCAA and withheld from the LSU game.

The Fifth and Fourteenth Amendments guarantee due process. Due process is the principle that the government must respect all of the legal rights owed to a person.[2] The due process clause prohibits state and local...
governments from depriving persons of life, liberty, or property without recognizing certain substantive rights and procedural rights. When government or the persons having governing authorities violate the civil rights of an individual, it is referred to as a state action.[3] A state actor is a person who is acting on behalf of a governmental body and is therefore subject to regulation under the United States Bill of Rights.[4] A violation of individual rights typically involves deprivation of individual property or liberty interests. Protected property interests refer to a thing for which an individual has a claim of entitlement, such as a tenured professor has a legitimate claim to employment.[5] Liberty interests consist of deprivations of certain basic liberties, such as an individual’s reputation or the freedom to pursue a job.[6] The Supreme Court significantly expanded the reach of procedural due process by requiring some sort of hearing before a state actor can terminate civil service employees, expel students from public schools, or cut off a welfare recipient’s benefits.[7]

Within the 405-page NCAA rulebook there are no pages dedicated to student-athletes rights. The lack of procedural rights for student-athletes prior to a declaration of ineligibility, during a bylaws violation investigation, and during the reinstatement and appeal processes are major criticisms of the NCAA. Additional lack of due process criticisms include the lack of access to an attorney, lack of access to key documents, inability to testify at eligibility and reinstatement hearings, inability to confront witnesses, and the absence of public hearings.

The lack of due process was apparent throughout the UNC/NCAA investigation. When NCAA officials initially questioned the UNC student-athletes, none had an attorney present. Some of the student-athletes did not have access to all of the documents the UNC athletic department exchanged with the NCAA during the hypothetical bylaw interpretation and reinstatement processes. When UNC submitted paperwork to the NCAA pertaining to student-athletes’ alleged academic fraud, the university did not share the content with one accused student-athlete.[8] Moreover, the 12 UNC football student-athletes did not have the opportunity to refute conflicting evidence prior to being declared ineligible and withheld from NCAA competition. At least one student-athlete involved in the investigation did not secure representation until nine months into the saga. Lastly, per NCAA appeal requirements, prior to being afforded the opportunity to appeal ineligibility and reinstatement denial decisions, a student-athlete has to admit to violating the bylaws.

This article will explore the legal and public policy history of due process in intercollegiate sports, document the UNC football case study, and ponder whether student-athletes are entitled to due process throughout NCAA investigation and enforcement processes. In particular, the article will explore the following:

(1) What happened in the UNC/NCAA investigation?
(2) Are student-athletes’ scholarships, right to compete, and access to an education property rights?
(3) Are student-athletes’ current and future reputation liberty interests?
(4) Should the focus of litigation, aimed at securing due process, take aim at NCAA member institutions as opposed to the NCAA?
(5) What are the legal and public policy strategies for strengthening student-athlete due process?

THE NCAA

Structure and Purpose

The NCAA is the governing body of Division I sports, and as such the organization distributes revenue, produces championships, and develops and enforces rules. The NCAA is a semi-voluntary association of 1,281 colleges and universities, athletic conferences, and sports organizations devoted to the administration of intercollegiate athletics. As a member institution, universities, via their athletic department, agree to follow NCAA bylaws. The Internal Revenue Service (IRS) recognizes the NCAA as a 501(c)(3) nonprofit, membership organization. The basic purpose of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program..."
and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”[9] Also according to the NCAA constitution, the organization exists to provide intercollegiate athletics for student-athletes and to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship, and amateurism.[10] The NCAA constitution applies to admissions, financial aid, eligibility, and recruiting by member institutions. NCAA member institutions are obligated to apply and enforce legislation, and NCAA bylaws govern all institutions and their staff.

The NCAA includes members at three levels: Division I, II, and III. The fundamental difference in divisions is the allocation of athletic-based scholarships. Division I and II member institutions offer scholarships, while Division III members do not offer athletic-based financial assistance. The primary distinction between Division I schools and Division II schools is that Division I schools generally have larger operating budgets than Division II schools. In addition, in Division I student-athletes are typically classified into two groups: revenue- and non-revenue-generating sports. Revenue-generating sports refer to football and men’s basketball, but some women’s basketball programs generate a profit. There are over 420,000 student-athletes including over 70,000 in NCAA Division I sports.[11]

**Bylaws and Enforcement**

The NCAA is also criticized because of the litany of bylaws in its manual, but clearly two of the more frequently violated bylaws are impermissible (including extra and improper) benefits (bylaw 16) and academic fraud (including unethical conduct) (bylaw 10). NCAA bylaw 16.02.3 states that “[a]n extra benefit is any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation.” According to bylaw 16.01.1, the receipt by a student-athlete of an award, benefit, or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible to compete while representing the institution in the sport for which he or she received the improper award, benefit, or expense.[12] If a student-athlete receives benefits between $100 and $300, then he or she must sit out 10 percent of the team’s regularly scheduled games in that season. For extra benefits ranging between $300 and $500, the penalty is 20 percent, and for benefits greater than $500, a student-athlete must miss 30 percent of the team’s regularly scheduled games.[13] The practice of student-athletes repaying the extra benefits, by donating the exact amount to a charity, is increasingly commonplace.

NCAA bylaws 10.01.1, 10.1(b), and 10.1(d) pertain to and define academic fraud as the “[k]nowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete.” Academic fraud includes, but is not limited to acquiring information (e.g., copying from other students on assignments or during exams), providing information (e.g., giving answers to other students for assignments or exams), plagiarism (e.g., claiming others work as one’s own), conspiracy (e.g., agreeing with other students to commit academic dishonesty), and/or fabrication of information (e.g., falsification of research results). Student-athlete penalties for academic fraud bylaw violations include suspension for 30 percent or more of the season, suspension from post-season competition, suspension for the upcoming season, or permanent ineligibility. NCAA bylaw 10.1(d), which is contained in the section on academic fraud bylaws, relates to lying to NCAA investigators. The bylaw defines unethical conduct as “[k]nowingly furnishing . . . the NCAA or the individual’s institution false or misleading information concerning an individual’s involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation.” Penalties for lying to investigators range from a suspension for the remainder of the season to a suspension for the entire season.[14] Another criticism of the NCAA is that the governing body plays a major role in developing, implementing, and enforcing the bylaws.

The NCAA adopted enforcement procedures in 1950, and in 1954 the Committee on Infractions (COI) was created and given power to punish member institutions.[15] Bylaws 19 through 32 govern the NCAA enforcement process, including investigation guidelines, provisions for legal counsel, interviews and hearing recordings, hearing procedures, and appeal procedures.[16] The NCAA enforcement process has been refined over the years, but many observers still note it lacks several key characteristics of due process. There are several significant steps in the enforcement process, but this description will only include the steps most.
meaningful to student-athlete eligibility and due process. There are four instances that can trigger an investigation: (1) information is obtained that indicates an intentional violation of bylaws has occurred, (2) a significant or recruiting advantage has occurred, or (3) the enforcement staff has been given false or misleading information. NCAA member institutions also may initiate an inquiry, via self-reporting, when they become aware of a violation. Typically, an NCAA member institution will submit the information regarding the alleged violation to the NCAA, via a hypothetical situation, and request an interpretation.[17] An investigation is initiated when a letter of inquiry is sent to the NCAA member institution’s president or chancellor informing the school leadership that the NCAA enforcement staff will be investigating the school.

Next, the enforcement staff conducts an investigation to determine whether adequate information exists to indicate that a violation of NCAA bylaws occurred. The investigation typically includes the NCAA enforcement staff and NCAA member institution administrators interviewing student-athletes. Interviews or communication with student-athletes, by NCAA enforcement staff, may occur prior to the letter of inquiry being sent to the university leadership. Student-athletes interviewed by NCAA enforcement staff may have legal counsel present during the interviews. Prior to interviews, student-athletes are asked to sign a form that notes: (1) they were informed of their right to an attorney, (2) they will be truthful in conversations with the investigator, and (3) the conversations are confidential. If the NCAA concludes there was a violation by a student-athlete, then the NCAA member institution (not the NCAA) must rule him or her ineligible. Once the student-athlete is declared ineligible, the athletic department can request reinstatement of his or her eligibility from the NCAA Committee on Student-Athlete Reinstatement. If the student-athlete is not reinstated, then the athletic department can appeal the reinstatement decision, but the student-athlete first must admit he or she violated the bylaw. An appeal to the Committee on Student-Athlete Reinstatement is the final step in the NCAA process for student-athletes to regain their eligibility. Again, there are additional steps for NCAA member institutions, but the focus here is on investigative and enforcement steps relevant to student-athletes.[18]

It is important to clarify the relationship between the NCAA, NCAA member institutions, and collegiate student-athletes. The NCAA’s jurisdiction is over NCAA member institutions, which in turn have authority over collegiate student-athletes. However, each year NCAA student-athletes become eligible to participate in intercollegiate athletics after they sign a student-athlete statement form. The student-athlete statement form includes six parts, and one part of the form pertains to whether the student-athlete violated any amateurism rules since he or she was last certified.[19] Even so, the NCAA does not have a relationship with student-athletes and does not purport to take direct action against them in enforcement processes. Despite the student-athletes status as a third party, oftentimes they are the first to receive some form of NCAA-initiated punishment.

Lastly, it is also important to note that over the last 30 years, in part because of member institutions’ relationship with the NCAA, athletic departments have frequently engaged in the practice of self-sanctioning student-athletes, teams, coaches, and their athletic programs in an effort to avoid more harsh penalties from the NCAA COI. The process of self-sanctioning occurs when an athletic department proposes and engages in self-sanctioning or self-punishment before the NCAA officially imposes its punishment. Common strategies include a voluntarily reduction in scholarships, public reprimand and censure, reduction in practice time, reduction in the number of official visits, additional rules education, and declaring involved student-athletes ineligible.[20] A critical moving part related to student-athlete due process is how NCAA member institutions’ fear of sanctions or their interest in self-preservation is in direct conflict with the best interest of involved student-athletes.[21] The NCAA manual includes a bylaw, 19.2.3.1, on exemplary cooperation by NCAA member institutions as a mitigating factor when determining a penalty for a violation.

**Student-Athlete Due Process**

**Legal Overview**

Collegiate student-athlete due process has a public policy and legal history that spans over three decades. Historically, the courts have held differing opinions on whether collegiate student-athletes should be afforded due process, whether eligibility is a protected interest, and if the NCAA is a state actor. In the public policy arena, several state politicians have raised concerns about the lack of student-athlete due process and its
impact on the success of athletic programs in the states they represent.[22] NCAA investigations have affected NCAA member institutions in 48 states. This section will provide a brief synopsis of the public policy and legal history related to NCAA student-athlete due process.

The legal history of student-athlete due process began in the early 1970s around the same time Title IX became law. Determining whether or not the NCAA was a state actor was at the forefront of early debates regarding NCAA due process. Early court opinions favored the NCAA as a state actor. In Buckton v. NCAA, a Massachusetts district court determined that the NCAA’s declaration that two Boston University hockey student-athletes were ineligible to compete involved state action.[23] The court maintained that the NCAA participated in a “symbiotic relationship” with NCAA member institutions.[24] The court believed that the NCAA, in supervising and policing the majority of intercollegiate athletics and U.S. student-athletes, performs a public function, sovereign in nature, that subjects it to constitutional scrutiny.[25] The court also raised the issue of the use of state funds to pay NCAA membership dues.

In Howard University v. NCAA, the university presented the entanglement theory to argue that NCAA actions were “impregnated with a governmental character.”[26] The D.C. Circuit raised the reality that one-half of NCAA member institutions are state-supported universities that receive public funds; thus, they provide the NCAA with most of its capital.[27] Because many NCAA members are state-supported schools, many of the governing committees are composed of, and subsequent policies made by, representatives from state-supported schools. The court surmised that the two aforementioned realities suggest that state-supported schools play a large part in NCAA regulation and supervision, including investigation and enforcement. Justice Tamm, writing for the majority, expressed that the court relied on several factors in its decision, including the belief that state institutions are the “dominant force in determining NCAA policy and dictating NCAA actions.”[28]

In Parish v. NCAA, the Fifth Circuit also relied on the entanglement doctrine and the public function test in holding the NCAA as a state actor.[29] Justice Thornberry commented that “the NCAA by taking upon itself the role of coordinator and overseer of college athletics—in the interest both of the individual student and of the institution he attends—is performing a traditional governmental function.”[30]

In Regents of the University of Minnesota v. NCAA, a Minnesota district court found that the action transgressed on the university’s legal obligation to provide the student-athletes due process when the NCAA imposed an indefinite probation on the university’s athletic program.[31] Prior to 1982, and the explosion of collegiate sports as a commercial enterprise, the courts generally found the NCAA to be a state actor and that student-athletes should receive due process.

McDonald v. NCAA was one of the few instances, prior to 1982, where the NCAA was not held to be a state actor.[32] Two California State University Long Beach men’s basketball student-athletes sued the university and the NCAA for injunctive relief after being ruled ineligible. The majority ruled that in order to find state action “the state must be so inextricably involved in the ‘private’ action or must be able to so control the ‘private’ action that this activity necessarily becomes the functional equivalent of an act of the sovereign.”[33]

In Arlosoroff v. NCAA, the Fourth Circuit indicated that unless the state orders the challenged action and the action performed is traditionally reserved by the state, no state action exists.[34]

In Spath v. NCAA, the First Circuit concluded that the University of Lowell as a publicly funded entity may be a state actor, but the court declined to decide the issue of whether the NCAA’s conduct constituted a state action.[35] The court did comment that “recent trends have limited [the concept of state action]” and moved to address the constitutional merits of the plaintiff’s claims.[36]

In Barbay v. NCAA, the Eastern District of Louisiana dismissed the student-athlete’s lack of due process claim on the grounds he failed to demonstrate state action when the NCAA suspended him from the Sugar Bowl.[37] The court reasoned that state subsidization by itself did not meet the threshold for status as a state actor or determining the suspension constituted a state action. This trend, which coincided with the increasing television revenue available via college football and basketball, marked a shift whereas the NCAA was not considered to be a state actor. The NCAA’s upcoming and protracted battle with basketball coach Jerry Tarkanian cemented the courts perspective.

University of Nevada v. Tarkanian, despite the actuality the defendant was an NCAA coach and not a student-athlete, has had an enduring impact on student-athlete due process.[38] The University of Nevada at Las Vegas
(UNLV) court battle with the NCAA began in 1972 when the governing body notified UNLV that it was initiating a preliminary inquiry into the university's athletic recruiting practices. When officials at UNLV conducted an investigation, they concluded that Tarkanian was innocent of any wrongdoing. The NCAA conducted its own investigation and as a result proposed sanctions, including reassigning Tarkanian and a two-year probation for the university. The president of UNLV chose to accept the sanctions and reassign Tarkanian.[39] Tarkanian filed for an injunction in state court, alleging that the NCAA deprived him of his property and liberty interests without due process. The trial court enjoined UNLV from suspending Tarkanian on the basis that he had been deprived procedurally and substantively of due process. Tarkanian then filed suit against the university and amended his filing to include the NCAA. The trial court ruled that because the NCAA’s conduct constituted state action for jurisdictional and constitutional purposes, the university was forbidden to take any other action against the coach. On further review, the Supreme Court of Nevada, agreeing that the NCAA engaged in state action, affirmed that because the NCAA violated Tarkanian’s substantive and procedural due process rights, the association could not enforce the sanctions that it had intended to impose on the coach. Dissatisfied with the outcome, the NCAA appealed, and the Supreme Court agreed to hear the case.

Almost 10 years later in *NCAA v. Tarkanian*, the Supreme Court reversed the state supreme court’s decision and held that threatened NCAA sanctions against the head basketball coach of a public university did not constitute state action, even though the university was a member of the NCAA.[40] Thus, the court ruled that the NCAA’s actions did not violate the coach’s civil rights. The dissent, written by Justice White, maintained that because the NCAA had hoped to have Tarkanian suspended for violations of NCAA bylaws, which UNLV had accepted as an NCAA member institution, the NCAA and the university acted jointly. The dissent pointed out that in other cases, the Supreme Court recognized that private parties became state actors when they acted jointly with state officials.[41] The dissent focused on the fact that UNLV contractually agreed to carry out its athletic program in accordance with NCAA rules. The dissent believed that because the NCAA determinations that Tarkanian violated its rules were made at NCAA-conducted hearings, the UNLV membership agreement, which resulted in Tarkanian’s suspension, amounted to joint action. Nonetheless, the Supreme Court ruling set the precedent for the NCAA’s lack of status as a state actor when NCAA member institutions restricted the property and/or liberty rights of student-athletes.

One trend that became apparent over time is when the courts addressed the issue of state actor status they rarely reached a decision on whether collegiate student-athletes have property and liberty interests that should be protected by due process. Comparable to the courts’ indifferent opinion on the issue of the NCAA as a state actor, the courts were also inconsistent in their views on whether student-athlete eligibility and reputation are protected property and liberty interests. One commentator posits: “The challenge for student-athletes is to demonstrate an entitlement to eligibility and the withdrawal of the eligibility without due process.”[42]

In early legal cases, including *NCAA v. Gillard*,[43] *Conard v. University of Washington*,[44] *Colorado Seminary v. NCAA*,[45] and *Howard University v. NCAA*,[46] the courts ruled that student-athlete eligibility was not a protected interest requiring due process. In particular, in *Colorado Seminary*, the courts ruled that due process could not be petitioned because the student-athletes did not lose their scholarships.[47] However, *Colorado Seminary* illustrates how the courts might be willing to recognize student-athlete’s protected interest in their athletic scholarships, if their ineligibility resulted in a loss of scholarship. In early cases, the court did not consider eligibility or the right to compete as a property right, although these were of the most interest to student-athletes.

The only federal case that determined athletic eligibility was a property right was *Hall v. University of Minnesota*. In *Hall*, a Minnesota district court ruled that eligibility to play collegiate sports was a protected property right and that the NCAA had failed to meet constitutional safeguards. The court concluded that an injunction requiring the university to admit the plaintiff into a degree program and to declare him eligible to compete in collegiate varsity basketball competition was appropriate. The court noted its concerns about the nature of the proceedings used to process the student-athlete’s application and that, given this aspect, the plaintiff should have at least been notified of the allegations made regarding his conduct so that he could have presented evidence in his own behalf.[49] If convincing the court that student-athletes’ eligibility was a property...
interest was viewed as difficult, then efforts to convince the courts of student-athletes liberty interests were almost impossible.

Few legal cases have demonstrated the willingness of the court to recognize student-athletes’ reputation or their liberty interests. In *Stanley v. Big Eight Conference*, a former Oklahoma State football coach claimed his reputation was damaged, and liberty to find a job limited, because of the process related to and the results of an investigation by the Big Eight Conference.[50] In *Stanley*, the Missouri district court ruled that the Big Eight was a state actor and that Stanley had a tangible interest in the adjudication of his alleged activities. Additionally, the court found that the plaintiff had demonstrated a very distinct liberty interest that could be drastically altered by the state action.[51] As a result, the court retrained and enjoined the Big Eight Conference from holding any hearings on any infractions in which Stanley allegedly played an active role and ordered the defendants to submit a process for completing any future hearings that comported with the demands of due process.[52]

In *NCAA v. Yeo*, a swimming student-athlete argued that her athletic reputation was damaged by her ineligibility.[53] Yeo obtained a temporary restraining order allowing her to compete, but the NCAA and University of Texas at Austin filed legal suits against her. Yeo, who had represented Singapore in two summer Olympics, argued that the decision would impact her reputation and the court agreed. The court concluded that her established swimming career vested more of a protected interest in her athletic eligibility. Yeo was awarded a permanent injunction that allowed her to compete. However, the Texas Supreme Court rejected the lower court’s ruling and dismissed Yeo’s claim for due process.

**Legislative Overview**

Legal precedents regarding student-athlete due process are mixed, but one characteristic is consistent in that student-athletes do not have the knowledge and resources to defend their interests. The purpose of government is to protect individual life, liberty, and property, and federal and state representatives have an interest in safeguards for student-athletes.

Congress is also concerned about the due process afforded to collegiate student-athletes.[54] Governmental concern first began in 1978 when the Subcommittee on Oversight and Investigations, of the House of Representatives Committee on Interstate and Foreign Commerce, convened to discuss the NCAA enforcement process. The committee developed 18 recommendations for the governing body including: (1) the specification of a statute of limitations, (2) the creation of evidentiary standards, (3) the elimination of ex parte contacts with the COI, (4) the elimination of the COI supervision of the enforcement staff, and (5) the establishment of a schedule of major and minor offenses. All of the aforementioned recommendations were adopted at the 1979 NCAA Convention.[55]

Thirteen years later in 1991, the House of Representatives developed a committee, the Special Committee to Review the Enforcement Process, to examine student-athlete due process. As a part of this process, the NCAA commissioned a study led by former solicitor general Rex Lee.[56] The Lee committee analyzed the NCAA enforcement process and suggested that the NCAA “should provide procedural fairness protections in the interest of its members and in its own interests.”[57] The committee proposed 11 recommendations, including suggestions relating to the hiring of independent judges to hear infractions cases and the opening of the enforcement proceedings to the public. At the 1992 NCAA convention, the NCAA council approved a number of meaningful Lee committee recommendations including: (1) providing enhanced preliminary notice of major rules violations to institutions’ CEOs, (2) developing a process for expedited hearings, and (3) liberalizing the use of tape recordings by making them available at locations other than the NCAA’s headquarters. However, the committee also proposed (4) that transcripts be made available to those with standing to appeal a COI decision, and (5) the hiring of an independent staff to assist the COI in scheduling hearings, writing reports, and handling public announcements. The executive committee did not approve the latter changes.

Also in 1991, Representative Ed Towns (D-N.Y.) introduced the Coach and Athlete’s Bill of Rights.[58] The bill called for the NCAA to provide due process in regulatory issues related to coaches, student-athletes, and NCAA member institutions engaged in sports considered interstate commerce. Almost simultaneously, state
governments also began to demonstrate an interest in student-athlete due process. By 1992, Florida, Illinois, Nebraska, and Nevada adopted student-athlete due process procedural guidelines, and six more states considered similar legislation. The right to proper notice, to counsel, and to suppress illegally obtained evidence, as well as the opportunity to cross-examine witnesses, were just a few of the procedural due process elements present in state legislation. However, a disconnect existed between the call for due process in state legislation and the practices of NCAA member institutions.

Due process, as a public policy issue, lay dormant until 1999 when the NCAA suspended several elite Division I basketball student-athletes. During the 1999–2000 basketball season, Erick Barkley, a St. John’s University basketball sophomore student-athlete, was suspended by the university athletic department intermittently for four weeks. Barkley, an All-Big East Conference performer, was first suspended on February 6, 2000. Initially, the NCAA did not reveal why Barkley was suspended, but the athletic department eventually learned it was because he allegedly accepted improper benefits related to his prep school tuition. On February 10, 2000, the Division I Committee on Student-Athlete Reinstatement upheld St. John’s appeal by reducing the suspension down to two games. On February 28, 2000, the NCAA suspended Barkley again for one game for accepting tuition assistance from Riverside Church to attend a prep school. Barkley was reinstated on March 4, 2000. At the end of the season, Barkley decided to enter the NBA draft early. “In a sense, I felt like they forced me out because they were bringing up issues that didn’t even occur, things I didn’t even do,” said Barkley.

Later in 2000, Representative Gregory Meeks (D-N.Y.) introduced the Collegiate Athletics Due Process Act of 2000, which sought to provide collegiate student-athletes who attend NCAA member institutions the same rights and privileges afforded to all citizens. According to Meeks, the legislation was proposed because the NCAA and its member institutions were violating the individual rights of student-athletes without affording them due process and because every institution of higher education should afford to its student-athletes the same protections of individual and private rights afforded to other citizens. On March 29, 2000, the bill was introduced and referred to the Committee on Education and the Workforce, but it was not passed into law. As such, the NCAA continued to suspended student-athletes—in particular student-athletes with low socioeconomic incomes who competed in revenue sports—in mass and without due process.

In 2004, 13 years after Congress last explored NCAA procedures, the Committee on the Judiciary held a hearing to explore concerns related to student-athlete due process. According to Senator Spencer Bachus (R-Ala.), the purpose or theme of the hearing was “fairness, particularly the fairness the NCAA displays in enforcing its rules.” Bachus noted that the NCAA implemented some meaningful changes over the last 13 years, but the association also had failed to implement significant changes recommended by the Lee committee. The most notable exclusions were the suggestions related to the hiring of independent judges to hear infractions cases and opening the enforcement hearings to the public. To conclude the hearing, Bachus formally wrote House Judiciary Committee Chairman Jim Sensenbrenner requesting a congressional oversight hearing to investigate actions of the NCAA. In the letter Bachus wrote:

After reviewing several recent cases in which NCAA member institutions were investigated and sanctioned, I am alarmed by the lack of procedural due process the NCAA provides to some member institutions it investigates and sanctions. The NCAA’s repeated failure to adopt meaningful reforms that afford even the most basic due process makes it apparent that this problem will not be resolved by the NCAA unilaterally.

Since the 2004 Judiciary hearings, the federal government has not acted to improve the due process rights of student-athletes. Also since then, 119 cases of impermissible benefits and/or academic fraud have occurred.

THE UNC ACADEMIC FRAUD CASE

The following case study will be narrowed to focus on the two UNC football student-athletes who allegedly violated bylaws related to academic fraud and exclude those solely accused of receiving improper benefits. Exploring student-athlete due process, in the context of the UNC/NCAA football investigation, requires a narrower focus for this article to sincerely contribute to social justice in collegiate athletics.


**The Setting and Context**

The University of North Carolina at Chapel Hill (UNC) became the nation’s first public university in 1789. UNC was the fifth best public university in *U.S. News & World Report’s* 2011 “Best Colleges” guidebook and tied for 12th among research institutions producing Fulbright students in 2009–2010.[68] In fall 2010, UNC enrolled 3,960 first-year students drawn from a record 23,271 applications. In all, UNC enrolled more than 18,500 undergraduates and nearly 11,000 graduate and professional students.[69]

The UNC athletics program boasts 28 sports—15 women’s sports and 13 men’s sports. The Tar Heels have won 39 national championships in six NCAA-sponsored sports. Forty-one Tar Heel student-athletes were named national athlete of the year. The UNC athletics program has a budget of $61 million and over 280 athletic department employees.[70] The Rams Club, a part of the Educational Foundation Inc., was chartered on December 7, 1938, to offer financial aid to worthy young men and women seeking an education at UNC. In 2008–2009, the Rams Club raised $23,875,000 for the UNC athletics program.[71] The UNC athletic department also initiated a $70 million rebuilding campaign, titled the “Blue Zone,” which adds the Student-Athlete Center for Excellence, and roughly 3,000 seats to the stadium’s east end.[72] Famous UNC alumni include former Democratic presidential candidate John Edwards, actor Andy Griffith, fashion designer Alexander Julian, and journalist Charles Kuralt. Notable UNC sports alumni include Michael Jordan, Mia Hamm, Charlotte Smith, Marion Jones, and Lawrence Taylor.

Paul Hilton “Butch” Davis officially succeeded John Bunting as the UNC head football coach on November 27, 2006. Prior to coming to UNC, Davis was the head coach at the University of Miami and for the NFL’s Cleveland Browns. Davis originally signed a seven-year deal worth approximately $1.86 million per season, with a base salary of $286,000 and a supplement of $1 million in 2007 ($1.3 million in 2013) from the Rams Club.[73] Davis took over a program that had fallen on hard times. The Tar Heels had only notched three winning seasons in the past eight years and had only crossed the six-win plateau two other times. By 2009, Davis had led the Tar Heels to an 8–4 regular season record and a second straight bowl appearance. Additionally, Davis led Carolina football to its sixth consecutive year of graduating more than 75 percent of its football student-athletes. The following season, the UNC football team finished with an 8–5 record, but lost its second straight bowl game (in the Meineke Car Care Bowl) to Pittsburgh (19–17). Coming into the 2010–2011 season, the UNC football team was ranked as high as 13th in preseason polls, and some analysts believed the team possessed the personnel to receive a Bowl Championship Series (BCS) bowl bid.[74] The 2010 UNC football team returned 19 starters, including 10 on offense and nine on defense. The Tar Heels had five starters on defense who were projected to go in the first round of the 2011 NFL draft, and according to some analysts their defense was the best in the country.[75]

**The Investigation**

On July 16, 2010, the UNC campus newspaper, the *Daily Tar Heel*, reported that the UNC football team was under investigation by the NCAA. The NCAA investigation was related to allegations that two rising senior football student-athletes received improper benefits from a sports agent.[76] On June 21, 2010, NCAA investigator Chance Miller sent North Carolina an interview notice form explaining to student-athletes that they will be asked if they have knowledge of rules violations. Then on July 12 and 13, 2010, Miller and another NCAA investigator, Rachel Newman Baker, interviewed an undisclosed number of UNC football student-athletes, including senior defensive tackle Marvin Austin, senior wide receiver Greg Little, and junior defensive end Michael McAdoo, on the UNC campus. The interviews pertained to the circumstances surrounding their attendance at parties in Miami, Florida, and Washington, D.C., earlier in the summer.[77] After the event, Austin apparently used the social networking site Twitter to share information on the party with his followers.

On August 24 and 29, 2010, after searching through emails from McAdoo and Jennifer Wiley, McAdoo again was interviewed by the NCAA enforcement staff. On August 27, UNC announced an internal inquiry over possible academic violations by football student-athletes. Veteran professors Jack Evans and Lissa Broome, along with associate athletic director John Blanchard, were tapped to lead the internal academic investigation. The emerging probe involved academic support tutor Jennifer Wiley and whether she provided improper academic

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assistance and benefits to UNC football student-athletes between 2009 and 2010.[78] At one time, the family of Butch Davis employed Wiley.

On September 5, 2010, the 18th-ranked Tar Heels were scheduled to begin the season against 21st-ranked LSU Tigers in the Chick-fil-A Kickoff Game. Three days before the game, on September 2, 2010, UNC suspended Marvin Austin, cornerbacks Charles Brown and Kendric Burney, Greg Little, and defensive ends Robert Quinn and Michael McAdoo.[79] McAdoo initially was suspended because UNC and the NCAA concluded that, in the summer of 2010, McAdoo had received a total of $110 in impermissible benefits in violation of NCAA bylaws 12.3.1.2, 16.02.3 and 16.11.2.1.[80] As a result, UNC declared McAdoo ineligible and planned to withhold him from the first three games of the season. In declaring McAdoo ineligible, the NCAA did not conduct its own investigation, but relied on the facts provided by UNC via interviews with UNC football student-athletes.

On September 28, 2010, UNC petitioned the NCAA for the reinstatement of Michael McAdoo. The request was based on the recognition of the NCAA’s reinstatement guidelines that identified the recommended punishment for receiving $110 in benefits to be the loss of at least 10 percent of the season (two games). During the request for reinstatement, UNC also informed the NCAA that McAdoo was allegedly involved in academic fraud and that he may have received impermissible benefits in the form of tutoring assistance.[81] UNC’s athletic department reported that McAdoo had violated NCAA bylaw 10.1 or the “[k]nowing involvement in arranging for fraudulent academic credit,” although the university’s investigation revealed McAdoo had no intent to deceive.[82]

On October 7, 2010, the Thursday before the Clemson game, Devon Ramsay, a junior fullback, was pulled from practice and told upon leaving practice that he needed to meet with athletic representatives immediately after showering. Ramsay participated in a 30-minute interview conducted by an assistant athletic director and the former UNC faculty athletic representative.[83] At the beginning of the interview, Ramsay signed a document that affirmed he understood that he had a right to legal counsel, he was required to cooperate with an NCAA investigation, and he could not talk to anyone about the interview. UNC athletic administrators and a faculty member asked Ramsay why he wrote certain sentences in the paper the way that he did for a course paper written over two years ago.[84] During the meeting, Ramsay called his mother, Sharon Lee, to ask her what he should do, and she advised him to immediately leave the meeting. After the meeting, there was no indication Ramsay did not write the paper, but the UNC compliance staff decided to withhold him from the Clemson game.

On or around October 12, 2010, the UNC honor court found McAdoo not guilty of the charge of representing another’s work as one’s own with respect to one course. The UNC student attorney general declined to bring charges against McAdoo with respect to the same allegation related to a second course. However, on October 14, 2010, the UNC honor court found McAdoo guilty of representing another’s work as one’s own with respect to a third course. This charge was the result of assistance that Wiley provided in July 2009 when she properly formatted the in-text citations and the website citations for the works cited page in that third class. On that day, McAdoo sent Wiley an e-mail with a draft of his SWAH 403 paper. In a second e-mail, McAdoo sent an electronic draft of the works cited for the entire paper. Two hours later, Wiley responded with a draft of the paper that included “references in the text of the paper that conformed to APA format, as well as a list of works cited.”[85] The works cited paged edited by Wiley did not include changes to book references, but the paper version did include reformatted website citations. McAdoo turned in the revised version of the paper. The honor court placed McAdoo on probation for the fall 2010 semester and suspended him for the spring 2011 semester. Further, the honor court ruled that McAdoo could re-enroll in the summer of 2011 and be eligible to play football in the fall of 2010.[86]

On October 9, 2010, UNC announced that fullback Devon Ramsay would be withheld from the Clemson game. Ramsay’s suspension was due to information gathered by UNC, via internal e-mail searches and interviews, regarding possible academic misconduct.[87] Allegations of academic wrongdoing revolved around a paper dated November 5, 2008, on “Industrialized Nations” for a Sociology 111 class. Ramsay also sent his paper to then tutor Jennifer Wiley for her review. A News & Observer (Raleigh, N.C.) article noted the paper only contained minor edits, but “there were major differences between the paper Ramsay sent the tutor and the...
paper he received back.” “A three-sentence concluding paragraph is added, and the material in the opening paragraph is rearranged and expanded,” the News & Observer reported.[88] The article also noted the version Ramsay sent Wiley described in detail complex issues like the distribution of wealth and that Ramsay owned a 2.6 grade-point average. On October 22, 2011, the UNC compliance staff ruled that Devon Ramsay and Michael McAdoo were ineligible for the Miami football contest.

**Permanent Ineligibility**

On November 15, 2010, the NCAA denied UNC’s reinstatement request and ruled Devon Ramsay and Michael McAdoo permanently ineligible under NCAA bylaw 10.1 for academic fraud.[89] Ramsay was ruled permanently ineligible by the NCAA despite the actuality the UNC honor court did not feel it necessary to hold a hearing regarding the paper for his Sociology 111 class. McAdoo was ruled ineligible despite the reality as the UNC investigation progressed UNC found that “it was reasonable for Mr. McAdoo to assume that the type of assistance offered and provided to him by his formally-assigned tutor in the Academic Support Program would be permissible.”[90]

On December 14, 2010, the NCAA conducted a telephone hearing for McAdoo regarding his appeal of reinstatement denial. UNC’s Office of University Counsel provided legal representation for the university athletic department, but McAdoo did not have representation. McAdoo was not allowed to participate in the hearing and was unaware the UNC attorneys were not there to represent his interests. At the time, the NCAA disregarded its own stated procedures and moved forward with the hearing despite disputes with the factual record. In dispute was that UNC reported McAdoo received impermissible assistance in multiple classes and over multiple academic terms. The UNC honor court ruled that impermissible assistance only occurred in one class. During the appeals hearing, the UNC staff attempted to argue there were no agreed upon facts and that the assumptions made by the NCAA were factually incorrect. However, UNC representatives did not request that the hearing be suspended because of the disputed facts.

On the other hand, in early December 2010, Ramsay’s mother, Sharon Lee, raised the issue publicly in the News & Observer. After the article appeared in the newspaper, former North Carolina Supreme Court Justice Robert Orr contacted News & Observer journalist Ken Tysiac, who in turn put him in contact with Lee. Two days before the final opportunity to appeal the reinstatement denial, it became clear that in order to proceed with the appeal, Ramsay would have to admit to committing the violation and stipulate to the facts. Justice Orr, Lee, and Ramsay conferred and agreed not to move forward with the hearing. At the time, there was no apparent process to further appeal the reinstatement denial. Justice Orr then made a proposal and UNC agreed that there was ample evidence that the NCAA never considered that a violation had occurred. Ramsay decided to push for reconsideration. On December 16, 2010, Ramsay postponed his appeal to the NCAA reinstatement decision. Meanwhile, Ramsay, Justice Orr, and Lee continued to provide information to the NCAA that contradicted information submitted by UNC. Almost three months later, on February 18, 2011, the NCAA reversed its decision and restored Ramsay's eligibility for his final season as a collegiate student-athlete.

On January 27, 2011, the NCAA denied McAdoo’s appeal of the reinstatement denial and affirmed his permanent ban from playing collegiate football. Throughout the entire process of being declared ineligible, McAdoo was without legal counsel. According to Noah Huffstetler, the attorney eventually secured by McAdoo, “no representative from UNC ever advised McAdoo that counsel for UNC could not represent McAdoo’s individual interest, or that he should consider getting separate counsel.”[91] On July 1, 2011, McAdoo filed a lawsuit against the NCAA and UNC, but on July 13, 2011, Durham (N.C.) Superior Court Judge Orlando Hudson denied McAdoo’s request for an injunction to compete during the 2011–2012 collegiate football season.[92] On November 15, 2011, Judge Hudson dismissed McAdoo’s lawsuit against UNC and the NCAA. On November 21, 2011, McAdoo’s attorney, Huffstetler, announced that McAdoo would appeal the dismissal of the suit.[93] The North Carolina Court of Appeals refused to reverse the lower court’s decision dismissing McAdoo’s case.

Over the course of the UNC investigation, a total of 16 players, all Black, missed at least one game during the 2010–2011 season due to the football investigation.[94] Seven were ruled ineligible for the entire year, while an eighth was cleared at midseason, but decided to redshirt.

**ANALYSIS**

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Ultimately, UNC decided that eligibility to compete in NCAA football competitions was more important than protecting student-athletes’ property and liberty interests. It is unreasonable to believe that UNC, or any other NCAA member institution for that matter, would risk forfeiting a game, a title, or a bowl appearance for the eligibility of one, two, or even 17 student-athletes. The UNC athletic department generates $61,263,269 in revenue, ranking it 31st among NCAA Division I schools.[95] In addition to Devon Ramsay and Michael McAdoo, 15 UNC football student-athletes targeted by the UNC/NCAA investigation missed a total of 87 games. A small price to pay compared to the financial repercussions of NCAA sanctions.

Legislative Next Steps

It is highly unlikely that federal policymakers will contribute to improving student-athlete due process because politicians are too transient, there is a lack of interest among constituents, politicians tend to be attention-driven, and student-athlete issues do not garner much attention. However, if federal policymakers decided to enhance student-athlete due process, then the laws in Florida, Illinois, Nevada, and Nebraska mandating student-athlete due process provide a blueprint for the protections they should be afforded, including notice of interview once suspected, the ability to confront witnesses, the full disclosure of the facts, the right to suppress illegally obtained evidence, the right to council, the right to a formal and public hearing, the inability to expel member schools, and the ability to impose damage liability. However, the critical attributes of any proposed federal due process legislation lie in the Collegiate Athletics Due Process Act of 2000, which calls for the following rights:

(A) The institution shall provide the student athlete with separate independent legal counsel at the institution’s expense immediately upon any investigation or alleged violation or infraction.

(B) The independent counsel shall be retained through the entire investigation and until all matters and facts of the pending case have concluded to the satisfaction of all parties involved.

(C) Notice and opportunity to be heard before an arbitrator, neutral party, or tribunal not associated with the National Collegiate Athletic Association or a member institution shall be afforded before any enforcement actions are administered by the institution.

(D) All hearings shall include the opportunity to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of the individual or private rights involved.[96]

Devon Ramsay and Michael McAdoo would have benefited from some of the basic protections mentioned above, and it is plausible that if these protections were in place that both student-athletes would not have been ruled ineligible and would have been able to compete.

Due Process for Ramsay and McAdoo

Devon Ramsay and Michael McAdoo were not afforded procedural due process. The case study indicates there was no notice of the allegations and no counsel for the two UNC football student-athletes upon being accused of NCAA bylaw violations. Neither UNC nor the NCAA provided a hearing for Ramsay or McAdoo prior to declaration of their ineligibility. While McAdoo was provided with a phone hearing for his appeal, his hearing did not include the opportunity to contest the facts he admitted guilt. Due process also includes the right to appeal, and Ramsay and McAdoo did not have the right to appeal, without prejudice, until they admitted guilt. When UNC, via the university honor court, provided McAdoo with due process and it was decided that he could return to football the following year, the athletic department did not respect the honor court’s decision. The absence of procedural due process deprived the student-athletes of certain property and liberty interests.

Ramsay and McAdoo’s Property Interests

One of the issues the court has rarely visited and has yet to resolve is how the property interests of student-athletes are impacted by the absence of due process. In order to have a property interest “a person clearly must have more than an abstract need or desire for it.”[97] The plaintiff must have more than a unilateral expectation...
and a legitimate claim of entitlement to the interest.[98] In the past, collegiate student-athletes have argued their protected interest is their athletic eligibility, but the prevailing legal rebuttal is that eligibility is too abstract to be a protected interest. However, what seems to be absent from the conceptualization of initial and continuing athletic eligibility is the labor student-athletes, parents, guardians, coaches, high school teachers, and administrators perform prior to the scholarship award and initial eligibility.

In this case, Devon Ramsay and Michael McAdoo invested seven to 10 years training, practicing, and competing to secure their athletic scholarship and initial eligibility. Ramsay began playing football at age 10. As a high school student-athlete, Ramsay attended Lawrenceville Prep, where the tuition for boarding students is $57,840.[99] As a senior, Ramsay won the Nick Gusz Best Male Athlete Award, which is given to the student-athlete who exhibits the highest degree of leadership, sportsmanship, and skill in two or more sports (he also ran track).[100] McAdoo also invested a great amount of time and energy to secure his athletic scholarship and initial eligibility. As a junior, McAdoo earned all-state, all-area, and all-district honors after collecting 36 tackles, including 13 sacks and 12 tackles for a loss. As a senior, McAdoo was rated among the top 50 defensive ends by Scout.com and posted 60 tackles, including 12 tackles for a loss and five sacks. Additionally, on offense McAdoo had 19 receptions for 29 yards and eight touchdowns.

Even after Ramsay and McAdoo signed their National Letter of Intent (NLI), they continued to earn their athletic scholarship and continuing eligibility as freshmen UNC football student-athletes. Ramsay earned his continuing eligibility by participating in workouts, meetings, practices, and NCAA football competitions, as well as meeting NCAA and UNC academic requirements. In 2007, Ramsay redshirted, meaning he delayed his athletic participation in order to lengthen his period of eligibility, but he was still responsible for participating in workouts, team meetings, and team functions, as well as meeting university and NCAA academic requirements. In 2008, Ramsay played in five NCAA competitions, primarily on special teams and as a reserve fullback. While representing UNC, Ramsay was injured and out for the 2008 football season after undergoing shoulder surgery in the middle of the season. In 2009, Ramsay had a career-best two catches for 40 yards against the University of Miami. In the next game, Ramsay made his first career start at fullback versus the University of Virginia and averaged 9.5 yards per catch.

McAdoo also earned his continuing eligibility to compete in collegiate football for UNC. In 2008, McAdoo produced a total of 20 tackles from the defensive end position including six solo tackles and three assists. In 2009, McAdoo continued to earn his continuing eligibility when he produced 20 tackles including 13 solo tackles and nine assists.[101] At the beginning of McAdoo’s junior season, he continued to earn his eligibility and athletic scholarship when he was named the defensive MVP of the spring game with four sacks and an interception. Lastly, when McAdoo graduated from Antioch High School (Tennessee) he was 6’7, 220 lbs., but he worked to add 20 lbs. for the purpose of representing UNC in collegiate football.

In light of the effort expended by Ramsay and McAdoo, from their childhood up until the moment they were suspended by UNC, both student-athletes had a legitimate claim to their athletic scholarship (i.e., opportunity to pursue an education), athletic eligibility, opportunity to compete, and the intersection between all three variables. A student-athlete’s property interests cannot be reduced to his or her athletic scholarship only. For elite collegiate athletes, who have aspirations to compete professionally, simply providing them with an opportunity to attend class, absent of the right to compete and possibly prepare for a professional sports career, deprives them of the opportunity to perform, perfect, and potentially profit from their “trade.” A large majority of Division I football student-athletes attend college because of the chance to compete in school-sponsored athletic competitions and audition for professional sports leagues. When student-athletes’ athletic role is removed, it is difficult for them to complete tasks associated with their role as students because the two roles are intimately intertwined. Practically speaking, the student role would not exist without the athletic role. When student-athletes are not allowed to participate in sports, because of ineligibility, their overall well-being is compromised. In addition to the time and energy invested by student-athletes, the courts should also consider the investment of parents, relatives, teachers, and former coaches who provide monetary, moral, equipment, travel, and other supports toward student-athletes’ athletic and academic property interests.
The Fourteenth Amendment is also designed to protect citizens’ liberty, reputation, and good name as they “bore directly on employment.”[102] The Supreme Court declared, “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”[103] Despite some meaningful legal cases involving student-athlete due process, few plaintiffs have raised their current and future athletic or nonathletic reputations as interests that should be protected by due process. Student-athletes’ liberty interests need to be protected from potential harm to their sport and non-sport reputations because of NCAA, athletic department, or university fact-finding investigations and the public reporting of information from the investigations. Harm might include the stigmatizing effects of the action; alterations to the student-athlete’s academic, sport, and future employment reputation; questions about the student-athlete’s character; and compromising the student-athlete’s overall psychological and social well-being. While much of the debate and legal wrangling has focused on student-athletes’ athletic liberties if their education is primary, then more discussion is needed related to their nonathletic liberties.

When a student-athlete’s eligibility expires, over 95 percent of students pursue a non-sport-related career, but controversies related to their former athletic role could impact their nonathletic professional reputation.[104] Nonsport reputations are important to former student-athletes who never make a professional sports team roster or who complete their professional sports playing days and seek non-sport-related careers after retirement. With regard to reputation, 61 percent of employers rank honesty or integrity as the most important employment trait.[105] Additionally, companies typically place a premium on character qualities, over skill variables, when considering new hires.[106]

If an employer conducted a Google search using the terms “Devon Ramsay, UNC football, and academic fraud,” he or she would find 37,000 hits or links. The first 50 pages would reference Ramsay’s suspension for violating NCAA bylaws. However, potential employers would find fewer Internet mentions, about 7,500, that Ramsay was cleared of academic fraud allegations and reinstated. Thus, when Ramsay desires to pursue a nonathletic professional employment opportunity, his former status as a UNC scholarship football student-athlete may harm his employability. Not only was Ramsay’s integrity questioned, but his intelligence was also ridiculed. One blog commenter posted, “Ramsay is a redshirt junior . . . think about that folks, let that sink in for a moment. A fourth year college student who has no grasp of basic punctuation, grammar, verb tense, and sentence structure—something most of us tamed, if not mastered, before leaving elementary school.”[107] On the Internet, McAdoo was frequently and consistently painted in a negative light. For example, when McAdoo filed the lawsuit against UNC and the NCAA, one comment written in response to the news read, “This is gold. I guess if your dumb & lazy enough to cheat, then you are probably dumb enough to sue after you were made to look foolish in the courtroom.”[108] Another blogger simply wrote, “haha. Stubborn cheater.” All of these elements damaged Ramsay’s and McAdoo’s nonathletic reputations, and the harm is likely to be perpetual. The actions of the UNC athletic department have the potential to deprive Ramsay and McAdoo of future liberty interests by damaging their sport and non-sport reputations.[109] In an (initial/first-time) employment climate that is more competitive than ever and an era where graduate school is almost a requirement, the reputation of these college athletes once they exit sport is critical.

**UNC as a State Actor**

In the past, the central issue regarding student-athlete due process is whether the NCAA is a state actor. However, in the current and transitional climate of NCAA sports, the central question should be whether NCAA member institutions are a state actor and not the NCAA. With the exception of *Hall v. University of Minnesota*, the balance of legal suits filed by student-athletes seeking due process were filed against the NCAA. Student-athletes seeking due process or damages caused by deprivation of due process have been unsuccessful because of the courts’ unwillingness to declare the NCAA a state actor. Unlike *McDonald v. NCAA*, *Buckton v. NCAA*, *Parish v. NCAA*, or *Regents of the University of Minnesota v. NCAA*, there is no need to determine or demonstrate a symbiotic relationship between the NCAA and the NCAA member institution.

Again, a state actor is a person acting on behalf of the government and is therefore subject to regulation under the Bill of Rights. If the NCAA member institution is a public, land-grant institution, then the likelihood it could be considered a state actor is greater than if it were a private institution. Secondly, if a NCAA member institution, as a component of the state, enters into a joint enterprise with a student-athlete, via the scholarship

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agreement, then this agreement strengthens the notion the NCAA member institution is a state actor. If the NCAA member institution uses its claim of legal right to violate student-athletes’ legal rights, such as suspend them without due process, then such state action gives the student-athlete the right to sue the NCAA member institution.

With respect to the deprivation of property rights, UNC initiated many of the key actions that adversely affected Ramsay and McAdoo. First, UNC conducted searches of McAdoo’s e-mail account. Next, UNC cooperated in the NCAA investigation by providing access for NCAA enforcement staff to interview the UNC student-athletes. Many aspects of the investigation were carried out by UNC because NCAA enforcement officials only conducted four in-person interviews with UNC student-athletes. Afterward, the UNC athletic department used information obtained from conversations and e-mail searches to generate cause to interview Ramsay. When exchanging information regarding the investigation with the NCAA, UNC forwarded erroneous information on both McAdoo and Ramsay. Moreover, once the UNC honor court found McAdoo guilty of one of three alleged violations, suspended him for one semester, and gave him an F in the class, the UNC athletic department had the authority to reinstate McAdoo for the 2011–12 football season, but it chose not to restore his eligibility.

UNC internal investigation was conducted surreptitiously and over an extended amount of time, which allowed for much speculation as to whether the two student-athletes violated the university honor code and any NCAA bylaws. The following actions impacted their liberty interests. Over the course of the UNC investigation, the UNC sports information department developed and distributed 10 press releases specifically related to the UNC football investigation. When UNC did release information, it was only to the media and to appease the media who viewed the case as a major collegiate sports scandal in light of UNC’s pristine reputation. With respect to Ramsay’s character, UNC reported erroneous and incomplete information regarding the paper on industrialized nations when UNC released the paper and alleged Ramsay received improper assistance from then tutor Jennifer Riley. The allegations raised questions about his intellect and integrity. McAdoo’s reputation was damaged when UNC sent erroneous information to the NCAA. Originally, UNC submitted that McAdoo had received impermissible assistance on multiple assignments, in several classes, and across several academic terms. The honor court determined that the honor code was violated in one class and over one semester. UNC initiated the majority of the actions against Ramsay and McAdoo and should be held accountable for depriving each of due process, but many barriers to student-athletes expecting and understanding due process exist.

**Barriers to Pursuing Due Process**

Absent the challenges associated with convincing the courts that NCAA member institutions are state actors, several challenges exists in the fight for student-athlete due process. Most notably is the task of helping student-athletes, many from backgrounds void of examples of social justice, understand their right to due process. Simply put, student-athletes are conditioned not to believe that they deserve or have any rights. Secondly, after the NCAA enforcement staff swoons down on them, student-athletes are oftentimes wedged between two very strong forces. The first influence comes from their athletic department, head coach, position coach, and teammates, who all have a desire to avoid sanctions. What is equally disturbing is that coaches, from the head coach to the associate coaches, like to pressure student-athletes to take off a few games (i.e., suspension), or even the whole season, for the sake of “the program.” It is difficult for a young man think about due process under the pressure of an athletic department. Being a part of an athletic department and team is like being a part of an extended family, and student-athletes do not want to be exiled by their extended family. Student-athletes may fear retaliation or being blackballed from team rosters or coaching positions.

The second competing force is internal because student-athletes want to be eligible, compete, and continue to audition for a career in professional sports. When a third party, the NCAA, puts student-athletes in this position, then due process is overshadowed by timelines to return to play for the student-athlete and the desire not to be portrayed by a school that will sell them out and use the next man on the depth chart. Student-athletes must be convinced that initiating litigation against their institution, in particular an injunction for due process when they receive notice, is critical. Nonetheless, it is a lot to ask a student-athlete to essentially confront the athletic department and coaches who provided their scholarship.

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Third, there are some falsehoods to dispel around a student-athlete’s access to an attorney.

CONCLUSION
In order to provide a more convincing argument, it is important to note that the framework for this case is the larger landscape of Division I sports. With the recent NCAA Division I Board of Directors’ decision to provide autonomy to the power conferences and the O'Bannon v. NCAA decision,[110] the population that due process concerns are most relevant and applicable to are the revenue-generating student-athletes in the power five conferences. On August 8, 2014, the Division I Board of Directors voted to allow the schools in the top five conferences to write many of their own rules. Some of the rules schools in the power five conferences intend to rewrite, including loosened restrictions involving contact between players and agents, letting players pursue outside paid career opportunities, and covering expenses for players’ families to attend postseason games. It is important to recognize that the ongoing deregulation of compensation for student-athletes means that schools will be more competitive, increased rule breaking is a possibility, and rule breaking can lead to more sanctions for member institutions and their student athletes. Several areas of rule autonomy have been discussed above, but due process is not one of them. In a post-O'Bannon era, a student-athlete who loses his or her eligibility will also sacrifice the $5,000 contribution to the trust that is only payable upon graduation as a result of the O’Bannon decision. The most likely way student-athletes will be successful in securing due process is via the courts. Neither the NCAA nor any NCAA member institutions are going to enhance student-athlete due process unless they are forced to address student-athletes’ needs and rights. At the conclusion of O'Bannon, the NCAA announced it would investigate UNC for a second time.

BIO:

ENDNOTES
[2]. Pursuant to its authority to enforce the provisions of the Fourteenth Amendment, Congress enacted 42 U.S.C. § 1983, which provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]”
[4]. See U.S. Const. amends. V, XIV.
[10]. Id. at art. 3.02.
[12]. There is an exception for benefits if they are available to other students. Bylaw 13.2.1 indicates the receipt of a benefit by a student-athlete or his or her relatives or friends that is not authorized by NCAA legislation is
not a violation if it is demonstrated that the same general benefit is available to the institution’s students, their relatives, and friends determined on a basis unrelated to athletic ability.


[17]. Typically, the NCAA does not conduct full investigations. Instead, the NCAA relies on coaches, athletic administrators, faculty athletic representatives, or special committees employed by the NCAA member institution to assist in investigations regarding NCAA bylaw violations.

[18]. The school is notified of alleged violations. The notice of allegations tells the school and all involved individuals the alleged violations the NCAA enforcement staff found during the investigation process. The involved parties have 90 days to respond and may request additional time if necessary. After the NCAA member institution responds, a prehearing conference with the school and other involved individuals is held four to six weeks before the hearing. During this conference call, the allegations are discussed. If the NCAA enforcement staff and the NCAA member institution disagree, then the member is subject to an official inquiry. The NCAA enforcement staff sends notice to the university president or chancellor detailing the outcome and requesting his or her cooperation. Afterward, a case summary and summary disposition are compiled. An in-person hearing does not have to take place if everyone associated with the investigation agrees on the facts and the penalties presented in the report. The COI reviews the report and decides to either accept the findings and penalties or conduct an expedited hearing. Lastly, the penalties are announced and there is an opportunity for an appeal hearing. Both institutions and involved individuals may appeal findings and penalties to the Infractions Appeals Committee.


[20]. Jason A. Winfree & Jill J. McCluskey, Incentives for Post-Apprehension Self-Punishment: University Self-Sanctions for NCAA Infractions, 3 Int’l J. Sport Fin. 196 (2008). The estimation results show that university self-imposed punishments can significantly affect the form or type of the final punishment, in particular the financial costs, NCAA members receive from the NCAA in response to a violation of NCAA rules.

[21]. NCAA Bylaws art. 19.7. The bylaw states that the NCAA can penalize an institution if an injunction is reversed in the interest of restitution.


[23]. 366 F. Supp. 1152 (D. Mass. 1973). The plaintiffs resided in Boston but were Canadian nationals and were ruled ineligible because they competed in the Canadian Junior Amateur League and received money for room, board, and expenses.

[24]. Id. at 1156–57.

[25]. Id. The court further explained that public institutions pay dues to the NCAA and that the state involvement in the NCAA includes the support, control, and regulation of member institutions.
[26]. 510 F.2d 213, 220 (D.C. Cir. 1975) (citing Evans v. Newton, 382 U.S. 296, 299 (1966)). The court observed the NCAA and public member institutions “form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny.” Id.
[27]. Id. at 219–20.
[28]. Id.
[29]. 506 F.2d 1028, 1028 (5th Cir. 1975). In this case, five Centenary College basketball student-athletes challenged the NCAA 1.600 rule.
[30]. Id. at 1032–33.
[33]. Id. at 630.
[34]. 746 F.2d 1019 (4th Cir. 1985). In this case, a Duke University tennis student-athlete sought injunctive relief against the university and the NCAA from being declared ineligible to compete because he was a member of the Israeli Davis Cup team.
[35]. 728 F.2d 25 (1st Cir. 1984). In this case, a Canadian hockey student-athlete was ruled ineligible for his senior season because he competed on an amateur team after his 20th birthday and prior to his college career.
[36]. Id. at 28.
[37]. No. 86-5697, 1987 WL 5619 (E.D. La. Jan. 20, 1987). In this case, the court theorized that the plaintiff must demonstrate that the state institution “caused or procured” the implementation of NCAA rules.
[39]. Kevin M. McKenna, Courts Leave Legislatures to Decide the Fate of the NCAA in Providing Due Process, 2 Seton Hall J. Sport L. 77, 78 (1992). According to McKenna, the president of UNLV reluctantly accepted the hearing officer’s recommendation, noting “the University was simply left without recourse.”
[41]. Id. at 199–200 (White, J., dissenting); see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288 (2001) (concerning whether the actions of an interscholastic sport association that regulated sports among Tennessee schools could be regarded as a state actor for First Amendment and due process purposes).
[43]. 352 So. 2d 1072 (Miss. 1977). In this case, a football student-athlete was ruled ineligible for receiving improper benefits, and while the supreme court stated his rights were of the upmost importance, it found that he was adequately provided with due process.
[44]. 834 P.2d 17, 22 (Wash. 1992). This case involved two football student-athletes who sued the university for breach of contract. The student-athletes claimed there was a breach of contract because the university did not renew their scholarships after their alleged misconduct.
[45]. 417 F. Supp. 885 (D. Colo. 1976), aff’d, 570 F.2d 320 (10th Cir. 1978). In this case, the court did not acknowledge that all student-athletes should be afforded due process, it concluded that due process could not be invoked because the students did not lose their scholarships.
[46]. 510 F.2d 213 (D.C. Cir. 1974). In this case, the NCAA found that certain members of the university’s soccer team participated in a competition while ineligible. The university imposed sanctions on the school and the school imposed sanctions on the student-athletes. The university sued, claiming the NCAA enforcement procedures violated their due process rights.
[47]. 417 F. Supp. at 895. The court did not acknowledge that all student-athletes should be afforded due process. It concluded that due process could not be invoked because the students did not lose their scholarships.


[49]. Id. at 106.

[50]. 463 F. Supp. 920 (W.D. Mo. 1978). In this case, all conference universities were state-supported schools.

[51]. In Stanley, Oklahoma State University head football coach, Jim Stanley, sought protection for his good name and reputation as they related to his ability to obtain employment. Stanley also argued his liberty interests could be impacted by the hearsay related to violating conference rules or any finding that he did break conference rules. Stanley sought to prevent the conference from conducting a hearing on the rules’ violations. The court opined that the interests of the court were too great to be decided by the 18-page investigator’s report.

[52]. Stanley, 463 F. Supp. at 934. Some of the processes consistent with due process included notice of the specific infractions and of the addresses of each witness appearing to testify against Stanley.


[54]. Issues in intercollegiate sports have increasingly received attention from the federal government. Within the last decade, Congress has held a hearing related to Title IX, the Bowl Championship Series (BCS), FBS Football, and diversity incoaching. At the state level, the Uniform Agent Act and Proposition 16 in California are the foci of state legislators.

[55]. The committee also recommended the NCAA should allow student-athletes to hearings and for the NCAA to make ineligibility decisions instead of institutions, but the NCAA disagreed and these reforms were not adopted.

[56]. Nat’l Collegiate Athletic Ass’n, Report and Recommendation of the Special Committee to Review the NCAA Enforcement and Infractions Process (1991). Rex Lee was then president at BYU, but he was also an attorney for the NCAA in Tarkanian v. NCAA.

[57]. Id.


[60]. Joe Drape, St. John’s Barkley Is Cleared to Play, N.Y. Times, Mar. 4, 2000,http://www.nytimes.com/2000/03/04/sports/basketball-st-john-s-barkley-is-cleared-to-play.html. In addition to Barkley, Michigan’s Jamal Crawford, Oklahoma State’s Andre Williams, Cincinnati’s DerMarr Johnson, Temple’s Kevin Lyde, Auburn’s Chris Porter, Missouri’s Kareem Rush, and UCLA’s JaRon Rush were suspended off and on for a total of 52 games due to their alleged involvement in violating NCAA bylaws.


[62]. Later, during the Big East tournament, the NCAA intimated that it was widening the investigation into circumstances surrounding Barkley’s college entrance exam taken while he attended prep school in Maine and Barkley’s relationship with Andy Miller.


[66]. Due Process and the NCAA, supra note 65.

[67]. The prevailing thought is that student-athletes who accept impermissible or extra benefits do not deserve or would not benefit from due process, even if due process procedures were enhanced, because they knowingly broke the bylaws and the outcome would be no different. The narrowing of the article’s focus is not an indicator. The author does not believe that student-athletes accused of violating extra benefits bylaws do not deserve due process. Nonetheless, to avoid the complexity of extra benefits bylaws, the focus of this section will be the on the two student-athletes accused of academic fraud and the role of due process in their declaration of ineligibility and reinstatement processes.


[79]. McDoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811 (N.C. Ct. App. 2013). The UNC athletic department also suspended seven other UNC football student-athletes including running backs Shaun Draughn and Ryan Houston, defensive end Linwan Euwell, and safeties Deunta Williams, Brian Gupton, Da’Norris Searcy, and Jonathan Smith. A total of 12 football student-athletes were withheld from UNC’s loss to LSU.

[80]. Id. at 818. The investigation revealed that an alleged “prospective agent” had paid for a two-night stay at a hotel ($89) and paid a cover charge to a Washington, D.C., nightclub in April 2010. McDoo believed that teammate Marvin Austin paid for the expenses. The investigation also revealed that McDoo had received one hour of tutoring services ($11) from a tutor no longer employed by the university.

[81]. Id. at 816.

[82]. Id. at 817.


[84]. Id.

[86]. *Id*.


[93]. *Id*.

[94]. Seventeen student-athletes missed a total of 87 games in the 2010–2011 season.


[98]. *Id*. Roth also identifies the source of property rights and that they are created and their dimensions are defined by existing rules or understanding that they stem from an independent source such as state law.


[102]. *Supra* note 52.


[106]. *Id*. at 44.


[109]. *Supra* note 64.

Parody, Satire, and Jokes

BY VICTORIA CUARTERO, DAN SATORIUS, MICHAEL DONALDSON

This article is excerpted from the fourth edition of Copyright & Clearance by Michael Donaldson and Lisa Callif. It covers three distinctly different concepts—parody, satire, and jokes—that people often confuse. A parody comments directly on a copyrighted work and therefore is allowed to take quite a bit from the work that is the subject of the parody. A satire comments on some aspect of society and is often evaluated liberally under the fair use doctrine. Neither one has humor as a requirement; even though, they frequently evoke laughter—or at least a smile. Therein lies their confusion with jokes. A joke gets no special break under copyright law. The issues raised by jokes are usually all about the personal rights of the person who is the object of the joke. That too will be explained.

DEFINITION OF PARODY

A parody is a specific legal concept with specific requirements, which is a very misunderstood area of the law. There is no humor defense for copyright infringement. You are not exempt from obtaining clearance of copyrighted material just because the material is used in a humorous way. There is only a parody defense, which is a subset of the fair use defense.

The first time the Supreme Court accepted a parody case was in what has become known as the Gaslight Case. Its facts are worth recounting, so let’s set the stage. In 1938, British playwright Patrick Hamilton wrote a play entitled Gaslight, which tells the story of a man in Victorian London who sets out upon a deliberate plan to drive his wife insane. After successful stage runs in both England and the U.S., MGM acquired the play’s motion picture rights and made a serious suspense film based on it. (Gaslight, 1944, directed by George Cukor, and starring Charles Boyer and Ingrid Bergman, was nominated for seven Academy Awards in 1945, winning two.[1])

In 1945, comedian Jack Benny licensed the right to make, what the court called, a 15-minute “burlesque” of the popular film that was broadcast over national radio. Then, in 1952, Benny made Autolight, a 30-minute TV show based on Gaslight.[2] It was made in a similar comedic fashion as the radio broadcast, but this time no license was obtained.

Loew’s Inc. (MGM’s parent company) and Patrick Hamilton didn’t think this was funny. The studio sued the TV network for copyright infringement.[3] The studio and author won.

The lower court wrote, “The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of copyright.”[4] The Supreme Court affirmed the lower court’s decision without issuing an opinion.[5]

Neither the Gaslight case nor its progeny[6] gives a clear legal definition of a parody; however, a distillation of the cases in this area provides the following working definition for the practitioner:

1. A new, copyrightable work
2. based on a previously copyrighted work
3. to such an extent that the previous work is clearly recognizable,
4. but not taking more from the copyrighted work than is reasonably appropriate,
5. that criticizes or comments on the subject matter or style of the previous work, at least in part, and
6. is not likely to invade the market for the previous work.
There is no requirement for humor. Statistically speaking, most examples of parody turn out to be humorous. But parodies rarely put a smile on the face of the owner of the underlying work. Judges often go out of their way to say that they don’t think that the parody before them is funny.

A TRUE PARODY DOES NOT HAVE TO BE CLEARED

One of the reasons that true parody is allowed without permission from (or payments to) the original copyright holder is that to do otherwise would eliminate the art form. If someone creates a serious work, they do not want someone else to take the heart of the work and poke fun at it or belittle its core message under the cover of parody.

The Supreme Court did not issue a detailed decision on parody until the 2 Live Crew case in 1994.[7] The reason for the lawsuit was that 2 Live Crew wrote, recorded, and released a song which they thought was a parody of Roy Orbison’s 1964 hit song “Oh, Pretty Woman.” Not surprisingly, this upset Orbison’s publisher Acuff-Rose Music. Here are selected lyrics from Orbison’s “Oh, Pretty Woman” compared to 2 Live Crew’s “Pretty Woman.”[8]

“Oh, Pretty Woman” by Orbison and Dees vs. “Pretty Woman” by 2 Live Crew

| Pretty Woman, walking down the street, | Pretty woman, walkin’ down the street, |
| Pretty Woman, the kind I like to meet, | Pretty woman, girl you look so sweet, |
| Pretty Woman, I don’t believe you, | Pretty woman, you bring me down to knee, |
| You’re not the truth, | Pretty woman, you make me wanna please. |
| beg | |
| No one could look as good as you. | Oh, pretty woman. |
| Mercy. | |
| Pretty Woman, won’t you pardon me, | Big hairy woman, you need to shave stuff |
| that | |
| Pretty Woman, I couldn’t help but see, | Big hairy woman, you know I bet it’s tough |
| Pretty Woman, that you look lovely as can be. | Big hairy woman, all that hair it ain’t legit |
| Are you lonely just like me? | ‘Cause you look like Cousin It. |
| Pretty Woman. | Big hairy woman. |

The 2 Live Crew won their case on the parody issue. As in virtually all parody cases, the first three factors in my definition were clearly established by 2 Live Crew. These lyrics are (1) a new creation (2) that is based on Roy Orbison’s “Oh, Pretty Woman” (3) to such an extent that the original “Oh, Pretty Woman” is clearly recognizable—even on the written page without the music.

The fourth factor brings in some subjective judgment as to whether 2 Live Crew did or did not take more from Orbison’s “Oh, Pretty Woman” than was reasonably appropriate. Courts tend to defer greatly to the artist, often finding that the taking was not excessive. Perhaps 2 Live Crew could have taken a little less, but that is basically a creative judgment. The courts try not to second-guess that creative judgment if they find that all the other parody requirements are satisfied. As we have more parody litigation and therefore more decisions, this factor will become clearer. Right now, the test is whether the amount taken is no more than “reasonably appropriate.”[9]

Justice Souter’s opinion set the record straight on that issue as follows:

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It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the “heart” of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.[10]

The fifth factor concerning commentary on the underlying work is the focus of most of the opinions. Almost any commentary on the work can qualify. Commentary on society in general rather than the source material in particular, however, will not qualify. That would be a satire, not a parody.

Once you get this far in the analysis, it almost always follows that the new work seeks a different audience from the audience sought by the previous work. While courts spend a lot of time on this factor and most scholarly writers believe that this finding is essential, we view it as less bothersome than the remaining elements since it is hard to imagine a circumstance in which the parody would be seeking the same market as the previous work. To me, one result of creating a parody of a work is an appeal to a different audience.

To listen to the 2 Live Crew song, navigate to this URL:
http://www.clearanceandcopyright.com/ch3/1

Here is an example in which the parody clearly seeks a different audience from the audience attracted to the original work. In an episode of the animated TV show Family Guy entitled “I Need a Jew,”[11] the show’s goofy central figure and patriarch, Peter Griffin, finds himself in a financial pickle. Taking advice from his friends, Peter decides that he needs to find a Jew to solve his financial troubles. Peter breaks into song, while looking up at the night sky similar to the toymaker Geppetto in Pinocchio. The new lyrics are “nothing else has worked so far, so I’ll wish upon a star, wondrous dancing speck of light, I need a Jew” to the tune of “When You Wish Upon A Star.”

The copyright holders of “When You Wish Upon A Star” sued. They lost.

Finding that the messages of the songs were “strikingly different,” the court held that “I Need a Jew” parodied the sweetness of the idyllic message of Geppetto’s song because Peter ignorantly sang about stereotypes of Jewish people.[12] The court concluded that the two songs served different market functions and appealed to different audiences.

To view the clip from Family Guy, navigate to this URL:
http://www.clearanceandcopyright.com/ch3/2

There are two interesting cases from the book publishing world that help to shed some light on the concept of parody and how the factor of commentary on the underlying work (not humor) is the key factor in deciding whether a work qualifies as a parody, and therefore does not need the permission of the owner of the copyright of the underlying work.

Humorous Book but Not a Parody

Not too long after O. J. Simpson’s criminal murder trial and before a civil jury found him responsible for killing his ex-wife Nicole Brown and Fred Goldman, several books came out about the case. One of these books was being shipped to stores when a court halted its delivery. Very few copies of the book ever saw the light of day. The book was called The Cat Not in the Hat.[13] The author/defendants claimed it was a parody based on Dr. Seuss’s famous The Cat in the Hat.

Let’s hold The Cat Not in the Hat up to the six-point Donaldson test set out above. Keep in mind that the fifth factor (criticizing or commenting on the subject matter or style of the previous work at least in part) is the key, and that is exactly where Simon & Schuster lost their case. Although their lawyers tried to argue that The Cat Not in the Hat was a commentary on the innocence of the Seuss book, it was crystal clear that the...
book was trying to take a humorous look at the murder trial. And the thing that made it humorous was the relentless, start-to-finish taking of the style and rhyming of Seuss and even the look of the illustrations in Seuss’s book.

The commentary was not on the Seuss book, it was on the O. J. trial. If the authors wanted to write humorously—or otherwise—on the O. J. trial, they would have to create their own work, not “borrow” someone else’s work. They merely rewrote the Seuss text, preserving many of the phrases of the original in order to create a wry look at what the authors believed was a miscarriage of justice.[14]

Once that factor went against the *The Cat Not in the Hat* authors, nothing else mattered. One could view the taking of *The Cat Not in the Hat* as excessive. After all, even the Seuss drawings were mimicked in the new work. And there is a strong argument that the existence of this work would have been very confusing to the young audience of *The Cat in the Hat*. Certainly, it would have been easy for someone to grab the wrong book because of the books’ visual similarities. It would have been natural for someone to believe that there was some sort of endorsement or approval from the Seuss estate for the new work. But the important reason that the copies of the new book had to be destroyed was that the social commentary was *not on the underlying work*, it was on a completely different subject—no matter how hard its publisher’s lawyers tried to twist things after the fact.

To view the material from *The Cat Not in the Hat*, navigate to this URL:

http://www.clearanceandcopyright.com/ch3/3

The court mentioned The Cat in The Hat case when they sided with Columbia Pictures against Miramax. Miramax made a trailer and poster for Michael Moore’s documentary film *The Big One* that they intended as a parody of the highly successful *Men in Black*. [15] The court said that Miramax’s poster and trailer did not comment on *Men in Black*, but merely incorporated features of Columbia’s work to “get attention” and “avoid the drudgery in working up something fresh.”[16]

To view the clip from *The Big One*, navigate to this URL:

http://www.clearanceandcopyright.com/ch3/4

Similarly, an Australian beer company was prevented from using Disney’s Snow White character in an X-rated advertisement.[17] In an effort to convince beer drinkers that its raspberry ale was “anything but sweet,” the beer company ran an ad that renamed Disney’s fairytale heroine Ho White, depicting her blowing smoke rings while lying in bed with seven semi-clad dwarves. Like Miramax, the beer company should’ve worked up something fresh on its own.

To view the material from *Snow White*, navigate to this URL:

http://www.clearanceandcopyright.com/ch3/5

In contrast, when Paramount Pictures ran its ad campaign for the 1994 movie *Naked Gun 33 1/3: The Final Insult*,[18] the studio was allowed to parody the cover of a famous 1991 *Vanity Fair* issue that portrayed the nude profile of then-pregnant actress Demi Moore, with her right hand and arm covering her breasts, her left hand supporting her distended stomach, and a serious look on her face. The ad in question featured male actor Leslie Nielsen’s head photo shopped into the famous Annie Liebowitz photo of Ms. Moore with a foolish smirk on his face. The court said that the Paramount ad targeted the original photo by ridiculing the “undue self-importance” conveyed by Moore, and that the ad could reasonably be perceived as an extension of the movie’s humorous treatment of pregnancy and parenthood.[19]

To view the material from *Vanity Fair*, navigate to this URL:

http://www.clearanceandcopyright.com/ch3/6

**Serious Book Was a Parody**

*The Wind Done Gone* is Alice Randall’s small and powerful 2001 novel about the slaves who populated Tara, the cotton plantation in Margaret Mitchell’s popular 1936 novel *Gone with the Wind*. [20] Mitchell described the

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furniture in *Gone with the Wind* in more detail than the black slaves who worked on Tara. The Mitchell estate sued Randall and her publisher—and won an injunction at the trial court level—on the theory that *The Wind Done Gone* was an unauthorized sequel.[21]

The estate lost on appeal[22] and *The Wind Done Gone* was allowed to be published.

When you compare the two books using the six-point Donaldson test, it is easy to see why *The Wind Done Gone* is available for purchase today. It clearly makes commentary on the subject matter of *Gone with the Wind*. It takes thinly disguised characters, particularly black characters, right out of *Gone with the Wind*, and tells their rich stories, including the pain they felt by being treated as less than human by Mitchell’s white characters who loom so large in American literary life. So the fifth factor—the key factor of commentary—is very much in favor of *The Wind Done Gone*. In fact, *The Wind Done Gone* could have used even more material from *Gone with the Wind* than it did.

This case also illustrates the powerful forces that seek to broaden the fair use area. The following news organizations all filed Amicus Briefs on behalf of *The Wind Done Gone*: Cox Enterprises, Cable News Network, and the owners of *The New York Times and the Boston Globe, The Wall Street Journal, the Chicago Tribune, The Los Angeles Times, and The Tampa Tribune*. [23]

To view the material from *Wind Done Gone*, navigate to this URL:


**Serious Film Was a Parody**

In late 2009, a family planning clinic near Detroit created an educational video in an effort to destigmatize abortion.[24] The message of the video was that abortion is not uncommon and that women are good regardless of how they exercise their reproductive rights. In early 2011, some opponents of abortion began making their own videos, which included some of the clinic’s original video. These anti-abortion videos set the audio of the clinic video’s to graphic, up-close images of the surgical procedure of dismembering and removing fetuses in late-term abortions. One of the opponents said that the message of its video was to “expose the fallacies” of the clinic’s video.

The clinic sued.

The clinic lost.[25]

The court found that the defendants’ anti-abortion videos were parodies of the clinic’s pro-choice video. The court said that the anti-abortion videos turn the clinic’s message “on its head”[26] by alternating clips of the calm, empathetic doctor explaining that choosing to have an abortion does not make you a bad woman with shockingly graphic images providing highly critical commentary on the pro-choice message of the clinic’s videos.

To view the clip from *Family Planning Clinic*, navigate to this URL:

WARNING: This clip contains extremely graphic footage and may be difficult to watch.


**Commentary Counts No Matter How Ridiculous**

Consider the case of the viral video “What What (In The Butt),”[27] a bewildering video uploaded to YouTube on Valentine’s Day in 2007, which featured an African-American man dressed in black pants and a half-buttoned red silk shirt, dancing, alternating between a seductive glare and a Cheshire grin, repeatedly singing, “I said what what in the butt . . . you want do it in my butt, in my butt.” In 2008, one of the characters in *South Park*, is convinced by his fellow classmates to record an Internet video with the goal that it will go viral and generate a lot of money. The *South Park* video is a one-minute animated mimicking of the original video.[28]

The copyright holder of the original video sued.

They lost.[29]
The court held that *South Park*’s video was clearly a parody, stating that it provides “commentary on the ridiculousness of the original video and the viral nature of certain YouTube videos.” The court marveled at *South Park*’s accomplishment, transforming the original by making it “even more absurd by replacing the African-American male singer with a naïve and innocent nine-year old white boy.” Importantly, the court discussed that, because the original video “exemplifies” the modern-day viral video, *South Park* properly took a substantial amount (the “heart”) of the original video in order to make its parody.[30]

To view the clip from *South Park*, navigate to this URL:


**Parody and Personal Rights**

If you parody a person, the chances of upsetting that person are substantial. Political candidates are so used to this, they generally just shake it off, but not everyone can. Take for example, Jerry Falwell, a well-known Evangelical pastor who was featured in a parody advertisement in *Hustler* magazine.[31] Falwell sued *Hustler* for defamation and intentional infliction of emotional distress when the porno mag featured a fictitious Campari liquor ad with a mock interview of Jerry Falwell talking about his “first time.” The *Hustler* ad was a parody of a series of liquor ads in which celebrities spoke about the first time they consumed Campari, which often times sounded like they were speaking about their first sexual experiences. The *Hustler* ad had Falwell saying that his first time was during a drunken rendezvous with his mother in an outhouse. Falwell was quite upset and sued on a number of theories, including defamation, but the court did not take his side on this issue. The trial court ruled that no reasonable person could have believed the advertisement to be true.[32] Falwell also sued for intentional infliction of emotional distress. On this issue, the court found *Hustler* liable. This case went all the way up to the Supreme Court, which affirmed the lower court’s ruling regarding the defamation claim[33] but reversed the ruling regarding Falwell’s claim for intentional infliction of emotional distress. The Court said that public figures and public officials may not recover for this claim without showing that the defendant maliciously made a false statement of fact (and this was clearly not a “fact”).[34]

To view the material from *Falwell*, navigate to this URL:

http://www.clearanceandcopyright.com/ch3/10

Public figures have also tried to assert publicity rights violations in order to curb these unflattering parodies. The Winter brothers—Johnny and Edgar, well-known Texas blues-rock musicians who have albino features—were very offended by their fictional portrayal in the Jonah Hex comic book series.[35] The series depicts the brothers, which it calls the Autumn Brothers, as villainous half-worm, half-human offspring born from a human mother who was raped by a worm. Even though the characters in the comic book are clearly fictional, they have long white hair, like the Winters, and their names are also very similar.

Unflattering? Yes.

A violation of the Winter’s brothers’ publicity rights? No.[36]

The court specified that what matters in a case like this is “whether the work is transformative” and it is irrelevant “whether it is a parody or satire or caricature or serious social commentary or any other specific form of expression.”[37] Therefore, since the depictions of the Winter brothers contain significant expressive content, the defendants do not greatly threaten the brothers’ right of publicity and are entitled to First Amendment protection.[38]

**TRADEMARK PARODY**

Courts have been increasingly tolerant of those who would make fun of a product by parodying its trademark. A couple of the best cases of this involved the good old-fashioned Barbie doll. Remember the catchy “Barbie Girl” song that repeatedly refers to Barbie’s ability to party and undress anywhere?[39]

Mattel sued MCA Records.

Mattel lost.[40]
Unfortunately for Mattel, the court ruled that there was little likelihood that consumers would think Mattel had anything to do with the song, and the song was a parody because it commented on the doll as opposed to any other subject.

This didn’t stop Mattel from suing others. Artist Tom Forsythe was also a victim of a trademark infringement suit by Mattel.[41] He photographed a series of images featuring Barbie dolls in a variety of nude and provocative poses. Some of the photos showed the dolls sitting in martini glasses and rolled up as enchiladas in an oven. Tom said he wanted to convey the message of “crass consumerism.” The court agreed with Tom.[42]

The court said Tom parodied Barbie even though his ultimate goal was to create his own work.

To view the material from Barbie Girl, navigate to this URL:
http://www.clearanceandcopyright.com/ch3/11

Corporations also go after parodies of their products. Wal-Mart sued a website owner, Charles Smith, who was (and is) an avid and vocal critic of the corporate giant.[43] He likened Wal-Mart and its practices to the "Walocaust" and "Wal-Qaeda."[44] Smith argued that his use of Wal-Mart’s trademarks constituted a parody. He claimed he created the website to stimulate discussion on the destructive effects of Wal-Mart both on its workers and the United States as a whole. The court agreed that Smith’s concepts successfully conveyed a parody and held that his parodic work outweighed any of Wal-Mart’s trademark claims.[45]

WHAT PARODY IS NOT

The above discussion is designed to give you a high-level idea of what constitutes a parody. To be absolutely clear, the following items are pointed out because they are not parodies:

- A copyrighted song presented in a funny way. A love song sung by someone in drag or by a drunk character slurring through a song or by a singer performing a song intentionally off-key may be intended as a joke. These may (or may not) bring laughs, but they fail as parodies and therefore must be cleared. They are not parodies because they are not new works and do not make any commentary on the original lyrics.

- Changing a song slightly (or significantly) to fit your purposes. California assemblyman Charles DeVore was found to have infringed Don Henley’s hit songs "The Boys of Summer" and "All She Wants to Do Is Dance" with two of DeVore’s political advertisements featuring the songs "The Hope of November" and "All She Wants to Do Is Tax."[46] Explaining that a parodist must directly target the original work, the court went on to hold that the politician excessively copied the music, rhyme scheme, and syntax of Henley’s songs in order to attack entirely separate subjects than those contained in the original songs.[47]

- An impersonator or impressionist singing a song (without changing it) in a style of someone other than the person who made it a hit is not a parody. If Dana Carvey were imitating President Obama singing "The Party’s Over", it would not be a parody. If the words and music remain the same, there is no parody. Even though the notion of President Obama singing that song, might be humorous.

SATIRE

A satire comments on social conventions. Unlike a parody, a satire can stand on its own and make a statement without borrowing from an original work.

When courts are presented with a satire case that borrows from another case, they don’t say “this is a satire, so we will give it extra latitude.” Rather, courts painstakingly set out the manner in which the new work comments on some social condition and use that as a significant factor in their fair use analysis. For the purposes of this article, satires are a separate subject because of the frequent confusion among parodies, satires, and jokes.
Let’s look at an example that you may remember—a film that’s a true satire, but doesn’t use any copyrighted materials (or trademark) to create the satire. However, almost every reference to Animal House declares it to be a satire on college fraternity life.[48] The film depicts two freshmen attempting to join a fraternity. The students, turned away from the clean, elitist, predominantly Catholic and conservative Omegas, try their luck at the Delta Tau Chi house. The Delta house engages in typical fraternity debauchery like breaking bottles, urinating on people, and strewing household items across the front lawn. The freshmen are quickly accepted by Delta because the fraternity needs the money. The remainder of the film serves as a forum to comment on the fraternity culture and their rivalries. So, as you can see, the film did not need to borrow from a copyrighted work to make its point, but it definitely could have! The several lawsuits concerning this film did not address these issues. The court’s opinion mention the film only as an archetypical example of satire.

Another, more recent case involved the artist Jeff Koons. Koons was paid $1.6 million to create a series of paintings entitled the Easyfun-Ethereal for Germany’s Deutsch Bank. One of these paintings was entitled “Niagara”. He culled advertising images and his own photographs, scanned them into a computer, and digitally superimposed the scanned images against backgrounds of pastoral landscapes to comment on the ways in which our most basic desires are depicted in popular images. In Niagara, Koons scanned a photo by Andrea Blanch titled Silk Sandals by Gucci, which was, as its title suggests, a photo of a pair of woman’s feet wearing Gucci sandals. Blanch had shot the photo for a Gucci ad. Koons incorporated part of the photo into his own artwork, which depicted four pairs of women’s feet and lower legs dangling over images of various dessert dishes. Blanch recognized her photo. She was not happy. She sued.

She lost.[49]

The court explained the satire in detail by describing the social comment being made, rather than sticking the satire label on the painting. In fact, the court doesn’t even mention the word satire. The court focused on the first fair use factor (the purpose and character of use), and said it weighed in favor of Koons’s appropriation stating the use of the photo was transformative because its purpose was to demonstrate how advertising whetted our various appetites, not to sell shoes for Gucci.

The court concluded that Koons used Blanch’s photograph in a transformative manner to comment on its social meaning rather than to exploit its creative virtues. Koons wanted to “comment on the ways in which some of our most basic appetites for food, play, and sex are mediated by popular images.”[50] This is the very definition of satire.

This wasn’t the first time that Koons was sued for using someone else’s work to create his own pricey pieces. In the two previous cases (both involving sculpture), he did not fare so well because the courts did not totally buy in to his social commentary argument.

Before the Blanch case, Koons directed the creation of a sculpture called String of Puppies based exactly on a photograph of puppies. Koons’s work was an enlarged three-dimensional sculpture of the puppies painted in different colors. The art medium otherwise, the photograph and sculpture were essentially identical except for size and color. Koons argued that his sculpture is a satire or parody of society at large.[51] The court stated that to qualify as parody the allegedly infringing work must comment or criticize the specific underlying work.

The main difference is that when Koons used Blanch’s photograph in Niagara, the artwork was commenting on how that photograph, along with other popular images, whet our appetites for food, play, and sex. When Koons copied elements of the puppies photo to create String of Puppies, the resulting piece did not comment on or criticize the original photo and his arguments that he was commenting on social norms was not persuasive with the court. Obviously, he learned how to present his point of view more convincingly from this earlier case.

To view the material from Koons, navigate to this URL:
THE CASE OF THE JOKE
Many clients confuse parodies and satires with jokes. Dictionary definitions range from “someone or something that is not worth taking seriously”[52] to “a brief story with a surprising and funny ending.”[53] Our office defines joke as something that is said or done to evoke laughter and is understood or perceived as an attempt to evoke laughter by the listener. We all have heard a loud groan when a joke falls flat, but it is a joke nevertheless. It was intended to be funny. Everyone knew it was so intended. It fell flat. It is still a joke. Likewise, one cannot turn a racist or sexist comment into a joke, by saying, after the target of the comment has been insulted, “I was just joking.” If no one perceived it as an effort at humor, the comment failed the test, and the speaker is not a joker. Yes, there are court cases on that also.

A joke can be a one-liner or an amusing story with a long-awaited punch line. The difference between a parody or a satire on the one hand and a joke on the other is crucial, since a joke is not generally copyrightable whereas parodies and satires are. We say “generally” since there are instances of a joke being copyrightable, but generally jokes are considered to be ideas and copyright law only protects expressions of ideas fixed in tangible form.

So what about all of those comedians accusing each other of stealing jokes? In 2006, a group of comedians, including Jay Leno and Rita Rudner, filed a lawsuit claiming copyright infringement when a woman compiled jokes performed by the comedians into several books and sold them to the public. The court didn’t have to decide this case because it was settled out of court, but the point of the matter is that comedians can be very protective of their work. And they may have a valid claim, albeit tough to prove, if they can show that their jokes are expressions of ideas similar to the expression found in an original literary work.[54]

Foxworthy’s Redneck Humor—A Case of Its Own
A custom t-shirt company produced a line of t-shirts bearing redneck jokes with lines like, “If you’ve ever financed a tattoo . . . you might be a redneck.”[55] Unfortunately, this was too similar for Jeff Foxworthy, a comedian known for his redneck humor. The only difference between his jokes and the jokes that appeared on the defendant’s shirts was format. Foxworthy’s jokes started with the redneck line “You might be a redneck if . . . you’ve ever financed a tattoo.”

The t-shirt company didn’t deny the allegation that they duplicated the redneck jokes found in Foxworthy’s books. Instead, they argued that Foxworthy’s jokes were not original, and thus he could not claim authorship. The court disagreed. It sided with Foxworthy holding that he established that the jokes were not only his ideas, but his own expressions, which the defendants copied verbatim.[56]

There is very little case law in which jokes were found to copyrightable, and we haven’t seen any case since Foxworthy which supports this concept. Nevertheless, it is important to note that there may be instances where a joke is indeed protected under the copyright law.[57]

Most of the legal claims on jokes occur when someone really doesn’t like to be made fun of. Most people don’t want to be the butt of a joke. But there is not much they can do about it. Personal rights are the right of privacy, the right not to be defamed, and the right not to be put in a false light. There is also the right of publicity. The over-arching reason that none of these rights are invaded is because no one is misled into thinking that the comic is making a statement of fact. The comic couldn’t possibly be slandering someone or putting them in a false light if everyone who hears the joke understands that it is a joke rather than a statement of fact. No privacy is invaded if no facts about the person are revealed and none of the content of a joke is taken as fact. The right of publicity is an individual’s right to control the exploitation of his or her name and likeness, but Joe Blow can’t object to a joke being told about him, unless there is a big sign outside that says, “Come on in. Tonight we are telling a lot of jokes about Joe Blow.”
Note that the key in all of this is that a joke is a comment intended to elicit a laugh (whether it does or not), and the listeners understand the comment that way at the time that it is uttered.


[8] Id. at 594-96.


[10] Id. at 588-89.


[14] Id. at 1401.


[16] Id. at 1188 (quoting Campbell, 510 U.S. at 580).


[19] Id. at 114-15.


[25] Id. at 972.

[26] Id. at 973.


[29] See Brownmark Films, LLC. v. Comedy Partners, 682 F. 3d 687 (7th Cir. 2012).

[30] See Id. at 693.


[33] See Id.

[34] See Id. at 56.


[37] Id. at 891.
A Practitioner’s Column

BY BRITTANY RAWLINGS

Fashion Bloggers, Celebrities, and Other Influencers’ Endorsements and the FTC Guidelines

From the New York Times to Vogue, media publications have long controlled what information consumers discovered, and ultimately what fashions they purchased, through the publications’ editorial discretion and ad-bidding process. So in 2009 when individuals started leveraging social media and personal blogs to post real-time photos of themselves jet-setting, in what was their opinion of the latest musthave ensemble, peers quickly caught on and tuned in to see what would be curated next. These average civilians provided publications and their advertisers seeking the 16- to 34-year-old demographic exactly what they wanted—trends, real-time, and at no cost. Fast forward to today, these new fashion influencers garner millions of views each day from their hundreds of thousands of social followers—many of whom once vowed to source the season’s trends from the fashion bible itself—Vogue. It didn’t take long for brands to recognize where they should start allocating their marketing and advertising budget, nor for the influencer’s once organic and genuine photos to become disguised advertisements. As it turns out, taking a photo and adding a quick caption is a great way to make a living. Many of these “influencers” earn upward of $1 million dollars each year and command a minimum payment of $10,000 per post.[1]

Now, here’s the problem. Somewhere along the lines, no one clued in the consumer that what had previously been critical commentary had been transformed into paid endorsements. For hundreds of thousands of social followers, the influencer’s “choice” of shoe or bag had traditionally been a genuine style preference, and therefore trustworthy. The undisclosed misrepresentation and conflict of interest issues initiated by influencers’ newly biased promotions and endorsements of products were so significant that in 2009 the Federal Trade Commission (FTC) revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides) for the first time in 28 years.[2] As influencer endorsements became even more popular, more common,
and more profitable,[3] the FTC revised the Guides again in 2015.[4] The purpose of the revisions are to address endorsements, or “material” connections” (i.e., payments or free products) that may not be clearly apparent to the consumer when influencers, bloggers, celebrities, ad agencies, organizations, or even consumers promote a product or service.[5]

As practitioners, we may represent the brand that pays the influencer to advertise its products, or we may represent the influencer. In either case, the FTC’s “blessing” requires both parties (i.e., the advertiser, or brand, and the endorser, or influencer) to comply with its Guides. So, here’s what you have to know:

**WHAT IS AN ENDORSEMENT?**

The FTC defines an endorsement as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”[6] Endorsements must reflect the honest opinions of the endorser.[7] Thus, when a material connection exists between advertisers and endorsers, which consumers would not expect, the FTC mandates the connection be disclosed.[8] However, the Guides do not apply to endorsers who received no consideration for the promotion or who paid for a product themselves.[9] What constitutes a material connection between advertisers and endorsers may involve either cash or something else of value to review a product, a commission on a sale of the product, free products, or other perks as incentive or inducement to promote the product.[10]

Two common material arrangements between brands and influencers are often referred to as affiliate marketing campaigns and paid endorsements. Either arrangement may trigger the FTC’s requirement for compliance with endorsements if the quid pro quo connection is not clearly made by the brand or the influencer.[11]

An affiliate marketing campaign enables influencers to promote the brand’s products on the influencer’s blog or social media and earn a commission on any resulting sale that occurs within a set time frame from when the user clicked the tracked link. These affiliate links may be visible as a hyperlink, or embedded within the influencer’s product photo. Typically, it is the latter hidden link that poses the most risk because the financial relationship is hardest to ascertain when an influencer embeds a tracking link in the image of the product he or she is wearing or reviewing. These links can be tracked no matter where the post occurs; therefore, a Twitter post or a photo on Pinterest, Facebook, or Instagram can all generate revenue to the brand, and commission to the influencer. Practitioners need to be aware of this, admittedly brilliant, medium,[12] which cloaks a paid-for advertisement in what seemingly appears to be a genuine “shout-out” by an influencer.

This confusion, or even the potential for confusion, is precisely the issue the FTC’s Guides seek to remedy. Consumers typically give little weight to the opinions or product recommendations from a company’s sales representatives because they tend to be inherently biased. We know the sales representative’s financial incentive to sell the company’s product, and therefore that representative’s endorsement is quickly dismissed. A brand’s payment to an independent influencer to tout the product is not all that different from the first scenario. However, in the latter, because the opinion of a product appears unrelated to the brand, the reader perceives it as credible. Therefore, disclosure of that “material” connection, or relationship, helps readers decide how much value to give the opinion.[13] This common-sense premise is what stirred the FTC’s research and the inclusion of various illustrative examples in the revised Guides.[14]

While consumers are often more aware of what is and is not a paid endorsement, that doesn’t preclude the need to comply with the FTC endorsement guidelines.[15] In July 2015, Instagram blogger Kim Kardashian was confronted by both the FDA and FTC for misleading consumers in a social media product endorsement. The FDA quickly targeted Kardashian after she posted a photograph of herself on Instagram with an anti-morning sickness drug called Diclegis. The then pregnant celeb supported the photograph with a caption that read:
OMG. Have you heard about this? As you guys know my #morningsickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, I felt a lot better and most importantly, it’s been studied and there was no increased risk to the baby.”

The FDA found fault with the posting and issued a letter to Diclegis complaining that Kardashian’s post failed to mention any possible risks or side effects when using the drug. The FDA demanded Diclegis delete the post and respond to the letter; in the meantime Kardashian removed the post from Instagram but not Twitter. By leaving this Twitter post up and readable by followers, Kardashian continued to be in direct violation of the FTC’s regulations regarding product endorsement, which clearly state that celebrities must disclose paid endorsements on social media.

It should be noted that while the First Amendment of the U.S. Constitution supports the proposition that one has the freedom to speak, as well as the freedom to not speak, when it comes to advertising for pecuniary gain, this speech falls within the realm of commercial speech. The U.S. Supreme Court has held that commercial speech can be regulated under the FTC Act if the speech, or advertisement, is deceptive.

**WHAT CONSTITUTES AN EFFECTIVE DISCLOSURE?**

As stated above, the FTC Guides provide that the advertiser and the endorser may be liable for misleading consumers if something of value is given to endorse the product and that material connection is not disclosed. Here is the appropriate way to disclose this exchange:

While there is no special language, clearly stating “Company X gave me this product to try, and my thoughts on this product are . . .” would suffice. For social media endorsements that limit word characters to 140 or less (e.g., Twitter), an effective disclosure could be #PaidAd, #Paid, #Ad, or #Sponsored. The guiding principle for practitioners and their clients is “what would a reasonable consumer perceive?” Things become a bit more obvious when an endorsement clearly states “paid advertisement,” so it is best to err on the side of caution.

The disclosure should be prominent and in close proximity with the individual review or blog posting, such as within the product review. In the foregoing example with Kim Kardashian, Diclegis should have required the disclaimer #PaidAd to be added before the “OMG. Have you heard about this?” It is not enough to simply have a general disclaimer on the homepage, the terms of service, or “About Us” sections, because then users may never become aware of the connection or relationship between the endorsed product and disclaimer. The FTC has further held that “an asterisk or any other reference symbol should not be used as a means of qualifying or contradicting the meaning of any advertising statement,” nor should accurate information in a text remedy a false headline. Finally, the disclosure must be clear and obvious. If the purpose of the disclosure is to inform the reader of a material connection, then it is imperative that the disclosure be noticeable, readable, and understandable.

Moreover, it is advisable that advertisers implement reasonable programs in order to train their employees on how to monitor advertisements about their clients’ products. For example, brands should create a communication guidelines manual that specifies what can and cannot be said about the product and the necessary disclosures. The FTC also advises that every program should include a reasonable monitoring program to check out what people are saying about the product, and follow up if questionable practices are found.

**CONCLUSION**

Practitioners for brands and influencers should be mindful of this disclosure requirement when engaging in advertising, as well as in day-to-day communication. For further information, please see the FTC website. It provides a number of guides that may be helpful to practitioners counseling online businesses concerning the use of endorsements and testimonials in advertising, guarantees, warranties, and the telecommunication sales rule.

BIO: Brittany Rawlings is a New York–based attorney who specializes in the field of entertainment, corporate, and fashion law, and has embarked on a new venture to help new artists create and grow their fashion
companies. Rawlings is also the owner, CEO, and designer of her own high fashion accessories label, B.RAWLINGS. The self-taught designer began her accessories line as a creative outlet from her daily grind as a law student. She may be reached at (239) 293-4391 or brittany@fashionboss.com.

ENDNOTES
[5]. Id. § 255.0.
[6]. Id. § 255.0(b).
[7]. Id. § 255.1(a).
[8]. Id. § 255.5.
[9]. Id. § 255.1(d).
[10]. Id. § 255.5.
[11]. Id.
[12]. The blend between advertising and editorial is often referred to as “advertorial” because the advertising is so well disguised as editorial.
[14]. Id. pt. 255.
[15]. Id.
[18]. The FTC works for the consumer, and its purpose is to prevent fraudulent, deceptive, and unfair business practices, as well as to provide information to help spot, stop, and avoid said practices.
[22]. See id.
[25]. While this appears to be an easy guideline to follow, many disclosures do not. In 1993, a study revealed that of the 157 commercial disclosures reviewed by the FTC, not one met all of the FTC’s clear and conspicuous standards. Imagine what the statistics are today when a blogger’s endorsement frequently doubles as an advertisement.
Message from the Chair

Dear Forum Members:

Welcome to the fall edition of the *Entertainment and Sports Lawyer*. I am humbled and delighted to begin my two-year term as your Chair of the ABA Forum on the Entertainment and Sports Industries.

Now is an exciting time in the world of entertainment, arts and sports law. Not only has social media changed the nature of our business, but our practices continually touch upon so many broad areas of the law that we are required to be knowledgeable in other practice areas. For example, the application of the laws in both amateur and professional sports allows us to pinch-hit and interact with other attorneys and colleagues involved in the practices of labor, antitrust, contract, and tort law. Likewise, our entertainment counterparts practice their song and dance in myriad legal disciplines that involve corporate, employment, intellectual property, and First Amendment law, as well as fair use and rights of privacy and publicity issues.

As we continue to evolve as a Forum committed to providing you with the latest news and developments in these legal realms, I am working with the leadership to develop an exciting agenda for the coming year. In an effort to help you continue to grow and succeed in your practice, over the coming months, we will be addressing many of the key issues facing our industry today and those in the news. All of these issues and “*in the news*” substantive topics will be brought to the forefront as the Forum marches to the tune of a new trumpet with you, our members, leading the charge. We will still have our Annual Meeting and regional programs so that you can network and interact with other Forum members face-to-face; however, we will be re-energizing our live webinar program and making resources relevant and essential to your practice more accessible to you on a regular basis.

In addition, and equally as exciting, the Forum leadership is actively addressing ways to meet the needs of our various member groups such as women in sports and entertainment, members of color, young lawyers, law students, and solo/small firm practitioners. In the coming months, the Forum leadership will be focusing on improvements to meet your unique needs, reaching out to you for your perspective, and making recommendations for enhancing the value of your Forum membership.

We hope you will watch your email for updates as they develop. As a first step, I encourage you all to check your ABA member profile to confirm that you do indeed accept email from the Forum. If not, please change your profile email status so you don’t miss a single announcement about our upcoming initiatives and expanded member services.

In closing, I would like to take this opportunity to thank Richard Idell, immediate past Forum Chair, for an incredible tenure and steadfast leadership. I also want to welcome our new Forums Manager, Carol Simmons, who has already proven herself a great asset to our group.

Finally, I hope to have a chance to speak with you at our upcoming Annual Meeting at the Grand Hyatt in Washington, D.C. October 8-10, 2015. The planning committee has put together a phenomenal program with a plethora of esteemed panelists, topical “hot issue” presentations, and fun networking opportunities to enjoy with our many colleagues and friends from around the world.

Should you have any questions about your Forum membership or our initiatives moving forward, please do not hesitate to contact me at ABAESForum@americanbar.org.

Best regards,

Janine Small