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A PUBLICATION OF THE AMERICAN BAR ASSOCIATION FORUM ON THE ENTERTAINMENT & SPORTS INDUSTRIES

"Never, ever be afraid to make some noise and get in good trouble, necessary trouble."
—Rep. John Lewis

We mourn the loss of civil rights icon/activist and national conscience Congressman John Lewis. We join the celebration of his achievements, passion, strength, and legacy. We embrace his philosophy to never be afraid to make some noise and get in good trouble, necessary trouble.

We acknowledge that racism is embedded in our way of life and commit to work to bring racial justice and equality to our profession, our society, and our country.


Peter J. Strand

We add our voices to the outcry of outrage at the killing and abuse of people of color by law enforcement and vigilantes.

We embrace our responsibility to activate our outrage and obligation to eliminate ignorance, racial injustice, inequality, discrimination, and bias in our professional and personal lives.

To that end, the Forum has taken steps to implement our commitment to social justice and racial equality. We have formed a diversity task force to ensure that our membership and leadership are as diverse and inclusive as the clients we serve in entertainment and sports. And, at our Annual Meeting in October, we will present two plenaries on social justice, racial injustice, discrimination, and bias in the entertainment and sports industries.

Finally, we commend Forum members to use the resources that the ABA has made available to Forum membership.

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Forum Information

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AMERICAN BAR ASSOCIATION
Forum on the Entertainment & Sports Industries

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Letter From The Editor

"The Future is unwritten."
—Joe Strummer

Dear Forum Members,

Welcome to Issue 36:3 of the *Entertainment and Sports Lawyer*! I think I've run out of things to say about the pandemic, politics, racism, sports without live fans and the lack of live entertainment. We are facing a Presidential Election whose outcome will have long lasting effects on our world.

Despite the lack of normalcy, our industry never stops. We have prepared protocols that allowed professional sports teams to return. We are optimistic that the same may be said of NCAA sports this fall. Live concerts may not be happening right now, but plans are underway for tours next summer. The film and television industries are back in production (albeit limited).

With that, we have another packed issue of the *Entertainment and Sports Lawyer*. Last issue featured Austin Moore's Tennessee-centric article on Force Majeure clauses and potential defenses to non-performance. For this issues, we start with his Addendum. We brought on three law students (Zach Prociuk, Angelica Prince and Jamila Batchelor) to expand the scope to cover more jurisdictions. This is a must-read for all Forum members! Lyndsay Dykstra and Jesse Tepperman keep us current with their look at advertising dollars in television industry in light of the pandemic in "Advertising Dollars and Content Wars: Why The Post-Pandemic Television Industry May Never Be the Same."

Matthew Henshon, a first time contributor to the law journal celebrate the return of Major League Baseball and all its drama in "Baseball and the Coming Strike in 2022." To be frank, it didn't feel like summer without baseball and its drama. Another first time contributor, law student Isaac Arreola looks at the Gig Economy during the pandemic in "AB5 is Causing a Hurdle for Gig Economy What Are Independent Contractors To Do When They Cannot Find Work in the Middle of a Pandemic?"

Chase LanCarte shares his thoughts on Copyright Termination and Reversion in "Give Me Back My Masters: Recording Artists Continue to Advance Sound Recording Copyright Termination Lawsuits Against UMG and Sony Music." Our own Forum Chair, Peter Strand, shares a bit of his expertise with "Branding the Band" which was originally published in Landslide, Vol. 12, No. 3, January/February, by the American Bar Association.

We are privileged to feature Corrine Belkoff's insightful and poignant "The Impact of Title IX on Women in Intercollegiate Sports Administration and Coaching." Corrine is a second year law student at University of Pennsylvania. She previously studied at Arizona State University where she was a member of Barrett the Honors College and a student-athlete on the women's gymnastics team.

Michelle Wahl and her team of law students and young lawyers once again provide us with an opus of a Litigation Update that every attorney will want to read. Gilberto Oliveros shares his assessment of Blockchain in the NBA with "The NBA's Blockchain Problem: Spencer Dinwiddie." The father and son team of Robert J. Misey, Jr. and Robert J. Misey, III look at monetizing student athletes in their article "A Picture Is Worth A Thousand Dollars, Even To Student-Athletes: An Analysis Of The NCAA's Recommendations for Name, Image and Likeness Income." And we close with Emily Behzadi's "The Art of Consignment Agreements".

If you have any interest in writing for the Journal, or working with us as an editor, please let me know! We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf. The pending deadlines for article submissions are:

- Fall 2020 (Anticipated October Publishing)
  August 15, 2020
- Winter 2020/21 (anticipated January Publishing)
  November 15, 2020
- Spring 2021 (anticipated April Publishing)
  January 15, 2021
- Summer 2021 (anticipated July Publishing)
  April 15, 2021

Please, share with me your ideas for the Journal. ■

Best,

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

AUTHOR'S ADDENDUM TO:

COVID-19 and Commercial Interruption

Potential Defenses to Non-Performance

Austin Moore[1] with additional research and support from Zachary Prociuk, Angelica Prince and Jamila T. Batchelor

Editor's Note: In Issue 36:2 of The Entertainment and Sports Lawyer, *we ran Austin Moor's article, "COVID-19 and Commercial Interruption: Potential Defenses to Non-Performance," examining how Tennessee courts may apply the common-law doctrines of impossibility of performance and frustration of commercial purpose to determine who bears the risk for a commercial party's non-performance allegedly caused by measures taken to combat the spread of COVID-19. This update is Mr. Moore's addendum to his original article providing an overview of how courts in California, Texas, New York, Florida, Illinois, and Michigan have defined and applied these two defenses.*

THE FRAMEWORK

While each of the jurisdictions below differ on when the impossibility-of-performance and frustration-of-commercial-purpose doctrines apply, all generally agree that the initial inquiry is to determine whether the parties intended for one party to bear the risk of the business interruption that allegedly caused the non-performance at issue. Courts will look to the relevant contract and, if appropriate, parol evidence to determine the parties' intentions regarding the allocation of risk for the business interruption that led to non-performance. If the parties intended for one party to bear the risk at issue, then neither doctrine will apply.

If a court cannot determine the parties' intentions, then the court will turn to the common law rules and defenses, including the impossibility-of-performance and frustration-of-commercial-purpose doctrines, to determine whether a party's failure to perform can be excused.

THE LAW

California

California courts will apply the impossibility-of-performance doctrine when the "performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be non-existent."[2] Performance that becomes more difficult than the parties believed or an increase in cost to perform are insufficient to render performance impossible.[3] The often cited example by California courts is a mining lease that requires a company to purchase a stipulated quantity of material from the owner of the land each year. When the land is no longer able to produce, the contract is deemed impossible to perform and the parties' performance is excused.[4]

Under the commercial-frustration doctrine, "[p] erformance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration."[5] In California, commercial frustration is an extension of impossibility of performance. The California Supreme Court has held, "a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[6] The crucial question in analyzing the commercial-frustration doctrine is, "whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case . . . ."[7] The answer to this question largely hinges upon whether the unanticipated circumstance was foreseeable.[8]

Notably, California courts have addressed the application of both doctrines to temporary instances of impossibility and frustration of purpose. California courts have held that "[t]he obligation to perform is not excused or discharged by a temporary impossibility—it is merely suspended—unless the delayed performance becomes materially more burdensome or the temporary impossibility becomes permanent."[9] Likewise, a frustration of purpose "that is only temporary suspends the obligor's duty to perform . . . but does not discharge his duty . . . ."[10]

Texas

Texas courts have addressed the impossibility-of-performance and frustration-of-commercial-purpose doctrines as one defense.[11] Impossibility is generally used to refer to an obligation that becomes objectively impossible to perform (*e.g.*, the death of a person necessary for performance, the destruction of a thing necessary for performance, or the prevention of performance by governmental regulation.)[12]

Frustration of commercial purpose, sometimes referred to as the impracticability defense, is used to describe instances when "a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged. . . ."[13] The impracticability defense is "limited to circumstances in which both parties held a basic (though unstated) assumption about the contract that proves untrue."[14]

Texas sets itself apart from the majority of jurisdictions in how it applies the frustration or impracticability doctrine. First, Texas courts focus on whether a basic assumption shared by the parties has changed rather than asking if the expected value of performance to the party seeking to be excused has been destroyed. Stated another way, Texas courts focus on whether there was an implicit condition precedent to performance under the contract rather than asking whether the parties will obtain the expected value of the contract. Second, whereas most jurisdictions hold that if the circumstances that caused non-performance were foreseeable then one party must be deemed to have assumed that risk, Texas courts have explicitly found that "even if the event was reasonably foreseeable, or even foreseen, the contracting party may still be discharged" under the doctrine of impracticability.[15] Foreseeability is but one factor in the court's analysis whereas it is often dispositive in other jurisdictions.[16]

New York

New York courts apply the impossibility-of-performance doctrine only when "the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."[17] The defense is typically "limited to the destruction of the means of performance by an act of God."[18] The defense is narrowly interpreted and seldomly applied due, in part, to the basic tenant that "the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances."[19] If the event that caused the impossibility was foreseeable, the defense will not apply.[20]

In New York, the frustration-of-commercial-purpose doctrine, often referred to as frustration of contract, only applies when "the frustrated purpose [is] so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[21] While the defense does not require objective impossibility, it has similar limitations to the impossibility-of-performance doctrine. This defense is not applicable if "no unusual or unforeseeable event prevented performance and where [a] provision could have readily been made for what actually occurred."[22] Finally, not only must the basis of the contract be frustrated but the change in circumstances must make "one party's performance virtually worthless to the other."[23]

Florida

Under Florida law, impossibility of performance "refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform."[24] While some Florida courts have held that the doctrine only applies to an act of God, more recent cases suggest that the scope of the defense has expanded and that Florida courts will apply the defense more liberally.[25]

Although Florida courts place great weight on whether the risk was foreseeable, they have contemplated that the impossibility-of-performance doctrine may be available even if the business interruption was foreseeable. The Florida Court of Appeals has stated, the defense "should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express contractual agreement."[26] If a court determines a risk was foreseeable at the inception of the contract, there is an "inference that the risk was either allocated by the contract or was assumed by the party."[27]

The frustration-of-purpose doctrine under Florida law "refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party."[28] Florida courts also consider whether the value of performance has been frustrated or destroyed to determine if the doctrine applies.[29] If the difficulties or risks that cause the frustration "could have been reasonably foreseen by the promisor at the creation of the contract," the defense is not available.[30]

Illinois

Under Illinois law, the impossibility-of-performance doctrine is applied "where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law."[31] The doctrine requires that "the circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party demonstrate that it has tried all practical alternatives available to permit performance."[32] Imposing this final requirement, that the party try all practical alternatives available, sets Illinois apart from most jurisdictions.

Illinois courts view the impossibility-of-performance doctrine in a different light than most jurisdictions. The doctrine is founded upon the notion that the parties must have known from "the nature of the contract and the surrounding circumstances" that "the contract could not be performed unless some particular condition or state of things would continue to exist."[33] Stated differently, Illinois courts will not absolve a party's obligation because an intervening event rendered performance impossible, but rather because "the contract was not in reality an absolute contract," but rested upon an implied condition or circumstance.[34]

In order for the doctrine of commercial frustration to apply in Illinois, the party asserting the defense must pass two "rigorous tests": (1) there must be a frustrating event not reasonably foreseeable, and (2) the value of the parties' performance must be totally or almost totally destroyed by the frustrating cause.[35] In determining whether the allegedly unforeseen event that caused non-performance was foreseeable, the Northern District of Illinois opined that the relevant inquiry is "whether the risk of the occurrence of the contingency was so unusual or unforeseen and the consequences of the occurrence . . . so severe that to require performance is to grant the buyer an advantage he did not bargain for in the contract."[36]

Michigan

In Michigan, "[a] promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform."[37] There are two categories of impossibility-of-performance defenses under Michigan law: (1) original impossibility (*i.e.*, performance was impossible at the outset of the contract) and (2) supervening impossibility (*i.e.*, performance became impossible sometime after the inception of the contract).[38]

Original impossibility voids the promise "unless the risk of its impossibility is assumed, as where the parties know that performance may be impossible and base their contract upon the assumption."[39] For supervening impossibility, Michigan courts follow the majority of jurisdictions in focusing primarily upon "whether the supervening event producing such impossibility was or was not reasonably foreseeable when [the parties] entered into the contract."[40] Finally, in order for the defense to apply, the circumstances causing the impossibility of performance must be beyond the control of the parties.[41]

Michigan courts recognize the frustration-of-purpose doctrine. In order for the defense to apply: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; and (3) this purpose must have been frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which was not due to the fault of the frustrated party and the risk of which was not assumed by him.[42] The frustration must be so severe that it cannot fairly be regarded as within the risks the promising party assumed.[43] Notably, financial hardship and unprofitability alone are insufficient to warrant the application of the defense.[44]

CONCLUSION

Clearly, these jurisdictions take different approaches in applying the impossibility-of-performance and frustration-of-commercial-purpose doctrines. For example, while most jurisdictions categorically forbid the application of either defense if the interruption at issue was foreseeable when the parties entered the contract, Texas views foreseeability as only one factor a court may consider. In determining whether the frustration-of-commercial-purpose doctrine applies, the central inquiry in some jurisdictions is whether an implicit condition precedent to performance can be read into the contract while others focus on whether the fortuitous interruption destroys a party's expected value in the contract. The practical implications of these differences could potentially result in disparate outcomes of similar cases in various jurisdictions. This, in turn, may lead to forum shopping, jurisdictional battles, and raise unique issues in cases that involve obligations across multiple states. ■

ENDNOTES

1 Austin Moore is a graduate of Vanderbilt University and the Washington University School of Law in St. Louis. Mr. Moore focuses his practice on commercial and intellectual property litigation at the law firm of Riley Warnock & Jacobson in Nashville, Tennessee. He may be reached at amoore@rwjplc.com. Mr. Moore gratefully acknowledges the additional research and support provided by the following dedicated law students: Zachary Prociuk (zach.prociuk@hotmail.com), DePaul University College of Law; Angelica Prince (angelica1.prince@famu.edu), Florida A&M University College of Law; and Jamila T. Batchelor (batchelorj2@mymail.nku.edu), Northern Kentucky University—Salmon P. Chase College of Law.

2 Mineral Park Land Co. v. Howard, 156 P. 458, 459 (Cal. 1916); *see* Cal. Civ. Code § 1511.

3 *See* Kashmiri v. Regents of Univ. of Cal., 156 Cal. App. 4th 809, 839 (2007); *Mineral Park Land Co.*, 156 P. at 459.

4 *See Mineral Park Land Co.*, 156 P. at 459.

5 Lloyd v. Murphy, 153 P.2d 47, 50 (Cal. 1944).

6 *Mineral Park Land Co.*, 156 P. at 460.

7 Dorn v. Goetz 85 Cal. App. 2d 407, 412 (1948).

8 *Id.* at 412 ("If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.").

9 Maudlin v. Pac. Decision Scis. Corp., 137 Cal. App. 4th 1001, 1017 (2006).

10 *Id.*

11 *See* Centex Corp. v. Dalton, 840 S.W.2d 952, 954 (Tex. 1992); Tractebel Energy Mktg. v. E.I. du Pont de Nemours & Co., 118 S.W.3d 60, 64–67 (Tex. App. 2003).

12 *Tractebel Energy Mktg.*, 118 S.W.3d at 65; *see* Janak v. Fed. Deposit Ins. Corp., 586 S.W.2d 902, 906 (Tex. Civ. App. 1979)

13 Juarez v. Hamner, 674 S.W.2d 856, 861 (Tex. App. 1984).

14 *Tractebel Energy Mktg.*, 118 S.W.3d at 66.

15 *Centex Corp.*, 840 S.W.2d at 955.

16 *See id.* at 954–55.

17 Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987).

18 Kolodin v. Valenti, 979 N.Y.S.2d 587, 589 (N.Y. App. Div. 2014).

19 *Kel Kim Corp.*, 519 N.E.2d at 296.

20 *See* Warner v. Kaplan, 892 N.Y.S.2d 311, 314 (N.Y. App. Div. 2009) ("the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.").

21 Crown IT Servs. v. Koval-Olsen, 11 A.D.3d 263, 265, 782 (N.Y. App. Div. 2004); *see Warner*, 892 N.Y.S.2d at 314; Jack Kelly Partners LLC v. Zegelstein, 140 A.D.3d 79 (N.Y. App. Div. 2016).

22 Frenchman & Sweet, Inc. v. Philco Disc. Corp., 21 A.D.2d 180, 182 (N.Y. App. Div. 1964).

23 PPF Safeguard, LLC v. BCR Safeguard Holding, LLC, 924 N.Y.S.2d 391, 394 (N.Y. App. Div. 2011).

24 Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965).

25 *See* Home Design Ctr.-Joint Venture v. Cty. Appliances of Naples, Inc., 563 So. 2d 767, 769 (Fla. Dist. Ct. App. 1990).

26 *Home Design Ctr.-Joint Venture*, 563 So. 2d at 769.

27 Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC, 209 So. 3d 622, 625, (Fl. Dist. Ct. App. 2017).

28 *Crown Ice Mach. Leasing Co.*, 174 So. 2d at 617.

29 Hopfenspirger v. West, 949 So. 2d 1050, 1053 (Fla. Dist. Ct. App. 2006).

30 *Home Design Ctr.-Joint Venture*, 563 So. 2d at 770.

31 Downs v. Rosenthal Collins Grp., L.L.C., 963 N.E.2d 282, 294 (Ill. App. Ct. 2011).

32 *Id.*

33 Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477, 480 (Ill. 1945).

34 *Id.*

35 Illinois-Am. Water Co. v. City of Peoria, 774 N.E.2d 383, 390–91 (Ill. App. Ct. 2002); *see also* Smith v. Roberts, 370 N.E.2d 271, 273 (Ill. 1977).

36 Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc., 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010).

37 Roberts v. Farmers Ins. Exch., 737 N.W.2d 332 (Mich. Ct. App. 2007).

38 Bissell v. L. W. Edison Co., 156 N.W.2d 623, 626 (Mich. Ct. App. 1967)

39 Rogers Plaza, Inc., 189 N.W.2d 346 (Mich. Ct. App. 1971).

40 *Bissell*, 156 N.W.2d at 626.

41 *Id.*

42 Liggett Rest. Grp., Inc. v. City of Pontiac, 676 N.W.2d 633, 637 (Mich. Ct. App. 2003).

43 Jabero v. Harajli, 2004 Mich. App. LEXIS 1507, at *6 (Mich. Ct. App. June 15, 2004).

44 Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 454 (Mich. Ct. App. 2015).

Chair's Column (CONTINUED FROM PAGE 1)

- Syllabus: 21-Day Racial Equity Habit-Building Challenge, https://www.americanbar.org/groups/labor_law/membership/equal_opportunity/

- Racial Justice Webinar (with perspectives from the African American, Muslim, Asian American, Hispanic, and Native American communities) https://www.americanbar.org/groups/diversity/commission_on_hispanic_legal_rights_responsibilities/webinars-racial-justice/

- Black Lawyers in America National Town Hall Series. https://www.americanbar.org/advocacy/justice-system/tools/black_lawyers_america/

- Three sessions of the four-part series are currently available.

- The first session of a four part series on Confronting Systemic Racism and Addressing Civil Unrest. https://www.americanbar.org/groups/young_lawyers/resources/webinars/liberty-and-justice-for-all-confronting-systemic-racism/

- ABA's new Racial Equity in the Justice System website: https://www.americanbar.org/advocacy/justice-system/—in particular in the Perspectives and Practical Tools Sections.

I hope you will join us in October for the Forum's 2020 Annual Meeting and CLE Conference. This year's Conference will be virtual. In addition to the Forum's timely and focused CLE programming, that includes panels that address the unexpected challenges of the times, we will provide numerous opportunities to network and interact one with one another, including a virtual exhibition hall, break-out/discussion rooms, speed mentoring; and social networking events. We have significantly reduced the registration fees for this virtual meeting.

Conference information and registration is now available: https://www.americanbar.org/events-cle/mtg/web/399231759/

Wishing you continued safety and good health in these challenging times. ■

Peter J. Strand
Chair, ABA Forum on the Entertainment and Sports Industries

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- Civil Rights and Social Justice in Entertainment & Sports
- Financial Survival for the Performing Arts
- Student-Athletes' Name, Image and Likeness Rights
- Music Modernization Act

Social Activities

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- Game Time with Attendees
- Behind the Scenes Activities Musical Performance
- Dedicated Networking Sessions with Attendees and Forum Governing Committee members

October 8th Keynote Speaker

Dina Titus
US Congresswoman
Nevada, 1st Congressional District

October 15th Keynote Speaker

Steven Adelman
Founder, Adelman Law Group, PLLC
and Vice President,
Event Safety Alliance

Advertising Dollars and Content Wars

Why the Post-Pandemic Television Industry May Never Be the Same

Lindsay E. Dykstra and Jesse Tepperman

INTRODUCTION

The COVID-19 pandemic has had an enormous impact on North America's entertainment industry, which was already facing significant pressure to adapt to the digital age. This is particularly true for television. As the novel coronavirus has swept the globe, productions have been shut down, put on hold and, in some cases, cancelled altogether, and the traditional broadcast television calendar has been heavily disrupted. As filming resumes, the production of television is anticipated to progress at a much slower pace given the need to adhere to stricter health and safety requirements and the backlog of productions that will be competing for limited resources. On the other side of the screen, social distancing measures have had a huge impact on consumers, who, as a result of social distancing, are spending far more time indoors. As such, there has been a significant increase in the consumption of media, and in particular, a rise in television viewership on both traditional and non-traditional platforms.

Disruption of the television industry is not new – TV has been undergoing significant transformation since long before COVID-19 spread to North America. When television was first broadcast by networks, it was via radiofrequency over the air ("OTA"), often referred to as terrestrial television. Programs would air according to a schedule set by the network, requiring viewers to tune in at a specific time in order to watch their preferred program. It was impossible to limit access to terrestrial television, so the main revenue source for networks was the sale of commercial spots to advertisers.[1] With the advent of cable and satellite, it became possible for networks to limit access to television channels, which led to subscription and hybrid revenue models. For a fee, customers could subscribe to cable or satellite television and have access to a specified channel or bundle of channels. Some cable and satellite networks have continued to air commercials, earning revenue both from advertising and subscription or other fees. Other networks no longer sell advertising space and offer commercial-free channels, relying instead on subscription fees as a primary source of revenue – for example HBO (Home Box Office), FX and Showtime. This is often referred to as "pay television."

OTA, cable and satellite television networks generally follow similar programming calendars that begin in September, when new television programs start airing, and end the following August. Content is developed and produced during the year to align with this schedule. For networks that sell commercial spots to advertisers, the sale of advertising is also part of this yearly schedule. A lot of sales happen through the "upfronts," which traditionally take place in late May and early June. The upfronts consist of promotional events hosted by networks to showcase and promote their new and returning programs to advertisers, followed by negotiations between networks and advertisers for the sale of advertising space for the 52-week period beginning in the fall. There has been some pressure to shift away from the traditional form that the upfronts take because they can be quite expensive for networks, and also because they follow the traditional broadcast programming calendar, which some have argued is becoming outdated.

With the rise of the digital age and the adoption of new technologies, over-the-top (OTT) platforms (i.e., services that provide for the streaming of media over the Internet), such as Netflix, Amazon Prime, Hulu, YouTube and Quibi, to name a few, have provided consumers with an alternative method of consuming media. Unlike with traditional broadcast television, customers can access and view media at any time, on any device that has access to the Internet. Different OTT platforms rely on different revenue models. Netflix and Hulu, for example, focus on subscription fees. YouTube relies on advertising and on subscription fees with respect to its premium service, which allows users to pay a fee for ad-free content. OTT platforms do not rely on the same programming calendar as traditional broadcast television, and instead generally introduce new content throughout the year. Many believe that the rise of OTT platforms has pulled viewership away from the more traditional television networks, and industry stakeholders have faced pressure to either adapt to the changing times or face the threat of reduced viewership. As a result, a number of traditional media companies have begun introducing their own variations of OTT platforms, including Disney+, HBO Max and ABC Go.

Given the havoc that the COVID-19 pandemic has wreaked on the television industry, producers, industry executives, analysts and other stakeholders have been forced to consider how to manage, develop and produce content during a time of crisis. Production delays resulting from the COVID-19 pandemic will have a particularly strong impact on broadcast television. A large amount of content destined for traditional broadcast would still have been in production when COVID-19 reached North America. With the exception of the few projects that made it to post-production or were completed prior to March 2020, many of the scripted and unscripted programs that were expected to air in the fall have now been delayed or cancelled. This disruption will likely result in broadcasters experiencing significant content gaps in the 2020-2021 broadcast season. For OTT platforms, which acquire, produce and air new content throughout the year, the impact may be less apparent in the fall, but they will still see an overall reduction in the availability of future content and will need to seek out alternatives and manage their existing content accordingly.

Will the quality and availability of content diminish as a result of production delays, or will the pandemic inspire producers and content creators to think creatively so they can continue to connect with audiences in a meaningful way? Will this encourage networks to seek out non-traditional content, providing a platform for niche programming that might otherwise have not found a home or an audience?

Stakeholders have also been forced to consider revenue models and whether they will be able to continue to generate sufficient revenue, both during the pandemic and after it has subsided. That is particularly true of the networks and OTT platforms that rely heavily on advertising revenue. Live upfront presentations were either cancelled, postponed indefinitely, or replaced by smaller-scale virtual meetings. Advertisers, who have also been impacted by the pandemic, may have less money to spend on advertising, or may choose to spend less given the uncertainties in the market. As a result, networks and OTT platforms that rely on advertising may be forced to seek alternative revenue streams. On the flipside, some subscription-based platforms have seen a substantial increase in subscribers, given that many consumers are now at home and eager to access content. However, these platforms will be faced with the challenge of maintaining this customer base given the potential lack of new content and the possibility that, when the pandemic subsides, some subscribers may leave.

Will entertainment executives be able to curate and, even more importantly, effectively promote and market a programming schedule given that the upfronts were all but cancelled this year? How will networks adapt if advertisers remain reluctant to spend money on advertising? Will major networks look to generate revenue in other ways, or adopt more flexibility in their approach to selling advertising space? Will this finally force the television industry to reconsider certain practices and update them for a new era?

While the answers to many of these questions remain to be seen, it is evident that the television industry in North America has been greatly impacted by the COVID-19 pandemic, in both positive and negative ways. By examining the unique measures adopted by industry stakeholders in response to COVID-19, we may gain insight into how the television industry may evolve in the future, long after the pandemic has subsided.

This article explores the impact of COVID-19 on an already evolving industry. We begin by considering the financial repercussions of the pandemic on the television industry's already-strained revenue models. We then turn to the management, development, and creation of content in light of significant production challenges and uncertainties. We conclude with thoughts about the overall impact that COVID-19 will have on the industry, in both the present and the future.

1. REVENUE GENERATION

a) Revenue Models

As mentioned above, broadcast television networks have traditionally earned the bulk of their revenue through the sale of commercial space to advertisers.[2] A network will develop or acquire the rights to a television program with the expectation that the network will be able to generate revenue through the sale of advertising space in connection with the series or program.

At a very basic level, advertising space is more expensive when aired alongside television programs with higher viewership. For example, the most-viewed television series during the 2019-2020 broadcast season, *NFL Sunday Night Football*, had a reported 19.993 million viewers, while the 100th-ranked series, *The Good Place*, had a reported 3.563 million viewers.[3] Generally then, the cost to advertisers to purchase a commercial slot during *NFL Sunday Night Football* would substantially exceed the cost for a commercial slot during *The Good Place*. There are exceptions to this principle, however: e.g., a program that can effectively reach a specific target audience may justify a higher rate than a program with an inconsistent viewer base.

Most major networks continue to embrace a broadcasting season that begins in the fall and ends in May, followed by summer programming that typically airs from June through August. The development and production of content, and the sale of advertising, generally align with this calendar, which has become an industry standard.[4] The table below provides a general chronological overview of how this process might look for an upcoming traditional broadcast season:

LEAD-UP TO JANUARY	Networks are pitched ideas and scripts for potential programs.
JANUARY – FEBRUARY	Potential programs that make it past the pitching stage are approved for production and developed further.
MARCH	The majority of pilot episodes are filmed.
APRIL	Networks determine the viability and marketability of the proposed programs. Advertisers determine their needs for the upcoming broadcast season.
MAY	By mid-May, major television networks have announced their programming schedule for the upcoming broadcast season and begin holding presentations in front of advertisers, called the "upfronts," to promote their programs and sell advertising space.
JUNE	Networks and advertisers negotiate deals for the upcoming broadcast season. This period is often referred to as the "upfront marketplace".
JULY – AUGUST	Summer programs (often re-runs or lower budget programs) air.
SEPTEMBER	New series, and new seasons of continuing series, go to air.

The upfronts have traditionally consisted of a series of promotional events, parties and negotiations, where networks actively try to convince advertisers to purchase advertising space during their new or returning television programs. Advertisers generally receive better rates when purchasing commercial space up front, and those that have established relationships with networks may receive even better rates.[5] However, buying up front is not without risk: new shows that will air in the fall do not have a proven track record, and may not draw the anticipated number or type of viewers. As a result, there is typically some flexibility built into the agreements between networks and advertisers, which allows advertisers to cancel a specified percentage of their pre-purchased advertising time each quarter. Historically, as much as 50-80% of a network's advertising space could be sold during the upfront marketplace, depending on the network.[6] In 2019, approximately $20 billion dollars of advertising space was purchased during the American upfronts.[7] The alternative to purchasing advertising space through the upfront process is to acquire time on an as-needed basis closer to the air date of the specific program, in what is referred to as the "scatter market." While this may be more expensive than purchasing blocks of time in advance – prices can be 15-40% higher[8] – it allows advertisers to be more flexible in their purchasing so that they can better react to their needs and the marketplace.

Not all television networks follow the advertising revenue model. The introduction of cable and satellite technologies paved the way for pay television, which is commercial-free and relies instead on subscription fees. OTT platforms rely on various combinations of advertising, subscription fees, and, less commonly, alternatives like per-episode or per-series fees for specific programs. To the extent that OTT platforms sell advertising space, the advertising tends to follow a different schedule than the long-established fall/summer schedule adopted by broadcast television, given that new shows are added to such platforms at varying times throughout the year. OTT platforms, and some pay television networks, also differ from traditional broadcast television in that they do not follow the conventional pilot-to-series order. For example, they may order a television show straight-to-series, and they will release an entire season of episodes either all at once or on a specified schedule. To attract subscribers, these networks and OTT platforms need to ensure not only that they are providing diverse content that viewers will pay to watch, but also that they are regularly adding new content to keep viewers engaged. As a result, content is created and added on an ongoing basis, and does not necessarily follow the traditional broadcast calendar.

In order to compete with established OTT platforms, some traditional networks have expanded their offerings and added additional revenue streams by introducing their own OTT platforms and other alternative ways to consume media. For example, Disney+ was launched in the fall of 2019 by the Walt Disney Company and features a variety of Disney-owned content,[9] complementing other media platforms owned by the company, such as traditional television networks like A&E and ABC that fall under the Disney umbrella. Despite only launching in the fall of 2019, Disney+ had reached 54.5 million subscribers globally by the end of Q2 in 2020.[10] Similarly, Home Box Office, Inc., a subsidiary of WarnerMedia, recently unveiled its new streaming service, HBO Max, which was launched on May 27, 2020 and features content from its other HBO platforms, films and television shows from the Warner Brothers catalog, and original content produced for the platform (referred to as "Max Originals").[11] This is in addition to HBO's three other branded products, including its namesake television channel HBO, the HBO Go mobile application, and the video-on-demand service HBO Now. By introducing alternative platforms, networks may be able to recapture some of the viewership that they otherwise might have lost to other OTT platforms and may expand their ability to generate revenue.

b) How COVID-19 has Impacted Revenue Models

As COVID-19 took hold in North America, and social distancing and work-from-home measures were put in place to varying degrees across the United States and Canada, there was a corresponding increase in the consumption of media on both traditional and non-traditional platforms.[12] One might have expected this increase to result in a corresponding increase in revenue across all television platforms. To date, however, this has not been the case for networks and OTT platforms that rely heavily on advertising sales as a revenue source.

Advertising spending generally has decreased as a result of the pandemic,[13] and a recent WARC Global Ad Trend Report forecast that ad-spend across all product categories would see a further decline in advertising investment in 2020.[14] Advertising spend on traditional network television has also declined. According to a report by Standard Media Index, television advertising in April 2020 fell 26.7%,[15] despite the overall increase in television viewership. This is likely due to a number of factors: Many product and service categories that might normally have taken up advertising space on television (for example, travel) are no longer relevant to consumers as a result of the pandemic. Consumers may be less likely to leave their homes to purchase products and services, making advertising less desirable for companies – particularly those that are already facing a decline in revenue and have less money available to spend on advertising. Moreover, there is a lot of uncertainty about what the landscape will look like in the coming year, both generally and as to what content will even be available to air on broadcast networks. Many advertisers also need time to retool their advertising strategy and adjust their messaging for the remainder of the year.

Additionally, the upfronts were heavily disrupted this year. Given the varying restrictions that were put in place with respect to travel, large gatherings, the closure of non-essential business, and other related limitations, the upfronts veered significantly from the norm. In the United States, some stakeholders skipped the upfronts entirely, others moved events online, and some held online events as a temporary fix with the hopes of being able to hold more traditional events later in the year.[16] For example, CBS ran a completely virtual upfront where advertising buyers, via videoconference, were introduced to the upcoming slate of programming for the network for the 2020-2021 broadcast season. The network tried to maintain some of the traditional glitz of usual upfront events by featuring appearances from actors like Thomas Middleditch and Tom Selleck, and taped appearances by Stephen Colbert and James Corden.[17] Many of the Canadian live upfront events were cancelled entirely and replaced with digital alternatives like virtual screenings and video or teleconference meetings.[18]

Many advertisers have been pushing to delay the majority of advertising sales until the early fall, or even later, when they will have a better sense of their own needs and what programming will be aired by the major networks.[19] Some advertisers are avoiding upfront buying altogether and may rely instead on "scatter market" purchases later in the year so that they can better adapt to the changing market. Many are also pushing for networks to decrease their advertising rates.[20] According to industry insiders, media buyers are pushing for some form of insurance (or better rates), in exchange for buying advertising space up front, given that the economic climate is so difficult to predict; they hope to benefit from discounted pricing, despite the inherent risks of upfront purchasing.[21]

As mentioned, upfront agreements often contain terms that allow an advertiser to cancel a certain percentage of its commitments each quarter. By April 2020, advertisers had already begun capitalizing on this flexibility in their upfront agreements from 2019, and cancellation of third-quarter commitments was expected.[22]

By contrast, many networks and OTT platforms that rely more heavily on revenue from subscription fees have seen a boost in subscriptions as consumers look for ways to fill time spent socially distancing indoors. For example, on April 20, 2020, Netflix reported an increase of 15.8 million new global subscribers, which was ahead of the 7.6 million new global subscribers anticipated for that quarter.[23] Still, a major challenge for the networks and OTT platforms that have experienced this revenue bump will be in maintaining these subscriptions once the pandemic has subsided; many anticipate that as lockdowns are lifted, viewing rates will readjust back to pre-pandemic numbers, and subscribers may cancel their subscriptions.

c) Looking to the Future

Even before the COVID-19 pandemic, technological advancements, changing consumer preferences, and the rise of niche content were shaking up the television industry. The pandemic is likely to only intensify the pressure for television to evolve.

As to the upfront model, there has been pushback from television industry stakeholders for some time.[24] Many networks view the upfronts as overly expensive and unnecessary, and advertisers argue that the traditional broadcast calendar with which the upfronts are aligned has become less relevant. Rogers Media Inc., a major media company that owns several Canadian television channels, did not hold traditional upfront events in 2019 and opted instead for mostly smaller meetings directly with advertisers, citing an effort to evolve with the needs of advertisers and other industry stakeholders.[25] In the future, advertisers may shift away from long-term television buys and instead perhaps rely more heavily on scatter market purchases, flexible arrangements with networks that do not follow the traditional network calendar, and more diversified purchase arrangements that span both digital and non-digital platforms.

The way viewers consume content has changed over time, with more consumers accessing media online via OTT platforms rather than traditional broadcast television. This has changed expectations of how often and how quickly content can be accessed, and thrown the longevity of the traditional fall-to-spring calendar into question. As viewing habits continue to evolve, the consumption of traditional television may decrease, and consequently the sale of traditional commercial slots during the upfronts may have less importance to advertisers.[26] Advertisers may decrease their spending on broadcast television and increase their focus on the digital space. While broadcast television is still one of the most effective ways to reach a large audience all at once, online advertising can offer a more targeted reach, and its impact can be more easily measured.[27] Perhaps the upfronts will continue to exist, but in a modified format that places an increased focus on online advertising.

Additionally, uncertainties in the marketplace are likely to lead to greater risk aversion. That means advertisers may be less likely to purchase commercial space for unknown television shows, preferring instead to stick with new seasons of already proven hits or, at the very least, new shows that follow a proven formula. Going forward, networks will need to maintain flexibility with respect to advertising sales. Networks are also likely to continue branching out into the digital sphere in order to maintain their viewership, diversify their revenue streams, and remain competitive.

Networks and other television platforms have seen their revenue models impacted as a result of the pandemic. Not only must they adapt to these changes in the immediate future, but they must also evaluate whether these changes will (or should) have a lasting impact. Just as revenue models need to adapt, so too will content creation. These changes open up unique opportunities for content creators. As advertisers reconfigure their methods and the television programming landscape changes, networks, studios, and other industry stakeholders will be required to find innovative ways to manage and develop content.

2. CONTENT CREATION

Most, if not all productions in North America were halted when COVID-19 took hold in the United States and Canada.[28] While some productions have since restarted, their readiness to air will likely be significantly delayed. Additionally, there is no guarantee that a production site will not experience a future outbreak and consequently be forced to shut down for a second time. Industry stakeholders are attempting to figure out a solution to address the dearth of new television content, particularly given the immediate pressure to meet the dramatic increase and shift in viewership. Producers, networks, studios, and content creators all face the same challenge: how to properly manage and develop content during this pandemic.[29]

Broadcast networks that follow more traditional production schedules may be scrambling to rework their 2020-2021 programming lineups, given the gap in programming as a result of production delays. This is certainly less of an issue for OTT platforms, many of which have continued to release original content during the pandemic, as well as having a number of programs in post-production that can be rolled out as the year progresses. For example, Netflix's Chief Content Officer was quoted as saying that the 2020 slate of series and films had been largely shot prior to the outbreak of COVID-19 and was already in post-production.[30]

Additionally, many OTT platforms have access to a vast library of licensed content, such as existing programs that previously aired on other networks and previous seasons of original shows. This is further bolstered by the fact that many offer films in addition to episodic television programming. OTT platforms with a global reach, such as Netflix and Amazon Prime, also benefit from global licensing rights to programs outside of North America, which means access to even more television programs and films. For example, Netflix has the global rights to a popular Canadian series, *Workin' Moms,* which just aired its fourth season on the Canadian network CBC.[31]

Networks can also air older programming and routinely obtain licenses to air content from other providers. However, they are still facing more pressure than OTT platforms, and some pay television networks, because they need to fill in the gaps in their previously planned 2020-2021 programming schedules. Some broadcast television networks are not prepared to announce their fall television programming schedules, while others appear to be moving forward with scheduling, despite production restrictions. ABC, CBS and Fox, have all announced their new and returning shows for the 2020-2021 season – though they have taken different approaches in getting there: ABC, for example, focused on renewing most of its shows for the upcoming season in the face of the pandemic production shutdown. Furthermore, the network made almost no pickups from its pilot orders as most pilots were unable to complete (or even begin) filming before the shutdown. CBS is betting on a return-to-production as early as mid-summer to ensure a full slate of television for the fall broadcasting season. Fox is instead relying on previously filmed content to complete its fall schedule. Unlike Fox, ABC did not announce any series acquisitions to fill gaps in its schedule if new and returning shows are unable to resume production in time for a fall launch.[32]

As for the content itself, the programs that have proven most resilient by functioning with limited resources and adapting to the circumstances (e.g., late-night hosts filming episodes from home) may ultimately become the content winners of COVID-19. Additionally, for television programs that have wrapped production, or will resume production in locations that are possible during COVID-19 – and, perhaps more importantly, for programs that are created without conventional production resources – success may be more achievable now than pre-pandemic. Simply put, a rise in television viewership coupled with a lack of new content might lead to already existing programs becoming more mainstream due to an increase in audience size and lack of competition. Producers are taking existing intellectual property and repurposing and reformatting it to create content. As the below analysis demonstrates, producers have been thinking innovatively to create content that might never have been produced in the pre-COVID-19 era.

a) Maintaining Content Creation During COVID-19

Maintaining and honoring a consistent format has proven to be difficult for many shows. The scarcity of resources, the lack of access to production sets, the inability to bring together a viable crew, and, in some cases, the lack of accessible talent, have all impacted the production of television programs. However, some programs have managed to reinvent their format while keeping audiences engaged. The examples below highlight how networks and OTT platforms have maintained and developed consistent content, while adapting to the limitations in place as a result of the pandemic.

i. *The Tonight Show Starring Jimmy Fallon*

On March 12, 2020, *The Tonight Show Starring Jimmy Fallon* filmed the last episode in its studio, without an audience, before shutting down indefinitely. Host Jimmy Fallon wasted no time getting back on screen in whatever capacity he could.[33] Writers and producers met virtually to develop a strategic plan for the show's future, which would, going forward, be filmed entirely by Jimmy Fallon and his guests using their own mobile devices. According to producers, the first week of the virtual show, which took on an amateur filmmaker style, was a success. By the second week, a larger production team was engaged to improve program planning. While producers are unsure how long this "filmed from home" format will last, it is clear that, with some creativity, this program has been able to keep fans engaged despite the inability to shoot in a studio.[34] Consequently, NBC, the network that airs this show, still draws in an audience and has reported viewership numbers that are comparable to, and for some episodes even greater than, its live-studio episodes.[35]

ii. *American Idol*

American Idol has also had to adapt its show dramatically as a result of COVID-19. When the pandemic took hold, the episodes featuring live performances of the Top 20 contestants had not yet been filmed. Rather than postponing the entire season, and to avoid a drop in ratings, *American Idol* was technologically reconfigured to adapt to the "from home" requirement, while still recording live performances. All 20 contestants were provided with the same audiovisual equipment and performed using videoconferencing software. The show's host and judges were able to provide live feedback to the contestants, also over videoconference. On the production side, producers assisted the contestants via remote dress rehearsals and performances. Video streaming was also used to engage with the contestants as they met with mentor and coach Bobby Bones.[36]

The risk seems to have paid off: the season finale, which aired on May 17, 2020, drew the show's biggest audience since late March 2020, averaging a total of 7.26 million viewers, a figure that was relatively strong compared to previous live versions of the show aired on ABC.[37]

iii. *All Rise*

CBS's scripted courthouse drama *All Rise*, which takes place in Los Angeles, has been one of the 2019-2020 broadcast season's breakout dramas. Just as the program was on the cusp of wrapping up its first season, the pandemic reached a turning point. In the days that followed the industry-wide shutdown of production sites, producers hoped that the editors would be able to compile a season finale with footage that was already filmed. However, with only 18 minutes of usable television content, producers were forced to think differently, particularly given that CBS needed content to fill its programming holes.

Producers had to determine whether a full-length one-hour television episode could be filmed using videoconferencing software, while still maintaining the essence of the show and connecting with viewers in a meaningful way. They decided to build the final episode around current circumstances. As a result of pandemic-related shutdowns in Los Angeles, in-court appearances were essentially halted and moved to teleconference, videoconference or postponed altogether. In an interview with *The Hollywood Reporter*, executive producer Michael M. Robin was quoted as saying: "[w]hat if we actually saw our characters in this situation? We could literally take a Zoom grid view of all of our characters going through something and maybe we could come up with a story where they're literally in this time."[38]

The idea was approved by the network and focus shifted to creating an episode that would underscore the current state of the Los Angeles judicial system as a result of the coronavirus. Producers filmed scenes via WebEx. Crew members partook in production, albeit remotely – location scouts sourced areas of cast members' homes for filming, cinematographers were engaged to confirm lighting, and costume specialists designed the actors' wardrobes from afar. The entire episode was compiled in under a month, and was able to use 50 out of the show's 90-person staff. The ability of producers to put together this finale amid a pandemic demonstrates that it is possible to pull off a virtual episode, and it will be interesting to see if other television programs follow suit.

b) Creating New Content

Driven by the need to fill content gaps, maintain jobs and keep the industry running, content creators have been able to adapt quickly and adeptly to this new reality. As such, viewers have been able to consume new forms of content that may not have existed prior to the pandemic. The following examples highlight how new content is being created during COVID-19.

i. Cast Reunions

Capitalizing on the promise of a built-in audience, producers have put together "cast reunions" via videoconferencing software and other virtual means. For example, television casts from popular shows like *Parks and Recreation, Friday Night Lights, My So-Called Life* and even *Too Hot to Handle*, have reunited, albeit virtually, to discuss the "behind the scenes" of their series and give fans a glimpse into the lives of their characters after the conclusion of their shows.[39] This has the added benefit for networks of drumming up interest in older series. With this trend likely to continue, it would not be surprising to see an increase in binge television for programs that were previously off the air, but may now be re-aired to fill content gaps. Niche shows like *Orphan Black* or *Schitt's Creek*, with more of a "cult" following, are also choosing to host cast reunions – perhaps betting that doing so might garner wider audiences.

Cast reunions have also been used as a strong marketing push for the networks and studios. As celebrities invite fans virtually into their homes to speak about their past experiences on a show, networks and studios can utilize celebrity talent to market a new project on the horizon (even if production has been delayed). For example, *American Crime Story* star and Emmy award winner Darren Criss took part in a *Glee* cast reunion, during which he promoted the new Ryan Murphy show, *Hollywood* (on Netflix), as well as his new show, *Royalties* (on Quibi).[40] Ultimately, cast reunions may serve as a vehicle to drive promotion of both old and new forms of content.

ii. *Some Good News*

John Krasinski's *Some Good News* has become one of quarantine's most popular non-traditional series. In weekly episodes, Krasinski presents positive news from around the United States. The series (until it was recently acquired) was self-financed and self-produced by Krasinski, with each episode centering around a specific theme and featuring news stories sourced from social media, appearances from celebrities, and interviews with a variety of guests. Despite only eight full episodes being released over a two-month period, the *Some Good News* YouTube channel has garnered over 2.5 million subscribers and 70 million views.[41] Arguably one of the most successful elements of the show has been its ability to actively engage audiences.[42] For example, Krasinski often displays viewer comments, feedback and fan art during each episode. As of May 2020, ViacomCBS announced that it had purchased the rights to *Some Good News* in partnership with Comedy Central Productions. CBS All Access will air the new slate of episodes, and although Krasinski will no longer host, he will serve as an executive producer.[43]

c) Alternative Platforms

Platforms like TikTok – which is less than three years old and has already been downloaded an estimated 2 billion times worldwide[44] – are leveraging at-home audiences eager for new content in order to draw A-listers, turn homegrown rosters of talent into bankable stars, and promote current or upcoming shows. TikTok's global downloads jumped when COVID-19 started to spread more widely, exceeding analysts' expectations.[45]

The platform allows creators to easily produce content from home while television production remains on standby, and has been flooded with videos produced by "TikTok Stars," celebrities and average users. Not only is TikTok a platform to produce original content, but producers are also using the application to increase brand awareness for their projects. For example, in April 2020, Netflix ran a TikTok Hashtag Challenge to promote the new Mindy Kaling series *Never Have I Ever*.[46] Alternative platforms like TikTok have allowed content creators to reach a widespread, captive audience by creating and delivering fresh and entertaining content that is easily accessible during these chaotic times.

CONCLUSION

Television as we know it is likely to look very different in a post-COVID-19 world. During the pandemic, those networks and OTT platforms that think innovatively about producing new content, repurpose resources to ride out programming gaps, and diversify their revenue streams are likely to gain an advantage. Success during this time may, in turn, lead networks and OTT platforms to adopt similar measures over the longer term, including developing content throughout the year (rather than following the traditional broadcast calendar), introducing alternative revenue platforms, providing advertisers with more buying flexibility, and acquiring and capitalizing on non-traditional content. While the industry's future is unclear, one thing is certain: we will have our eyes glued to our televisions, watching with anticipation what happens next. ■

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Baseball's Short Summer and Coming Strike

Matthew Henshon

"Baseball is too much of a sport to be a business, and too much of a business to be a sport."
—P.K. Wrigley

As of this writing, the Major League Baseball (MLB) owners and the MLB Players Association (MLBPA) were preparing for a shortened, 60-game season set to begin in late July. Since the beginning of the pandemic, the two sides fought over what the 2020 season would look like – the number of games, the percentage of salary that the players would receive, even whether to expand the playoff system. Much can be read into the fact that MLB's response to COVID-19 initially lagged well behind all the other major sports leagues: NHL, NBA, NASCAR, Premier League (soccer) and even the PGA Tour all announced plans and in some cases, restarted their seasons, before baseball did.[1] The difficulties in negotiating baseball's return underscored the traditional animosity that has existed from almost the first days of professionalism.

The crisis created by the COVID-19 pandemic – and the bitterness that surrounded the negotiations over the 2020 season[2] -- could not have come at a worse time for MLB and its players. While the baseball industry reached a record $10.7B[3] in revenues in 2019 (with further revenue growth expected thanks to expanded sports betting), player salaries have fallen the last three years.[4] Further, the advent of technology has dramatically disrupted the way that baseball is scouted, developed, and coached, also adversely impacting the players. Relatedly, few free agents are receiving large multi-year contracts. In short, technology has broken the economic system for the players. The owners and players have never reached a revenue-sharing agreement, which has made all negotiations zero-sum.[5] And with a collective bargaining agreement (CBA) that will expire at the end of the 2021 season, the two sides appear to preparing for yet another work stoppage – which would be baseball's 9th in the five decades since 1972.[6]

A BRIEF HISTORY OF BASEBALL LABOR RELATIONS

Baseball's history is beset with owner-player animosity, built in large part on a single phrase, the 'reserve clause.' From the very dawn of the game, the idea of players jumping teams in pursuit of higher salaries has existed; in Cincinnati, Harry Wright (who himself had jumped from a cross-town cricket-playing rival two years earlier) assembled the first professional team by offering high salaries, and the Red Stockings went undefeated for the entire 1869 season.[7] Other clubs quickly caught on. With few exceptions, players were free to jump from club-to-club every year (the practice was called "revolving"[8]); some players would jump after virtually every season[9] and sometimes even during the middle of a campaign.[10]

Revolving was not the only problem: there was gambling, game-fixing, and drunkenness, as well.[11] Meanwhile, baseball's organizers were also trying to eke out a profit. On September 29, 1879, the National League clubs agreed to recognize a "reserve clause,"[12] essentially a permanent club option in players' contracts, which allowed a club to retain a player's services "for the ensuing season."[13]

The reserve clause was perhaps baseball's original sin.[14] Ostensibly, the reason was to give fans of a local club some confidence of "continuity rather than a game of musical chairs" with each new year.[15] Other rationales included preventing the wealthiest clubs from monopolizing the best players, keeping competitive balance, and protecting the clubs' "investment in the players."[16] The reality was that in a time of rapidly escalating salaries, restricting the ability of a player to revolve "'kept salaries within money-making bounds,'" in the later analysis of the founder of *The Sporting News*.[17] Within two decades, the National and American Leagues had been organized, and starting in 1903, the two champions played in the World Series. The business of baseball was off-and-running.

While the owners were seeing financial success, the players chafed against the reserve clause. They formed a nascent union[18] in 1885, a rival player's league[19] in 1889-90, even cheered on a holdout by star Ty Cobb in the spring of 1913.[20] That same year, a third league was organized. In order to obtain talent, the Federal League needed to raid the American and National Leagues; the older leagues attempted to enforce the reserve clause.[21] The Feds responded by claiming baseball was an unlawful monopoly, but most teams[22] settled soon thereafter.[23]

The stockholders of the Baltimore Feds did not settle, and brought suit. At the trial court, the Baltimoreons won a verdict (after trebling under the Sherman Act) of $240,000.[24] In 1920, the Court of Appeals reversed, setting up another appeal to the U.S. Supreme Court.[25] There, in 1922, the Court ruled that baseball's interstate travel was incidental to the activity; Justice Oliver Wendell Holmes, Jr. wrote, "[t]he business is giving exhibitions of baseball, which are purely state affairs," and therefore do not involve interstate commerce.[26] Technically, baseball did not receive an "exemption" from antitrust law, although that became the common perception; rather, the Sherman Act was determined not to apply to the nature of baseball exhibitions (i.e., games).

POST-WAR, MARVIN MILLER, AND THE RESERVE CLAUSE (REDUX)

Regardless of the details, the reserve clause remained in MLB contracts for the next fifty years.[27] There were, to be sure, attempts to overturn it. In 1946, Harvard grad Robert Murphy attempted to form a union, the American Baseball Guild[28]. He was undoubtedly inspired by his service on

FDR's National Labor Relations Board during WWII, where he observed union membership grow by 63%.[29] While the owners pushed back and the guild fizzled, Murphy was successful in three areas: the owners agreed to a minimum salary ($5,500), a pension fund, and a spring-training *per diem*. The latter was known as "Murphy Money" for many decades thereafter.[30]

During this time, a star player's recourse was an attempted holdout: Joe DiMaggio in 1938[31], Mickey Mantle in 1959[32], or Sandy Koufax and Don Drysdale (jointly) in 1966.[33] None were really effective. MLB's salary scale still reflected Babe Ruth's $80,000 in 1931; the upper limit in the 1960s was about $100,000.[34]

The arrival of Marvin Miller in 1966 as head of the MLB Players' Association (MLBPA) changed the calculus.[35] Miller's background with the Steelworkers lead to a multi-pronged strategy. After initially squeezing victories in pension-expansion and trading-card-license revenue, Miller advanced to taking on the reserve clause.

The first case was Curt Flood's direct challenge to its enforcement. Flood's personal experience was a throwback to the Negro-League-era; as a minor-leaguer in the late 1950s, he and a Hispanic teammate (by law) "could not even dress with teammates."[36] Before he filed his lawsuit, he wrote MLB Commissioner Bowie Kuhn: "'I do not feel I am a piece of property to be bought and sold.'"[37] (Kuhn made no substantive response.)

Flood's case went all the way to the Supreme Court, but a 5-3 majority affirmed the Federal League decision.[38] Afterwards Miller re-read the reserve clause; while conventional wisdom said that the clause obligated a player for life, Miller considered that the option was for just a single year – the one following the expiration of the contract. If the player did not re-sign, the club could reserve the player for the subsequent year only. Andy Messersmith played out his option year in 1975 and prepared for free agency. When an arbitrator read the clause Miller's way, the market was open. Messersmith played for $90,000 in 1975; in early 1976, he signed a 3-year deal worth $1.75 million.[39]

That same winter, the MLBPA was negotiating a renewal of the CBA. The reserve clause was now on life support. But Miller was concerned that if every player could quickly become a free agent (the original contract year plus the reserve year), the glut of talent would depress salaries. (His thoughts were echoed by parsimonious Oakland A's owner Charlie Finley, who said, "'Make 'em all free agents.'"[40]) Messersmith, after all, was the sole free agent in 1975-76.[41]

Miller's instinct was for free agency after a five-year threshold that would have included both time in the minors and majors.[42] But the MLPBA calculated that free agency after six years in the bigs would likely maximize MLB players' salaries[43]; the calculus importantly assumed that players' prime would be in their late 20s or early 30s.[44] The reality, Miller conceded later, was that "'No one knew what the magic figure was.'"[45] The owners agreed to the six-year proposal. The reserve clause – tempered by higher minimum salaries during the first three MLB years and a chance at arbitration during MLB years four through six[46] – still survived.

In the short term, the MLBPA calculation was correct, although the release of a century of pent-up salary pressure undoubtedly played a role as well.[47] In the twenty years after World War II, the minimum MLB salary inched up to $6,000[48]; in the first four years of free agency, the average MLB salary almost tripled.[49] It tripled again during the 1980s.[50] The salaries were tracking TV revenues: from 1971 to 1990, the "average player salary grew 1,741 percent. In the same span, the revenue from national TV contracts grew 1,742 percent."[51] But the owners continued to try to roll back free agency.

The owners attempted to limit 'unrestricted' free agency. The effort failed. The owners attempted to force compensation to offset the loss of a free agent. The players struck, resulting in the 1981 split season.[52] Five years later, the owners colluded in an effort to control salaries; dozens of free agents waited by phones that did not ring.[53] In September 1987, an arbitrator ruled in favor of the players' grievance; the owners paid $280 million in collusion compensation.[54]

The disfunction between about 750[55] MLB players and 30 owners over cutting up the economic pie of baseball reached its nadir in 1994, when a strike ended the season prematurely, cancelling the World Series for the first time in close to a century. Since then, baseball has avoided a work stoppage, but the storm clouds now building are ominous.

In (large) part because of the historic animosity, the MLBPA has taken the position that it would not accept a revenue-sharing arrangement[56], nor a salary cap/floor.[57] (Although each professional league's definitions are different, in general, revenue-sharing means that the players are guaranteed a certain percentage of revenue (usually in the form of a salary floor), but contracts in aggregate are subject to an overall salary-cap.) Yet, two provisions added to the Collective Bargaining Agreement (CBA) since the 1994-95 strike – revenue-sharing between large- and small-market teams, and a luxury tax for teams exceeding certain salary thresholds – have created a *de facto* cap, but without player/owner revenue-sharing. And the six-year reserve clause lives.

As an observer noted,

> [b]eginning in the late 1960s, the players have adopted an adversarial stance, and the owners have responded in kind. Distrust, disrespect, lack of accommodation, name-calling, and inattention to face-saving have characterized negotiations, poisoning chances for uninterrupted play.[58]

CONTRAST WITH OTHER LEAGUES

Over the years, MLB players have adamantly resisted revenue sharing and/or a salary cap. The contrast to the other sports leagues is clear. The NFL, NBA, and NHL all use some sort of revenue-sharing combined with a salary cap. And while each has had work stoppages[59] at times, they have not had the repeated problems that exist with MLB and its players.[60]

Further, the other three leagues have operated under such an arrangement for decades. Indeed, even as the initial COVID-19-stay-at-home-orders were happening in the US, the National Football League Players Association (NFLPA) approved a new ten-year agreement that will guarantee union/management peace until 2030.[61] The players received increases in minimum salaries, and perhaps most importantly, an uptick in their designated share of revenue in any season with 17 games, up from 16 currently.[62] The last point is important to understand: by guaranteeing a percentage of overall revenues, football owners and players are essentially business partners, subject to the salary cap. The same concept exists in the National Basketball Association (NBA), where the players are currently guaranteed between 49-51% of "basketball-related revenue."[63] Likewise, the National Hockey League's (NHL) collective bargaining agreement guarantees its players a 50%[64] split of hockey-related revenue.[65]

The MLBPA's near-religious opposition to a revenue-share/salary-cap system could be justified if as a result, player salaries in baseball were significantly higher (taken as a whole) than the other sports. But studies found that average MLB total compensation for baseball (51%) to be trailing football, but about the same as the NBA and NHL; arguably, baseball players should be earning more than the latter two.[66] Baseball has significantly higher revenues than either the NBA or NHL, and considering that the fixed costs (front office, team travel, ticketing, etc.) are roughly the same for all sports, with the balance available for player salaries and owner profits; the study concluded, "given the higher revenue in MLB, one would expect its [salary] share to be above the NBA's and NHL's."[67] Further, technology advances are putting more pressure on salary expansion in MLB.

TECHNOLOGY AND BASEBALL DEVELOPMENT

Modern technology and sports science have been rapidly adopted by baseball in the last few years. The revolution began when Billy Beane brought the sabermetric concepts popularized by Bill James[68] throughout the 1980s and 1990s into the Oakland A's front office, a story told in print and on the big screen via "*Moneyball*."[69] As with Wright's Red Stockings, the other teams followed suit; every front office is now filled with young minds[70] -- often recruited from Wall Street -- who are using statistical regressions on the latest computers[71] to discern the future, and therefore worth, of every single player.[72]

The consensus analysis across baseball is that the average player's most productive years are usually from ages 26-29, with the natural peak for most players at 27-28,[73] earlier than the 1976 MLBPA estimates. Given that players rarely hit a major league roster before age 22 or 23, this means that a player's most productive years occur while under the six-year reserve clause – and unable to test the market via free agency.[74] If teams want to sign free agents, they are paying for (in the absence of steroids), statistical decline. As one observer wrote:

> as more and more teams have not only embraced high-end analytics, but also made them the backbone of their operations, player valuations now exist on a narrow and almost identical band…Armed with mountains of data, nearly every team has come the same conclusion: Free agency is for suckers.[75]

But technology has not been limited to the front office. Player development (improvement of skills) has also benefited, although not evenly – in the last decade, technology advances have skewed towards pitching performance.

To be sure, batters have incorporated different elements of modern tech.[76] For instance, former-Red Sox Manny Ramirez incorporated advanced training of his eyes in to his off-field "strength training" regimen.[77] When his MLB career was in trouble in 2014, JD Martinez began using three different iPads[78] to record video of every swing he took in batting practice to try to develop "launch angle."[79] In 2017, less than four years after almost washing out of baseball, he hit 45 homeruns and subsequently signed a contract worth $68 million over four years. Finally, there are devices like Trackman, which measures the ball flight of a batted ball.[80] Originally developed for use with golfers, it helps hitters understand the relationship between launch angle, exit velocity, and spin rate. A Trackman is now a part of almost every high-end batting facility.[81]

But while hitting has taken some steps, technology advances have grown fastest in the art of pitching.[82] Traditionally, scouts used a radar gun to rate young prospects, or to determine whether older pitchers had 'lost a foot on their fastball.' One of the early significant breakthroughs in applying technology to pitching was by training with weighted balls, which increased velocity with marked effects.[83] Over the last eight years, the average MLB fastball has increased a full 1 mile per hour, an "enormous boost,"[84] and the number of times a pitcher has thrown a 100+ MPH fastball in the MLB has increased five times in the last decade.[85]

But speed is only a single variable in the flight of a ball, and no matter how fast a pitcher can throw, sooner or later Major League hitters will catch up to a fastball that does not move. A radar gun, in short, is a blunt instrument for measuring true pitching effectiveness.

Baseball has known since (at least) 1959 that a curveball does, in fact, curve. That year, the former director of the National Institute of Standards and Technology wrote a paper confirming that a curveball's 'break' depends on the high rate of spin put on the ball.[86] The seams on the baseball create a 'whirlpool' of air currents on different sides of the baseball; this so-called "Magnus effect" causes the curvature of the ball in the air.

Starting around 2006, MLB began installing "PITCHF/x" systems in every big league park to be able to track not just speed, but also break (movement) and location of pitches in real time.[87] The resulting data was revolutionary; however, the high cost of the system, plus its fixed nature (fixed cameras pointed at homeplate, and calibrated accordingly) made its use for development (i.e., in practices) limited.

It was the creation of the Rapsodo – an optical device not much larger than a shoebox, set on the ground in the bullpen – that created a new way of instructing pitchers. The Rapsodo could not only measure pitch velocity, but also spin rate, which translates into movement. Spin rate has a direct correlation to ball movement on almost all pitches, not just curveballs – a 92-MPH fastball with 2,400 rotations per minute (RPM) of perfect backspin will drop less on its way to the plate than a 92-MPH fastball with only 1,800 RPM – all thanks to the Magnus effect.[88]

But there is another recently-developed technology that has helped pitchers. A high-speed camera, like the Edgertronic, allows a pitcher to focus on the release point – the last moment the fingers are in contact with the baseball. And the Edgertronic can record in hundreds- or even thousands-of-frames-per-second.[89] By reviewing the film, frame-by-frame, a pitcher can determine how the fingers are releasing the ball. With minute adjustments to grip, the player can then check the data from the Rapsodo to see how the spin rate, velocity, and movement on the ball is changing. This is called "pitch design."

Pitch design has clear ramifications. First, the flexibility of the technology means the democratization of development; players at all levels – not just the major leagues – can find a facility with this equipment.[90] Further, traditionally, training for pitchers was primarily a master-apprentice arrangement. A former elite pitcher who was experienced, would work one-on-one with a young player to improve a particular pitch; but movement was judged with the naked eye. But with these new tools, anyone with a technology-background and interest in baseball can essentially coach. Sure, a high-level baseball background helps, but it is no longer a requirement.

But it is the speed of skill-development that truly changes the environment. In the 1990s, future Hall-of-Famer Greg Maddux "perfected the comeback, two-seam fastball, which would start inside off the plate to a left-handed batter, then move into the zone."[91] But while it took Maddux a decade, Trevor Bauer (then of the Cleveland Indians[92]) was able to learn a "reasonable facsimile"[93] of the pitch in one off-season. While Bauer's pitch may not have had all the nuance that Maddux's had, the fact that he could develop it within the course of a single winter had – and continues to have – massive implications for baseball economics.

MLB AND SERVICE TIME

In short, pitchers can be developed faster and at a younger age than ever before. Going back to the control (the post-1976 reserve clause) that baseball clubs have during the first six years of a player's major league career, combined with the analytics that show players physically peaking before age 30, it that means that clubs can get even *more* out of a player's most effective years. When that quickly-developed pitcher reaches full free-agency, there will be another younger prospect ready in the farm system.

Further, MLB clubs are essentially manipulating their rosters to effectively gain a seventh year of control for the best players. While this article has used the short-hand of "six years" to describe the post-1976 reserve system, the reality is more complex: players accumulate MLB service time for each day they spend on a big-league roster. To qualify for a full year of service, a player must spend 172 days on the roster. With 162 regular season games, plus off-days, there are about 185 potential "MLB days"; but with high-profile minor league players – who are projected, thanks to advanced analytics, to be big-league stars – teams have been manipulating the service time by not promoting the player until there are fewer than 172 days left in the season.

Kris Bryant was the second player drafted overall 2013. After tearing through the Chicago Cubs' system in 2013-14, the team delayed his promotion in the spring of 2015. Accordingly, he made his major league debut on April 17, 2015 (the Cubs' ninth game of the season.)[94] Even though Bryant won the 2015 NL Rookie-of-the-Year, he accumulated just 171 days on the roster; he did not 'complete' his first year of service until the first "MLB day" of 2016. Bryant filed a grievance, but the arbitrator determined that the Cubs were within their rights to delay Bryant's promotion.[95]

The Cubs effectively bought themselves a seventh year of control over Bryant's services. Instead of becoming a free agent after the 2020 season, when he would be 28, Bryant will not hit the open market until a year later. Delaying the promotion of young stars is now common-place: last year, Toronto delayed calling up Vladimir Guerrero Jr. until April 26th to accomplish the same thing.[96] And it is clear that teams are becoming wary – in the post-steroid era – of giving long-term contracts to players approaching 30 years of age.

CONCLUSION

The MLBPA made a judgment in 1976 that a six-year reserve clause, no salary cap and no revenue sharing would serve the players well. For fifty years, that has been the case. But in 2020, we see a baseball world where player's average salaries have decreased year-over-year, and the prospects for all-but-the-most-elite players to never really cash-in on free agency is very much a factor. Unlike their brethren in the NFL, NBA, and NHL, baseball players are not partnered with the team owners. Analytics in the front office, and technology in the bullpen are making long MLB careers much harder to foresee. It is a long time since 1879, but the reserve clause speaks just as loudly now as it did then. And baseball is looking at upcoming labor strife—when the current CBA expires over the winter of 2021-22—as a result. ■

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ENDNOTES

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16 Banner, Baseball Trust, at 9.

17 Banner, Baseball Trust, at 5.

18 The Brotherhood Professional Base Ball Players, organized by player John Montgomery Ward, who was also a Columbia Law grad. Burk, Never Just a Game, at 94-97.

19 Again led by Ward. Banner, Baseball Trust, at 13.

20 Banner, Baseball Trust, at 43-44. There was even a one-hour strike before Game 5 of the 1918 World Series. Alex Speier, "Fight over revenues has stopped baseball before," Boston Globe (May 24, 2020), at C5.

21 No other attempt to organize a major league occurred until Branch Rickey's efforts with the Continental League in the late 1950s. It never got off the ground, although some of the proposed cities and financial backers became MLB expansion teams in the 1960s. Charles Fountain, The Betrayal: The 1919 World Series and the Birth of Modern Baseball, Oxford (2016), at 183.

22 For instance, Chicago owner Charles Weeghman settled for the contracts to his Federal League players and the deed to his brand-new Weeghman Park. It's currently used by the Cubs and known as Wrigley Field. Fountain, The Betrayal, at 186.

23 Banner, Baseball Trust, at 53.

24 Banner, Baseball Trust, at 69.

25 The Supreme Court at the time was obligated to hear every case that was properly appealed to it. Three years later, Congress passed the Judiciary Act, which gave the Supreme Court discretion as to which cases were of sufficient national import. Banner, Baseball Trust, at 81-82.

26 Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs et al., 259 U.S. 200 at 209 (1922).

27 Somewhat ironically, the Negro Leagues during this time had no contracts; "[t]he contracts came in only after Jackie Robinson went to the majors and the owners tried to protect their players from being taken… with no compensation." Buck O'Neil, with Steve Wulf & David Conrads, I Was Right on Time, Simon & Schuster (1996), at 71.

28 Robert F. Burk, Much More Than a Game: Players, Owners, and & American Baseball Since 1921, Univ. of North Carolina (2001), at 88.

29 Steven Greenhouse, Beaten Down, Worked Up: The Past, Present, and Future of American Labor, Alfred A. Knopf (2019), at 94.

30 Robert Weintraub, "Failed Baseball Union Helped Pave Way for Success," *N.Y.Times* (Dec. 1, 2012), accessed at https://www.nytimes.com/2012/12/02/sports/baseball/failed-baseball-union-helped-pave-way-for-success.html

31 Richard Ben Cramer, Joe DiMaggio: The Hero's Life, Simon & Schuster (2000), at 114-18.

32 https://thisdayinbaseball.com/1959-mickey-mantle-of-the-new-york-yankees-ends-his-holdout-after-one-day-mantle-agrees-to-a-salary-of-72000-and-a-bonus-of-2000-he-had-been-asking-the-yankees-for-85/

33 Jane Leavy, Sandy Koufax: A Lefty's Legacy, HarperCollins (2002), at 206-09.

34 Id.

35 Robert F. Burk, Marvin Miller: Baseball Revolutionary, Univ. of Illinois Press (2015), at 103-9.

36 David Halberstam, October 1964, Villard (1994), at 114.

37 Roger I. Abrams, Legal Bases: Baseball and the Law, Temple (1998), at 43.

38 Flood v. Kuhn, 407 U.S. 258 (1972)

39 George Vescey, Baseball: A History of America's Favorite Game, Modern Library/Random House (2006), at 144-47.

40 Burk, Marvin Miller, at 183.

41 Technically, the all-but-retired Dave McNally was also a free agent, but neither he nor any club thought he had a future in MLB.

42 Burk, Marvin Miller, at 183-5. Most players would have hit free agency at age 24.

43 Burk, Much More Than a Game, at 201.

44 Burk, Marvin Miller, at 183-84.

45 Id., at 184.

46 Salaries for the first three years of a players' career are effectively set with minimums rising each year; during years four through six, a player can go to arbitration for a one-year contract. In such case, the arbitrator is limited to selecting either the player's suggested one-year salary, or that suggested by the club. The arbitrator cannot 'split the difference,' and hence the term "baseball arbitration."

47 The sudden emergence of the business side of the game had its costs: "we have begun to understand at last that baseball is most of all an enormous and cold-blooded corporate enterprise, and as such is probably a much revelatory and disturbing part of our national psyche than we had supposed." Roger Angell, Five Seasons: A Baseball Companion, Simon & Schuster (1977), at 8.

48 Vescey, Baseball, at 143.

49 John Helyar, Lords of the Realm: The Real History of Baseball, Villard (1994), at 221. Salaries went from $52,300 in 1976 to $143,756 in 1980.

50 Vescey, Baseball, at 147. By 1989, the average salary was $489,000.

51 Helyar, Lords of the Realm, at 364.

52 Jeff Katz, Split Season 1981: Fernandomania, The Bronx Zoo, and the Strike that Saved Baseball, St. Martin's (2015), at 105.

53 Helyar, Lords of the Realm, at 343-355.

54 Jon Pessah, The Game: Inside the Secret World of Major League Baseball's Power Brokers, Little Brown (2015), at 128.

55 Technically, each team has a 40-man "major league" roster, although only 24-25 are active at any one time.

56 The owners have from time-to-time offered to move to a revenue-sharing/salary cap system, perhaps most famously in 1990. They renewed the concept in the run-up to the 1994 work stoppage. Staudohar, Diamond Mines, at 51-55.

57 Alex Speier, "MLB wants to cut more pay; players balk," Boston Globe (May 27, 2020), at C5-6.

58 Staudohar, Diamond Mines, at 49.

59 The NFL in 1982 and 1987; the NHL in 1992 and 1994; the NBA in 1998. James Quick and Rodney Fort, Hard Ball: The Abuse of Power in Pro Team Sports, Princeton Univ. (1999), at 71.

60 In fairness, any sort of revenue-sharing arrangement requires full and fair disclosure from the league to the players, including accounting for related party transactions (e.g., revenues from local television deal when the team owner also owns the cable station.) There may be too much distrust between MLB owners and players. Likewise, in the NBA, the highest-paid players (LeBron James, Steph Curry, et al.) are actually paid *below* market, because of the "maximum contract" provision (currently about $40MM per year.) When teams attempt to attract these high-level players in free agency, they do not compete on contract dollars, but rather amenities of a particular city, the coaching staff, or existing and future teammates.

61 Dan Graziano, "NFL players approve new CBA, runs through 2030," March 15, 2020, located at https://www.espn.com/nfl/story/_/id/28906786/nfl-players-approve-new-cba-2030.

62 Id.

63 David Aldridge, "NBA, NBPA reach tentative seven-year CBA agreement," Dec. 14, 2016, located at https://www.nba.com/article/2016/12/14/nba-and-nbpa-reach-tentative-labor-deal. The details of how the percentage can change from 49 to 51% is not relevant for our purposes.

64 Greg Wyshynski, "NHL players will be paid final 3 checks through end of season," March 13, 2020, located at https://abcnews.go.com/Sports/nhl-players-paid-final-checks-end-season/story?id=69591265. The NHL currently does have a unique system that escrows a percentage (currently 14%) of players' salaries against projected revenues, with the possibility that some of the money be 'returned' to the respective owner to get both sides to 50/50, although that resolution in Spring 2020 may be different in the wake of COVID-19.

65 To be sure, the definition of "sports-related revenue" is different for each of the three sports, and open to (at times bare-knuckled) negotiation in each one. But the principle of enhanced revenues helps both groups is common to all three.

66 Discrepancies between the nominal amounts in the various league CBAs and the amount calculated here reflect payments to injured players,

67 Andrew Zimbalist, "Reflections on Salary Shares and Salary Caps" in Circling the Bases: Essays on the Challenges and Prospects of the Sports Industry, Temple Univ. Press (2011), at 96. The 57% number includes minor league salaries, which total about 6%.

68 Benjamin Baumer and Andrew Zimbalist, The Sabermetric Revolution: Assessing the Growth of Analytics in Baseball, UPenn (2014) at 1-22. James was not the first 'sabermetrician'; he built directly on the work of (among others) Pete Palmer and Craig Wright. But it goes back even further: Henry Chadwick essentially invented the box score; Brooklyn GM Branch Rickey (at the same time he was (re)-integrating the game with Jackie Robinson) hired Allan Roth to glean new statistics; Harold Richman invented the "Strat-o-Matic" baseball game; and Earl Weaver used index cards filled with stats on individual hitter-on-pitcher matchups. See generally, Alan Schwarz, The Numbers Game: Baseball's Long Fascination with Statistics, Thomas Dunne (2004).

69 Mark L. Amour & Daniel R. Levitt, In Pursuit of Pennants: Baseball Operations from Deadball to Moneyball, Univ. of Nebraska (2015), at 352-53.

70 Shifting has been one of the most visible indications of the application of sabermetrics. "Between 2010 and 2017, the number of infield shifts by [MLB] teams increased by a factor of 10." Russell A. Carleton, The Shift: The Next Evolution in Baseball Thinking, Triumph (2018), at 144.

71 It seems a long way from baseball in the 1930s and 1940s: then, superstitions were the 'analytics' of elite baseball. "Satch [Paige] avoided black cats and broken mirrors. He never once in his life walked under a ladder." Joe Posnanski, The Soul of Baseball: A Road Trip Through Buck O'Neil's America, Morrow (2007), at 145. Today's analytics is more like a high-frequency trading program, shaving pennies off the price of a stock.

72 See, e.g., Vincent Gennaro, Diamond Dollars: The Economics of Winning in Baseball, Maple Street (2007), at 69-91.

73 https://baseballwithr.wordpress.com/2017/05/08/what-age-do-baseball-players-peak/

74 In the 2018-19 winter, two top-line pitchers—former Cy Young Award winner Dallas Keuchel (31 years old) and seven-time All-Star Craig Kimbrel (30 years old)—were free agents, but neither was signed until the 2019 season had commenced, and at salaries that were lower than many pundits expected.

75 Jon Tayler, "Baseball's Power Surge," in Baseball America 2020 Almanac, at 8.

76 Hitting a baseball is often said to be the hardest thing to do in all of sports. As Hall of Famer Willie Stargell once said, "They give you a round bat and they throw you a round ball and they tell you to hit it square."

77 Michael Rand, "Vision can give players competitive advantage," Minn. Star-Tribune (Jun 22, 2017), accessed at https://www.startribune.com/vision-can-give-players-competitive-edge/430250083/. The average MLB hitter's vision is 20/12, two lines better than 20/20 on a standard eye chart.

78 Ken Powtak, "J.D. Martinez and his BP iPad No Longer a Laughing Matter," Associated Press (July 14, 2018), accessed at https://www.boston.com/sports/boston-red-sox/2018/07/14/j-d-martinez-and-his-bp-ipad-no-longer-a-laughing-matter

79 Andy McCullough, "Dodgers Hitting Coach Revitalized J.D. Martinez's Swing Despite Lack of MLB Credentials," L.A. Times (Mar. 22, 2019), accessed at https://www.latimes.com/sports/dodgers/la-sp-jd-martinez-robert-van-scoyoc-20190322-story.html "Launch angle" describes the angle of the ball as it leaves the bat; with pitchers having the advantage of getting hitters out, hitters have responded by trying to lift the ball out of the ballpark, which is an uncatchable result. Ben Lindbergh & Travis Sawchik, The MVP Machine: How Baseball's New Nonconformists are using Data to Build Better Players, Basic (2019), at 213.

80 Mike Fast, "What the Heck is PITCHf/x?", in The Hardball Times Annual 2010, p. 5, accessed at http://baseball.physics.illinois.edu/

FastPFXGuide.pdf.

81 Lindbergh & Sawchik, MVP Machine, at 60. A lower-cost solution (for amateurs) attaches a sensor to the knob of the bat, providing much of the same information on a smart phone. See https://blastmotion.com/ or https://diamondkinectics.com/

82 It should be noted that there is some evidence that MLB is trying to help hitters via a ball that flies further. Throughout its history, baseball has contended with theories of a "juiced ball." For instance, it is widely considered that around 1920, in response to Babe Ruth's popularity (and his then-MLB record of 29 homeruns in 1919); "[r]easoning that if one Babe Ruth could fill a park, 16 would fill all the parks, the owners instructed the manufacturers to produce a livelier ball … [but n]one of these devices produced another Ruth, of course, because Ruth was one of a kind." Red Smith, "One of a Kind," in Strawberries in the Wintertime (Quadrangle/New York Times Books (1974)), at 9. The current evidence is that the ball since 2017, the ball has had a slightly higher coefficient of restitution (i.e., bounciness), slightly lower seam height, and slightly smaller circumference, which result in about 7 feet further flight. Ben Lindbergh and Mitchel Litchman, "The Juiced Ball is Back," The Ringer (Jun 14, 2017), accessed at https://www.theringer.com/2017/6/14/16044264/2017-mlb-home-run-spike-juiced-ball-testing-reveal-155cd21108bc. MLB has denied any intentional change, but the two AAA leagues (International and Pacific Coast), who began using the MLB ball in 2019, saw their respective homeruns jump by 57.5% (from 3,652 to 5,752.) Josh Norris, "Home Runs, Looming PBA Pockmark Minor Leagues," Baseball America 2020 Almanac, at 369.

83 Jeff Passan, The Arm: Inside the Billion-Dollar Mystery of the Most Valuable Commodity in Sports, HarperCollins (2016), at 295-97.

84 Michael Clair, "Are pitchers really throwing harder than ever?" Aug. 29, 2018, accessed at https://www.mlb.com/cut4/are-pitchers-really-throwing-harder-than-ever-c292153594

85 Id.

86 Press Release, U.S. Dep't of Commerce Sci. & Tech., Eminent Scientist Reports How Far a Baseball Curves (Mar. 29, 1959), https://www.nist.gov/news-events/news/1959/03/eminent-scientist-reports-how-far-baseballcurves.

87 Mike Fast, "What the Heck is PITCHf/x?", in The Hardball Times Annual 2010, p. 1, accessed at http://baseball.physics.illinois.edu/FastPFXGuide.pdf

88 Spin Rate: What We Know Now, Driveline Baseball (Nov. 17, 2016), https://www.drivelinebaseball.com/2016/11/spin-rate-what-we-know-now. Curveballs move thanks to a ratio of both backspin and transverse spin (i.e., side spin).

89 https://www.edgertronic.com/our-cameras/sc1

90 Which is not to say the tools are cheap. The Rapsodo ranges from $4-5,000. https://rapsodo.com/product-category/diamond-sports/?category=diamond-sports. The entry-level Edgertronic retails for $6,500. https://www.edgertronic.com/our-cameras/sc1. But a $10-12,000 investment is well within the range of a major college Division I program, or other similar high-end baseball training facility.

91 Lindbergh & Sawchik, MVP Machine, at 109.

92 He was subsequently traded to the Cincinnati Reds.

93 Lindbergh & Sawchik, MVP Machine, at 109-110.

94 https://www.baseball-reference.com/register/player.fcgi?id=bryant001kri

95 Evan Drellich, "After Kris Bryant loses landmark grievance, players may push to change service-time system," The Athletic (Feb. 3, 2020), located at https://theathletic.com/1579879/2020/02/03/after-kris-bryant-loses-landmark-grievance-players-may-push-to-change-service-time-system/

96 https://www.baseball-reference.com/players/g/guerrvl02.shtml. In fairness, Bryant and Guerrero are both position players; teams are less likely to holdback pitchers because their futures – in light of statistics that show 50% of pitchers on the injured list in a given year – are far less predictable. Passan, The Arm, at 3. It should be noted that the MLB owners have at least shown some awareness of the playing time issue; in the initial agreement between the owners and players relating to COVID-19, signed in March, 2020, granted a full year of service for MLB players during the 2020 season, regardless of how many games ultimately get played. Ken Rosenthal, "MLB and players' union making progress toward service-time resolution," The Athletic, Mar. 24, 2020, accessed at https://theathletic.com/1699559/2020/03/25/rosenthal-mlb-and-players-union-making-progress-toward-service-time-resolution/

AB5 Is Causing a Hurdle for the Gig Economy

What Are Independent Contractors to Do When They Cannot Find Work in the Middle of a Pandemic?

Isaac Arreola[1]

Coming off the heels of the California Supreme Court case *Dynamex Operations West, Inc. v. Superior Court*,[2] Assembly Bill 5 (AB5) was signed into law on September 18, 2019.[3] AB5 (like its federal counterpart, the Protecting the Right to Organize Act (PRO Act)[4] was penned with the goal of protecting workers from being misclassified as "non-employees"[5] in the ever-growing gig economy.[6] The law was meant to act as a metaphorical leash on larger corporations and businesses seeking to circumvent labor and employment laws by forcing them to accurately classify their workers or else face a penalty.[7] The primary goal of AB5 was "part of a trend by state and federal governments to increase the focus on misclassification of workers,"[8] and in doing so, it was intended as a way to protect workers, offer them greater benefits, and increase state and federal income tax revenues.[9] This primary goal, however, has yet to be achieved in the music, arts, and entertainment community. This paper explores how the music, arts, and entertainment community—a sub-section of the independent contractors that work within the gig economy—have been affected by AB5.

The gig economy is made up of "temporary or freelance workers"[10] who perform a specific service for another person or entity. This includes musicians, artists, actors, and ride-share drivers, among others. Although the bill was intended to help workers in the gig economy by securing benefits that may have otherwise been unavailable to them, the bill also harshly punishes employers for any misclassification.[11] This has made some employers averse to hiring independent contractors out of a fear of being penalized or because they simply cannot afford to hire someone to do a temporary job but be forced to pay them as a regular employee.[12] The bill has also forced some employers to hire independent contractors from states outside of California to perform the same job outside state lines to avoid the risk of a penalty.[13]

Musicians, artist, and entertainers have especially been outspoken about their disdain for the bill, writing petitions and filing complaints since AB5 was introduced into law.[14] The general consensus amongst the music and arts community is that the bill has hurt their ability to find and keep work.[15] What was supposed to be a helping hand for the gig economy has become a massive hurdle for artists and musicians alike. What should have been a law that offered financial support and job security through employee benefits, has instead become another hurdle for the "starving artist." Since the bill was signed into law earlier this year, there has been a tremendous amount of opposition from people working in the gig economy. However, not everyone working in the gig economy feels the same way and there are others who see the law as a way to secure benefits that would not have otherwise been available to them. AB5 has split workers into opposing sides: those that want to amend or repeal the law entirely and those that want the law to be enforced more strictly so that employers actually make efforts in providing employee benefits and an overall better working environment.

The divisiveness of AB5 considers very narrow outcomes of how the law should be implemented or repealed because the law looks at only two possible options for classifying a worker: an employee or an independent contractor. This places a strain on both employers and employees as they navigate through the difficulty of correctly classifying a worker. Instead, this Article proposes a hybrid classification of worker that is recognized within labor and employment law. This classification would retain the independent status of an independent contractor while providing certain benefits and protections typically given only to employees.

The recent events of COVID-19 have also fueled the debate on AB5.[16] The pandemic has caused a ripple effect through the music and arts community that has led to massive layoffs and cancellations of major events.[17] The uncertainty of how long the pandemic will last has pushed many artists and musicians to entirely change the way they perform their jobs, and some are left without much of an option other than to file for unemployment, if they can.[18]

The Coronavirus relief bill, The CARES Act, has offered relief for independent contractors, but many are struggling to file for unemployment,[19] or the money they receive from unemployment does not equate to the amount that the individual was earning before.[20] Generally, unemployment benefits are not awarded to freelancers or independent contractors, but the CARES Act has significantly expanded employment benefits to include independent contractors and other individuals that are self-employed. The relief offered to these individuals should compensate them for their loss of work and provide them with a livable wage, but it is not. There are currently musicians and artists that are struggling in the COVID-19 environment[21] without much financial stability to keep them afloat during this time.[22]

Many artists and musicians make their living through commissioned work or live performances. Those that were already struggling to find work prior to the pandemic are not having much luck now because work is limited and, in some areas, nonexistent.[23] Live music, in particular, has been largely affected by the pandemic. Even as some cities begin to move into the next stage of handling the pandemic by reopening certain businesses, many live music venues have yet to re-open or have been forced to permanently close.

The result of AB5 has caused controversy and headache within the gig economy. The Bill affects the livelihood of many individuals. In this paper, I will focus generally on individuals that work in music, arts, and entertainment with some examples of other areas of the gig economy. I will begin with the procedural history of AB5; how individuals within the arts, music and entertainment community have been affected by the law; the consequences that AB5 has on intellectual property; a proposal for a third "hybrid class" of worker known as the "dependent contractor"; and how COVID-19 has played a role in the debate over AB5.

HISTORY BEHIND AB5: *BORELLO, MARTINEZ, & DYNAMEX*

Borello

To understand how the multifactor "ABC test" in *Dynamex* became codified into law under AB5, we must begin by understanding the test that was established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.[24] In 1989, the *Borello* court dealt with an early case of worker misclassification and the holding in *Borello* set the precedent for correctly classifying a worker.[25] The "*Borello* test" remains good law today and it applies to non-wage order claims and to workers who fall into one of the exempt categories of AB5. So, there are essentially two different tests that are used today, the *Borello* test and the ABC test.

At the heart of the *Borello* dispute was the Worker's Compensation Act (the Act),[26] which was enacted to help workers who were injured at work by requiring that California employers provide workers compensation insurance for all employees. The Act, however, does not apply to independent contractors, who the Act defines as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."[27] The Act's definition looks closely at the relationship between the hiring entity and the worker; this relationship became an essential part of the *Borello* test.

The dispute in *Borello* arose on August 14, 1985, when S.G. Borello & Sons, Inc. ("Borello") received a stop order/penalty assessment for "failure to secure workers compensation coverage for 50 migrant harvesters of its cucumber crops."[28] Borello appealed the citation to the Division of Labor Standards Enforcement (Division) of the Department of Industrial Relations, arguing that the harvesters were "independent contractors" under the Worker's Compensation Act and were therefore excluded from workers compensation law.[29]

To bolster its argument, Borello introduced evidence of a preprinted agreement with the migrant workers that designated each worker as a "Share Farmer."[30] The agreement stated that the function of the "Share Farmer" was to "prepare for and harvest cucumbers," and left much of the "method and manner" of harvesting the crops to the Share Farmer's discretion.[31] The agreement also stated that "the parties deem themselves principal and independent contractor" and that Borello would "not provide workers' compensation or disability insurance coverage."[32]

Borello sold a majority of its cucumbers to the Vlasic Pickle Company (Vlasic),[33] who would "unilaterally [determine] the cucumber varieties it [would] accept and set[] the prices it [would] pay," and Borello would sell its cucumbers to Vlasic by adhering to Vlasic's preferences.[34] Vlasic supplied the "Share Farmer" agreement form and would keep "records of each share farmer's harvest."[35] Borello had requested that Vlasic directly issue a weekly check to the Share Farmers, although Borello would "physically" deliver the check.[36]

Despite Borello's agreement with the Share Farmers, much of the farming and harvesting of the crops were determined by Borello.[37] Borello planted and cultivated its own crops, used its own pipe irrigation system and controlled the water, and sprayed pesticides "under Vlasic's direction."[38] Borello also provided bins for the farmers to store the cucumbers they harvested and retained title to the crop until it was sold.[39] Once the crop was gathered, Borello itself would deliver the harvested crops to Vlasic.[40] In the "Share Farmer" agreement, Borello agreed to pay all the costs with respect to the cucumber farming.[41] For these reasons, the Division determined that Borello retained "predominant control over the cultivation, harvest, and sale of its cucumbers" and the workers had a "lack of investment in the crop."[42] Thus, the workers could not be considered independent contractors.[43]

The Court of Appeals reversed the lower court's decision, noting Borello's "relinquishment of control over the harvester's work; its lack of authority to discharge them at will; their responsibility for furnishing tools; the "result" method of compensation; the temporary nature of the work; and the mutual assent of the written contract.[44] The case was then heard by the California Supreme Court.

The California Supreme Court found that the "distinction between employee and independent contractor arose at common law" out of a concern for vicarious liability.[45] The court noted that the common law was focused on limiting the vicarious liability for the "misconduct of a person rendering service" for an employer.[46] Where an employer would generally be held vicariously liable for the misconduct of an employee, an employer would generally not be held liable for the misconduct of an independent contractor because the employer retains little control over them.[47]

The court noted, however, that the common law purpose for distinguishing between employees and independent contractors was not the same as the Worker's Compensation Act.[48] The common law tests were developed in response to a concern about vicarious liability, whereas the statutory purposes of the Worker's Compensation Act were to determine "which injuries *to* the employee should be insured against by the employer."[49] The Act's intent was to provide a "comprehensive coverage of injuries" for employees, and it accomplished its goal by "defining 'employment' broadly," by "including a general presumption" that a worker is an employee, and by providing more coverage generally.[50]

Therefore, in analyzing if the Share Farmers were employees, the court turned to using the "control of details" or "control-of-work" test, which looks at the "extent to which the employer had the right to control [the details of the service] activities." If an employer had more control over the details of the service activities, then it was more likely that there was an employer/employee relationship, but the test "applied rigidly and in isolation" would not work in every situation where there are an "infinite variety of service agreements."[51] For this reason, the court found that additional factors from the Restatement Second of Agency should be applied to determine whether an employee/employer relationship exists.[52] Additionally, the court noted that the "right to discharge at will" is evidence in support of an employment relationship.[53] These additional factors are "intertwined" and "their weight depends often on particular combinations."[54]

The court determined that, taken together, the legislative intent and the "control of details test" would offer a better approach to distinguishing between employee and independent contractor[55] than the stiff definition of "independent contractor" in the Worker's Compensation Act. This was because there were several purposes to the Act[56] that "intended to bring comprehensive coverage of injuries in employment."[57] The Act accomplishes the goal of comprehensive coverage by defining "employment" and "employee" broadly.[58] The control of details test looked solely at the relationship between the worker and the hiring entity, whereas, in the court's opinion, a multi-factor test would be more appropriate to determine classification. Indeed, the court stated that the "control of details" test "*must* be applied with deference to the purpose of the protective legislation."[59] The "Act must be liberally construed to extend benefits to persons injured in their employment."[60]

In essence, the *Borello* court wanted to create a test that could fit nearly every service arrangement by using a multi-factor test.[61] The *Borello* test begins with the common law approach; "whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired." Secondary factors are then applied to "supplement the central inquiry into the right of control."[62] In total, the *Borello* court listed nine secondary factors to consider in determining whether the employee is an independent contractor: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; (h) whether or not the parties believe they are creating the relationship of employer-employee; and (i) whether the hiring entity has the right to discharge the worker at will. All applicable factors are then taken together with the "control of details" test and with "deference to the purposes of the protective legislation."[63]

In the end, the court used the "control of details" and the list of secondary factors to hold that Borello had "all necessary control"[64] over the activities performed by the share farmers. The Share Farmers fell within the class of workers that the Worker's Compensation Act intended to cover, and the purpose of the Act was to protect such workers and provide them with adequate benefits and insurance for work related injuries.[65] Under the *Borello* test, the Share Farmers were considered to be employees.

Martinez

Although *Martinez* did not directly distinguish independent contractors and employees, "it did address the meaning of the terms 'employ' and 'employer'" as used in a claim for unpaid wages.[66] This was central to *Dynamex* because the court took the definition for "employer" used in *Martinez* to determine if the drivers in *Dynamex* were considered "employees."[67]

In *Martinez*, the plaintiffs, a group of seasonal agricultural workers, sued their employer, Munoz & Sons, as well as Apico, Inc. and Combs Distribution Co., two produce merchants "through whom Munoz sold strawberries."[68] The agricultural workers filed a complaint for "unpaid minimum or overtime wages" under California Labor Code section 1194.[69] Section 1194 states that employees who receive less than the legal minimum wage or overtime pay are "entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation."[70] The workers alleged that they were not being paid adequately, and that under the Wage Order definition for employer, Munoz and the produce merchants should be held liable for the unpaid wages.[71] To bolster their argument, the plaintiffs used the definitions found in the California Wage Order[72] for the transportation industry.[73]

In its analysis, the court in *Martinez* looked at the wage order pertaining to the transportation industry.[74] Subdivision 1 stated that the wage order applies "to all persons employed in the transportation industry, whether paid on a time, piece rate, commission, or other basis."[75] Subdivision 2 contained the following definitions for employer and employee:

> (D) "Employ" means to engage, suffer, or permit to work.
>
> (E) "Employee" means any person employed by an employer.
>
> (F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.[76]

Subdivision 2 does not contain the words "independent contractor," and the wage order makes no distinction between employees and independent contractors.[77] The court found that the words "to employ" had three alternative definitions under the IWC's Wage Order: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship.[78]

The *Martinez* court concluded that these definitions for employee from the wage order did "apply in civil actions for unpaid minimum or overtime wages under section 1194" but did not find that the defendants were "employers" for the purposes of section 1194.

Dynamex

Nearly three decades after *Borello*, the Supreme Court of California once again determined the distinction between independent contractors and employees in April 2018 for wage order claims,[79] but this time, the court applied a different test than the one used in *Borello*.

The crux of the dispute in *Dynamex* was the definition of "employee."[80] In determining class certification, the trial court used the definitions of "employee" and "employer" from *Martinez*.[81] The plaintiffs in *Dynamex* argued that the "standards and tests" used in *Martinez* should be applied and that the *Borello* test was not the "sole applicable standard" for determining whether a worker is an independent contractor or employee.[82] The trial court agreed and stated that "[t]hese definitions must be considered when analyzing whether the class members are employees or independent contractors."[83] The plaintiffs were eventually certified as a class action that embodied "a class of Dynamex drivers who, during a pay period, did not themselves employ other drivers and did not do delivery work for other delivery businesses or for the drivers' own personal customers."[84]

In December 2012, Dynamex filed a petition for writ of mandate to decertify the class certification stating that the trial court had erred in "relying upon the wage order's alternative definitions" in *Martinez*. The court of appeals denied the petition in part and granted the petition in part. The court held, "the trial court properly relied on the alternative definitions of the employment relationship" when assessing wage order claims, but the *Borello* test would apply to anything outside the scope of the applicable wage order.

The California Supreme Court granted Dynamex's petition for review on the grounds that the court of appeal's conclusion that the trial court's use of "employee" and "employer," as established in *Martinez*, could be used to determine whether an employee is an independent contractor or an employee "for purposes of the obligations imposed by the wage order."[85] In sum, the court was asked what the proper test for classification would be for a wage order claim.[86]

Dynamex argued that two of the three alternative definitions, "the exercise control over wages hours or working conditions standard and the suffer or permit to work standard," should only be used when a business entity is "jointly responsible for the obligations imposed by the wage order."[87] The court declined to determine whether those two alternative definitions applied, because it concluded that the "suffer or permit to work standard properly applies" to determine whether a worker should be considered an employee or an independent contractor.[88] In affirming the applicability of *Martinez*, the court noted that the suffer or permit work standard should be "interpreted and applied broadly" to include "all individuals who can reasonably be viewed as 'working in the [hiring entity's] business.'"[89] This interpretation came from the legislative intent behind IWC's wage orders and the Fair Labor Standards Act (FLSA), which sought to provide a benefit to the workers by improving the work environment and raising the living standards.[90] Although the interpretation was meant to be applied broadly, the court noted that there would still need to be some multi-factor test to determine where the line between independent contractor and employee gets drawn.[91]

The multi-factor test the court used is what is now commonly known as the "ABC test."[92] This is the test that shook the gig economy in California. Under the ABC test, all workers are presumptively considered to be employees; to refute this presumption, the business entity must demonstrate that the worker is an independent contractor by showing that the worker satisfies the following three factors:

> (A) is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;
>
> (B) performs work that is outside the usual course of the hiring entity's business; *and*
>
> (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[93]

The first factor, that the worker be free from the control and direction of the business entity is similar to language found in the *Borello* test (the control of details test).[94] The other two factors come straight from the suffer or permit to work standard.[95] Part (B) was intended to bring a uniformity to term "employee" by categorizing all "individuals who can reasonably be viewed as working '*in the [hiring entity's] business*'" as employees.[96] Part (C) is intended to preclude businesses from evading the rules and regulations in the wage order by classifying workers as independent contractors.[97] When an individual is simply designated as an independent contractor by the hiring entity, then there is a risk that the hiring entity is trying to avoid any liability to the worker.

The *Dynamex* court held that to determine whether a worker is an employee or an independent contractor in a wage order claim, the "suffer or permit to work" standard applies,[98] requiring that the hiring entity making the assertion that their employee is an independent contractor establish each of the ABC factors.[99] The worker is presumed to be an employee unless the hiring entity can prove otherwise, and if the hiring entity fails to establish any of the ABC factors, then the worker will be deemed an employee.[100]

The Aftermath of Dynamex and the Creation of AB5

Dynamex burdened hiring entities and independent contractors alike. Its holding makes it more difficult for companies to hire workers as independent contractors because the risk of misclassification is much greater. The "suffer or permit to work" standard begins with the presumption that the worker is an employee. This is a high hurdle for hiring entities. If they do not correctly classify their worker, then they run the risk of being held legally liable for not providing their worker with the appropriate pay and benefits during the period that they worked.

The ABC test is more rigorous than the *Borello* test. Under the ABC test, all three prongs must be satisfied to prove that the worker is an independent contractor. Unlike *Borello*, the hiring entity's right to control is not the most important factor in determining the classification of the worker. It is just one of the three required factors. Under the *Borello* test, it is more likely that a worker will be found to be an independent contractor whereas under the ABC test, it is more likely that the worker is an employee. *Dynamex* did not overrule *Borello*, however. The ABC test applies only to wage-order claims. The *Borello* test still applies to non-wage-order claims and to those that are exempt from AB5.

AB5 was written into law in the following year after *Dynamex*. The bill codified the *Dynamex* decision and clarified its application of the ABC test. AB5 provides that "for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission," a worker will be considered an employee unless the hiring entity can demonstrate that the worker is actually an independent contractor under the ABC test. This bill was written with the acknowledgement that independent contracting has become a growing trend in the workplace. Several reports have found that "alternative work arrangements" or "nonstandard work" have increased in the last decade. These types of alternative workers include independent contractors.[101]

AB5'S EFFECTS ON THE GIG ECONOMY

Independent contracting works well for the gig economy. Gig workers understand that their work is temporary but in return they are given more freedom to choose when and where to work, they can work on multiple projects for multiple companies simultaneously, and they can make more money working less hours than a fulltime employee would.[102] The largest risk of course is that there is no guarantee in having stable work. Work for an independent contractor can be inconsistent, and independent contractors must constantly look for work to maintain their financial stability.

AB5 expanded on the ruling in *Dynamex* by extending employee classification status to gig workers. The ABC test used in *Dynamex* was codified in California Labor Code § 2705.3.[103] Under AB5, a worker is either an employee or an independent contractor. Unlike an employee, an independent contractor is not covered by certain employment and labor laws,[104] and the hiring entity does not withhold taxes from a contractor's pay.[105]

In theory, the law works well. It sets out guidelines for the classification and misclassification of workers.[106] Under AB5, most workers are assumed to be employees unless they offer a professional service that falls within one of the law's listed exceptions or are unable to meet the classification of employee under the "ABC" test. The burden of proof falls on the employer to prove that the worker is in fact an independent contractor. In this respect, AB5 accomplishes its goal of encouraging employers to properly classify workers, thereby ensuring them proper benefits and compensation. However, since its ratification, the bill has received a great amount of backlash from gig workers.[107] These workers do not want to be classified as employees because it hurts them more than it helps them, including musicians, artists, and other individuals in the entertainment industry.[108]

AB5's Exemptions and the Music Industry

The music industry has generally been made up of individuals who provide their services temporarily or for a brief period of time, such as touring musicians, session musicians, backup singers, DJ's, sound engineers, music producers, venue owners, and tour and merchandise managers. These individuals are commonly independent contractors. Under AB5, however, these individuals are now considered employees until proven otherwise. This means that the hiring entity must treat each of these individuals as an employee and must place them on their payroll, provide workers compensation insurance and other benefits, pay unemployment taxes, follow California Labor Code (which includes classifying employees correctly), and file a Form W-2.

Under AB5, if a musician requires a backup singer for their performance, then they must treat that singer as one of their employees. Likewise, a venue must treat the musicians hired to play at their establishment as its own employees. If a wedding band is hired to play a wedding, then they must now be treated as employees of the wedding party. Because these types of performances generally last only a few hours, having to designate these workers as employees is nonsensical. For one, many hiring entities, such as couples getting married or people throwing a party, are not prepared to assume the legal burden of being an employer. Employers also run the risk of being penalized if they misclassify an employee,[109] and the cost of maintaining workers would also increase staffing costs about 30%.[110]

Labor Code section 2750.3 subdivision (c) explicitly states that the holding in *Dynamex* does not apply to persons who are contracted for their "professional services."[111] These professional services include: marketing services; administrator of human resources; travel agent services; graphic designer; grant writer; fine artist; Internal Revenue Service agents; payment processing agent through an independent sales organization; photographer, photojournalist, freelance writer, editor, or a newspaper cartoonist who does not provide content submissions to their employer more than 35 times a year; and licensed estheticians, barbers, electrologist, manicurists, or cosmetologists.[112] Musicians and many other individuals who work in the music industry are excluded from the list of exemptions.[113]

The issue is not who is exempt from AB5, but who is *not* exempt. The Bill does not mention musicians, and the word "music" is mentioned only once in the entire bill to state that the exemptions are not applicable to individuals who work in motion picture, which includes "music videos."[114] The fact that musicians were not exempt from AB5 led to much pushback from the music community, who felt they were left without a voice in the matter.[115] Ari Herstand, an independent musician from Los Angeles who currently leads

Independent Music Professionals United, a group of music professionals that "[i]nitially formed to secure an exemption for the music industry,"[116] has been an outspoken critic of AB5. Herstand was one of the major opposers to AB5 and worked rigorously to collect more than 185,000 signatures for a petition to amend the law.[117] Herstand has advocated for amendments to AB5 that would "appropriately narrow the effect of AB5 to clarify that music professionals, due to the unique nature of our business, cannot be treated as an employer every time they collaborate."[118] The proposed amendments, however, do not seem to be broad sweeping, and Herstand admitted that "[they] weren't able to exempt small orchestras and small community theater productions …. [the California legislature] wouldn't budge on that."[119]

On Friday, April 17, 2020, after months of efforts from the music community to compel California legislators to rewrite the bill, California lawmakers announced that they would make amendments to AB5 to include most music professionals and to "ensure fair treatment for gig economy workers in the music industry without inhibiting their ability to create and collaborate."[120] The new amended language "revises rules employers must use to determine whether [musicians, composers, songwriters, engineers, producers, and other individuals working in the music industry] are employees or independent contractors." The amendment would allow most musicians to continue using the more flexible *Borello* test to determine their classification and would also "[preserve] the right for unions to continue to organize the work of" individuals working in the music industry.[121] This amendment applies to musicians who perform in standalone live performances, "unless they're a part of a group headlining at a concert venue with more than 1,500 attendees or performing at a music festival that draws more than 18,000 attendees." This would mean that AB5 would still apply to many artists and musicians performing at large concert venues and music festivals. The amendment would also not apply to "[m]usical groups regularly performing at theme parks, and musicians in symphony orchestras, performing as a part of a tour or performing in a musical theater production . . . ." So, although some agreement has been reached between California Legislators and groups of musicians in opposition to the Bill, AB5 will continue to affect a significant portion of live performances.

Until these amendments are codified, however, AB5 as originally written is still in effect. This means that most workers who work in the music industry would be presumptively classified as employees and the burden of proof is on the employer to show that they are in fact independent contractors. The COVID-19 pandemic also forced the State Legislature to adjourn their meetings until May 4, 2020.[122] Although AB5's drafters may have been well intentioned in their approach to solving an issue they perceived in the gig economy, mainly with rideshare services, their broad sweeping Bill has threatened the livelihood of many who work in the music industry.

For now, musicians can have a short sigh of relief knowing that most will be exempt in an amended AB5, but that does not mean that the Bill has not already had detrimental effects. Earlier this year, the Island City Opera (ICO), a Bay Area company, postponed its March production of Dame Ethel Smyth's 1906 opera "The Wreckers," amid AB5 confusion.[123] Artistic director of ICO, Eileen Meredith, stated that the new law caused them to postpone the production, saying "I don't know all the details of the regulations . . . [b]ut since we have such a short time frame, we decided it wasn't appropriate to go forward."[124] Likewise, members of the Recording Academy in the Los Angeles and San Francisco Chapters have reported that it has become more difficult to secure work due to AB5.[125] Earlier this year, the Los Angeles Times asked readers to write in about their own personal concerns with AB5 and over 120 individuals responded.[126] Freelance musicians, composers, choreographers, and even the manager of a live karaoke band wrote to the Los Angeles Times to voice their concerns with AB5.[127]

The Divide of the Gig Economy

To many employers, especially smaller, independent companies, the cost of hiring workers as employees outweighs the benefit. Indeed, since AB5 was signed into law, there have been massive layoffs in the gig community.[128] To say that AB5 has affected the livelihood of many individuals who work as independent contractors is an understatement; it has nearly decimated the entire gig economy in California. Alisha Grauso, a co-leader of California Freelance Writers United (CAFWU), has stated that "Companies can simply blacklist California writers and work with writers in other states, and that's exactly what's happening."[129] Grauso's main concern with AB5 is the 35-piece-per-company limit. AB5 gave a partial exemption to writers, photographers, photojournalists, editors, and newspaper cartoonists by "allowing publishers to hire them for up to 35 separate 'content submissions' in a given year."[130] Anything beyond the 35-limit would mean that the worker would not be exempt from AB5. The 35-limit constraint amounts to less than one submission per week to the employer. This would mean that weekly columnists could be out of a job unless their publisher hires them as employees, but some companies like Vox Media, Rev, and Scripted are averse to doing so.[131] These companies have stopped using workers in California after AB5 was passed last fall either out of a concern of legal liability or because they "may not have the resources to convert freelancers to staff members."

However, not everyone shares a negative sentiment towards AB5. The Bill inadvertently advocates for unionization by attempting to reclassify independent contractors as employees.[132] Workers that would not have been able to unionize before now have the opportunity to do so under their new classification of "employee."[133] Soldiers of Pole, a pro-unionization group of exotic dancers based in Los Angeles, has advocated for AB5 because it has allowed them the opportunity to "file claims with the California Labor Commissioner's office for wage theft, retaliation and a variety of other labor law violations."[134] Before AB5, most exotic dancers were classified as independent contractors and were left without much protection or recourse for work discrimination or labor disputes.[135] The tides changed with *Dynamex*, and now dancers should have more power. Under the ABC test, a dancer would be considered an independent contractor if their work falls outside the usual course of business, but dancers at these clubs "*are* the business."[136] However, even with the passing of AB5, some clubs still have not adhered to the new law. Antonia Cane, one of the leaders of Soldiers of Pole, has said that "the change in status hasn't stopped clubs from implementing bogus policies, like requiring performers to do their first handful of dances for free, while the club pockets the tips."[137] This runs afoul of labor and employment law. In forming unions for exotic dancers, Cane hopes to bring more bargaining power to their position so that exotic dancers are able to avoid being misclassified and mistreated by their employers.

THE GIG ECONOMY IN THE TIME OF COVID-19

Beyond the effects of AB5, the future of the gig economy is uncertain. The COVID-19 pandemic has created another hurdle for the gig community. Among other things, "many creative professionals still work for themselves and don't have typical salaried-worker safety nets like extended sick leave."[138] This has forced many individuals to pursue work outside of their usual source of income, and there have been several mutual aid funds that have formed to provide temporary relief amidst the COVID-19 pandemic.

The pandemic has forced millions of Americans to file for unemployment.[139] In California alone, 2.7 million residents filed for unemployment within the first month of the pandemic.[140] Gig workers have been feeling the effects of the pandemic especially hard because there has been a decrease in demand for their work.[141]

Los Angeles Times reporter Johana Bhuiyan has written on the debate between workers that view AB5 as a solution to the decline in work and workers who see AB5 as a hurdle that adds more difficulty to the decline in work.[142] Those for whom it has become increasingly difficult to find jobs amid the pandemic advocate for a repeal of AB5 or a suspension of the Bill until the pandemic is over.[143] They argue a complete repeal of the bill would allow more flexibility to work as an independent contractor.[144] On the other side are workers who are pushing for enforcement of the law, arguing that the pandemic is a perfect example of why employee benefits, such as sick leave, are necessary.[145]

Even as the pandemic has ignited both sides of the debate, it has slowed the progression of changes or amendments to AB5.[146] In truth, even if AB5 was repealed, the jobs that once existed may no longer be around after the COVID-19 pandemic. The future of the gig economy will look very different than what it looked like before the pandemic, but perhaps that is a good thing. This raises another idea, a "hybrid classification" that would "[blend] the flexibility of contract work with some of the protections of employee status."[147] This has become known as the "dependent contractor."

The Dependent Contractor

The dependent contractor is a hybrid classification that is modeled after Canadian law. The main difference between an independent contractor and a dependent contractor is how much the worker relies on the hiring entity for "their total annual income." To establish a dependent contractor relationship, the key factor a worker must demonstrate is "a certain minimum economic dependency" on the hiring entity or the company they work for. Economic dependency is shown by an "exclusivity of service provision," or in other words, by showing that the worker performs a service that is exclusive or nearly exclusive to the hiring entity.[148] Exclusivity can be shown by the amount of income a worker receives from the hiring entity. In several cases, Canadian courts have found a dependent contractor relationship to exist where the "relationship was absolutely exclusive in nature." Even if the relationship is not absolutely exclusive, courts have found a dependent contractor relationship where "substantially more than a majority of the dependent contractor's income was earned from the contracting party." In *Thurston v. Ontario (Children's Lawyer)*, the Ontario Court of Appeals held that "near-exclusivity necessarily requires substantially more than 50% of billings."[149] A dependent contractor must therefore show that they rely on the hiring entity for more than half of their total income. Workers that are hired by multiple hiring entities, and thus have multiple sources of income, may still be designated as independent contractors.

The dependent contractor classification gives courts and legislatures more flexibility to "grant protections to potentially disadvantaged workers." Canadian law affords dependent contractors "entitlement to the same notice and severance benefits that Canadian employees are entitled to receive."[150] This would help disadvantaged workers if they were to suddenly lose their job. The addition of a dependent contractor classification would also decrease the risk of a misclassification because a hiring entity could classify a worker as a dependent contractor without fear of being penalized by Labor Code 2750.3.

The CARES ACT

On March 27, 2020, the federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into effect.[151] The Senate passed the $2 trillion bill with the intent to provide widespread relief to the struggling American economy.[152] The CARES Act has expanded the availability of unemployment insurance to include independent contractors, persons who otherwise would not have been able to file for unemployment.[153] The CARES Act permits an independent contractor to receive unemployment benefits "if the individual self-certifies that he or she is able and available to work within the meaning of applicable state law and is 'unemployed, partially unemployed or unable or unavailable to work'" because of a COVID-19 related reason.[154]

Despite the CARES Act's intended immediate assistance, some people are still waiting for their relief. The pandemic has made it difficult to file for unemployment, let alone receive any benefits. Different states have found that their unemployment-insurance systems were not prepared for the 22 million workers who filed for unemployment in the last few weeks.[155] The archaic and outdated unemployment-insurance system has been burdensome for many.[156] For example, Mohammed Saiful Islam, a Lyft driver in Queens, New York, was asked to fax his pay stubs to complete his claim.[157] The forty-nine-year-old driver never once had to apply for unemployment benefits since immigrating from Bangladesh at the age of fourteen.[158]

These unemployment systems are outdated and were not built for independent contractors and the self-employed.[159] Although the CARES Act has expanded unemployment insurance to these individuals, they are still experiencing obstacles that make it difficult to receive any form of relief.[160] In New York, for example, self-employed individuals "must first apply for traditional unemployment benefits," and only after the state denies their claim can they "then pursue the new pandemic-related benefits available to them."[161]

CONCLUSION

AB5 has not completely fulfilled its purpose of providing workers with more rights and benefits. The gig economy has become frustrated by the passing of AB5, and work for many within the gig economy has become strained. For most members of the music, arts, and entertainment community, AB5 creates a large burden on their ability to find and keep work. A small minority of members of the gig economy view the bill as a law that will help them preserve an employee classification that will give them additional benefits and compensation. This divide between the workers places people on two sides of a debate: those that see AB5 as a good thing and those that view it as a hurdle and want to amend the law to allow for more exemptions or want to repeal it completely.

One solution to the disadvantages of AB5 would be to create a classification of "dependent contractor." This classification would provide workers with some amount of protection while giving hiring entities some flexibility in how they classify their workers and employees, and it would decrease the risk of a misclassification. This seems to be working well in Canada. Viewing how gig workers are faring in the U.S., the additional classification might be a welcomed solution.

The COVID-19 pandemic has also burdened the livelihood of many gig workers. While the push to compel legislatures to add more exemptions would be a tiresome battle amid the COVID-19 pandemic, the reward will at least be a comfort for those who become exempt from AB5 because it will allow them to keep their independent contractor classification with much more ease. As the pandemic unfolds in real time, we must stay hypervigilant in how AB5 plays out in the legislature. There is a lot of uncertainty in the near future and many are learning to cope with the new reality of a society stricken by a pandemic. Work should be one less thing that remains uncertain and any ability to ease that uncertainty so that others can find stable work, should be advocated. ■

ENDNOTES

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Give Me Back My Masters

Recording Artists Continue to Advance Sound Recording Copyright Termination Lawsuits Against UMG and Sony Music

Chase LanCarte

On Tuesday, March 31, 2020, the Southern District of New York issued court orders granting plaintiff recording artists the right to continue to advance their sound recording copyright termination lawsuits against Universal Music Group (UMG) and Sony Music.[1] The rulings came in separate class action lawsuits filed in February 2019 in the Southern District of New York against Universal Music Group ("UMG) (John Waite, Joe Ely, and others) and Sony Music (David Johansen of the New York Dolls and others).[2] Both lawsuits ask the federal district court to declare that they have terminated and recaptured their U.S. Copyright rights to the sound recordings and further find such labels liable for copyright infringement for their continued exploitation of such recordings.[3]

2013 marked the first year that artists could attempt to terminate copyright transfers and revert the ownership of the sound recordings to themselves under Section 203 of the U.S. Copyright Act of 1976.[4] Section 203 allows authors of copyrightable works to terminate any grant or license of a U.S. copyright, executed on or after January 1, 1978, thirty-five years from the date of the grant's execution or, if the grant covers publication rights, the earlier of thirty-five years after the work's publication or forty years after the execution of the grant.[5] A similar set of rules for termination of grants for pre-January 1, 1978 works is found in the Copyright Act under § 304(c) which allows an author of such copyrightable work to terminate such grant or license of copyright at the end of fifty-six years from the date the copyright was originally secured, or beginning on January 1, 1978, which is later.[6] Sound recordings created before February 15, 1972 are not terminable under laws in the United States.[7]

There are very specific rules for the timing of the termination and filing of such notices of termination with the U.S. Copyright Office.[8] And most importantly as it pertains to sound recordings, termination of a grant or license of copyright is available for all works executed by the author(s), **other than . . . "works made for hire."**.[9]

Record labels, such as Sony Music and UMG, as a standard practice, have refused to acknowledge an artist's right to terminate assignments of rights in *sound recordings* that they hold. When a termination notice is timely sent to record labels as required by statute, record labels like Sony Music intentionally wait until days before the elected termination is set to occur, before ultimately denying and rejecting the validity of such termination notices, arguing among other things that the sound recordings in question are "works made for hire."[10] Historically, sound recording termination disputes between artists and record labels have not been litigated, settling privately as both parties seek to avoid precedential rulings on the termination of sound recordings. The present, class action lawsuits against UMG and Sony Music have for the first-time brought the sound recording termination disputes before the federal courts to ultimately decide whether sound recording transfers are terminable.

In both lawsuits, the federal district court rejected UMG and Sony Music's arguments that the subject copyright termination notices pertaining to recorded works both created and originally granted on or after January 1, 1978 by the artists to the record labels, were facially invalid.[11]

Upon its review of Mr. Ely's notice, the district court was required to analyze the effect of a post January 1, 1978 recording created under a pre-'78 agreement, which was the first time a Court would rule on the so-called "gap grant" issue.[12]

The Court was assisted in its determination by the Copyright Office's ruling that "gap grants may be terminated under § 203, 'because as a matter of copyright law, a transfer that predates the existence of the copyrighted work cannot be effective (and therefore cannot be executed') until the work of authorship (and the copyright) come into existence.'"[13] While the Copyright Office noted that its decision to accept the recordation of termination notices for gap grants was 'without prejudice to how a court might ultimately rule…[on the issue,]" the district chose not to specifically rule on whether it agreed with the Copyright Office, because it found technical fault with the proposed album termination based on the facts alleged.[14]

The district court noted that if it were to adopt the Copyright Office's view and find that gap grants could be terminated under § 203, the Copyright Office's regulations require that such notices must contain "the date on which the work was created" and further state that the date of execution of the grant was the date the work was created.[15] So instead of meeting the issue head on, the Court noted that Ely's termination notice only included "the date of publication" and failed to provide the required creation date.[16] The Court also noted that UMG had alleged that the date of creation was 1977.[17] So on procedural issues alone, the district court found Ely's claim related to his pre-1978 agreement for sound recordings to be invalid either because Ely had failed to allege the "creation date", which inhibited UMG's ability to determine which grant and work Ely sought to terminate, or the subject recordings were created in 1977 and outside the scope of § 203.[18] Thus, Ely's termination notice with regards to the *Honky Tonk Masquerade* album recordings was invalid, and such claim was dismissed by the district court.[19]

The district court in the *UMG* lawsuit further dismissed the artists' claim for declaratory relief, which sought a general ruling from the court on whether the exercise by recording artists of their rights under §203 of the Copyright Act to terminate the original grant, and to thereafter exploit the sound recordings after the effective date of termination, constitutes a breach of the recording agreements."[20] In reaching its decision, the district court explained, the Declaratory Judgment Act provides a "broad grant of discretion on district courts to determine whether to exercise jurisdiction over an action for declaratory judgment. The Second Circuit has instructed the district courts to consider several factors including 'whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved' and 'whether a judgment would finalize the controversy and offer relief from uncertainty.'"[21]

The district court in the *UMG* lawsuit explained that it could not issue a general ruling on the declaratory relief claim because some of the termination notices in dispute have effective dates of termination that have not yet passed and if the court were to issue a declaratory judgment ruling now on such notices, it is unclear what new arguments UMG might later offer to argue "why such termination notices are invalid or why the grants could not be terminated."[22] Further, the district court noted that the declaratory relief sought "…could not guarantee that UMG would accept the termination notices and cease exploitation of the sound recordings after the effective date of termination."[23] Thus, "the cloud of uncertainty would not necessarily be lifted" by the declaratory relief sought by the plaintiff artists.[24]

Additionally, the district court in the *UMG* lawsuit dismissed the plaintiff artists' termination that were based on copyright grants that were originally executed between the record label and a third-party company (i.e. grants by loan-out companies including Heavy Waite, Inc. for certain album recordings by John Waite or grants by South Coast Records for certain album recordings by Joe Ely).[25] The court noted that under § 203(a) "[o]nly grants 'executed by the author' (or the statutorily designated successor) may be terminated. Therefore, third parties to a contract and loan-out companies, which 'loan' out an artist's services to employers and enter into contracts on behalf of the artists, do not have a termination right under the statue."[26]

Nevertheless, with regard to the alleged termination claims brought based on grants originally executed between the artist and label, the district court rejected UMG's argument that artists' copyright infringement claims were time-barred based on the Copyright Act's statute of limitations.[27] Accordingly, the artists' surviving termination claims based on grants executed between the artists and labels along with the additional causes of action based on the alleged infringement will proceed toward a trial on the merits.

Putting aside these procedural rulings, now that these cases are alive in the District Court, the ultimate question to be decided by the federal court in either case is whether the surviving sound recording works granted under the recording agreements in question constitutes a "work made for hire."

Under § 101 of the Copyright Act, a "work made for hire" is either: (1) a work "prepared by an employee within the scope of his or her employment" or (2) certain types of "specially ordered or commissioned" work, so long as the parties agree in writing that the work will be considered a "work made for hire."[28] Under subsection (2), the statutory definition enumerates nine categories of works that can qualify as commissioned works: 1) a contribution to a collective work; 2) motion picture or audio visual work; 3) a translation; 4) a supplementary work; 5) a compilation; 6) an instructional text; 7) a test; 8) answer material for a test; and 9) an atlas.[29] "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[30] "A 'compilation' is a work formed by a collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works."[31]

While UMG generally asserted in its motion to dismiss that subject sound recording works were created as "works made for hire," the district court in the *UMG* lawsuit held that based on the substantive pleadings of the parties, the artists' claims could not be dismissed based on the "work made for hire" exception because none of the parties contended that there was an employer-employee relationship between the artists and record labels, and neither party has yet to argue that the works were specifically commissioned.[32] Thus, the district court did not rule specifically on the "work made for hire" issue in deciding the motions to dismiss.

Still, whether the artists will ultimately prevail in their lawsuits against UMG and Sony Music depends on whether the alleged works are found to be "works made for hire." It is anticipated that UMG and Sony will argue that the sound recordings appearing on the artists' albums are "works made for hire", specifically commissioned "as a compilation" or as "a contribution to a collective work." But as *Nimmer* points out, "[E]ven if a court were to hold that the combination of all…[sound recordings] in an album qualifies as a 'compilation,' which therefore may be eligible to be treated as a specially commissioned work, it does not follow that the artist's termination rights would thereby be defeated. Instead, it would mean that…[the artist] could not terminate rights in the 'compilation,' meaning that …[the artist] could not reclaim the right to release the…[album's sound recordings]…*as an album*, namely in the particular sequence and arrangement selected by…[the record label]. By contrast, [the artist]…would not necessarily be under any disability from reclaiming rights to each of the [album's sound recordings]…*individually*. For the statutory command that 'all the parts of a compilation constitute one work' applies solely for purposes of assessing statutory damages—pointedly *not* for the instant purpose of figuring out what portions qualify as specially commissioned, and in turn where the boundaries of termination lie."[33]

Additionally, *Nimmer* suggests that if the record company intends to prevent the artist "from terminating [his or] her rights in individual sound recordings, then it seems that it would need to style each [sound recording of a] song not as a part of a 'compilation,' but instead under the separate category of 'contribution to a collective work.'"[34]

Ultimately, as contemplated by *Nimmer*, "If courts… conclude that the sound recordings there in issue qualify as contributions to collective works (or in one of the other categories), no termination will arise."[35] Otherwise, "[t] o the extent that individual sound recordings are ruled to fall outside the work for hire framework, then all authors are eligible to terminate their assignments to the record companies."[36]

It is also possible that the record companies will argue that under prong 1, sound recordings were prepared by an employee within the scope of his or her employment.[37] This inquiry will also be fact intensive especially since not all sound recordings have been prepared under the same scenario.

Alas, while record companies and recording artists nervously cling to their seats in anticipation of the precedent decisions that will continue to follow in the present lawsuits against UMG and Sony Music, these two cases may ultimately be settled before a final judgment is issued. Labels simply cannot risk an adverse ruling on this issue which would surely jeopardize the future holdings of the record labels' back catalog, which arguably comprises a substantial portion of the labels' revenue. ■

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ENDNOTES

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3 *Waite, et al. v. UMG Recordings, Inc., et al.*, 1:19-CV-01091-LAK (S.D.N.Y. 2019); *Johansen, et al. v. Sony Entertainment, Inc., et al.*, 1:19-CV-01094-ER (S.D.N.Y. 2019).

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6 *See* 17 U.S.C. 304(c).

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8 In order to effectuate the termination of an assignment of copyright, advance statutory notice must be timely sent to the original grantee or successor grantee of the copyrightable work (i.e. the record label, the publisher, or the production company) within two to ten years prior to the elected and eligible termination date. *See* 17 U.S.C. 203(a)(4); *see* 17 U.S.C. 304(c)(4). A copy of the termination notice must also be filed with the U.S. Copyright Office before the elected and eligible termination date occurs for the termination to take effect. 17 U.S.C. 203(a)(4)(A); see 17 U.S.C. 304(c)(4)(A).

9 *See* 17 U.S.C. 203 (a); *see* 17 U.S.C. 304(c).

10 *See Johansen, et al. v. Sony Music Entertainment, Inc.*, 1:19-cv-01094-ER, Docs 5-2 (Ex. B), 5-4 (Ex. D.), & 5-6 (Ex. F) (S.D.N.Y. February 7, 2019) (Ex. B is a letter from Sony Music dated June 14, 2017 in response to Notice of Termination from David Johansen dated, June 15, 2015 regard purported termination on June 16, 2017; Ex. D is a letter from Sony Music dated June 1, 2017 in response to Notice of Termination from Southside Johnny dated, June 1, 2015 regard purported termination on June 2, 2017; Ex. F is a letter from Sony Music dated June 14, 2017 in response to Notice of Termination from Paul Collins dated, June 15, 2015 regard purported termination on June 16, 2017.).

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12 *See Waite, et al. v. UMG Recordings, Inc.*, 1:19-cv-01091-LAK, Doc 68 at 21-24 (S.D.N.Y. March 31, 2020) (mem. op. & order on UMG's Mot. to Dismiss Pl.s' 1st Am. Complaint); *See also Waite, et al. v. UMG Recordings, Inc.*, 1:19-cv-01091-LAK, Doc 45 at Ex. C (S.D.N.Y. June 26, 2019) (Joe Ely's Termination Notice).

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at 23 (S.D.N.Y. March 31, 2020) (mem. op. & order on UMG's Mot. to Dismiss Pl.s' 1st Am. Complaint).

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23 *Id.*

24 *Id.*

25 *See id.* at 20-21; "Loan-out companies are common in the entertainment industry. The purpose to this corporate structure is to limit personal liability and secure tax treatment." *Id.* at fn. 69 (*citing Great Entm't Merch., Inc. v. VN Merch., Inc.*, No. 95-cv-9333 (LBS), 1996 WL 355377, at *1 n.1 (S.D.N.Y. June 27, 1996)); *see also id.* at fn. 70 (*citing Waite, et al. v. UMG Recordings, Inc.*, 1:19-cv-01091-LAK, Doc 51-5 (S.D.N.Y. June 26, 2019) (Independent Production Agreement b/w MCA Records, Inc. and South Coast Records, Inc.)).

26 *Id.* at 20.

27 *Id.* at 15.

28 17 U.S.C. § 101 (definition of "work made for hire").

29 *Id.*

30 17 U.S.C. § 101 (definition of "collective work").

31 17 U.S.C. § 101 (definition of "compilation").

32 *Waite, et al. v. UMG Recordings, Inc.*, 1:19-cv-01091-LAK, Doc 68 at 9 (S.D.N.Y. March 31, 2020) (mem. op. & order on UMG's Mot. to Dismiss Pl.s' 1st Am. Complaint).

33 1 *Nimmer on Copyright* § 5.03 (B)(2)(a)(ii)(II-III) (2019).

34 *Id.*

35 1 *Nimmer on Copyright* § 5.03 (B)(2)(a)(ii)(IV) (2019).

36 *Id.*

37 *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

AMERICAN BAR ASSOCIATION
Forum on the Entertainment & Sports Industries

Fundamentals of Developing an Entertainment Law Practice

Wednesday, September 16, 2020
1:00 pm to 3:00 pm Eastern – 120 minutes

Entertainment law continues to be a dynamic and evolving practice that is becoming more and more accessible to lawyers desiring to work in this area. The panel consists of veteran entertainment lawyers experienced in a variety of entertainment fields and located in primary and secondary entertainment markets. They will discuss what they learned about breaking into the practice of entertainment law and what they do to keep and maintain a practice in this area. Topics will include practice development, entertainment law resources, marketing, billing practices, difference between in-house and private practice and many others. This program is a great introduction for beginners but will also have useful tips and reminders for lawyers already practicing entertainment law.

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Branding the Band

Peter J. Strand

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One of a musical band's most important assets is the BAND NAME. The band name identifies many aspects of the band—its sound, its look, its musical style, its fashion style, its known songs, its known recordings, its videos, and of course the individuals comprising the band. In other words, the band name is a source identifier for the music the band creates. The band name and often the accompanying band logo that may comprise the band's brand are the band's trademarks.

TRADEMARK CLASSES FOR BANDS AND MUSICAL ARTISTS

Bands or musical artists typically register their band name and/or logo as a trademark or service mark[1] in the following three international classes (ICs):

- IC 009 for sound recordings and music videos;
- IC 025 for clothing, including T-shirts, hats, hoodies, onesies, jackets, etc.; and
- IC 041 for entertainment services, namely performances by musical and vocal groups.

The United States Patent and Trademark Office (USPTO) shows no love for one-hit wonders. It will not register a mark for a single title and requires that sound recordings and other creative works, such as books, films, and television programs, be a series of two or more separate works to qualify for trademark protection. The *Trademark Manual of Examining Procedure* (TMEP), the USPTO guidebook for examination of trademark registration applications, requires a series of sound recordings for the mark to be registered.

> Any mark consisting of the name of an author used on a written work, or the name of a performing artist on a sound recording, must be refused registration under §§ 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, if the mark is used solely to identify the writer or the artist. Written works include books or columns, and may be presented in print, recorded, or electronic form. Likewise, sound recordings may be presented in recorded or electronic form.
>
> However, the name of the author or performer may be registered if:
>
> (1) It is used on a series of written or recorded works; and
>
> (2) The application contains sufficient evidence that the name identifies the source of the series and not merely the writer of the written work or the name of the performing artist.[2]

The band should be able to demonstrate that a series of more than one single or digital download is released—i.e., made available to the public for purchase, download, or streaming. As a practical matter, this requirement for a series of works means that the trademark registrations for the band's mark for entertainment services and clothing (and any other goods or services) may issue long before the IC 009 registration for sound recordings. Note that although sound recordings and music videos are both in IC 009, the series must be more than one sound recording or more than one music video. Claiming a series in a single sound recording with a single music video will not suffice.

There are several other classes that may cover other goods that bands often brand with their trademarks. It is not uncommon for bands to expand the reach of their trademark or brand by using it with a wide variety of merchandise, including coffee and beer mugs, posters, stickers, buttons, toys, action figures, guitars and musical instruments, lunchboxes, etc. For example, the trademark registration for BRUCE SPRINGSTEEN, Registration No. 4,454,482, includes the goods and services that bands and musical artists typically cover (i.e., IC 009, IC 025, and IC 041), and also covers posters, photographs, and concert programs under IC 016.

USE AND REGISTRATION

A fundamental aspect of trademark law is that trademark rights are based on use, not registration. A band must use the band name as a trademark in commerce to secure ownership of the mark. A band will have rights in its name or trademark as soon as the band starts using the mark in connection with its performances. Registration is not required for ownership of the mark. However, before the mark is registered, the band's rights in the name or trademark may be limited to the geographic area where the band uses the mark, usually the places where the band actually performs. In the internet era, band name use can be global through the band's website and social media platforms; but use of a domain name or URL is not trademark use for a band's performances, sound recordings, or merchandise.

It is not unusual for more than one band or artist to have adopted the same band name or trademark. In a dispute, the band who adopted and used the name in commerce first will have primary rights or priority over subsequent or junior users. A junior or subsequent user of the band name may have rights in the geographic area where it uses the mark if the senior or first user has not used the mark in that same geographic area.

The most practical way for a band to secure nationwide trademark rights in a band name is to file an application to register the mark with the USPTO as soon as the name is chosen—even before the band plays a note.[3] Registration expands and confirms rights beyond the geographic limitations of actual use and provides constructive notice to any junior user that the senior or first user claims nationwide rights to that trademark. (It is possible that a junior user who adopts the same band name or trademark after the senior user but before the senior user's application to register the mark with the USPTO is filed will have certain geographically limited rights in the band name or trademark.)

In addition to the nationwide rights that come from registration, registration affords the authority to use the registration symbol ®, the right to claim attorney fees in litigation, and protections against counterfeiting. A registration is a very effective tool to compel takedown of pop-up online stores sites selling band merchandise, especially T-shirts, photographs, etc., without authorization.

IDENTIFYING THE OWNER OF THE BAND NAME OR TRADEMARK

It is not always clear who owns a band trademark. Bands can be organized in several different ways, from equal partnerships to a single member with hired help to a legal entity. Before preparing an application to register a band name or trademark, identify the owner of the band name. Someone, maybe a band member, came up with the name. The band members may not even agree or understand who owns the name. Be aware that not all band members are equal and not all bands are alike.

When working with a band, consider preparing an agreement for the band members to agree on how a leaving member can use the band name or trademark after leaving the band. For example:

> Any Band Member who ceases to be a Band Member for any reason shall have no right, title, or interest in the Band Name, trademark, or logo and, except as provided in this paragraph, shall not perform under or otherwise use the Band Name in any manner whatsoever, provided such Band Members may use the billing "Formerly of [Band Name]."

APPLICATION PROCESS AND REQUIREMENTS

After identifying the owner of the band name or trademark, conduct a preliminary or "knock out" search of the USPTO online database to determine if there are any pending applications or subsisting registrations for the same or similar trademarks. Be sure to check for marks in ICs 009, 025, and 041, and in the other classes of goods or services that are in use or will be in use in connection with the band name. Then conduct a thorough online search via an online search engine to determine if the band name or trademark is in use by any artist, band, or other music industry enterprise such as a record label, production company, music publisher, music video, or music TV program, anywhere else in the country. As noted earlier, use rather than registration, determines the primary rights in the mark.

Next, determine whether to file a multiclass registration application to cover the sound recordings (IC 009), clothing (IC 025), and live performances (IC 041), or a separate application for each class. The total filing fee is going to be the same ($225–$275) per application filed online). A multiclass registration application can be troublesome if the examining attorney requires more information or refuses registration of one but not all of the classes. This could delay registration of the mark in all of the classes. To move an approved class forward to registration while addressing issues raised by other classes in the application, the applicant can file a request to divide and for an additional fee the application can be divided into more than one application. This procedure raises the cost of registration and increases the time between application and registration. Thus, a recommended practice is to file separate applications for each class rather than attempting to register all of the classes in a single registration. The total filing fee will be the same whether filed separately or in a multi-class application.

Prepare and file the application to register the trademarks either based on actual use of the mark in commerce at the time of filing the application or on the applicant's intent to use the mark. If filing a use-based application, the applicant must submit specimens showing the mark in use in commerce in connection with the goods or services covered by the mark. For sound recordings (IC 009), acceptable specimens include: photographs of physical media (e.g., CDs, LPs, 45s) that include the mark; website screenshots showing the band's downloadable or streamable recordings; and screen captures of the band's sound recordings available at an online retailer (e.g., iTunes, CD Baby). For clothing (IC 025), submit photographs of the clothing showing the mark with the price and size. The mark must be a source identifier and should be in the collar or on a hanging tag or sticker on the clothing. A band name mark on the front, back, or sleeves of the clothing may be found to be "merely ornamental" by the examining attorney and the USPTO will refuse to register the mark. For entertainment services (IC 041), acceptable specimens include: tickets showing the mark, venue, date, and ticket price; posters advertising the performance that include the mark, venue, date, and ticket price; and website screenshots of the band's touring or performance schedule.

The trademark registration process typically takes three to six months for the USPTO to assign a staff attorney to examine the application. The examining attorney then reviews the application to confirm that all of the elements required to register have been provided and that there are no grounds for refusing to register the mark. Grounds to refuse to register include:

1. The mark is substantially similar to an existing mark or pending application for similar or related goods or services.

2. The mark is merely ornamental; that is, it is not functioning as a source identifier. A typical band T-shirt with the band name across the front will often be refused because it does not establish the mark as the source of the T-shirt. Placing the mark inside the tab collar where the manufacturing label usually goes will generally suffice. Stickers on the front of the T-shirt or a hanging tag attached to the shirt listing the name of the band, the size, and the price of the shirt usually will be sufficient.

3. The mark is merely descriptive. A mark that simply describes the goods or services is not registrable. To be registered, marks should be arbitrary and fanciful and cannot merely describe the goods or services. HEAVY METAL BAND for a heavy metal band is merely descriptive and will likely be refused registration.

4. The mark identifies a person whose consent is required. To obtain a trademark registration for BRUCE SPRINGSTEEN, the applicant had to include the following statement in the application: "The name(s), portrait(s), and/or signature(s) shown in the mark identifies 'BRUCE SPRINGSTEEN', whose consent(s) to register is made of record."

5. The mark suggests a false connection to a famous mark or person. The USPTO will cite a false connection when: (1) the mark sought to be registered is the same as, or a close approximation of, the name or identity of another person or institution; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution; (3) the person or institution identified in the mark is not connected with the goods sold or services performed by the applicant under the mark; and (4) the fame or reputation of the named person or institution is of such a nature that a connection with such person or institution would be presumed when the applicant's mark is used on its goods or services.[4] The USPTO refused to register the mark THE RISING BRUCE SPRINGSTEEN TRIBUTE on the basis that the mark falsely suggested a connection with Bruce Springsteen.[5]

6. The mark contains matter that may disparage persons, living or dead[6].

After the USPTO examining attorney's initial review of the filed application, the USPTO will respond by either approving the application to move forward toward registration, or raising an objection or concern that registration should be refused based on one of the above listed grounds.

If the examining attorney finds no grounds to refuse registration or if an initial refusal has been addressed and re-reviewed, the mark will be approved for publication in the USPTO's *Official Gazette*. Upon publication, any person or entity that believes it will be harmed by registration of the mark can file within 30 days of publication an objection to registration, or within the 30 days request additional time up to 90 days to decide whether to file an objection. An objection is filed in the Trademark Trial and Appeal Board (TTAB) and proceeds like federal court litigation without any in-person court appearances.

If there are no objections filed, the USPTO will issue a registration. A trademark registration lasts for 10 years, but between the fifth and sixth year after registration, the registrant must file a declaration of current use and a declaration of continuous use of five years to maintain the registration. If those declarations of use are filed and accepted, the registrant must file additional declarations of use between the ninth and tenth year after registration, and every 10 years after that.

RECENT DEVELOPMENTS

In 2017, the U.S. Supreme Court gutted the grounds for refusal based on disparagement. In *Matal v. Tam*, the Court ruled that the First Amendment right to express unpopular or nonmainstream ideas trumped the Lanham Act's prohibition on marks that disparage people.[7] In *Tam*, a rock band comprising all Asian Americans named themselves "The Slants." The band chose the name "slant," a derogatory term for people of Asian descent, to "reclaim" the word. The USPTO denied registration of the name on the basis of the disparagement clause, which "prohibits the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'"[8]

Simon Tam, the leader of the band, first contested the denial of the trademark before the USPTO attorney who had denied the request and before the TTAB. After these attempts were to no avail, Tam brought the case to the Federal Circuit, where the disparagement clause was found to be unconstitutional under the First Amendment. The government filed a petition for certiorari to the Supreme Court. The issue in front of the Court was "whether the disparagement clause '[was] facially invalid under the Free Speech Clause of the First Amendment.'"[9] In dismissing all of the government's arguments, the Court held that the disparagement clause violates the free speech clause of the First Amendment of the Constitution.

The government advanced three main arguments in order to maintain that the disparagement clause was not invalid under the First Amendment. These included: "(1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new 'government-program' doctrine."[10] The Court found that the disparagement clause could not be supported under any of these theories, emphasizing that "national protection of trademarks is desirable."[11]

Lastly, the Court addressed the issue of whether trademarks are commercial speech subject to relaxed scrutiny as outlined in *Central Hudson*. The Court found that the disparagement clause neither serves a "substantial interest" nor is "narrowly drawn" in such a way that it should be afforded relaxed scrutiny, reasoning that the First Amendment affords Americans with the privilege to "express 'the thought that we hate'" and that the disparagement clause is not narrowly drawn insofar as it "reaches any trademark that disparages *any person, group, or institution*."[12]

Over the years, a number of band names have been refused registration by the USPTO because the mark consisted of or comprises immoral or scandalous matter. Following the Court's decision in *Tam*, it is doubtful that the USPTO will refuse registration of a band name on the basis that the mark is vulgar, offensive, immoral, or scandalous.

TRUTH IN MUSIC ADVERTISING

To protect audiences from "imposter bands"[13], more than 30 states have enacted a "legacy artist statute" to limit use of legacy artist band names (in several of these states, the statute is commonly known as the "Truth in Music Advertising Act").[14] These statutes are designed to prevent promoters using band names from presenting performances where none of the performers have any connection to the original artist.

In Illinois, the concert-going consumer is protected by the Consumer Fraud and Deceptive Practices Act, which provides:

> (a) As used in this Section:
>
> "Performing group" means a vocal or instrumental group seeking to use the name of another group that has previously released a commercial sound recording under that name.
>
> "Recording group" means a vocal or instrumental group at least one of whose members has previously released a commercial sound recording under that group's name and in which the member or members have a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.
>
> (b) It is an unlawful practice for a person to advertise or conduct a live musical performance or production in this State through the use of a false, deceptive, or misleading affiliation, connection, or association between the performing group and the recording group. This Section does not apply if:
>
> (1) the performing group is the authorized registrant and owner of a Federal service mark for that group registered in the United States Patent and Trademark Office;
>
> (2) at least one member of the performing group was a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group;
>
> (3) the live musical performance or production is identified in all advertising and promotion as a salute or tribute;
>
> (4) the advertising does not relate to a live musical performance or production taking place in this State; or
>
> (5) the performance or production is expressly authorized by the recording group.[15]

It is not clear from the statute if the use of a legacy name which is authorized by the owner of a federal trademark registration who is not the performing group is permissible.

CONCLUSION

The band name or band trademark is a significant asset of the band. It establishes and identifies the band's brand, including its sound, appearance, discography, song catalog, and history. It is an asset that can be protected and exploited for longer than the band's copyrights and can be licensed or sold so the band brand can continue after the expiration of the band members. ■

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ENDNOTES

1. Trademarks for goods and service marks for services are both referred to as trademarks.

2. U.S. Patent & Trademark Office, Trademark Manual of Examining Procedure (TMEP) § 1202.09(a) (Oct. 2018) (citations omitted).

3. Registration applications may be based on actual use of the mark in commerce or based on the applicant's bona fide intent to use the mark in commerce in connection with the goods or services contemplated.

4. TMEP, *supra* note 2, § 1203.03(c)(1).

5. "Registration is refused because the applied-for mark consists of or includes matter which may falsely suggest a connection with Bruce Springsteen. Although Bruce Springsteen does not appear to be connected with the services provided by applicant under the applied-for mark, Bruce Springsteen is so famous that consumers would presume a connection." Office Action issued September 9, 2009 against application serial number 77/751,396. p.1.

6 The *Tam* case, 137 S. Ct. 1744 (2017), discussed below, does away with the disparagement grounds for refusal to register a mark.

7. 137 S. Ct. 1744 (2017).

8. *Id.* at 1765 (Kennedy, J., concurring in part).

9. *Id.* at 1755 (majority opinion).

10. *Id.* at 1757.

11. *Id.* at 1752.

12. *Id.* at 1764–65.

13 The True Story of the Fake Zombies: https://www.buzzfeed.com/danielralston/the-true-story-of-the-fake-zombies-the-strangest-con-in-rock

14. The following states have enacted legacy artist statutes: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and Wisconsin.

15. 805 Ill. Comp. Stat. 505/2XX.

The Impact of Title IX on Women in Intercollegiate Sports Administration and Coaching

Corinne Belkoff

I. INTRODUCTION TO TITLE IX

This paper will discuss Title IX of the Education Amendments of 1972 (Title IX), a federal law that states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal assistance."[1] The act was passed by the 92nd Congress of the United States, which, at the time, was comprised of only fifteen women out of all 535 representatives.[2] The original act did not address athletics or sports at all, it was meant to promote equal opportunity on the basis of sex in schools. It was not until 1973 that the Department of Health, Education, and Welfare began holding public hearings around the country to research and write draft regulations that addressed athletic representation. In 1987, the Civil Rights Restoration Act[3] formally brought athletics within the scope of Title IX.[4] This addition requires athletic departments comply with Title IX regulations based on gender representation, creating standards that must be met to prove institutions' athletic departments are complying with Title IX.[5]

A three-prong test was put in place to ensure that athletic departments were complying with Title IX; however, institutions need only meet one of these tests of their choice to prove their compliance with Title IX.[6] Test one addresses proportionality, meaning institutions must provide opportunities for female student-athletes that are comparable to their representation in the undergraduate population of that institution. This means that if 50% of undergraduate enrollment is female, about 50% of student-athlete representation must also be female, give or take a few percentage points.[7] Test two requires continued program expansion for the underrepresented sex. Since this underrepresented group is nearly always women, institutions must therefore prove that opportunities are expanding and evolving for females in sport. The third test requires universities provide all teams of the underrepresented sex with legitimate competition opportunities within the university's competitive region.[8] Institutions thus have options as to how they comply with Title IX and are judged by objective metrics.

Title IX also brought about a single governance structure to represent both men and women's sports, in place of multiple separate organizations. Prior to Title IX, female intercollegiate sport was headed by the Association of Intercollegiate Athletics for Women (AIAW).[9] The National Collegiate Athletic Association (NCAA), which hosted championships for men only, actively sought, through legislation and the courts, an exemption from Title IX for intercollegiate athletics. However, as Title IX influenced the growth in competitiveness of women's sports, many female athletic teams began joining the athletic conferences of male's sports, further increasing the intensity of competition. By 1980, seventeen conferences within the NCAA held regular season games and competitions for women's teams. Further, by the late 1980s, 75% of NCAA member institutions managed men and women varsity sport under a single athletic director, unlike in the past when men and women sports were headed by separate directors.[10] Hence, the NCAA and member institutions realized they would not gain an exemption from Title IX and began hosting championships for women. As a result, the AIAW folded.

Since the initiation of Title IX and enforcement of the three-prong test, representation of female student-athletes at the collegiate level has grown tremendously, becoming a highly competitive arena for student-athletes. Such growth has paved the way for education, allowing more women to earn college degrees. With an increase of 118,000 intercollegiate student-athletes between 1971 and 1999,[11] and a female student-athlete graduation rate on most campuses that tops the graduation rate of the female student population as a whole,[12] an evident trend toward increased female opportunity is apparent. Such statistics show how Title IX paved the way for athletic and professional careers among the female student-athlete population. It has created a clear path for them to obtain an education through their athletic talents, and ultimately use this education to pursue a professional career in a field other than sport.

However, the progress seen in the expansion of participation opportunities for athletes has not translated to improved coaching and athletic administrative positions. In fact, as female intercollegiate athletics has increased in competitiveness, more coaching positions are allocated to men, thereby decreasing representation of women in coaching and athletic administration.

Before Title IX, over 90% of female teams were headed by women; in 1978, 58.2% of female teams were headed by women; and by 2006, only 42.2% of female teams were headed by women. Today, only 20% of athletic director positions are headed by women.[13] This shows the lack of female leadership that exists at the collegiate and university level in sport administrations. This only reinforces the trend of minimal female hiring and a limited female presence among sport leadership roles. For example, the creation of the Senior Women's Administrator position allowed schools to have "just one" woman in an administrative role.

Is such a drastic drop in female representation in coaching and administration an unintended consequence of Title IX? It would seem that an increase in female athletic opportunity would translate to roles for women in sport beyond the student-athlete. However, the opposite has come about, as the percentage of females in coaching and administrative roles have drastically reduced. This paper will show that while Title IX has increased the representation of female student-athletes in intercollegiate competition, it has also paradoxically expanded the opportunities for men in coaching and administrative positions, while limiting the opportunities available for women to take on such roles. This has been an unanticipated consequence of the implementation of Title IX.

II. FEMALE ATHLETIC OPPORTUNITY

The initial intention of Title IX was to promote equal opportunity for women in all aspects of higher education. Its greatest success occurred in the realm of competitive intercollegiate athletics, in large part because there was such room for growth. Title IX produced an 875% increase in female participation in high school sports and a 435% increase in intercollegiate athletics.[14] The dramatic increase in female participation in intercollegiate athletics is shown in the table below, which lists student-athlete population at the intercollegiate level from 1981, shortly after Title IX initiation, to 2012, forty years post initiation.

Division I				
Year	Schools	Males	Females	Total
1981-82	276	73,742	26,461	100,203
1986-87	291	83,124	36,602	119,726
1991-92	298	81,417	38,572	119,989
1996-97*	307	82,555	52,151	134,706
2001-02*	324	84,532	65,032	149,564
2006-07*	327	86,688	71,473	158,161
2011-12*	340	91,357	78,616	169,973

TABLE 1[15]

The increase of over 52,000 female student-athletes within a forty-year period shows the extensive impact Title IX had on intercollegiate athletics.

The opportunity for females to pursue athletics opened educational paths as well. Because female athletes were previously given limited opportunity to pursue sport at high levels, competitions were difficult to organize. However, as intercollegiate female athletic opportunities increased, female student-athletes embraced their academic and athletic passions without compromise to the other.

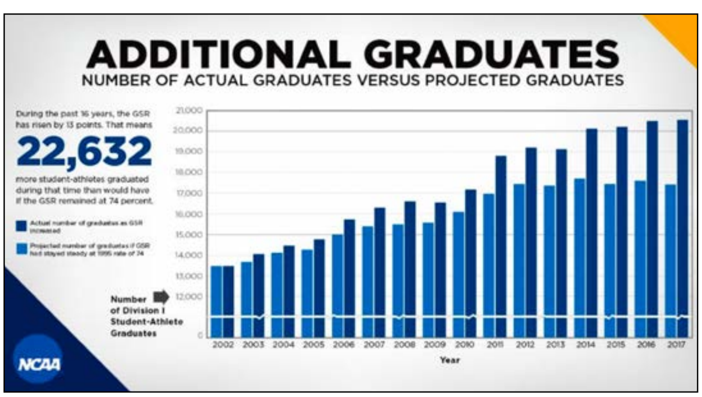

TABLE 2[16]

Graduation rates among student-athletes continue to grow, often outpacing NCAA projections. This trend suggests the increased academic and professional opportunities intercollegiate athletics provides females. Similarly, as the educational opportunities and success rates grow, professional success follows.

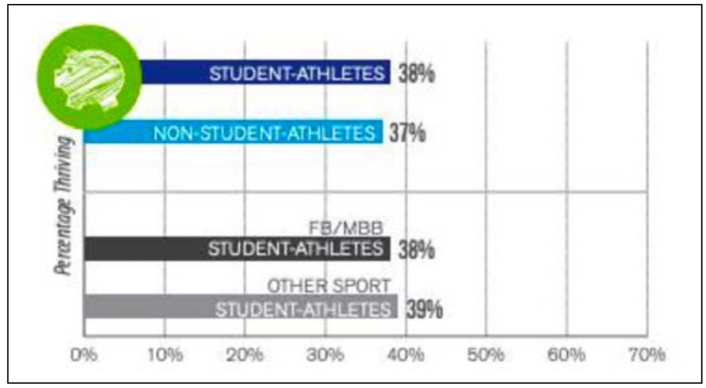

TABLE 3[17]

The Gallup-Purdue Index Report shows that after graduation student-athletes achieve financial success roughly equal to their non-athlete peers. Student-athletes that are part of sports other than football and men's basketball achieve greater financial success than their non-athlete peers. This indicates that intercollegiate athletics prepare students for success after graduation. Title IX has allowed females equal access to this desirable preparation.

Improved academic success among student-athletes is partly due to recently implemented standards and rules. These guidelines must be met for student-athletes to retain their eligibility[18] and have contributed to the growth in graduation rates.

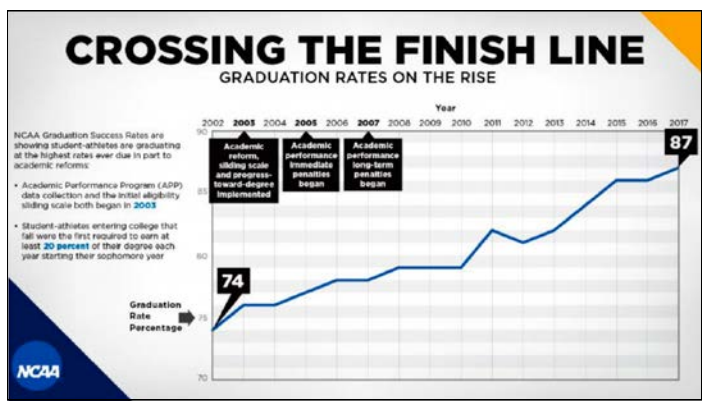

TABLE 4[19]

These guidelines in combination with the direction and guidance of coaches, paves the way for academic success. Female student-athletes benefit from the unique opportunity that intercollegiate athletics provide in academic and professional endeavors.

Increased enrollment rates in college for women may be due to the desire to participate in sport, the availability of athletic scholarships, or other less quantifiable factors. From 1971 to 1981, there was a 10% increase in female college enrollment. By 1981, females surpassed males in terms of the number of undergraduate degrees earned. Increased female enrollment in college has led to an expansion of women in various professions. Between 1972 and 1994, the rate of women with medical degrees increased by 29%, dental degrees increased by 37%, and law degrees increased by 37%.[20] The growth of women in such high-level careers may be partly due to the academic consciousness of female student-athletes.

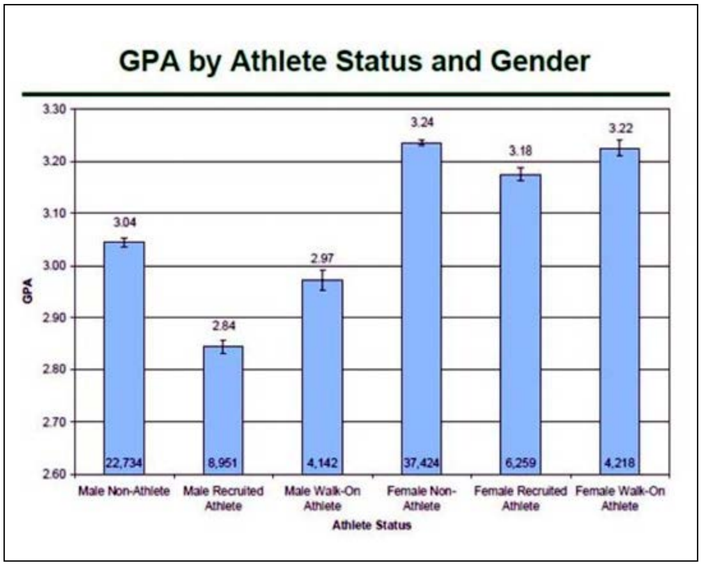

TABLE 5[21]

As indicated in Table 5, with a GPA level that is far higher than their male counterparts, females statistically perform better in the classroom at the university level. This table also shows that female walk on student-athletes have higher GPAs than female recruited student-athletes. This allows one to infer that walk-on athletes, although not as athletically proficient as recruited student-athletes, when given the unique opportunity to pursue sport and education, take full advantage of the student-athlete experience. This then allows them to contribute to the population of professionals that pursue careers post intercollegiate athletics. Further, it also emphasizes the point that recruited student-athletes, had they not been given financial aid for college athletics, may not have pursued a college education. This reinforces the notion that athletics provide student-athletes opportunities for success in the classroom and beyond.

However, this is not to say that females do not ever use collegiate athletics as a step towards a professional athletic career. Sports such as women's basketball and women's golf regularly produce athletes that pursue a professional career after college, albeit at a more limited level than their male counterparts. In Division I, 4.9% of female collegiate basketball players pursue professional athletic careers after college. Whereas 19.3% of male collegiate basketball players make it to the professional level.[22] This illustrates the disparity in professional athletic opportunity between genders. Perhaps with increased attainment of bachelor's degrees but limited opportunities in professional sport, Title IX created an influx of female professionals.

TABLE 21. DEGREES CONFERRED BY DEGREE-GRANTING POSTSECONDARY INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENT: SELECTED YEARS, 1869–70 THROUGH 2024–25

Year	ASSOCIATE'S DEGREES				BACHELOR'S DEGREES				MASTER'S DEGREES				DOCTOR'S DEGREES[1]			
	Total	Males	Females	Percent female	Total	Males	Females	Percent female	Total	Males	Females	Percent female	Total	Males	Females	Percent female
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1869–70	—	—	—	—	9,371[2]	7,993[2]	1,378[2]	14.7	0	0	0	—	1	1	0	0.0
1879–80	—	—	—	—	12,896[2]	10,411[2]	2,485[2]	19.3	879	868	11	1.3	54	51	3	5.6
1889–90	—	—	—	—	15,539[2]	12,857[2]	2,682[2]	17.3	1,015	821	194	19.1	149	147	2	1.3
1899–1900	—	—	—	—	27,410[2]	22,173[2]	5,237[2]	19.1	1,583	1,280	303	19.1	382	359	23	6.0
1909–10	—	—	—	—	37,199[2]	28,762[2]	8,437[2]	22.7	2,113	1,555	558	26.4	443	399	44	9.9
1919–20	—	—	—	—	48,622[2]	31,980[2]	16,642[2]	34.2	4,279	2,985	1,294	30.2	615	522	93	15.1
1929–30	—	—	—	—	122,484[2]	73,615[2]	48,869[2]	39.9	14,969	8,925	6,044	40.4	2,299	1,946	353	15.4
1939–40	—	—	—	—	186,500[2]	109,546[2]	76,954[2]	41.3	26,731	16,508	10,223	38.2	3,290	2,861	429	13.0
1949–50	—	—	—	—	432,058[2]	328,841[2]	103,217[2]	23.9	58,183	41,220	16,963	29.2	6,420	5,804	616	9.6
1959–60	—	—	—	—	392,440[2]	254,063[2]	138,377[2]	35.3	74,435	50,898	23,537	31.6	9,829	8,801	1,028	10.5
1969–70	206,023	117,432	88,591	43.0	792,316	451,097	341,219	43.1	213,589	130,799	82,790	38.8	59,486	53,792	5,694	9.6
1970–71	252,311	144,144	108,167	42.9	839,730	475,594	364,136	43.4	235,564	143,083	92,481	39.3	64,998	58,137	6,861	10.6
1971–72	292,014	166,227	125,787	43.1	887,273	500,590	386,683	43.6	257,201	155,010	102,191	39.7	71,206	63,353	7,853	11.0
1972–73	316,174	175,413	140,761	44.5	922,362	518,191	404,171	43.8	268,654	159,569	109,085	40.6	79,512	69,959	9,553	12.0
1973–74	343,924	188,591	155,333	45.2	945,776	527,313	418,463	44.2	282,074	162,606	119,468	42.4	82,591	71,131	11,460	13.9
1974–75	360,171	191,017	169,154	47.0	922,933	504,841	418,092	45.3	297,545	166,318	131,227	44.1	84,904	71,025	13,879	16.3
1975–76	391,454	209,996	181,458	46.4	925,746	504,925	420,821	45.5	317,477	172,519	144,958	45.7	91,007	73,888	17,119	18.8
1976–77	406,377	210,842	195,535	48.1	919,549	495,545	424,004	46.1	323,025	173,090	149,935	46.4	91,730	72,209	19,521	21.3
1977–78	412,246	204,718	207,528	50.3	921,204	487,347	433,857	47.1	317,987	166,857	151,130	47.5	92,345	70,283	22,062	23.9
1978–79	402,702	192,091	210,611	52.3	921,390	477,344	444,046	48.2	307,686	159,111	148,575	48.3	94,971	70,452	24,519	25.8

Year	ASSOCIATE'S DEGREES				BACHELOR'S DEGREES				MASTER'S DEGREES				DOCTOR'S DEGREES[1]			
	Total	Males	Females	Percent female	Total	Males	Females	Percent female	Total	Males	Females	Percent female	Total	Males	Females	Percent female
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1981–82	434,526	196,944	237,582	54.7	952,998	473,364	479,634	50.3	302,447	151,349	151,098	50.0	97,838	68,630	29,208	29.9
1982–83	449,620	203,991	245,629	54.6	969,510	479,140	490,370	50.6	296,415	150,092	146,323	49.4	99,335	67,757	31,578	31.8
1983–84	452,240	202,704	249,536	55.2	974,309	482,319	491,990	50.5	291,141	149,268	141,873	48.7	100,799	67,769	33,030	32.8
1984–85	454,712	202,932	251,780	55.4	979,477	482,528	496,949	50.7	293,472	149,276	144,196	49.1	100,785	66,269	34,516	34.2
1985–86	446,047	196,166	249,881	56.0	987,823	485,923	501,900	50.8	295,850	149,373	146,477	49.5	100,280	65,215	35,065	35.0
1986–87	436,304	190,839	245,465	56.3	991,264	480,782	510,482	51.5	296,530	147,063	149,467	50.4	98,477	62,790	35,687	36.2
1987–88	435,085	190,047	245,038	56.3	994,829	477,203	517,626	52.0	305,783	150,243	155,540	50.9	99,139	63,019	36,120	36.4
1988–89	436,764	186,316	250,448	57.3	1,018,755	483,346	535,409	52.6	316,626	153,993	162,633	51.4	100,571	63,055	37,516	37.3
1989–90	455,102	191,195	263,907	58.0	1,051,344	491,696	559,648	53.2	330,152	158,052	172,100	52.1	103,508	63,963	39,545	38.2
1990–91	481,720	198,634	283,086	58.8	1,094,538	504,045	590,493	53.9	342,863	160,842	182,021	53.1	105,547	64,242	41,305	39.1
1991–92	504,231	207,481	296,750	58.9	1,136,553	520,811	615,742	54.2	358,089	165,867	192,222	53.7	109,554	66,603	42,951	39.2
1992–93	514,756	211,964	302,792	58.8	1,165,178	532,881	632,297	54.3	375,032	173,354	201,678	53.8	112,072	67,130	44,942	40.1
1993–94	530,632	215,261	315,371	59.4	1,169,275	532,422	636,853	54.5	393,037	180,571	212,466	54.1	112,636	66,773	45,863	40.7
1994–95	539,691	218,352	321,339	59.5	1,160,134	526,131	634,003	54.6	403,609	183,043	220,566	54.6	114,266	67,324	46,942	41.1
1995–96	555,216	219,514	335,702	60.5	1,164,792	522,454	642,338	55.1	412,180	183,481	228,699	55.5	115,507	67,189	48,318	41.8
1996–97	571,226	223,948	347,278	60.8	1,172,879	520,515	652,364	55.6	425,260	185,270	239,990	56.4	118,747	68,387	50,360	42.4
1997–98	558,555	217,613	340,942	61.0	1,184,406	519,956	664,450	56.1	436,037	188,718	247,319	56.7	118,735	67,232	51,503	43.4
1998–99	564,984	220,508	344,476	61.0	1,202,239	519,961	682,278	56.8	446,038	190,230	255,808	57.4	116,700	65,340	51,360	44.0
1999–2000	564,933	224,721	340,212	60.2	1,237,875	530,367	707,508	57.2	463,185	196,129	267,056	57.7	118,736	64,930	53,806	45.3
2000–01	578,865	231,645	347,220	60.0	1,244,171	531,840	712,331	57.3	473,502	197,770	275,732	58.2	119,585	64,171	55,414	46.3
2001–02	595,133	238,109	357,024	60.0	1,291,900	549,816	742,084	57.4	487,313	202,604	284,709	58.4	119,663	62,731	56,932	47.6
2002–03	634,016	253,451	380,565	60.0	1,348,811	573,258	775,553	57.5	518,699	215,172	303,527	58.5	121,579	62,730	58,849	48.4
2003–04	665,301	260,033	405,268	60.9	1,399,542	595,425	804,117	57.5	564,272	233,056	331,216	58.7	126,087	63,981	62,106	49.3
2004–05	696,660	267,536	429,124	61.6	1,439,264	613,000	826,264	57.4	580,151	237,155	342,996	59.1	134,387	67,257	67,130	50.0
2005–06	713,066	270,095	442,971	62.1	1,485,242	630,600	854,642	57.5	599,731	241,656	358,075	59.7	138,056	68,912	69,144	50.1
2006–07	728,114	275,187	452,927	62.2	1,524,092	649,570	874,522	57.4	610,597	242,189	368,408	60.3	144,690	71,308	73,382	50.7
2007–08	750,164	282,521	467,643	62.3	1,563,069	667,928	895,141	57.3	630,666	250,169	380,497	60.3	149,378	73,453	75,925	50.8
2008–09	787,243	298,066	489,177	62.1	1,601,399	685,422	915,977	57.2	662,082	263,515	398,567	60.2	154,564	75,674	78,890	51.0
2009–10	848,856	322,747	526,109	62.0	1,649,919	706,660	943,259	57.2	693,313	275,317	417,996	60.3	158,590	76,610	81,980	51.7
2010–11	943,506	361,408	582,098	61.7	1,716,053	734,159	981,894	57.2	730,922	291,680	439,242	60.1	163,827	79,672	84,155	51.4
2011–12	1,021,718	393,479	628,239	61.5	1,792,163	765,772	1,026,391	57.3	755,967	302,484	453,483	60.0	170,217	82,670	87,547	51.4
2012–13	1,006,961	388,846	618,115	61.4	1,840,164	787,231	1,052,933	57.2	751,751	301,575	450,176	59.9	175,038	85,104	89,934	51.4
2013–14[3]	964,000	379,000	585,000	60.7	1,859,000	794,000	1,065,000	57.3	760,000	305,000	455,000	59.9	178,000	86,000	91,000	51.1
2014–15[3]	949,000	375,000	574,000	60.5	1,852,000	789,000	1,063,000	57.4	778,000	318,000	459,000	59.0	178,000	86,000	91,000	51.1
2015–16[3]	952,000	375,000	577,000	60.6	1,847,000	788,000	1,059,000	57.3	802,000	335,000	467,000	58.2	179,000	87,000	92,000	51.4
2016–17[3]	973,000	380,000	593,000	60.9	1,845,000	775,000	1,069,000	57.9	824,000	344,000	480,000	58.3	182,000	89,000	93,000	51.1
2017–18[3]	991,000	385,000	606,000	61.2	1,847,000	779,000	1,069,000	57.9	851,000	354,000	496,000	58.3	187,000	93,000	94,000	50.3
2018–19[3]	1,016,000	391,000	625,000	61.5	1,871,000	785,000	1,086,000	58.0	877,000	365,000	511,000	58.3	190,000	94,000	96,000	50.5
2019–20[3]	1,041,000	398,000	644,000	61.9	1,903,000	795,000	1,108,000	58.2	899,000	374,000	525,000	58.4	194,000	96,000	98,000	50.5
2020–21[3]	1,062,000	403,000	659,000	62.1	1,933,000	805,000	1,128,000	58.4	920,000	382,000	539,000	58.6	198,000	98,000	100,000	50.5
2021–22[3]	1,082,000	409,000	673,000	62.2	1,956,000	814,000	1,142,000	58.4	943,000	389,000	554,000	58.7	201,000	99,000	102,000	50.7
2022–23[3]	1,103,000	415,000	688,000	62.4	1,977,000	821,000	1,156,000	58.5	969,000	398,000	571,000	58.9	203,000	100,000	103,000	50.7
2023–24[3]	1,126,000	421,000	706,000	62.7	2,004,000	830,000	1,173,000	58.5	996,000	408,000	588,000	59.0	206,000	101,000	105,000	51.0
2024–25[3]	1,150,000	427,000	723,000	62.9	2,029,000	840,000	1,190,000	58.6	1,019,000	416,000	603,000	59.2	209,000	102,000	107,000	51.2

—Not available.
[1]Includes Ph.D., Ed.D., and comparable degrees at the doctoral level. Includes most degrees formerly classified as first-professional, such as M.D., D.D.S., and law degrees.
[2]Includes some degrees classified as master's or doctor's degrees in later years.
[3]Projected.

NOTE: Data through 1994–95 are for institutions of higher education, while later data are for degree-granting institutions. Degree-granting institutions grant associate's or higher degrees and participate in Title IV federal financial aid programs. Some data have been revised from previously published figures. Detail may not sum to totals because of rounding.

SOURCE: U.S. Department of Education, National Center for Education Statistics, *Earned Degrees Conferred*, 1869–70 through 1964–65; Higher Education General Information Survey (HEGIS), "Degrees and Other Formal Awards Conferred" surveys, 1965–66 through 1985–86; Integrated Postsecondary Education Data System (IPEDS), "Completions Survey" (IPEDS-C:87–99); IPEDS Fall 2000 through Fall 2013, Completions component; and Degrees Con-ferred Projection Model, 1980–81 through 2024–25. (This table was prepared April 2015.)

TABLE 6[23]

a. Why Females Pursue Sport

As part of my research for this article, I conducted a survey of female student-athletes at Arizona State University. The survey asked participants why they joined intercollegiate Division I Athletics.[24] A significant number of student-athletes reported that they participated in sport because it paid for their education, allowing them to pursue athletics and academics simultaneously. For others, being able to compete in their sport at a national level was reason enough for them to attend a four-year institution. Some survey respondents reported that intercollegiate athletics was a step towards a career in professional athletics. One individual stated, "I am participating in an intercollegiate Division I program in college because I would like to utilize my athletic abilities … as well as take advantage of the unique opportunities given to me as a student-athlete." Some female student-athletes reported that intercollegiate athletics gave them the unique opportunity of pursuing school and sport simultaneously. One survey response stated, "If I hadn't chosen to swim in college, I would've either quit the sport to study full time or not gone to college…." These results support the conclusion that intercollegiate sport provides student-athletes an opportunity to take advantage of enhanced academic and athletic opportunities, a phenomenon that Title IX brought about. For those who sought to become professional athletes, doing so would be much more difficult without Title IX. Hence, the wide array of answers provided throughout this survey shows the various reasons females pursue sport in college.

It has been shown that student-athletes at the collegiate level graduate at a higher rate than those who are not enrolled in athletics.[25] This relationship demonstrates the diligence and drive an athletic role can have on students, but also the accountability that being an NCAA student-athlete brings about. The book *The Games Do Count,* by Brian Kilmeade, explains the relationship between sport and professional success. The foreword of this study, written by former collegiate and professional football player Jim Brown, states:

> Sports teach you how to deal with failure and in this way it's a great equalizer…sports will humble you. Sports also teach us how to deal with pressure, whether it be the pressure of expectations on the field or simply the pressures that come to us in everyday life.…What we learn is that it's never too bad that we can't get up. And it's never so good that we're not going to fall down.…Sports gives us an opportunity to look at ourselves, to see what we're made of, to forge relationships with other people, some of which last a lifetime.[26]

Such a quote truly speaks to the power sport can have over one's future endeavors, emphasizing the positive influence and pathway that female's increased involvement in intercollegiate athletics can provide.

The pressure of NCAA eligibility, the academic support staff that work in college athletics, and team GPA pride, helps female student-athletes earn degrees at a higher rate than non-student-athletes. Table 7 illustrates this trend.

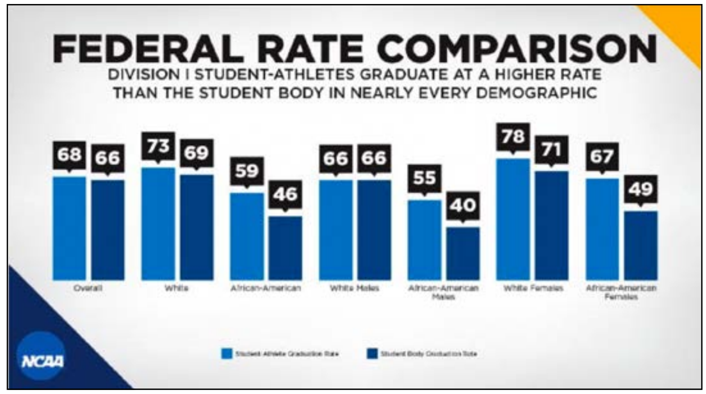

TABLE 7[27]

Student-athletes of multiple demographics graduate more regularly than the average student, emphasizing the positive repercussions increasing female representation in college sport can have, beyond just athletic success.

Therefore, as shown by the data, the long-term effects of Title IX go well beyond athletics, paving the way for females to pursue an education on a much more leveled playing field than prior to this legislative action. And with improved access and opportunity, female student-athletes then go on to successfully complete their education at a higher rate, motivated by the responsibilities of being on an athletic team.

b. Student-Athlete Post Graduate Success

As demonstrated by a research study conducted by the NCAA, female student-athletes have a higher employment rate after graduation than female non-student athletes, whereas male student-athletes have a lower employment rate than non-student athlete male graduates.

		EMPLOYED FULL TIME (EMPLOYER)	EMPLOYED FULL TIME (SELF)	EMPLOYED PART TIME, DO NOT WANT FULL TIME	UNEMPLOYED	EMPLOYED PART TIME, WANT FULL TIME	NOT IN WORK-FORCE
Males	Non-Student-Athletes	71%	6%	6%	3%	5%	9%
	Student-Athletes	67%	8%	6%	3%	5%	11%
Females	Non-Student-Athletes	56%	4%	14%	3%	6%	17%
	Student-Athletes	62%	5%	17%	3%	4%	9%
Overall	Non-Student-Athletes	63%	5%	10%	3%	5%	13%
	Student-Athletes	65%	6%	11%	3%	5%	10%
Younger Than Age 65	Non-Student-Athletes	66%	5%	9%	3%	6%	12%
	Student-Athletes	66%	6%	11%	3%	5%	10%

TABLE 8[28]

As shown in Table 8, female student-athletes attain full-time employment at a 6% higher rate than female non-student-athletes, whereas male student-athletes experience the opposite, with a 4% lower full-time employment rate than male non-student-athletes. In this way, females take fuller advantage of the education they receive as student-athletes, allowing them to pursue a successful professional future, more so than their male counterparts. With growth in female representation in secondary educational institutions, along with this trend of higher post-graduation employment, women are steadily increasing their professional engagement, and athletics are serving as an avenue to promote this trend.

This trend towards female collegiate representation growth has steadily continued, as there has been an athletics participation growth rate at the collegiate level of 10.1% for males, and 13.6% for females since 2004,[29] a statistic that shows the ongoing effects of Title IX. Such a trend can be explained by the responsibility of universities to provide an athletic opportunity for women that is equal to that of the student-athlete body as a whole. Therefore, as universities continue to grow in the number of sports teams they hold, they must grow at a comparable ratio of male to female student-athletes. Meaning that if a male sports team is added to an institution, a female team must too be added, at a level that provides a comparable number of positions for both male and female student-athletes. In the instance of Arizona State University, when a Division I men's hockey program was added to the university in 2015, the university also announced the introduction of a women's lacrosse and women's triathlon team, allowing the university to comply with Title IX regulations. This trend is seen at universities nationwide. The initiation of a male sporting team must be accompanied by that of a women's team, and sports as large as football must be balanced by a wide variety of female teams. Therefore, in the case of Arizona State University, multiple women's teams had to be created in order to comply with Title IX when men's hockey was introduced, because of the large roster that a men's hockey team requires.

III. FEMALE COACHING AND ADMINISTRATIVE CONSEQUENCES OF TITLE IX

Although Title IX drastically increased female representation in intercollegiate sport, just the opposite has become apparent among athletic administrations. Female representation on the administrative side of collegiate athletics has plummeted since the enactment of Title IX. It is important to note that as Title IX was expanded to include intercollegiate athletics, no one in the Department of Health, Education, and Welfare predicted the negative repercussions that Title IX would have for female coaches and administrators. However, these repercussions have turned into long term unintended consequences. The percentage of female collegiate teams with female coaches was at almost 90% pre-Title IX. However, by 1998 that number dropped to 47%,[30] a drastic 43% decrease within a twenty-six-year period. Only one out of every ten collegiate institutions have a female Sports Information Director,[31] and only 20% of Athletic Directors at all athletic institutions are females. As noted in an interview by a female head coach at Arizona State University who has held her coaching position since 1985, "From my experience, the coaching side is sort of catching up, there's more females, but I would wholeheartedly agree that the administration side is still a man's world." This quote proves that coaches who have watched the aftermath of Title IX unfold agree that athletic administrations are very unbalanced when it comes to male/female representation and admit that this is very much an issue within college athletics. Having male dominated athletic administrations at the highest level therefore only reinforces the pattern of male dominant hiring practices. The table below displays such discriminatory hiring practices, regarding the position of Division I Athletics Directors:

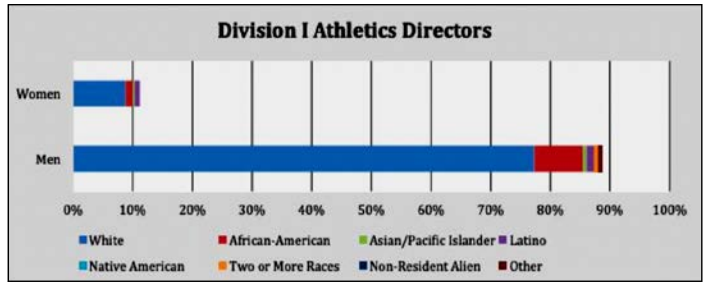

TABLE 9[32]

With a nearly 80% disparity between female versus male athletics director positions, male dominance at the highest levels of sports administrations is apparent. Allowing this trend to trickle down to athletic departments reinforces male representation at all administrative levels. This trickle-down effect is proven when considering positions like Associate Athletic Directors, Sports Information Directors, and Faculty Athletic Representatives. All three roles are powerful positions in athletic departments that are heavily male dominated. Tables 10-12 illustrate men's outsized presence in athletic departments.

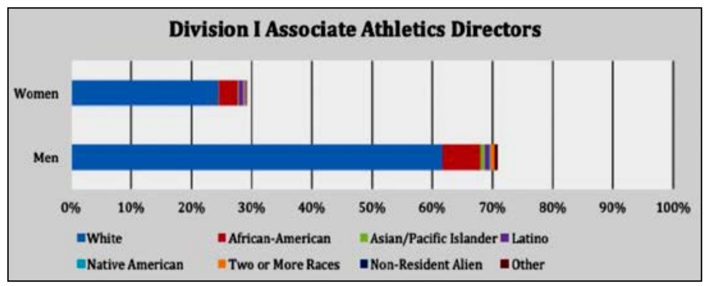

TABLE 10[33]

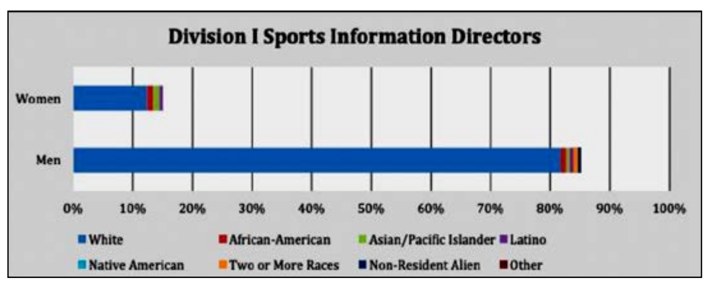

TABLE 11[34]

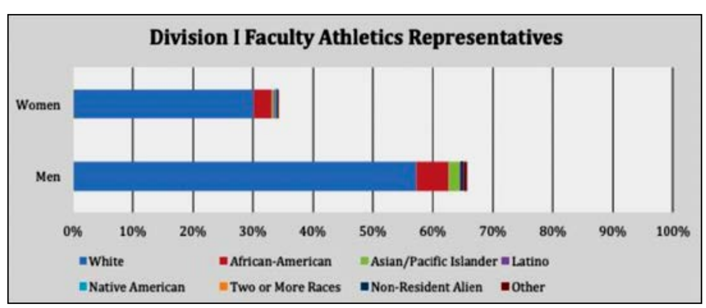

TABLE 12[35]

In order to combat this trend, in 1981 the NCAA created the Senior Women's Administrator (SWA) position to ensure women were involved in athletic administrations. The role of the SWA is to "promote meaningful representation of women in leadership and management of college sport."[36] However, by hiring a woman to fill this position, athletic departments disregard any other necessary efforts to include women in their administration, as they see one position as being enough. Hence, they make no further efforts to promote a stronger female presence and fail to combat male hegemony.

Commentators have coined the term "tokenism" to describe the absence of a strong female presence when it comes to administrative leadership positions, positions that are filled by men, only reinforcing the gender bias that exists among powerful institutions.[37] This unbalanced leadership hierarchy then deters aspiring female leaders from achieving such a goal, as it is portrayed as unattainable. This mindset has linked professional competence with gender, communicating the idea that females lack skill as compared to men when it comes to professional abilities. That is not to say that all corporate governance has adopted such a mindset, but rather the reinforcement of male dominance in administrative institutions hinders a woman's professional aspirations, as well as her available opportunity. As noted by another female head coach at Arizona State University, referring not to the trends of all NCAA institutions: "We do need to get more women involved in administration…We need to have athletic directors that are willing to hire more women." This coach has been involved in sport from the enactment of Title IX to the present. Therefore, her experience with the lack of female representation emphasizes the severity of the issue. With most of these institutions practicing a top down approach to hiring, it is regularly men making such decisions, reinforcing the tokenism that exists in powerful administrations, including the intercollegiate athletics departments at Division I colleges and universities.

Judy Sweet, the first male athletic director at the University of California, San Diego, believes the top-down approach practiced by male athletic directors is a growing issue throughout the NCAA. She claims that: "In too many cases, athletic directors take the easy way out…Instead of actively recruiting outside of their networks, they hire the people they already know, and their networks are likely to be male-dominated."[38] As someone who has been involved in NCAA athletic administrations at the top level, Sweet speaks to this issue from experience. She argues that athletic administrations need to diversify in terms of gender by hiring outside of their familiar professional circles.

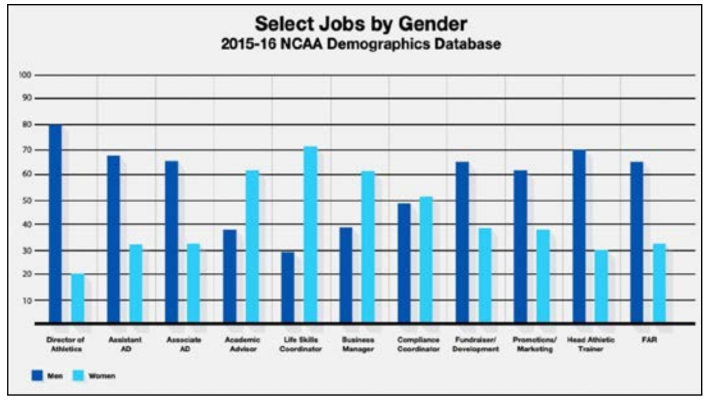

TABLE 13[39]

Although there are a few positions that are represented by females more than males, these positions lack prestige and influence, such as "academic advisor" and "life skills coordinator." These positions have minimal to no influence when it comes to athletic department wide decisions, still making the influence of athletic departments predominantly a male's world.

To change the direction of this trend, hiring practices used by administrations must branch out and take on professional women that may not fit their envisioned mold of the ideal candidate. With that said, by expanding the standards and guidelines of hiring practices, perspectives will grow throughout athletic departments, creating a path towards a more diverse, and female-heavy athletic administration.

In terms of coaching, female intercollegiate sports programs are increasingly being led by male coaches. The reason for this is that as female collegiate athletics gained prominence, so did the payroll of the coaches who directed these teams. A former Arizona State University head coach, recounting her early coaching days when female team coaches were regarded as inferior to male team coaches, stated:

> I was here starting in 1980 and my office was in the basement of Wells Fargo Arena (the basketball stadium at Arizona State University), it was a storage room that had been converted into an office.…I was part time and I only made $8,000 a year. The men's coach had a nice office on the main floor of Wells Fargo with a window and all that, and he made $40,000, so there was a huge discrepancy in that.

Clearly female coaches were not valued at the time, creating the struggle of them having to catch up to their male counterparts, in order to gain legitimacy for their coaching positions. In the words of a current Arizona State University female head coach, "When Title IX first started there was no money for coaching, so who would take these coaching positions? Women." She then explained that the women who took these positions were professors at the university at the same time, making coaching a side job that was hardly compensated. The lack of value given to females that held positions as coaches had the effect of deterring other females from pursuing such roles, as they were not given the valor, financial compensation, or recognition they deserved.

However, with the enactment of Title IX came the growing prestige and pay scale for such positions. Legendary women's basketball coach of the University of Tennessee, Pat Summitt, received a starting salary of \$250 a month when she began her coaching career in 1974. Prior to her retirement in 2012, Coach Summitt drew an annual salary of \$2 million,[40] showing an exponential increase in the pay scale and value that a female head coaching position has gained due to the enactment of Title IX. This growth made the head coaching position of a female team a prestigious position that was no longer looked down upon when compared to the head coaching position of a men's team. As noted by an Arizona State University athletics female head coach who has been coaching since before Title IX existed:

> When salaries started to increase, then men became more and more interested. And prior to that they… didn't really think it was a worthy job to be coaching the girls, as they would say, "I don't want to coach the girls." But then when they realized that the salaries were now being raised and they started coaching women, they said "Wow, I had no idea how incredible these women are and what great athletes they are." So, it became more and more popular to do that, and the jobs became more enticing to the men and so unfortunately, we see a lot of men coaching the women's teams.

This trend exists nationwide, and as a result, female coaching positions began to draw attention, and provided incentives for males to take on these roles that gained new prestige and recognition. Men were then given the chance to take on either male or female team coaching positions, doubling their coaching opportunity, while females were still harshly limited to coaching female teams. Hence, males began taking female team coaching positions away from female coaches, contributing to the drastic upset in female coaching availability. When a different Arizona State University athletics female head coach was asked about the same issue, she provided a similar response:

> I think what's happened is that the pay scale has gotten much greater, I mean some of these coaches are making boatloads of money…as salaries are beginning to reach six figures in a lot of these sports…with the money I think that's why we had a lot of males flock to (female) coaching.

This quote is testimony to the financial incentive that drew male coaches to heading female student-athlete programs, driven by a salary that could support a family, a trend that did not exist in the past.

The salary changes that influenced female representation in sport was also a result of the Equal Pay Act of 1963,[41] which prohibited wage discrimination based on sex. Although this legislation was intended to promote equality, it paradoxically created incentives for universities to hire male coaches for female teams, over female coaches, since they could pay men less for such positions than they could a female coach,[42] but still more than if the only applicants were women. Historically, female teams are less revenue generating than their male counterparts. Therefore, a male coach can be justified for being payed less when coaching a female team. However, if a female coach holds this same position, if they are then payed less, such a payroll discrepancy has the chance of being blamed on discrimination, putting the university at risk of violating the Equal Pay Act. In this case, hiring a man for a female team coaching position protects the university from such liability, giving the government no way to target the university for any such violations. This regulation is yet another example of how legislative action has created unintended consequences for protected classes, reinforcing the rise of male head coaches heading female sports teams.

a. Discrepancy Between Male/Female Coaching Opportunity

By contrast, female coaches are rarely given the opportunity to coach men's teams.

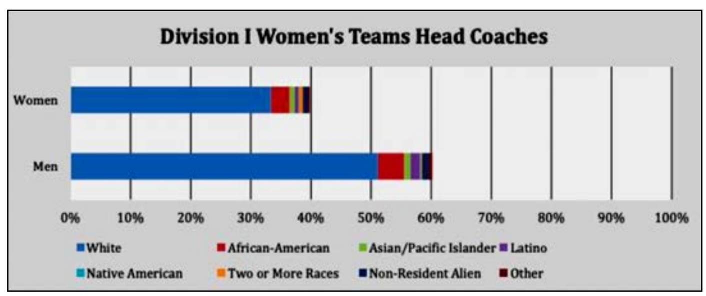

TABLE 14[43]

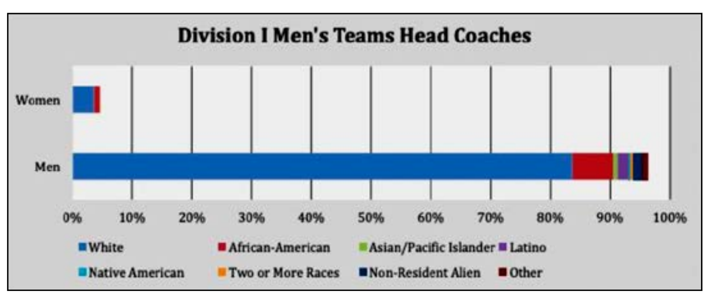

TABLE 15[44]

Males clearly lead in terms of coaching female and male intercollegiate athletic programs. However, the true discrepancy is the opportunity that clearly exists for men to coach women, but not for women to coach men. Currently, only

3% of male teams are headed by women, demonstrating the limited opportunity women are experiencing when it comes to collegiate coaching positions. And with the number of NCAA women's teams increasing by 14% in the last ten years, but a 16% decline in female head coaches, as seen in table 16,[45] the discrepancy between female athletic opportunity, and coaching roles being given to women continues to grow.

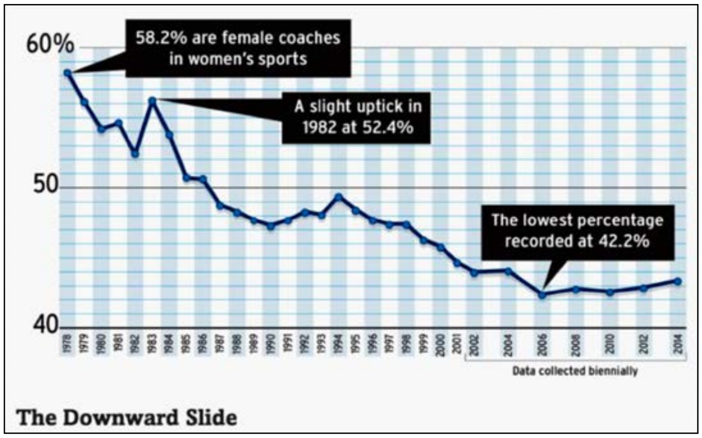

TABLE 16[46]

This is precisely an unintended consequence of Title IX that has come about in intercollegiate sports. The legislation has paradoxically increased male representation in coaching roles, limiting females in their opportunity to pursue careers in athletic coaching or administrations.

When comparing the lack of female representation in sport coaching positions to other professional fields, it appears that the sport world is falling behind in terms of female progress. Twenty percent of Congress is female, in 2013 there were 69 women serving as a general or an admiral in the United States Armed forces, 30 women have served as US governors, and this past August the Marine Corps named its first female platoon commander. Females are progressing in other realms of society, even in fields that have been male dominated in the past. The sporting world is therefore trailing behind other prestigious professions. As claimed by Nicole LaVoi, Co-Director of the Tucker Center for Research on Girls & Women in Sport at the University of Minnesota, "Diversity is valued in the marketplace…yet sports are behind the times."[47]

Of the roughly 2,600 coaches employed by professional sports teams, the number of women coaching is not even one percent. Of that 2,600, there are only six female head coaches.[48] Such a statistic proves just how far behind the sporting world is in terms of equal representation. However, the ability of females to thrive in roles as demanding as military and political positions proves they have the strength and leadership qualities to thrive as head sports coaches and should therefore not be looked down on because of their gender.

On the other hand, some argue that the lack of females in powerful administrative sports roles is because institutions and athletes see this practice as taking a risk, one that may risk their careers. Drew Benner, former NFL player, stated, "As a pro athlete I have a small window for a career. Maybe a couple years…. I'm all about encouraging workplace diversity and breaking barriers, but if it affects my ability to learn at the top level, I don't want it."[49] Such is the mindset that many professional male athletes face. It is a step towards societal progress that they feel might hinder the progress of their careers, as they have not witnessed women in such positions in the past, and therefore are hesitant to believe in the ability of women to thrive in such roles. To make matters worse, some claim male athletes would not thrive under female leadership, as claimed by former NBA head coach, "By and large the NBA is an incredibly sexist environment…. In our society there are men uncomfortable working under women and a handful of our players would have a problem with it."[50] Obviously societal bias is playing a role here, making men incapable of complying with female leadership based on societal perceptions. Therefore, when arguing that athletic directors are not taking a chance on hiring women coaches to head men's teams, it is important to consider how the male athletes may react to such a decision and the backlash it may cause.

This issue then relates to the feminist theory that society perceives masculinity as a sign of capability, which may explain why so many athletes prefer to be coached by males. In a research study conducted at Minnesota State University regarding feminist theory and its relation to female coaching, it was argued that "For human beings there is no essential femaleness or maleness, femininity or masculinity, womanhood or manhood, but once gender is ascribed, the social order constructs and holds individuals to strongly gendered norms and expectations."[51] This quote emphasizes the societal perceptions that are seen in the sporting world, and help to explain why athletes and administrators view females and their competency a certain way. As this quote implies, it is almost a societal stigma that is not voluntarily emphasized, but has been engrained in society, hurting a female's ability to achieve the professional success they desire.

Regarding hiring practices, studies show that men are more likely to hire other men for leadership positions, even if there are equally or even better qualified female candidates for that same position.[52] This fact only increases the severity of the issue. When girls in sport rarely see female head coaches at the highest level, they are convinced over time that males make better leaders than females, potentially altering their future goals, even if such goals do not involve athletics. This means that such aspirations can include leadership positions in other professional realms of society, still convincing these individuals that female leadership is rare and exceedingly difficult to accomplish. The quote, "If she can see her, she can be her," has been coined throughout the sporting world, emphasizing the belief that in order for women to pursue powerful coaching roles, they must see other women in such positions in the first place.[53] However, the lack of such a practice is demonstrated in the hiring practices of the NCAA over the past decade, as the representation of females in NCAA full time staffing positions decreased by almost 7% between 2011 and 2017.

Total Full-Time NCAA Staff					
	%	#		%	#
2017			*2011*		
White	79.9%	417	White	79.6%	312
African-American	14.9%	78	African-American	16.8%	66
Latino	1.5%	8	Latino	1.3%	5
Asian	2.1%	11	Asian	2.0%	8
Other	1.5%	8	Other	0.3%	1
Women	54.2%	283	Women	61.5%	241
Total	x	522	Total	x	392

TABLE 17[54]

Without the presence of female leaders, especially at the highest levels of sport, this sends the message of the incapability of a woman to pursue a similar position, only increasing the trend and severity of the issue.

IV. WHAT NEEDS TO BE DONE TO INCREASE THE NUMBER OF FEMALE COACHES IN INTERCOLLEGIATE ATHLETICS

It is important to note that the lack of female coaches and leadership roles starts from even the lowest levels of coaching, creating a culture of male leadership from a young girl's first experience in sport. This message of male dominance, authority, and coaching expertise that is being communicated to young girls starting from recreational sport can influence their mindset as they grow, only exacerbating the problem of there being such a male dominant presence in the sports world. In order to create a pipeline for females to pursue coaching and administrative positions, they must have role models that have successfully pursued the same in the past. Without reassurance that such a career path is attainable due to the lack of female presence in such positions, this pipeline becomes difficult to put in place.

One former women's head basketball coach who was interviewed claimed that the best way to alter the male dominated sports world that girls are exposed to from their childhood is for women who wish to pursue coaching to start at the most basic, recreational level, and move their way up in the coaching world. She stated:

> We as women need to take control of the dynamic of there being a lack of female coaches having opportunity, particularly at the college level, by encouraging our athletes to go back to coaching at the grassroots level and being head coaches at their high school and other recreational administrations. That's how you learn to make it on the big stage in college athletics. That's how we're limiting our opportunities, by not being involved in clubs, high schools, and organizations like the Boys and Girls Club.[55]

This quote highlights the idea that male dominance of female athletics starts at the most basic level. With girls being led by male coaches their entire lives, they are given the message that females are incapable of coaching them, contributing to the trend of the lack of female coaches. Rather, if such athletes are exposed to female coaches starting at the recreational level, a clearer path towards future involvement in sports coaching will be perceived, creating more of a visible pipeline for these girls to pursue careers in coaching. As coined by USA Baseball Women's National team member Veronica Alvarez:

> As women we almost have to start in Little League, says the former catcher. Even there we'll be ridiculed, and people will assume we don't know what we're talking about. But we do. We have knowledge and ability to coach. We just have a lot more to prove than guys. A lot more barriers to break down.[56]

Here, Alvarez emphasizes the point that women must start coaching at the grassroots level, regardless of the backlash they may receive when integrating themselves in the coaching world. Although the societal barriers that exist around females in coaching is a battle that women must continue to fight, starting this fight from the bottom up allows women to expose themselves at the recreational level, setting an example for young girls. This example then eventually extends to the collegiate and professional levels, sending a powerful message to the world that women are capable of far more than society gives them credit for.

However, when considering this issue, one must account for the pay gap that exists between professional, collegiate, and recreational coaching positions. To explain, with professional and collegiate head coaches making a significantly higher income than a lower level position, convincing females to pursue coaching at a lower level to bring about female leadership exposure is a heavy financial sacrifice. While on average, high school female basketball coaches make an annual salary of $39,600,[57] intercollegiate women basketball coaches at Pac 12 schools make $427,651 on average.[58] Most women want to pursue the coaching position that will ultimately provide them the most benefits and financial stability. And with professional coaching jobs for women being so rare, intercollegiate sports coaching draws the most attention. Therefore, it is important to consider the coach's side of the issue when emphasizing the need for more women coaches at lower levels, as there may not be sufficient economic incentive for women to pursue low-level coaching positions.

In addition, this survey of female student-athletes also asked whether they had ever considered coaching high school, college, or professional sports after college. The results are displayed in table 18.

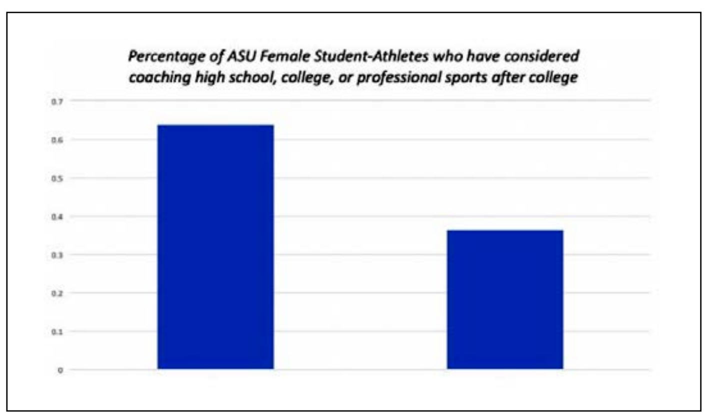

TABLE 18

Such results indicate that 63.64% of the Arizona State female student-athletes surveyed have considered coaching sport after college, while only 36.36% have not.[59] With such an overwhelming percentage of student-athletes that have considered pursuing a career in coaching, the underrepresentation of females in coaching and athletic administration is very much a result of the lack of opportunity that exists for women, rather than the lack of desire to hold such positions.

Student-athletes were also asked to explain why they have considered coaching in the future. A common answer was both love and connection to their sport. One student-athlete explained, "I can't imagine not being active in my sport in some way, and it has given me great opportunities, experiences, and joy that I would love to help other athletes find." Clearly, sport is incredibly influential to the lives of these student-athletes and sharing such a positive influence with up and coming athletes is reason enough for these women to pursue coaching post college.

Other student-athletes have more long-term plans in pursuing a career in sport, one claiming that, "I have a passion for the sport I am in. I have considered coaching at a collegiate level and developing a sports agency that handles young athletes in their emotional and physical development." With entrepreneurial visions beyond just coaching, such female student-athletes, if given the avenue, can be a driving force for positive influence in the athletic community. There must therefore be a path put in place for athletes, like this one, to pursue a career in sport, as the limits that exist on such positions today deter such positive change from taking flight.

Some student-athletes claim they wish to pursue coaching because they want to be the strong female figure that their younger selves needed as an athlete. Multiple student-athletes answered with responses along the lines of, "I would like to coach because I have had both good and bad coaches throughout the years, and I would want my players to grow both on and off the field. I would want to make personal connections (with my athletes)," showing their desire to once again be a positive influence on aspiring female athletes. This also shows that female student-athletes recognize the need for change and the need for stronger leaders to guide aspiring athletes, showing that they are willing to take on such roles.

Regarding those who indicated they do not plan on pursuing a career that involves coaching, it is important to note that these individuals, through being student-athletes, are graduating with a degree that will allow them to take on the professional role they so desire. As coined by one of the female student-athletes surveyed, "While I loved my time as an athlete, I want to proceed with my life after college and step away from the world of athletics to find myself in a different realm of society." Answers like this one seem to be a trend among about one third of the student-athletes surveyed, highlighting the idea that although they are not interested in pursuing a career in sport, the educational opportunities being a student-athlete provided them were positive, being one of the intentions of Title IX.

However, when discussing female/male coaching ratios, it is important to consider the preference of female athletes. In a survey conducted using the female student-athlete population at Arizona State University, participants overwhelmingly preferred male coaches, as displayed in table 19.

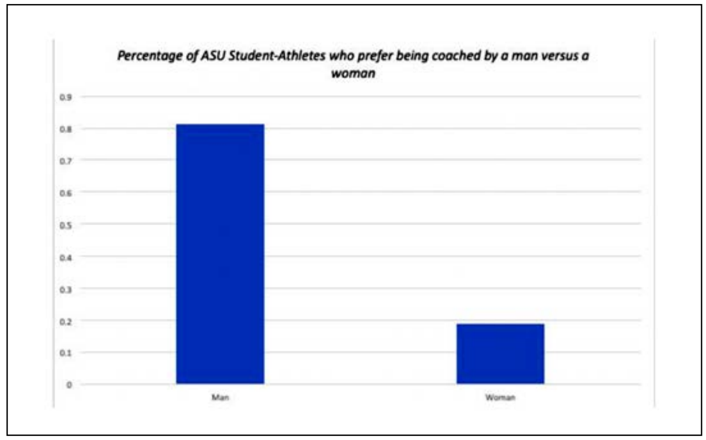

TABLE 19

In this case, 81.25% of these student-athletes claimed that they preferred a male head coach over a female. Although this survey is not statistically significant enough to represent female student-athletes at a national level, such an imbalanced preference towards male head coaches at the Pac 12 athletic powerhouse that is Arizona State University shows a popular trend among female intercollegiate student-athletes. As stated by a female Arizona State University head coach, for "female coaches it's harder for them to get jobs in the professional world because a lot of the females would now rather have a male coach.… A lot of times I have a male assistant so they can hit with the kids." This statement alone may partially account for the growth in male representation when it comes to coaching women's teams, as they may have a stronger physical ability and endurance level to withstand long practices working with their athletes, more so than a female coach may be able to.

However, this issue relates back to the lack of female representation in coaching positions starting at the recreational level. If female student-athletes have only been coached by males, all the way through high school, their preference toward male coaches is biased due to lack of female exposure. As coined by a former NCAA head basketball coach:

> The best way to build your sport in terms of female representation is by going back to the grassroots level and building your knowledge there, which creates sustainability for your sport and maintains more female athletes in the sport.[60]

Once again, the bias that may contribute to female student-athlete's preference toward male coaches starts at the recreational levels of athletics. Further, as Dr. Victoria Jackson has stated on the subject:

> I know so many older women athletes who regret expressing a preference for men coaches when they were younger. Think about all the messages we consume as young people, and the lack of representation

of women in sports and women leadership in sports. We aren't exposed to positive women coaching role models in the broader culture, but we're overrun with positive men coaching role models.[61]

Exposure to male coaches may develop into a preference, and lack of exposure to females may contribute to the lack of such a preference toward female coaches.

Therefore, the survey results that show an overwhelming preference towards male coaches may be due to the male dominated athletic system that has been in place since these athletes started at the most recreational levels. The student-athletes surveyed have grown up in an environment where males dominated the sporting world, an environment that heavily contributes to their coaching bias towards male head coaches. If female involvement in sports even at the lowest level increases, these aspiring coaches will be able to grow as coaches individually, without the pressures and philosophies of a collegiate athletic environment that is primarily male dominated.

In the survey, the female student-athlete population was asked to explain why they prefer to be coached by either a male or a female coach. A trend in the responses appeared to be the atmosphere and attitude male coaches bring to the table. One student-athlete claimed she prefers to be coached by a man because "I feel as though they are tougher and therefore expect more out of you, making it easier to improve." Others communicated a similar point, explaining that male coaches were "more direct and honest," and they felt "less of an emotional attachment to them." Such traits may provide for a more intense and less emotionally driven athletic environment, one that many female student-athletes claim to thrive in.

However, it is important to consider the circumstances of such responses, as the population of student-athletes surveyed have grown up in an athletic environment that was already male dominant in terms of head coaching positions of female teams. As mentioned previously, male coaches were all the student-athletes knew, which may be a contributing factor to their preference for male coaches, simply due to lack of exposure to female coaches. Many student-athletes explained that they "are just more used to being coached by men," a claim that asserts an environmental bias towards male coaches, because female coaches are far less prevalent. This speaks to the previous point of there not being an adequate pipeline for females to pursue coaching positions, as even from the time of recreational sport, girls are not seeing male coaches head their teams.

On a similar note, although this paper does not aim to address this issue, there is an issue about which female student-athletes voiced a concern about, that is very relevant to the coaching discussion. In light of recent events, most recently the Larry Nassar scandal that overtook USA Gymnastics and the United States Olympic Committee, sexual harassment and male dominance is an issue that also comes up in the situation of males coaching women's teams. As claimed by an Arizona State University female student-athlete, "I have almost always been coached by males and find that there is always a barrier for them talking to females as opposed to males. I have also dealt with sexual harassment and assault by my past male coaches and don't feel that that would be a problem if I were coached by a female." This is an incredibly powerful point highlighting the necessity for a female presence among female sporting teams. Regardless of the protections that the NCAA and individual institutions instill to prevent such issues, sexual harassment and assault is still a concern when males serve as head coaches for female teams, and one that should be taken very seriously.

An additional issue that must also be addressed when considering the lack of females in head coaching positions, is the "second shift" theory that females are entitled to when balancing a career while raising a family. To explain, as intercollegiate athletics gained prestige and popularity, so did the time demands of the job. Coaches responsibilities went far beyond just attending practices, as recruiting, administrative work, and increased travel for competition made head coaching positions an around-the-clock job.[62] Further, although the "stay at home father" role has gained popularity, a Pew Research Study concluded that stay at home fathers comprise only 16% of such parents, still making it a role that is heavily represented by women.[63] Therefore, when women take on the responsibility of raising a family, while still serving as head coaches, they are typically forced to prioritize one over the other. This then leads to both exhaustion, stress, and guilt, taking an excessive toll on the mental state of these coaches.[64]

As quoted in an article by the NCAA, Arizona State University women's head basketball coach Charli Turner Thorne stated, she "knows a lot of women who have gotten out of coaching because they want more family time."[65] This is a common dilemma faced by female head coaches who are forced to choose between coaching and family life. Coach Thorne later claims that she has had "players who never considered coaching because they didn't see them being able to have everything they wanted with their family life,"[66] further emphasizing the stigma that a head coaching job does not provide a healthy work-life balance. A former Division I head basketball coach commented on this issue in an interview, claiming that, "If we are moving into a more inclusive and diverse environment, we need to realize that women need support that is different than men."[67]

The support she refers to includes nannies, and allowing female coaches to travel with their children, basic accommodations that would allow females to pursue coaching, without sacrificing so much family commitment while doing so. Such measures must be taken to promote equality among high level athletic coaching positions, as women have societal roles that go beyond that of men, and those roles must be accommodated to level the playing field for pursuing these head coaching positions.

This situation can be demonstrated in the case of gay couple Lauren and Colleen Mullen, who both were NCAA Women's basketball head coaches. Along with serving as head coaches, the Mullens maintain the challenge of raising a three-year-old and one-year old twins. Although they were able to keep up both realms of life for some time, the overwhelming demands of kids and work became too consuming for both women to keep up, and compromise had to be made in order to maintain an acceptable standard of life. As claimed in a New York Times article discussing their story, "After four years of matching basketball calendars to Colleen's biological clock to plan births for the off-season, timing recruiting calls around nap schedules, and wrestling with nanny problems and a merry-go-round of fill-in babysitters, they needed a change." Colleen asserted that they "were at a breaking point…. A lot of coming and going," followed by Lauren's claim that their lives were "absolute insanity…. To be frank, at the end of last year, it was like, O.K., what are we going to do?" As a result, the couple found a middle ground, as Colleen maintained her head coaching position at SUNY Albany, while Lauren resigned from her head coaching position at NYU to dedicate time to raising her family.[68] They have found this life more maintainable, although it took sacrifice to get to this point. Hence, the "second shift" work/family life balance that so many women struggle with is exemplified through collegiate athletic coaching positions in this instance. The lack of female coaches in intercollegiate sport can be the fault of the inability to balance such a prestigious position with the pressures of raising a family, making this factor a disincentive when it comes to women pursuing coaching careers. This creates the need for change and societal support from an intercollegiate employment standard for women to be able to pursue coaching at an accessibility level equal to that of males.

The transition to a more female friendly coaching environment may already be in existence. As coined by an Arizona State University female head coach when asked about the difficulties of balancing family and coaching, "I don't think it's a deal breaker for women to be head coaches and start a family, with the salaries and care opportunities that exist today…the escalation of salaries allows people more help." This comment leads to the point that certain support does exist in the form of financial benefits that are the growing salaries for female head coaches. This allows female coaches to afford the childcare they need in order to work long hours. However, the time demands that coaching requires while raising a family is difficult to compensate for, still emphasizing the need for a more accommodating way for females to pursue coaching while raising a family.

On the administrative side of intercollegiate athletics 23% of NCAA athletic programs have women involved in their athletic administration, while women hold just 34% of all intercollegiate athletic administrative positions, in terms of women's sports only.[69] This shows the challenges female administrators face to even obtain their position, having to assert themselves in a position that is predominantly a male's world. Again, with a majority of leadership roles being headed by men, the visible pipeline for women to pursue such positions is limited. As claimed by a female head coach of Arizona State University Athletics, "Administration has failed to create a pipeline to open up positions to females – [there are] more male interns than females." As noted, rather than sport creating a pipeline for females to pursue careers involved in administrative athletics, such roles are being given to males, neglecting the goal of equality that Title IX legislation intended to bring about. Such a trend starts with basic roles like internships and student managerial positions. As claimed in the quote above, with lack of female representation in such basic roles, the pipeline for females to ultimately reach an administrative position in athletics appears exceedingly difficult to obtain for women pursuing sports administrative roles. This then possibly deters them from seeking such a profession in the first place.

To emphasize such imbalanced hiring practices, "Of the 418 new athletic administrative jobs added at NCAA institutions since 1998, women were hired for only 45 of these positions,"[70] being less than 11% of all hires. As mentioned earlier, there has been a 14% increase in female intercollegiate athletic teams in the last ten years, implying an increased need for women leadership in sport. Evidently such a trend is not the case, as hiring practices have taken an alternate route, allowing for male dominated administrations that now oversee student-athlete populations heavily represented by female sports. The need for change is evident through statistics and personal accounts of coaches and student-athletes, a population of strong females who deserve to exercise their expertise in sport and give back to an athletic community that has shaped their lives for the better.

V. CONCLUSION

While Title IX has been successful in providing opportunity for females to pursue intercollegiate sports, the opposite has become the case in terms of coaching and administrative roles. Instead, males have seized the positions that have opened because of Title IX, an unintended consequence that has severely limited a female's ability to pursue a career in coaching or administrative sport. The growing prestige and salary that is awarded to head coaches of female teams has drawn attention and brought prestige to the position, urging male coaches to take on the role of coaching female teams. Meanwhile, females are not given the same opportunity to coach their male counterparts, creating an unfair advantage for males pursuing coaching careers. This therefore leaves women with a much more limited scope of opportunity for coaching positions, contributing to the unbalanced representation of male/female in sport.

The same imbalance can be seen in sport administration positions. The top-down hiring approach practiced regularly throughout athletic administrations urges men to hire other men to fill such administrative positions, as they instinctively hire individuals in their "inner circle," those individuals typically being males. This limits female presence in the sporting world, as they receive less attention even when applying for such positions, despite the skill and qualifications they may bring to the table. It is essential to further integrate females into athletic administrations immediately and reverse the top down hiring approaches and trend of male dominated athletic administrations that exist at NCAA institutions nationwide. Although increasing representation will be a process of social reform that takes time and adaptation, by placing females in positions of athletic authority and advertising their success, perceptions of their skill will begin to change, and female athletic administrative representation will grow.

Resolving the issue of female underrepresentation in athletic administrations would entail reforming social perceptions of females as less capable when it comes to coaching high level athletics, and enacting hiring practices where males and females are evaluated equally. This societal perception of female inferiority has minimal statistical support and fails to account for women's ability to thrive on the athletic field. If they can compete in athletics, surely, they have the capacity to coach and regulate it. It also requires that a pipeline for females to pursue coaching and administration be put in place, as the lack of visible opportunity that currently exists deters such aspiring professionals from reaching the career goals they desire.

This pipeline must therefore start at the grassroots level, exposing young girls to female coaches starting from their youth, creating a culture that encourages female involvement in all levels of sport, unlike the male dominant environment that young girls are now regularly exposed to. If young girls become accustomed to working with female coaches and administrators, the mindset of female inferiority wouldn't be engrained in their minds when molding their future career goals. This may change the female preference toward male coaches that exists today, creating a more widespread desire for female athletes to be coached by other female coaches.

Title IX has brought about unintended consequences that have hurt aspiring female athletic professionals. This is a message that needs to be discussed and addressed among the intercollegiate athletics community, as equality and diversity is a widely regarded American ideal that must exist among all social realms, sport being one of the most influential aspects of American society today. Although the intentions of Title IX were to bring about such societal equality, the unintended consequences of this act of legislation has done the opposite. This has impaired the aspiring female professionals of the future from reaching their full potential and changing the sporting world for the better, and therefore must be addressed immediately. ■

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ENDNOTES

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2 For clarity and ease of reference, this article will use the term "female" as opposed to other gender references. "Female" connotes biological sex, and therefore is the most appropriate term for this subject. However, sometimes the word "women" will be used because it is a term often used by the NCAA.

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Litigation Update

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UNPRECEDENTED TIMES

2020 marked the start of a new decade. Various forms of media celebrated anniversaries this year. For example, in the world of movies: *Monty Python and the Holy Grail* and *Jaws* both turned 45; both *The Breakfast Club* and *Back to the Future* turned 35; *Home Alone* turned 30, and most importantly, *Toy Story* turned 25. *See* AT&T, *2020 Pop Culture Anniversaries: Movies, TV Shows, Celebrity Birthdays* (Jan. 22, 2020) https://entertainment.directv.com/2020-pop-culture-anniversaries-movies-tv-shows-celebrity-birthdays/. Meanwhile, in the TV world: *SNL* first premiered 45 years ago; *The Simpsons*, *The Fresh Prince of Bel Air*, and *Twin Peaks* all reached the young age of 30; and more recently, comedies like *The Office* and *It's Always Sunny in Philadelphia* first premiered 15 years ago. *Id.* This is also a special year for album anniversaries, such as Queen's *The Game* turning 40, Radiohead's *The Bends* turning 25, and System of a Down releasing their double album, *Mesmerize* and *Hypnotize*, six months apart in 2005. *See* Kink.fm, *2020: Important Album Anniversaries*, https://www.kink.fm/2020-important-album-anniversaries/.

Although it is comforting to reminisce on the passage of time in relation to some of these landmark pieces of media, the legal realm waits for no one. Today, we will focus on several legal developments involving event cancellations due to the novel coronavirus ("COVID-19") and its impact on refund policies, a case involving a large fire on NBCUniversal's lot 12 years ago, and an interesting, but important case involving the First Amendment and trademarks in video games.

REFUNDS? NEVER HEARD OF THEM

From production companies pushing back release dates or going straight to streaming, to esports having events and their yearly tours canceled, to the 2020 Tokyo Olympics being postponed to 2021, COVID-19 has impacted both the event space and the entertainment industry as a whole. It is safe to say that the music industry has suffered the most, and many artists have now transitioned to home or studio streams to give concertgoers and fans a show even while in quarantine. Thanks to the folks over at *Vulture*, we have a constantly updating list of every canceled tour, movie, or live event as they are announced. *See* Vulture, *All the Live Events, Movies Releases, and Productions Affected by the Coronavirus*, (updated Apr. 28, 2020), https://www.vulture.com/2020/04/events-cancelled-coronavirus.html. Fingers crossed for Riot Fest staying on so I can finally live out my teenage dream of seeing My Chemical Romance live.

As music fans, we are all familiar with the excitement (and simultaneous frustration) of dealing with ticket websites (e.g., Ticketmaster), with their "convenience" fees and constant war with ticket scalpers. Earlier in April, StubHub first made the headlines in light of COVID-19. According to *Billboard*, Matthew McMillan filed a $5 million federal class action lawsuit on April 2, 2020 against StubHub for refusing to issue him a refund over a suspended NHL game. Claudia Rosenbaum, *StubHub hit with $5M Class Action Lawsuit Over Coronavirus Refund Policy*, Billboard (Apr. 6, 2020), https://www.billboard.com/articles/business/legal-and-management/9352530/stubhub-5-million-class-action-lawsuit-coronavirus-refund-policy. According to Mr. McMillan's complaint, when he initially purchased his tickets, StubHub had a "Fanprotect guarantee" in place, which would issue full refunds in the event of a cancellation. Madison Bloom, *StubHub Hit With $5 Million Class Action Lawsuit*, Pitchfork (Apr. 7, 2020), https://pitchfork.com/news/stubhub-hit-with-dollar5-million-class-action-lawsuit/?verso=true.

However, StubHub claimed that the NHL game was "postponed" as opposed to being cancelled, and subsequently changed their refund policy after Mr. McMillan's purchase. *Id.* According to an email sent by StubHub's president, this new policy would instead give fans a "credit" they could use on a future purchase, worth 120% of the initial purchase price. *Id.* Mr. McMillan claimed breach of contract and negligent representation and asked for the court to prevent StubHub from issuing coupons instead of offering full refunds. *Id.* StubHub has not commented and the case is ongoing.

Not to be outdone, Ticketmaster also updated their own refund policy. Prior to the change, refunds were available if an event was "postponed, rescheduled or canceled;" now, the page reads to clarify that refunds are available if an event is "canceled." Ben Sisario and Graham Bowley, *Angry Fans Say First the Concerts Were Canceled, Then the Refunds*, The New York Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/arts/music/ticketmaster-refunds-coronavirus.html. According to Ticketmaster, this was just a point of clarity and they have claimed that their message has been consistent. Charles Trepany, *'Absolutely revolting': Ticketmaster quietly clarifies COVID-19 refund policy, sparks outrage*, USA Today (Apr. 13, 2020), https://www.usatoday.com/story/entertainment/music/2020/04/13/coronavirus-ticketmaster-changes-refund-policy-sparks-outrage/2986708001. Ticketmaster stated that over 4,000 events authorized refunds but there are no guarantees, leaving fans to go on Twitter and voice their concerns, similar to how we shame airlines after a bad flight or cabin experience. *Id.*

Rounding out these refund woes are other lawsuits in the works. For example, the festival South by Southwest (SXSW) has been hit with a class action lawsuit for failing to issue refunds to ticket buyers after cancelling its event due to COVID-19. Taylor Mims, *SXSW Hit With Class Action Lawsuit Over Ticket Refunds*, Billboard (Apr. 28, 2020), https://www.billboard.com/articles/business/legal-and-management/9367600/sxsw-class-action-lawsuit-ticket-refunds. Similarly, California EDM festival Lightning In a Bottle was hit with a $5 million class-action lawsuit after failing to issue refunds after cancelation. TMZ, *Lightning In A Bottle EDM Festival Sued … 'NO REFUNDS' POLICY IS WHACK!!!*, (Apr. 14, 2020), https://www.tmz.com/2020/04/14/edm-festival-lightning-in-a-bottle-sued-no-refunds-policy/.

THE EMBERS OF THE 2008 UNIVERSAL FIRE

On June 1, 2008, a large fire broke out at a 22,320 sq. ft. warehouse named Building 6197, known to many of the employees there at Universal Studios Hollywood as "the vault," which housed various videotapes and film reels, most of which were owned by NBC Universal. Jody Rosen, *The Day The Music Burned*, The NY Times (Jun. 11, 2019), https://www.nytimes.com/2019/06/11/magazine/universal-fire-master-recordings.html. This fire was significant for another reason, however, as it destroyed thousands of physical "masters" owned by UMG (the largest record company in the world), who was essentially serving as a tenant on NBC's property. *Id.*

Masters are the original sound recording of a song or album, i.e., they are irreplaceable. According to *The New York Times*, it is estimated that about 120,000 to 175,000 masters (containing about 500,000 songs) were destroyed in the 2008 fire, including works from Louis Armstrong, Chuck Berry, Elton John, Sonic Youth, Nirvana, Tupac, and more. Alex Johnson, *What did we lose in the Universal Music fire that blazed through archives in 2008?*, NBC News (July 4, 2019), https://www.nbcnews.com/pop-culture/music/what-did-we-lose-universal-music-fire-blazed-through-archives-n10255566. Universal immediately tried to save face when a spokesman told Billboard that most of what was stored in the vault had already either been digitized or had physical backup copies. Jonathan Cohen, *Universal Music Group Masters Unharmed in Fire*, Billboard (June 2, 2008), https://www.billboard.com/articles/news/1045218/universal-music-group-masters-unharmed-in-fire. However, copies just do not cut it, as digital copies of a master: 1) can't replace the master, as some quality is lost every time a copy is made; 2) lack small details only present in the original recording; or 3) sometimes force us to miss out on unused material, songs that we may now never hear. Drew Schwartz, *Why You Should Care About the Fire That Destroyed Thousands of Master Recordings*, Vice (June 28, 2019), https://www.vice.com/en_ca/article/neamxm/what-is-a-master-recording-why-are-masters-important-universal-music-group-fire-umg.

Now, more than a decade later, a class action regarding the 2008 fire has had an important update. In 2019, several artists, including Soundgarden, Hole, the estate of Tupac Shakur, and Jane Petty (Tom Petty's ex-wife) filed a class action against UMG for failing to properly protect the masters, and taking in settlement proceeds and insurance claims valued at $150 million. Ben Sisario, *Artists Sue Universal Music Group Over Losses in 2008 Fire*, The New York Times (June 21, 2019), https://www.nytimes.com/2019/06/21/business/media/universal-music-fire-lawsuit.html. UMG moved to dismiss, arguing that UMG, and not the artists, owned the masters, meaning there was no obligation for UMG to split the insurance and settlement proceeds they received as a result of the fire. Jem Aswad, *Universal Music Files Motion to Dismiss Lawsuit From Artists Claiming Fire Damage*, Variety (July 27, 2019), https://variety.com/2019/music/news/universal-fire-motion-dismiss-soundgarden-hole-tupac-tom-petty-1203270567/. UMG also argued that the fire damage was publicly disclosed and that the statute of limitations had already run. *Id.*

On April 6, 2020, Judge John A. Kronstadt from California dismissed five of the six causes of action in the original filing. Jon Blistein, *Judge Dismisses Universal Music Group Vault Fire Lawsuit*, Rolling Stone (Apr. 6, 2020), https://www.rollingstone.com/music/music-news/universal-music-group-vault-fire-lawsuit-dismissed-979284/. Four of the five original plaintiffs had already dropped out by this point, leaving Jane Petty as the only plaintiff in the case. *Id.* Interestingly enough, Judge Kronstadt did state that the complaint was in fact, not time-barred, because it was fair to assume that she only knew about the possible damages due to the 2019 piece published by *The New York Times*. Eriq Gardner, *Universal Music Defeats Legal Claims Over Destroyed Recordings in Fire*, The Hollywood Reporter (Apr. 6, 2020), https://www.hollywoodreporter.com/thr-esq/universal-music-defeats-legal-claims-destroyed-recordings-fire-1288695. Whether or not any of these plaintiffs choose to pursue a new complaint is still unknown.

ANOTHER VIDEO GAME FIRST AMENDMENT VICTORY

In 2017, the makers of the Humvee military vehicle, AM General, filed a lawsuit with various claims against Activision Blizzard ("Activision") for using their trademarks and trade dress without permission in several Call of Duty ("COD") games since *Call of Duty: Modern Warfare* in 2007. Jonathan Stempel, *Humvee maker sues Activision over 'Call of Duty,'* Reuters (Nov. 8, 2017), https://www.reuters.com/article/us-activision-amgeneral/humvee-maker-sues-activision-over-call-of-duty-idUSKBN1D828F. According to AM General, Activision was essentially capitalizing off of the Humvee trademarks and the vehicle itself by using them in the COD games; this is motivated in part due to COD being one of the most successful video game franchises, earning Activision more than $15 billion by 2016. Saqib Shah, *Humvee maker sues Activision for using its trucks in 'Call of Duty,'* Engadget (Nov. 10, 2017), https://www.engadget.com/2017-11-10-humvee-activision-call-of-duty-lawsuit.html. The crux of AM General's argument was that by having the vehicles present in the COD games, the average gamer would believe this was some form of license or endorsement.

On May 31, 2019, Activision moved for summary judgment and AM General moved for partial summary judgment. *AM Gen. LLC v. Activision Blizzard, Inc.*, No. 17-CV-8644 (GBD) (JLC), 2019 U.S. Dist. LEXIS 37471

(S.D.N.Y. Mar. 7, 2019). On March 31, 2020, Judge George B. Daniels of the U.S. District Court for the Southern District of New York granted Activision's motion for summary judgment. Owen S. Good, *Call of Duty may use Humvees without maker's permission, judge rules*, Polygon (Apr. 3, 2020), https://www.polygon.com/2020/4/3/21207385/call-of-duty-humvee-lawsuit-activision-am-general-ruling.

In granting the summary judgment motion, the court went through the two-pronged *Rogers* test as the case dealt with trademarks within an expressive work, i.e., there were First Amendment concerns. *AM Gen. LLC v. Activision Blizzard, Inc.*, 2020 U.S. Dist. LEXIS 57121, at *11-31 (S.D.N.Y. Mar. 31, 2020). Under *Rogers*, artistic or expressive works may use trademarks without facing Lanham Act liability if 1) the work has some "artistic relevance" to the underlying work and 2) the use of the mark is not "explicitly misleading." *Id.* at *10-11. Regarding artistic relevance, the court found that the COD games did have artistic relevance since "[f]eaturing actual vehicles used by military operations around the world in video games about simulated modern warfare surely evokes a sense of realism and lifelikeness to the player …." *Id.* at *16. The court further explained that "any reasonable juror would conclude that the presence of Humvees in *Call of Duty* games possesses an artistic value that is at least 'above zero.'" *Id.* at *17.

Next, the court looked at whether Activision's use was explicitly misleading. In particular, the court focused on the *Polaroid* factors and found that many of the factors weighed in Activision's favor and that AM General could not show that the uses were explicitly misleading. *Id.* at *26. The Humvees' use, according to the court, "enhance[d] the games' realism." *Id.* at *27. Following the *Rogers* analysis, the court looked to the trade dress claims, and found that AM General failed to show that there was a likelihood of confusion between the actual Humvee and the game. *Id.* at *31.

Thanks to Judge Daniels, this case now allows other game developers to use actual military equipment to enhance realism in their games without fear of potential Lanham Act claims. Here is hoping that the courts continue to expand protections for video games as an expressive medium.

HOW WILL COMPENSATING STUDENT-ATHLETES AFFECT COLLEGE SPORTS

Maintaining the distinction between amateurism and professionalism in competitive sports has been at the forefront of advocacy both for and against a hot-button issue in recent years - allowing student athletes to be paid.

The popularity of sports in American culture has steadily risen in recent decades thanks in large part to ease of access. More teams exist, whether collegiate, semi-professional or professional, than did 50 years ago. Expansions to farm systems in the minor leagues of the MLB, the addition of the NBA G-League to develop more players, and the ever-expanding realm of television and social media have given sports fans the opportunity to watch more sports more often.

As such, revenue streams for governing bodies have risen at a commiserate rate. This includes the NCAA and its affiliated institutions, ranging from the small and humble, such as Jackson State, to the large and mighty, like the Texas Longhorns or the Florida State Seminoles.

For reference, in the 2017-18 academic year, total revenue for Jackson State's athletic department was $8,120,167, while its total expenses were $8,249,184, according to USA TODAY financial reports. That same year, Texas and Florida State generated $219,402,579 and $168,177,850 in total revenue respectively, both turning a profit in excess of $10 million dollars. Steve Berkowitz & Jim Varney, COLLEGE FINANCES USA TODAY, https://sports.usatoday.com/ncaa/finances/ (last visited May 5, 2020).

As of 2011, the average full-ride scholarship to a four-year institution is valued at around $100,000, per NCAA estimates. The following quote from Hall of Fame coach Steve Spurrier most aptly summarizes the significance of these figures; "...50 years ago, athletes got full scholarships. Television income was what, maybe $50,000? Now, everybody's getting $14, $15 million bucks, and they're still just getting a scholarship." Ben Cohen, THE CASE FOR PAYING COLLEGE ATHLETES THE WALL STREET JOURNAL(2011), https://www.wsj.com/articles/SB10001424053111904060604576572752351110850 (last visited May 5, 2020).While it may be the most extreme example to date, in 2011, ESPN and the University of Texas inked a 20-year deal valued at $300 million dollars.

In the last decade, the concept of compensating the student-athletes largely responsible for this economic explosion with "stipends" has steadily gained traction in the media, as well as relevant social and jurisdictional circuits. "Pay-for-play", as it is often labeled, has amassed considerable momentum in recent years, especially in light of numerous recruiting scandals and violations that have exposed a glimpse of the scale of under-the-table payments that many high-profile student-athletes are already receiving in certain instances.

Those who support providing college athletes with stipends often view it as a deterrent to such illicit and unregulated activity, favoring a structured and transparent system that would support fair and equal opportunity for every student-athlete, from the backup midfielder to the starting quarterback.

But now, a new monetary opportunity is being afforded to student-athletes that presents uncharted and potentially damaging effects on the long-term landscape of collegiate athletics.

The NCAA announced on Tuesday, April 28 that it supports a proposed rule change that would allow its student-athletes to receive financial compensation for the use of name, image and likeness. In essence, this rule—set to take effect in the 2021-22 academic year—would enable college athletes to pursue and accept endorsement contracts, as well as hire agents to represent them in such scenarios, among other things.

On the surface, many question how this will impact the integrity and sanctity of the amateur status of a student-athlete receiving a scholarship for his/her commitment to a given school and its athletic program. Prior to its announcement, the NCAA had been unwavering in its commitment to upholding the long-standing definition of amateur status.

However, as this new rule seems to signal the dawn of a new era in college sports, perhaps the most profound effect may also be among the least discussed; its impact on Title-IX.

Enacted in 1972 as a follow-up to the progressive and inclusive values spurred by civil rights movement, Title-IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX and Sex Discrimination, HOME (2020), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited May 5, 2020).

The main components of Title-IX were intended to create an equal and inclusive environment by providing female student-athletes the same amount of opportunities as male students-athletes, including the number of scholarship allocated to each sport and the number of teams funded, as well as the provisions of the scholarships themselves.

However, with the inception of the NCAA's proposed rule change, the involvement of third parties in endorsements and other monetary opportunities will essentially subvert the intended precedent of Title-IX. After all, all bodies federally required to comply with Title-IX will still be doing so: the NCAA, the universities themselves, and the governing conferences will not be providing athletes with any assistance whatsoever in profiting from their likeness.

As shoe companies, athletic brands, video game studios and countless others attempt to capitalize on the popularity and notoriety of the few (i.e. Zion Williamson, Trevor Lawrence, etc.) the harmful effects will inevitably trickle down to the many.

Perhaps the most immediate effect will be on recruiting, which is already a difficult road to navigate for all parties involved. All else being equal, what can a mid-major school such as Jackson State do to competitively recruit a player against the likes of national powerhouses with infinitely more brand awareness and national media visibility, the two biggest factors in determining the potential marketing value of a high-profile college athlete?

Similarly, what can a 3-star softball recruit do to generate as many endorsement opportunities for herself as a 5-star point guard recruit atop ESPN's top 100?

Furthermore, what is to deter a student unsatisfied with his/her opportunities at a given school from seeking transfer opportunities to a larger school with more potential exposure?

These and many other relevant questions do not have definitive answers, and the uncertainty surrounding this issue could permanently alter the climate of collegiate athletics. Resentment among student athletes already exists to a certain degree on campuses across the country. This historic and controversial move by the NCAA will drastically impact the social, financial and legal elements of what it means to be an "student-athlete" in the increasingly capitalistic world of American sports, ultimately redefining "amateurism" for monetary gain.

PITBULL SUCCESSFULLY TRADEMARKS HIS ICONIC "EYO" CHANT OR "GRITO"

Armando Christian Perez, professionally known as "Pitbull" and "Mr. 305," has successfully protected his famous yell. The protection of his signature shout, which he uses in many of his songs, could foreshadow substantial changes for the music industry, paving the way for other artists to follow suit.

This sound trademark falls under mark code 6, which is "[f]or situations for which no drawing is possible, such as sound." The application was filed on October 6, 2017, and was officially registered on October 8, 2019. The description of the mark is detailed as consisting "of a man yelling 'EEEEEEEYOOOOOO' in falsetto with 'E' drawn out followed by a 'U' sound." Pitbull's legal team filed for both "[e]ntertainment services in the nature of live musical performances" and "[m]usical sound recordings; musical video recordings." Registration Nos. 5877076-77.

There's no denying the cultural significance of the "grito" (the Spanish word for "yell") very often contained within Latin music. Sound trademarks fall under the "sensory" trademarks category and are exceptionally rare with few having been able to attain registration. In fact, there are currently less than forty active "familiar" sound trademarks, which provide protection for sounds that are not accompanied by words. Other notable sound trademarks include NBC's chimes and MGM's roaring lion. *See e.g.*, Registration No. 523,616 (NBC Chimes—i.e., the musical notes G, E, C played on chimes); *see also* https://www.uspto.gov/trademark/soundmarks/trademark-sound-mark-examples (last visited May 12, 2020).

To put the rarity of sound trademarks into context, there are more than 2.6 million active trademark registrations in the United States. Justin F. McNaughton, Ryan Kairalla, Leslie José Zigel, & Armando Christian Perez, EEEEEEEYOOOOOO!: Reflections On Protecting Pitbull's Famous Grito, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 179 (2020). It is said that Pitbull's "Eyo" is now the first sound by a musical artist to be trademarked. *Id*. Pitbull's legal team persuaded the United States Patent and Trademark Office ("USPTO") to grant sound trademark protections by emphasizing the uniqueness and recognizable nature of his chant. *Id*. According to the filings, they made a successful case by arguing the significance that the sound has on his brand and that it is so closely associated with the artist that anyone who hears the sound will think it is him. *Id*.

Interestingly, this registration offers an additional layer intellectual property protection as its unauthorized use would constitute both copyright and trademark infringement, leaving lawyers and artists alike anticipating the implications of such unauthorized use.

LEVY V. ADIDAS AG, NO. 18-CV-6542 PSG (MAAX), 2020 U.S. DIST. LEXIS 73532 (C.D. CAL. MAR. 24, 2020)

The sports apparel giant, Adidas, has prevailed in a trademark dispute over the phrase "YOU'RE NEVER DONE" brought by Plaintiff Abraham Berti Levy, a Los Angeles-based entrepreneur. On March 24, 2020, a judge in the U.S.

District Court for the Central District of California granted Adidas' motion for summary judgment.

Background

Levy filed an Intent-To-Use trademark application for the work mark "YOU'RE NEVER DONE" on August 13, 2014, for use on water bottles and various clothing items. An Intent-To-Use trademark application does not require evidence of use at the initial filing. Levy subsequently filed a statement of use in January 2016 with the United States Patent and Trademark Office (USPTO), which thereafter issued a registration to Levy in March 2016. In August 2016, Levy also filed trademark applications for variations of the original word mark, such as "WE'RE NEVER DONE," "I'M NEVER DONE," and "NEVER DONE." Levy filed a statement of use for these marks in October 2019. A hat, shirt, and water bottle each displaying the mark "YOU'RE NEVER DONE," were then sold on Levy's website.

Levy claimed that he entered into discussions with Adidas in August 2016 regarding the possibility of licensing the use of the marks; however, the parties could not come to an agreement. Adidas disputed that these negotiations ever occurred. In about March 2018, Levy discovered that Adidas was using "YOU'RE NEVER DONE" and "NEVER DONE" as the theme of a multi-media campaign promoting Adidas' training program and appearing on athletic shirts and apparel.

The Case

Levy filed suit on July 30, 2018, alleging the following five causes of action:

- Federal trademark infringement, Lanham Act § 32;
- Federal unfair competition and false advertising, Lanham Act § 43(a);
- Reverse confusion, Lanham Act § 32;
- Unfair competition in violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.; and
- Common law unfair competition and trademark infringement.

Adidas moved for summary judgment on all of Levy's claims, arguing that Levy did not have a protectable ownership interest in any of his marks because the marks were both void *ab initio* (i.e., it was never valid to begin with) and also void because it is ornamental. Adidas also contended that Levy failed to raise a triable issue of whether he used the marks before Adidas.

In order to establish ownership of a trademark, an entity has the burden of showing that the trademark is used in commerce. Section 45 of the Lanham Trademark Act defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." Therefore, in order to both maintain its validity and also the ability to enforce it against third parties, a trademark must be used in the ordinary course of trade. An Intent-To-Use trademark application does not, in and of itself, create enforceable trademark rights in the mark.

Through its reasoning, the U.S. District Court concluded that Adidas was the first to use the disputed phrase in commerce; noting that, although Levy had set up a website displaying aforementioned merchandise, these items were not actually available to customers for purchase until after Levy filed suit. Moreover, the Court explained that Levy's "non-sales activity related to the mark reflects 'mere preparation' rather than actual use." As such, the U.S. District Court granted Adidas' motion for summary judgment; thus effectively rendering the dispute "DONE."

OLSON V. MAJOR LEAGUE BASEBALL, NO. 20-CV-632 (JSR), 2020 U.S. DIST. LEXIS 59218 (S.D.N.Y. APR. 3, 2020)

On April 3, 2020, a federal judge sitting in the U.S. District Court for the Southern District of New York issued a 32-page opinion dismissing a class action suit against Major League Baseball ("MLB"), the Houston Astros, and the Boston Red Sox over the infamous sign-stealing scandal.

The Plaintiffs were five individual fantasy baseball players who participated in daily fantasy baseball contests between 2017 and 2019 hosted by DraftKings, an online sports betting platform. MLB determined that the Astros and Red Sox used electronic devices as part of sign-sealing schemes during these seasons. In light of MLB's determination based on the Defendants' contracts with DraftKings, the Plaintiffs brought a civil action alleging several causes of action, including fraud, negligence, unjust enrichment, and consumer rights violations.

The defendants moved to dismiss the amended complaint pursuant to Rule 12(b)(6), alleging that the Plaintiffs failed to state a claim upon which relief could be granted. The Defendants' motion contended that "Plaintiffs got exactly what they bargained for: contests determined by baseball players' actual performance on the field, whatever the contributing factors, predictable or unpredictable, may have been (skill, luck, matchups, injuries, weather, umpiring, or, perhaps, rules violations)."

According to the opinion granting the motion to dismiss, the "thrust of [P]laintiffs' complaint is that [D]efendants were aware of the sign stealing by the Astros and Red Sox, but intentionally took no action to stop it in order to protect their financial interest and investment in DraftKings" and describes it as an "overarching theory of wrongdoing." However, the Court concluded that "the initial efforts of [the Astros, of the Red Sox], and supposedly of Major League Baseball itself, to conceal these foul deeds from the simple sports bettors who wagered on fantasy baseball [did not] create a cognizable legal claim."

HORROR, INC. V. MILLER, SECOND CIRCUIT APPEAL

The Second Circuit has been tasked with determining whether the copyright interest and exclusive rights in a screenplay revert back to a screenwriter pursuant to termination, or whether the production company retains the screenplay copyright interest because termination cannot be effectuated on a work for hire. This decision has significant impact on the copyright laws and rights, as well as the entertainment industry as a whole, because it concerns transfer termination rights in the film industry pursuant to § 203(a) of the Copyright Act.

In 2018, a District Court judge for the District of Connecticut concluded that a screenwriter who wrote a screenplay for a film was an independent contractor and, therefore, the work could not be appropriately termed a work for hire. *Horror Inc. v. Miller*, 335 F. Supp. 3d 273 (D. Conn. 2018). Thus, thirty-five years after the transfer of rights, the screenwriter validly terminated the production company's interest in the screenplay. *Id.* The case is now before the Second Circuit and oral arguments were heard on February 13, 2020, with an ultimate decision scheduled for May or June 2020. *Horror Inc. v. Miller*, appeal pending, No. 18-3123 (argued Feb. 13, 2020).

The case concerns the screenplay and the corresponding copyright ownership and exclusive rights for the popular *Friday the 13th* original film. The key argument made by Cunningham and Horror, Inc., the producer and production company, respectively, is that Miller, the screenwriter, was an employee at the time the screenplay was written. As an employee, Miller would never have had any copyright interest or rights in the script since it would be classified as a work for hire. Thus, as the argument goes, Miller had no § 203(a) termination right.

Under the Copyright Act of 1976, copyright ownership vests in the author(s) of the work, the party that affixes an idea onto a tangible medium of expression for more than temporary duration. 17 U.S.C. § 201(a). In the context of a work for hire, this author who obtains copyright ownership of a work is the employer or party for whom the work is created. § 201(b). The author(s) of a work may transfer ownership of a copyright and any of the corresponding exclusive rights by a conveyance. § 201(d). Under § 203(a) of the Copyright Act an author may then terminate any transfer thirty-five years after the transfer of rights. Upon termination, any interest in the work reverts back to the author.

However, termination does not apply to a work made for hire. Section 101 of the Copyright Act provides two ways in which a work for hire may arise. The first instance is when a work is "prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101. The second is when a work is "specially ordered or commissioned for use" as one of the nine enumerated works in the Copyright Act and the parties agree in writing to the work for hire status. *Id.*

In the case before the Second Circuit, there was no argument that there was a written agreement establishing that the work was commissioned as a work for hire. Thus, the underlying question the Second Circuit must consider is whether Miller was an independent contractor or whether he was an employee and under the direction of Cunningham and the production company. This consideration will be the ultimate guiding factor for determining whether Miller was the author of the original *Friday the 13th* screenplay or whether it was a work for hire.

The District Court relied on factors laid out in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), to determine that Miller was an independent contractor. Specifically, the court considered the skillful nature of the work, location where Miller worked, use of personal tools, style of compensation, lack of employee benefits, and Miller's tax treatment. In oral argument before the Second Circuit panel, Cunningham and Horror Inc. argue that the court should consider the WGA membership and WGA agreement between the parties an additional factor in determining Miller's status. At the moment, there appears to be no indication on how the Second Circuit will respond to this argument.

Whether the Second Circuit will find Miller to be an independent contractor with the copyright interests reverting back pursuant to termination or an employee with the production company retaining the rights as work for hire is to be determined. Regardless of who wins at the Appellate Court level, both parties will likely work together in order to continue the *Friday the 13th* franchise since this case only concerns the original script and not the additional elements added in later developments. Further, the case may ultimately end up reaching the Supreme Court irrespective of the Appellate Court's conclusion.

NFL SUNDAY TICKET ANTITRUST

The NFL and DirecTV have requested the United States Supreme Court review the Ninth Circuit's ruling that DirecTV's NFL Sunday Ticket is monopolistic in nature and, in fact, might be illegal under the Sherman Antitrust Act. On March 9, 2020, before the court postponed oral arguments and closed to the public due to the coronavirus pandemic, the Supreme Court granted a motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal. *NFL v. Ninth Inning, Inc.*, 206 L.Ed.2d 373 (U.S. 2020). Thus, the Supreme Court's decision on whether it will hear the case is still pending.

The NFL is concerned that a finding that DirecTV's NFL Sunday Ticket violates federal antitrust laws will alter the way football games may be televised because the broadcast of live NFL football games depends on the cooperation of the member clubs. The antitrust issue in this case will depend on what legal doctrine the court ought to apply, and, in applying such doctrine, whether there are procompetitive benefits that outweigh any finding of a restraint on trade caused by the NFL football game telecasting agreements.

Under Article X of the NFL bylaws, member clubs are prohibited from broadcasting live football game telecasts in the "home territory"—a 75-mile radius around the city—of another member club. This has allowed the NFL to restrict member clubs from competing for football game broadcasting licenses and to collectively pool member club telecasting rights in order to provide license packages to distributors, such as Fox, NBC, ABC, CBS and ESPN, under agreements covered by the Sports Broadcasting Act. Specifically, the pooling of member club telecasting rights led to an agreement between the NFL and DirecTV governing out-of-market NFL football game telecasts. This NFL-DirecTV agreement has, in turn, allowed DirecTV to obtain all live NFL football game telecasts aired on Sunday afternoons and produced by both CBS and Fox in order to create and provide subscribers the bundled NFL Sunday Ticket service. In *National Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC*, 933 F.3d 1136 (9th Cir. 2019), the putative class of NFL Sunday Ticket subscribers maintained that such pooling arrangements, specifically those that preclude member clubs from competing for out-of-market broadcasting, harm fans by eliminating competition and increasing prices for live NFL game telecasts, a key element of antitrust claims.

The writ of certiorari filed by the NFL and DirecTV centers on whether the rule of reason antitrust legal doctrine should have been applied by the Ninth Circuit when analyzing agreements among joint venture participants that govern the "distribution of [the] venture's jointly produced product—in this case, NFL football game telecasts." *NFL v. Ninth Inning, Inc.*, petition for cert. pending, No. 19-1098 (filed Feb. 7, 2020).

Correspondingly, the Petitioners assert the Ninth Circuit found a monopolistic nature in these NFL football game telecast agreements between the member clubs, NFL, and television providers without applying the rule of reason. *Id.* Key to the Petitioners' writ of certiorari is the allegation that the Ninth Circuit failed to require plaintiffs properly define the antitrust market and anticompetitive effects within that market because the license agreements and rights create a naked restriction. *Id.*

The rule of reason requires courts to determine the alleged restraint's effect on competition in the relevant product market. Notably, the rule requires an examination of the facts surrounding the business and the history and purpose of the restraint. It is in this regard where courts consider any procompetitive effects of a restraint. To support their proposition, the Petitioners rely on *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010), which held that the rule of reason guides antitrust scrutiny concerning agreements relating to a joint venture and it's product.

The Petitioners further highlight a potential circuit split created by the Ninth Circuit's holding. To make such a claim, the Petitioners cite to cases in the First, Second, Third, Sixth and Seventh Circuits. Specifically, Petitioners proclaim Second and Seventh Circuit cases hold that professional sports leagues are joint ventures with interdependent members that must cooperate in order to produce the joint product, and thus, intellectual property license agreements under antitrust scrutiny require application of the rule of reason. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996).

The outcome of this case may implicate many areas of the entertainment industry, as well as the sports industry relevant to the present case. As the NFL and DirecTV identify, joint ventures that require cooperation to produce and license intellectual property are common in motion picture, recording, and publishing.

The Supreme Court has previously considered an antitrust claim in the context of blanket licenses from performance rights organizations ("PRO"). Copyright owners of musical compositions first affiliate and register the works with a PRO. The PRO then issues blanket licenses for the public performance of the musical compositions. The rates under these licenses are determined by the PRO and are not subject to negotiations with the copyright owners. The Supreme Court applied the rule of reason and found the licenses were not illegal price-fixing, but rather had procompetitive benefits. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). The NFL and DirecTV use this example to argue that an adverse holding in this case will jeopardize the multitude of joint ventures across many industries that integrate "separately-owned assets to create and distribute a product that no single member could produce on its own."

This case has the possibility of shaking up the sports broadcasting industry, and possibly the overall nature of joint ventures. It will lead to positive and negative consequences for the many constituencies that have an interest in the ultimate outcome. The Supreme Court has yet to grant the Petitioners writ of certiorari, but there is no question that this case presents a significant qualm given the nature of the current market landscape.

MUSIC INDUSTRY & COVID-19: HOW THE LIVE-PERFORMANCE INDUSTRY IS TAKING A HIT

COVID-19's Impact on the Music Industry

Live music events have either been postponed indefinitely, canceled, or rescheduled effective as of February 2020 due to the pandemic. Concerts Canceled Due To Coronavirus: Ongoing List, Billboard, (June 4, 2020), https://www.billboard.com/articles/business/touring/9323647/concerts-canceled-coronavirus-list (last visited April 8, 2020).The live music industry consists of artists, production crews, security guards, promoters, coat checkers, ticket sellers, box office staff, merch sellers, fans, and many more. *Id*. Estimates show that American consumers spent nearly "$3.5 billion on tickets in the U.S. for concerts and festivals this summer." Dave Brookes, How to Get Refunds for Concert & Festival Tickets, Billboard, (April 23, 2020), https://www.billboard.com/articles/news/9365025/refunds-how-to-concert-festival-tickets. Some ticket holders did not want to wait to hear whether their event was actually canceled, rescheduled, or postponed indefinitely.

Class action lawsuits have begun to sprout up, with fans suing ticket providers regarding rescheduled or canceled shows. Chris Cooke, Ticketmaster sued over COVID-19 refunds policies Complete Music Update Completemusicupdate.com (April 21, 2020), https://completemusicupdate.com/article/ticketmaster-sued-over-covid-19-refunds-policies/. SXSW and Ticketmaster have been the earliest defendants in these cases. *Id*. Fans complained to these organizations that they should be granted a refund, but there were provisions in the purchase contract (typically on the back of the ticket), that allowed for the ticket providers to reschedule events instead of giving refunds. *Id*.

A contract is illusory, and thus unenforceable if it lacks mutuality; in other words, if one party to a contract has discretion whether to perform their side of the bargain. *Talk Radio Network Enterprises v. Cumulus Media Inc*., 271 F. Supp. 3d 1195 (D. Or. 2017). One of the defenses that may be used is the force majeure clauses incorporated in the contracts between the ticket providers and consumers. "A force majeure clause relieves one of liability only where nonperformance is due to causes beyond the control of a person who is performing under a contract. An express force majeure clause in a contract must be accompanied by proof that the failure to perform was approximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive." *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774, 778 (2014).

Illusory Contracts

One of the plaintiff's claims is that the contracts for tickets are illusory. Contracts are illusory when each party is not bound to perform; there must be mutuality of obligations. *Dorman v. Cohen*, 66 A.D.2d 411, 413 N.Y.S.2d 377 (1979). That does not mean that the obligation has to be equal. *Id*. Plaintiffs claim that Ticketmaster in particular "retroactively changed their refund policies so that visitors to the same webpage were redirected to a new page that said only that refunds were available for cancellations." *Id*. Making full-performance optional for Ticketmaster. Therefore, the contract should be avoidable. Ticket providers are able to withhold refunds or cancel a show without any consequences according to the plaintiffs.

Force Majeure Clauses

Force majeure clauses are incorporated in contract provisions to protect parties from unforeseen events that are out of their control at the time the contract was signed. P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & Com. 213 (1995).

Force majeure events are not within the parties' control under the contract and may be an excuse for non-performance. *Id*. For example, the inclusion of unforeseeable government interventions at the time of contracting. Typically, the clause must contemplate what specific unforeseen event that may render performance impossible for one of the parties. *Id*. Courts have also held that events of the same kind as the circumstance contemplated in the contract relieves liability for the party that is unable to perform. *Id*.

To enforce the terms of a force majeure clause, the party seeking to avoid performance must typically provide what makes performance impossible. *Id*. A party typically will not be able to give economic hardship or financial difficulty to avoid liability. *Id*. It is believed that ticketing and event organizers will use the impossibility to delay issuing refunds. Depending on state laws, the organizers do not have to issue a cash refund entirely.

What Are Artists and Organizations Doing to Combat Recent Obstacles Due to COVID-19

Depending on where the event is held, some ticket buyers may receive an answer sooner than others. Missouri announced that it will allow citizens to attend concerts as early as May 4. Taylor Mims, Missouri Governor Says Concerts Can Resume Monday, Billboard (May 2, 2020), https://www.billboard.com/articles/business/9368428/missouri-concerts-resume-may-4-coronavirus. Venues still have to adhere to social distancing requirements, but will not have the same occupancy limitations as retail businesses. *Id*. Events in other states and globally have been outright canceled or postponed indefinitely. Brookes, *supra*. Live Nation and AEG have decided to issue automatic cash refunds for shows. *Id*. Live Nation provides incentives for consumers to accept vouchers worth up to 150% of the face value of their original ticket. *Id*.

Live Nation is also allowing people to wait until the show has been rescheduled or officially canceled. *Id*. The "policy goes into effect May 1, when Live Nation [began] sending out notification emails updating customers on the status of thousands of shows affect[ing] stay-at-home and large gatherings ban issued over the last two months." *Id*. If 60 days have passed since a show was postponed and no rescheduled dates have been announced, the 30-day window for refunds will open at that time." Jayme Deerwester, Live Nation customers will get automatic refunds for canceled shows, USA Today (April 25, 2020), https://www.usatoday.com/story/entertainment/music/2020/04/25/live-nation-customers-get-automatic-refunds-canceled-shows/3028772001.

Conclusion

Current laws in regards to COVID19 are constantly changing and different between states depending on the number of infections, testing, and treatment supplies. Most likely, plaintiffs will not win in a lawsuit against live performance organizers. If the force majeure clauses are narrowly tailored, courts will likely find that it was reasonable for organizers not to foresee governments shutting down and then extending those shutdowns. The outcomes of these cases may be very different since contracts are a state issue. However, these class actions could have an incredible impact on how these contracts are formed and which companies make it out of the pandemic if it is held that the ticket purchase contracts are illusory or unconscionable. ■

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The NBA's Blockchain Problem
Spencer Dinwiddie

Gilberto Oliveros

I. BLOCKCHAIN EXPLAINED

Blockchain, far from being a new phenomenon, as it initially burst onto the scene in 2008[1], has been recently making waves in everything ranging from cryptocurrencies to sports. Blockchain is essentially a chain of blocks that contain data, which is held together in a specific order that creates the Blockchain ledger, with each new block representing a new transaction. Blockchain then is a record of transactions in which the users can not only make but also verify each transaction.[2] It is helpful to visualize Blockchain as analogous to a spreadsheet. Traditionally, collaborating users would have to send a document back and forth for revisions and edits. The problem is that the first user has to wait until receiving a copy in return before they can see or edit it, because they are locked out of editing the document until the other person finishes. Blockchain solves that problem in the same way GoogleDocs spreadsheets would, as both users have access to the document at the same time, meaning that no user is locked out. Therefore, collaborating users can see and edit the document at any time, and the entire document is visible and accessible to the users at all times. Blockchain essentially functions this way as opposed to how traditional databases and banks work.[3]

There are three main pillars or principles which are the foundation of Blockchain. The three main pillars are decentralization, transparency, and immutability.[4] Decentralization means the information is never stored by a single entity; therefore, the network of users owns all the information, and if one user needs to interact with another, they can do so without going through a third party, as opposed to how banks operate, for example. Transparency is a twofold concept in Blockchain, as users' real identities remain hidden with the use of complex cryptography, while the transaction information is visible to all users on the Blockchain by way of users' public addresses. Immutability, the third central pillar of the Blockchain which is achieved through 'hashing', means that once a transaction is entered into a Blockchain ledger, this transaction cannot be tampered with, changed, or deleted.

Blockchain is far from perfect, and recent developments have proved that it is not the 'cure-all' many thought it would be. Early in 2019, Blockchain was hacked, and the hacker was able to 'double-spend' more than one million dollars.[5] Blockchain was supposed to be the solution to the double-spend problem, Blockchain's pillars were supposed to be indestructible. The events of 2019 have proved that idea wrong. Blockchain, however, remains a reliable alternative. With better coding and stronger regulations, Blockchain will develop and prevent future hacks. The key to avoiding these problems is understanding, which will only happen with continued use of the technology. The idea behind Blockchain is to provide a safe alternative to transactions, where a decentralized, transparent, and immutable ledger provides security to users.

II. BLOCKCHAIN IN THE NBA

NBA player Spencer Dinwiddie signed a contract extension with the Brooklyn Nets, beginning October 2019, for three years and $34 million, with the last year being a player option.[6] In September 2019, Dinwiddie, a self-described "Tech guy with a Jumper,"[7] revealed his plans to *tokenize* his NBA contract, which runs from 2019-2022. Although the NBA has momentarily silenced talks regarding contract tokenization[8], Dinwiddie's attempt, and possible success could be the first of many, in the NBA and other major sports leagues.

III. TOKENIZATION

Tokenizing is the act of using digital tokens to prove ownership of real assets, such as shares.[9] A tokenized contract is a contract that is broken down into tokens, and those tokens are sold just the way shares would be, with each token representing a share of the contract. Tokens can be either utility or security tokens, with the most common form being utility tokens.[10] Utility tokens are "coins backed up by a project."[11] Typically, users that invest in utility tokens receive "some definable benefit in return."[12] Security tokens, however, instead of offering a "tangible benefit" to the user investing in it, represent shares in the company that issued it, comparable to buying shares on the stock market.[13] This fact essentially means that security tokens are, by definition, more regulated by the government than utility tokens.[14] Security tokens offer "the speed and ease of blockchain without sacrificing strong legal protection"[15] and "enhanced protection against fraud and misselling."[16] The United States Securities and Exchange Commission (SEC) regulates anything denominated as a 'security' within the U.S., which includes security tokens.[17] A transaction can be classified as a security if the four criteria of the 'Howey Test,' established by the United States Supreme Court in 1946, are met. The four conditions of the Howey Test are; (i) an investment of money, (ii) an expectation of profits, (iii) the investment is in a common enterprise, and (iv) revenues come from the efforts of a third-party.[18] Tokenizing a contract into security tokens, therefore, means the act of dividing a contract into tokens that will be sold to investors in an SEC-regulated transaction, where investors will expect a return on investment from the efforts of a third-party.

IV. THE CASE OF SPENCER DINWIDDIE

In September 2019, Dinwiddie announced his plan to tokenize his new contract with the Brooklyn Nets, a 3-year

$34 million contract. Dinwiddie launched his site for investors (https://dreamfanshares.com/sd8/), in which he outlined his plan for investors to "[i]nvest in the first-ever security represented by a Professional Athlete Investment Token (PAInT)." [19] Dinwiddie believes that Blockchain "technology offers the potential to help generate and preserve wealth for athletes, artists, and influencers."[20]

As envisioned by Dinwiddie, people could invest in his three-year, $34 million contract, just like they can invest in treasury bonds or corporate bonds. In monthly installments, investors would be paid back their principal, plus interest. Meanwhile, by receiving investors' funds upfront, Dinwiddie would essentially be paid earlier than he'd be paid by the Nets. He could use those funds to invest in other ventures, ideally earning enough to pay back investors and take home a healthy profit for himself.[21]

Dinwiddie plans to offer "a minimum of 33 tokens worth $4.95 million to a maximum of 90 tokens worth $13.5 million"[22] to "qualified investors."[23] Dinwiddie is giving up future income in return for a smaller lump sum payment; however, he would then have more money to immediately invest, thus potentially getting an even greater profit, although attached to a higher risk.[24] "The idea is that the investments received by Dinwiddie will be reinvested. By the time the money is to be paid out in the future, the investments— if all goes well— will have grown to a larger amount".[25] Qualified investors would need a minimum investment of $150,000, paid through U.S. dollars, Bitcoin Hot (BTH), or Etherium (ETH), utilizing blockchain.[26]

The issued tokens, backed by Dinwiddie's contract, are considered debt instruments that require fixed scheduled payments to investors in the form of payback of the principal and payback of the interest.[27] The interest paid on the principal is the main attraction for investors, but it might be just one of the benefits of investing in Dinwiddie. Investors "might also be entitled to special premiums based on whether Dinwiddie earns bonuses, negotiates a new contract and other factors,"[28] conditions that would need to be specified in the investor contracts. The prospect of additional benefits besides interest payments would make the risk of investment much more appealing.[29] One of the main attractions of investing in Dinwiddie's contract, however, is the player option it contains in 2021.[30] Dinwiddie's player option is worth $12.3 million for the 2021-22 season, and as he pointed out;

" With the way mine works, if I play well in that player option year and we split the profits up the first year of my new deal, it greatly appreciates the return on this investment vehicle. It allows you to get up in that 15-percent range in a return, like a growth stock, and that'll be something most guys won't beat."[31]

If Dinwiddie plays well enough to warrant a pay raise, he could opt out of his 2021-22 contract and sign a more lucrative deal that would create a significant return for both him and his investors.

Dinwiddie plans that his "contract will be tokenized, and bond-backed security tokens will be sold,"[32] meaning that SEC compliance will be essential. "Rule 506 of Regulation D of the Securities Act of 1933 would govern the selling of security interests tied to Dinwiddie's contract. Among other things, Rule 506 would obligate Dinwiddie and his business partners undertake *reasonable steps* to verify that its investors are *accredited investors*".[33] Under the SEC rules, an *accredited investor* is a person who, among other things, possesses a net worth of more than $1 million or has earned more than $200,000 in annual income over the last few years with an expectation to make the same amount in the future. Alternatively, an accredited investor can also be a business that has assets exceeding $5 million, among other characteristics.[34] SEC rules also establish that Dinwiddie would need to prove that they are taking *reasonable steps* for verification, which often include a "review of financial statements, including tax returns, credit reports and W-2 wage forms".[35]

While no investment goes without risk, Dinwiddie has taken all the necessary measures to ensure that investors feel safe in the product, his contract. There are always risks, NBA contracts are no exception, Spencer Dinwiddie's investment site states (in all caps); "INVESTMENTS IN PRIVATE PLACEMENTS ARE HIGHLY SPECULATIVE AND INVOLVE A HIGH DEGREE OF RISK. INTERESTS SHOULD NOT BE PURCHASED BY ANY PERSON WHO CANNOT AFFORD THE LOSS OF ITS ENTIRE INVESTMENT".[36] While the circumstances that would give rise to a guaranteed contract in the NBA not being paid out are remote, they still have "a greater than 0% chance of occurring".[37] Yet, Dinwiddie, as a crypto technology enthusiast, has taken all the necessary measures to ensure investors that this investment is worth the risk.

V. APPLICATION OF THE NBA'S COLLECTIVE BARGAINING AGREEMENT

The NBA has been opposed to Dinwiddie's plan and, after meeting with Dinwiddie to discuss it, has remained opposed to contract tokenization.[38] The NBA cites Article II of the Collective Bargaining Agreement (CBA) when opposing Dinwiddie's plan. Section 13(d) of Article II says that "[n]o player shall assign or otherwise transfer to any third party his right to receive [c]ompensation from the Team under his Uniform Player Contract."[39] This is the NBA's version of FIFA's Article 18 addressing a third-party ownership ban.[40] It is the opinion of the NBA that since Dinwiddie's contract acts as a security interest for another person's investment, the other person should be considered a third-party under the CBA.[41] The NBA is attempting to find a middle ground with Dinwiddie but has stated that if Dinwiddie goes forward without the NBA's approval, he could be subject to contract termination, fines, or suspension without pay.[42]

Spencer Dinwiddie has stated that he plans on moving ahead with his strategy because he considers "the NBA's lack of approval is baseless." [43] Dinwiddie said;

Even with our desire to partner with the NBA, it is not necessary. And I want to be clear, this is not and never was an 'assignment' nor am I in violation of the CBA. By definition an 'assignment' would give fans rights towards the Nets/NBA. [On the contrary] this is a third party business transaction between the fans and I beyond the jurisdictions of those entities. Much like the way no one can tell me which home or car I can buy, I am free to use my money the way I see fit.[44]

Dinwiddie's view is that the success of the deal should be determined by a free market, and disrupting such development would be an abuse of power by the NBA.[45] Cryptocurrency and Blockchain technology experts agree with Dinwiddie;

It will be very hard for the league to stop him, legally, because the arrangement is not tied to his contract but to the amounts promised over the three years. Once received, Dinwiddie will use his salary to pay early investors with interest. The league and teams cannot tell players what house or car to buy. And they cannot control what investments or business arrangements they make.[46]

Dinwiddie's intent is not to transfer a right to be paid. It is to use his right to paid to secure an investment, something not expressly prohibited in the CBA.[47] Investors in Dinwiddie's contract would not obtain any rights related to the NBA or even the Brooklyn Nets for that matter; they would only get rights limited to the value of a contract owed to Dinwiddie. [48]

Dinwiddie's plan likely falls in the gray area not covered by the current CBA. The NBA has valid reasons to fear Dinwiddie's blueprint, especially considering it lacks any oversight over the transactions and the potential liability it could be faced with.[49] Both parties seem to have solid arguments and expert supporters, which could lead talks between the NBA and Dinwiddie to go on for a while until a reasonable solution is achieved. Bearing in mind that the current CBA is in force until 2023 at the earliest, any possible conflicts arising out of this situation will most likely be covered by the next CBA. In the meantime, however, the NBA and Dinwiddie will continue to work together to find a temporary solution that appeases both parties reasonably.

VI. CONTRACT TOKENIZATION IS THE FUTURE (AND THE PRESENT)

Far from being the first-time professional athletes have ventured into blockchain technology[50], Dinwiddie's case could define Blockchain's sports interaction for the future. The way Spencer Dinwiddie has set up his investment strategy will potentially lead to new CBA rules regarding Blockchain. Spencer Dinwiddie's attempt and possible success will have ripple effects throughout most major sports, not only basketball.

There's a wide array of professional athletes who've ventured in cryptocurrency in some fashion, from global soccer star Lionel Messi to boxer Floyd Mayweather. Messi isn't alone in the soccer world, as other soccer stars like Didier Drogba, Ronaldinho, and others have jumped in.

Soccer stars adopting blockchain-based currencies shouldn't be a surprise as European soccer clubs are on the leading edge in the sports world of adoption of the products, including Italian teams Juventus and Roma, French team Paris Saint Germaine, Portugal's Benfica, and England's West Ham United, among a slew of others.

Among athletes in the American big four leagues, there are also a variety of athletes who've made a splash beyond Dinwiddie.

San Francisco 49ers cornerback Richard Sherman is an avid cryptocurrency investor, from bitcoin to litecoin to ethereum. He's also a spokesperson for Cobinhood and its coin, COB.[51]

Blockchain and cryptocurrencies have taken the world by storm. Athletes, clubs, and leagues have begun investing in them, and some have started developing their particular blockchain technologies. Spencer Dinwiddie has taken a giant step in going against the league and pursuing his plan. Thanks to Dinwiddie's attempt to tokenize his contract, the future of player contracts could be nearer than ever before. Contract tokenization brings fans closer to the athletes, especially to those that are not in the top tier of their fields. Is contract tokenization the future of sports contracts? We may not have to wait that long to find out anymore. ■

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A Picture is Worth a Thousand Dollars, Even to Student-Athletes

An Analysis of the NCAA's Recommendations for Name, Image, and Likeness Income

Robert J. Misey, III and Robert J. Misey, Jr.

Due to many challenges to its rules on student-athlete earnings and the rise in the use of social media, the National Collegiate Athletic Association ("NCAA") has recognized it must promulgate rules allowing student-athletes to profit from the use of their name, image, and likeness (hereinafter "NIL"). Accordingly, on April 17, 2020 the NCAA's Board of Governors released a variety of recommendations to guide the promulgation of rules regarding student-athletes earning NIL. These recommendations focus on third-party endorsements and student-athlete work product, while providing seven safeguards.

Moreover, on May 23, 2020, fearing a variety of state NIL laws that would provide for inconsistent standards, the Commissioners of the five largest Division 1 conferences wrote the leaders of Congress to request federal legislation regarding NIL income.[1] The letter contains nine Consensus Principles that are consistent with the NCAA recommendations, but not as detailed as the NCAA recommendations.

The purpose of this article is to suggest issues that the NCAA should consider when writing the rules to implement these recommendations. After evaluating the NCAA's two recommendations and their various prohibitions, this article will analyze the various safeguards the NCAA recommends and suggests opportunities for clarity.

BACKGROUND

Six years ago, the *O'Bannon v. NCAA*[2] case provided landmark precedent for student-athlete earnings. However, opportunities to earn NIL income through social media did not exist as they do today. *O'Bannon* determined that preventing payment to student-athletes from using their NIL violated federal antitrust laws. In the aftermath, EA Sports paid $40 million to the plaintiff class of more than 100,000 student-athletes.[3] At that time, Instagram was growing at accelerating rates, but *O'Bannon* was narrow in scope, focusing on the portrayal of student-athletes in EA Sports' NCAA video games.[4] While *O'Bannon* affirmed that student-athletes held intellectual property rights to their own NIL, the NCAA stopped working with EA Sports to produce video games, ostensibly to prevent profiting from the student-athletes use of their NIL in a manner inconsistent with the NCAA's educational goals.

Now, six years later, social media has evolved into its own full-fledged industry. Social media has created new opportunities for celebrities, such as some student-athletes, to earn income. An individual can now make a career as an "influencer" by accumulating large numbers of people to follow one's profile. For example, a former contestant on The Bachelor stated that she could earn $250 just by holding a product open in a picture and posting it on her Instagram account.[5] These influencers may also become brand ambassadors for everything from clothing lines to food delivery services.

Many businesses now use the social media profiles of athletes to promote their businesses and products. P.K. Subban of the New Jersey Devils is one of Adidas' numerous hockey brand ambassadors, often promoting new Adidas shoes and other apparel on his personal social media pages.

Due to the increase in professional athletes engaging in social media advertising, the NCAA needed to proactively deal with legal issues that could potentially arise from college athletes engaging in social media advertising. Moreover, considering the corruption scandals involving NCAA basketball and a few shoe and apparel companies, the NCAA needed to provide rules that balance the NCAA's educational goals with the rights of student-athletes to profit from their NIL.

By making NIL recommendations, the NCAA opens new income opportunities for student-athletes. The NCAA rules implementing these recommendations will challenge attorneys and college compliance officers, in addition to the 18-year-old student-athlete who is unfamiliar with NCAA compliance. Similar to many new statutes, the NIL recommendations issued by the NCAA on April 17, 2020 offer guidance, but also raise several issues.

CATEGORY ONE: THIRD-PARTY ENDORSEMENTS

Category one NIL recommendations focus on compensation for third-party endorsements. Per the recommendations, student-athletes could "receive compensation for their use of their NIL in third-party endorsements or social media influencer activity, including certain activity or endorsements that may be related in some way to athletics."[6] The NCAA further recommended "[a] prohibition on institutions arranging, identifying, facilitating or having any other kind of participation (including by encouraging booster participation) in endorsement deals for their student-athletes."[7]

This NCAA recommendation raises concern over the involvement of boosters, who the NCAA broadly defines as representatives "of the institution's athletic interests."[8] More specifically, the NCAA defines a booster to include anyone who, *inter alia,* (a) makes financial contributions to the athletic department or to a college booster organization,

(b) employs student athletes, or (c) otherwise promotes a college's athletics.[9]

Case Study 1: Wings and Things restaurant offers the star quarterback of the State University Cardinals $1,000 to record a promotional video that touts Wings and Things as a great place to watch State University football games. The quarterback will post the video on his own Instagram page, while Wings and Things may use the video in a local television commercial. Provided Wings and Things is not a booster, the quarterback can participate in this advertisement. However, due to the broad definition of booster, local businesses near a college may have difficulty obtaining the social media promotion of student-athletes.

Case Study 2: As in Case Study 1, Wings and Things restaurant offers the star quarterback at State University $1,000 to record a promotional video by touting Wings and Things as a great place to watch State University's football games. Wings and Things also employs a student-athlete (not on scholarship) from State University's swim team as a part-time bartender. As a result, Wings and Things is a booster, as defined by the NCAA. Because Wings and Things is a booster, it cannot offer the quarterback an endorsement opportunity similar to that offered in Case Study 1.

The broad definition of a booster may prevent many student-athletes from earning money for their NIL from local businesses. For example, even if Wings and Things did not employ a swim team member, Wings and Things may be a booster by promoting itself as the restaurant from which to watch State University's football games. Moreover, local businesses may intentionally avoid contributing to State University's Athletic Department to avoid becoming a booster that cannot obtain NIL endorsements from student-athletes.

The third-party endorsement recommendation prohibits student-athletes from using the college's intellectual property in student-athlete endorsements.[10] Accordingly, the star quarterback could not use any of State University's intellectual property, such as wearing his football jersey or a State University golf shirt.

Case Study 3: Wings and Things offers the star quarterback of the State University Cardinals $1,000 to record a video promoting Wings and Things. The quarterback wears a golf shirt with the Cardinals logo in his video for posting on his Instagram account and use in television commercials. This use of State University's intellectual property violates the third-party endorsement recommendation. Additionally, the quarterback could violate this recommendation if Wings and Things has school memorabilia (*e.g.*, signage) with the logo in the background of his video.

Case Study 4: Wings and Things offers the star quarterback at State University $1,000 to record a promotional video. The star quarterback will post the video on his own Instagram page, while Wings and Things may use the video in a local television commercial. In the video promoting Wings and Things, the State University quarterback wears a solid cardinal-colored golf shirt without the Cardinals logo. Because none of the State University's intellectual property appears, the star quarterback has not violated this recommendation.

In many college towns, stores sell apparel with "knock-off" logos that do not constitute the intellectual property of their local colleges, but are similar to that intellectual property. If star quarterback were to use one of these "knockoff" logos, he would encourage proliferation of these logos at the expense of State University's Cardinals logo. The NCAA rules should prohibit the use of both a college's intellectual property and any intellectual property that one could reasonably associate with the college's athletics.

The NCAA's recommendation for third-party endorsement income explicitly prohibits a payment by a college to an athlete for an endorsement.[11]

Case Study 5: Wings and Things sponsors the State University football broadcast network. To satisfy contractual obligations, State University has its star quarterback visit Wings and Things and record a promotional video that Wings and Things will air during football broadcasts. State University offers the star quarterback $1,000 to induce him to record the video. State University and the star quarterback violate the prohibition against payment by a college because the payment comes from State University.

CATEGORY TWO: STUDENT-ATHLETE WORK PRODUCT

In category two, the NCAA recommended changes regarding compensation for student-athlete work product and business activities, with a focus on social media earnings. The NCAA recommendation permits "student-athletes to receive compensation from third parties, but not schools or conferences, for their use of NIL in their work product or business activities," which includes social media content, promotion of a student-athlete's own business, and personal promotion activities. An example of a personal promotion activity would be an autograph signing.[12]

Case Study 6: A local clothing store offers State University's star basketball player $1,000 and a free suit to sign autographs for a couple of hours. This personal appearance is permissible work product as the NCAA recommendations explicitly permit the student-athlete to sign autographs.

Case Study 7: A star basketball player receives $1,000 from State University to sign autographs at a local clothing store for a couple of hours. Because this is a payment by the university to a student-athlete for use of their NIL, the payment violates the work product recommendations.

Case Study 8: Similar to Case Study 6, a local clothing store offers a star basketball player $1,000 and a free suit to sign autographs. The local clothing store also sponsors the basketball team's radio broadcast and, as a result, is a booster. Therefore, if the basketball player were to accept the $1,000 and the free suit, the basketball player would violate the work product recommendation. Even if the player were to receive only a free suit and not the $1,000, the rules could construe the free suit as a disguised payment by a booster that would violate the work product recommendation.

Although not a common occurrence, a handful of student-athletes playing football or basketball will annually achieve nationwide celebrity status due to their athletic success. Their work product opportunities will exceed all the others described in this article.

Case Study 9: Joe Cool leads State University's football team to the title game and is the leading Heisman Trophy candidate the next season. During that next season, Joe Cool hosts a half-hour television show for a sports network for $5,000 an episode. This NIL activity does not violate the work product recommendation, but may violate some of the NCAA's recommend safeguards that this article will later discuss.

The NCAA drafted special prohibitions within the work product recommendations to preserve the NCAA's vision of collegiate athletics. The first prohibition states that colleges should not pay their athletes for work product or business activities.[13]

Case Study 10: A star hockey player works during the summer as an instructor for nationwide power skating clinics conducted by an independent third party. The player also volunteers for State University's weeklong hockey camp. The work product recommendation permits both opportunities. However, State University may not pay the star hockey player any amount for his participation in its camp.

Case Study 11: A hockey player for State University volunteers at State University's hockey camp. All the campers and staff live at campus housing. However, State University houses the star hockey player at the exclusive four-star resort next to campus and offers to pay his room service bill. The rules should clarify that the resort and room service are a disguised payment from State University and ensure its prohibition.

The NCAA further prohibits colleges from arranging or having any involvement in work product activities,[14] raising more issues for the facilities used in a sports camp.

Case Study 12: A hockey player at State University organizes her own summer hockey camp at her hometown rink, which is 800 miles away from State University. Because State University is not involved in any way, the star hockey player does not violate this prohibition.

Case Study 13: A hockey player organizes her own hockey camp at State University. Even if the star hockey player did not receive preferential treatment (*e.g.,* lower ice rental fees and favorable ice times), the star hockey player's use of State University's facilities could constitute prohibited State University involvement. More specifically, State University would have to schedule the ice time and, if the camp runs overnight, the student-athlete may need to rent dormitories from State University to house the campers.

The rules need to clarify this prohibition with respect to facilities that a student-athlete may rent on an arm's-length basis. On a smaller scale, suppose that the State University hockey player spends the summer at State University and trains in their athletic facilities. Even giving one-on-one skating lessons to kids at State University's rink during public skating may violate this prohibition.

The NCAA also prohibits the use of the colleges' intellectual property in these activities,[15] just as the NCAA does with the third-party endorsement recommendations. There are several questions as to what constitutes the use of intellectual property, even with the mere provision of skating lessons.

Case Study 14: A hockey player creates a promotional flyer for skating lessons that cites her role as a student-athlete on State University's hockey team, including a brief summary of her accomplishments including statistics and awards. This flyer does not violate the intellectual property prohibition.

Case Study 15: A hockey player creates a promotional flyer for skating lessons with the State University's logo on it and a game photo of the student-athlete in her State University hockey jersey. During lessons, she wears a cardinal-colored pullover that says "State University Athletic Dept." The hockey player's use of State University's intellectual property violates this prohibition.

The presence of State University's intellectual property embedded in the facilities may raise issues. If the ice rink has the State University logo in the middle of the ice, the student-athlete could arguably be using the State University's intellectual property by giving skating lessons at that rink. An analogous scenario could arise with basketball lessons on a court with the logo or any other venue used for athletic competitions, as State University will undoubtedly have their logo embedded at several locations in their athletic facilities.

This issue also relates to the growing use of social media as a coaching tool. A simple search on YouTube for "hockey workouts" provides hundreds of videos and channels dedicated to the topic. A prominent student-athlete could take advantage of these social media tools to earn some money because of their NIL. For example, a star hockey player at State University could release a video "*How to Shoot Like Ovechkin*" that displays the Cardinals logo at center ice, gains thousands of views, and profits from advertising revenue. The rules should clarify that the Cardinals logo at center ice does not constitute the use of intellectual property, provided that the video does not prominently feature the Cardinals logo.

A social media video, due to the definition of boosters, may raise issues for both third-party endorsements and student-athlete work product. For example, many local businesses purchase advertisements that appear on the sideboards of the local ice rink. Because these local businesses constitute boosters, the presence of the booster's sideboards advertisement in the video could constitute booster involvement. The NCAA rules need to clarify that this is not prohibited booster involvement as long as the video does not prominently feature the sideboard advertisement.

The last NCAA prohibition prevents colleges from paying student-athletes for public appearances on the colleges' behalf.[16] This could relate again to a college-sponsored sports camp, but extends much further.

Case Study 16: State University's basketball coach hosts a "Coach's Show" every Monday night on local television and YouTube Live. The coach's star guard appears as a noncompensated guest. By not receiving compensation, the star guard is not violating this rule. However, if the coach, an agent of State University, pays the star guard to appear, the payment violates the recommendation.

ADDITIONAL RECOMMENDED SAFEGUARDS

The NCAA Board of Governors recommends seven safeguards against the unrestricted use of NIL by student-athletes. These safeguards prevent new NIL activities from undermining the integrity of the recruiting process and the collegiate model,[17] whereby athletics supplement the educational curriculum that colleges provide without dominating the educational experience of attending college.[18]

The first safeguard concerns the subject of the student-athletes' promotion. The NCAA has always made their decisions with a value system of how young student-athletes reflect and represent their colleges. For student-athletes' use of their own NIL, the NCAA wants to ensure that student-athletes are not promoting products that go against those values.[19] The safeguard states, "certain categories of promotional activities (e.g., alcohol, tobacco and sports gambling) should be precluded because they are inconsistent with the NCAA membership's values."[20]

Case Study 17: Beer Bar offers the star quarterback of the State University Cardinals $1,000 to record a promotional video. The quarterback will post the video on his own Instagram page, while Beer Bar may use the video in a local television commercial. Promoting a bar in and of itself should constitute promoting alcohol. If so, this falls under the NCAA's precluded promotional activities.[21]

This safeguard may also prohibit the star quarterback from posting an advertisement on Instagram regarding how Beer Bar is the best spot to conduct a fantasy football draft with one's friends, assuming that fantasy football is gambling.

The rules also need to expand and refine the subject matter of the promotional activities that violate the NCAA's membership values as this safeguard only specifies alcohol, tobacco, and sports gambling. With colleges constituting a diverse array of ideas, this is a gray area that student-athletes could have trouble navigating. For example, promoting a strip club would violate NCAA membership values. However, suppose a star quarterback with concussion issues begins promoting medical marijuana as a treatment method. The medical use of marijuana raises issues that differ from the recreational use of marijuana, whose prohibition would be similar to the prohibition of tobacco products.

The second safeguard illustrates the NCAA's concerns with athletic shoe and apparel companies. This safeguard states that "certain categories of third-party businesses (e.g., athletics shoe and apparel companies) should be precluded from, or have limited participation in, the newly permitted activities, due to their history of encouraging or facilitating recruiting and other rules infractions."[22] This safeguard is a result of the past involvement of brands, such as Adidas, and the various scandals in basketball.[23]

Case Study 18: The star basketball player of State University becomes a brand ambassador for a small athletic clothing company located near State University. There is not any history of scandals with this small company and they only operate within a 20-mile radius of State University. The rules clarifying this safeguard should offer certainty for this Case Study.

Clearly targeting large shoe and athletic apparel companies, the NCAA has several options. First, the NCAA could preclude all these companies from paying student-athletes for NIL. Such a blanket ban may be overkill that precludes endorsement income from the local clothing store.[24] Moreover, it is uncertain whether a rule precluding these companies from paying NIL to student-athletes would violate antitrust law.[25] Second, the NCAA could evaluate each situation on a case-by-case basis. Although case-by-case evaluations are flexible, they may be impractical. Third, the NCAA could offer a safe harbor based on the size of the company or the nature of the NIL. A safe harbor could prevent Heisman candidate Joe Cool in Case Study 9 from accepting $100,000 for endorsing his own brand of shoes.

The third safeguard concerns promotional activity prior to enrollment, which focuses on recruitment.[26] The NCAA stated that the rules should consider how to regulate and monitor promotional and commercial activity before a recruit enrolls in a college.[27] The NCAA also suggested enacting guardrails to prevent colleges from using NIL opportunities in recruiting.[28]

Case Study 19: A basketball prospect visits State University and takes a video of himself shooting half-court shots (with the Cardinals logo prominently shown at center court) for his personal Instagram account. Because State University does not pay him, this posting does not violate any safeguard. However, if the recruit is the "prospect of the century" with one hundred thousand Instagram followers, such a posting may result in an unfair recruiting advantage to State University that the NCAA rules must consider.

The fourth safeguard tries to ensure that the NIL activities do not unduly burden the time of student athletes.[29] This safeguard's goal is to preserve the NCAA's vision of the student-athlete experience: that the athletic activity of a student athlete serves to enhance the educational process of attending college.[30] As with many of these recommendations, the NCAA will face a challenge finding a middle ground in defining an undue burden.

Case Study 20: After the season ends, a star basketball player films a social media advertisement at a local coffee shop to post on his social media page. The video has not resulted in an undue burden on the star basketball player's time.

Case Study 21: A star basketball player receives $5,000 to fly first-class to Los Angeles during winter finals to film an advertisement for a new phone App with Lebron James, Jennifer Lopez, and Snoop Dogg. The basketball player has violated this undue burden safeguard.

In contrast, consider Case Study 9 where Joe Cool hosted his own weekly television show. It is possible that the time necessary to host a weekly show in-season would constitute an undue burden of time on a student-athlete.

The fifth safeguard re-focuses these NIL issues on the role of boosters. This safeguard prevents boosters — directly or indirectly — from compensating student-athletes and requires disclosure and enforcement mechanisms to monitor these NIL activities.[31] To assist in implementing this safeguard, the rules should mandate that its member colleges draft an NIL Manual that includes a checklist of items to ensure compliance with the rules.[32]

The sixth safeguard considers how student-athletes may interact with professional service providers in conjunction with new NIL activities. This safeguard creates "a framework to permit student-athletes to engage and consult with professional services providers in connection with their NIL and business activities (e.g., tax, legal, subject matter experts) consistent with existing federal and state laws."[33] The use of experts may cross a blurring line that prohibits student-athletes from hiring an agent.

Case Study 22: State University's star quarterback receives an endorsement opportunity from a local business. Not understanding the eight-page contract presented by the local business, the quarterback hires a local attorney, who is also a registered agent with the NFL Players' Association. Six months later, the quarterback announces his intention to forego his fourth year of eligibility and enter the NFL draft. The quarterback's new agent is that same attorney. Problems could result if the attorney performed services as an agent while the star quarterback was playing for State University and the attorney-client privilege may prevent either State University or the NCAA from ever finding out if the attorney acted as an agent.

The seventh safeguard provides for conducting NIL education and compliance instruction on a gender-neutral basis.[34]

Case Study 23: State University organizes a seminar for all incoming student-athletes regarding what they can and cannot do with their NIL while participating in NCAA athletics. Such a seminar follows the letter of the safeguard. However, excluding female student-athletes would violate this safeguard.

CONCLUSIONS

The recommendations made by the NCAA, while providing guidance for rules to deal with NIL changes in an evolving social media landscape, are a good start towards providing concrete criteria for student-athletes to follow. Remaining issues will offer the opportunity for the NCAA to provide more clarity. Additionally, the various safeguards suggested by the NCAA demonstrate that the NCAA has seriously considered the various ways by which excess NIL opportunities may taint the student-athlete educational experience.

Nevertheless, student-athletes need more clarity. As stated, the recommendations raise a variety of scenarios in which student-athletes could unknowingly violate NCAA compliance. The NCAA must analyze and clarify these potential issues and specifically state what is or is not a violation via concise rules and examples that an 18-year-old student-athlete could understand. ■

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ENDNOTES

1 Commissioners' Letter dated May 23, 2020 to Nancy Pelosi, Mitch McConnell, Kevin McCarthy, and Charles Schumer.

2 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *See also, Keller v. Electronic Arts, et al*, 724 F3d 1268 (9th Cir. 2013).

3 *O'Bannon,* 802 F3d 1049.

4 *Id.*

5 Bereznak, Alyssa, How the 'Bachelor' Franchise Became an Influencer Launchpad, The Ringer, (Jan. 6, 2020) (available at https://www.theringer.com/tv/2020/1/6/21048923/the-bachelor-bachelorette-instagram-influencer).

6 NCAA Board of Governors, Federal and State Legislation Working Group Final Report and Recommendations (2020) (available at https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf).

7 *Id.*

8 Role of Boosters, NCAA.org, (available at http://www.ncaa.org/enforcement/role-boosters).

9 *Id.*

10 NCAA Board of Governors, *Supra* n. 6.

11 This recommendation is consistent with the Commissioners' Consensus Principle of prohibiting Pay-For-Play.

12 NCAA Board of Governors, *Supra* n. 6 at 22-23.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 24.

17 *Id.*

18 *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation*, 275 F.Supp.3d 105 (M.D. Cal. 2019)

19 This safeguard is consistent with the Commissioner's Consensus Principle to preserve standards by avoiding opportunities inconsistent with higher education.

20 NCAA Board of Governors, *Supra* n. 6.

21 Compare to Case Study 1, which involved a restaurant instead of a bar. Whether this subject matter preclusion would apply to a restaurant that serves alcohol is beyond the scope of this article.

22 NCAA Board of Governors, *Supra* n. 6 at 24.

23 Forde, Pat, et al., Fed court docs allude to corruption involving Nike programs, Yahoo! Sports (Feb. 15, 2019) (available at https://sports.yahoo.com/nike-schools-pay-federal-court-docs-allude-corruption-involving-flagship-nike-basketball-programs-212410675.html).

24 *See* Case Studies 6 through 8.

25 *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, No. 19-15566 (9th Cir. 2020).

26 This safeguard is consistent with the Commissioner's Consensus Principle to preserve the integrity of college recruiting.

27 NCAA Board of Governors, *Supra* n. 6 at 24, 25.

28 *Id.* at 25.

29 *Id.* This safeguard is consistent with the Commissioner's Consensus Principle to promote academics by requiring a semester of academic progress before student-athletes can earn NIL income.

30 Playing Rules Goals and Objectives, NCAA.org (available at http://www.ncaa.org/playing-rules/playing-rules-goals-and-objectives)

31 NCAA Board of Governors, *Supra* n. 6 at 25.

32 This safeguard is consistent with the Commissioner's Consensus Principle to protect student-athletes with respect to representation by NIL advisors.

33 NCAA Board of Governors, *Supra* n. 6 at 25.

34 *Id.* This safeguard is consistent with the Commissioners' Consensus Principle to provide opportunity by protecting gains made under Title IX.

The Art of Consignment Agreements

Emily Behzadi

In 2014 artist Derek Fordjour[1] sent an email to the Lower East Side gallerist Robert Blumenthal, offering: "for the sum of 20k, I commit 20 works, 15 paintings (oil and or acrylic on panel) and 5 works on paper."[2] Now, nearly six years later, Robert Blumenthal is suing Mr. Fordjour for breach of contract, unjust enrichment, and injunctive relief, claiming that Mr. Fordjour failed to deliver the twenty works.[3] In response, Mr. Fordjour claims that he never promised to sell twenty works to the gallery, but rather he merely offered Robert Blumenthal the opportunity to sell them, and to receive a share of the profits.[4] Mr. Fordjour now demands that Blumenthal return all the works previously given to the gallery.[5] The main issue between the parties is whether the email from 2014 constituted a consignment agreement as between the gallery and the artist or a mere sales agreement. In 2014, Mr. Fordjour's pieces were selling in the range of $1,000 to $2,000 each. Now, his work sells for over $100,000 and are in demand by esteemed collectors such as Drake, Beyonce, and Jay Z.[6] Because of the high demand for Mr. Fordjour's work, each party stands to profit substantially. The rights to such proceeds are dependent on the interpretation of the 2014 email.

Cases comparable to those of Mr. Fordjour are illustrative of the consequences of failing to enter into written agreements tailored to the parties' intentions. The art market is unregulated and is certainly not immune to its fair share of legal disputes. The objects of these disputes are works of art with significant appreciating monetary value. Due to this potentially sizeable financial investment, individuals should no longer rely on handshake agreements or informal deal memos to govern the sale and consignment of art.[7] A consignment entails the transfer of artwork to another for purposes of sale, display, and exhibition.[8] Individuals who seek to sell their art through an intermediary must utilize iron-clad agreements to protect themselves from liability and the improper disposition of their artworks.

Given the unique nature of the art market, drafters must be cognizant of interdisciplinary elements required to create a well-drafted consignment agreement.[9] The contract should be specific in defining the intent – whether it is a consignment or an outright sale – or there is a risk of being mischaracterized by the courts.[10] While many consignors focus on the minimum sales price and commission rates, there are other significant issues that must be contemplated by the attorney when drafting the agreement. Depending on the state where the consignor is located, the contract may require specific provisions to comply with the applicable state's art consignment statute.[11] The following will provide an overview of the provisions and applicable law attorneys should discern when drafting consignment agreements.

I. OVERVIEW OF THE CONSIGNEE-CONSIGNOR RELATIONSHIP

The art market commonly relies on consignments for the sale of artworks. The consignment is subject to the Uniform Commercial Code ("UCC") which imposes obligations of entrustment and other duties upon the consignee. # Darraby, Ch. 4:6-4:17 (Some states maintain art consignment laws that purport to abrogate certain UCC provisions). A consignment relationship commences when the owner of an artwork wishes to sell the artwork for a profit. Within the consignment arrangement, the owner of the work or the "consignor" entrusts the artwork to an intermediary or the "consignee" (which could be a dealer, commercial or nonprofit gallery, an auction house, an art consultant, a retail store, or another outlet).[12] Some consignees work exclusively with "secondary market" consignors, which includes estates, other dealers, foreclosures, bankruptcies, museums, and other collectors.[13] While other consignees deal in "primary market" consignors, which consists of artists or producers of the objects themselves.[14] After the artwork is sold, the consignee receives a portion of the selling price (a "commission"). The consignor then receives the proceeds of the sale minus the consignee's agreed-upon commission.[15] Throughout this process, the consignor remains the owner of the artwork.[16] The consignor provides the consignee with the right to convey title, and once the artwork is sold, title is transferred to the purchaser.[17] Each party to the consignment makes a commitment – the consignor may give up possession over the artwork, and the consignee may commit the time and financial investments to sell the artwork.

Regardless of whether the consignor is in the primary or secondary market, the consignment agreement authorizes the consignee to undertake the sale of the consigned work on behalf of the consignor. Through this arrangement, the parties may establish a principle-agent relationship, which can be imposed under the law of agency, under state art consignment statutes, a written or oral contract, and court orders.[18] In the consignor-consignee relationship, the consignor serves as the principal, and the consignee serves as the agent. However, the obligations of the consignee to collectors and other consignors (non-artists) vary from state to state.[19] The establishment of this agency relationship, and the many duties that derive from it, is perhaps one of the many reasons why litigation ensues – parties must determine whether contracts are sales agreements or consignment agreements to ascertain their rights to artworks or proceeds derived from their sales.[20]

Under common law, courts will generally look at the following factors to determine whether the parties intended the transaction to be a consignment: (1) whether the alleged consignor retained ownership over the property that is in the consignee's possession, including the right to have that property returned on demand;[21] (2) whether the alleged consignor retains any associated intellectual property rights;[22] (3) whether the alleged consignor controls the sale price and terms; (4) whether the alleged consignee receives a "commission" rather than "the profits of the sale,"[23] and (5) whether the parties' relationship reflects "signs of an agency relationship."[24] Once that principle-agent relationship is established, certain duties attach to the consignee. These duties include the obligation to properly care for the consigned property, to account periodically to the consignor, and to disclose all relevant subject matter of the consignment.[25]

In addition to establishing the agency relationship, the parties must decide whether the consignee has the "exclusive" power to sell the artwork of the consignor. The issue of whether the consignor reserves the right to allow others to sell or promote the artwork is at the forefront. With respect to collector-consignors, exclusive agency relationships are reasonable. Exclusivity prevents multiple parties from offering conflicting offers to interested parties. Exclusivity also avoids multiple parties from offering the artwork to the same potential buyers. If the relationship is exclusive, the agreement should also indicate whether the consignor is also permitted to sell the work. If the response is in the affirmative, the parties will then decide whether the consignee should receive commissions based on those sales.

The consignment relationship with a consignor-artist can be a little more nuanced than the average collector-consignee relationship. Art consigned by artists to art merchants is regulated by specific art consignment laws in approximately thirty-three states.[26] Historically, artists have relied on consignee-galleries to facilitate the sale and display of their art. Beyond occasional sales or sporadic exhibitions, galleries may also represent the same living artist regularly.[27] Through this representation, galleries consistently promote, sell, and exhibit the artist's works, while also offering commitment, support, and patronage to the artist.[28] Depending on the terms of the contract, the artist may agree to create a certain amount of works and deliver those works to the dealer for consignment.[29]

Galleries may also represent the estates of deceased artists or consign their work in consultation with the deceased artist personal estate.[30] The artist-consignor or the artist's estate may grant the consignee the exclusive rights to sell his/her works in various geographic markets (i.e. the United States or solely Los Angeles, California) or in different mediums (i.e., one gallery may exclusively sell the artist's paintings while the other might sell sculptures).[31]

The exclusivity of the consignment may be intertwined with the representation of the artist.[32] If the consignee assumes an added professional relationship with the artist and additionally makes a large investment in the artist (through active promotions or periodic exhibition of the artist's works), the consignee may request a higher degree of exclusivity.

While risk is inherent in any transaction, ultimately, risks can be reduced or managed by conducting due diligence. As a result, it is incumbent on attorneys to encourage clients to conduct due diligence on the other party. The attorney must also conduct her due diligence on behalf of the client. Consignor-clients should perform due diligence on potential dealer-consignees by inquiring with art professionals who have previously worked with the consignee. Likewise, consignee-clients may want to look at the history of the consignor's previous sales – do they have a record of consigning inauthentic art? Attorneys should conduct due diligence on corporate registrations, "dbas," LLCs, and partnership documents. Attorneys should also check court dockets, such as PACER, Lexis Nexis, and West Law, for lawsuits against the other party. Additionally, attorneys may access credit search reports about companies on Dun & Bradstreet and similar services.[33] It is essential for the client to be confident in the notion that the other party is trustworthy, financially secure, and has a dependable reputation before entering the consignment agreement.

II. THE RATIONALE BEHIND ART CONSIGNMENTS

A consignor invariably makes more money when it sells through consignment as opposed to a self-sale. In terms of an outright sale, a consignor rarely makes more than fifty percent of the retail price.[34] However, consigning to a dealer more frequently yields higher profits – a consignor can make between sixty to eighty percent of the retail price, contingent on the strength of the market for the artist and the desirability of the artwork.[35] This large disparity in profit is augmented by the fact that the consignor, who may not be in the business of dealing artwork, does not have to attempt to maneuver the intricacies of the art market to attempt to make a profit.

A dealer who understands the market and has the requisite experience selling art by artists similar to the consignors is able to garner prospective buyers. The dealer-consignee likely has an extensive client list as well as the skills and knowledge to promote and market the artwork. By selling through the dealer-consignee, the consignor avoids unnecessary expenses, stress, and expenditure of time required to selling the works.[36] For artist-consignors, consigning their work to established galleries and dealers allows them to gain broader exposure in the market and may result in the attainment of important industry contacts for future ventures.[37] For those artists who work on the "fringe" of the art world, such as craft artists, consigning works to galleries allows them to exhibit their works on a more professional or prestigious stage, as opposed to selling these works at smaller venues like wholesale markets or fairs.[38]

From the point of view of the dealer-consignee, it is equally beneficial to deal in consigned artworks. If the gallery possesses consigned works, it saves money by reducing the capital tied up in inventory.[39] The increasing availability of funds can allow the gallery to show a diverse range of exhibitions, display unique works which have no definite market yet, and to introduce emerging artists, without significant financial risks.[40] Galleries that provide varied exhibitions and that maintain a large cache of artworks will not only increase their prospect of sales but also amplify their reputations in the art market.[41]

III. DESCRIBING THE ARTWORK

The heart of the consignment agreement is, of course, the artwork. It is not simply enough to provide the name of the artwork and the artist. The artworks subject to the agreement should be described as precisely as possible. The artworks must be listed on a schedule, which provides specific information about the piece, including, without limitation, the title, the artist(s), creation date, dimensions (in centimeters or inches, with and without frames), edition number (if applicable), type of proof (i.e., publisher or artist proof), ownership history, framing, mounting, and medium/material. In addition, the drafter should attach photographs of the artworks to correspond to the schedule. If the consignor additionally sends work to the consignee, the schedule should be amended and signed by both parties. If the consignment is by an artist, the contract may require the artist to provide the gallery with a certain number of new works throughout the term of the agreement. Therefore, the additional schedules will be necessary to maintain a record of the total number of works consigned to the gallery by the artist.

To protect both parties' interests and to avoid disputes over the initial condition of the pieces, the agreement should obligate both parties to prepare conditions reports on the artwork. A condition report is best described as a document that reports the condition of the artwork and creates a record of the evolving physical condition of the artworks and any ancillary equipment (such as frames). Condition reports are beneficial in the event of potential destruction or damage to the artwork and may be helpful for insurance coverage. The agreement should obligate the consignor to prepare a condition report for each artwork consigned to the consignee. The consignee may also prepare its own condition report on receipt of the artwork or may review the condition report provided and make appropriate changes as necessary. At the termination of the consignment relationship, the condition report must be updated and returned to the consignor, along with the artwork.

When representing any consignor, the attorney should carefully review and draft any warranties regarding the artwork. Under the UCC, certain warranties are implied as a matter of law when a seller sells artwork to a buyer.[42] Given the consignee's potential liability, he/she will likely (and should) request that the consignor provide warranties for the consigned work. Since the UCC establishes a warranty of title between a seller and buyer, the consignee (as the future seller) should insist on a warranty of title by the consignor, which may include assurances that the work is free and clear of any liens or other encumbrances.[43] This clause is rarely negotiated. The consignee may request that the consignor warrant the authenticity of the artwork.[44] The attorney must be meticulous in drafting any warranties regarding authenticity, as any blanket representation or warranty may expose the consignor, who is presumably not an art expert, to liability.[45] Whenever possible, the attorney should restrict the language to limit the consignor's liability. In the instance where the consignor is not the original artist, reasonable language could include verbiage indicating that the consignor has "no reason to believe" that the work is not by the named artist in the schedule or that the work is "attributed to" a certain artist.[46] The consignee may also ask that the consignor to warrant that he/she has provided a complete provenance – a record of ownership. In many cases, it is nearly impossible to account for every owner, especially given the confidential nature of the art world.[47] Irrespective of the type, the drafter should limit any representations and warranties to only those details within the consignor's personal knowledge.

IV. THE DURATION OF THE CONSIGNMENT AGREEMENT

Some consignment agreements are open-ended and allow the consignee to possess the artwork until it is either sold or the parties decide to mutually terminate the relationship. While these arrangements are common, they are not recommended. Many aspects of the consignment can go awry in the arrangement – the artwork can be sitting in the consignee's storage without potential buyers to see the work, the artwork can be on display and may be overexposed, leading to diminution in value, or the artwork can become damaged. Bearing this in mind, it is logical to limit the term of the agreement to a specific period of time.[48]

The initial period for a consignment agreement is usually between one to three years. If the consignee has a shorter period to find a potential purchaser, there may be more pressure and motivation to sell the work. The duration of the agreement should be treated distinctly, depending on the intent of the parties. The term of consignment intertwines with the purpose - if the purpose is only to consign to a gallery for a special exhibition, the period will be only for the duration of the exhibition. If the consignment is for the purpose of display and the eventual sale, the term may likely be longer.[49] If galleries or dealers are also representing the artists, the period may be longer – between two to three years – in order to give reasonable time to promote the artist and to reap the benefits of their investment.

The term provisions should also address whether the consignee's rights extend beyond the consignor's death. For example, in *Mesbahi v Blood*, the parties entered into a consignment relationship during the decedent's lifetime.[50] The consignment agreement provided the right to terminate the agreement upon notice to the other party and, further, that it should "continue after the death of [decedent]."[51] After the executor of the decedent's estate sent notice of termination of the agreement, the agent sued for declaratory relief that the agreement was still in effect.[52] The court held that the "continuation provisions of the agreement certainly reflect[ed] the parties' intent to continue the consignment" after death.[53] However, the agreement was no longer in effect as a result of the notice of termination provision and that the artwork was the property of decedent's estate.

After the initial period of the consignment agreement, the parties may want to extend the term of the agreement. The benefit of renewal periods is that they allow the parties to maintain their relationship, while simultaneously reassessing the parties' agreement and allowing for a modification if there is a change in circumstances. The attorney should include a provision that allows for such renewal periods. Some agreements may have an automatic renewal/ extension period on a month-to-month basis. If the attorney is representing the consignee, it is also prudent to draft a clause which extends the agreement in case of a *bona fide* ongoing sale or negotiations. This language will help guarantee that the consignee receives a commission even though the term has expired.

After expiration of the term, the onus is traditionally on the consignor to retrieve the artwork from the consignee. While it is desirable for the consignor-drafter to require the consignee to return the artwork, many times this is simply not feasible. For consignee galleries with hundreds of consigned works, it may not be possible to take the time to contact and dispose of each consignor's artwork. It is important for attorneys to keep clients cognizant of the importance of these dates and any consequences derived from failing to retrieve or return the artworks.

V. RESTRICTING THE LOCATION OF THE ARTWORKS

The consignee usually takes physical possession of the artwork in order to display the artwork and attract potential buyers. However, there are many instances where the artwork might not remain in the same place for the duration of the agreement. The provisions of the agreement should contemplate where the artworks will be held and anticipate circumstances in which the artworks might be placed at another site.

The agreement should specifically provide the addresses where the artworks are going to be held – in the consignee's inventory or at a storage facility. If the artwork is going to be placed in storage, the agreement should specify the location of the storage facility, how the artworks are going to be stored (i.e., with climate controls, smoke alarms, sprinkler systems etc.), and who should be in charge of paying the storage fees.

On an occasion where the artwork may leave the consignee's facilities, the consignor should request that the consignee seek prior written consent from the consignor. The artwork could be removed for a variety of reasons, including rentals or loans to galleries, museums, or other institutions for the purpose of exhibition. These arrangements could help expose the artwork to more audiences, thereby increasing the probability of a sale. If the parties foresee that the artwork may be loaned to other institutions, the parties may want to initially agree to some basic terms regarding the loan, including the maximum duration of the loan, the number of loans permitted, any compensation to the consignor, responsibilities of the consignee to effectuate the loan, and payments of transportation costs and insurance.

The consignor should also give serious consideration to whether the consignee should be permitted to sub-consign the artwork. It is common practice in the art industry for one gallery to "sub-consign" artwork to another gallery or dealer or to involve multiple intermediaries in a single transaction.[54] Under this arrangement, the consignee may enlist another individual (an art consultant or a dealer) to find potential buyers, thereby sub-consigning the artwork. In this case, the consignee and the sub-consignee will expect to be paid upon the sale of the artwork. While the gallery retains the obligation to pay the consignor, the consignor may want to retain some discretion as to when a sub-consignment may occur. Any discretionary provisions should require written authorization for sub-consignment, as well as notice of the name of the sub-consignee, the location of the artwork (if moved), and deductions made to the consignee's commission. Regardless of the type of change in location, the agreement should delineate a notification process for any change of location, including the means of delivering the notice, effectiveness of the notice, time periods of notice, and calculation of time periods. The notification should allow the consignor to confirm in writing his or her consent to the change of location.

VI. CURBING THE RISKS

The cost of crating, packing, and shipping a valuable piece of art can be a significant expense, especially for those pieces of considerable size and weight.[55] Due to the prohibitive nature of these transportation costs, the contract should specifically identify the party to be charged with the costs of packing, shipping, insurance, and handling expenses from the consignor's location to where the consignee plans to store the artwork (i.e., gallery, studio, storage etc.). In considering which party should assume these expenses, the parties should contemplate the location of the artwork in relation to the consignee (long-distance shipping is more expensive) and the scale of the artworks to be crated and shipped. There is no hardline rule, however, the consignor usually bears the expense of transportation to and from the premises of the consignor to the consignee. Larger commercial galleries may bear the total costs of shipping.[56]

In addition to the costs of transportation, the parties must contemplate which party shall bear the costs of insurance. It is prudent business practice for both parties to carry fine art insurance, which would protect against loss due to damage, destruction or theft. While there is no law expressly requiring the consignee to maintain such insurance, it is recommended that the agreement obligate the consignee to maintain sufficient insurance to cover the any loss, damage, or destruction of the artwork while it is in the consignee's possession. Specifically, the agreement should summarize specific insurance requirements, including: the policy limits, the risks insured, any exclusions, the value of the artwork (whether itis the stated value or current market value), waivers of subrogation, and designation of consignor as additional named insured.[57] It is also recommended that the agreement require the consignee to provide a certificate of insurance evidencing the terms and conditions of the insurance policy.[58] The agreement should require the consignee to notify in writing of any change in the insurance's terms and conditions.[59] If the consignor is not named on the insurance policy, the agreement should further specify that the consignor is entitled to any insurance proceeds in the event of loss or damage of the artwork. The parties may additionally want to negotiate whether the consignee would still be entitled to a commission in the event of loss, damage, or destruction.[60]

While the artwork is in the consignee's custody or in transit between the consignee and purchasers and loaners, the parties need to decide who bears the risk of loss in the case of damage, destruction, or loss of the artwork. If the artwork is consigned by artists, some state's art consignment statutes hold galleries strictly liable for damage to or loss of artworks.[61] Notwithstanding the presence of protective state legislation for artists, the agreement should state who is responsible for any loss, damage, or theft to the consigned works, if the consignor is entitled to full fair market value, and at what point that obligation begins (i.e. upon receipt of the artwork for consignments or after it leaves the premises of the consignor). Under some circumstances, insurance may only cover 80% for dealer owned objects, and 50% of consignment value for consigned artworks.[62] To protect the consignor, the drafter should negotiate for the risk of loss to belong to the consignee at all points of the agreement, including during transportation to and from the consignee's premises.

To protect the consignee, the agreement should limit liability only to the price that the consignee would have paid the consignor if the work had been sold.

VII. MONEY AND THE CONSIGNMENT AGREEMENT

The price of each artwork is essential for determining the ultimate financial benefit of the consignment agreement. The consignor and consignee must agree on the minimum sales price for the consigned artwork. The consignor may defer to the consignee to assign the Fair Market Value ("FMV")[63] to the artwork or may have the work independently appraised by an art appraiser. Many factors may be utilized in calculating the FMV of artwork, including numerous characteristics encompassed in "CROSSAQ" – condition, rarity, ownership, size, subject matter, authenticity, and quality.[64] The contract should make clear the specific price of the artwork and whether or not the consignee may deviate from the sales price. It is common in the art world for some commercial galleries to give discounts to certain purchasers.[65] However, the consignor may want to specifically limit the percent discount and the specific class of purchases entitled to a discount. Artists should clarify with their consignees, if and when, a collector discount can be offered, the maximum percentage allowed for any discount, and whether the artist and consignee will divide the net proceeds after an offset or, or if the consignee will absorb the discount, and if the artist will obtain his full share of the consignment proceeds.[66] Discounts on artist's consignments should be expressly stated and described in advance.

Subsequent to the determination of the price of the artwork, the parties must negotiate one of the key provisions of the agreement – the apportionment of the proceeds to the consignee. The parties may agree that the amount due to the consignor is a "set fee," meaning a minimum dollar amount.[67] More frequently, the commission is calculated by subtracting a percentage of the sale proceeds from the sale price of the artwork. Depending on the status of the consignee, the commission can range between 30% to 50% of the total purchase price. If the consignee is a well-known art gallery or dealer, the commission may likely be on the higher range. However, if the consignor is a well-established artist with a world-renowned reputation, the consignor can negotiate a lower commission rate. The consignor must also compute the commission to take into account any discounts given by the consignee. Regardless, the parties should consider the amount of financial investment, and the services rendered by the consignee to determine the appropriate commission rate.

After the artwork is sold, all of the thirty-three states with art consignment statutes require that the proceeds of the sale be held in trust.[68] Some states have a mandatory provision in their art consignment legislation establishing that the trust requirement be a mandatory component for an enforceable consignment agreement.[69] Additionally, the agreement should provide a set period (usually thirty days) from the date of sale for when the consignee must transfer the final payment to the consignor.[70]

Under the UCC, title is transferred when the artwork is physically delivered to the purchaser.[71] The consignor needs to protect their ownership interests by specifying in the consignment agreement that the consignee may not transfer possession of the artwork or title unless the purchaser has paid the purchase price in full.[72] The agreement should maintain that the consignee is still liable to the consignor for the full amount of monies owed to the consignor, even if the purchaser defaults. The justification for this liability is that the consignee is likely in a better position to evaluate the creditworthiness of the purchaser and, thus, should assume the risk of sale.[73]

Similarly, the consignee might also wish to clarify in the agreement whether it is authorized to allow purchasers to make installment or deferred payments. Installment sales are common for many dealers, especially during economic downturns.[74] Some state art consignment statutes require that the consignee use the proceeds from the installment payment to pay the consignor first.[75] In such a case, the consignor should make clear in the contract that delivery of the artwork should not be made until either the final payment is made or the consignee makes a guaranty of such in writing. The parties must additionally establish the permitted payment schedule to the consignor, whether the consignee will charge interest, if the parties charge interest, how will that be allocated between the parties, and who bears the risk of loss if the purchaser defaults.

It may also be prudent for the consignor to require the consignee to provide a copy of the sales receipt after it is sold to ensure compliance with the commission rates under the consignment agreement.

Under common law, the consignee has a duty to account to the consignor and to keep complete and accurate records. The consignor also has the right to review those records.[76] It is in both parties' best interest for the agreement to keep a paper trail and to designate the frequency by which the consignor is entitled to an accounting, especially when the consignor has consigned multiple artworks. In some art consignment statutes, criminal penalties are imposed on art merchants who fail to properly pay and account.[77] If the consignor has delivered a large number of works to the consignee, it is also recommended that drafter require the consignee to send periodic statements to the consignor, which outline the particular works sold, the dates of those sales, lists of all unsold works, and whether those works are in the possession of the consignee or at a different location (i.e., on loan or in storage). Particularly in the case of artist-consignors, the agreement may also state that the consignee is required to reveal the names of the purchasers of the artworks. If the artist desires to do a retrospective of their own work or create a catalogue raisonné[78] of their work, they will need to know the whereabouts of their artworks. Most of the disputes that derive from the consignment relationship center around money and the failure to properly bookkeep and promptly pay.

VIII. SECURITY INTEREST AND THE PROTECTION OF CONSIGNOR'S ARTWORK

The economic ramifications of COVID-19 has rapidly permeated the artworld. Due to the temporary closure of businesses and the apprehension of buyers to expend disposable income on art, art galleries or other business where consignees operate may incur financial difficulty, close, or become insolvent or bankrupt.

When a consignor entrusts an artwork to the consignee, certain risks flow from this relationship. Regardless if the consignor and consignee have a well-crafted consignment agreement, it is important that the artworks be clearly designated as consigned goods to protect the consignor's interest against creditors or trustees in bankruptcy.[79] To give notice to the consignee's creditors of the consignor's interest in the artworks, the consignor has available in all states the ability to file a UCC-1 Financing Statement to perfect their interest in the artwork. For example, *In Kraken Invs. Ltd. v.* Jacobs *(In re Salandar-O'Reilly Galleries, LLC)*,[80] a Botticelli painting on consignment was subject to bankruptcy proceedings from the gallery's bankruptcy estate. On appeal, the court held the artwork was not subject to the bankruptcy estate because the consignment was not covered by UCC Section 9-319.[81] While the artwork was ultimately returned, the case offers a valuable lesson – consignors need to protect themselves from unnecessary risks by filing a UCC-Financing Statement. The Financing Statement is a relatively easy and inexpensive form application filed with the applicable entity designated by each state. The perfection of the security interest, regardless of whether it is a collector or artist, will protect the consignor in the event that the consignee becomes insolvent or cannot pay its debts to its creditors. It does not necessarily protect, it gives notice, so the consignor has evidence of its superior claim to the property and a right to seek recovery, sometimes right away, sometimes via the trustee and sometimes via judicial process.

Many artists and lawyers rely on the art consignment statutes in the hopes that they will provide artists with a "haven" away from the claims of creditors. However, only some state statutes give automatic protections to the artist.[82] In fact, some states offer fewer protections and have specific requirements in order to fall under the protection of the statute. For example, Florida requires the artist to give notice to the public by affixing the artwork with a sign or tag, which specifies that the artwork is being sold subject to a contract of consignment.[83] If the artist does not comply with the mandatory notice provisions, then the artist is not protected under Florida's Artist's Consignment Act and, thus, a third-party could have a superior possessory interest.[84] Likewise, many of these art consignment statutes only protect artists and do not protect collectors. In fact, the only state statutes which broadly protect artists and collectors are in Massachusetts,[85] Michigan,[86] and Connecticut.[87] Some state statutes do not even contain UCC preemption provisions and, thus, the consignment may still fall under the UCC.[88]

The most efficient way to protect the consignor by way of the consignment contract is to grant the consignor a security interest in the consigned work until the purchase price less the consignee's commission is delivered to the consignor. The consignee should authorize the consignor to file a UCC-1 Financing Statement covering the security interest in both the artwork and any proceeds from the sale of the artwork that may be held in trust. The consignor should also require that the consignee inform any other secured creditors of the existence of the consignor's security interest in the artwork. Should the consignor desire to add another layer of protection, they may also obligate the consignee to post a sign next to the artwork that identifies the artwork as an object "subject to a contract of consignment." This sign puts potential creditors on notice that the artwork is not the property of the consignee and is not subject to the consignee's creditors.[89]

Notwithstanding this additional attempt to protect interests, perfection of the security interest is the only avenue to maintain superior possessory interest in the consignor's artwork. Under the UCC, the Financing Statement remains valid for a period of five years from the date of filing.[90] If the financing statement lapses, the perfected security interest in the artwork (perfected by the Financing Statement) becomes unperfected. In the event that the artwork is still on consignment for more than four years, the consignor should file a continuation statement, which will extend the effectiveness of the initial financing statement for five more years commencing on the day on which the financing statement would have become expired.[91]

IX. CONCLUSION

The unpredictability of the art industry creates a mutually advantageous opportunity for both consignor and consignee to sell artworks for profit. The consignee can sell the work without exerting excessive financial investments, and the consignor can benefit from the consignee's experience as well as networks in the art world. To many, the price of art extends beyond its pecuniary value. The inherently personal nature of art and the nature of the art market lends itself to inevitable disputes over transactions. Once an industry built on trust, the billion-dollar art market now dictates the necessity to formalize relationships through narrowly tailored contracts. While the consignment agreement cannot prevent all disagreements, it can clearly define the responsibilities and expectations of each party. Within this solid framework, the parties can eliminate potential problems and protect their interests through transparency and compromise. ■

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ENDNOTES

1 Derek Fordjour is an interdisciplinary artist whose colorful works often include references to issues of African American identity.

2 Eileen Kinsella, *Rising Star Derek Fordjour Is Asking a Judge to Toss Out a Lawsuit From an Ex-Dealer, Claiming He Is Resentful of the Artist's Success*, Art Net, March 19, 2020, https://news.artnet.com/art-world/derek-fordjour-robert-blumenthal-lawsuit-2-1809582 (last accessed April 15, 2020).

3 *Id*.

4 Graham Bowley, *A Fight Over Money, Loyalty and Who Gets Credit for an Artist's Rise,* The New York Times, March 29, 2020, https://www.nytimes.com/2020/03/29/arts/design/artist-fordjour-legal-battle.html (last accessed April 15, 2020).

5 *Id*.

6 Kinsella, *supra* note 2.

7 Alexandra Darraby, Art, Artifact, Architecture & Museum Law § 2:1 (2017).

8 *Id*. at §9:84.

9 For materials on contract drafting, the author recommends Kenneth A. Adams, A Manuel of Style for Contract Drafting (ABA Publishing 4ed. 2017).

10 *See In re Estate of Friedman*, 64 A.D.2d 70 (App. Div. 2nd Dep't 1978) (interpreting a contract as a consignment even when there were elements of both sale and consignment) and *Red Pocket, Inc. v. Interactive Communs. Int'l, Inc.*, 2020 U.S. Dist. LEXIS 29109, *23 (S.D.N.Y 2019) (declining to grant summary judgement, where the agreement had many "contradictory characteristics" that were indicative of a consignment agreement).

11 See e.g., Conn. Gen. Stat. Ann. §42-116m; *Litchfield Cty. Auctions, Inc. v. Brideau,* 2019 Conn. Super. LEXIS 2459 (Sept. 3, 2019).

12 Tad Crawford and Susan Mellon, The Artist-Gallery Partnership: A Practical Guide to Consigning Art 26 (Allworth Press 3 ed. 2010)(ebook). Consignment Agreements with auction houses are more nuanced and should be drafted strategically. For advice on how to draft a consignment agreement with an auction house, *see* Steven Thomas, *Auction Consignment Agreements: Pitfalls and Planning Strategies*, 36:4 Estate Planning 23 (April 2009).

13 Darraby, *supra* note 7 at §2:3.

14 Patty Gerstenblith, *Art Merchants – Auction Houses and Dealers* in Art, Cultural Heritage, and the Law (Carolina Academic Press 4 ed. 2019). Many auction houses, like Christie's only deal with "secondary market" consignors. It should also be noted that there are many other avenues where people consign the art outside the scope of the art world including restaurants, antique shops, and bars, among others.

15 Darraby, *supra* note 7 at Appendix 3.

16 *See e.g. Naber v. Steinitz,* 1992 N.Y. Misc. LEXIS 685 (Sup. Ct. N.Y. County Jan. 27, 1992) (because a consignment relationship existed between the parties, the consignor had both title and right to possession superior to that of the consignee).

17 Darraby *supra* note 7 at §9:84; UCC § 2-401(2).

18 *Id*. at §2:35; *Nakian v. DiLaurenti*, 673 F. Supp. 699 (S.D. N.Y. 1987) (the court imposing a mandatory injunction on a gallery, where there exited a written exclusive agency agreement to the artist's estate for an exhibition in a museum).

19 Darraby *supra* note 7 at §2:28.

20 *See e.g. Scher v. Stendhal Gallery Inc*., 117 A.D. 3d 146 (App. Div. 1st Dep't 2014).

21 *Morgan Art Found. Ltd. v. Brannan*, 2020 U.S. Dist. LEXIS 14043, *27 (S.D.N.Y. 2020); *see also Khaldei v. Kaspiev*, 135 F. Supp. 3d 70 (S.D.N.Y. 2015) (finding a consignment agreement between a photographer's estate and an art dealer when the art dealer did not own any of the photographs at issue) and *Plumb v. Casey*, 2014 Mass. LEXIS 712 (Sept. 8, 2014)(a consignment agreement was formed upon delivery and acceptance of artwork for the purpose of exhibition or sale on commission).

22*Al Hirschfeld Found. v. Margo Feiden Galleries Ltd*., 296 F. Supp. 3d 627, 631, 642 (S.D.N.Y. 2017) (finding an agreement between foundation of deceased artist and art gallery to be a consignment when gallery was authorized to reproduce the artist's work in certain circumstances, but that foundation "retained . . . sole proprietorship of copyright, trademark, privacy, publicity and related rights in the Works.").

23*Italian Designer Imp. Outlet, Inc. v. New York Cent. Mut. Fire Ins. Co*., 26 Misc. 3d 631 (N.Y. Sup. Ct. Kings County 2009) (the "primary distinguishing factor" of a consignment is "whether the 'consignee' is acting as the 'consignor's' agent, compensated by a commission on the retail price set by the consignor, rather than a fully-independent merchant, compensated by the difference between the price charged by the consignor and the retail price set by the consignee").

24 *United States v. Nektalov,* 440 F. Supp. 2d 287 (S.D.N.Y. 2006) (citing *Rahanian v. Ahdout*, 694 N.Y.S.2d 44, 47 (1st Dept. 1999).

25 *See* Restatement (Third) of Agency §§8.08-8.12.

26 For citations to all of the state consignment statutes, see "Artist-Gallery Consignment Statutes" https://vlaa.org/artist-gallery-consignment-statutes/ (last accessed May 14, 2020).

27 Darraby, *supra* note 7 at §9:100.

28 Id. at §2:12.

29 *See e.g., Sonnabend Gallery, Inc. v. Halley*, N.Y.L.J., July 14, 1992 (Sup. Ct. N.Y. County 1992) (artist Peter Halley entered into an oral representation agreement with Sonnabend Gallery to provide the gallery with eleven paintings).

30 Darraby, *supra* note 7 at 2:13.

31 Daniel Grant, The Business of Being an Artist 127 (Allworth Press 2015)(ebook).

32 For a detailed overview of the requirements of an artist-dealer representation agreement, *see* Darraby *supra* note 7 at §9:100. Provisions in an artist-dealer representation agreement should not be relied upon in lieu of consignment agreements. *Id*. at 9:99.

33 Dun & Bradstreet, https://www.dnb.com, (Last accessed April 15, 2020).

34 "Art Market Tips for Consigning Art," Art Business, https://www.artbusiness.com/consignart.html (last accessed April 15, 2020).

35 *Id*.

36 Crawford & Mellon, *supra* note 12 at 26.

37 For this reason, when an artist terminates the agreement with the dealer-consignee and litigation ensues, dealers often make a *quantum meruit* argument based on services rendered on behalf of the artist. *See e.g. O'Keeffe v. Bry*, 456 F. Supp. 822 (S.D.N.Y. 1978).

38 Crawford & Mellon, *supra* note 12 at 26.

39 *Id*.

40 *Id*.

41 *Id*.

42 Such warranties include the implied warranty of merchantability (UCC §2-314) and the implied warranty for fitness for particular purpose (UCC §2-315).

43 UCC §2-312.

44 Gary D. Sesser and Judith Wallace, *What They Never Told You About Consigning Your Art*, 5:1 Spencer's Art Law Journal (2015).

45 *Id*. The consignor likely does not have first-hand knowledge of authenticity. Instead, their knowledge of the degree of authenticity of the work is likely based on the prior seller's warranties, the provenance of the artwork (the history of its ownership), or an expert's opinion (if applicable).

46 *Id*.

47 *Id*.

48 *See Pace v. Schwartz*, 680 F. Supp. 2d 591 (S.D.N.Y 2010)(finding that the contract was not terminable-at-will when there was a fixed term in the consignment agreement, but there was genuine issue of material fact arose as to whether the consignee had a superior possessory right for the duration of the agreement).

49 Crawford & Mellon, *supra* note 12 at 46.

50 172 A.D.3d 1580 (App. Div. 2019).

51 *Id*. at 1580-1.

52 *Id*.

53 *Id*.

54 *See Weil v. Murray,* 161 F. Supp. 2d 250 (S.D.N.Y 2001) (illustrating the common practice for which dealers conduct multiple transaction between buyer, seller, and other intermediaries into one single transaction).

55 *See e.g. Lyon-Wall v Cooper*, 2011 N.Y. Misc. LEXIS 638 (N.Y. County 2011) (an artist contracted defendant to create crates to store and transport the subject artwork for $33,000).

56 Crawford & Mellon, *supra* note 12 at 51.

57 Darraby *supra* note 7 at 9:98; *Id*. at 2:31.

58 *Id*.

59 *Id*.

60 *See e.g., Pelletier v. Eisenberg*, 177 Cal. App. 3d 558, 560 (4th Dist. 1986) (finding that after damage of plaintiff's fine art for which he received full fair market value, the consignees were not entitled to commissions).

61 *See e.g*. 815 Ill.Comp. Stat. Ann. 320/2(5) and Colo. Rev. Stat. § 6-15-102(4).

62 Darraby *supra* note 7 at §9:97.

63 The Fair Market Value (FMV) is "is the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts." IRS, Publication 561 (02/2020), Determining the Value of Donated Property *available at* https://www.irs.gov/publications/p561#en_US_201911_publink1000257932 (last accessed April 19, 2020).

64 Darraby *supra* note 7 at §3:55; *See e.g. Eboigbe v. Zoological Soc. Of Cincinnati,* 1994 Ohio App. LEXIS 3054 (1994) (holding that a determination of the fair market value of a sculpture that was damaged while on consignment is based upon multiple considerations including the market for the artist's work, sales of lesser pieces, and expert opinions, among others).

65 *Id.* at §9:73.

66 *d Darraby, Ch. 9, Checklist 9-1*"Business Records Rules for Artists" and ID Vol II, Appendix 3. Bookkeeping and Accounting Journal and Ledgers for Discounts on Art Consignments

67 *Id*. at §9:91.

68 Crawford & Mellon, *supra* note 12 at 104.

69 *See e.g.* Conn. Gen. Stat. Ann. §42-116m; Fla. Stat. Ann. § 686.503; Ga. Code Ann. §10-1-523; 15 Ill. Comp. Stat. Ann. 320/5; Iowa Code Ann. §556D.2; N.H. Rev. Stat. Ann. §352:7; and Ohio Rev. Code Ann. §5815.45.

70 Alaska's statute provides that the dealer "shall transmit the proceeds to the artist within 30 days of receipt by the dealer." Alaska Stat. §45.65.200(a)(6).

71 UCC § 2-401(2).

72 *Matter of Miller*, 545 F.2d 916 (5th Cir. 1977) (in a bankruptcy action, the consignment of paintings to dealer under written consignment agreement gave dealer the power to convey title of paintings to third parties).

73 Darraby *supra* note 7 at §9:92.

74 *Id*.

75 *See e.g.* Ind. Code Ann. §§ 24-4-17-8(2).

76 *Empire Corvette of Am., Inc. v. Just Toys Classic Cars*, LLC, 2018 U.S. Dist. LEXIS 234322 (Mid. Dist. 2018)("[A] consignee has the common-law duty to account to the consignor to keep complete and accurate records, and the consignor has the right to review those records, even when a contract exists between the parties"); see also *Wilson v. Burch Farms, Inc.*, 176 N.C.App. 629, 627 S.E.2d 249, 259 (2006) ("After selling the goods, the consignee must account to the consignor with the proceeds from the sale."); *Holzer v. Tonka Bay Yachts and Marine Sales, Inc.,* 386 N.W.2d 285, 287-88 (Minn. App. 1986) ("A consignee…must provide his principal with all necessary and useful information relating to the consignment and has a duty to account to the consignor within a reasonable time or upon a reasonable demand."

77 *See, e.g.,* Cal. Penal Code § 536a.

78 A catalogue raisonné is a comprehensive listing of all the known artworks by an artist, which is critical for researching the provenance and attribution of a particular artwork.

79 Darraby, *supra* note 7 at 4:57.

80 (2014 U.S. Dist. LEXIS 181203 (S.D.N.Y 2014)

81 *Id*.

82 *See* N.Y. Arts & Cult. Aff. Law § 12.01.

83 Fla. Stat. § 686.502(2).

84 *See Shuttie v. Festa Restaurant, Inc*., 566 So. 2d 554 (3rd DCA 1990) (finding that because the consignor did not satisfy the notice requires under Florida's Art Consignment Act, the restaurant owner had priority over the artwork).

85 Mass. Ann. Laws ch. 104a, §§1-6.

86 Mich. Comp. Laws Ann. §§442.312.

87 Conn. Gen. Stat. Ann. § 42-116l.

88 Md. Code Ann., Com. Law§§11-8A-01 – 04.

89 As stated above, this notice requirement is required under various state statutes. It is thus critical for the attorneys to check the applicable for statute to see if this is mandated. Please also note that the notice requirement alone will not prevent the artwork to be subject to the consignee's creditors. Instead, the consignor must perfect the security interest through either possession or filing of the UCC-1 Financing Statement.

90 UCC §9-515(d).

91 UCC §9-515(e).