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NOTE

Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications

Andrew B. Carrabis



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Faculty Advisor's Introduction

Peter Carfagna

It has been my great pleasure to serve as Faculty Supervisor of the Journal of Sports and Entertainment Law again this year. From the first week of the school year, I have felt privileged to work closely with Editor in Chief Josh Podoll, Executive Editors Ben Glicksman, Abigail Hackler, and Mike Mozes, and the rest of JSEL's Editorial Staff as they embarked on the most ambitious project of publishing not just one, but two Editions of JSEL in only its second year of existence. Yet, they have proven more than equal to this exciting challenge, as those of you who read both Volumes of this Issue will agree. My congratulations therefore go out to everyone on the JSEL Staff who contributed so mightily to this singular accomplishment.

In particular, regular readers of JSEL will note that a wonderful "evolution" occurred this year, under Josh's guidance. This year's editions have tipped favorably in the direction of "Entertainment Law," while at the same time publishing cutting-edge pieces on "sports and the law" – a discipline that led the way last year under then-Editor in Chief Ashwin Krishnan's direction. This evolution has produced some unique and thought-provoking scholarship, which will hopefully initiate ongoing dialogue between JSEL and its readers – another new challenge Josh, his Staff, and future editors of the Journal have embraced.

This second edition contains a number of insightful pieces in my area of expertise: sports law. An agent-related piece by my good friend and professional colleague, Darren Heitner, with his co-author, Jeffrey F. Levine, will guide the avid sports law "fanatic" through the intricacies of the Cam Newton "loophole." And the student-published article co-authored by Senior Editors Ben Glicksman and Mike Mozes will bring into relief nuances contained in the oft-studied American Needle Supreme Court case that will justify re-reading and further dialogue.

Of course, there are articles that might have been accepted, if greater publication space were available. Accordingly, the Journal strongly encourages authors whose work was not published to re-submit next year, and to continue to submit new publications to JSEL in the future.

In that regard, I am proud to welcome next year's Editor in Chief, Dave

Zucker. Dave will, I am sure, pick right up where his predecessors Josh Podoll and Ashwin Krishnan have left off. Good luck to Dave, as he embarks on leading the next stage in the continuing evolution of JSEL, in which I am proud to have played a part since its inception last year.



From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings

Mary LaFrance*

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* IGT Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author would like to thank the participants in the Intellectual Property Works-in-Progress (WIPIP) Colloquium at the Boston University School of Law, February 11–12, 2011, for their helpful comments on an earlier version of this article. This research was awarded a 2011 Sponsored Scholarship Grant by the Institute for Intellectual Property and Information Law (IPIL) at the University of Houston Law Center.

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I. INTRODUCTION

As early as the discussions leading to the Rome Convention,¹ a major objection to the full recognition of public performance rights in sound recordings was the concern that the enforcement efforts of neighboring rights holders (record producers and musical performers) would interfere with the efforts of music composers and publishers to maximize the opportunity to commercially exploit their copyrighted compositions.² This concern remains at the heart of opposition to a full public performance right in the United States. It takes two forms: (1) a concern that neighboring rights holders will act as gatekeepers, potentially vetoing exploitation opportunities for the copyrighted compositions embodied in their sound recordings,³ and (2) a concern that the royalty stream which users must pay to neighboring rights holders will reduce the royalty stream available to the owners of copyrighted compositions.⁴ Because the owners of composition copyrights perceive that there is little to gain, and much to lose, if the U.S. grants full recognition to public performance rights in sound recordings, they have in many cases actively opposed these rights. If sound recordings are to receive full performance right protection in the U.S., it is therefore essential that neighboring rights holders and the owners of musical composition copyrights find ways in which they can work cooperatively. This is difficult in an environment where Congress itself has set them at odds, at first giving everything to one group and nothing to the other, and then only grudgingly beginning to recognize the rights of the second group. In other countries, however, performance rights in sound recordings have managed to coexist with those in compositions; there is no evidence that the recognition of new rights holders has diminished the well-being of those who create musical compositions.⁵

¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 1961 WL 59331, available at http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html [hereinafter Rome Convention].

² See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 1220 (2nd ed. 2006) (citing C. MASOUEY, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 16 ff. (1978)).

³ *Id.* at 1221 (citing MASOUEY, *supra* note 2, at 17; STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 226 (2d ed. 1989)).

⁴ *Id.* (citing STEWART, *supra* note 3, at 192, 226).

⁵ *Id.* (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, REPORT OF THE

The arguments for and against enacting a full public performance right for sound recordings have been made elsewhere at length,⁶ and this article will not revisit them,⁷ except for a brief examination, in Part I, of the likely economic consequences of enacting the expanded right.⁸

Therefore, this article assumes that, in the near future, sound recording performance rights in the U.S. will be expanded to encompass at least terrestrial broadcasts (as proposed in the Performance Rights Act (PRA)), and eventually public venues as well. Spreading the performance right more broadly creates a larger revenue base, which means that the rates applicable to each class of user can be lower, which will reduce the burdens on individual user groups. It will also eliminate — or at least mitigate — the current problem of giving a competitive advantage to one user group (e.g., terrestrial radio) over another (e.g., satellite radio and webcasters).

However, once the sound recording public performance right is expanded beyond its current limits (digital transmissions only), the task of implementing these rights will become more complex. This article examines some of the more significant challenges that will accompany this expansion of the public performance right.

II. COSTS AND BENEFITS

A. *The Goal: Reciprocity*

One of the most significant benefits of expanding the public performance right in sound recordings is that it will enable U.S. record companies and

INTERGOVERNMENTAL COMMITTEE OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS, Annexe I, ¶28 (1979).

⁶ See, e.g., Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates our Democratic Civil Society?*, 21 Harv. J.L. & Tech. 233 (2007); William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 Harv. J. on Legis. 249 (1994); John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization — And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1041, 1045-53 (2002); *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 2d Sess. (2009) (passim).

⁷ Suffice it to say that the arguments in favor of the right are far more persuasive. This conclusion is shared by an overwhelming majority of disinterested experts. For a large collection of scholarly articles, see Thomas D. Sydnor II, *A Performance Right for Recording Artists: Sound Policy at Home and Abroad*, THE PROGRESS AND FREEDOM FOUNDATION, PROGRESS ON POINT (Feb. 2008), <http://www.pff.org/issues-pubs/pops/pop15.2performanceright.pdf>.

⁸ See *infra* notes 10–34 and accompanying text.

recording artists to collect foreign performance royalties that are currently being withheld by foreign collecting societies. Broadcasters and public performance venues in other countries that play American musical recordings are typically required to pay performance royalties for those recordings,⁹ but the societies that collect those royalties simply retain them, due to the absence of material reciprocity.¹⁰

Enacting an expanded public performance right will enable the United States to join the Rome Convention, which will trigger the requirement of national treatment¹¹ in most signatory countries,¹² enabling U.S. record

⁹ Some countries, such as Canada, do not even bother to collect royalties on U.S. recordings. See *infra* notes 124–30 and accompanying text.

¹⁰ *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 16–30 (2007) (statement of Marybeth Peters, Register of Copyright); *Performers and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 39 (1993) (statement of Jason S. Berman, President, RIAA).

¹¹ Article 4 of the Rome Convention provides that signatory countries are obligated to provide national treatment to *foreign performers* if (1) the performance takes place in another contracting state, (2) the performance is incorporated in a phonogram that is protected under Article 5 of the Convention, or (3) the performance is carried by a broadcast protected by Art. 6 of the Convention. If the U.S. becomes a contracting state, then a musician that performs on a recording made in the U.S. would qualify under both (1) and (2). See Rome Convention, *supra* note 2, art. 4. Under Article 5(1), Rome Convention countries must extend national treatment to *foreign record producers* if (1) the producer is a national of another contracting state, (2) the first fixation of the record was made in another contracting state, or (3) the phonogram was first published in another contracting state. (National treatment also applies if the record was first published in a non-contracting state, but was then published in a contracting state within 30 days.) However, signatories may opt out of the publication criterion or the fixation criterion. See Rome Convention, *supra* note 1, art. 5.

¹² The Rome Convention currently has 91 signatories, including most of the major markets for U.S. music (except China). See WIPO, *Contracting Parties, Rome Convention*, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17. However, because of several options available to signatory countries, see *supra* note 12, adherence to the Rome Convention does not guarantee full reciprocity in every case. For example, France requires distribution of public performance royalties only in the case of recordings made in France or another EU country. See Nathalie Piaskowski, *Collective Management in France*, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 192 & n.59 (Daniel Gervais ed., 2010); Law No. 92-597 on the Intellectual Property Code, as amended by Laws Nos. 94-361 and 95-4, art. L. 214–1, L. 214–2, (1995) (Fr.), available at www.wipo.int/wipolex/en/text.jsp?file_id=127148. For this reason, American recording companies, and most American recording artists, are unlikely to receive French public performance royalties even if the U.S. recognizes a full public performance right and joins the Rome Convention.

companies and performers to claim their share of performance royalties under the domestic laws of those countries. In practice, many foreign collecting societies (frequently referred to as Collective Management Organizations, or CMOs) have been willing to reciprocate even before being legally required to do so. For example, even under the limited public performance right created by §§ 106(6) and 114,¹³ SoundExchange has already obtained reciprocal agreements for the exchange of digital performance royalties with collecting societies in the United Kingdom (PPL), the Netherlands (SENA), Brazil (UBC) (covering artists only), Spain (AIE) (artists only), and Mexico (SOMEXON). Some other foreign CMOs allow individual artists and record labels to register with them directly.¹⁴ Even among the Rome Convention countries, the laws and collecting society practices pertaining to public performance royalties are not identical. Because of these differences, individual collecting societies in each country negotiate reciprocal arrangements with foreign societies on a case-by-case basis.¹⁵

Although the rule of national treatment also applies to signatories of the WIPO Performances and Phonograms Treaty (WPPT)¹⁶—a treaty which the U.S. has joined—countries are permitted to “opt out” of specific provisions through the reservations process, and the U.S. has opted out of the public performance right under Art. 15(3), except with respect to certain digital transmissions.¹⁷ Accordingly, to this extent national treatment does not

¹³ 17 U.S.C. § 106(6) (2002); 17 U.S.C. § 114 (2009).

¹⁴ *Collect Foreign Territory Non-Terrestrial Performance Royalties*, <http://a2im.org/2010/02/09/collect-foreign-territory-non-terrestrial-performance-royalties/> (last visited Mar. 4, 2011); M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 75–76 (10th ed. 2007).

¹⁵ See, e.g., REGISTER OF COPYRIGHTS, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS, 198–99, 205 (Comm. Print 1978) (describing lack of reciprocity between several Rome Convention countries due to differences in performance rights legislation).

¹⁶ See WIPO Performances and Phonograms Treaty art. 4, Dec. 20, 1996, S. Treaty Doc. No. 105–17 available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPPT].

¹⁷ The United States’ instrument of ratification of WPPT provides:

Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.

apply,¹⁸ and other WPPT countries can, and do, withhold performance royalties to the extent that the U.S. does not materially reciprocate.¹⁹

As the U.S. public performance right is expanded to accompany a wider array of public performances, this will trigger reciprocity with respect to larger amounts of foreign royalties that have heretofore been withheld. The next section attempts to assess the amounts at stake, and how they might influence the design and implementation of the expanded performance royalty.

B. How Much is at Stake?

The magnitude of the worldwide public performance royalties attributable to U.S. recordings is unclear. It has been reported that the total worldwide performance royalties paid to record producers and performers in 2007 was \$1.2 billion.²⁰ According to one source, some 60 percent of the recorded music performed worldwide is attributable to U.S. record companies and recording artists.²¹ Others have estimated that U.S. performers and producers forego \$70–100 million per year in foreign performance royalties that are withheld by foreign collecting societies due to lack of reciprocity.²² Another source puts the figure vaguely at \$600

the United States of America (Sept. 14, 1999), available at http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

¹⁸ WPPT, *supra* note 17, art. 4(2).

¹⁹ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST INDUSTRIES 14 (Feb. 26, 2010), available at www.gao.gov/new.items/d10428r.pdf.

²⁰ PRICEWATERHOUSE COOPERS, VALUING THE USE OF RECORDED MUSIC 52 (2008), http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf.

²¹ *Performers and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 103rd Cong. 1st Sess. 40 (1993) [hereinafter *1993 Hearings*] (statement of Jason S. Berman, President, RIAA). Another source reports that 40% of music distributed worldwide comes from the United States. Joshua D. Levine, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 Seton Hall Legis. J. 624, 643–44 (1996). It seems likely that U.S. recordings make up a similar percentage of worldwide public performances.

²² *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 1st Sess. 36 (2009) (statement of Paul Almeida, President, AFL-CIO); Keith Holzman, *Performance Royalties*, http://www.musicbizacademy.com/articles/kh_royalties.htm (last visited Mar. 3, 2011) (Register of Copyrights Mary Beth Peters estimates \$70 million); *Public Performance Right for Sound Recordings (Fact Sheet)*, <http://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings> (estimating \$100 million). In 1991, Jay Berman of the

million “over the last several years.”²³ The wide disparity in these estimates may result from any of several factors: the use of questionable or out-of-date data, exaggeration by advocates of the expanded performance right, currency fluctuations, differences in collecting and reporting mechanisms (e.g., where performance royalties from audiovisual transmissions may be lumped in with those from audio transmissions, or where delayed distributions of amounts previously held back may have artificially inflated the amounts distributed in a subsequent year)²⁴, or the sheer difficulty of compiling worldwide data. Also, sources providing figures in the lower range may be netting the incoming royalties against outgoing royalties that will be owed to foreign record companies and foreign performers under reciprocity arrangements, while those in the higher range may be focusing on the loss to U.S. performers and record companies, while ignoring the outflow from U.S. users to foreign rights holders.

According to older data presented at the 1993 congressional hearings on the performance right, the worldwide recording industry earned \$125 million in performance royalties during 1991, mostly from Europe.²⁵ (None, of course, was from the United States.) Due to rapid changes in European laws and collecting society practices during the last twenty years, the amount of performance royalties being generated in Europe has steadily increased.²⁶ At the same time, the partial reciprocity arising from the 1995 enactment of the digital audio performance right in the U.S. means that, after 1995, at least some of the foreign collecting societies that had previously withheld such royalties from U.S. rights holders began to

Recording Industry Association of America (RIAA) told Congress that the U.S. recording industry was being excluded from performance royalties in excess of \$120 million. *Digital Performing Rights: Hearing on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 1st Sess. (1995) (statement of Jason S. Berman, Chairman and CEO, RIAA); *Copyright Protection for Digital Audio Transmissions: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. 1st Sess. (1995) (statement of Jason S. Berman, Chairman and CEO, RIAA); Stephen Koff, *Recording Artists and Radio Stations Fight Over Royalties, Air Play and Spin*, http://www.cleveland.com/open/index.ssf/2010/06/recording_artists_and_radio_st.html (quoting John Simson, Executive Director of SoundExchange, setting the figure at \$70–100 million per year).

²³ KRASILOVSKY & SHEMEL, *supra* note 14, at 65.

²⁴ See AEPO-ARTIS, PERFORMERS’ RIGHTS IN EUROPEAN LEGISLATION: SITUATION AND ELEMENTS FOR IMPROVEMENT 26 (2009).

²⁵ *1993 Hearings*, *supra* note 21, at 30 (statement of Nicholas Garnett, Director General, IFPI). There was no indication of the nature of the public performances that generated these revenues.

²⁶ AEPO-ARTIS, *supra* note 24, at 27–31.

disburse them, leaving less money “on the table” in subsequent years.

Because some countries have been slow to develop webcasting, simulcasting, and interactive services, and others have been slow to apply their performance royalty requirements to such services,²⁷ the amount of these disbursements to U.S. shareholders has probably increased slightly in recent years, and that increase could become more substantial in the future. However, more recent data from Europe indicates that, in the aggregate, webcasting, simulcasting, and interactive services are generating much smaller royalties than terrestrial broadcasting and performances in public venues.²⁸ This would indicate, then, that the failure to extend the U.S. performance right to terrestrial broadcasting and performances in public venues has prevented U.S. rights holders from collecting the *vast majority* of performance royalties that have been generated in Europe.

In most European countries, performance royalties generated from performances other than transmissions (for example, performances in public venues) represent one-third to one-half of the total performance royalties collected for the use of sound recordings.²⁹ This suggests that expanding the U.S. performance right to restaurants, bars, clubs, and retail establishments that play recorded music, assuming that reciprocity is thereby triggered, will greatly increase the foreign royalties collected by U.S. performers and record producers.

On the basis of this rather disparate data, it is probably fair to say that U.S. rights holders are currently losing several hundred million dollars per year due to the lack of material reciprocity with major markets for U.S. recorded music. If the performance right is not expanded, much of this money will never reach U.S. shores. On the other hand, the loss suffered by U.S. *rights holders* does not necessarily translate to an equally large loss to the overall U.S. economy, since an expanded public performance right for sound recordings will also generate a small *outflow* of royalties from U.S. terrestrial broadcasters and public venues to foreign record companies and recording artists.

The case for an expanded public performance right will be strengthened if better data can be obtained. The ability to collect such data will be helpful in the future as well, when U.S. performers and record producers are eventually able to collect these royalties. That will happen, of course, only if and when the expanded public performance right comes to fruition.

It is also important to note that the expansion of sound recording performance rights to terrestrial broadcasts and, eventually, to other public

²⁷ AEPO-ARTIS, *supra* note 24, at 18–20, 26.

²⁸ AEPO-ARTIS, *supra* note 24, at 26.

²⁹ AEPO-ARTIS, *supra* note 24, at 27–31.

venues will impose new costs on users within the U.S. — users such as radio and television broadcasters, and the operators of public venues such as bars, clubs, retail establishments, and restaurants. Many, probably most, of these costs will indirectly be passed along to consumers, and some marginal businesses that cannot pass along the increased costs may be unable to continue operations. This has been a major political obstacle to expansion of the public performance right. The expansion of the performance royalty to encompass a much broader user base therefore must be done with sensitivity to the differences between users. A nonprofit college radio station, for example, should not be subjected to the same royalty as a large commercial radio operation. Under current law, similar disparities—between large and small webcasters, and between webcasters and satellite or cable broadcasters—have repeatedly required legislative resolution, as well as negotiated settlements, in the context of digital transmissions.³⁰ Thus, the expanded royalty scheme should discriminate carefully to avoid skewing the marketplace in favor of larger operators.

Policymakers, and ultimately the public, must decide if the benefits of the performance right outweigh these costs. The *foreign* royalties that will be generated by the expanded performance right do not impose costs on U.S. consumers and will produce a significant gain to U.S. creators as well as the overall U.S. economy. However, the royalties generated by public performances *within* the U.S. will simply shift wealth from one group (consumers and business owners) to another (the creators of recorded music).³¹ Whether this wealth shift is desirable depends on the value one places on the services of recording artists and record companies. While the prospect of major record labels making more money does not strike everyone as a good thing, it is important to keep several things in mind: (1) the royalty scheme can be structured so that a guaranteed share of the royalty will go directly to performers (as is partially true even under the

³⁰ Webcaster Settlement Act of 2009, Pub. L. No. 111–36, 111th Cong., 1st Sess. (June 30, 2009) (codified as amended at 17 U.S.C. § 114(f)(5)); Webcaster Settlement Act of 2008, 122 Stat. 4974, Pub. L. No. 110–435, 110th Cong., 2d Sess. (Oct. 16, 2008) (codified as amended at 17 U.S.C. § 114(f)(5)); Small Webcasters Settlement Act of 2002, 116 Stat. 2780, Pub. L. No. 107–321, 107th Cong., 2d Sess. (Dec. 4, 2002) (codified as amended at 17 U.S.C. § 114(f)); *see* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1491–94 (2010).

³¹ In addition, some small component of this wealth will leave the U.S., because it will be payable to foreign artists and record companies whose recordings are publicly performed in the U.S. This component, then, will not directly benefit U.S. consumers or creators. Because foreign recordings represent only a small share of the recordings publicly performed in the U.S., this outflow of funds will be dwarfed by the inflow of foreign royalties.

current version of § 114³²); (2) the major record labels have been, and continue to be, instrumental in obtaining performance rights for both producers and performers, and in developing methods for implementing the royalty scheme; (3) small independent record labels also benefit from the performance right; and (4) new technology and new business models are making it easier for performers to self-produce and self-distribute,³³ so that, in the future, even the label's share of the performance royalty is likely to offer benefits to performers.

III. CURRENT LAW

This section provides a brief overview of the most important aspects of the sound recording performance right under current law.

In the 1995 Digital Performance Rights in Sound Recordings Act (DPRSRA),³⁴ as amended in 1998, Congress recognized a narrow form of public performance rights in sound recordings. Under §§ 106(6) and 114,³⁵ the performance right applies only to digital audio transmissions—i.e., satellite radio, digital cable and satellite television music services, on-demand digital music streaming, and webcasting (or simulcasting, in the case of terrestrial radio stations that retransmit their programs over the Internet). The right does not apply to terrestrial radio (i.e., FCC-licensed AM or FM stations), or to performances in public venues such as bars, restaurants, clubs, and retail stores; all of these are currently exempt from the sound recording performance royalty.

The nonexempt digital services are divided into two categories: interactive and noninteractive.³⁶ Interactive services stream music on demand; thus, the listener selects the particular recording he or she wishes to hear at a particular time. The recording industry sought and obtained greater control over these services, on the theory that they have greater

³² Under § 114, specified percentages of the statutory licensing fees must be paid to featured and non-featured performers. 17 U.S.C. § 114(g)(2). In contrast, the allocation of interactive licensing fees is determined by the individual performers' contracts with the record companies. *Id.* § 114(g)(1).

³³ The trend toward self-producing is international in scope. See Letter from Fédération Internationale des Musiciens to the European Commission, *Comments on the Notification Published 17 August 2001 (Ref: Case COMP/C2/38.014-IFPI)* ¶ 1.8 (Aug. 17, 2001), available at http://www.fim-musicians.com/eng/pdf/7_1_2_2_2.pdf.

³⁴ Pub. L. 104-39, 109 Stat. 336 (1995).

³⁵ 17 U.S.C. §§ 106(6), 114.

³⁶ See 17 U.S.C. § 114(d)(2)–(3).

potential to displace record sales.³⁷ Accordingly, in order to obtain a public performance license to perform a recording, the interactive service must negotiate directly with the record company.³⁸ In contrast, noninteractive services, such as satellite radio and most webcasters, are more like traditional radio, and have less potential to displace record sales; accordingly, they are eligible for a compulsory license under § 114(f). (This arrangement prevents the record companies from exercising a veto over noninteractive licensing requests; this alleviates the concerns of songwriters and music publishers.)³⁹ The Copyright Royalty Board (CRB) conducts proceedings to set the statutory rate; proceedings to date have been lengthy and complex, and, in some cases, controversial enough to require congressional intervention. Separate royalty schemes have been developed for different kinds of services; in some cases, the royalty is based on gross revenues, while in others it is a flat fee per performance, based on audience size. Once the rates have been set, any noninteractive service can perform sound recordings if it registers for the license with the U.S. Copyright Office, satisfies certain other statutory conditions, and pays the statutory royalty. The statutory royalty is paid to SoundExchange, a nonprofit entity spun off from the Recording Industry Association of America (RIAA), which distributes the royalties to record companies and recording artists.⁴⁰

In the case of interactive services, the negotiated royalty is paid directly to the record companies. Because the law does not require the record company to share the royalty with performers, a performer's right to share in the royalty depends on his or her recording contract.⁴¹ In contrast, for noninteractive services, § 114(g) requires the compulsory license fee to be split as follows (a duty carried out by SoundExchange): 50% to the record company that produced the recording, 45% to the performer(s) featured on the recording (an amount that must be calculated on a per-recording basis, reflecting the actual recordings that were played), and 5% to escrow

³⁷ KOHN & KOHN, *supra* note 30, at 1468.

³⁸ Because § 106(6) designates the digital performance right as an exclusive right, and § 114(d)(2) specifies that the § 114(f) compulsory license applies only to non-interactive digital performances, only the latter fall short of being true exclusive rights that are subject to voluntary negotiation. Even the right to voluntarily negotiate interactive licenses is limited; however, § 114(d)(3) limits the right of the record companies to enter into exclusive interactive licenses.

³⁹ See, e.g., *Digital Performance Rights: Hearing on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. (1995) (Statement of Wayland Holyfield, ASCAP) (expressing "gatekeeper" concerns).

⁴⁰ See generally KOHN & KOHN, *supra* note 30, at 1468–1504 (2010).

⁴¹ 17 U.S.C. § 114(g)(1); DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 310 (2009).

accounts managed on behalf of nonfeatured performers. The 5% share for nonfeatured performers is split equally between two independently administered escrow accounts, one for musicians and one for vocalists, and payments are disbursed from these accounts to nonfeatured performers “who have performed on sound recordings” (not necessarily the specific sound recordings that generated the royalties).⁴² In order to make accurate disbursements to featured performers and record companies, SoundExchange needs to identify the specific recordings that have been played by each music service, and how often they have been played. Accordingly, to the extent it is technically feasible, each audio transmission under the compulsory license must be accompanied by the identifying information encoded on the sound recording (including, *inter alia*, the title of the recording and the names of the featured performers).⁴³

IV. CRITIQUE OF CURRENT LEGISLATIVE PROPOSALS

In 2008, the Department of Commerce urged Congress to expand the § 114 compulsory license to include terrestrial radio transmissions, arguing that this would: (1) level the playing field between satellite, Internet, and terrestrial broadcasters, (2) increase the incentives for performers and record companies to produce new recordings, and (3) make it possible for U.S. record producers and performers to receive substantial amounts of foreign performance royalties that have previously been held back by foreign PROs.⁴⁴ Public performance royalties would also replace some of the mechanical royalties that record producers and performers have lost due to the proliferation of unauthorized downloads.⁴⁵

The proposed Performance Rights Act (PRA)⁴⁶ would extend public performance rights to terrestrial radio broadcasts. Although the House and

⁴² 17 U.S.C. § 114(g)(2).

⁴³ *Id.* § 114(d)(2)(A)(iii).

⁴⁴ See Letter from Cameron F. Kerry, General Counsel, U.S. Department of Commerce, to the Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary (April 1, 2010), *available at* <http://www.ogc.doc.gov/ogc/legreg/letters/111/S379Apr0110.pdf>.

⁴⁵ The expanded public performance right would not replace the mechanical royalties lost by music composers and publishers as a result of unauthorized downloads; however, this is only because music composers and publishers *already* receive public performance royalties. Arguably, their performance royalties have played an important role in diminishing the impact of their lost mechanical royalties, whereas the loss of mechanical royalties by record companies affects their most important revenue stream.

⁴⁶ H.R. 848, 111th Cong. (2010); S. 379, 111th Cong. (2010).

Senate Judiciary Committees approved their respective versions of the legislation in 2010, and the legislation had the support of the Obama Administration, neither bill proceeded to a floor vote. They are, however, likely to be revived in the 112th Congress.⁴⁷

The House (H.R. 848) and Senate (S.379) versions of the bill are not identical, but both include the following provisions:

The PRA will make the § 106(6) right applicable to all audio transmissions, including not only satellite and Internet transmissions, as under current law, but also terrestrial broadcasts.⁴⁸ However, the right will *not* extend to other public performances of recorded music, such as those in clubs, restaurants, bars, and retail or other business establishments. Thus, the PRA leaves intact the § 114(d) exemption for transmissions *within* business establishments and transmissions *to* business establishments for use in the ordinary course of business.⁴⁹

The PRA also provides relief to smaller terrestrial broadcasters, giving them the option to pay, in lieu of the statutory royalty that would otherwise apply to its over-the-air nonsubscription broadcasts, an annual flat fee determined by their gross revenues.⁵⁰ As discussed below, the Senate version of this proposal offers a bit more relief to the lowest-grossing broadcasters. Although both bills limit this relief to terrestrial broadcasters, expanding this relief to small webcasters as well would foster the growth and diversity of webcasting, especially in less commercial “niche” markets, thus increasing the opportunities for artists (and songwriters) to find an audience.

Under transitional provisions, the new statutory royalty for terrestrial stations does not take effect for one year after enactment (three years, for stations with gross revenues of less than \$5,000,000 during the year immediately preceding enactment).⁵¹ This delay in implementation allows some time for broadcasters and rights holders to develop systems for tracking usage, and for collecting, allocating, and disbursing royalties.⁵²

Outright exemptions apply to eligible nonsubscription transmissions of

⁴⁷ The Obama Administration reiterated its support for the legislation in its recommendations to the 112th Congress. ADMINISTRATION’S WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGISLATIVE RECOMMENDATIONS 3, 17 (2011).

⁴⁸ H.R. 848 § 2; S. 379 § 2.

⁴⁹ 17 U.S.C. § 114(d)(1)(C)(ii), (iv).

⁵⁰ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

⁵¹ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

⁵² Counterpoint Systems is a United Kingdom company that performs this service in several countries. *See generally* COUNTERPOINT SYSTEMS, <http://www.counterp.com> (last visited Mar. 4, 2011).

(1) religious services and (2) incidental uses of musical recordings.⁵³

The rates and terms established by the Copyright Royalty Judges must also include the option of a per-program license for terrestrial broadcast stations that make “limited feature uses of sound recordings.”⁵⁴

The PRA also makes a significant change in the way that performance royalties are allocated to *nonfeatured* performers in the case of voluntarily negotiated (i.e., nonstatutory) audio transmission licenses, which are the licenses applicable to interactive transmissions. Under current law, a nonfeatured performer is entitled to receive a share of these royalties from the record company *only* if and to the extent that the performer’s contract with the record company calls for such payments; under this system, most nonfeatured performers receive no payments at all.⁵⁵ Under the PRA, the record company must deposit 1% of the negotiated license fee for each recording into the Intellectual Property Rights Distribution Fund of the AFM and AFTRA (or any successor entity), which will then distribute the fee to the nonfeatured performers who have performed on sound recordings⁵⁶ (presumably using the same system they currently employ for distributing the nonfeatured performers’ share of the *statutory* license fees).⁵⁷ Along with these deposits, the record company must indicate the amounts attributable to each licensee, and, for each sound recording performed, the following information (but only if the information is included in the licensee’s reports):

- (1) The name of the artist;
- (2) The International Standard Recording Code (ISRC) of the sound recording;⁵⁸
- (3) The title of the sound recording;
- (4) The number of times the sound recording was transmitted; and
- (5) The total amount of receipts collected from that licensee.

⁵³ H.R. 848 § 3(b); S. 379 § 3(b).

⁵⁴ H.R. 848 § 4; S. 379 § 4.

⁵⁵ 17 U.S.C. § 114(g)(1)(B).

⁵⁶ H.R. 848 § 6; S.379 § 6.

⁵⁷ Cf. 17 U.S.C. § 114(g)(2)(B) (using the same statutory language). The AFM/AFTRA Fund’s distribution methodology is described at <http://www.raroyalties.org/digital/guidelines.html>.

⁵⁸ The ISRC is an international ISO standard (ISO 3901) that identifies particular sound recordings and music videos by their unique 12-character alphanumeric designations. The ISRC registration authority is the International Federation of the Phonographic Industry (IFPI). See generally ISRC – INTERNATIONAL STANDARD RECORDING CODE, <http://www.usisrc.org/> (last visited Mar. 4, 2011).

The AFM/AFTRA Fund will then distribute 50% of the deposited fee to nonfeatured vocalists and 50% to nonfeatured musicians (after deducting reasonable costs).⁵⁹ Thus, under the PRA, nonfeatured performers will be guaranteed at least a small share of the negotiated performance royalties, even if their individual contracts do not call for such payments.

However, the PRA does not impose on licensees any legal *duty* to provide the information listed in (1)–(5) above, even though the AFM/AFTRA fund will need at least some of this information in order to make accurate distributions to the nonfeatured performers. And if the licensees omit any of this information from their reports to the record company, then the record company does not have to provide it to the AFM/AFTRA Fund. In other words, the record company has no affirmative obligation to assist the AFM/AFTRA Fund in obtaining this information, or any other information, for that matter.⁶⁰

Rather than impose such a duty on *licensees*, the PRA requires the *record company* (the “sound recording copyright owner”) to “use reasonable good faith efforts to include in all relevant licenses a requirement to report” this information.⁶¹ There are potential problems with this approach: (1) the record company has no incentive to make a “good faith” effort to include such provisions in its negotiated licenses with users; (2) even if the record company includes this reporting requirement in a negotiated license, it has no incentive to enforce that requirement; and (3) major record labels, and larger commercial licensees, will be in a better position to comply with these reporting provisions than smaller labels (or self-producing recording artists) and smaller licensees. Thus, the AFM/AFTRA Fund may not receive all of the information needed to make distributions, which may cause the Fund to incur additional expenses in order to make accurate distributions; these expenses will further reduce the total funds available for distribution. Thus, while the PRA’s new distribution method may be better than the current method (which allows the record companies to use their superior bargaining power to retain these royalties), it still falls short of guaranteeing that nonfeatured performers will receive their legal share.

The PRA makes no change to the current rule regarding *featured* performers’ rights to receive a share of a negotiated (i.e., interactive) performance royalty. Thus, their shares will still be determined by the terms of their recording contracts, meaning that in most cases the record

⁵⁹ H.R. 848 § 6; S.379 § 6.

⁶⁰“The sound recording copyright owner shall not be required to provide any additional information to the Fund . . .” S. 379 § 6(1); H.R. 848 § 6(1).

⁶¹ H.R. 848 § 6(1); S. 379 § 6(1).

company will retain their shares.⁶²

If a record company and a terrestrial broadcaster enter into a negotiated license that covers transmissions that are also eligible for the § 114(f) statutory license (that is, the compulsory license that applies to *noninteractive* transmissions), then the statutory license distribution mechanism for featured and nonfeatured performers takes precedence over the mechanisms described above. In other words, the broadcaster must pay 50% of the total negotiated royalty to the agent designated to receive statutory royalties under § 114(f) (i.e., SoundExchange), which then distributes them among featured and nonfeatured performers in the same manner as statutory royalties are distributed under current law (2-1/2% to nonfeatured vocalists, 2-1/2% to nonfeatured musicians, and 45% to featured artists).⁶³

Both bills recite (repeatedly) the same directive found in the current statute⁶⁴—that sound recording performance royalties shall not be considered in any governmental proceeding⁶⁵ pertaining to royalties for the public performance of musical compositions, which “shall not be reduced or adversely affected in any respect as a result of the rights granted by § 106(6).”⁶⁶ Clearly intended to address the objections of songwriters and music publishers, this language underscores the continuing presumption that the underlying musical works deserve greater protection than the recorded performances of those works. Neither bill endorses a corollary rule for protecting recording artists—that the performance royalties payable to songwriters and publishers should not be considered in the determination of performance royalties for sound recordings.

A. Provisions Unique to the House Bill

As an alternative to the statutory royalty, the House bill allows smaller terrestrial broadcast stations the option of paying an annual flat fee based on their annual gross revenues, according to the following schedule:

Annual Gross Revenues

Annual Fee

⁶² S. 379 § 6(1); H.R. 848 § 6(1).

⁶³ 17 U.S.C. § 114(f)(2)(B)–(D).

⁶⁴ *Id.* § 114(i).

⁶⁵ The new bills add the mysterious phrase “or otherwise.” H.R. 848 § 5(a), (c); S. 379 § 5(a), (c). Surely Congress cannot intend that parties engaged in voluntary licensing negotiations for the use of recorded musical compositions will be legally barred from considering the impact of the sound recording royalty.

⁶⁶ S. 379 § 5; H.R. 848 § 5.

<\$100,000	\$500
At least \$100,000 but < \$500,000	\$2,500
At least \$500,000 but < \$1,250,000	\$5,000 ⁶⁷

In the case of public broadcasting entities,⁶⁸ the fees are the same, except that they top out at \$1,000 per year for a station with annual gross receipts of \$100,000 or more.⁶⁹

Section 7 of the House bill expresses congressional intent not to interfere with the public interest obligations of broadcasters to local communities, and Section 8 instructs the Copyright Royalty Judges, in setting statutory rates, to consider their effect on the diversity of broadcasters as well as performers and record labels, specifically:

- (1) Religious, minority-owned, female-owned, small, and noncommercial broadcasters;
- (2) Non-music programming, including local news and information programming; and
- (3) Religious, minority or minority-owned, and female or female-owned royalty recipients.⁷⁰

B. Provisions Unique to the Senate Bill

Like the House bill, S. 379 allows smaller terrestrial broadcast stations to pay an annual flat fee instead of the statutory royalty, and the amount of the fee depends on the station's annual gross revenues. However, the Senate version of the fee schedule offers greater relief to stations grossing less than \$50,000:

<u>Annual Gross Revenues</u>	<u>Annual Fee</u>
<\$50,000	\$100
At least \$50,000 but <\$100,000	\$500
At least \$100,000 but < \$500,000	\$2,500
At least \$500,000 but < \$1,250,000	\$5,000 ⁷¹

As in the House bill, the same fee schedule applies to public

⁶⁷ H.R. 848 § 3(a)(1).

⁶⁸ These are defined in 17 U.S.C. § 118(f).

⁶⁹ H.R. 848 § 3(a)(1).

⁷⁰ *Id.* § 8.

⁷¹ S. 379 § 3(a)(1).

broadcasting entities, but it tops out at \$1,000 for stations with annual gross receipts of \$100,000 or more.⁷²

Under current law, digital transmissions are eligible for statutory licensing only if they are “accompanied, if technically feasible, by the information encoded on that sound recording, if any,” which identifies the title of the sound recording, the featured recording artist, and “related information, including information concerning the underlying musical work and its writer.”⁷³ This information facilitates the task of identifying the parties who are entitled to share in the statutory royalties — the owner of the sound recording copyright, the performers, and the copyright owner(s) of the underlying musical work. The Senate bill, in a provision captioned “Eliminating Regulatory Burdens for Terrestrial Broadcast Stations,” eliminates this requirement for nonsubscription and noninteractive broadcast transmissions.⁷⁴ In other words, the Senate bill eliminates the information-encoding requirement for most terrestrial broadcasters. This recognizes that, when the means of transmission is not digital, the encoded information is less useful because it cannot be transmitted.

However, neither the House nor the Senate version of the bill imposes any duty on terrestrial broadcasters to maintain records of this information in any other manner. While this may indeed reduce the regulatory burden on these users, it increases the burden on the record companies and performers—together with their agent SoundExchange—who need this information in order to ensure that the statutory royalties are properly allocated among the rights holders. This creates an information gap, and some mechanism must therefore be developed to fill that gap. It will not be possible to allocate statutory royalties accurately unless the licensees are required to maintain logs of their musical transmissions and deliver these records to the parties charged with allocating the royalty. This requirement may be burdensome, especially on smaller stations. However, these stations are already required to maintain logs — at least periodically — under their blanket licensing arrangements with ASCAP and BMI. If ASCAP and BMI are willing to cooperate with SoundExchange, it may only be necessary to add additional information to those logs, identifying the particular sound recordings (as opposed to merely the musical compositions).⁷⁵ Although

⁷² *Id.*

⁷³ 17 U.S.C. § 114(d)(2)(A)(iii).

⁷⁴ S. 379 § 2(d).

⁷⁵ The accuracy of the data currently being collected for digital transmissions has been questioned, which suggests that future legislation on neighboring rights should place a greater priority on tracking mechanisms, for both digital and terrestrial broadcasts. See Christopher Herot, *John Simson of SoundExchange at Harvard Law School*, CHRISTOPHER

some of the burden of tracking usage may inevitably fall on the recording industry, other countries have imposed recordkeeping requirements on radio broadcasters that are far more rigorous than anything contemplated by the PRA.⁷⁶

V. LOOKING AHEAD: PUBLIC VENUES

Even if the PRA becomes law, there will still be a significant gap between the public performance rights of performers and record producers and those of songwriters and publishers. Most of the public performances that fall into this gap are those which do not involve either digital or terrestrial transmissions of sound recordings — in other words, on-site performances of sound recordings in public venues, such as clubs, bars, restaurants, and retail establishments, where the recorded music may serve either as background music or as featured entertainment.

Under current law, public establishments are in the same position as terrestrial broadcasters. To obtain the right to perform musical works, they must negotiate with each of the three PROs representing songwriters and publishers to obtain blanket licenses covering the entire catalog of music controlled by that PRO. If they wish to perform recordings of these compositions (as opposed to bringing in live musicians), they do not need the consent of the record companies or recording artists.⁷⁷

The PRA will eliminate this exemption for terrestrial broadcasters, but retain it for public venues. While this is typical of incremental legislative reform, there is no principled justification for continuing to exempt these businesses, and eventually they, too, should be required to pay for the use of these recordings.⁷⁸

HEROT'S WEBLOG (last visited Apr. 7, 2011), <http://herot.typepad.com/cherot/2008/04/john-simson-of.html> (reporting on lecture by John Simson, Executive Director of SoundExchange, who estimates that sampling methods used by ASCAP and BMI missed 41% of artists and 26% of titles).

⁷⁶ *ReSound Engages Nielsen BDS to Track Commercial Radio Music Airplay in Canada* (Sept. 27, 2010), http://www.resound.ca/en/docs/press_release_2010-09-27.pdf (noting that Canada requires radio stations to report radio logs 28 days per year, while mandatory 365-day reporting is the norm in most countries); COPYRIGHT BOARD OF CANADA, STATEMENT OF ROYALTIES TO BE COLLECTED BY SOCAN, RE:SOUND, CSI, AVLA/SOPROQ AND ARTISTI IN RESPECT OF COMMERCIAL RADIO STATIONS ¶¶330–31 (2010), <http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf>.

⁷⁷ See 17 U.S.C. § 114(a) (stating that the public performance right under 17 U.S.C. § 106(4) does not apply to sound recordings).

⁷⁸ The Register of Copyrights has consistently adopted this position. See, e.g., *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 115 (2007) (Statement of

Expansion of the right to public venues would raise some of the same questions that must be resolved for terrestrial broadcasters. How will the rates be set—by compulsory license, or through individual or collective negotiation? The typical use of recorded music in public venues is more analogous to terrestrial broadcasting or noninteractive digital music services than it is to interactive music services, because it usually does not allow the listeners to dictate which songs will be played when. Like terrestrial radio, it is also more ubiquitous than interactive music services and does not provide the kind of perfect listening experience that threatens to displace record sales. Therefore, Congress would almost certainly adopt the compulsory license model.

With respect to recordkeeping, however, the expansion of the performance right to public venues will be more problematic than its expansion to terrestrial radio. In order to allocate royalties (compulsory or negotiated) among the various rights holders, the agent in charge of collecting and disbursing those royalties (SoundExchange or a similar entity) will need some way to determine which recordings have been played, and how often. If the burden of monitoring usage falls on the rights holders and their agent, this will be even more burdensome than the task of monitoring radio broadcasts. It would be virtually impossible to monitor thousands of individual venues, geographically disparate, with widely varying music usage (e.g., dance clubs versus grocery stores), to the degree that would be necessary to develop a database from which broader nationwide usage could be extrapolated. How, then, will royalties be allocated? The PROs for songwriters and music publishers do not require venue operators to maintain records of the music they play, relying instead on radio airplay and other proxies to estimate frequency of performance.⁷⁹ Under the PRA as currently proposed, however, terrestrial broadcasters will not be required to maintain records of the recordings they play. Thus, the convenient “radio proxy” will not be available. As suggested earlier, this deficiency in the PRA should be addressed, so that terrestrial broadcasters are required to engage in at least some degree of recordkeeping in order to make allocations of the sound recording royalty as accurate as possible. Alternatively, operators of large commercial venues (for example, large retail chains) could be subject to a limited recordkeeping requirement—perhaps limited to a few days per year—and their records could be used as proxies for the smaller venues. Collecting societies outside the United

MaryBeth Peters, Register of Copyrights); *Internet Streaming of Radio Broadcasts: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004) (Statement of David Carson, General Counsel, United States Copyright Office).

⁷⁹ KOHN & KOHN, *supra* note 30, at 1281.

States have developed their own methods for estimating usage of sound recordings by public venues as well as broadcasters;⁸⁰ these methods may be useful models for the United States.

Under their blanket licensing arrangements with ASCAP, BMI, and SESAC, public venue operators normally pay a license fee that reflects their revenues and the nature of their business (because music plays a greater role in some businesses than others—e.g., dance clubs versus grocery stores). If the compulsory license is extended to public venues, then the CRB will need to take similar factors into consideration by establishing different rate schedules for different kinds of establishments. There is tremendous variation in the nature of the public venues that perform music, the ways in which they use that music, and the extent to which that music contributes to their gross revenues. In contrast, most digital music services and terrestrial radio broadcasters perform the sole function of delivering audio performances to listeners. The current compulsory licensing scheme for digital audio services, and the proposed extension of that scheme to terrestrial broadcasters, distinguishes between services only on the basis of revenues and audience size; this is a nearly “one size fits all” approach that simply will not work for public venues.⁸¹

VI. PROBLEMS IN SETTING RATES

A. Procedures

To the extent that the CRB or the courts become involved in setting the rates for public performance royalties, § 114(i) of the current law⁸² and the corresponding provisions in both PRA bills provide that the public performance rates for sound recordings shall not be considered in any proceeding to adjust the public performance rates for musical compositions. This language responds to the long-standing concern that any royalties that become payable for sound recordings will reduce the royalties paid for

⁸⁰ For the methods used in France by the Société Civile des Producteurs Phonographiques (SCPP), see *FAQ*, SCPP, <http://www.scpp.fr/SCPP/Home/LASCPP/questionsfr%C3%A9quentes/tabid/240/Default.aspx> (last visited Apr. 7, 2011).

⁸¹ In France, for example, the Société Civile des Producteurs de Phonogrammes en France (SPPF) calculates royalties differently for state-owned radio, private radio (further differentiated according to the amount of nonmusical programming), television stations, discotheques and other recreational facilities, and background music. Code de la Propriété Intellectuelle, Rémunération Equitable Dispositions Réglementaires SPPF [hereinafter SPPF Remuneration], <http://www.sppf.com/legislation.php?rub=2>.

⁸² 17 U.S.C. § 114(i).

musical compositions. It is questionable, however, whether rate-setting bodies should be constrained in this way.

Neither § 114(i) nor the corresponding provisions in the PRA addresses the opposite scenario: whether the performance rates payable for musical compositions should be considered in any proceeding to set the rates payable for sound recordings. In fact, in every congressional hearing addressing the performance right in sound recordings, and even in the international discussions that led to the Rome Convention, opponents of the performance right in sound recordings have repeatedly argued that broadcasters and other users already pay for the rights in the musical works, and cannot afford to pay for both sets of rights.⁸³ This illustrates the widespread perception that authors' rights deserve priority over neighboring rights. This perception is rooted in the same thinking that prevented the United States from recognizing any copyright at all in sound recordings until 1971—that sound recordings are not creative works of authorship, but mere mechanical fixations. This same perception is responsible for sound recording rights being labeled mere “neighboring rights” in most other countries, where they have generally received a shorter term of protection than the term applicable to copyrighted works.⁸⁴

Under current law, the rate-setting procedure for § 114(f) compulsory licenses for performing sound recordings is completely separate from the procedure that establishes the royalty for performing the underlying musical compositions.

For *musical compositions*, public performance royalties in the United States are negotiated between the users (terrestrial broadcasters, digital

⁸³ See, e.g., RICKETSON & GINSBURG, *supra* note 3, at 1221; *Performance Rights Act, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 142-43, 153-54 (2009) (Testimony and Prepared Statement of Steve Newberry, CEO of Commonwealth Broadcasting); *Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 71-79 (1993) (Testimony and Prepared Statement of Edward O. Fritts, National Ass'n of Broadcasters); *Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin of Justice of the H. Comm. on the Judiciary*, 95th Cong. 82 (1978) (Testimony of John Bayliss, Combined Communications Corp.); John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global-Harmonization – And the Need for Congress to Get in Step with a Full Public Performance Right in Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1053 & nn. 52-54 (2002).

⁸⁴ In the European Union, for example, the copyright term is the life of the author plus 70 years, while the term of protection for live performances and sound recordings is only 50 years. See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection for Copyright and Certain Related Rights, OJ L 372, 12-18 (Dec. 27, 2006) [hereinafter Directive 2006/116/EC].

services, and operators of public venues such as clubs and restaurants) and the three performing rights organizations (PROs) that provide collective representation for songwriters and music publishers—ASCAP, BMI, and SESAC. The degree of negotiation varies from individually negotiated deals to take-it-or-leave-it blanket licenses (although the blanket licensing fees of ASCAP and BMI can be challenged in the federal “rate court” in the Southern District of New York).⁸⁵ For noninteractive audio streaming services (such as webcasting and satellite radio), the royalty rate is, in practice, based on a percentage of revenue, subject to minimums. Smaller services simply pay the rate required under standard licenses available on the PRO websites, while larger users such as Yahoo! and MySpace negotiate separately with the PROs.⁸⁶ For interactive streaming and bundled services, such as those offered by Napster, Rhapsody, MySpace, and Yahoo!, negotiations between the users and ASCAP failed, and resolution required the intervention of the courts as well as the CRB.⁸⁷

For *sound recordings*, current law calls for a public performance royalty only in the case of digital audio transmissions (specifically, those which are not altogether exempt from the § 106(6) right).⁸⁸ Under the DPRSRA, the rate-setting method depends on the nature of the service.⁸⁹ In the case of *interactive* music services (those that stream listener-selected recordings on demand), record companies negotiate directly with the services. While the negotiated royalties are not publicly disclosed, they are generally structured as a percentage of advertising revenue or subscription fees, pro-rated for each recording, and based on the number of plays. In case the music service fails to generate sufficient revenue, some deals call for a per-play minimum (usually a fraction of a penny).⁹⁰ In the case of *noninteractive* satellite radio and webcasting services, the compulsory license under § 114(f)⁹¹ applies, and the royalty rate is determined by the CRB.⁹²

Thus, under current law, the performance royalty rates for the use of sound recordings and musical works in digital transmissions are set independently, using two completely different methods—collective

⁸⁵ See KOHN & KOHN, *supra* note 30, at 1263.

⁸⁶ PASSMAN, *supra* note 41, at 246–47.

⁸⁷ *Id.* at 247–49; KOHN & KOHN, *supra* note 31, at 753–64, 776–80, 1269–71; *see also* 37 C.F.R. § 385 (2011).

⁸⁸ The exemptions are listed in 17 U.S.C. § 114(d)(1). Under current law, they include, *inter alia*, terrestrial broadcasts and certain transmissions used in business establishments. The Performance Rights Act would repeal the exemption for terrestrial broadcasts.

⁸⁹ 17 U.S.C. §§ 106(6), 114.

⁹⁰ PASSMAN, *supra* note 41, at 167.

⁹¹ 17 U.S.C. § 114(f).

⁹² 17 U.S.C. §§ 803–805.

negotiation on the one hand (subject to judicial appeal), and administrative rulemaking on the other. This means that there is no place in the rate-setting process to consider the cumulative burden on the music services, and how that burden should be split between the different groups of rights holders. Because the fees are set independently, there is no single body with the authority to determine whether this outcome makes sense or to make the necessary changes if it does not.

Under the proposed Performance Rights Act, the compulsory license under § 114(f) would apply to terrestrial broadcasters, who would then pay the statutory rate for sound recordings, and the blanket license fees for musical works.⁹³ As in the case of digital music services, the rates would be set independently, and would bear no rational relationship to one another; once again, § 114(i), if not repealed, would preclude consideration of the sound recording royalty in any governmental proceeding (e.g., a judicial appeal) to determine the royalty for musical works.

Ideally, rate-setting legal bodies should be free to consider both royalties in every rate-setting proceeding, to ensure that the cumulative burden on music services and broadcasters is reasonable and not subject to major fluctuations over time. Rather than have two separate rate-setting processes for non-interactive services such as webcasters, terrestrial radio, and satellite radio, there could be a single process—either a collective negotiation or an administrative proceeding by the CRB. The negotiation process could involve joint negotiations, with the record companies, performers, songwriters, and publishers on one side, and the music services and broadcasters on the other. If the royalties for each user group were entirely independent, however, the joint negotiation would be cumbersome and ultimately ineffective, because it would truly be a three-way negotiation. In contrast, if Congress were to legislate that the royalty rates for musical works and sound recordings must be equal, or that they must maintain some other pre-set ratio (e.g., 2/3 to the songwriters and publishers, and 1/3 to the record company and performers, or vice versa), this would eliminate conflict between the two groups of rights holders, in which case the joint negotiation process could be highly effective. (The question of the relative ratios of the two royalties is discussed in the next section.)

Alternatively, rate-setting could be left to separate negotiations between collective societies and users. Under this approach, record companies and performers, through their collective representative (currently SoundExchange, whose passive role in the compulsory licensing scheme would have to be transformed into an active role as a negotiator, unless the

⁹³ H.R. 848; S. 379.

RIAA undertakes this role directly), would engage in the same negotiation process, with the same option for judicial or administrative review, that is currently used to establish the performance royalty for musical works (where the rights holders are represented by ASCAP, BMI, and SESAC, depending on their chosen affiliation). Under this approach, however, the failure of one group of rights holders to reach an agreement with users could stymie the ability of the other group to move forward under their own agreement. In other words, if the songwriters and publishers reached an agreement with broadcasters, but negotiations between the broadcasters and the record companies stalled, the broadcasters would not be able to play recordings of the music they had licensed until the negotiating impasse was resolved. Thus, a system of separate negotiations does not appear to be feasible.

If the law were changed so that the rate for public performances of musical compositions were set administratively, by the CRB, rather than through blanket licenses appealable to the rate court, it is possible that the rates for musical compositions and for sound recordings could be set through separate administrative proceedings. Under § 114(i) and its equivalents in the PRA, the proceeding to set sound recording royalties could take account of musical composition royalties, but not vice versa. However, it would be impossible for a single tribunal, while engaged in setting the rate for the musical composition royalty, to completely ignore the sound recording royalty it had established, albeit in a separate proceeding. Thus, the separation envisioned under § 114(i) would be unsustainable. Even if § 114(i) were repealed, holding two separate rate-setting proceedings would be inefficient. In the United Kingdom, where tariffs for public performances of musical compositions and sound recordings are set through separate proceedings, the most recent tariff announced by the neighboring rights society (Phonographic Performances Ltd, or “PPL”) went into effect immediately, but was significantly reduced by the Copyright Tribunal five years later (after a lengthy administrative proceeding and an appeal to the High Court), necessitating refunds to the licensees of five years of overpayments.⁹⁴ In the U.S., some of the early rate-setting proceedings under § 114 have also been drawn-out affairs.⁹⁵ Thus, if separate administrative proceedings must be undertaken for each type of royalty, the delays (and costs) are likely to multiply.

Another solution is to utilize a joint rate-setting procedure, giving the

⁹⁴ See Louisa Albertini, *Phonographic Performance Ltd v. British Hospitality Association: PPL Case Exposes Difficulties with Aspects of the Copyright Tribunal’s Jurisdiction*, ENT. L.R. 2010, 21(5), 201 (2010).

⁹⁵ See KOHN & KOHN, *supra* note 30, at 1490–94; PASSMAN, *supra* note 41, at 308.

CRB the authority to set rates for both the underlying musical works and the sound recordings. This would eliminate the possibility that stalled negotiations with one set of rights holders could block the effectiveness of an agreement reached with the other set of rights holders. This approach has been used in Canada, where the Copyright Board of Canada has held joint rate-setting proceedings to set the tariffs for each class of users.⁹⁶ This approach has the advantage of efficiency, and would help to protect users from becoming subject to excessively burdensome cumulative royalties. It could only be accomplished, however, by repealing § 114(i). In addition, if ASCAP, BMI, and SESAC are compelled to submit their licensing rates for CRB approval, this arguably undermines the strength of the exclusive public performance right, converting it to little more than a remuneration right (although songwriters could still, in theory, choose not to allow their works to be performed at all). Of course, the antitrust consent decrees under which ASCAP and BMI operate already subject their blanket licensing rates to judicial review;⁹⁷ thus, the collective enforcement of songwriters' and music publishers' exclusive public performance right already resembles a remuneration right rather than a true exclusive right.

When the sound recording performance right is eventually extended to include public venues, the operators of these venues will face the same rate-setting dilemma that currently plagues digital services and threatens to overwhelm terrestrial broadcasters. Operators of public venues may be stymied by incompatible demands from the two sets of rights holders, and overburdened by the cumulative royalties. The same solutions will need to be explored—either joint negotiations, or a joint administrative proceeding—with Congress determining, as a policy matter, the mandatory ratio between the rates for musical works and those for sound recordings.

B. Relative Amounts of the Two Royalties

If a more coordinated rate-setting process can be developed, either through joint negotiations or by enlisting the Copyright Royalty Board, there will remain the substantive question of “How much?” And, specifically, how should the performance royalties for sound recordings and for musical works compare?

If the question of relative rates were left entirely to negotiation, it is unlikely that the respective rights holders would reach agreement. It would be more efficient to establish the relationship between these rates

⁹⁶ See COPYRIGHT BOARD OF CANADA, *supra* note 76.

⁹⁷ See Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the “Economic Realities” of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1 (1983).

legislatively. While this might involve a contentious congressional hearing (and would necessitate the repeal of § 114(i)), it would not have to be repeated every time the rate schedule comes up for reconsideration. The relative entitlements of composers and publishers, on the one hand, and producers and recording artists on the other, present an important question of copyright policy, one that should be resolved through the legislative process, with significant input from all of the interested parties, rather than renegotiated repeatedly in multi-party adversarial regulatory proceedings.

It is therefore worthwhile to consider some of the arguments that might be—and in some cases, have been—presented to support conflicting claims as to the “correct” relationship between performance royalties for musical compositions and those for sound recordings. As discussed below, many of these assertions involve questionable factual claims that have neither been proved nor disproved, and may not lend themselves to proof at all.

Arguments that the composers’ and publishers’ performance royalty should be higher than the sound recording performance royalty include:

1. *Musical compositions make a more valuable contribution to creative expression than individual recordings of those compositions.* One could argue endlessly whether this is true or not. How is the value of each contribution measured? If it is measured in the short term, one would focus on what drives consumer demand for particular recordings. Do people listen to recorded music because of the composition or the particular performance? Surely the answer is both, and the exact proportion would constantly vary, depending on the individual listener, the song, and the performance. Should relative values be measured in the long term instead? Does the creation of a musical composition always, or usually, make a greater long-term contribution to creative expression than the creation of a particular recording? Surely this question is unanswerable. Relative rates should not be set based on a questionable judgment that the contribution of the writer is more important than the contribution of the performer.
2. *It is more difficult (or less enjoyable) to write a good musical composition than it is to create a good recorded performance, so writers need more incentive than performers in order to do their work.* According to this argument, sound recording royalties would increase a songwriter-performer’s potential to earn money from performing, and this would reduce his or her incentive to

compose.⁹⁸ This argument requires several questionable assumptions. It assumes that large numbers of good songwriters are also good performers. (To the extent that the skills do not co-exist in the same people, a difference in the relative incentives to employ the two skills will probably not cause one person to switch to an activity in which he or she consistently fails to succeed. A great songwriter who cannot sing a note will not switch to performing, and a great singer who is unable to sell her original compositions will probably not persist in composing simply because the royalty rate is higher.) It also assumes that most songwriter-performers would prefer performing to composing, and that any additional time spent performing decreases the time they would otherwise spend composing (as opposed to other activities). There are no data to back up these assumptions. Finally, if a songwriter-performer cannot make a living as a performer, that artist may abandon the music business altogether (enrolling in law school, perhaps) and never achieve his or her potential as a songwriter.

Arguments that the sound recording performance royalty should be the higher of the two include:

1. *The public is more interested in a particular artist's recording than in the underlying musical composition.* This argument was advanced by PriceWaterhouse Coopers in a report prepared, not surprisingly, for IFPI and eight recording industry collecting societies.⁹⁹ Certainly, most people are not indifferent to whether they listen to Dolly Parton's rendition of "I Will Always Love You" or Whitney Houston's version of the same song. Of course, this is simply the converse of the first argument discussed above, and is subject to the same objections. Some people will be indifferent to the singer. Sometimes it depends on the circumstances. And surely Whitney Houston's fans don't love all of her recordings equally; they will prefer some songs to

⁹⁸ See Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233 (2007) (presenting this argument as a reason for providing no public performance rights for sound recordings at all); Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, INTELL. PROP. & TECH. L.J., Aug. 2009, at 13 (critiquing Sen).

⁹⁹ See PRICEWATERHOUSE COOPERS, VALUING THE USE OF RECORDED MUSIC 2 (2008), http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf.

others. Even where a consumer is strongly motivated to prefer one performer's rendition over another's rendition of the same composition, this may change over time. Some day Whitney Houston may be forgotten, and another performer's cover version of the same song may top the charts. A performance that is strongly preferred in the short term may be forgotten after a few years, and yet the underlying composition may continue to be covered by future performers because it has continuing audience appeal. Thus, this assertion is as unsupportable as its converse.

2. *The costs and risks of producing and marketing a recording are higher than those for the production and marketing of the underlying music.* This argument was made, apparently seriously, in the same PriceWaterhouse Coopers report.¹⁰⁰ However, the report provided no data to support this claim. How does one quantify the "costs and risks" of creating a musical composition? It may not involve renting a studio and sound equipment and paying for session musicians and engineers, but there are costs involved in developing the necessary skills to compose, and there are opportunity costs and risks involved in devoting one's time to composing as opposed to pursuing a more secure occupation. While record companies incur manufacturing, advertising, packaging, and shipping costs, songwriters also incur costs in marketing their works to publishers, and publishers incur costs in marketing these works to record companies and other potential licensees. Furthermore, by focusing only on costs, and ignoring returns, this argument exaggerates the record company's need for a performance royalty. The focus on cost alone ignores the significant difference in the non-performance revenues that the record company and the songwriter derive from their respective efforts — that is, revenues from record sales. Since the record company keeps the lion's share of the revenues from record sales, any performance royalty it receives is simply an additional level of compensation. The copyright owners of musical works receive only a small mechanical royalty from record sales (less than 2 cents per minute of playing time, typically split 50/50 between the songwriter and publisher), and there is no longer much of a market for sheet music; thus, the songwriter's need

¹⁰⁰ *Id.*

for performance royalties is arguably much greater than the record company's.

3. *The sound recording royalty typically must be split among more people — i.e., the record company, the featured performers, and the nonfeatured performers.* Therefore, a larger aggregate sum is needed in order to compensate each person adequately. The royalty for the underlying composition, however, does not go to just one person either. It is split between the publisher (and perhaps a subpublisher) and the songwriter, or several songwriters if the work is jointly authored. Furthermore, the split in each case is not necessarily equal. Depending on the statutory scheme and the recording contracts, the record company may retain 50% of the performance royalty, and nonfeatured performers as a group may receive only 5% to be shared among the entire group. This is the case under the current statutory royalty scheme for digital audio transmissions in § 114.¹⁰¹ Also, this argument looks only at one side of the equation (rewards) without considering the other side (costs). Finally, it ignores the cumulative effect of receiving performance royalties for numerous works. If a record company releases numerous recordings during a one-year period, the cumulative effect of the royalties will be significant, even if the per-recording royalty is small. A songwriter, in contrast, may write only a few songs in the course of a year.

4. *A sound recording may be in demand for only a short period of time before its popularity fades.* A single musical work, however, can be recorded many times by many artists, and thus may have a longer revenue-producing life. Therefore, the sound recording should receive higher royalties to make up for its shorter useful life. Even if this is true, it contradicts the first argument in favor of higher sound recording royalties — that sound recordings deserve a higher royalty because the public is more interested in a specific recording than in the underlying composition. This argument also leads to the bizarre conclusion that recordings of low quality should receive higher royalties than recordings of high quality, because the latter will have a longer useful life in which the royalties can accumulate.

¹⁰¹ 17 U.S.C. § 114(g)(2).

5. *The career of a performer is typically shorter than the career of a composer.* This could be true, and data might be obtainable to prove it. Because so much music is youth-oriented, successful performers often “age out” of their popularity as they become too old for their fans, or the attention of their fans is drawn elsewhere. Also, the carefully cultivated image that resonates with today’s audience may be difficult to shake off when it ceases to be fashionable, and the performer may not necessarily be successful at “re-inventing” herself as fashions change. This could be an argument for giving larger performance royalties to performers than composers. On the other hand, successful performers can also generate (even if during a short career) substantial revenues from tours, endorsements, merchandise, and personal appearances, opportunities typically not available to composers. This argument may also be somewhat circular; if performers could anticipate a future filled with performance royalties, they might be more selective in their recording projects and their tour commitments, and might be less inclined to suffer from overexposure or burnout so early in their careers. Finally, even if the short-career argument does have some merit for performers, it does not apply to record companies, which will receive performance royalties continually from an inventory of recordings that is constantly changing to appeal to new audiences.

6. *Cable firms have to pay 41.5% of gross revenues for their motion picture programming, and the rate that a music service pays for recorded music should be comparable.* The RIAA reportedly made this argument during the proceeding that established the 1998 statutory licensing fee for digital subscription music services.¹⁰² Not surprisingly, this apples-to-oranges comparison gained no traction, and the rate was set at 6.5%.

Not one of these arguments based on “first principles” or abstract notions of merit or justice is sufficiently persuasive to rebut the countervailing arguments. Perhaps the default rule should simply be that the rates for musical works and sound recordings should be equal.

¹⁰² KRASILOVSKY & SHEMEL, *supra* note 14, at 73.

VII. A COMPARATIVE PERSPECTIVE

In the European Union, even though there has been some degree of harmonization with respect to performance rights in sound recordings, there is still significant variation in the scope and implementation of the rights.¹⁰³ Royalties are usually set through negotiations between the users and the collecting societies representing the rights holders; if they are unable to agree, there is usually a route for administrative or judicial intervention.¹⁰⁴ In some countries, the law requires the royalties to be split equally between the record companies and the recording artist; even where this is not required by law, it has emerged as the customary practice.¹⁰⁵ Collections and distributions are handled by the collecting societies; in most cases this is mandated by law.¹⁰⁶ Currently, European laws are not uniform on the question whether the performer's share of the royalty can be waived in the recording contract. When waivers are allowed, they are routine, due to the weak bargaining position of performers, and the record company generally receives the performer's share. Concern over this practice has led to calls for legislative change.¹⁰⁷

Collecting societies in the EU are, in general, subject to a high level of government regulation and oversight.¹⁰⁸ In Luxembourg, the public performance tariffs are established by administrative action rather than negotiation.¹⁰⁹ Elsewhere in the EU, the tariffs are determined by the collecting societies, usually through negotiations with user groups.¹¹⁰ However, in most EU countries the societies are required either to publish

¹⁰³ AEPO-ARTIS, *supra* note 24, at 18–20, 32.

¹⁰⁴ *Id.* at 21; KEA EUROPEAN AFFAIRS, THE COLLECTIVE MANAGEMENT OF RIGHTS IN EUROPE: THE QUEST FOR EFFICIENCY 82–83, 104, 119–23 (2006) (report prepared for the European Parliament), <http://www.keanet.eu/report/collectivemanpdffinal.pdf>.

¹⁰⁵ AEPO-ARTIS, *supra* note 24, at 21–23, 33; David Laing, *The Economic Importance of Music in the European Union*, Soundscapes.info, Vol. 2 (July 1999), <http://www.soundscapes.info>.

¹⁰⁶ AEPO-ARTIS, *supra* note 24, at 21; KEA EUROPEAN AFFAIRS, *supra* note 105, at 69, 89–96.

¹⁰⁷ AEPO-ARTIS, *supra* note 24, at 7–8.

¹⁰⁸ KEA EUROPEAN AFFAIRS, *supra* note 104, at 89–130; Daniel J. Gervais, *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*, 50–53, 57–58, 60–63 (2001), http://works.bepress.com/daniel_gervais/28.

¹⁰⁹ KEA EUROPEAN AFFAIRS, *supra* note 104, at 112; Law of April 18 on Copyright, Neighboring Rights, and Databases, art. 47 (2001) (Fr.).

¹¹⁰ See KEA EUROPEAN AFFAIRS, *supra* note 104, at 73, 76, 103–17.

their tariffs or to submit them to a government agency.¹¹¹ In Portugal, the tariffs are subject to standards of reasonableness and proportionality.¹¹² In Poland, they must be approved by the Copyright Commission.¹¹³

In Europe, the royalty rates for sound recordings are usually set independently of the rates for musical works (often as a percentage of gross income), although in some cases (mostly nonbroadcast performances) they are set as a percentage of the latter.¹¹⁴ In some EU countries and elsewhere, the collecting societies for musical works and for sound recordings work jointly to increase efficiency—for example, sharing a common log book for tracking usage and allocating royalties to their members,¹¹⁵ or allowing one society to collect the royalties for both.¹¹⁶

In Canada, as in the EU, performance royalties for both sound recordings and musical compositions are subject to a high degree of government regulation. Collecting societies are required to submit their proposed tariffs to the Copyright Board for approval.¹¹⁷ The Board then publishes the proposed tariffs for public comment,¹¹⁸ and is required to take those public comments into account in determining whether to approve or reject the proposed rates.¹¹⁹ In conducting its evaluation, the Board has broad authority to “take into account any factor that it considers

¹¹¹ *Id.* at 76, 103–17.

¹¹² *Id.* at 114; Law No. 83/2001 of 3 August (Collecting Societies of Copyright and Related Rights), ch.1, art. 4(e) (2001) (Port.).

¹¹³ KEA EUROPEAN AFFAIRS, *supra* note 104, at 121; Law of February 4, 1994 on Copyright and Neighboring Rights, art. 108-3 (1994) (Pol.).

¹¹⁴ *See, e.g., Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 183, 187, 197 (1978) [hereinafter *1978 Hearing*]]. For example, this method applies to background music services in France. *See* SPPF Remuneration, *supra* note 82.

¹¹⁵ *1978 Hearing*, *supra* note 114, at 182.

¹¹⁶ *See* Will Page, *ECADonomics: Understanding Brazil’s Unique Model of Collective Rights Management*, ECONOMIC INSIGHT, Dec. 15, 2010, <http://www.prsformusic.com/economics>.

¹¹⁷ Copyright Act, R.S.C. 1985, c. C-42, art. 67.1(1)–(2) (2011) (Can.) [hereinafter *Canada Copyright Act*]. The 1997 amendments added neighboring rights to Canada’s copyright regime. Maryse Beaulieu & John Lorinc, *CCC-DAMI Research Project on The Working Conditions of Creators in Quebec and Canada*, Summary Report at 19 (1995). Three years of lobbying by the Canadian music industry preceded this enactment. *About CIMA: Our History*, CANADIAN INDEPENDENT MUSIC ASSOCIATION (CIMA), <http://www.cimamusic.ca> (last visited Apr. 14, 2011).

¹¹⁸ *Canada Copyright Act*, *supra* note 117, at art. 67.1(5).

¹¹⁹ *Id.* at art. 68(1).

appropriate.”¹²⁰ In the case of broadcasters, however, a statutory rate of \$100 (CAD) applies to the first \$1.25 million (CAD) of advertising revenues; this reduced rate applies only to the neighboring rights tariff, not the tariff for the underlying musical compositions.¹²¹ Once approved, the final tariffs must be published.¹²²

While the public performance rate for sound recordings in Canada is lower *on paper* than the rate for musical compositions, the effective rates are equal (after the first \$1.25 million in revenues). This is because U.S. sound recordings make up 50–55% of the commercial radio repertoire in Canada.¹²³ Radio stations (and other users) are not required to pay a performance royalty on these U.S. recordings.¹²⁴ Because the sound recording tariff is based on the station’s gross revenues, the rate of the tariff must be reduced to reflect the ineligible portion of the repertoire. This equality in effective rates is not accidental; the collecting societies in Canada¹²⁵ participate in joint tariff hearings,¹²⁶ and the practice of the Canadian Copyright Board has been to establish equal tariffs.¹²⁷ However, ArtistI, one of three organizations representing musical performers, has objected to the equality in rates, arguing that the sound recording royalty

¹²⁰ *Id.* at art. 68(2).

¹²¹ *Id.* at art. 68.1(1)(a)(i). Community broadcast systems are subject to a flat \$100 (CAD) yearly tariff as well. *Id.* at Art. 68.1(1)(b). This example of inequity between neighboring rights tariffs and songwriter/publisher tariffs has been noted. Beaulieu & Lorinc, *supra* note 118, at 103 (“It seems to be received opinion that copyright takes precedence over neighbouring rights.”).

¹²² Canadian Copyright Act, *supra* note 118, at art. 68(4).

¹²³ *Neighbouring Rights*, CANADIAN HERITAGE, <http://www.pch.gc.ca/eng/1274283867016/1274275915148> (last updated May 19, 2010).

¹²⁴ COPYRIGHT BOARD OF CANADA, *supra* note 76, ¶ 309; *New Music Tariffs in Canada Could Spell New Tariffs for Lodging Industry Worldwide*, INTERNATIONAL HOTEL & RESTAURANT ASS’N (2005), http://www.ih-ra.com/html-ihra/ihra31/I31_Alert_New_Mu.htm (suggesting that Canadian hotels would switch to using American sound recordings for background music to avoid otherwise-applicable sound recording tariffs).

¹²⁵ Among others, these include Re:Sound (formerly NRCC), an umbrella organization representing the rights holders in sound recordings, and SOCAN, which represents the copyright owners of the musical works.

¹²⁶ COPYRIGHT BOARD OF CANADA, *supra* note 76, ¶ 15. The tariffs are not totally equal, however, because Re:Sound is allowed to collect its full royalty rate for commercial radio stations only to the extent that their revenues exceed \$1.25 million CAD.

¹²⁷ *Statement of Case of the Canadian Association of Broadcasters, Re: Consolidated Commercial Radio Tariffs Proceeding (2008-2012)*, Copyright Board of Canada 8 (Sept. 5, 2008), http://www.cab-acr.ca/english/research/08/sub_sep0508.pdf. This is said to be “[b]ased on the notion that neighbouring rights should be equal in value to musical work . . . performing rights.” *Neighbouring Rights*, *supra* note 123.

should be set independently, and should be higher than the royalty for musical works.¹²⁸ Performers are entitled to 50% of the sound recording royalty.¹²⁹

In the United Kingdom, the public performance tariffs for musical compositions and sound recordings are set independently by the respective PROs—PRS for the former and PPL for the latter—but each tariff may be reviewed by the Copyright Tribunal to determine whether it is “reasonable under the circumstances.”¹³⁰ The rate-setting methods used by the two PROs are completely different, making rate comparisons difficult.¹³¹ Because user groups have not disclosed the amounts they are actually paying under the two tariffs,¹³² it is impossible to state whether the “bottom line” figure is higher for the PRS tariff or the PPL tariff. The Copyright Tribunal considers the musical composition tariff to be a relevant comparator for determining whether a proposed sound recording tariff is reasonable.¹³³ Because the UK has no provision analogous to § 114(i), presumably the converse is permissible as well. The Copyright Tribunal has in fact considered the PRS tariff in determining whether a proposed PPL tariff is reasonable.¹³⁴ In a recent proceeding, however, the Tribunal decided that the PRS tariff was a less relevant comparator than the previous PPL tariff, and therefore rejected most of the increase that PPL had proposed.¹³⁵ The Tribunal’s explanation of its reasoning leaves the impression that, despite the difficulty of drawing direct comparisons due to differing methodologies, the PRS tariff is indeed somewhat higher than the PPL tariff.¹³⁶

¹²⁸ *Neighbouring Rights*, *supra* note 123.

¹²⁹ Canadian Copyright Act, *supra* note 117, at art. 19(3); *Musicians’ Neighbouring Rights Royalties Frequently Asked Questions*, <http://www.mnrr.ca/faq.html#2> (last visited Apr. 14, 2011).

¹³⁰ *Phonographic Performance Ltd v. The British Hospitality Ass’n & Ors*, [2009] EWHC 209 (Ch) ¶ 17 (Feb. 12, 2010).

¹³¹ For example, even where both organizations base their licensing fees on the square footage of an establishment, they use different increments, so that no apples-to-apples comparisons are possible. *Id.* ¶¶ 24–33, 96–99.

¹³² *Id.* ¶¶ 57–59.

¹³³ *Id.* ¶¶ 61, 93–95.

¹³⁴ *Id.* ¶¶ 73–75.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶¶ 93–99.

VIII. CHALLENGES

As the preceding discussion has shown, expanding the scope of the public performance right in sound recordings is not a simple undertaking. The task of rate-setting alone will require fundamental policy decisions affecting the interests of rights holders, licensees, and consumers. As discussed below, however, even when the substantive and procedural issues pertaining to rate-setting have been resolved, additional implementation challenges lie ahead.

A. Tracking Usage

As noted earlier,¹³⁷ § 114(d) currently requires digital broadcasts to include, “if technically feasible,” the information encoded in the sound recording that identifies the title of the recording and the featured recording artist; while this requirement helps to track usage of recordings via digital transmissions, it will not be helpful in tracking their usage in terrestrial broadcasts or in non-broadcast situations such as public venues. Because the statutory royalty mechanism does not allow SoundExchange or any other collecting agent to negotiate the terms of the royalty with the individual users, some mechanism will be needed to determine which recordings are being played in these settings, and how often. The ability to impose such a requirement may or may not be within the authority of the CRB,¹³⁸ and may require further legislation.¹³⁹

B. Building, Maintaining and Sharing a Database of Rights Holders

It will also be necessary to build and maintain a database of recordings that identifies the producers and featured performers, and maintains an updated record of their contact information. If ownership of the copyright changes hands, this information will also have to be updated. This database must be accessible not only to the agent in charge of collections and disbursements, but also to the stakeholders—producers and performers—in order to verify that their information has been properly recorded.

Identifying the ownership of sound recording copyrights may be

¹³⁷ See *supra* text accompanying note 73.

¹³⁸ The CRB currently has the authority to dictate the form and manner of recordkeeping with respect to the statutory license for digital transmissions under § 114(f)(4). See KRASILOVSKY & SHEMEL, *supra* note 14, at 75; 37 C.F.R. Part 370. If Congress expands the scope of the statutory license, it should expand the Board’s authority over recordkeeping commensurately.

¹³⁹ See notes 75–76, 79–80, *supra*, and accompanying text.

complicated by several factors. Courts have yet to resolve the question whether work-made-for-hire provisions in recording contracts are enforceable, and if they are not, beginning in the year 2013 there may be a wave of terminations in which the ownership of those copyrights will revert to the performers.¹⁴⁰ Performers may find themselves jointly owning these copyrights with others who performed in the recording, or jointly with the record company.

Federal copyright law does not currently protect sound recordings made in the United States before February 15, 1972.¹⁴¹ Although some of those recordings may be protected under state copyright laws until 2067,¹⁴² state law protection does not render them eligible for performance rights royalties under the federal scheme.¹⁴³ However, recent legislative proposals would restore federal copyright in these older recordings, in which case they too would be entitled to performance royalties.¹⁴⁴ The producers and featured performers on those older recordings would then have to be identified, along with their contact information, and added to the database. Because there will be gaps in the data, the disbursing agent will also have to establish procedures for dealing with funds that cannot be disbursed, perhaps holding them in reserve for some period of time in hopes that the rights holder can be located, and, if not, dedicating them to some other use.¹⁴⁵ Due to the length of the copyright term for sound recordings in the U.S., and the fact that some of these recordings will be more than a few decades old, there may be a significant amount of missing data; an informational campaign by the music industry and the musicians' unions would encourage the successors and heirs of producers and performers on

¹⁴⁰ See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002).

¹⁴¹ See *Goldstein v. California*, 412 U.S. 546 (1973).

¹⁴² 17 U.S.C. § 301(c) (1998).

¹⁴³ The public performance right for sound recordings under 17 U.S.C. § 106(6) applies only to "the owner of copyright *under this title*," and the italicized language can only refer to Title 17 of the U.S. Code.

¹⁴⁴ Congress has directed the Register of Copyrights to undertake a study on the desirability and means of extending federal copyright protection to pre-1972 sound recordings. COPYRIGHT OFFICE, NOTICE OF INQUIRY; FEDERAL COPYRIGHT PROTECTION OF SOUND RECORDINGS FIXED BEFORE FEBRUARY 15, 1972, 75 Fed. Reg. 67777-01 (Nov. 3, 2010).

¹⁴⁵ This is analogous to the "orphan works" problem in the Google Books settlement. Foreign collecting societies already have well-established mechanisms for undisbursable sums, largely because they have been withholding the royalty shares that would go to U.S. rights holders were it not for the lack of reciprocity. In some cases, these funds are contributed to cultural programs or to programs aimed specifically at assisting the development of young musicians. See Piaskowski, *supra* note 13, at 193-94 (describing practice in France).

these recordings to come forward and be added to the database.

Another challenge in building and maintaining an accurate database of rights holders will arise from the restoration of U.S. copyrights in foreign sound recordings under § 104A,¹⁴⁶ including those made prior to 1972. Identifying these rights holders, and obtaining updated contact information, will in some cases be complicated, due to the age of the recordings and the fact that the rights holders are located overseas. One question to be resolved is whether these parties will be required to file a “Notice of Intent” under § 104A(e) in order to be able to claim their shares; such a requirement will simplify the task of maintaining the database, but will place a burden on the foreign rights holders. If the parties cannot be identified and located, the funds due to them will be undisbursable. If § 104A(e) applies, and it probably will, foreign collecting societies and other musicians’ organizations may be able to assist by publicizing this requirement and encouraging foreign rights holders to take the necessary steps to claim their rights. Because the term of protection for sound recordings can be considerably shorter outside of the United States (typically lasting fifty years),¹⁴⁷ it is possible that foreign collecting societies will have failed to maintain updated information for older sound recordings that nonetheless continue to generate performance royalties in the United States, which will make distributions to these foreign rights holders more challenging. Much of this burden will fall on the foreign collecting societies. However, in order to remit the correct amount of royalties to each foreign collecting society, the U.S. collecting society will need to know at least where the fixation took place, and the nationality of the performers, in order to determine how much to remit to each foreign collecting society. To the extent this information is not readily available, some funds may be undisbursable, and the question will arise of what to do with the undisbursable amounts attributable to these “orphan works.”

In addition to the administrative challenge of identifying the rights holders for each recorded work and maintaining updated contact information for those parties, organizing this information into a database accessible to the collecting societies presents a technological challenge. Significant progress toward this goal has already been made at the international level. A consortium of international organizations representing rights holders, including, among others, the International Confederation of Societies of Authors and Composers (CISAC) and the International Performers Database Association (IPDA), has created an ISO-

¹⁴⁶ 17 U.S.C. § 104A (1998).

¹⁴⁷ See, e.g., Directive 2006/116/EC, *supra* note 85; *Capitol Records v. Naxos of America, Inc.*, 372 F.3d 471, 479 (2d Cir. 2004); KRASILOVSKY & SHEMEL, *supra* note 14, at 440.

certified global standard (Draft ISO 27729), called the International Standard Name Identifier (ISNI), for identifying contributors to a wide variety of creative works, including music recordings. The ISNI is similar to the ISBN used for books. The ISN International Agency, a London-based nonprofit organization established in December of 2010, will assign the 16-digit ISNI numbers (through registration agencies) and administer the database. The ISNI database is scheduled for initial release in mid-2011.¹⁴⁸

C. One Collecting Society or More?

Currently, SoundExchange is the sole collecting and disbursing agent for the § 114(f) statutory royalty.¹⁴⁹ Tracking usage of specific recordings is relatively easy because the necessary information is encoded in the digital recordings. However, as the performance right expands to terrestrial broadcasts and public venues, identifying which recordings are played, and how often, will become more difficult and less precise. Sampling, logbooks, and selective monitoring will help, but a certain amount of judgment and extrapolation will be required, as it is in the case of musical works. Songwriters and publishers can choose to affiliate with ASCAP, BMI, or SESAC, and one basis for choosing one of these societies over another is the methodology that the society uses to make these judgments. Another consideration is the administrative expense that the society subtracts before disbursing funds to the rights holders.¹⁵⁰ For the same reasons, producers (especially independent producers) and featured

¹⁴⁸ See *How to easily identify all digital content contributors?*, INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC), <http://www.cisac.org/> (last visited Apr. 14, 2011), INTERNATIONAL STANDARD NAME IDENTIFIER (ISNI), <http://www.isni.org/> (last visited Apr. 14, 2011); KRASILOVSKY & SHEMEL, *supra* note 14, at 450; Juha Hakala, *International Standard Name Identifier: An Introduction*, TECHNOLOGY WATCH REPORT, <http://metadaten-twr.org/2010/02/03/international-standard-name-identifier-an-introduction/#more-280>.

The ISNI must be distinguished from the ISRC, which identifies only the recording. See *supra* note 58 and accompanying text. It also differs from the International Standard Musical Work Code (ISWC) (ISO 15707), an 11-character code that identifies a specific musical composition, and which is administered by the ISWC International Agency. See INTERNATIONAL STANDARD MUSICAL WORK CODE (ISWC), <http://www.iswc.org/> (last visited Apr. 14, 2011).

¹⁴⁹ An aspiring competitor, Royalty Logic, represents some labels and performers in receiving royalties from SoundExchange, but does not yet have the legal authority to compete with SoundExchange in tracking usage and collecting royalties directly from users, and must depend on SoundExchange's usage data. See MUSIC REPORTS, <http://www.royaltylogic.com> (last visited Apr. 14, 2011).

¹⁵⁰ See Nigel Parker, *Music Business: Infrastructure, Practice and Law* 203–05 (2004); PASSMAN, *supra* note 41, at 235; KRASILOVSKY & SHEMEL, *supra* note 14, at 142.

performers may want a choice of organizations with which to affiliate. AFM and AFTRA may be helpful in this regard.

If multiple collecting and disbursing societies develop, they will need to share access to the database of rights holders. If the expanded public performance right requires broadcasters and venue operators to maintain records of the recordings they play, then in order to avoid burdening smaller webcasters, broadcasters, and venue operators with excessive recordkeeping, the societies might agree to share access to the logbooks (if any) that the amended law requires these parties to maintain.

D. Exceptions and Limitations

Any royalty scheme that covers a diverse array of users—small and large broadcasters, “niche” webcasters, major retail chains, and small “mom and pop” establishments—must be sensitive to the economic differences between these users. If the statutory or negotiated royalty rates under the expanded performance right are not responsive to the needs of nonprofits and other small operators, these users will not be able to deliver performances to consumers, and consumers, in turn, will have fewer choices. For example, college radio stations should receive special accommodations under the royalty scheme.

The hospitality industry will likely respond to an expanded public performance right by seeking a concomitant expansion of the § 110(5) privilege. Under current law, § 110(5)(B)¹⁵¹ permits a large percentage of bars, restaurants, and retail establishments to play radio or television broadcasts of music for their patrons without paying a public performance royalty to the owners of the musical compositions.¹⁵² These industries would certainly demand a similar privilege with respect to sound recordings. While the current version of § 110(5)(B) has been held to violate the United States’ obligations under the TRIPS Agreement,¹⁵³ an expansion of this provision to encompass sound recordings appears to be less problematic, because TRIPS does not require the United States to

¹⁵¹ 17 U.S.C. § 110(5)(B) (2005).

¹⁵² See Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R para. 6.118–6.133 (June 15, 2000) (finding that a substantial majority of U.S. eating and drinking establishments, and a large percentage of other business establishments, qualify for the § 110(5)(B) exemption).

¹⁵³ *Id.* The TRIPS Agreement is the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is administered by the World Trade Organization. The United States became a party to TRIPS in 1994, as part of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Agreement Establishing the World Trade Organization, art. III & annex 1C (April 15, 1994).

provide any public performance rights in sound recordings.¹⁵⁴ Nor would an expanded version of § 110(5)(B) prevent the United States from adhering to the Rome Convention; Article 15 of Rome specifically permits a signatory country to recognize the same limitations for neighboring rights that it recognizes for copyrights.¹⁵⁵ Even if an expansion of § 110(5)(B) did not violate international agreements, however, it could provide an excuse for neighboring rights countries to deny full reciprocity to U.S. performers and record companies seeking to collect their share of foreign performance royalties.

E. Section 114(i)

As noted earlier, the broadening of sound recording public performance rights will highlight the infirmity of § 114(i), which bars any governmental body from considering the sound recording royalty in setting the rate for the musical composition royalty. When the DPRSRA was enacted, § 114(i) was a political accommodation that was necessary to defuse opposition from songwriters and music publishers.¹⁵⁶ Those same groups will likely vehemently oppose any effort to repeal or weaken § 114(i), as evidenced by their success in retaining this provision in both versions of the proposed PRA. Indeed, the entrenched interests of songwriters and composers appear to present the single greatest political obstacle to implementing a full performance right for sound recordings. Yet there is no policy justification for retaining this provision, which favors one group of rights holders over another based solely on being the first to achieve their “place at the table.” Section 114(i) stands in the way of establishing a fair and efficient rate-setting procedure. As evidenced by the recent UK proceedings, it is *possible* to establish performance royalties for one group of rights holders while giving little weight to the cumulative effect of the two royalties on users.¹⁵⁷ However, such a procedure increases the risk of unreasonable and economically unjustified burdens on users.

¹⁵⁴ Article 14(1) of TRIPS protects the rights of performers in their live musical performances, and Article 14(2) protects the reproduction rights of record producers. However, nothing in Article 14 addresses a public performance right in sound recordings.

¹⁵⁵ Rome Convention, *supra* note 1, art. 15(2).

¹⁵⁶ *Copyright Protection for Digital Audio Transmissions: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (statement of MaryBeth Peters, Register of Copyrights).

¹⁵⁷ See *supra* notes 130–36 and accompanying text.

F. A Note on Derivative Works

One other category of performances that would be encompassed by a full public performance right consists of performances of sound recordings that have been incorporated into motion pictures or other audiovisual works, including theatrical or television films. Under current law, negotiated master use licenses permit the integration of the sound recording into a derivative work;¹⁵⁸ however, such licenses do not automatically confer public performance rights on the licensee, because the licensee does not need a public performance license under current law. However, if a full public performance right is granted to sound recordings, incorporating such recordings into films that are performed in movie theatres (or other public venues, such as airplanes) or on television, or which are streamed by a service such as Netflix, will necessarily implicate this right.

Addressing this additional right in the master use license should not be problematic on a *prospective* basis; because these licenses are voluntarily negotiated and are not subject to judicial or administrative oversight, the parties are free to reach any agreement as to the licensing fee. Indeed, adding this additional right to future licenses may have only a modest effect on the typical licensing fee: because record companies will probably share only a small portion of this fee with recording artists (as determined by their individual recording contracts), any increase in the master use license fee will be pure profit to the record company, with no increased expense.

A more difficult question is presented by *existing* master use licenses. Because record companies and filmmakers negotiated these licenses at a time when there was no public performance right in sound recordings, these licenses typically do not convey a public performance right. If and when record companies become entitled to a full public performance right as a matter of law, it is conceivable that they would demand additional royalty payments as a condition of the continued public performance of the existing films in which their recordings have been incorporated. Copyright owners of motion pictures would be likely to resist these demands, and if the parties could not reach a voluntary settlement, then some judicial or legislative solution would be required.

To some degree this problem may be avoided if the duty to obtain a public performance license is placed on the party responsible for the performance, whether that is a movie theatre (unlikely in the case of older films) or other public venue operator, a television broadcaster, or a video streaming service.

¹⁵⁸ See KOHN & KOHN, *supra* note 30, at 1545; RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 398 (2005).

Alternatively, it can be argued that incorporating a sound recording into an audiovisual work causes the incorporated recording to lose its separate character as a sound recording, because it is now part of the audiovisual work.¹⁵⁹ Under this analysis, public performances of the audiovisual work would not constitute public performances of the sound recording; thus, the existing master use license would continue to be sufficient without any need for further negotiation.

However, if neither of these solutions is adopted, then the copyright owner of an existing motion picture will face the problem of obtaining permission for future public performances of any sound recordings incorporated in that work. In that case, § 104A of the Copyright Act offers a possible model for resolving this problem. Under that provision, creators of derivative works that incorporated public domain foreign works before the copyright in those foreign works was restored (in 1996 and later years) are entitled to continue exploiting those derivative works if they pay “reasonable compensation” to the owner of the copyright in the restored work.¹⁶⁰ If the parties cannot agree on the amount of this compensation, then it will be determined by a federal district court.¹⁶¹ One objection to applying this paradigm to existing master use licenses is that, if voluntary negotiations do not succeed, these disputes will place further demands on the limited resources of the federal district courts. If these disputes begin to crowd the federal docket, then a statutory license may be needed—for example, a set percentage of the film’s future performance revenues.

One final possibility is that the legislation that expands the public performance right for sound recordings could expressly exclude pre-existing master use licenses. Unlike the restoration of copyrights under § 104A, recognition of a public performance right in sound recordings is not mandated by TRIPS. Thus, creating a limited exception for pre-existing master use licenses would not violate TRIPS. Like an expansion of § 110(5)(B), however, it could undermine efforts to establish reciprocity with other Rome and WPPT signatories.

IX. CONCLUSION

The policy debate surrounding a public performance right in sound recordings has been well rehearsed for over forty years. Despite a strong consensus in favor of the right, the political will has materialized slowly.

¹⁵⁹ Under the Copyright Act, the definition of a sound recording specifically excludes “the sounds accompanying a motion picture or other audiovisual work.” 17 U.S.C. § 101.

¹⁶⁰ 17 U.S.C. § 104A(d)(3)(A).

¹⁶¹ *Id.* § 104A(d)(3)(B).

The still-pending Performance Rights Act is the next incremental step. However, it is limited to broadcast performances, and excludes on-site performances of recorded music in public venues (clubs, stores, bars, restaurants, and other venues where recorded music is played). Because it falls short of the full performance right recognized by most Rome Convention countries, it will fail to trigger full reciprocity from those countries, depriving U.S. rights holders of substantial overseas royalties. While the PRA piggybacks on the existing statutory royalty mechanism created for digital subscription transmissions and webcasting (already complex in itself), enacting a full performance right that encompasses dispersed public venues will present even greater implementation challenges. As public performance rights are broadened, the number of licensees will increase, and the nature of their music-related activities and revenue streams will be more diverse. This will make rate-setting and data collection more challenging; one size will no longer fit all.

Further complicating the task is the proliferation of rights holders due to changes in the music industry and its legal environment. The dominance of major record labels is slowly declining as musicians embrace new alternatives for funding, promotion, and distribution. Increasingly, these artists will retain the copyrights in their recordings. Identifying all of the rights holders for each sound recording, and maintaining an accurate database of their contact information, will present formidable challenges.

Expanding the performance right presents significant political challenges. However, the expanded right is more likely to become a reality if the recording industry can develop a plan to overcome the implementation challenges. Thus, producers and recording artists should be prepared to address practical objections to the expanded right by having a plan for implementing the right in a manner that is sensitive to the best interests of rights holders, service providers, and consumers.



Adjusting the Stream? Analyzing Major League
Baseball’s Antitrust Exemption After *American Needle*

Michael J. Mozes*
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I. INTRODUCTION

In the summer of 2010, the Supreme Court heard and decided *American Needle, Inc. v. National Football League*,¹ a case that some have called the most important in sports law history.² The National Football League (“NFL”) asked the Supreme Court to hold it immune from antitrust laws as a single entity. The predictions were dire. Worries of the NFL “killing free agency [and] dictat[ing] ticket prices”³ grabbed the headlines. Even some players, like New Orleans Saints quarterback Drew Brees, a member of the NFL Players Association (“NFLPA”) Executive Committee, became involved, saying, “[t]he gains we fought for and won as players over the years could be lost, while the competition that runs through all aspects of the sport could be undermined.”⁴ In the end, the Court decided that the NFL was not a single entity for purposes of licensing its apparel and that the NFL’s behavior would have to be judged according to the rule of reason analysis, which is the classic formulation of Sherman Act Section 1 analysis.⁵

While Major League Baseball (“MLB”) was not a party to the *American Needle* suit, the Supreme Court can draw lessons from its decision in that case in determining whether to abolish what remains of professional baseball’s long-standing antitrust exemption. Parts II and III of this article summarize the history of how baseball’s antitrust exemption developed and how courts have interpreted it in the nearly ninety years since it was first announced by the Court. Part IV analyzes the current reach of the antitrust exemption. Part V summarizes the *American Needle* litigation. Part VI discusses the antitrust exemption after *American Needle* and how that case

¹ 130 S. Ct. 2201 (2010).

² Michael McCann, *Why American Needle-NFL Is Most Important Case in Sports History*, SI.COM (January 12, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedle.v.nfl/index.html.

³ Ameet Sachdev, *American Needle Victory Puts NFL on Defense*, CHICAGO TRIBUNE (May 25, 2010), http://articles.chicagotribune.com/2010-05-25/business/ct-biz-0525-chicago-law--20100525_1_antitrust-exemption-american-needle-appeals-court.

⁴ Drew Brees, *Saints' Quarterback Drew Brees Weighs in on NFL's Supreme Court Case*, WASHINGTON POST (Jan. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/07/AR2010010702947.html?hpid%3dopinionsbox1>.

⁵ *Am. Needle*, 130 S. Ct. at 2206–07.

should influence the Court's reasoning in future cases regarding baseball's exemption, as well as a discussion about the effects of removing the exemption.

II. PURELY STATE AFFAIRS

Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”⁶ In the early twenty-first century, it seems almost incomprehensible that MLB would not be considered interstate commerce.⁷ In the first quarter of the twentieth century, however, the Supreme Court thought otherwise. In *Federal Baseball*,⁸ Justice Oliver Wendell Holmes wrote for a unanimous Court that the American and National Leagues were not subject to the antitrust laws because their “business is giving exhibitions of base ball, which are purely state affairs.”⁹ According to the Court, the transport of players across state lines

⁶ 15 U.S.C. § 1 (2006).

⁷ MLB currently has a fourteen team American League and a sixteen team National League, including teams in seventeen states, the District of Columbia, and Canada. Team-by-Team Information, <http://mlb.mlb.com/team/> (last visited March 29, 2011). MLB also owns an off-season winter league, the Arizona Fall League. Arizona Fall League, <http://mlb.mlb.com/mlb/events/winterleagues/about/?league=119&id=history> (last visited March 6, 2011). It also operates two spring training leagues, one in Florida and another in Arizona. Spring Training: The Official Site of MLB's Cactus and Grapefruit Leagues, http://mlb.mlb.com/mlb/events/spring_training/ (last visited March 29, 2011). The League also partners with three national television broadcasters and has its own television station, MLB Network. National Broadcasters, MLB.COM, http://mlb.mlb.com/mlb/official_info/broadcasts/national.jsp?tcid=mm_mlb_schedule (last visited March 29, 2011). Major League Baseball's television contracts will generate approximately \$5.3 billion through 2013. Matthew J. Mitten, American Needle v. NFL: U.S. Professional Clubs Are Separate Economic Threads When Jointly Marketing Intellectual Property 5 n.10 (Marquette University Law School Legal Studies Research Paper Series, Research Paper No. 10-33, 2010), available at <http://ssrn.com/abstract=1645364>. Major League Baseball is also affiliated with a number of Minor League Baseball leagues, of which there are fifteen that include 176 teams as of 2009. General History, MLB.COM, http://web.minorleaguebaseball.com/mlb/history/general_history.jsp (last visited March 6, 2011). In addition, the team with the lowest revenue during the 2009 season, the Florida Marlins, had revenues of 144 million dollars, while the New York Yankees made 441 million dollars, highest in the MLB. Kurt Badenhausen et al. eds., *The Business of Baseball*, FORBES.COM (April 7, 2010), http://www.forbes.com/lists/2010/33/baseball-valuations-10_The-Business-Of-Baseball_Revenue.html.

⁸ Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Base Ball Clubs, 259 U.S. 200 (1922).

⁹ *Id.* at 208. See also Nathaniel Grow, *Defining the "Business of Baseball": A Proposed*

was not commerce because it was only incidental to playing the games. “[P]ersonal effort, not related to production, is not a subject of commerce.”¹⁰ *Federal Baseball* laid the groundwork for what is now nearly ninety years of MLB’s freedom from antitrust scrutiny.¹¹

The Court once again took up the issue of applying antitrust laws to baseball in *Toolson v. New York Yankees*.¹² In a one paragraph per curiam opinion upholding *Federal Baseball*, the Supreme Court used baseball’s reliance on that decision as a basis to leave *Federal Baseball* undisturbed.¹³ In addition, without examining the underlying facts of how baseball operated or developed over the thirty years since *Federal Baseball*, the Court deferred to Congress to hold baseball subject to the antitrust laws if it so desired, even though Congress never removed baseball from the Sherman Act’s scope in the first place.¹⁴

The Court examined the issue a third time nineteen years after *Toolson* when Curt Flood brought a suit challenging baseball’s reserve clause¹⁵ after being traded from St. Louis to Philadelphia. The majority in *Flood v.*

Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption, 44 U.C. DAVIS L. REV. 557, 568 (2010) (arguing that *Federal Baseball* may not be unreasonable given that baseball’s revenue was generated mainly through local ticket sales).

¹⁰*Federal Baseball*, 259 U.S. at 209. As discussed below, the *Flood* Court points out fifty years later that the business of baseball is not necessarily the same thing as the playing of baseball games. *Flood v. Kuhn*, 407 U.S. 258, 269 (1972).

¹¹ As discussed below, Major League Baseball is now explicitly subject to the antitrust laws in some areas like labor negotiations.

¹² 346 U.S. 356 (1953).

¹³ “The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.” *Id.* at 357.

¹⁴ “We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.” *Id.*

¹⁵The reserve clause prevented players from moving to another team for the duration of their contract by allowing the team to renew the standard player contract for another season with the same contractual provisions. *See Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6, 12 (N.Y. Sup. Ct. 1914) (explaining the elements of the reserve system). Players that attempted to play for another team were subject to an injunction requiring them to remain with their current team. *See Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 222 (1902). For an interesting argument supporting the resurrection of a modified reserve clause, *see Sky Andrecheck, The Case for the Reserve Clause*, SI.COM (January 14, 2010), http://sportsillustrated.cnn.com/2010/writers/sky_andrecheck/01/14/andrecheck.free.agency/index.html. Interestingly, NBA player Rick Barry unsuccessfully challenged the NBA’s reserve clause after attempting to leave the Warriors for the ABA. The Ninth Circuit affirmed a San Francisco judge’s order that upheld the clause and made Barry sit out a year before playing in the ABA. *Wash. Capitols Basketball Club v. Barry*, 419 F.2d 472 (1969). *See also* TERRY PLUTO, LOOSE BALLS 50–51 (2007).

*Kuhn*¹⁶ began its opinion with an exploration of the history of baseball, which includes a recital of the fact that the first professional baseball team, the Cincinnati Red Stockings, had only one Cincinnati on the roster, traveled over 11,000 miles during its first seasons, and played fifty-seven games.¹⁷ Justice Blackmun continued the opinion with a litany of several of baseball's greatest players and references to works about sports, including *Casey at the Bat* and *Tinker to Evers to Chance*.¹⁸ The Court explained how *Federal Baseball* had been cited favorably in both baseball and non-baseball antitrust cases for fifty years. Based on *stare decisis* and Congress' awareness of the exemption and subsequent inaction, the Court upheld the antitrust exemption created in *Federal Baseball*, while also holding that baseball is a business engaged in interstate commerce.¹⁹

III. INTERPRETING *FEDERAL BASEBALL*

Although the Supreme Court bears responsibility for the creation of MLB's antitrust exemption, the Court, to its credit, has signaled its desire to cut down the exemption, admitting that the cases creating and upholding the exemption, *Federal Baseball* and *Toolson*, were "aberration[s] confined to baseball."²⁰ These "anomal[ies]"²¹ are "unrealistic, inconsistent, [and] illogical."²² Justice Douglas even referred to the exemption as a "derelict in the stream of the law."²³ Unfortunately, despite what seemed early on to be

¹⁶ 407 U.S. 258 (1972).

¹⁷*Id.* at 261. It is hard to imagine how this level of economic activity across state lines would not have given rise to interstate commerce.

¹⁸*Id.* at 262–64. Blackmun's list also included some baseball players who were not so well known, a sportswriter, an umpire, and eight owners or managers. Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181, 188–89 (2007). Interestingly, Justice White found this homage so unnecessary that he concurred in all but this part of the Court's opinion.

¹⁹*Flood*, 407 U.S. at 282.

²⁰*Id.* See also Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 259 (2008) (arguing that the antitrust exemption applies only to the reserve system in professional baseball). Upon this premise, the Curt Flood Act of 1998 effectively removed the exemption, since the reserve system deals with labor negotiations.

²¹*Flood*, 407 U.S. at 282.

²² *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957). *Federal Baseball* held that baseball was not commerce because the leagues were in the business of "giving exhibitions of base ball, which are purely state affairs." *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922). The Court in *Flood* rejects this interpretation of commerce, holding that MLB is indeed engaged in interstate commerce, while refusing to apply the antitrust laws to it. *Flood*, 407 U.S. at 282.

²³*Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

the best of intentions, the Court has never definitively removed the exemption.

In his *Toolson* dissent, Justice Burton recognized the Court's error in refusing to apply antitrust laws to baseball.²⁴ While he understood the Court's position in 1922 to exempt baseball as not engaging in interstate commerce, he also recognized that the facts in 1953 could not support that same decision.²⁵ While the Court later comes to recognize the exemption as an aberration, the Court uses *stare decisis* and congressional inaction to uphold baseball's antitrust exemption, while in the same breath pointing out that other major sports are not exempt.²⁶ In his dissent in *Flood*, Justice Douglas criticizes *Federal Baseball*, and by extension the *Flood* majority's upholding *Federal Baseball* under the principle of *stare decisis*, for having a "parochial view of commerce."²⁷ He asserts that, "the whole concept of commerce has changed."²⁸ Even if the Court were not comfortable with baseball as interstate commerce in 1922, by *Flood*, baseball was clearly a national enterprise, based on both the law²⁹ and the facts.³⁰

²⁴ *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (Burton, J., dissenting).

²⁵ "In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce." *Id.* at 357–58 (Burton, J., dissenting).

²⁶ *Flood*, 407 U.S. at 282–83.

²⁷ *Id.* at 286 (Douglas, J., dissenting). See also Tomlinson, *supra* note 20, at 261 (arguing that the holding that baseball was not interstate commerce was "an odd rationale for the decision" especially since the leagues "clearly market[ed] themselves as national products with the best players in the nation playing for various franchises located across the country").

²⁸ *Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

²⁹ By this time, the Court was firmly entrenched in post-New Deal Commerce Clause jurisprudence that expanded the reach of federal power. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the commerce clause reached the activities of a farmer growing wheat for his personal consumption).

³⁰ By 1972, MLB consisted of 24 teams (12 in the American League and 12 in the National League) stretching from Boston to Los Angeles and Montreal to Houston. *MLB Season History – 1972*, ESPN.COM, http://espn.go.com/mlb/history/season/_/year/1972 (last visited March 30, 2011). The first players' strike in baseball also occurred in 1972 under the direction of Marvin Miller, which resulted in salary arbitration for the players. Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences*

The *Flood* court also looks to Congress's not acting to remove baseball's antitrust exemption as evidence that Congress approves, or at least does not disapprove, of the exemption.³¹ This explanation relies on the assumption that Congress has actively taken up the issue of the exemption and has refused to apply the antitrust laws to it. The Court's evidence of this deliberation is remedial legislation that was introduced but never passed.³²

The majority's reliance on Congressional inaction misses the mark in two respects. First, Congress did not create the exemption; that responsibility lies with the Court itself.³³ As Justice Douglas put it, baseball's antitrust exemption is a peculiarity "that [the Supreme Court], its creator, should remove."³⁴ Additionally, the *Toolson* Court should never have mentioned Congressional intent at all given that Congressional intent was never mentioned in *Federal Baseball* as a basis for baseball's exemption.³⁵ Some commentators have suggested this "statement by the *Toolson* Court is particularly noteworthy because it effectively changes the rationale underlying baseball's antitrust exemption."³⁶ Second, Congressional refusal to remove the exemption with legislation cannot be read as an approval of the judicially created exemption.³⁷ On the contrary, Congressional refusal to pass legislation that exempts other major sports leagues from antitrust laws cuts against the proposition that Congress

Crippled the Salary Arbitration Remedy—and How to Fix It, 1 HARV. J. SPORTS & ENT. L. 63, 69 (2010).

³¹*Flood*, 407 U.S. at 283.

³²*Id.*

³³ Justice Burton argued in his *Toolson* dissent that *Federal Baseball* indicated that the "then incidental interstate features of organized baseball might rise to a magnitude that would compel recognition of them independently." *Toolson v. New York Yankees*, 346 U.S. 356, 360 (1953) (Burton, J., dissenting). Others argue that *Federal Baseball* was wrongly decided in the first place. See, e.g., *Flood*, 407 U.S. at 286 (Douglas, J., dissenting) (referring to the exemption as a "derelict in the stream of the law"). Both of these views strengthen the argument that the Supreme Court should be the institution to overturn the exemption.

³⁴*Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

³⁵See Grow, *supra* note 9, at 570–71.

³⁶*Id.* at 570. See also Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 2 J. SUP. CT. HIST. 88, 102–05 (1998).

³⁷See, e.g., *Flood*, 407 U.S. at 288 note3 (Douglas, J., dissenting). Douglas' dissent cites another Supreme Court decision, *Helvering v. Hallock*, 309 U.S. 106 (1940), which expressly rejects Congressional inaction as a basis to uphold an erroneous application of a statute. The *Helvering* Court stated, "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." 309 U.S. at 119–121.

approves of any antitrust exemption.³⁸ As Justice Douglas rightly states, “[t]he unbroken silence of Congress should not prevent us from correcting our own mistakes.”³⁹ It is improper for the Court to read silence as anything but silence. If Congress truly wanted to exempt MLB from antitrust laws, it could do so through legislation.⁴⁰ The lack of legislation codifying the exemption is evidence no less powerful than the absence of legislation that would apply antitrust laws. It is also important to note that Congress is a democratically elected body with a constituency to consider. Each Congressman’s constituents no doubt have an opinion on whether baseball should keep its exemption. But, their ideas may be based more on how a lifting of the exemption would affect their own favorite team, rather than on an analysis of antitrust law. In this respect, the Supreme Court can act more effectively and efficiently by acting unilaterally to remove baseball’s exemption, rather than waiting on Congress to act, which it may never do because of political expediency.

In the wake of these cases, courts have treated the exemption differently depending on the aspect of the game under challenge. In *Salerno v. American League of Professional Baseball Clubs*,⁴¹ the Second Circuit applied the exemption to MLB’s dealings with umpires. The court refused to predict the overruling of *Federal Baseball*, saying that the “Supreme Court should retain the exclusive privilege of overruling its own decisions.”⁴² However, it is important to note that this decision preceded *Flood*. It is unclear after the *Flood* decision whether the Court would come to the same conclusion with regard to umpires. Another case, *Postema v. National League of Professional Baseball Clubs*,⁴³ suggests that it would not apply the exemption to interactions with umpires. In *Postema*, the court concluded that “the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates.”⁴⁴ Since baseball’s relations with its umpires are not unique to the game, unlike the reserve system, it is not essential to preserve the integrity

³⁸*Flood*, 407 U.S. at 288 (Douglas, J., dissenting) (“I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.”).

³⁹*Id.*

⁴⁰ One might argue that Congress has no need to take up this issue as baseball already enjoys the protections of the judicially created antitrust exemption. However, the Court can strike down such a judicial creation the next time the issue comes before it. To remove the exemption from the Court’s purview, Congress would have to codify the exemption into law.

⁴¹429 F.2d 1003 (2d Cir. 1970).

⁴²*Id.* at 1005.

⁴³799 F. Supp. 1475 (S.D.N.Y. 1992).

⁴⁴*Id.* at 1489.

of the game and does not get the benefit of the exemption.⁴⁵ Courts have also refused to apply baseball's exemption to a number of "outside" parties, including concessionaires,⁴⁶ merchandisers,⁴⁷ and radio broadcasters.⁴⁸

With regard to franchise relocation, on the other hand, after two minor detours, courts have upheld the exemption. In *Piazza v. Major League Baseball*,⁴⁹ a group of investors wanted to buy the San Francisco Giants and move them to Tampa, Florida.⁵⁰ After MLB rejected the offer, the investors sued, alleging that the league put illegal restraints on the purchase and relocation of baseball teams in violation of the Sherman Act.⁵¹ The court refused to apply the antitrust exemption, narrowing the exemption's scope to the reserve clause.⁵² The saga did not end with that decision. After MLB disapproved of the sale to the Piazza-led group, the Giants were sold to a local San Francisco investment group.⁵³ When Florida lost its battle for a Major League franchise, Florida Attorney General Robert Butterworth issued antitrust civil investigative demands that focused on whether there was any "combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise."⁵⁴ In *Butterworth*, the Florida Supreme Court chose to defer to the interpretation of *Piazza* in its reading of *Flood*, *Toolson*, and *Federal Baseball*, and limited the antitrust exemption to the reserve clause.⁵⁵

This diversion from a broad reading of the antitrust exemption did not last long, however. In 1999, the Minnesota Supreme Court prevented that state's attorney general from serving civil investigative demands on MLB because "the business of professional baseball is exempt from federal

⁴⁵*Id.*

⁴⁶*Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

⁴⁷*Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981).

⁴⁸*Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982).

⁴⁹831 F. Supp. 420 (E.D. Pa. 1993).

⁵⁰*Id.* at 422.

⁵¹*Id.* at 423–24.

⁵²*Id.* at 438. Of course, *Flood* never explicitly limited the scope of the baseball exemption to the reserve clause, leading at least one commentator to say that "the entirety of the *Flood* majority opinion simply does not support the *Piazza* court's conclusion that *Flood* 'clearly' limited baseball's antitrust exemption to the reserve clause." Grow, *supra* note 9, at 595.

⁵³*See Giants to Stay in San Francisco*, THE MILWAUKEE J., Jan. 13, 1993, at C3, available at

<http://news.google.com/newspapers?id=JTAgAAAIBAJ&sjid=nCwEAAAIBAJ&pg=3030,3984713&dq=giants+stay+in+san+francisco&hl=en>.

⁵⁴*Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1022 (Fla. 1994).

⁵⁵*Id.* at 1025.

antitrust laws.”⁵⁶ The case arose after owner Carl R. Pohlad announced that he intended to sell the Twins to a North Carolina investment group, and MLB said it would approve the move if a publicly funded stadium were not to be built in Minnesota.⁵⁷ The court admitted that the *Piazza* decision was “intellectually attractive”⁵⁸ but felt “compelled to accept the paradox the Supreme Court acknowledged in *Flood* when it declined to overrule *Federal Baseball*” because “the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of professional baseball and falls within the exemption.”⁵⁹ Two years after *Minnesota Twins*, Florida Attorney General Butterworth issued another set of civil investigative demands on MLB after finding out that it planned to contract the League to twenty-eight teams for the 2002 season.⁶⁰ In *Butterworth II*, a Federal District Court in Florida applied the antitrust exemption to the contraction at issue, saying, “It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”⁶¹

Courts have varied in their approaches to determining how to apply the antitrust exemption. In general, the courts seem to have drawn a distinction between those things that they believe are intimately a part of baseball, such as the reserve system and franchise relocation,⁶² and those things that are not, such as concessions.⁶³

In addition to the judiciary explicitly limiting the antitrust exemption, Congress limited the scope of baseball’s exemption in the Curt Flood Act of 1998.⁶⁴ Seventy-six years after *Federal Baseball*, Congress finally got involved in the business of baseball by explicitly applying antitrust laws to Major League Baseball players in the same way it applies to other professional athletes.⁶⁵ The Act, however, specifically excludes from its purview minor league players,⁶⁶ umpires,⁶⁷ broadcasting,⁶⁸ and franchise

⁵⁶ *Minn. Twins P’ship v. State*, 592 N.W.2d 847, 856 (Minn. 1999).

⁵⁷ *Id.* at 849.

⁵⁸ *Id.* at 856.

⁵⁹ *Id.*

⁶⁰ *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1319 (N.D. Fla. 2001).

⁶¹ *Id.* at 1332.

⁶² *See, e.g., Portland Baseball Club v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974) (applying the antitrust exemption to the minor league system).

⁶³ *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev’d on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

⁶⁴ 15 U.S.C. § 26b (2011).

⁶⁵ *Id.* at § 26b(a).

⁶⁶ *Id.* at § 26b(b)(1).

⁶⁷ *Id.* at § 26b(b)(5).

⁶⁸ *Id.* at § 26b(b)(4). The Sports Broadcasting Act of 1961 exempts from antitrust laws the

relocation issues.⁶⁹ It should be noted that this language does not necessarily mean that antitrust laws do not apply to those areas or any other areas not covered explicitly by the statute.⁷⁰ In light of the Act's non-effect on most of the issues, Congress really only brought a small part of the business of baseball into the mainstream.⁷¹ However, the combination of the limiting principles of the courts and Congress's limitation in the Flood Act serves to restrict baseball's judicially created antitrust exemption to extremely isolated fragments of the business of baseball.

IV. APPLYING LIMITING PRINCIPLES: AN ANALYSIS OF BASEBALL'S ANTITRUST EXEMPTION AND FRANCHISE RELOCATION

Synthesizing the limits on the antitrust exemption requires some skill given the variety of decisions and rationales courts have given over the years. Nevertheless, there are at least two issues that are likely presently included within the scope of baseball's antitrust exemption, the minor league system and franchise relocation,⁷² the latter of which will be the

agreements covering the television broadcasting of sports contests in the major leagues. 15 U.S.C. § 1291 (2011).

⁶⁹ 15 U.S.C. § 26b(b)(3) (2011).

⁷⁰ The Act states that “[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) of this section.” *Id.* at § 26b(b). Senator Orrin Hatch of Utah, a co-sponsor of the bill, noted on the Senate Floor, “With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.” 145 CONG. REC. S9621 (daily ed. July 31, 1998) (statement of Sen. Hatch). President Clinton agreed. *See* Statement on Signing the Curt Flood Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2150 (Oct. 27, 1998) (“The Act in no way codifies or extends the baseball exemption . . .”). *See* Tomlinson, *supra* note 20, at 284–89, for a more lengthy discussion of the Act's history.

⁷¹ Some have argued that Congress really did not accomplish anything by passing the Curt Flood Act because of the Supreme Court's decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996), two years earlier, in which the Court held that the non-statutory labor exemption prevented NFL players from suing the league for an antitrust violation. Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 749–51 (2009). *See infra* note 138 for background on the non-statutory labor exemption. In other words, although Congress has given MLB players the same rights as other professional athletes to sue for antitrust violations, those athletes are unable to use these rights so long as they remain in a collective bargaining relationship with their respective leagues. However, this point does not lessen the fact that the Flood Act did signal Congress's intent to get involved to limit baseball's exemption; nor does it matter whether the Flood Act is effective in analyzing whether the antitrust exemption applies.

⁷² *But see* Pete Toms, *LWIB: MLB's Anti-Trust Exemption and Franchise Relocation*, THE BIZ OF BASEBALL, Jan. 4, 2010,

focus of this section.

The judicial limits on the antitrust exemption and the Curt Flood Act go further in restricting the exemption than may be obvious at first. As discussed above, both the Supreme Court and Congress have weighed in to reduce the reach of the antitrust exemption, if only to a limited extent. Such limitations are important for those facets of baseball that are expressly no longer included in the exemption, most notably subjects of mandatory bargaining in labor negotiations with the players. But what is often overlooked is how MLB reacts to such judicial and legislative limits on its beloved exemption, specifically in the context of those issues that are still subject to the antitrust exemption, like franchise relocation.

Baseball's commissioner, Allan "Bud" Selig, believes a good reason to maintain franchise relocation under the exemption is to "vigilantly enforce strong policies prohibiting clubs from abandoning local communities which have supported them."⁷³ Selig focuses on baseball's best interests, as well as those of society at large, arguing that "[n]o legitimate public policy would be served by legislation that would force MLB to defend constantly the reasonableness of its efforts to promote franchise stability."⁷⁴

A. *The Similarity Among the Leagues*

It seems unclear why the public policy served by antitrust laws in general is less served in the context of professional baseball than other professional sports. Courts have declared such restraints on franchise movement illegal in other professional sports contexts, as explicated in the *Raiders*⁷⁵ cases and *In re Dewey Ranch Hockey*.⁷⁶ In *Raiders I*, the Ninth

http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=3897:lwi-b-mlbs-anti-trust-exemption-and-franchise-relocation-&catid=67:pete-toms&Itemid=155 (Providing an overview of arguments about the ambiguity relating to whether the exemption applies to franchise relocation). See also Andrew Zimbalist, *May the Best Team Win: Making Baseball Competitive*, THE BROOKINGS INSTITUTION, http://www.brookings.edu/articles/2003/fall_competitiveness_zimbalist.aspx (last visited March 6, 2011) ("Together the rulings cover only three of the eleven judicial circuits in the United States, leaving ample ambiguity in the status of the scope of the exemption in the remaining circuits.").

⁷³ Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT L. 277, 280 (1994). Indeed, teams are so entrenched in the local consciousness that losing them could be compared to losing a relative. Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocations*, 8 DEPAUL-LCA J. ART & ENT. L. 263, 264 n.4 (1998) (citing CHARLES C. EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM* 5 (1993)).

⁷⁴ Selig, *supra* note 73, at 278.

⁷⁵ "Collectively, the *Raiders* opinions held that rule of reason analysis governed a

Circuit held that the NFL rule requiring three-quarters approval⁷⁷ of team owners to relocate a franchise (regardless of whether the new location would infringe upon another team's exclusive territory) was an unlawful restraint of trade under the Sherman Act.⁷⁸ When it comes to NHL relocation, an issue raised in *In re Dewey Ranch Hockey*, the NHL Constitution contains what appears to be a veto for franchise relocation, which may violate *Raiders I* as an unreasonable restraint on trade.⁷⁹

The operative question then is whether there is any difference between baseball and other professional sports that should allow MLB to control when and where its teams locate. Some commentators are quite outspoken on this question:

Quite simply, football and basketball have not only managed to survive while being subject to antitrust regulation, but both have grown tremendously, particularly relative to baseball, over the past few decades. There does not seem to be any material distinction between baseball and other sports that would explain why it would not be able to adapt and continue to thrive if subjected to federal antitrust law.”⁸⁰

But, the Supreme Court seemingly has gone in different directions on this question. On one hand, the Court has relied on Congressional inaction in removing the exemption. This would seem to suggest that the Court thinks there is a principle protecting the exemption that should only be challenged by a democratically accountable entity. On the other hand,

professional sports league's efforts to restrict franchise movement.” *National Basketball Association v. San Diego Clippers Basketball Club, Inc.*, 815 F.2d 562, 567 (9th Cir. 1987).

⁷⁶ 406 B.R. 30 (Bankr. D. Ariz. 2009).

⁷⁷ Originally, Rule 4.3 required unanimous vote of the clubs for a move into another team's home territory. *L.A. Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1385 (9th Cir. 1984).

⁷⁸ *L.A. Memorial Coliseum Commission*, 726 F.2d 1381. See also *San Diego Clippers Basketball Club*, 815 F.2d at 567. Shortly after the Raiders won their suit to move the team from Oakland to Los Angeles, the San Diego Clippers challenged NBA franchise relocation rules and successfully defended its move to Los Angeles.

⁷⁹ See Ryan Gauthier, *In re Dewey Ranch Hockey*, 1 HARV. J. SPORTS & ENT. L. 181, 201 (2010). The NHL Constitution reads: “No other member of the League shall be permitted to play games (except regularly scheduled League games with the home club) in the home territory of a member without the latter member's consent. No franchise shall be granted for a home territory within the home territory of a member, without the written consent of such member.” CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE, art. 4.3. It is important to note that these cases do not hold that franchise movement restrictions are invalid as a matter of law, but they may be so under antitrust analysis.

⁸⁰ Tomlinson, *supra* note 20, at 297.

given the *Flood* majority's contempt of the basis underlying *Federal Baseball*, it seems unlikely that the Court would continue to see a principled justification for separating MLB from all other major sports. In that case, the key element keeping the exemption alive for franchise relocation is *stare decisis*. This conclusion seems correct given that baseball's franchise relocation rules are not unique to baseball, even if they are part of the business of baseball.

B. The Free Market Analysis

Commissioner Selig's concern for the local communities that support baseball teams is appealing because the league does not want to alienate fans whose teams have left the local market, but his concerns are misplaced. Selig does not explain why MLB as a whole is in a better position than a local team to determine what will serve the public best, although he does admit that the League will block owners who want to relocate to increase profits. What is unclear is why allowing moves in a more or less free market would necessarily be a bad decision for the League, its teams, and local communities. In fact, preventing a move, and thus forcing a team to remain in an undesirable situation, would arguably promote the competitive imbalance that MLB has spent many years trying to remedy and would not serve the interest of the League or the public.⁸¹

If a franchise is a profit-conscious entity, and intuitively it should be in order to stay in business, it should relocate when there is a profit or benefit to the move outweighing any economic costs.⁸² One of the most important aspects of profit maximization for a franchise depends on the fan base. In this aspect, Selig's arguments regarding the fan base particularly are misguided. As one commentator has noted, "Concerning the fans, loyal fans don't get winners. Instead, fickle fans get winners because they express their demands at the box office."⁸³ In addition, "[c]ities that during some years appear apathetic toward baseball appear passionate in other years, depending on team performance."⁸⁴ So if a team has a weak fan base, it should be in a better position to relocate because "a team can have

⁸¹See ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 35-53 (2003) (discussing competitive balance).

⁸² Craig A. Depken II, *Fan Loyalty in Professional Sports: An Extension to the National Football League*, 2 J. SPORTS ECON. 275, 282-83 (2001).

⁸³ Philip Porter, *Market Advantage as Rent: Do Professional Teams in Larger Markets Have a Competitive Advantage?*, in 1 ADVANCES IN THE ECONOMICS OF SPORT 237, 246 (Gerald W. Scully ed., 1992).

⁸⁴ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOKS INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 145 (1992).

a lower quality and higher price combination than it would have been able to extract in its previous host city,"⁸⁵ which will in turn improve its profit margin. This financial success could eventually mean better players, a new stadium, better equipment, and so on, which would increase interest in baseball, seemingly in the game's best interests, meeting Selig's primary concern. After all, owners move a franchise (even if only motivated by profits) because of a determination that having a Major League franchise is more highly valued in the destination city than in the departure city.

Another factor that might contribute to a desire for relocation is the location's population, which is an important factor in determining franchise revenues.⁸⁶ Each win in the regular season increases revenue between \$65,000 and \$88,000 for every one million residents in the metropolitan area.⁸⁷ In addition, teams playing in new stadiums have higher franchise values on average than teams playing in older stadiums. A new facility increases a Major League franchise's value by about \$17 million⁸⁸ and local revenues by almost \$50 million if a team has a new stadium, which gives teams that relocate the ability to afford better players, coaches, and managers.⁸⁹ Admittedly, these revenue streams are not benefits exclusive to relocations, but new stadiums are often part of the package that lures a team to a new area.⁹⁰ Regardless, it is hard to see how a move to a more baseball-friendly city could be bad for baseball.

It is also important to note that an owner's desire to relocate his franchise may not be due entirely to a desire to increase profits.⁹¹ Nevertheless, this reality does not change the analysis in any meaningful

⁸⁵ Depken, *supra* note 82, at 282–83 (“Team owners typically know what their costs will be for a given season. Player salaries are, for the most part, determined before the beginning of the season. Furthermore, in general, stadium expenditures are also predetermined. Therefore, the most important random element of a team's profit relation is revenue. Although season ticket sales provide a predetermined level of revenue, the number of marginal ticket sales is the source of the randomness in team revenues. A team owner desires the strongest fan base possible to weather random influences on his or her team's competitiveness. Random impacts to a team's competitiveness, such as player injuries, opponent competitiveness, or overall team synergies, cause a team owner to prefer a fan base that attends games at a level greater than predicted by the quality-price relationship alone.”).

⁸⁶ Daniel Brown & Charles R. Link, *Population and Bandwagon Effects on Local Team Revenues in Major League Baseball*, 9 J. SPORTS ECON. 470, 483 (2008).

⁸⁷ *Id.*

⁸⁸ Donald L. Alexander & William Kern, *The Economic Determinants of Professional Sports Franchise Values*, 5 J. SPORTS ECON. 51, 59 (2004).

⁸⁹ Brown & Link, *supra* note 86, at 485.

⁹⁰ See ZIMBALIST, *supra* note 84, at 136–40 (discussing the relationship between relocation and stadiums).

⁹¹ Hurst & McFarland, *supra* note 73, at 293.

way. If, as Leonard Koppett has argued,⁹² owners are in the business more for social prestige than profit, it presumably would not be in an owner's best interest to move a franchise that the community still supports. Additionally, as mentioned above, team relocation may also be in the public interest since a team moves to a city "with a stronger demand for the game, and the abandoned city usually succeeds in attracting an expansion team."⁹³ Without an antitrust exemption, teams might be able to move into a market that would be the exclusive territory of another team. Thus, perhaps the League's desire to keep its antitrust exemption has to do more with mollifying the owners of certain teams in order to avoid competition in their exclusive territories.

Admittedly, there are times when an individual franchise owner's interest may conflict with the interests of the League and possibly the public.⁹⁴ Given this, and evidence that a "free market" relocation system generally serves the needs of owners, fans, and the League, the important question is whether those needs are better served with the exemption in place. The exemption would not do as well in promoting those interests that concern baseball when "fellow owners might disapprove of welfare-enhancing relocations, even when a nonintegrated competition organizer or an independent board of directors might see the move as in the league's overall interest."⁹⁵

Since Major League Baseball is "confident that it operates free from a

⁹²LEONARD KOPPETT, *SPORTS ILLUSION, SPORTS REALITY: A REPORTER'S VIEW OF SPORTS, JOURNALISM AND SOCIETY* 49–51 (1981). "[T]he most important true 'profit' to the franchise owner is an intangible: there are enormous ego rewards." *Id.* at 50.

⁹³ZIMBALIST, *supra* note 81, at 31.

⁹⁴Stephen F. Ross, *Antitrust, Professional Sports, and the Public Interest*, 4 J. SPORTS ECON. 318, 323 (2003) ("An owner with great personal wealth might seek to relocate a team to a small city, even though the most efficient allocation of franchises would preserve the team in a larger city where many more fans can attend the games or closely follow the team on television. An owner might seek a relocation that will disrupt effective team travel (a team in Tokyo); a relocation could affect traditional rivalries; it could prop up an inefficient owner when the best result would be to force a sale to new management who can operate the club profitably in its existing location; for newer leagues, the relocation could reflect free-riding on efforts by a franchise in another city to promote the entire sport; and a relocation could be inconsistent with a clear, long-term strategy of building credible commitments with localities that encourage local investment in return for assurances that the club will not move absent extraordinary circumstances.").

⁹⁵*Id.* ("Two prominent examples come to mind. A club might find itself in a nonviable situation that requires relocation, but the owner is a maverick who is aggressive and innovative thus annoying his fellow owners. Relocation might be refused that owner and then permitted when the franchise is sold. The other scenario would be where a league would be better off with multiple teams in a large media market or a new team in a market proximate to an existing club's home, but the owners reject the relocation to protect the existing franchise.").

credible threat of entry[, it] will artificially suppress the number of franchises that participate in its competition.”⁹⁶ “[W]ithout competitors, a single merchandiser has no incentive to innovate, so it offers consumers fewer options.”⁹⁷ This market position allows the League to “exploit local communities for monopoly rents in the stadium market.”⁹⁸ This exploitation goes even further in Leagues where the owners of the franchises and the organizers of the competition are one in the same, rather than the organizers being an independent body. In this case, “the number of franchises will be set even below the reduced number that would be established by an efficient monopolist independently providing competition-organizing services.”⁹⁹ Furthermore, owners are concerned

⁹⁶*Id.* at 326. See also MARK S. ROSENTRUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO’S PAYING FOR IT 74–75 (1997) (“Like any business, professional sports teams can increase their profits if they reduce or eliminate competition. Most businesses must accomplish this objective by producing the best possible product at the lowest price. The professional sports leagues, however, have been able to establish a protected environment and eliminate competition while maintaining the illusion of a free market. All the professional sports leagues are, in reality, cartels or private business associations insulated from the competitive pressures of a free market. These cartels control the number of teams that exist, allowing association members to extract subsidies and welfare from state and local governments that want one of the controlled franchises located within their borders. . . . The labor strife that has dominated each of the leagues in the last several years is really a battle for control of the cartels’ profits, with neither players nor owners desiring a market-based environment that would end the subsidies provided by governments.”).

⁹⁷ Derek Taylor, *Splitting the Uprights: How the Seventh Circuit’s American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. CONTEMP. PROBS. 143, 170 (2010).

⁹⁸ Ross, *supra* note 94, at 326. See also Zimbalist, *supra* note 72 (“Baseball’s monopoly allows it to restrict artificially the number of franchises and to dally with cities that have no team—to hold out to them the elusive promise of a franchise, pressuring existing host cities to build new stadiums or otherwise do MLB’s bidding. As a consequence, cities and states compete against each other, leading to exorbitant stadium-financing packages and sweetheart leases. Cities have attempted on their own to include lease provisions that deter team relocation and provide a more equitable sharing of the facility returns. But usually only the largest cities have sufficient bargaining leverage to accomplish even part of these aims.”).

⁹⁹ Ross, *supra* note 94, at 326. See also Sanghoo Bae & Jay Pil Choi, *The Optimal Number of Firms with an Application to Professional Sports Leagues*, 8 J. SPORTS ECON. 99, 107 (2007) (“We conclude that the semi-collusive cartel [which does not set the prices of the firms in the cartel] provides a smaller number of firms than the fully collusive cartel [which does set the prices]. Because the semi-collusive league cartel cannot control prices, it chooses a smaller number of firms to relax price competition. Second, the fully collusive cartel chooses a larger number of firms compared to the socially optimal one. The cartel’s choice is based on the difference between the surplus of the marginal consumer and the fixed cost. On the other hand, the social planner’s choice is based on the average surplus of consumers. This leads to the league’s overprovision in the variety of firms to maximize its

with the possible capital gain from the future sale of a franchise.¹⁰⁰ In order to maintain or increase the market value of the team, and thereby maximize the resale value, the owners will artificially suppress the number of teams.¹⁰¹

Additionally, while Selig claims that efforts to block franchise relocation are in the best interest of the game, in many cases attempts to block franchise relocations “appear to have been motivated more by personality conflicts than by a genuine desire to protect the interests of the host city or of the league in general.”¹⁰² Because of the possibility in this case that owners will act contrary to the public interest and the interest of baseball, “a rule that requires supermajority approval for franchise relocations would not be in the public interest.”¹⁰³

In a free market, however, there is a concern of teams fleeing small market cities for the bright lights of the big cities like New York and Los Angeles. Certainly, this might happen, as teams try to build on the success of already-established franchises in those cities. But, in fact, this will only happen to a certain point. “The market will react to the needs of the consumer and thus determine how much . . . is too much [I]t is better to err on the side of competition than on the side of monopoly.”¹⁰⁴ Certainly, the antitrust exemption cannot be “the only policy that is in the public interest”¹⁰⁵ or in the best interest of baseball.

C. *The Effect of the Exemption – Use It and Lose It*

In fact, for all the talk of how the antitrust exemption is needed to preserve franchise stability, it is unclear how much of an effect the exemption has on relocation.¹⁰⁶ The reality is that there have been more franchise relocations in MLB than the NFL since 1950.¹⁰⁷ In fact, since

joint profits. Therefore, the effects of any policy toward the number of franchises in the sports leagues should be evaluated with more caution because they depend crucially on the extent to which the leagues can control franchisees’ pricing behavior.”).

¹⁰⁰ Bruce I. Oppenheimer, *Comments on League Contraction in Baseball*, 4 J. SPORTS ECON. 393, 395–96 (2003).

¹⁰¹ *Id.*

¹⁰² Hurst & McFarland, *supra* note 73, at 266–67. This is evidenced by the attempts to block “maverick” owners like Charles Finley and Bill Veeck. *Id.* at 266.

¹⁰³ Ross, *supra* note 94, at 324.

¹⁰⁴ Gary Chester, Op-Ed. *Views of Sports; Question in Antitrust Case: Was Public Interest Served?*, N.Y. TIMES, Aug. 3, 1986, at S2.

¹⁰⁵ Selig, *supra* note 73, at 278.

¹⁰⁶ Tomlinson, *supra* note 20, at 295–96.

¹⁰⁷ There have been eight franchise relocations in the NFL, while MLB has totaled eleven. Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical*

1958, MLB expands or relocates a team on average every eight years.¹⁰⁸ While the numbers themselves rebut Selig's contention that baseball uses its exemption to promote franchise stability, what also seems to be clear from the evidence is that MLB does not actually use its antitrust exemption for fear of losing it.¹⁰⁹

Without ever using the exemption in its negotiations, MLB is able to employ it as a sword against those to whom it still applies to force them into complying with MLB's wishes.¹¹⁰ This function vastly overstates the exemption's value, because MLB is unlikely to ever employ the exemption. The exemption retains the value of threatened use, but nothing more. In fact, in *Major League Baseball Properties, Inc. v. Salvino*,¹¹¹ a merchandise manufacturer sued MLB Properties, the licensing arm of MLB, for violating the Sherman Act. MLB Properties did not attempt to use its antitrust exemption as a basis for dismissing the case, but rather moved for judgment on the merits. In doing so, the MLB acknowledged that the presumed antitrust exemption in fact does not protect the licensing of their intellectual property.¹¹² The first time MLB uses the exemption to force an adverse party into an undesirable result may be the end of the exemption as the Court may step in and limit the exemption or even reverse *Federal Baseball* and its progeny. As the Court and Congress have already started to whittle down the exemption to a few select functions, there is reason to believe that, after *American Needle*, the Court will remove the exemption entirely.

V. AMERICAN NEEDLE

An analysis of *American Needle* must begin with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,¹¹³ a decision on which the Court relied in *American Needle*. The *Copperweld* Court held that a parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of [Section] 1 of the Sherman Act."¹¹⁴ The

Review, 58 RUTGERS L. REV. 1, 24 (2005).

¹⁰⁸ Phil Rogers, *Relocating a Team to Portland Makes Sense*, ESPN.COM (Jan. 12, 2007), http://sports.espn.go.com/mlb/hotstove06/columns/story?columnist=rogers_phil&id=2727901.

¹⁰⁹ Tomlinson, *supra* note 20, at 295. See also Nathanson, *supra* note 107, at 25–43 (giving comprehensive accounts of some of baseball's failed attempts to block relocation).

¹¹⁰ See, e.g., *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (upholding MLB's antitrust exemption in its dealings with umpires). As a result, MLB has been able to impose more favorable terms on umpires in negotiations.

¹¹¹ 542 F.3d 290 (2d Cir. 2008).

¹¹² See Grow, *supra* note 9, at 620–622.

¹¹³ 467 U.S. 752 (1984).

¹¹⁴ *Id.* at 777.

Court came to this conclusion due to a parent and a wholly owned subsidiary having “a complete unity of interest [whose] objectives are common, not disparate[;] their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”¹¹⁵

On May 24, 2010, the Supreme Court held that, in their intellectual property licensing, NFL teams acting collectively cannot be considered a “single entity” and are therefore not immune from antitrust scrutiny.¹¹⁶ The unanimous opinion, authored by Justice Stevens, overturned decisions by a district court and the Seventh Circuit that had enabled the NFL to escape potential antitrust liability for its granting Reebok an exclusive merchandising license that prevented American Needle from making NFL-branded headwear. The case has been remanded and the NFL will be subject to antitrust scrutiny on the collective action of its teams.¹¹⁷

A. District Court Opinion

American Needle, Inc. is a headwear designer, manufacturer, and seller¹¹⁸ that manufactured and sold NFL team logo headwear for over twenty years prior to 2000. In December 2000, the NFL and its member teams authorized NFL Properties to grant exclusive intellectual property licenses to different vendors.¹¹⁹ NFL Properties subsequently granted Reebok International Ltd. a ten-year exclusive license to manufacture NFL branded uniforms, fitness equipment, sideline apparel, and headwear. As a result, American Needle lost its ability to produce NFL headwear.¹²⁰

In response, American Needle sued the NFL, its member teams, NFL Properties, and Reebok, asserting, among other things, that the exclusive license was an antitrust violation under Section 1 of the Sherman Act.¹²¹ Before a federal district court in the Northern District of Illinois, the NFL asserted that in licensing intellectual property, the teams were promoting the league and functioning as a “single entity” that should be immune from antitrust liability since a single entity cannot make agreements with itself.¹²²

¹¹⁵*Id.* at 771.

¹¹⁶ *Am. Needle Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2217 (2010).

¹¹⁷*Id.*

¹¹⁸ AMERICAN NEEDLE, <http://shop.americanneedle.com/pages/about> (last visited March 6, 2011).

¹¹⁹ *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007). NFL Properties is the licensing agent of the NFL and its teams.

¹²⁰*Id.*

¹²¹*Id.*

¹²² Memorandum in Support of the NFL Defendants’ Motion for Summary Judgment (Single Entity) at 7, *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F.Supp. 2d 941(N.D. Ill. 2007) (No. 1:04CV07806), 2005 WL 6087988.

The court had to determine whether the 32 NFL teams could create and be bound by the decisions of a common actor, NFL Properties, regarding their intellectual property rights.¹²³ In response to the NFL's motion for summary judgment, the district court held that the teams were acting as a single entity because "in that facet of their operations they have so integrated their operations" that the teams had gone beyond the level of a joint venture acting cooperatively.¹²⁴ Therefore, the NFL was immune from antitrust liability and the court granted summary judgment to the league and its member teams.

B. Seventh Circuit Appeal

After losing at the district court, American Needle appealed to the Seventh Circuit.¹²⁵ The court reviewed the motion for summary judgment *de novo* and identified the primary issue as whether "the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes."¹²⁶ The Seventh Circuit affirmed the district court grant of summary judgment.¹²⁷ The court reasoned that NFL teams share a single source of economic interest in creating NFL football because actual games can happen solely by the collective action of the individual teams.¹²⁸ The court noted that it could find no case law supporting the proposition that a sports league cannot be a single entity.¹²⁹ The court concluded that the NFL teams share a common economic interest in promoting the game of football and act as a single entity in licensing activities that further that objective.¹³⁰ The court noted that the NFL has acted as a single source of economic power in licensing since 1963¹³¹ and found that nothing in Section 1 of the Sherman Antitrust Act "prohibits the NFL teams from cooperating so the league can compete against other entertainment providers."¹³² Accordingly, the Seventh Circuit held that the NFL, as a single entity for licensing purposes, was immune from Sherman Act Section 1 liability and was entitled to summary judgment.

¹²³*Am. Needle*, 496 F. Supp. 2d at 942–43.

¹²⁴*Id.* at 943.

¹²⁵*Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 740 (7th Cir. 2008).

¹²⁶*Id.* at 742(citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769–71 (1984)).

¹²⁷*Id.* at 744.

¹²⁸*Id.* at 743.

¹²⁹*Id.* at 742.

¹³⁰*Id.* at 743.

¹³¹*Id.* at 744.

¹³²*Id.*

C. Appeal to the Supreme Court of the United States

American Needle subsequently petitioned for,¹³³ and was granted,¹³⁴ a writ of certiorari from the Supreme Court. American Needle not only sought to overturn the lower courts' rulings but also to have the Court expand beyond licensing to find that all joint conduct among the NFL's teams should be subject to rule of reason analysis and antitrust scrutiny.¹³⁵ The NFL supported American Needle's petition.¹³⁶ The league sought to affirm and expand the Seventh Circuit's holding and hoped the Court would hold that the teams were acting as a single entity in licensing and all other facets of the production and promotion of NFL football, and thus protect the league from antitrust liability in all business dealings.¹³⁷ It should be noted that as a single entity immune from Sherman Act antitrust scrutiny, the NFL would no longer have to rely on the nonstatutory labor exemption¹³⁸ that applies to the NFL's collective bargaining relationship with the NFL Players Association.¹³⁹ That nonstatutory labor exemption allows the NFL to escape antitrust scrutiny with regard to many of the conditions imposed on players (such as a salary cap), but it requires that the NFL reach agreements with the NFL Players Association ("NFLPA") to obtain that protection. A broad grant of single entity status would eliminate the need for the nonstatutory labor exemption and would have given the NFL leverage in dealings with the NFLPA.

The NBA and the NHL would also have benefited from a determination that sports leagues can be single entities, and filed briefs in support of the

¹³³ Am. Needle Petition for a Writ of Certiorari, 130 S. Ct. 2201 (2010) (No. 08-661) 2008 WL 4948434.

¹³⁴ Am. Needle, Inc. v. Nat'l Football League, 129 S.Ct. 2859 (Jun. 29, 2009).

¹³⁵ See Brief for Petitioner on Writ of Cert., 2009 WL 3004479 (2009) (No. 08-661). Rule of reason analysis began in 1911 with *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Allegedly anticompetitive conduct has only been deemed in violation of antitrust laws if the conduct unreasonably restrains trade. Reasonable restraints on trade are allowed.

¹³⁶ Brief for Respondents on Petition for Writ of Cert. at 4, 130 S. Ct. 2201 (2010) (No. 08-661).

¹³⁷ *Id.*

¹³⁸ The non-statutory labor exemption first came about in two Supreme Court decisions handed down June. 7, 1965: *United Mine Workers v. Pennington*, 381 U.S. 657, and *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676. These two plurality opinions set out the basic structure of the non-statutory labor exemption; namely that where the issues negotiated were mandatory subjects of collective bargaining, the agreements are protected from federal antitrust scrutiny. *Jewel Tea Co.* 381 U.S. at 690.

¹³⁹ See *Brown v. Pro Football*, 518 U.S. 231 (1996); *Powell v. NFL*, 930 F.2d. 1293 (8th Cir. 1989).

NFL's position.¹⁴⁰ Unlike the other major sports leagues, MLB already has an antitrust exemption.¹⁴¹

The Court, rejecting the broad positions of both American Needle and the NFL, reached a narrow decision to overturn the Seventh Circuit's determination that the NFL is a single entity for licensing purposes. The Court stated that any inquiry into joint action by the NFL must focus on whether the NFL is "capable of engaging in a 'contract, combination..., or conspiracy' as defined by § 1 of the Sherman Act."¹⁴² The key question for the Court was whether the alleged joint action was between "separate economic actors pursuing separate economic interests[]" such that the agreement 'deprive[d] the marketplace of independent centers of decision-making,' and therefore of 'diversity of entrepreneurial interests.'¹⁴³ Declining to take a broader look at the NFL, the Court examined how the 32 NFL teams relate to one another solely in the context of intellectual property.¹⁴⁴ The Court determined that each NFL team is "a substantial, independently owned, and independently managed business" with potentially different business objectives.¹⁴⁵ It remarked that while "teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."¹⁴⁶

The Court essentially found that although NFL teams have a collective interest in promoting the game, when it comes to licensing intellectual property, each team has unique objectives. Despite the fact that the teams have been working together in this manner for a long time, "a history of concerted activity does not immunize conduct from § 1 scrutiny."¹⁴⁷ The Court stated that an "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement itself."¹⁴⁸ Furthermore, the

¹⁴⁰Brief of Amici Curiae Nat'l Basketball Ass'n and Nat'l Basketball Ass'n Props. in Support of Respondents at 3, *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661); Brief for Amicus Curiae the Nat'l Hockey League in Support of Respondents at 4, *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661).

¹⁴¹*See* Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (holding that professional baseball is exempt from federal antitrust law).

¹⁴²*Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2208 (2010).

¹⁴³*Id.* at 2212 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57(1st Cir. 2002)).

¹⁴⁴*Id.* at 2213.

¹⁴⁵*Id.* at 2212.

¹⁴⁶*Id.* at 2213.

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 2213–14 (quoting *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003)).

Court held that “[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action.”¹⁴⁹ As Justice Stevens opined, “a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to [antitrust scrutiny].”¹⁵⁰

Therefore, the Supreme Court overruled the Seventh Circuit, holding that the NFL was not a single entity in its merchandising capacity.¹⁵¹ As a result, summary judgment was inappropriate and the case was remanded for a trial on the merits of American Needle’s antitrust violation claim. Although the Court chose not to address whether the NFL’s actions would survive a rule of reason analysis, its rhetoric implied a view that much of the NFL’s conduct should not constitute an antitrust violation. For example, the Court observed that there are areas where the teams can and must work in concert, such in as scheduling games;¹⁵² collective action likely will survive rule of reason analysis where “restraints on competition are essential if the product is to be available at all.”¹⁵³ The Court suggested that the NFL may ultimately win on the merits, but it held that “the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.”¹⁵⁴ On remand, the court will have to engage in a full rule of reason analysis in order to determine whether the NFL’s exclusive license with Reebok constituted an antitrust violation.

While American Needle prevailed in defeating the NFL’s motion for summary judgment, the ultimate outcome of this case is still yet to be determined. The Supreme Court decision creates the potential for additional antitrust challenges to the NFL, but the extent to which this decision will impact the NFL, and other professional sports leagues, outside the realm of intellectual property licensing is uncertain.

VI. ADJUSTING THE STREAM: ON APPLYING AMERICAN NEEDLE TO FUTURE CASES AND REMOVING THE EXEMPTION

Some would consider sports leagues single entities, and therefore

¹⁴⁹*Id.* at 2214. As the Court points out in a footnote to the cited passage, “necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA*, 468 U.S. at 101, 104 S.Ct. 2948 (holding that NCAA restrictions on televising college football games are subject to Rule of Reason analysis for the ‘critical’ reason that ‘horizontal restraints on competition are essential if the product is to be available at all’).”

¹⁵⁰*Id.*

¹⁵¹*Id.* at 2217.

¹⁵²*Id.* at 2216.

¹⁵³*Id.* (quoting *NCAA*, 468 U.S. at 101).

¹⁵⁴*Id.*

incapable of antitrust attack, because, while they compete on the field, they do not compete economically.¹⁵⁵ In fact, Major League Soccer (“MLS”) was held to be a single entity in 2002.¹⁵⁶ The competition between the teams, then, is just incident to the complete package the leagues present to the consumers. It is true that, in order to survive, professional sports teams have to collaborate on some aspects of their business, such as the rules of the game, but must remain independent in other aspects, such as remaining competitive on the field and in their pursuit for the best players.¹⁵⁷ This distinction requires an understanding on the part of all parties that baseball must not be subject to antitrust laws on all fronts.¹⁵⁸ This argument is intellectually compelling because it seems to reflect what fans see every day on television, but it ultimately misses the mark. Teams compete for players, coaches, fans, sponsors, and possibly even things like real estate if the team is moving into an already occupied territory.¹⁵⁹ Indeed, “granting a sports league single-entity status would inappropriately provide a blanket exemption from the application of [Section] 1 [of the Sherman Act].”¹⁶⁰

If the Court would have accepted the NFL’s single entity defense and expanded its reach to all aspects of the NFL’s business, it could have affected MLB as well, even though baseball already has an antitrust exemption. As discussed above, the exemption does not apply to labor negotiations with the union because of the Flood Act. However, if MLB could claim to be a single entity, it would not have to bargain with the players’ association in order to secure the shelter of the non-statutory labor exemption. MLB could theoretically unilaterally impose terms on the players with no repercussions other than the players going on strike. It could have also had effects on the steroid scandal that has plagued the

¹⁵⁵ *San Francisco Seals, Ltd. v. Nat’l Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

¹⁵⁶ *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002). “MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams’ schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.” *Id.* at 53. The First Circuit held that this unique structure was sufficient for MLS to be considered a single entity.

¹⁵⁷ Michael A. McCann, *Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications*, 42 CONN. L. REV. 901, 919 (2010).

¹⁵⁸ As discussed below, this does not require baseball to have an antitrust exemption. Rather, antitrust laws may not apply based on a rule of reason analysis.

¹⁵⁹ Hurst, *supra* note 73, at 290.

¹⁶⁰ *Id.* at 292–93.

League over the last decade.¹⁶¹

Nonetheless, while the Court refused to accept the NFL's single entity defense, *American Needle* does more than preserve the status quo.¹⁶² In the context of professional baseball, it is probably most important as a signal of the Court's willingness to address antitrust issues in professional sports, and to do so with a heavy handedness that has not been seen since *Federal Baseball*. *American Needle* has made the Court's position on antitrust in professional sports more clear than it has been at any time since *Federal Baseball*. After all, *American Needle* is the "first decision in some time that effectively broadens, rather than reduces, the scope of the Sherman Act."¹⁶³ As mentioned above, courts were attempting to draw distinctions between things that were part and parcel of baseball and those that were just incident to the game.¹⁶⁴ Congress really gutted this strategy and removed any sense of a principled approach in applying the exemption by passing the Flood Act.

A. Removing the Exemption

American Needle seems to be the next logical step in the right direction after *Flood* and the Flood Act.¹⁶⁵ The court is now willing to hold unanimously that a major sports league, the NFL, is not exempt from antitrust laws and, as a result, their actions must be analyzed under the rule of reason.

As the Court has progressed thus far by monotonically decreasing the breadth of the exemption, it is logical to assume that the Court will continue along this path in the future, and it is right to do so. Given the exemption's already anemic existence and its lack of principled application, the Court

¹⁶¹ Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 772–74 (2010).

¹⁶² Cf. Wm. David Cornwell, Sr., *A Hail Mary Falls Incomplete: The American Needle Decision's Impact on Collective Bargaining in the NFL*, THE HUFFINGTON POST, May 24, 2010, http://www.huffingtonpost.com/wm-david-cornwell-sr/a-hail-mary-falls-incompl_b_587770.html ("It is rare that a Supreme Court decision is considered a 'landmark' decision when it does little more than preserve the status quo, but today's decision may have its greatest impact because it did not alter the playing field between the NFL and the NFLPA.").

¹⁶³ Judd Stone & Joshua D. Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of American Needle v. NFL*, 2009-2010 CATO SUP. CT. REV. 369, 395 (2010).

¹⁶⁴ See *supra* text accompanying notes 62–63.

¹⁶⁵ *American Needle* itself does not deal with MLB's antitrust exemption, and it does not hold that the NFL violated antitrust laws. However, the Court did hold that the NFL is subject to the rule of reason analysis under the antitrust laws when it comes to licensing merchandise. 130 S.Ct at 2207.

should take the next opportunity to end the antitrust exemption.¹⁶⁶ MLB is no longer the league it was in 1922 when *Federal Baseball* was decided. It is not even the same league that it was in 1972 when *Flood* was decided. There is no principled way to apply the exemption based on *stare decisis* because either *Federal Baseball* was wrongly decided in the first instance, or the facts of baseball have changed so much that the assumptions underlying that decision are no longer applicable. In addition, the Court has already admitted, in *Flood*, that baseball is engaged in interstate commerce.¹⁶⁷

When analyzing whether to remove baseball's antitrust exemption, more than the needs of the owners, players, or the league must be analyzed. Antitrust law is concerned with the market, and hence, the needs of the consumers.¹⁶⁸ The final decision, then, should be more about protecting the rights of another stakeholder, the fans of baseball.¹⁶⁹ "The laws are concerned with efficiency: whether the market activity enhances competition, which is ultimately good for the consumer, or hurts competition, which injures the consumer."¹⁷⁰

As mentioned above, some anti-competitive restraints are ultimately good for the consumer, like the agreement among Major League teams upon the rules of the game, which is central to the business of giving baseball exhibitions. League rules define everything from runs and outs to the equipment used during games.¹⁷¹ Without agreement upon rules, two teams could not play a game of baseball. Such a lack of agreement would obviously be fatal to the game, so it is not something that should logically fall outside an antitrust exemption. However, other leagues have fared well in this regard absent an exemption. It is fair to say that agreement on League rules would be upheld under a rule of reason analysis. The agreement is necessary to promote competition, and any anti-competitive effects of agreement on rules seem to be negligible.

However, when it comes to licensing, MLB has refused to use its

¹⁶⁶ Justice B. Hill, *Loss for NFL Should Lead to Loss for MLB, Too*, REALCLEARSPORTS.COM, May, 26, 2010, http://www.realclearsports.com/blognetwork/justice_is_served/2010/05/loss-for-nfl-should-lead-to-loss-for-mlb-too.html ("Pro baseball has no more right to an antitrust exemption than Exxon-Mobil, Microsoft or Wal-mart, and the public should question why it still does. The league should operate under the same business principles and antitrust laws as other professional sports.").

¹⁶⁷ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

¹⁶⁸ Chester, *supra* note 104.

¹⁶⁹ Larry C. Smith, *Beyond Peanuts and Cracker Jack: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 137 (1996).

¹⁷⁰ Chester, *supra* note 104.

¹⁷¹ Grow, *supra* note 9, at 605–06.

exemption presumably because of the assumption that it does not apply to such activities.¹⁷² By extension, since baseball does not view its licensing activities as eligible for the exemption, it is not a stretch to say that baseball views itself no differently than the NFL on this matter. As such, if a case similar to *American Needle*, but against MLB, were to come before the Supreme Court, the Court would be correct to refuse to apply the exemption in the case, since there is nothing unique about baseball's licensing activities, and baseball has admitted as much by refusing to use its exemption. In this case, the Court would be relying on nothing more than *stare decisis*,¹⁷³ more specifically its decision in *American Needle*, in holding that MLB is not a single entity for purposes of licensing. As discussed above, such a defense of the exemption is untenable. If MLB were brazen enough to raise the exemption as a defense to such a suit in the Supreme Court, the Court would be right to strike it down and should take the opportunity to remove the exemption entirely.

B. Effects of Removing the Exemption

If the Court were to repeal baseball's antitrust exemption, there may be a few interesting results in the two areas that seem to be most obviously under the purview of the exemption, the reserve clause as applied to minor league players and franchise relocation. The reserve clause as then conceived was upheld in *Flood*. However, that reserve clause was effectively struck down in the Messersmith arbitration, when arbitrator Peter Seitz determined that the reserve clause's one-year language meant one year.¹⁷⁴ The original reserve clause allowed one team to keep a player under contract indefinitely. The current, collectively-bargained clause allows a team to keep a player under contract for six years, during which time the player cannot sell his services to the highest bidder.¹⁷⁵ Of course, since this version of the reserve clause is collectively-bargained between the

¹⁷²See *supra* notes 111–112 and accompanying text.

¹⁷³As discussed above, the Court has had no qualms using *stare decisis* as a rationale to continue the exemption.

¹⁷⁴David Greenberg, *Baseball's Con Game: How Did America's Pastime Get an Antitrust Exemption?*, SLATE, July 19, 2002, <http://www.slate.com/id/2068290/> (“In 1975, pitcher Andy Messersmith's contract with the Los Angeles Dodgers expired, and although the Dodgers and Major League Baseball insisted the Dodgers alone had the option to re-sign him, Messersmith claimed otherwise. The parties took the case before an arbitrator hired by the owners, Peter Seitz, who ruled for Messersmith. (Seitz was immediately fired.) The owners lost an appeal in federal court, and thereafter players enjoyed a limited right to free agency.”).

¹⁷⁵Adam Fleisher, *What Moneyball Missed*, THE AMERICAN, Apr. 3, 2009, <http://www.american.com/archive/2009/april-2009/what-moneyball-missed>.

league and MLBPA,¹⁷⁶ it evades antitrust scrutiny under the non-statutory labor exemption, so antitrust scrutiny would not affect it.¹⁷⁷

The minor league system, however, would be vulnerable to attack absent the exemption. It is unclear whether the current minor league system would survive if the court repealed the antitrust exemption.¹⁷⁸ In fact, the system may never be challenged in the first place because minor league players “want to ingratiate themselves with, not alienate themselves from, MLB.”¹⁷⁹ If a minor league ballplayer were to sue, some commentators argue that baseball may actually win because the minor league reserve clause allows “teams to draft and develop their own young minor-league talent [which] gives small and mid-market teams a better chance to compete with large-market teams with much larger payrolls, and competitive balance benefits the league and the public as a whole.”¹⁸⁰

If a suit were to succeed, major league teams would probably have to sever their ties with the minor leagues, but this consequence would not necessarily lead to the disappearance of the minor leagues.¹⁸¹ Instead, MLB clubs would use the draft to take players from the minor leagues, rather than high schools or colleges, which would increase competitive balance among major league teams because the players would be more developed and easier to scout, resulting in a proven talent pool from which MLB could draw.¹⁸² Allowing players to develop in college and in the minor leagues provides owners a costless way to assess talent before taking on any expense. While Major League owners would have to spend more on those players, they would save on the salaries and expenses of players that will never contribute to their success in the Major League. As the testimony of former Major and Minor League player Dan Peltier illustrates, “only one out of every ten players drafted even gets one day in the majors. Only one out of every hundred actually has a career in the majors.”¹⁸³ Owners are spending a great deal on players who languish in these leagues when they could be spending it on players and teams that will contribute to the league and community in which they live and work. Regardless, Major League teams would no longer be able to draft players and keep them on a minor

¹⁷⁶ Major League Baseball Collective Bargaining Agreement 2007–2011, Article XX – Reserve System, 69.

¹⁷⁷ See *supra* note 138.

¹⁷⁸ Grow, *supra* note 9, at 610.

¹⁷⁹ ZIMBALIST, *supra* note 81, at 26.

¹⁸⁰ Tomlinson, *supra* note 20, at 296–97.

¹⁸¹ ZIMBALIST, *supra* note 81, at 26.

¹⁸² *Id.* at 26–27.

¹⁸³ *Major League Baseball Antitrust Reform: Hearing Before the Subcomm. on the Judiciary*, 105th Cong. 14 (1997) (statement of Dan Peltier).

league team with no chance of changing teams or earning more money.

Were the Supreme Court to remove baseball's immunity, however, it would likely be felt most in franchise relocation. Without the exemption, it would be more difficult for MLB to prevent owners from moving their franchises. If MLB tried to restrain a franchise's movement, there is virtually no doubt that the club's owner would sue MLB for unreasonable restraint of trade.¹⁸⁴ MLB would then probably be subject to rule of reason analysis. MLB could theoretically come out victorious by proving that, on balance, it is better for competition within baseball that baseball keeps the team from relocating. As argued above, the League should have reason to worry when it comes to losing its exemption in this respect because of the numerous anti-competitive arguments owners could make about the exemption.

There would also be the likelihood that rival leagues would develop in an attempt to draw players and fans from MLB. Of course, this competition may not be bad for baseball. The NFL has faced competition from no less than eight leagues over the past ninety years.¹⁸⁵ This competition includes the United Football League ("UFL"), which began play in 2009, after founder Bill Hambrecht determined it "was illogical that NFL teams would be leaving two of the largest and best growth markets in the country."¹⁸⁶ From a marketing angle, he knew there was room for more football teams."¹⁸⁷ The UFL then fills the void that the NFL has refused to fill in the market for football.

As mentioned above, it is important to remember that the removal of baseball's exemption is not fatal to any league action, since a plaintiff would have to prove an anti-competitive effect under a rule of reason analysis, which is generally the standard used to judge sports leagues' conduct.¹⁸⁸ Under a rule of reason analysis, courts weigh the anti-competitive effect within the market against pro-competitive benefits of the restraint. If the pro-competitive benefits are significant enough to outweigh anti-competitive effects, the plaintiffs have the opportunity to show that the

¹⁸⁴ This suit would likely be nearly identical to the *Raiders* cases described earlier, *supra* notes 75–78 and accompanying text.

¹⁸⁵ See Smith, *supra* note 169, at 139 n.167.

¹⁸⁶ The Los Angeles Rams' move to St. Louis and the Houston Oilers' move to Nashville.

¹⁸⁷ ABOUT US, UFL, <http://www.ufl-football.com/about-us> (last visited March 29, 2011).

¹⁸⁸ Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998)) ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product' such as sports leagues.").

legitimate objectives can be achieved in a less restrictive manner.¹⁸⁹ This “least restrictive alternative” test is used in order to determine whether challenged conduct is inherently pro- or anti-competitive.¹⁹⁰ If there is a less restrictive restraint than the one used, there is a presumption that the intent of the restraint is not inherently pro-competitive.¹⁹¹ Proof of less restrictive alternatives can be used “in determining the net competitive effects of a restraint . . . where the economic impact is difficult to determine.”¹⁹²

In conclusion, the Court waiting for Congress to act to remove the exemption would be a bad policy choice.¹⁹³ Leagues are “well-positioned to exert disproportionate influence on congressional decisionmaking.”¹⁹⁴ This ability to lobby is not available in the federal courts, where any dispute over the antitrust laws “would presumably be resolved on the merits.”¹⁹⁵ Congress can, and as discussed above, occasionally does, provide antitrust immunity. But while “courts have struggled to assess potential exemptions for professional sports leagues,”¹⁹⁶ it is not clear that “Congress, with its institutional advantages, has established a more capable record.”¹⁹⁷ There is no way to tell whether Congress would support a removal of the exemption at any time. Party affiliation, or ideological leaning in the case of the Supreme Court, is not an accurate predictor of whether a congressional representative or justice will support the repeal of the exemption.¹⁹⁸

VII. CONCLUSION

While the *American Needle* decision is not groundbreaking for the way it treats NFL teams as separate economic entities, it is important as an indication that the Court is more willing than ever to look past the historical

¹⁸⁹ Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005).

¹⁹⁰ Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense*, 2009 WIS. L.REV. 835, 909 (2009).

¹⁹¹*Id.* at 912–13.

¹⁹²*Id.* at 913–14. *See also id.* at 914–15 for a good example of application of this rule.

¹⁹³*See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005) (“The legislative process is untidy and opaque; it gives those with intense and even outlying preferences numerous opportunities to slow or stop legislation and to insist upon compromise as the price of assent.”).

¹⁹⁴ McCann, *supra* note 161, at 780.

¹⁹⁵*Id.* at 781.

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸ Smith, *supra* note 169, at 133.

aspects of sports leagues as putting forth a single product for consumption. Furthermore, MLB has refused to use its antitrust exemption for fear of losing it, which had rendered it effectively useless. In addition, the Court's argument that Congress should be the body to remove the exemption is meritless. Congress did not generate the exemption, nor has it ever acted broadly on baseball's antitrust exemption. For this reason, it should be the province of the Supreme Court to exercise its discretion in refusing to follow unworkable precedent and ultimately to remove the antitrust exemption that it created nearly ninety years ago. Since the antitrust exemption has been rendered effectively useless and the public interest is better served by free market competition, the Supreme Court should use the next available case that puts forth a reasonable question of whether the exemption applies to remove baseball's antitrust exemption. To let a judicially created antitrust exemption stand based on long outdated facts is an affront, not only to the justice system, but also to true fans of sport everywhere who believe contests should be settled through true competition on the field or court, not in the courtroom.

The French Revolution 2.0: Copyright and the Three Strikes Policy

Eldar Haber*

ABSTRACT

Internet file-sharing of copyrighted materials created a struggle between right holders, Internet Service Providers (ISPs), and file-sharers. After several different attempts to resolve the struggle, many countries began to debate the possibility of a *Three Strikes Policy* (3SP), which includes, *inter alia*, providing for the termination of subscriptions and accounts of repeat infringers in appropriate circumstances. This policy has thus far been implemented by way of legislation in Taiwan (2009), South Korea (2009), France (2010), the United Kingdom (2010) and New Zealand (2011), and by means of private ordering in Ireland (2010). It is still under consideration elsewhere. The 3SP is portrayed as a panacea for Internet-related infringements.

This article examines the legal, social, and economic implications of implementing the 3SP as a solution to copyright infringements through file-sharing. I discuss the potential impact on the right to privacy, due process rights and free speech. I locate the 3SP within the emerging framework of Users' Rights and criticize it. I argue that the 3SP is an inappropriate attempt to strengthen right holders' power over users and might reshuffle and jeopardize the balance set in the copyright regime between the interests of authors and those of the public. I therefore propose an alternative version of the 3SP. Furthermore, I argue that the 3SP is yet another link in a chain of a criminal paradigm set in copyrights, meaning that some copyright law

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policies will probably continue to shape in accordance with criminal law, despite copyright's civil law rationales. I claim that this paradigm shift in copyright law will continue through global legislation. Finally, I conclude that the 3SP is not the proper means for resolving illegal file-sharing issues. Rather, it is an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, at least not yet.

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I. INTRODUCTION

The emergence of the Internet opened a gateway to many intellectual property infringements. As technology has evolved, the Internet has become more accessible to users around the globe. Technology holds many advantages. Among other things, it allows for the sharing of files between users, which promotes freedom of speech and information. On the other hand, file-sharing may pose a real problem for the business models of some industrial copyright holders. Accordingly, Internet file-sharing of copyrighted materials has caused a struggle among right holders, Internet Service Providers (ISPs), and file-sharers. After several diverse attempts to resolve the struggle, many countries are now considering implementing the

so-called Graduated Response, or *Three Strikes Policy* (3SP),¹ which provides for the termination of repeat infringers' Internet subscriptions and accounts. In a nutshell, the 3SP means that each time a user is caught infringing copyrighted material over the Internet, he or she receives a notice. If that user receives three notices within a defined time period, the user might be suspended from all domestic Internet access providers for a certain period of time. Such a policy has thus far been implemented by way of legislation in Taiwan (2009),² South Korea (2009),³ France (2010)⁴ and New Zealand (2011),⁵ is in a pilot stage in the United Kingdom (2010),⁶ has been implemented by means of private ordering in Ireland (2010),⁷ and is being considered elsewhere.

In this Article, I examine the legal, social, and economic implications of implementing the 3SP as an enforcement solution to copyright infringements through file-sharing. I discuss the potential impact of the 3SP on the right to privacy, due process rights and free speech. I locate the 3SP within the emerging theoretical framework of Users' Rights within copyright law. This framework demonstrates that the 3SP is an inappropriate attempt to strengthen right holders' power over users in a way that might reshuffle and jeopardize the balance set in the copyright law regime between the interests of authors and those of the public.⁸ Furthermore, I claim that the 3SP is yet another link in a chain of a growing

¹ The graduated response policy has also been dubbed the "Digital Guillotine." WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 11–14 (2009). It seems that the industry prefers the term "graduated response" to 3SP, probably because it sounds less dramatic than a three strikes policy. The fact that the name of the tool is contested reveals the struggle. I will deliberately use the 3SP terminology as an illustration of my own point of view.

² 著作權法 [Copyright Act], art. 90quinquies (2007) (Taiwan), translated in WIPO, www.wipo.int/wipolex/en/text.jsp?file_id=187795#None (2009).

³ 저작권법 [Copyright Act of Korea] art. 133bis (2007) (S. Korea).

⁴ Projet de loi favorisant la diffusion et la protection de la création sur Internet [Bill supporting the diffusion and the protection of creation on Internet] (2009) (Fr.), translated in La Quadrature du Net, www.laquadrature.net/wiki/HADOPI_full_translation (2010) [hereinafter *Projet de Loi*].

⁵ Copyright (Infringing File Sharing) Amendment Act, 2011 No. 11 § 92A (N.Z.). Although the act includes a power for a district court to suspend an internet account for up to six months under § 122O, it is only intended to be used if the notice process and actions by the Copyright Tribunal prove ineffective.

⁶ Digital Economy Act, §§ 124A–124N (2003) (U.K.).

⁷ See *EMI Records & Ors v. Eircom Ltd*, [2010] IEHC 108 available at www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument.

⁸ For more on Users' Rights, see generally LYMAN R. PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005).

criminal paradigm in copyright law, and argue that a paradigm shift in copyright will continue as different legislative proposals are enacted around the globe, meaning that copyright law will continue to shape some of its policies in accordance with criminal law despite its civil law rationales. Finally, I will argue that the 3SP is impractical and is likely to harm rights holders over time.

Part II describes the 3SP in general and its implementation in France in particular. Part III suggests an economic analysis of the 3SP. Part IV points out the main pros and cons of the 3SP in order to determine whether it is an appropriate policy to deal with illegal file-sharing. Part V discusses enforcement issues that are likely to arise in the implementation of the 3SP. Part VI examines the possible success of 3SP and highlights further implementation issues. Part VII outlines a revised and more proportionate 3SP model. Part VIII locates the 3SP within a paradigm change in copyrights towards criminal-based legislation, criticizing it as an inappropriate method. The last Part summarizes the discussion and concludes that the 3SP is not the proper tool to resolve illegal file-sharing issues; rather, it is an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, at least not yet.

II. THE THREE STRIKES POLICY (3SP)

After more than a decade during which copyright holders around the globe tried many different methods to enforce their rights and stop Internet illegal file-sharing,⁹ the 3SP emerged as a possible panacea for dealing with copyright infringements.¹⁰ The policy received its name from an analogy to baseball, where each batter receives three strikes before the end of his or her at-bat.¹¹ The concept of a 3SP – albeit in a different context – was first implemented in several U.S. states, including California, as an attempt to

⁹ As I will demonstrate, at first the right holders filed lawsuits against ISPs alleging direct liability and/or secondary liability (contributory infringement or vicarious infringement). Later the right holders turned to prosecuting the end users themselves, alleging direct liability. *See infra* Part III.

¹⁰ However, it has been suggested that in the majority of cases, there is no solution for illegal file-sharing over the Internet. *See* Jeremy Phillips, *Three Strikes...and Then?*, 4 J. INTELL. PROP. L. & PRAC. 521 (2009).

¹¹ The baseball metaphor is inaccurate. The third strike of the 3SP might disconnect the user from the Internet completely as opposed to the third strike in baseball, in which the player can still play the field. A better metaphor should be soccer, as the referee usually warns a player orally at the first serious foul he commits; later he receives a yellow card as a further warning, and if he continues to commit fouls, he will receive a red card, which will suspend him for at least another game, along with the game played. Electronic Frontier Foundation, *European ACTA Negotiators Reject "Three Strikes" Moniker* (2010), <http://www.eff.org/deeplinks/2010/04/european-acta-negotiators-reject-three-strikes>.

deter crimes.¹² The California law states that each person convicted of a third offense (by certain classifications of different felonies), will receive a minimum 25-year penalty regardless of the nature of the crime. In the intellectual property context, the 3SP has been thus far implemented in Taiwan,¹³ South Korea,¹⁴ France,¹⁵ UK¹⁶ and New Zealand.¹⁷ However, many countries, including Germany, Hong Kong, Spain, and Sweden, have rejected the 3SP.¹⁸

Some countries are making use of similar methods without direct legislation. For example, in Australia¹⁹ and Singapore,²⁰ a user can be disconnected from the Internet in a judicial procedure if he or she is adjudged to have infringed copyrights online. In the U.S., ISPs can disconnect users from the Internet by relying on the DMCA's safe-harbor provisions,²¹ which instruct that the service provider can enjoy immunity only if it "adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."²² However, the implementation of this DMCA

¹² CAL. PENAL CODE § 667 (2011).

¹³ 著作權法 [Copyright Act], art. 90quinquies (2007) (Taiwan), *translated in* WIPO, www.wipo.int/wipolex/en/text.jsp?file_id=187795#None (2009).

¹⁴ 저작권법 [Copyright Act of Korea] art. 133bis (2007) (S. Korea).

¹⁵ Projet de loi, *supra* note 4.

¹⁶ Digital Economy Act, §§ 124A–124N (2003) (U.K.).

¹⁷ Copyright (Infringing File Sharing) Amendment Act, 2011 No. 11 § 92A (N.Z.).

¹⁸ At first, a district court in Sweden indicated that the 3SP would be appropriate to resolve file-sharing. However, shortly thereafter, the Swedish Ministers of Justice and Culture published "a public opinion piece setting out their forthcoming policy that explicitly excluded the three strikes model." Michael Geist, "Three Strikes and You're Out" Policy Strikes Out (2008), www.michaelgeist.ca/content/view/2851/135.

¹⁹ Copyright Act, 1968, § 116AH(1)(1) (Austl.).

²⁰ Copyright Act, 1987, c. 63, § 193DB(1)(b) (Sing.).

²¹ 17 U.S.C. § 512(i) (2010).

²² 17 U.S.C. § 512(i)(1)(A). One American ISP, Comcast, has a stipulation in their terms of use indicating that "[i]t is Comcast's policy in accordance with the DMCA and other applicable laws to reserve the right to terminate the Service provided to any customer or user who is either found to infringe third party copyright or other intellectual property rights, including repeat infringers, or who Comcast, in its sole discretion, believes is infringing these rights. Comcast may terminate the Service at any time with or without notice for any affected customer or user." COMCAST ACCEPTABLE USE POLICY FOR HIGH-SPEED INTERNET, <http://www.comcast.com/Corporate/Customers/Policies/HighSpeedInternetAUP.html> (last visited Apr. 9, 2011). For this matter, some ISPs, such as AT&T and Verizon, choose to include such paragraphs in their license agreements, while other ISPs avoid this sort of private ordering. See Chloe Albanesius, *Comcast, Others Deny "Three Strikes" Piracy Plan*, PCMag (Mar. 27, 2009), available at

requirement has thus far been problematic because it is quite vague. Therefore, although the DMCA clause usually exists in Terms of Use (TOU) or End Users' Licensing Agreements (EULAs), ISPs have rarely used it.²³

Ireland currently implements the 3SP through private ordering as part of a settlement agreement between Eircom, the largest Irish ISP, and the music industry. The settlement agreement requires Eircom to provide the identities of alleged illegal file-sharers to the Irish Recorded Music Association (IRMA), while applying a 3SP against those file-sharers.²⁴

Beyond these legislative and private efforts, there are signs of an attempt to globalize the 3SP by requiring countries to implement a 3SP in domestic legislation.²⁵ In 2008, an unofficial text of the Anti-

www.pcmag.com/article2/0,2817,2343977,00.asp. See also Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010).

²³ See Michael Murtagh, *The FCC, the DMCA, and Why Takedown Notices are Not Enough*, 61 HASTINGS L.J. 233, 259 (2009) (interpreting Nimmer to mean that “one is not an ‘infringer’ for purposes of the repeat infringers policy unless one has either been adjudicated to have committed copyright infringement or the ISP has actual knowledge that one has committed infringement”); see also MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.10(A)(2) (2001); Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1455 (2006). In the U.S., there is also another specific avenue of disconnecting users from the Internet due to illegal file-sharing through the Higher Education Opportunity Act of 2008 (HEOA), which conditions federal funding for higher education facilities in part on certification that the participating institution has developed plans to effectively combat the unauthorized distribution of copyrighted materials. 20 U.S.C. §1092(a)(1)(P) (2008). It seems that the HEOA was enacted based on research indicating that college students comprise one of the main groups that infringe copyrights over the Internet. A study conducted by the Motion Picture Association of America (MPAA) claimed that 44% of the of the industry's domestic losses were a result of illegal downloading by college students. Later, the MPAA admitted that the numbers were vastly inflated. See Zack Whittaker, *College students face file sharing penalties under new rules*, ZDNET (July 2, 2010), available at: www.zdnet.com/blog/igeneration/college-students-face-file-sharing-penalties-under-new-rules/5470; See also Chris Hogg, *The Movie Industry That Cried Wolf: MPAA Admits Piracy Numbers Vastly Inflated*, DIGITAL JOURNAL (2008), www.digitaljournal.com/article/249246/The_Movie_Industry_That_Cried_Wolf_MPAA_Admits_Piracy_Numbers_Vastly_Inflated (last visited April 11, 2011).

²⁴ The Irish court dismissed claims made by the Irish Data Protection Commissioner regarding the possible impact on users’ rights to privacy. However, the Irish High Court also ruled that laws to identify and cut off internet users illegally copying music files were not enforceable in Ireland. See *EMI Records & Ors v. Eircom Ltd*, [2010] IEHC 108 available at www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument.

²⁵ The plurilateral agreement on counterfeiting is currently being negotiated by Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, the Republic of

Counterfeiting Trade Agreement (ACTA) deliberation was leaked.²⁶ While this version of the ACTA did not propose to force countries to implement a 3SP, it encouraged them to do so in order to qualify for a safe-harbor provision.²⁷ However, no such example appeared in an official ACTA draft published in April 2010. Instead, the draft stated that at least one delegation of the ACTA (the text does not indicate which one) proposes to include language regarding “policy,” meaning that an implemented policy will have a clear definition in the ACTA, in order to provide greater certainty that its existing national law complies with this requirement.²⁸

The latest leaked version of the ACTA²⁹ suggests in Article 2.x that “[p]arties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” Also, Article 2.18 states

Korea, Singapore, Switzerland and the United States. See trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145774.pdf.

²⁶ Anti-Counterfeiting Trade Agreement, informal draft (2010), available at https://2974639497112273069-a-1802744773732722657-s-sites.googlegroups.com/site/iipenforcement/201001_acta.pdf?attachauth=ANoY7cpAtT2TOyyRQtbnbyX-QqmlY18u6_ovqidxT0ivIpg1aPe6RXTXYKhrm0PfDS_C6HxgytcYaGimFCgMH04m9J_kwSOOTene_4AdjBGMaEtUbTWivPP54yI2hee2fc20B1Qmoz3ZqEWaJbLkZoxmhyEkOBqEiihUnrxP7hRcSX5TnV3ThFAQC2AYAsCsSaS7ytHpjD6xjkgvX9qGbj87G_pbl0ivRQ%3D%3D&attredirects=0 (last visited April 19, 2011).

²⁷ “[A]n online service provider adopting and reasonably implementing a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights except that no Party may condition the limitations in subparagraph (a) on the online service provider’s monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring.” The term policy was addressed as a footnote in the following language: “An example of such a policy is providing for the termination in appropriate circumstances of subscriptions and accounts in the service provider’s system or network of repeat infringers.” Anti-Counterfeiting Trade Agreement, informal draft (2010); see also Michael Geist, *ACTA Internet Chapter Leaks: Renegotiates WIPO, Sets 3 Strikes as Model* (2010), www.michaelgeist.ca/content/view/4808/125 (last visited April 19, 2011).

²⁸ Anti-Counterfeiting Trade Agreement, consolidated text prepared for public release (2010), available at www.wcl.american.edu/pijip/go/acta04212010.

²⁹ Anti-Counterfeiting Trade Agreement, Informal Predecisional/Deliberative Draft (25 August 2010), available at https://2974639497112273069-a-1802744773732722657-s-sites.googlegroups.com/site/iipenforcement/acta/text08252010.pdf?attachauth=ANoY7crvVhIqw53AN006X0X-zE0wB-U5949IKiKYuYL6SyZHoRyUAiLZNpm6-nD-Hy1-evSaMAZk42Wvg3qGLRix0Rqrp0JeLCKEaH4I4KY2XKLIKznBH90ghexJ9eP1qpbAbRFywLCrnG-K3qaE6XZpfZMCUe-WfolGrV6uYIceY0B8weQo8wAFDGu8FafRq57tjfJHQIfIIhMAN0eF9yotyOTX_LPdzQ%3D%3D&attredirects=0 (last visited April 19, 2011).

that “[e]ach Party's enforcement procedures shall provide the means to address the infringement of (copyright or related rights/intellectual property Rights) in the digital environment, including infringement that occurs via technologies (or services) that can be used to facilitate widespread infringement.”

It seems that the ACTA in its current form allows flexibility and a wide margin for each future member of ACTA to implement its own policies. However, a second possible interpretation of Articles 2.x and 2.18 is less generous: that the drafters do indeed intend to implement the 3SP, and that the rather vague and general language is a deliberate strategy. Will the 3SP be a part of ACTA or any other international agreement? It is still too early to tell. Although some parties, such as the European Union, stated that they would not support a mandatory 3SP,³⁰ the EU does not rule out a 3SP either. In sum, these drafts of the ACTA emphasize the critical condition in which the policy makers found themselves. While thus far global conventions usually dealt with vast copyright infringements related to possible negative global financial trade impacts, the ACTA might affect many *individuals* around the globe because it targets small, in addition to vast, copyright infringements.

Next, I focus on the French 3SP as a leading example of how the 3SP can be implemented and enforced if legislated globally. Of the five countries that have implemented the policy, France is the best example because it sets the clearest blueprint of how the policy would be implemented.³¹

France was one of the first countries that began searching for a legislative solution to Internet illegal file-sharing.³² In 2007, France formed a Regulatory Authority for Technical Measures entitled ARMT (*l'Autorité de Régulation des Mesures Techniques*), charged with promoting the interoperability of digital media distributed in France with embedded

³⁰ “[The European Parliament considers that in order to respect fundamental rights such as freedom of expression and the right to privacy, with full respect for subsidiarity, the proposed Agreement must refrain from imposing any so called ‘three strikes’ procedures.]” *Motion for a Common Resolution: on Transparency and State of Play of ACTA Negotiations*, EUROPEAN PARLIAMENT (2010), available at christianengstrom.files.wordpress.com/2010/03/common-resolution-acta-final-8-march-2010.doc. See also David Meyer, *Europe “Will Not Accept” Three Strikes in ACTA Treaty*, ZDNET (Feb. 26, 2010), news.zdnet.co.uk/communications/0,1000000085,40057434,00.htm (last visited April 19, 2011).

³¹ Although France is only an example of a country that implemented the 3SP, it seems that their 3SP is the least vague policy implemented out of the five countries, as I will elaborate.

³² See *Projet de loi*, *supra* note 4.

Digital Rights Management (DRM).³³ The new law, entitled *Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information (DADVSI)*, indicates that ISPs should utilize Internet filtering to prevent illegal file-sharing. A direct infringement of copyrighted material is subject to a fine of up to €300,000 and up to 3 years of imprisonment. But policy-makers did not stop there. In November 2007, after much deliberation, the French government, the copyright industry, and French ISPs signed the *Elysée Agreement*.³⁴ This agreement committed the French government to enacting anti-piracy legislation instituting the 3SP, and it did so soon after.

The French government proposed a new law entitled *A Law Promoting the Distribution and Protection of Creative Works on the Internet (Creation and Internet Act)*,³⁵ which implements the 3SP. The French National Assembly passed the law on May 12, 2009 and the French Senate approved it the day after.³⁶ However, on June 10, 2009, the Constitutional Council declared the law void, since the French Constitution lists freedom of communication and expression as a basic human right and the presumption of innocence prevails; thus, the sanctions under the law can only be imposed in a judicial procedure.³⁷ On October 22, 2009, the Constitutional Council of France approved a revised version of the Creation and Internet Act, which came into force on January 1, 2010.³⁸

The Creation and Internet Act formed a regulatory authority named

³³ Digital Rights Management (DRM) technologies attempt to control what users can and cannot do with the media and hardware they have purchased. See Electronic Frontier Foundation, DIGITAL RIGHTS MANAGEMENT, <http://www.eff.org/issues/drm> (last visited Apr. 19, 2011). See generally Jane K. Winn & Nicolas Jondet, *A New Deal for End Users? Lessons From a French Innovation in the Regulation of Interoperability*, 51 *WM & MARY L. REV.* 547 (2009).

³⁴ Winn & Jondet, *supra* note 33, at 562.

³⁵ Law No. 2009-669 of June 12, 2009, *Journal Officiel de la République Française [J.O] [Official Gazette of France]*, June 13, 2009.

³⁶ See Nate Anderson, *France set for showdown with EU after passing 3 strikes law*, ARSTECHNICA (2009), arstechnica.com/tech-policy/news/2009/05/france-set-for-showdown-with-eu-after-passing-3-strikes-law.ars (last visited April 11, 2011).

³⁷ See *CC decision no. 2009-580DC*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (June 10, 2009), available at www.conseil-constitutionnel.fr/decision.42666.html [French].

³⁸ See *CC decision no. 2009-590DC*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (October 22, 2009), available at www.conseil-constitutionnel.fr/decision//2009/2009-590-dc/decision-n-2009-590-dc-du-22-octobre-2009.45986.html [French]. During the attempt to pass the first law, a petition supporting the cause was signed by 10,000 French artists. Later on, it was discovered that many of the signatures were forged and that some names on the petition were fictitious. See Julie Saulnier, *Hadopi: couacs autour de la pétition des 10 000 artistes*, L'EXPRESS (2009), www.lexpress.fr/actualite/high-tech/HADOPI-couacs-autour-de-la-petition-des-10-000-artistes_754193.html [French] (last visited April 11, 2011).

HADOPI,³⁹ which replaced the ARMT and was vested with the authority to search for copyright infringements over the Internet while supervising the implementation of the 3SP by the ISPs. The French 3SP operates in the following manner: a right holder who has actual knowledge of infringement of his or her copyright over the Internet can notify HADOPI, supplying it with the infringing user's IP address and details of the alleged infringement, including the protected work that was allegedly infringed. HADOPI then notifies the user's ISP. The ISP sends a first notice to the user by e-mail suggesting that the user cease any illegal activity, and indicating the exact time and date of the alleged infringement. If HADOPI receives a second notice of infringements made by the same IP address within a six month period following the first notification, it will notify the ISP, which will send a second notification to the user, this time by regular mail, indicating the second alleged infringement. In the case of a third notice referring to the same IP address within a one-year period following the second notice, authorities will file charges against the user in a special judicial procedure held by a single judge.⁴⁰ The judge has the authority to fine the user and to suspend his or her Internet access for two months to a year.⁴¹

There are as yet no reported cases of disconnecting users under the French policy or any other 3SP.⁴² Accordingly, there is no evidence to judge whether the global implementation of the 3SP will succeed in its mission to eliminate illegal file-sharing over the Internet.

III. ECONOMIC ANALYSIS OF THE 3SP

Some media industries are affected by illegal file-sharing. However, the

³⁹ In French: Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet (High Authority of Diffusion of the Art Works and Protection of Copyrights on the Internet).

⁴⁰ The special judicial procedure is entitled "Ordonnance penale." Although the procedure is made without the presence of the user, the user can file a request to be present. *See* Projet de loi, *supra* note 4.

⁴¹ The user will be blacklisted by the ISPs in France and therefore will not be able to reconnect to the Internet through French ISPs during the period of suspension that was set by the court. The user will keep paying his or her ISP for the period of the Internet access suspension and also will be held liable for any administrative costs that will be imposed on the ISP due to the suspension. *See* Projet de loi, *supra* note 4.

⁴² *See, e.g.,* Eric Pfanner, *France's Three-Strikes Law for Internet Piracy Hasn't Brought Any Penalties*, N.Y. TIMES (July 18, 2010), available at www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html?_r=1&ref=music. *See* Heesob Nam, *Three Strikes Rule: Sleeping for Seven Months*, HEESOB'S IP BLOG (Mar. 9, 2010), hurips.blogspot.com/2010/03/three-strikes-rule-sleeping-for-seven.html (last visited April 11, 2011).

extent of the effect is debated⁴³ and uncertain.⁴⁴ One of the main arguments in favor of file-sharing over the Internet is a sampling effect: potential customers can download music in order to gather more information that may increase their willingness to purchase a copy of the CD. However, the availability of free copies for download might decrease the legal copies sold by the companies, thus providing the user with a relatively free copy.⁴⁵

The strategies the right holders use to prevent illegal file-sharing over the Internet should be examined to determine which strategy leads to optimal cost reduction.⁴⁶ One strategy that right holders employ is to sue ISPs for direct liability. This approach, however, has not been successful in the courts.⁴⁷ Another strategy, used in *Religious Technology Center v. Netcom On-Line Communications, Inc.*,⁴⁸ is to sue the ISPs for secondary

⁴³ Many researchers found a negative impact on the music industries due to illegal file-sharing. See, e.g., Norbert J. Michel, *Digital File Sharing and the Music Industry: Was There a Substitution Effect?*, 2 REV. OF ECON. RES. ON COPYRIGHT ISSUES 41, 50 (2005) (arguing that there appears to be mounting evidence that digital copying negatively impacted music sales); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 71 (2004) (finding that music downloading could have caused a 20% reduction in music sales worldwide between 1998 and 2002); Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, 5 TOPICS ECON. ANALYSIS & POL'Y 1 (2005) (finding a direct link between illegal file-sharing and decreasing CD sales). On the other hand, some researchers stated that it is difficult to argue that weaker copyright protection has had a negative impact on artists' incentives to be creative. See Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* (HARVARD BUSINESS SCHOOL, Working Paper No. 09-133, May 2009), available at www.hbs.edu/research/pdf/09-132.pdf.

⁴⁴ See Patrick Mooney, Subarna Samanta & Ali H.M. Zadeh, *Napster and Its Effects on the Music Industry: An Empirical Analysis*, 6 J. SOC. SCI. 303, 308 (2010) (concluding that testing for illegal downloading's actual effects on CD sales is a near impossibility because data about what has been downloaded is largely unavailable. However, the researchers indicate that the decrease in CD sales makes illegal downloading a very likely suspect.).

⁴⁵ See Eitan Altman, Sulan Wong & Julio Rojas-Mora, *P2P business and legal models for increasing accessibility to popular culture*, 21 LECTURE NOTES IN COMP. SCI. 130 (2009); see also *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1015 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000); Peitz & Waelbroeck, *supra* note 43, at 71.

⁴⁶ See Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972); Dieter Schmidtchen et. al., *The Internalization of External Costs in Transport: From the Polluter Pays to the Cheapest Cost Avoider Principle*, 2008 GERMAN WORKING PAPERS IN LAW AND ECON. 1, 43 (2008).

⁴⁷ *Religious Tech. Ctr. v. Netcom On-Line Commc'ns Serv., Inc.*, 907 F. Supp. 1361 (1995) (finding that an Internet access provider for a Bulletin Board System (BBS) operator was not directly liable for copyright infringement committed by a subscriber to the BBS, where the access provider took no affirmative action to copy work and received no direct financial benefit from the infringement).

⁴⁸ *Id.* at 1373.

liability (contributory infringement or vicarious infringement), perhaps because ISPs seem to be the cheapest cost avoiders.⁴⁹ The right holders may estimate that, if file-sharing networks were outlawed, Internet users would cease their unlawful behavior. Although it might be appropriate to impose liability in certain cases in which the intermediary is directly involved in the misconduct, as was the case in *Napster*,⁵⁰ or the intermediary knowingly induced infringement, as in *Grokster*,⁵¹ new P2P technologies make it difficult to detect and prevent the misconduct, and therefore intermediaries will probably not be held directly liable in these matters.⁵²

The third strategy is to sue the end users themselves.⁵³ Although civil litigation against file-sharing users succeeded in many cases, the overarching problem for the right holders has not been resolved; illegal file-sharing continues.⁵⁴

The online file-sharing problem is basically “the conflict between the free-riders and the copyright owners, and the balance between access to information and the incentive to create information.”⁵⁵ From an economic

⁴⁹ See *MGM, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

⁵⁰ See *Napster*, 239 F. 3d 1004.

⁵¹ See *Grokster*, 545 U.S. 913.

⁵² A proper determination requires not only that the gatekeepers be able to detect offenses, but they also be able to prevent them economically. See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 259 (2005). Also, as mentioned, in the U.S., ISPs can rely on the DMCA’s safe-harbor provisions (17 U.S.C. § 512(i) (2010)), which instruct that the service provider can enjoy immunity only if it “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”

⁵³ In September 2003, the Recording Industry Association of America (RIAA) began to file lawsuits against end users. See, e.g., *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008); *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2008). This continued until December 2008, when the RIAA announced that, after filing more than 35,000 lawsuits, it would cease to file new lawsuits against users at that time. Although the RIAA has stopped, other right holders have continued to file lawsuits. See, e.g., *Voltage Pictures, LLC v. Does*, 1:10-cv-00873-RMU (D.D.C., filed May 24, 2010); Greg Sandoval, ‘Hurt Locker’ Downloaders, You’ve Been Sued, CNET NEWS (May 28, 2010), news.cnet.com/8301-31001_3-20006314-261.html.

⁵⁴ For a full analysis on illegal file-sharing and its economic effect, see Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. OF POL. ECON. 1 (2007).

⁵⁵ Charn Wing Wan, *Three Strikes Law: A Least Cost Solution to Rampant Online Piracy*,

point of view, the legal institution of copyright appears to be an internalization means, whose social benefits should offset its social costs.⁵⁶ In other words, copyright in the economic sense is mainly a property right or a form of private ownership that fosters the internalization of costs and benefits.⁵⁷ The digital environment led to an adoption of a new set of laws targeted towards fighting copyright infringements.⁵⁸ However, these laws do not appear to consider the user's perceived cost of infringing. These costs mainly rely on two factors: the probability of getting caught and the expected fine.⁵⁹ This leads to the economic assumption that the behavior of the internet user regarding this matter is determined by those two linked factors: "the perceived probability of getting caught multiplied by the amount of the fine."⁶⁰ However, until recently, the different attempts made by right holders and legislators around the world usually focused only on the amount of the fine, to the exclusion of the probability of its imposition.⁶¹ The 3SP, however, seems like a more economically efficient tool, whereby users' behavior might change due to a higher perceived probability of being caught multiplied by a large penalty such as an internet suspension.

Optimal cost reduction is integral to achieving economic efficiency. Optimal cost reduction generally results in imposing liability on the cheapest cost avoider. According to the Coase Theorem, the key element should be the examination of which party should bear the transaction costs of copyright enforcement.⁶² The 3SP is an enforcement model that treats the imposition of certain rules on the ISPs as an optimal cost reduction factor and suggests that infringers should bear the transaction costs of

5 J. OF INTELLECTUAL PROPERTY L. & PRACT. 232, 233 (2010).

⁵⁶ These costs consist partly of enforcement costs, which include the costs related to the exclusion of unauthorized users. See Olivier Bomsel & Heritiana Ranaivoson, *Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response*, 6 REV. OF ECON. RES. ON COPYRIGHT ISSUES 13 (2009).

⁵⁷ *Id.* at 16.

⁵⁸ See 17 U.S.C. § 1201(a)(1); Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10. The legislation led to higher fines for counterfeiters and prohibited circumvention of technological measures for the protection of works. Bomsel & Ranaivoson, *supra* note 56, at 24.

⁵⁹ Bomsel & Ranaivoson, *supra* note 56, at 24.

⁶⁰ *Id.*

⁶¹ *Id.* at 24. Also, see the attempt made by the RIAA to prosecute individual users, which led the RIAA to file relatively few lawsuits against users (although more than 35,000 filed lawsuits, as mention *supra* note 53, might sound like a large amount, it is clearly but a small fraction of infringing users). See also Wing Wan, *supra* note 55, at 239 (arguing that due to prohibitive costs of copyright enforcement, civil action alone against the online infringers will not be enough).

⁶² See Ronald H. Coase, *The Problem of Social Cost*, 3 J. OF L. AND ECON. 1 (1960); Wing Wan, *supra* note 55, at 242.

copyright infringements.⁶³ However, liability rules may not be enough. For the model to succeed, users must be deterred from illegal file-sharing. The 3SP may be the optimal cost reduction method, at least in the long run, if users' behavior changes without the use of massive lawsuits. However, a model which seeks optimal cost reduction might be more effective against the ISPs than against users, and stricter liability rules applied to ISPs might actually achieve right holders' goals, but at a cost to society.⁶⁴ In some cases misconduct can be sanctioned most effectively through the indirect imposition of liability on intermediaries.⁶⁵ Hence, the 3SP does not require active monitoring by the ISPs and therefore it could be cheaper for ISPs to implement than schemes that would require the ISP to monitor the conduct of its customers to identify unlawful file-sharing.⁶⁶

To achieve actual success of the 3SP, policy-makers need to take several short-term costs into account. These costs include judicial time spent on this matter and the securing of full cooperation from the ISPs.⁶⁷ The 3SP could also create a market for technical solutions, such as filtering or monitoring, in order to prevent the user from being sued.⁶⁸ Moreover, the 3SP might result in disconnecting significant numbers of users from the Internet. Although this may aid some right holders, as illegal downloading would be reduced, network operators might suffer from a revenue loss,⁶⁹

⁶³ Wing Wan, *supra* note 55, at 242.

⁶⁴ As intermediaries stand in the best position to prevent illegal file-sharing, imposing stricter liability rules could be the optimal cost reduction solution. However, imposing such rules on intermediaries may affect network architecture and involve long-term ramifications that go far beyond the immediate interests of copyright owners and ISPs. See generally, Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15 (2006).

⁶⁵ See Mann & Belzley, *supra* note 52, at 266. See generally Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

⁶⁶ Cf. Mann & Belzley, *supra* note 52, at 285-86 (arguing that law enforcement organizations are better equipped to actively enforce anti-gambling laws than ISPs).

⁶⁷ Cooperation from ISPs may vary between different judicial systems due to a difference in right holders' identities. In the U.S., for example, there is a larger concentration of broadband services providers and studios than in France, where the right holders are highly scattered. As a result, it is more difficult for ISPs in France to cooperate with right holders, leading to a different cooperation approach. See Bomsel & Ranaivoson, *supra* note 56, at 25.

⁶⁸ *Id.* at 27.

⁶⁹ For example, a report from the management consultancy firm Booz & Company indicates that "[a] high-level sensitivity calculation, for the UK as an example, estimates 'three strikes' to result in the disconnection of 500,000 users and a revenue loss of €180 million for the network operators (Exhibit 56). In comparison, the music industry assesses an upside of only €33 million in revenue—this total revenue loss of about €150 million is

aside from a potential economic loss from depriving a large amount of citizens of access to the Internet in an internet-based society.⁷⁰ However, these costs could be rolled over to consumers, forcing infringers to bear the transaction costs of copyright infringements, as the Coase Theorem posits they should. In the long run, piracy-proof incentives, operating like the "polluter pays" principle,⁷¹ would reduce enforcement costs.⁷²

To conclude, it seems that, in the long run, a full implementation of the 3SP might be economically efficient and fair to right holders. Given the prohibitively high costs of enforcing copyrights on the Internet, the 3SP makes sense, as copyright holders cannot afford to incur substantial litigation costs to enforce their rights.⁷³ However, as I will illustrate, the 3SP has many drawbacks that might change this equation.

IV. PROS AND CONS

To assess whether the 3SP should be implemented as a global solution to illegal file-sharing, I examine its main pros and cons.⁷⁴ I begin by describing the benefits and drawbacks that the 3SP might have for right holders, ISPs, and users. I then examine whether the current 3SPs deal with these drawbacks in a satisfactory manner.

A. Pros

The 3SP is an attempt to deter Internet users who download copyrighted materials without permission. Given the critical role the Internet plays in

likely to be only a minor share of the downside for other stakeholders, for example, through the reduction of e-Commerce volume." Booz & Company, *Digital Confidence: Securing the Next Wave of Digital Growth*, 69 (2008), www.lgi.com/pdf/LG%20DC_english.pdf (last visited May 8, 2011).

⁷⁰ Users will be deprived from using the Internet will not be able to engage in a large number of activities, including e-commerce. This could negatively impact the global economy and international commerce.

⁷¹ The principle first appeared in a document (in a legal context) by the international Organization for Economic Cooperation and Development (OECD). It means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the costs of goods and services that cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment. See Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies, Annex 1, OECD Doc. C(72)128, (May 26, 1972).

⁷² See Bomsel & Ranaivoson, *supra* note 56, at 27.

⁷³ See Wing Wan, *supra* note 55, at 239.

⁷⁴ For a general discussion of the benefits and drawbacks of the 3SP, see Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010).

modern life, threatening to disconnect users might be an effective method of intimidation.

From the right holder's point of view, the 3SP might reduce and even eliminate file-sharing of copyright materials, and therefore increase profits. If the 3SP is extensively implemented and enforced, users might be concerned about being disconnected from the Internet and cease infringing activities. Unlike regular litigation against individual file-sharing users, which had been in use for several years in the U.S. and did not seem to achieve its purpose,⁷⁵ the 3SP litigation is a relatively faster and cheaper method, which could achieve its purpose by locating the infringement and sending a simple e-mail to the ISP.

The 3SP might be perceived as beneficial for the ISPs as well. ISPs, which often act as intermediaries between their subscribers and right holders, might be held liable under secondary infringement rules, such as contributory infringement, for facilitating copyright infringements made by their subscribers.⁷⁶ Although Internet access providers usually serve as mere conduits and therefore generally enjoy immunity for their subscribers' actions,⁷⁷ the 3SP offers them full immunity if they comply with the law by using safe harbor provisions. This is an important matter in countries that do not provide immunity or safe harbor provisions for ISPs, such as those set by the DMCA.⁷⁸ Therefore, ISPs might be able to allocate more funds to improve services and infrastructure or reduce fees.⁷⁹

There are also potential financial benefits. The number of users who

⁷⁵ Although there had been a certain drop in illegal file-sharing due to civil litigation against individual users, it seems that it did not achieve its goal as the RIAA announced that they will cease filing new lawsuits. See the cases discussed *supra* note 53. See also Memorandum from Lee Rainie & Mary Madden, *The Impact of Recording Industry Suits Against Music File Swappers* (Jan. 2004), available at www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_Internet_music_downloads_010504.pdf; Megan Richardson, *Downloading Music Off the Internet: Copyright and Privacy in Conflict?*, 13 J. L. & INFO. SCI. 90 (2002). For the RIAA's announcement, see Greg Sandoval, *RIAA drops lawsuits; ISPs to battle file sharing*, CNET NEWS (December 19, 2008, 9:05 AM), news.cnet.com/8301-1023_3-10126914-93.html.

⁷⁶ See, e.g., *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Playboy Enterprises Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

⁷⁷ In the U.S., see 17 U.S.C. § 512(k)(1)(A); in Europe, see Council Directive 2000/31, art. 12-13, 2000 (EC) (discussing certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

⁷⁸ Yu, *supra* note 74, at 1384 (arguing that to some extent, the 3SP serves the same purpose as that of the Internet safe harbor provided by § 512 of the Copyright Act).

⁷⁹ Although the mentioned funds will not necessarily be directed for these purposes. See also Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1887-88 (2000).

download copyrighted material over the Internet might become a financial burden on the ISPs. This is partly due to the fact that ISPs sometimes receive notice letters from right holders regarding the activities of those users, requiring them to allocate funds and labor as part of the civil litigation process against those users.⁸⁰ Hence, the 3SP process will aid the ISPs, as the procedure will likely be easier and require less labor. Although usually the ISPs can disconnect users from the Internet without a statutory 3SP by applying contractual stipulations, disconnecting users under a statutory scheme is more likely to be perceived as legitimate.⁸¹ In other words, ISPs could benefit financially from the 3SP in two different ways: first, they might be able to reduce civil litigation costs and labor, and second, they will have the opportunity to cut off problematic users without the possible outcome of being portrayed as the “bad guys.” This is so because ISPs could benefit from problematic users being cut off for what seems a legitimate reason.

At first glance it seems that the 3SP does not benefit users, as it increases enforcement and limits their ability to share copyrighted material.⁸² However, adopting the 3SP might improve Internet services and infrastructure or reduce fees allocated to deal with illegal file-sharing such as some other enforcement methods used in the past.⁸³ Consider, for example, civil litigation against individual file-sharers in the U.S., which started soon after right holders realized that filing lawsuits against file sharing companies – Napster, for instance – became more difficult due to new technologies that allow substantial non-infringing uses of that software, like person-to-person networking.⁸⁴ The industry's policy of suing

⁸⁰ For an example of a notice letter sent from the RIAA to ISPs to inform them one of their customers is accused of file sharing, see Greg Sandoval, *Copy of RIAA's new enforcement notice to ISPs*, CNET NEWS (2008), http://news.cnet.com/8301-1023_3-10127050-93.html (last visited May 8, 2011).

⁸¹ For general discussion see NIMMER & NIMMER, *supra* note 23, at § 12B.10[B][3][b].

⁸² This matter poses a crucial drawback for users sharing non-copyrighted materials.

⁸³ See Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELECTRONIC FRONTIER FOUNDATION (Dec. 19, 2008), www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes (last visited May 8, 2011). See also Yu, *supra* note 74, at 1384 (arguing that the graduated response system (3SP) helps ensure that ISPs can continue to develop and improve their service without worrying about the constant need to respond to lawsuits and the high costs of legal defense).

⁸⁴ After several different lawsuits involving file-sharing technologies such as Napster, KaZaA and Grokster, new technologies such as the BitTorrent protocol emerged and made prosecution more difficult. For the principle of substantial non-infringing use, see *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 442 (1984) (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable

individual file-sharers was harmful to users for two reasons: first, many users were falsely accused of infringement;⁸⁵ second, some users were asked to pay huge amounts of money, while others settled for less.⁸⁶ For the industry, suing its own past, present, or future customers might be a public relations nightmare.

However, unlike regular civil lawsuits filed against users globally, the 3SP does not catch users unaware: disconnecting a user is the last resort, after two warnings, which gives users time to consider the possible consequences of their actions. This is important to the discussion of the 3SP's proportionality.⁸⁷ Despite the fact that several litigation processes in the past began with a warning letter, it seems that the warning letter might not be perceived as a "fair" warning. The 3SP seems to avoid such difficulties, as it warns the user prior to any actual sanction and promotes global intellectual property awareness – at least in the industry's view. Moreover, the user's identity is not revealed to the right holder, unlike in prior methods of civil litigation. This might enhance the users' anonymity and privacy, at least as long as the users' information is revealed only to the ISPs (and in France, to HADOPI), and is not misused.

purposes. Indeed, it need merely be capable of substantial noninfringing uses.”). The landmark cases involving file sharing companies in the U.S. are *MGM, Inc. v. Grokster Inc.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *A&M Records Inc. v. Napster Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F. 3d 1004 (9th Cir. 2001).

⁸⁵ See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET, Feb. 1, 2010, news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1 (last visited May 8, 2011); John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either.*, THE N.Y. TIMES, Sept. 25, 2003; Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID, Oct. 30, 2008, www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple (last visited May 8, 2011).

⁸⁶ See, e.g., *Maverick Recording Co v. Harper*, 598 F.3d. 193, 199 (5th Cir. 2010) (awarding statutory damages); *Capitol Records Inc. v. Thomas*, 579 F.Supp.2d 1210, 1228 (D. Minn. 2009) (vacating jury verdict and award of "hundreds of thousands of dollars in damages"); *Sony BMG Music Entm't v. Tenenbaum*, 721 F.Supp.2d 85, 121 (D. Mass. 2010) (deeming jury's \$675,000 damage award grossly excessive and therefore unconstitutional). For a settlement example, see *The Economist Global Agenda, Not-so-Jolly Rogers*, ECONOMIST.COM, Sept. 10, 2003, www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=2050467 (describing the case of "pre-teen file-swapper" Brianna Lahara, who settled with the RIAA for \$2,000 and an apology) (last visited May 8, 2011).

⁸⁷ Proportionality is an important principle in the European Union and other countries around the world. In the U.S., for instance, when a law or policy threatens a fundamental constitutional right or involves a suspect classification, that law/policy may only stand if it is justified by a compelling governmental interest and is narrowly tailored to achieve that goal or interest, i.e., if it is proportionate. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

Moreover, from a legitimate user's point of view, the 3SP may enhance and improve Internet connectivity. Downloading large files over the Internet – an action taken many times by illegal file-sharers – might slow down Internet traffic for all users of the same ISP. If the 3SP dramatically reduced illegal file-sharing, it may also reduce network congestion for all users.⁸⁸

The 3SP has many pros. First, it could actually resolve a real problem for the right holders who struggle to find a solution to Internet illegal file-sharing. Second, the 3SP might actually prove to be the lowest cost solution to online piracy, making it the most economically efficient tool available. Third, it may assist the ISPs in establishing clearer legal boundaries where they do not exist, and aid them in allocating more funds to enhance and improve Internet services and infrastructures. Also, the 3SP may benefit Internet users, who would be better warned before any actual sanction is taken. Finally, it could reduce network congestion, providing faster and better connections for all users.

B. Cons

The 3SP may serve its purpose and reduce illegal file-sharing over the Internet. Important though this may be, the 3SP might also take a heavy toll on society as a whole and on individual users. I now turn to examine the 3SP's cons from two perspectives: the ISPs' perspective and the users'.

I begin with a general comment regarding a possible drawback for the right holders. From some right holders' and artists' points of view, the 3SP could harm their business models, much like any policy that eliminates file-sharing. Although right holders are generally against file-sharing, some of them actually spot the benefits that arise using these methods. Through file-sharing, many artists can easily and fairly cheaply promote their works. Due to file-sharing, artists can achieve broader exposure, expand their audience, and thereby increase sales of concert tickets and other merchandise.⁸⁹ While it seems that the 3SP will not affect those artists who

⁸⁸ Cf. Yu, *supra* note 74, at 1385 (arguing that “the graduated response system can help ISPs direct traffic and reduce network congestion”).

⁸⁹ For example, rock band Radiohead released their 7th album "In Rainbows" through their own website (www.inrainbows.com - no longer available for downloading the album), which allowed users to download the album for free, and decide later whether they would like to pay the band for the record. See Mike Masnick, *Radiohead Tells Fans To Name Their Own Price For Latest Album Downloads; Gives Them A Reason To Pay*, TECHDIRT, Oct. 1, 2007, www.techdirt.com/articles/20070930/214524.shtml; see also *Radiohead Publishers Reveal "In Rainbows" Numbers*, ROLLING STONE, Oct. 15, 2008. More artists posted their opinions regarding the benefits of file-sharing to artists, usually relying on the fact that many artists do not possess their intellectual property rights, and therefore usually

will simply not complain to HADOPI for infringements, a possible chilling effect on file-sharing networks and users might still occur. Specifically, users will be afraid to use file-sharing networks at all, regardless of the legal status of the shared materials.⁹⁰ Therefore, the 3SP might endanger the usage of such networks, which contribute to some right holders and artists' livelihood. However, this might be proven to be false if artists primarily provide their music through legitimate channels of distribution over the Internet, because users would not be deterred from downloading files from legal sources. If this were the case, the 3SP might not negatively affect artists.

From the ISPs' point of view, the model surely has some drawbacks. To comply with the 3SP, the ISPs will have to undertake structural and financial changes, while allocating human resources to deal with right holders' claims. The French law tries to reduce the financial burden laid on ISPs by charging the suspended subscriber fully for the duration of suspension. Although this action might compensate ISPs for their costs, I am uncertain that it will be enough. The ISPs' expenses will probably be much higher than users' subscription payments, because ISPs will be obliged to retain users' data for longer periods of time and will have to allocate human resources and invest in different technologies that will assist with the implementation of the new policy. The intermediary tasks that the law imposes – searching and matching IP addresses to users, and sending notices, for example – also have administrative costs. The ISPs might choose to pass those costs onto the users by increasing subscription fees, which might harm both the ISPs and users.⁹¹

Some ISPs might also stand in an ambivalent position. In many cases, ISPs act as Internet access providers as well as providers of other services, such as cable and telephone services. While a user barred from using the internet under the 3SP will be forced to pay the ISP for the duration of suspension from the Internet, he or she will not be obliged to continue acquiring other services. This, of course, has financial ramifications for ISPs acting as providers of other services, and might reduce their incentives to take part in this policy.

From the user's point of view, the 3SP might have dramatic impacts on

receive only a small percentage of the profits. *See, e.g., Courtney Love, Courtney Love does the math*, SALON, June 14, 2000, www.salon.com/technology/feature/2000/06/14/love/index.html.

⁹⁰ This could be resolved, at least partly, if artists that seek to utilize file-sharing networks differentiate their shared files by using certain symbols or naming legal files differently. However, users might still be deterred, due to the uncertainty of the content and legal status of the files.

⁹¹ Although ISPs might choose to roll over costs onto users, they might consider alternative ways to be compensated for their losses, mostly due to competition between the ISPs.

different rights, including the right to privacy, due process rights, free speech, and users' rights in the copyright regime.

A negative impact on the right to privacy, in countries where privacy is protected,⁹² might occur because the implementation of the 3SP requires some sort of monitoring of user activities to locate illegal file-sharing. Up until now, in civil file-sharing litigation, the right holders usually discovered the alleged infringements over the Internet by searching for their copyrighted works on file-sharing networks. After locating the alleged infringements, they would usually apply for a subpoena to reveal the identity of the file-sharer to file a civil lawsuit against him or her.⁹³ Similarly, in the French model, a right holder locates its material in the same way and then contacts HADOPI with details, such as the user's IP address and the alleged nature of the infringement. HADOPI then contacts the ISP to unmask the user's identity and send him or her proper notice.

If the 3SP only uses this method to locate infringing uses, it seems legitimate. Its implementation appears proportionate, it creates a situation similar to the situation that existed before the 3SP, and it might even be better than regular civil litigation, since the right holder has no knowledge of the user's identity.⁹⁴ In particular, it seems that the right to privacy

⁹² The right to privacy has different global definitions. For example, in the U.S., certain aspects of the right to privacy are protected by the U.S. Constitution, *see* *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); *Lawrence v. Texas*, 539 U.S. 558, 594 (2003), and by specific statutes, such as the Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501-650 (1998). However, in the U.S. there is no constitutional right to privacy in the sense of the internet. The right to privacy is also part of many European constitutions and several human rights conventions. *See, e.g.*, Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution], April 18, 1999, SR 101, RO 101, art. 13 (Switz.); Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution], art. 10 (F.R.G.); Regeringsformen [RF] [Constitution] 2:3, 2:6 (Swed.); Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 8, Nov. 4, 1950, ETS no. 005; Universal Declaration of Human Rights, United Nations General Assembly, art. 12, Dec. 10, 1948; Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC) (regarding "the protection of individuals with regard to the processing of personal data and on the free movement of such data"); Directive 2002/58/EC, 2002 O.J. (L 201), 37 (EC) (regarding privacy and electronic communications).

⁹³ *See* 17 U.S.C. § 512(h). Note that this matter is not always easy for courts to decide, because fundamental human rights, such as free speech and the right to privacy, are at risk. *See* Michael Birnhack, *Unmasking Anonymous Online Users in Israel*, 2 HUKIM 51, 82 (2010) [Hebrew]; *see generally* Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

⁹⁴ In other words, under the 3SP, a user's identity could be held secret from the right holder, unlike in civil litigation.

would not be jeopardized.⁹⁵ The impact on privacy is not very strong and might qualify as a necessary measure to protect the rights of the holders.⁹⁶ However, this is only true for the current methods which are used to locate illegal file-sharing. If the right holders take those methods a step further and require ISPs to monitor their users' actions on their behalf, the privacy implications might change. Furthermore, if HADOPI makes further use of retrieved information regarding those users, their right to privacy might be jeopardized, because such information-monitoring might implicate the general right to preserve our surroundings, i.e. our thoughts, our secrets, our feelings and our identity.⁹⁷

I carefully claim that the 3SP might also negatively impact due process rights. The 3SP marks a shift in the copyright law regime from civil litigation to criminal enforcement; though criminal enforcement existed prior to the 3SP, the 3SP marks a crucial shift in this paradigm change. Whereas, thus far, right holders usually file lawsuits against users to receive remedies and perhaps deter other users, the 3SP provides the state with a legitimate authority to prosecute users and curtail liberty, raising the bar on public intimidation. This is somewhat troublesome. If legislators seek to criminalize copyright law, as some have already done,⁹⁸ they ought to preserve the basic rights that defendants receive in criminal litigation. Hence, if the 3SP is implemented, every user should enjoy due process rights. Due process rights vary among countries,⁹⁹ but they usually protect

⁹⁵ IP addresses could perhaps be defined as personal data and therefore could be protected by different legislation. Even so, it seems that the right to privacy in this matter will not be jeopardized. *See, e.g.*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and On the Free Movement of Such Data, art. 2, 1995 O.J. (L 281) 31, 38.

⁹⁶ On the other hand, the European Data Protection Supervisor (EDPS) holds that a three strikes Internet disconnection policy constitutes a disproportionate measure and can therefore not be considered a necessary measure. *See* Peter Hustinx, *Opinion of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)*, 2010 O.J. (C 147) 1, available at www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf. The EDPS is furthermore convinced that alternative, less intrusive solutions exist, or that the envisaged policies can be performed in a less intrusive manner or with a more limited scope. *Id.*

⁹⁷ This statement does not apply to the U.S., since there is no general constitutional right to privacy in this manner. *See supra* note 92.

⁹⁸ *See, e.g.*, No Electronic Theft ("NET") Act of 1997, 17 U.S.C. §§ 101, 506, 507; 18 U.S.C. §§ 2319(a)–(c), 2320 (2006).

⁹⁹ For example, in the United States, due process rights are provided in the Fifth and Fourteenth Amendments to the United States Constitution. *See* *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). In Europe, the European Parliament has stated that every access termination to the Internet may only be imposed if they are appropriate, proportionate and necessary within a democratic society. Directive 2002/21/EC of the European Parliament and of the

rights such as adequate notice, receiving full details about the charged offense, being heard in a proceeding by a neutral arbiter, and ensuring that his or her claims are taken into consideration in court proceedings. Moreover, the 3SP must respect the presumption of innocence.

Under the 3SP, these rights might be at risk. In France for example, the 3SP provides the user with an opportunity to “be heard” in front of HADOPI, but that does not necessarily mean that the right to be heard is completely fulfilled in this matter, as HADOPI may not count as a judicial process in some contexts.¹⁰⁰ Moreover, the fast-track judicial process in France is not necessarily adequate and does not necessarily comply with the presumption of innocence,¹⁰¹ since under some 3SP regimes, the user is considered guilty unless proven otherwise; this might prove to be a real burden for users and might lead to false accusations and therefore might not be proportionate in its implementation in France. However, if implemented in the U.S., HADOPI proceedings may satisfy procedural due process requirements and therefore be justified.¹⁰²

Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (L 108) 33. Furthermore, their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of community law, including effective judicial protection and due process. *Id.*

¹⁰⁰ Although HADOPI might consist of judicial authorities, it cannot count as a proper judicial process primarily because it does not hold the same judicial power.

¹⁰¹ Though the presumption of innocence is considered a constitutional right in the United States, for example, it is regarded as one that is implicitly – —and not explicitly – — guaranteed by courts’ interpretation of the U.S. Constitution. *See Coffin v. United States*, 156 U.S. 432, 453 (1895).

¹⁰² Yu, *supra* note 74, at 1401 (arguing that “taking away an individual’s Internet access as a penalty for *alleged* copyright infringement is even worse than introducing criminal sanctions for downloading and peer-to-peer file sharing. While the criminal court system will determine whether sanctions will attach under the ‘beyond a reasonable doubt’ standard, a graduated response system may involve *mere* allegations of infringement by copyright holders or their industry group.”) (emphasis added). Note that the presumption of innocence, like any other right, can be legitimately curtailed when it is proportionate to achieve an important goal. Take, for example, criminal enforcement of traffic violations that rely on camera systems to detect the violations, including speeding, running a red traffic light, unauthorized use of a bus lane, etc. The vehicle owner receives a fine notice, meaning that he was found guilty, and must pay all such fines regardless of whether he was driving at the time of the offense. *See* in Canada, for example, the Motor Vehicle Act, RSBC 1996, c. 318, in Section 83.1: “The owner of a motor vehicle is liable for the contravention of section 140, 146 (1), (3), (5) or (7), 147 or 148 (1) if evidence of the contravention was gathered through the use of a prescribed speed monitoring device.” Much like the traffic enforcement controversy, the burden on users to prove their innocence is not an easy task. Take, for example, a French user who allegedly was file-sharing illegally. That user might have to prove that the downloadable file, if such even

The 3SP also endangers freedom of speech. Due to the important role the Internet plays in daily life,¹⁰³ suspending access to the Internet might be a real burden on users. The right of acquiring Internet access is sometimes considered an independent legal right, or at least an important one.¹⁰⁴ Moreover, even if Internet connection does not enjoy the status of a legal right, freedom of speech usually does.¹⁰⁵ Because the Internet serves as a somewhat anonymous forum where users can exchange opinions without the fear of being detected by others, Internet suspension might limit opportunities for expression, inhibit individuals' ability to fulfill themselves, and impact free speech and access to knowledge, and be perceived as a disproportionate penalty for their crime.¹⁰⁶ Furthermore, the

exists, was lawfully downloaded. There could be many different scenarios that will impact this task differently. A user that never downloaded materials over file sharing network will have an easier task than one who does. This of course could be proven by a technical expert, analyzing the user actions on her computer, but it seems that the short judicial procedure set in will not provide the user with the proper tools handling this task.

¹⁰³ For instance, a global poll conducted by GlobeScan for the BBC found that four in five adults regard Internet access as their fundamental right. The poll of more than 27,000 adults found that 87 percent of those who used the Internet felt that Internet access should be "the fundamental right of all people." *Four in Five Regard Internet Access as a Fundamental Right: Global Poll*, BBC WORLD SERVICE, Aug. 3, 2010, news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf (last visited May 8, 2011).

¹⁰⁴ See, e.g., Council Directive 2002/21, amend. 128/46, 2002 O.J. (L.108) 3 (EC) ("Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."). In the U.S., although Internet access has never been formally declared as a (fundamental) legal right, Congress has allocated funds for broadband expansion across America. See U.S. Dept. of Commerce Nat'l Telecomms. & Info. Admin., Broadband Tech. Opportunities Program (BTOP), *available at* www.ntia.doc.gov/broadbandgrants. Furthermore, the government of Finland has officially made the possession of an Internet connection a legal right for Finnish citizens. See Gordon Aldridge, *Finland: Internet Connection Made a Legal Right*, INEWP, Jul. 1, 2010, inewp.com/?p=3466 (last visited May 8, 2011).

¹⁰⁵ In sum, freedom of speech is usually considered to be a highly important right. In the U.S., for example, free speech is protected by the First Amendment to the U.S. Constitution. U.S. CONST. amend. I. It is also recognized globally as a human right in various forms of international legislation, agreements and declarations, such as under Article 19 of the Universal Declaration of Human Rights. See Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10 1948). For more information regarding free speech and copyrights, see *generally* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths & Uma Suthersanen eds., Oxford, University Press 2005).

¹⁰⁶ However, it might not seem disproportionate while users still possess various other ways to fulfill themselves as individuals using free speech.

3SP in its current manifestation is not implemented in furtherance of a compelling state interest and is definitely not narrowly tailored.¹⁰⁷ At least in the U.S., 3SP legislation must be “compelling” to describe the societal importance of the law and must be a narrowly tailored means of furthering U.S. interests.¹⁰⁸

Finally, the 3SP might reshuffle the current balance set in the copyright law regime between the interests of authors and those of the public. Copyright law usually provides users with various exemptions and defenses that allow them to use copyrighted materials without the right holder’s prior permission. These include the fair use defense¹⁰⁹ and the use of materials that are in the public domain.¹¹⁰ As to the latter, the 3SP should not usually create much of a problem. However, the 3SP might unduly limit fair use rights for several reasons. First, the 3SP does not include an examination of the alleged copyright infringements. When a right holder notifies HADOPI of an alleged infringement, a notice to the user is sent without HADOPI or any court examining whether an infringement actually occurred. If, for example, someone wishes to download copyrighted material for the purpose of non-commercial academic research, then under the 3SP she might still be treated as an infringer. Second, many users do not have sufficient – if any – knowledge about intellectual property in general and the fair use defense specifically. Therefore, many users who receive a notification might cease all file-sharing actions, although at least some of those actions might qualify as fair uses. In other words, the 3SP does not allow sufficient breathing room for the fair use defense and thus might be overbroad and create a chilling effect.¹¹¹

¹⁰⁷ For more on the importance of anonymous speech, see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). For more regarding “strict scrutiny,” see *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938); *Widmar v. Vincent*, 454 U.S. 263 (1981). Narrow tailoring entails that the law capture within its reach no more activity than necessary to advance those compelling ends. A compelling state interest means that only the most pressing circumstances can justify the action. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 800 (2006).

¹⁰⁸ See *supra* note 107.

¹⁰⁹ See 17 U.S.C § 107 (2006).

¹¹⁰ “A work of authorship is in the public domain if it is no longer under copyright protection or if it failed to meet the requirements for copyright protection. Works in the public domain may be used freely without the permission of the former copyright owner.” For this definition, see U.S. Copyright Office. Definitions (FAQ), www.copyright.gov/help/faq/faq-definitions.html (last visited May 11, 2011).

¹¹¹ Fair use allows some use of copyrighted material without requiring permission from the rights holders, such as criticism, comment, news reporting and research, and plays an important role in promoting and safeguarding free speech. See *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding

This is a crucial drawback of the 3SP. In civil litigation, it is reasonable for users to hire lawyers to defend them in court and raise a fair use defense or any other user rights' claims. Under the 3SP, it is not clear that such a defense is available. Moreover, the two warnings users receive prior to any sanction given will also be problematic for users' rights for similar reasons. Users might not attempt to challenge warnings they receive, even though their file sharing actions are lawful. However, when the third strike arrives, the user might face an Internet suspension without any examination by the court of the first two strikes. It might be too late to act. Therefore, it appears that the 3SP does not currently include proper tools to deal with users' rights issues, and therefore it is not a proper solution for resolving illegal file-sharing over the Internet.

Despite its many potential benefits, the 3SP is not without disadvantages. First, it can resolve the illegal file-sharing problem, but at the same time it may harm artists that benefit from those activities. Second, it might impose obligations on the ISPs that will force them to undertake structural and financial changes like allocating human resources to deal with right holders' claims. Third, the 3SP might impose a new role on ISPs which they did not initially anticipate, putting them in a difficult position and causing adverse financial consequences. Finally, the 3SP might have dramatic impacts on individual rights including privacy, due process rights, free speech, and users' rights.

V. 3SP ENFORCEMENT

Setting aside the debate regarding the 3SP's benefits and drawbacks, enforcement issues of the 3SP might jeopardize its success. Although one cannot yet analyze the actual success or failure of the different 3SPs worldwide, there are some enforcement issues that are likely to arise.

A. *Bypassing the 3SP Limitations*

Technology might aid users in circumventing or surpassing the 3SP's limitations. This might occur in two different situations: first, *ex ante*, users could either avoid getting caught by the right holders, ISPs and the regulatory authorities; second, *ex post*, they could sidestep the Internet suspension sanction.

1. Avoid Detection

There are two main methods that users who illegally download

that a parody, even with a commercial nature, can qualify as fair use under U.S. law).

copyrighted materials could use to avoid detection. First, the 3SP, much like other methods used to detect illegal file-sharing over the Internet, usually depends on the right holder's detection of a copyrighted file shared over a file-sharing network. Usually, in order to detect illegal file-sharing over the Internet and in order to press charges against infringers, right holders connect to a p2p network and search for their copyrighted materials. Once they detect that their copyrighted materials are illegally available, they simply track the user's IP address. However, there are many other ways to make use of copyrighted materials on the Internet.¹¹² Other methods of downloading and data consumption, such as websites that offer streaming of copyrighted materials, direct access to copyrighted materials (such as Rapidshare and MegaUpload), and instant messaging and chat software (such as Usenet or IRC), make detection and enforcement by right holders much more difficult.¹¹³ The endless cat and mouse game of copyright owners and users over the past fifteen years teaches us this lesson.

Second, users can encrypt their actions or their IP addresses using various technologies and thus avoid getting caught.¹¹⁴ This raises further issues: since many of the right holders do not search for the infringements on their own and instead outsource the task, there have been, and will likely continue to be, reported incidents of false accusations. A fifty-three year-old American user was accused of downloading copyrighted television

¹¹² See *How To Not Get Sued for File Sharing*, THE ELECTRONIC FRONTIER FOUNDATION (Jul. 2006), <http://www.eff.org/wp/how-not-get-sued-file-sharing> (last visited May 8, 2011). There are currently two main methods used to detect file-sharing over P2P networks other than the mentioned method. The first, known as port-based analysis, is based on the concept that many P2P applications have default ports on which they function, and administrators "observe the network traffic and check whether there are connection records using these ports." Yimin Gong, *Identifying P2P Users Using Traffic Analysis*, SYMANTEC (Jul. 20, 2005), <http://www.symantec.com/connect/articles/identifying-p2p-users-using-traffic-analysis> (last visited May 8, 2011). The second method, known as protocol analysis, uses "an application or piece of equipment [that] monitors traffic passing through the network and inspects the data payload of the packets according to some previously defined P2P application signatures." *Id.* While those two methods might detect file-sharing over P2P networks, they cannot be used in order to distinguish between legal and illegal file-sharing. *Id.*

¹¹³ A recent study conducted in Rennes, France, indicated that the 3SP did actually reduce the usage of file-sharing software but enhanced the usage of other methods. See Nate Anderson, *Piracy up in France after tough three-strikes law passed*, ARSTECHNICA (Mar. 26, 2010), http://www.arstechnica.com/techpolicy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-lawpassed.ars?utm_source=rss&utm_medium=rss&utm_campaign=rss (last visited May 8, 2011). See also Sylvain Dejean, *Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français*, M@RSOUIIN (2010), www.marsouin.org/IMG/pdf/NoteHadopix.pdf (last visited May 8, 2011). For the research findings, see (in French) www.marsouin.org/IMG/pdf/NoteHadopix.pdf.

¹¹⁴ See, e.g., ITS HIDDEN, <http://itshidden.com> (last visited Apr. 9, 2011).

series such as South Park, even though she was the only user of her home network and had no actual knowledge of file-sharing at all.¹¹⁵ The RIAA also sent legal notices to people who were deceased when the alleged infringements took place.¹¹⁶

Therefore, current copyright infringement detection methods may become obsolete and damage the effectiveness of the 3SP. However, enforcement concerns do not stop here. One of the major concerns regarding the enforcement of the 3SP takes place after the legal sanction of suspending the user's Internet access.

2. After Internet Access Suspension

If, under a 3SP, a user is caught three times for copyright infringements, he or she will be disconnected from the Internet for a certain period of time. However, there are still multiple Internet access solutions available to the user that endanger the efficacy of the 3SP.

Disconnected users can use wireless networks such as WiFi (Wireless Fidelity) or WiMax (Worldwide Interoperability for Microwave Access) that are often free, open, and available in cafes. Users can also connect to a neighbor's wireless device, or even connect to the Internet by subscribing as another member of the household. This issue did not escape the attention of legislatures. In Italy, for example, in an attempt to fight terrorism, citizens are required to take measures in order to secure their network connection, while businesses are obligated to register and track all Internet users using their connection and to retain their personal information as well as their Internet activities.¹¹⁷ If the 3SP had similar requirements, it might be more difficult for the disconnected user to reconnect in such a manner.¹¹⁸

¹¹⁵ See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET (2010), news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1 (last visited May 8, 2011). In Boston, a sixty-six year-old woman was a suspected rap music file-sharer, although she never downloaded any materials over the Internet. See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES, Sept. 25, 2003. This also occurred outside the U.S. In the UK, for example, several elderly citizens were falsely accused of downloading computer games. See Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID (Oct. 30, 2008), www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple (last visited May 8, 2011). The music industry claims that this is part of the actions, and only a small portion of false accusations are made. See Dennis Roddy, *The Song Remains the Same*, PITTSBURGH POST GAZETTE, Sept. 14, 2003.

¹¹⁶ Andrew Orłowski, *RIAA Sues the Dead*, THE REGISTER (2005), available at www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

¹¹⁷ See Legge 31 luglio 2005, n 155 (It.).

¹¹⁸ Individually securing an Internet connection will require technical knowledge, which some users do not possess. Also, mandating Internet connection obligations on businesses

However, requiring businesses to monitor their customers' actions could adversely affect users' privacy rights.

The various methods that are currently available for Internet connection are vast. Moreover, it seems that completely suspending a user from the Internet, while blocking her connection to any other ISP in her country using black-lists, is difficult if not impossible. While ISPs possess two different identities for each user – her actual identity and her IP address – it is hard to understand which user identity would be black-listed. If ISPs black-list both user identities, it seems that the IP identity black-list will pose a real problem in regard to the proportionality of the 3SP, as the same IP address could be used by different people. In either case, it will still be possible for another person at the user's household to connect to the Internet through the same ISP or a different one. Consider, for example, a family of five, using the same Internet access connection. If one member of the family incurs three strikes, she would be barred from internet connectivity. But, because the whole family shares an internet connection, the disconnected user might still have up to twelve more strikes, provided she has access to other family members' computers. On the other hand, preventing the whole household from accessing the internet because of one family member's behavior would raise serious questions regarding the 3SP's proportionality. Why, one might ask, should a whole family suffer because one of its members committed three infringements? I believe they should not.

VI. THE SUCCESS OF THE 3SP & FURTHER QUESTIONS

One of the main questions arising from the implementation of the 3SP is its potential for success in eliminating illegal file-sharing over the Internet. Aside from the enforcement issues just discussed, there is still doubt whether the 3SP can actually achieve its declared goal. This section outlines the main issues regarding the potential success of 3SP.

First, the 3SP will only succeed if users are actually deterred by the legal sanctions applied in the 3SP. As much as disconnecting users from the Internet might be perceived as intimidating, current copyright infringement sanctions, such as large fines and imprisonment, might deter infringement more effectively. If the 3SP is to succeed where other policies have failed, it must be implemented and strongly enforced by the right holders, ISPs and governmental bodies like the French HADOPI. Sanctions

might be a financial burden to small businesses, therefore providing larger businesses with a commercial advantage.

will have to be applied at least once, if not more, to deter other potential infringers.¹¹⁹

Second, implementing the 3SP is expensive. From a governmental point of view, there will be costs such as judicial time and the allocation of funds to create and support the actions of the governmental body and the ISPs. As mentioned, the ISPs will have to undergo structural and financial changes, while allocating human resources to deal with right holders' claims, which might be higher than the fee the subscriber pays for the duration of suspension as set in the French law.¹²⁰

Third, it is not clear that 3SP is a proportionate sanction. In the U.S.,

¹¹⁹ It is hard to determine exactly how often users must be prosecuted until deterrence is achieved, if it can be achieved at all. However, users might be deterred even if no actual Internet suspension takes place. Consider the following example: the U.S. government, which currently does not employ a 3SP, announces that from now on, every user caught file-sharing on Sundays will be prosecuted and may even go to jail. Even if the U.S. government does not actually prosecute every single user or even any user, this might still deter users from downloading on Sundays. Although this is not exactly the same, it does hold similar principles. A general study regarding the dynamics of deterrence in criminal offenses explains that “[w]hen punishment capacity is constrained and offenders’ behavior responds to changes in the probability of punishment, a dual-equilibrium ‘tipping’ situation can result. In that case, temporary increases in punishment capacity can lead to lasting changes in violation rates. A strategy of dynamically concentrating sanctions on a subset of violators can reduce violation rates and the total amount of punishment actually delivered. When the capacity to punish is constrained, dynamic concentration can be more effective and less costly than randomly assigning sanctions to offenders.” Mark Kleiman & Beau Kilmer, *The Dynamics of Deterrence*, 106 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, no. 34, at 14234 (2009); see also Ed Felten, *Targeted Copyright Enforcement: Deterring Many Users with a Few Lawsuits*, FREEDOM TO TINKER (2009), www.freedom-to-tinker.com/blog/felten/targeted-copyright-enforcement-deterring-many-users-few-lawsuits (last visited May 8, 2011). Although the copyright law regime is not the same as criminal law, it seems that this might work in regards to file-sharers.

¹²⁰ For example, a study in the UK, which was set to provide an impact assessment for the Digital Economy Act of 2010 found that the related costs of implementing a 3SP might reach £500,000,000 over a 10-year duration: “Costs to ISPs of complying with the legislation, including costs of notifying infringers, capital costs to ISPs, costs of setting up and running a call centre, annual capital and operating costs to mobile network operators. Possibility of higher broadband costs for consumers. (Total cost: £290 -500 million.) Costs to low income/low valuation digital product consumers who would stop consuming digital content altogether rather than purchase it; costs to rights holders of identifying infringing IP addresses and taking infringers to court.” Department for Innovation & Skills et al, *Digital Economy Act 2010: Impact Assessment*, 13 (2010), available at <http://webarhive.nationalarchives.gov.uk/20100511084737/http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf>13. In regard to the right holder's claims, the 3SP should also consider inserting a system in which right holders pay a fee to ensure that ISPs will have proper funds to deal with their claims.

the 3SP was implemented as a deterrent in some states' criminal, as opposed to copyright, law.¹²¹ In California, for instance, Mr. Cecilio Gonzalez failed to reregister as a sex offender within five working days of his birthday. Because Gonzalez had been convicted of two prior offenses, the Court sentenced him to twenty-eight years of imprisonment under California's 3SP criminal law policy.¹²² Applying the 3SP within the area of intellectual property might raise similar questions regarding the fit between punishment and crime. Hence, for example, the 3SP does not differentiate between a user who shares 1000 copyrighted files and a user who only shares a single file, if both are caught only once, other than giving a judge the opportunity to decide the length of Internet suspension. That does not seem enough.¹²³

The 3SP can also be misused by the right holders. In France, for instance, right holders might have incentives to report as many users as they can to HADOPI, since they will not be punished if those accusations are proven false. However, HADOPI will probably find a solution to prevent such a radical scenario. In order to prevent this scenario, a plausible 3SP should have to include mechanisms to prevent misuse similar to those in the DMCA. For instance, possible remedies for false accusations could include paying a fine to the regulator and to the wrongly disconnected user.

Finally, if 3SP succeeds in eliminating illegal file-sharing, countries that implement it would need to amend certain legislation designed to compensate right holders for infringements.¹²⁴ Otherwise, right holders could be compensated twice for their financial losses. In France, for example, there should be an amendment to the law that compensates right holders by imposing a levy on digital devices that can be used to store

¹²¹ See Cal. Pen. Code § 667.

¹²² *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) (finding that Gonzalez failed to update his registration annually within five working days of his birthday, and sentenced him to an indeterminate term of 28 years to life).

¹²³ It seems that due to the nature of the 3SP identification techniques, identifying infringers through P2P software, and sending notification notices without a distinction between two different file-sharers (e.g., someone who shares one song and another person who shares 1000 songs, if caught only once are treated the same), the courts will need more power to differentiate between different file-sharing, such as a non-commercial scale vs. commercial scale of file-sharing (which will be determined by the court). The major difference between the 3SP litigation and "regular" civil litigation in regards to IP, is that in the latter, the right holders get a much better picture of the user's profile than in the 3SP, and therefore they have a wider range of decision in regards to the alleged infringer, i.e., they can choose whether they want to prosecute someone who downloaded a single song or focus on "bigger fish."

¹²⁴ In the U.S. for example, see the Audio Home Recording Act of 1992 (17 U.S.C. §§ 1001-10). Under this Act, all digital recording devices must incorporate a Serial Copy Management System.

music.¹²⁵

VII. ALTERNATIVE 3SP PROPOSITION

If the 3SP is a legitimate method to deal with illegal file-sharing, we should address its problematic aspects and seek to amend them.¹²⁶ First, an official governmental body empowered to deal with illegal file-sharing other than courts, such as HADOPI, must be established. However, this body must take a more active role in analyzing right holders' claims prior to sending alleged infringement notices to users and hire employees with knowledge of copyright law. Furthermore, in order to minimize the infringement of due process rights, the official governmental body must supply the user with an adequate right to be heard. In other words, the governmental body should possess the power to stop proceedings against a user who was falsely accused.¹²⁷ In this way, users will be able to make legitimate use claims like fair use. This will strike the proper balance between the interests of authors and those of the public. Legislators must also formulate rules regarding the nature of information usage to preserve users' right to privacy. Moreover, as mentioned, the 3SP must create mechanisms similar to those set in the DMCA to address misuse.¹²⁸ The government should address financial costs to ISPs who will be affected by the 3SP implementation requirements. The 3SP will also have to provide courts with the power to deal with different file-sharing infringements, meaning that courts will have the ability to suspend a user for a very short time if it seems that the alleged infringement occurred due to unjust circumstances.¹²⁹ For instance, under the 3SP in France, the minimum

¹²⁵ Intellectual Property Article L. 311-5 (Fr.). See also P. Bernt Hugenholtz & Lucie Guibault Sjoerd Van Geffen, *The Future of Levies in a Digital Environment, Final Report*, INSTITUTE FOR INFORMATION LAW (2003).

¹²⁶ See generally, Yu, *supra* note 74 at 1419 (proposing that if the system is to be considered fair and legitimate, and rule of law is to be respected, the infringing activities of those who stand to lose internet service must be verified through an independent review process, and also that the graduated response system needs to take its educative and rehabilitative roles seriously).

¹²⁷ If implemented in the U.S., it will probably be subjected to the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), and the administrative agency will have power to propose and establish regulations.

¹²⁸ This is much like statutory damages set in U.S. copyright law that authorize the court to reduce damages to two-hundred dollars if the defendant was not aware of and had no reason to believe that its acts constituted a violation. See 17 U.S.C. § 504.

¹²⁹ There could be many different situations where users' alleged infringement will occur due to unjust circumstances. For instance, if a user does not know how to "block" his internet connection to other users, his neighbors could download copyrighted files using his IP address, and therefore, he could be sued, unfairly and unknowingly.

penalty is set to a period of two months' suspension, a long period which does not provide the judge with sufficient power to reduce the penalty for lighter infringers. Finally, if the 3SP succeeds in its mission, legislation enacted to compensate right holders for copyright infringements should be amended to prevent double-compensation for the right holders.

Additionally, a reasonable 3SP must set a minimum period of time between the first two accusations of infringements. Under the current 3SP regime, a user could be notified three times within a matter of seconds, which would not give her enough time to alter her behavior and internalize the policy.¹³⁰ Moreover, e-mail notices should not count as a proper notice, since users use different email boxes, sometimes provided by the ISPs and not used by the subscribers; therefore, there is a real chance that this notice will never reach them. This matter might not be perceived as problematic in sense of law;¹³¹ however, it should matter in a normative sense. Finally, if adopted, the 3SP should be widely advertised and explained to the general public. This is due mostly to technological and legal gaps between different users.¹³² Moreover, I submit that Internet suspension should be limited to certain actions, so that users can still use online applications that do not threaten right holders, such as e-mail services and the usage of governmental websites. This would reduce the 3SP's negative impact on free speech and freedom of information, making the 3SP a more reasonable and proportional method of copyright enforcement.

VIII. NEW DIRECTIONS IN COPYRIGHT?

Until recently, civil litigation was the typical means of copyright enforcement.¹³³ The 3SP, by contrast, advances a relatively new approach to copyright protection. Under the 3SP, the state takes on an active role in enforcement by threatening criminal sanctions. This method might have a crucial impact on the current balance set in the copyright law regime between the interests of authors and those of the public. I will analyze the

¹³⁰ NIMMER & NIMMER, *supra* note 23, at § 12B.10(C)(1); Yu, *supra* note 74, at 1420 (arguing that the system should focus on the type of infringement that is understandable by Internet users with limited knowledge of copyright law).

¹³¹ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

¹³² Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 39 (1996).

¹³³ See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000); *A & M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp.2d 1045 (D. Minn. 2010); *Sony BMG Music Ent. v. Tenenbaum*, No. 07-cv-11446-NG (D. Mass. 2010); *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010).

new methods used in file-sharing to elucidate possible new directions in copyright law. I will argue that the fast-track judicial procedure set in the French model misuses the internet-suspension sanction; the system's rationale is clearly punishment, not prevention. On a larger scale, I will claim that the 3SP is yet another step in the criminalization of copyright law.

A. Copyright Criminalization

Copyright infringement is primarily a civil wrong. When infringement occurs, copyright holders usually turn to civil litigation for compensation.¹³⁴ While copyright law also includes criminal sanctions, they are usually only applied in cases of infringement for commercial purposes.¹³⁵ The 3SP proposes a new method for copyright holders to deal with infringements through private ordering and criminal procedure. I claim that a global paradigm shift has already started in copyright and that it is reflected in the 3SP. I illustrate this point through a general analysis of U.S. copyright law and various 3SP legislation.

For many decades, willful infringement of a copyright for commercial advantage or private financial gain has carried criminal penalties.¹³⁶ The emergence of the Internet and technologies that enable users to infringe copyrighted materials more easily changed this rationale, expanding the interpretation of commercial advantage and financial gain.¹³⁷

¹³⁴ See Alan N. Young, *Catching Copyright Criminals: R. v. Miles of Music Ltd.*, 5 I.P.J. 257 (1990).

¹³⁵ See, e.g., 17 U.S.C. § 506, 18 U.S.C. § 2319, 18 U.S.C. § 2318, 18 U.S.C. § 2319, 17 U.S.C. §§ 1201-1204, 18 U.S.C. § 2320, 18 U.S.C. § 1832. See also Young, *supra* note 134, at 258; Steven Penney, *Crime, Copyright, and the Digital Age* in WHAT IS A CRIME? CRIMINAL CONDUCT IN CONTEMPORARY SOCIETY 63 (Law Comm'n of Canada ed., 2004); Kent Walker, *Federal Remedies for the Theft of Intellectual Property*, 16 HASTINGS COMM. & ENT. L.J. 681 (1994). See also Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and The Importance of the Willfulness Requirement*, 77 WASH. U.L.Q. 835, 840 (1999).

¹³⁶ See, e.g., NIMMER ON COPYRIGHT, *supra* note 23, at § 15.01(A)(2). In the U.S. criminal procedures were first introduced in copyright law in 1897. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481-82 (Adding a provision to create criminal sanctions for unlawful public performances and representations of copyrighted dramatic or musical compositions); Copyright Act of 1909, ch. 320, 33 Stat. 1075-82. In 1976, the U.S. continued to include criminal procedures in copyright laws. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. (1987); 18 U.S.C. § 3571; The Copyright Felony Act (Felony Act) of 1992, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (current version at 17 U.S.C.A. §501 (2002)); (18 U.S.C. § 2319). See Mary J. Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U.L. REV. 671, 673 (1994); Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 990 (2001).

¹³⁷ See, e.g., *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), in which a

The TRIPS agreements, which obligated member states to provide for criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, demonstrate this global shift.¹³⁸ In 1995, U.S. lawmakers realized that the Internet might have a crucial impact on copyright holders, Congress proposed an act to extend the possibilities of criminal sanctions for non-commercial piracy as well.¹³⁹ Although this act was ultimately not enacted, it led to the passage of the No Electronic Theft Act of 1997 ("The NET Act").¹⁴⁰ The NET Act clearly marks the beginning of a copyright paradigm shift toward criminal procedures.

The NET Act mainly added a provision that criminalizes infringements that are not undertaken for a commercial purpose.¹⁴¹ The Act seems to have had an impact on the traditional perception of copyright in the U.S. and worldwide. On one hand, it seems that subjecting a substantial amount of citizens to criminal penalties is undesirable, even through the eyes of the right holders.¹⁴² On the other hand, introducing criminal sanctions into

twenty-one-year-old student from Massachusetts Institute of Technology was sued for copyright infringement using a bulletin board. The court held that

[c]riminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, it is the legislature, not the Court which is to define a crime, and ordain its punishment.

Id. at 545.

¹³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) ("TRIPS") at § 5, Article 61.

¹³⁹ Criminal Copyright Improvement Act of 1995, S. 1122, 104th Cong. § 2(b) (1995).

¹⁴⁰ No Electronic Theft (NET) Act, Pub. L. No. 105-47, 111 Stat 2678 (1997), (17 U.S.C. §§ 101, 506, 507; 18 U.S.C. §§ 2319, 2320; 28 U.S.C. § 1498).

¹⁴¹ The NET Act also states that:

Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed . . . (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

17 U.S.C. § 506(a)(1) (2008).

¹⁴² See generally *Criminal Sanctions for Violations of Software Copyright: Hearing on S. 893 Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. (1992); see also *LaMacchia*, 871 F. Supp. at 544 ("It is not clear

copyright law might deter users more effectively than civil compensation.¹⁴³ For users who illegally file-share, the NET Act might prove a real threat as they might face criminal charges.¹⁴⁴

The U.S. continued to criminalize copyright in the DMCA, which criminalized certain circumventions of copyright protection systems.¹⁴⁵ Globally, it seems that this trend will continue if and when the Anti-Counterfeiting Trade Agreement (ACTA) is signed, as ACTA requires the enhancement of criminal intellectual property enforcement.¹⁴⁶

B. The 3SP as a New Link in the Criminal Chain

As mentioned above, the 3SP seems like yet another link in the chain of copyright criminalization. Although the criminalization process started before the 3SP, its implementation through the NET Act was not directed mainly against end-users.¹⁴⁷ The 3SP attempts to change the copyright

that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable.”); Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 414–15 (2003) (“Even copyright owner industry groups agree that Congress should not ‘accidentally tak[e] a large percentage of the American people . . . into the gray area of criminal law.’” (internal citations omitted)).

¹⁴³ See Ronnie Heather Brandes et al., *Intellectual Property Crimes*, 37 AM. CRIM. L. REV. 657, 680 (2000); but see Penney, *supra* note 135, at 80 (“it would not be surprising if criminal enforcement proved to be ineffective”).

¹⁴⁴ See Declan McCullagh, *Perspective: The Copyright Conundrum*, CNET NEWS (Oct. 14, 2002), news.com.com/2010-1071-961818.html; Goldman, *supra* note 142, at 416; Aaron M. Bailey, *A Nation of Felons?: Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 531 (2000). However, infringement might only occur in cases that an actual file-transfer was completed, as opposed to just making it available for download. See Declan McCullagh, *Perspective: The New Jailbird Jingle*, CNET NEWS Jan. 27, 2003, news.cnet.com/2010-1071-982121.html (“For purposes of a criminal prosecution, you’d have to show more than that the defendant made the files available—you’d have to show that she actually made or distributed copies . . . Not too difficult using today’s tools, but you would need to show the actual copying of the file by third parties rather than merely proving that defendant downloaded the files into her share directory.”) (quoting Jessica Litman).

¹⁴⁵ 17 U.S.C. §§ 1201-1204 (1999). The DMCA’s criminal penalties apply only to willful infringements for purposes of commercial advantage or private financial gain. 17 U.S.C. § 1204(a) (1999).

¹⁴⁶ Anti-Counterfeiting Trade Agreement, PUBLIC Predecisional/Deliberative Draft, April 2010, art. 2.14–2.17.

¹⁴⁷ See, e.g., the following cases that were published by the American government: Jeffrey Levy, a 22 year student, “pled guilty to illegally posting computer software programs, musical recordings, entertainment software programs, and digitally-recorded movies on his Internet web site, allowing the general public to download these copyrighted products. On November 23, 1999, Levy was sentenced to a two year period of probation with conditions.” Eric Thornton pled guilty to criminal infringement of a copyright under the

paradigm. Until recently, copyright infringements were treated as civil wrongs or as criminal felonies in cases of willful counterfeiting or copyright piracy on a commercial scale. The emergence of the Internet and file-sharing protocols have changed the way policy makers think and act globally.

The 3SP will make a paradigm shift for several reasons. First, unlike the NET Act where the state takes an active role to prosecute infringers, the 3SP procedure as established in France is simple and any copyright holder can make claims.¹⁴⁸ The simplicity of the 3SP is where the success of the model lies. Even if it is possible to open criminal procedures against end-users on a non-commercial scale, such a strategy has proven ineffective as right holders have not pursued it. I believe that the 3SP's fast judicial procedure will alter that, leading to the enhancement of copyright criminalization.

Moreover, the 3SP sanction plays an important role in its implementation. Although Internet suspension poses many threats to end-users, other criminal sanctions, like imprisonment or large fines, might be viewed as a harsher penalty. Therefore, the 3SP sanction is crucial for the paradigm shift. As long as legislation enables different criminal sanctions against end-users, harsh penalties imposed upon non-commercial end-users might not be viewed as justified in the public's eyes. Even if Internet suspension seems a harsh penalty, it will probably be conceived as a better solution for the public than imprisonment, and therefore will enhance copyright criminalization.¹⁴⁹ However, the Internet has caused many enforcement changes both in copyright law and beyond. To elucidate the possible copyright paradigm change, I will examine a more general guideline that has changed over the years.

C. Internet Criminal Enforcement

The Internet poses threats to many different statutes around the world, due to its unique nature that usually allows for user anonymity and raises questions regarding where an "act" was committed due to the Internet's lack of geographical restrictions.¹⁵⁰ Technology enables users to avoid detection

NET Act for Unlawful Distribution of Software on the Internet. U.S. Dep't. of Justice, Computer Crime and Intellectual Property Section, Intellectual Property Legal Resources, available at www.justice.gov/criminal/cybercrime/iplaws.html. See also Goldman, *supra* note 142, at 381–92 (describing the publicized convictions under the Act).

¹⁴⁸ See *supra* note 4 (discussing French 3SP form).

¹⁴⁹ I believe that as long as legislatures implement relatively lenient criminal sanctions, they will be more broadly used than a harsh penalty. This would introduce more effective criminal sanctions into copyright law.

¹⁵⁰ For more regarding the internet's virtual borders, see generally Joel R. Reidenberg,

not only in the copyright context, but in other areas of law as well.

The Internet facilitates many criminal offenses, including illegal gambling, child pornography, and online scams.¹⁵¹ To deal with the special nature of the Internet and the criminal offenses it enables, legislatures shaped many different policies over the last fifteen years. Take, for example, the different enforcement methods used to deal with illegal online gambling. Online gambling is prohibited in many countries, even when the actual website is hosted in a country where online gambling is legal.¹⁵² In the U.S., Congress decided to prohibit funding of unlawful internet gambling.¹⁵³ By so doing, the American legislature demonstrated its conviction that online gambling poses a real threat and dealt with it by imposing criminal sanctions.

These facts suggest several rationales for implementing the 3SP. First, its implementation may be rationalized due to a general criminalization paradigm shift. Alternatively, its rationalization could be due to the changes the internet has generated for various laws due to enforcement problems. It is hard to say with certainty where the 3SP is located within these two options. I believe that the 3SP, as implemented in France, leans in both directions because the two are linked. However, despite the fact that the 3SP criminal procedure started as a direct result of the fact that the Internet has changed media consumption, I believe that the general criminalization process that already began in copyright law also plays an important role in the 3SP legislation and will continue to do so throughout different legislation around the globe.

D. Discussion

Disconnecting users from the Internet is a harsh penalty. It might not amount to a “cruel and unusual punishment,” but it is definitely not a lenient one. Accordingly, the 3SP should only be imposed if its detrimental

Technology and Internet Jurisdiction, 153 U. PA. L. REV. 1951 (2005). See also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D Pa. 1997) (finding personal jurisdiction over a defendant providing Internet services); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L ‘Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004). (holding that a U.S. court lacked jurisdiction with respect to U.S. search engine’s declaratory judgment action against French anti-Nazi groups seeking to block French internet users’ access to racist web sites).

¹⁵¹ For more on the history of criminal offenses over the Internet and attempts to prevent and prosecute them, see Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535 (2007). See also *infra* notes 152–153.

¹⁵² See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999) (enjoining a foreign corporation from operating or offering online gambling services).

¹⁵³ 31 U.S.C. §§ 5361–67 (2006).

effect on personal rights is proportionate to its benefits. In the U.S., for instance, the 3SP endangers freedom of speech, and so would likely be subject to strict scrutiny. Hence, it could be implemented only if it furthered a compelling state interest and was narrowly tailored to achieve that interest.¹⁵⁴ As mentioned above, this is not the case in the current 3SP model.

The 3SP attempts to succeed where other enforcement methods have failed. To achieve public deterrence of illegal file-sharing using the 3SP, the policy would have to be implemented and fully enforced. The main difference between the 3SP and earlier methods of enforcement regarding file-sharing, such as filing lawsuits against file-sharing companies or suing individual file-sharers, lies in the simplicity of the new policy. While other methods, such as filing lawsuits against individual users, might be costly and time-intensive, the 3SP policy could achieve its purpose from day one by sending a user notification, usually a simple and inexpensive action. At worst, after sending a user two prior notices, a quick judicial procedure is easier and cheaper than regular civil or criminal procedures. The question is whether achieving the goals of efficiency and deterrence is more important than preserving the individual rights discussed above.

To answer the normative question, I will compare the 3SP to other enforcement methods. The comparison will consist of enforcement methods, much like the 3SP, in which the main sanction imposed is depriving the user of access to the tool that was used to commit the wrong.

I start with an analogy to an older telecommunication device, the telephone. Telephones have become an integral part of our lives. Although used primarily for communicative activities, they can also be used to plan or commit crimes such as robbery, fraud, and harassment. Committing crimes using a telephone might cause the service to be suspended by either the phone company or by the court.¹⁵⁵ It seems that in this case, the criminal

¹⁵⁴ This refers to the possibility that the U.S. will implement a 3SP, while it must be compelling to describe the societal importance of the law, and must be a narrowly tailored means of furthering U.S. interests, as mentioned. Winkler, *supra* note 107, at 800.

¹⁵⁵ For example, a common carrier is authorized to terminate service based on criminal use of telephones: "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency,

usage of the telephone causes a public risk and therefore the disconnection serves a public interest.

Peter Yu suggests another analogy of enforcement methods which is closer to the 3SP.¹⁵⁶ If a driver decides to drive his car while under the influence of alcohol, the driver might lose his license and face confiscation of the vehicle, even if he does not own it.¹⁵⁷ Those sanctions might be perceived as more severe than disconnecting a user from the Internet. Also, unlike the 3SP, which provides two warnings before imposing a sanction, this enforcement method is immediate.

It seems the main discussion as to whether the 3SP is appropriate regarding file-sharing circles around the implementation of the main principles that underlie similar sanctions in criminal law. In criminal law, legislators sometimes seek to prevent public hazards by enacting laws that might reduce a possible negative impact on society.¹⁵⁸ Take, for example, release conditions set by some U.S. courts for convicted sex offenders, which ban the offender's Internet access, usually for a limited period of time.¹⁵⁹ Such conditions must have a clear nexus to the underlying crime and involve “no greater deprivation of liberty than is reasonably necessary” to deter future criminal conduct, to protect the public” from further crimes

that such facility should not be discontinued or removed, or should be restored.” 18 U.S.C. § 1084(d) (1994). Needless to say, common carriers can usually terminate service where customers are in breach of contract.

¹⁵⁶ “To some extent, the threat of internet disconnection is similar to, and as effective as, the threat of suspension of a driver's license for drunk driving.” Yu, *supra* note 74, at 1381.

¹⁵⁷ In California, for example, if a driver is convicted of drunk driving the first time, his driver's license might be suspended up to 6 months; for subsequent convictions the duration of suspension may be longer. See CAL. VEHICLE CODE §23152 (a)-(b) for the offences and CAL. VEHICLE CODE § 13352 (a) for the penalties.

¹⁵⁸ See, e.g., 18 U.S.C. § 3583 (d)(1)-(2) (2008) (release conditions must entail “no greater deprivation of liberty than is reasonably necessary” to deter future crime, protect the public, and rehabilitate the defendant.). The release conditions are set to deter future crime; hence, they might reduce a possible negative impact on society.

¹⁵⁹ See *United States v. Thielemann*, 575 F.3d 265, 269 (3d Cir. 2009) (Thielemann was prohibited from “own[ing] or operat[ing] a personal computer with Internet access in a home or at any other location, including employment, without prior written approval of the Probation Office”); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (overturning a lifetime ban to computers and the internet. However, the court indicated that a limited ban could be imposed in some circumstances); *United States v. Freeman*, 316 F.3d 386, 387 (3d Cir. 2003) (vacating the District Court's decision of supervised release condition by “failing to state the reasons for its special condition of supervised release and by imposing a condition that unreasonably impinges upon Freeman's liberty interests”); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999) (The court upheld a three-year ban that prohibited the defendant from using any “computer network, bulletin board, Internet, or exchange format involving computers” without prior permission).

by the defendant and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁶⁰ In a recent case, a defendant pleaded guilty to one count of receiving child pornography over the Internet.¹⁶¹ The court upheld a ten-year special condition of supervised release that prohibited the offender from using the Internet without prior permission from a probation officer. The court concluded that a ten-year restriction on computer and internet use does not involve a greater deprivation of liberty than is necessary in this case.¹⁶² However, in a recent similar case, the same court held that a condition barring the offender from using any online computer service without the approval of the probation officer involves a greater deprivation of liberty than is reasonably necessary.¹⁶³ In sum, U.S. courts have weighed the liberty interests of the defendant against the interests of the state in ensuring public safety and rehabilitation, and have concluded that special conditions implicating First Amendment rights must be “narrowly tailored.”¹⁶⁴ However, in many cases, courts overturned decisions to suspend Internet access of convicted sex offenders, explaining that they are unreasonably excessive.¹⁶⁵

Although file-sharing might harm different business models of the media industry, it can hardly qualify as a public hazard,¹⁶⁶ and suspending Internet access does not benefit public safety. Hence, in file-sharing the restriction might not pass as constitutional. Therefore, in accordance with U.S. law, the fast-track judicial procedure in the French model misuses the internet-suspension sanction as a preventative method to deal with users while the rationale that stands behind it is clearly punitive. This strongly suggests that civil litigation is a more appropriate method of fighting against file-sharing, whether it achieves its purpose or not.

The analogies to criminal enforcement methods raise further questions regarding the role of the state in the 3SP. Usually the state does not take

¹⁶⁰ *Voelker*, 489 F.3d at 145 (citing 18 U.S.C. §§ 3583(d)(2), 3553(a)); For further information, see Recent Cases, *Criminal Law - Supervised Release - Third Circuit Approves Decade-Long Internet Ban for Sex Offender*, 123 HARV. L. REV. 776, 776 (2010).

¹⁶¹ *Thielemann*, 575 F.3d at 267.

¹⁶² *Id.* at 278.

¹⁶³ *Freeman*, 316 F.3d 386, at 391–92.

¹⁶⁴ See *Thielemann*, 575 F.3d at 273, 277; see also Recent Case, *supra* note 160, at 778.

¹⁶⁵ See, e.g., *United States v. Russell*, 600 F.3d 631, 637 (D.C. Cir. 2010) (vacating a thirty-year total ban on possessing or using computers for being “substantively unreasonable” and “aggressively interfer[ing] with the goals of rehabilitation” for a man convicted of soliciting a thirteen-year-old girl over the internet).

¹⁶⁶ However, in my opinion, in some cases file-sharing might be perceived as a public hazard, such as if it will bankrupt media industries and subsequently lead to massive job dismissals.

sides when it comes to copyright infringements on a non-commercial basis, meaning that the state does not take an active part pursuing the infringers. However, the 3SP contains a shift from civil litigation to criminal enforcement. When a jurisdiction adopts a 3SP regime similar to the French model, the state undertakes an active role in the pre-judicial allegations against users by creating a governmental body directed to deal with right holders' infringement allegations. Furthermore, the judicial procedure set in the French 3SP resembles criminal litigation much more than civil litigation, in the sense that in the 3SP, much like in criminal litigation, the state files charges against the user and not the right holder.¹⁶⁷

In my opinion, the 3SP is an inappropriate attempt to strengthen right holders' power over users. Furthermore, the 3SP might reshuffle and jeopardize the balance set in the copyright law regime between the interests of authors and those of the public by depriving users of the right to make fair use of copyrighted materials without the right holders' prior permission. On a more general note, it seems that policy-makers should not take an active role when it comes to copyright infringements on a non-commercial basis, especially not with criminally-based enforcement methods. Right holders still possess a variety of methods to fight against illegal file-sharing. If legislators wish to resolve the file-sharing struggle in a more proportionate manner, they should seriously consider either implementing a 3SP which only restricts file-sharing and not the whole usage of the Internet,¹⁶⁸ or better, consider new approaches, such as implementing a noncommercial use levy system, as suggested by William Fisher and Neil Netanel.¹⁶⁹

IX. CONCLUSION

Technological innovations have clearly enhanced media consumption,

¹⁶⁷ It is still unclear how this procedure will actually occur, since no allegations have as yet been filed against users under the French 3SP. Even if the right-holder will actually be the entity who files charges against the user, it seems that the automatic procedure of the 3SP and the fast-track judicial procedure reveal the true identity of what drives the procedure, i.e., the state. See Pfanner, *supra* note 42.

¹⁶⁸ Even though restricting only file-sharing might be a difficult task, mere administrative ease cannot justify the deprivation of a constitutional right. Cf. Frank E. Correll, Jr., *You Fall into Scylla in Seeking To Avoid Charybdis: The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681, 703–706 (2007); see also Recent Case, *supra* note 160, at 783.

¹⁶⁹ See Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1 (2003); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* (2004).

partly due to Internet file-sharing. The sharing of files between users could promote freedom of speech and information. On the other hand, this flow of information may pose a real challenge to copyright holders' business models, creating a struggle between right holders, ISPs and file-sharers. After several attempts to resolve this struggle, the 3SP has emerged as a possible solution for the right holders, but not without a cost. Policymakers considering adopting a 3SP regime should consider these costs carefully. I, for one, would not advocate such a system.



Corking the Cam Newton Loophole, a Sweeping Suggestion

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I. INTRODUCTION

College athletics is a billion dollar industry.¹ In particular, major men’s sports such as college football and basketball have “become more than an extracurricular activity [They have become] a global business.”² This “global business” creates billions of dollars for stakeholders such as the National Collegiate Athletic Association (the “NCAA” or “Association”), the hundreds of schools and universities throughout the nation that make up the NCAA, television networks, and sponsors. Yet while the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical nature of the Association, as its financial success is built on the sweat of amateur athletes. As NCAA athletes, student-athletes are bound to the rules of amateurism, which prohibit them from profiting off the collective sweat-equity they put into college athletics.³ Thus, under NCAA rules, the intercollegiate athletes themselves are the only stakeholders not benefitting from their relationship with the NCAA.⁴

The debate over whether the existing system exploits college athletes is not a novel topic. Under the current scheme, a student-athlete may only receive tuition, educational fees, and room and board in exchange for his or her participation on a particular collegiate team.⁵ NCAA bylaws finitely outline the limited circumstances in which an athlete may receive additional benefits without violating amateurism rules.⁶

Amateur athletes face significant time constraints with little time to

¹ See *Time for Professional Student Athletes?*, THE ECONOMIST (Apr. 4, 2011), http://www.economist.com/blogs/freeexchange/2011/04/sports_and_games. See also Jodi Upton, Steve Berkowitz and Jack Gillum, *Big-Time College Athletics: Are They Worth the Big-Time Costs?*, USA TODAY (Jan. 15, 2010), http://www.usatoday.com/sports/college/2010-01-13-ncaa-athletics-subsidies_N.htm.

² KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, THE BUSINESS OF SPORTS AGENTS 172 (2d ed. 2008).

³ See 2010–2011 NCAA DIV. I MANUAL § 12 (2010) [hereinafter NCAA MANUAL].

⁴ As one person put it, “[w]inning is enormously lucrative for everyone involved except the players, who happen to have the biggest influence over who wins and who loses.” SHROPSHIRE & DAVIS, *supra* note 2, at 3.

⁵ *Id.* at 6.

⁶ See NCAA MANUAL, *supra* note 3, §§ 12.4, 15, 16.

procure a part-time job. Advocates of student-athlete compensation argue that the demands placed on the average college athlete, such as practice time, study hall, film, and conditioning, make it almost impossible for a student to earn extra money through part-time employment. Adding to this difficulty is the fact that NCAA rules place limits on the hourly wage athletes may earn for a part-time job.⁷ While possible solutions such as paying athletes a minimum wage⁸ and providing low interest loans⁹ have been discussed, a more comprehensive solution still must be discovered, agreed upon, and implemented.¹⁰ Because there is no reasonable alternative to assist a student-athlete in need of funds, some athletes are tempted to accept handouts offered by the many individuals clamoring to represent the prospect at the next level.

While in college, an elite player may encounter player agents, marketing agents, financial planners or one of their associates (i.e. a “runner”). These individuals most likely offer a combination of benefits if the player signs or promises to sign after he becomes a professional athlete. For example, agents and other third parties seeking to represent a player in some capacity may approach him or her and offer items such as cash, cars, jewelry, and real estate. An athlete may speak with each of these individuals without repercussion, but he or she will violate NCAA bylaws concerning amateurism and potentially forfeit eligibility if the athlete receives an extra benefit.¹¹ The athlete may also lose eligibility if a family member or friend receives a benefit.¹²

In an attempt to provide universities and, to a certain extent, players with a cause of action against agents who violate NCAA bylaws on amateurism, states and the federal government have enacted sports-specific statutes governing the player-agent relationship. While these statutes are not perfect, they do help police agents who willfully pursue athletes as clients while they are still amateurs. Until more adequate policing mechanisms are implemented, however, it will continue to be exceedingly difficult truly to prevent the various kinds of agent abuse that plague the amateur athletic model.

Agents have recently devised a new scheme to circumvent NCAA rules

⁷ See *id.* § 12. 4.

⁸ SHROPSHIRE & DAVIS, *supra* note 2, at 167.

⁹ *Id.* at 169.

¹⁰ *Id.* at 165.

¹¹ Receiving a “benefit” becomes problematic and may disqualify the player when that extra benefit is “not available to the student body in general.” NCAA MANUAL, *supra* note 3, § 12.3.1.2(a).

¹² *Id.* § 12.3.1.2.

by offering athletes impermissible benefits during the recruitment process.¹³ Two recent events involving prominent collegiate athletes symbolize the next wave of challenges the NCAA must combat to defend its amateurism principals.¹⁴ It is unclear, however, whether the NCAA is the proper actor to police such events or whether it possesses the proper tools to do so. The first “pay to play” scandal involved former University of Southern California (“USC”) standout Reggie Bush in 2005.¹⁵ More recently, Auburn Tigers’ All-American quarterback Cam Newton was accused of similar acts, thereby thrusting the “pay to play” scheme back into the nation’s conscious.¹⁶

This Comment will discuss the emerging “pay to play” scenario in the context of the Cam Newton accusations. Part II briefly outlines the current regulatory schemes available to police NCAA athletes, their family and friends, as well as prohibited athlete-agent conduct. Part II also explains why current NCAA legislation fails to deter agents from recruiting student-athletes while they are still amateurs. Part III introduces a concept known as the “Cam Newton Loophole” and provides a factual background of the Heisman Trophy winner’s career as a student-athlete. Part IV presents a discussion and analysis regarding recent scandals in which notable NCAA athletes Reggie Bush and Damon Stoudamire received impermissible benefits. Part V unveils the authors’ proposed solution for deterring individuals from violating the NCAA’s principles of amateurism. Part VI provides a conclusion to this Comment.

II. CURRENT REGULATORY SCHEMES TO POLICE ATHLETES, AGENTS AND OTHER INDIVIDUALS AND PROHIBITED ATHLETE-AGENT CONDUCT

Attempts to regulate undesired NCAA athlete and agent conduct have spawned state, federal, and private legislation. The first lawsuits filed against troublesome agents were founded in common law causes of action.¹⁷

¹³ See Pat Forde, Chris Low, and Mark Schlabach, *Cash Sought for Cam Newton*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/ncf/news/story?id=5765214>.

¹⁴ See *id.* § 2.9.

¹⁵ See Madison Gray, *USC Trojans Get Black Eye Over Reggie Bush Scandal*, TIME.COM (June 10, 2010), <http://newsfeed.time.com/2010/06/10/usc-trojans-get-black-eye-over-reggie-bush-scandal/>.

¹⁶ See *Cam Newton Scandal: Rep Sought Cash from MSU*, CBSNEWS.COM (Nov. 5, 2010), <http://www.cbsnews.com/stories/2010/11/05/sportsline/main7025408.shtml>.

¹⁷ See Eric Willenbacher, Note, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing*

Much of the modern athlete-agent regulation, however, now occurs through NCAA bylaws and state or federal statutes.¹⁸ The following paragraphs briefly discuss the most popular methods of athlete-agent regulation.¹⁹

A. *The NCAA and its Bylaws*

The NCAA was initially founded in response to mounting safety fears over college football.²⁰ As rules governing college athletes became more standardized and safety concerns were alleviated, the governing body evolved into an institution predicated on adhering to the principles of amateurism.²¹ Under these notions, an amateur athlete must compete for the physical, mental and social benefits of a sport and must reject any commercial aspects.²² To maintain his or her amateur status, a student-athlete participating in NCAA sanctioned events cannot receive anything other than pre-approved compensation, either directly from the university or from a third party.²³ If a student-athlete violates this rule, both the student-athlete and member school may be disciplined. The NCAA levies discipline so as to guard the amateurism ideal or Olympic model of athletic competition.²⁴

Amateurism is fundamental under the Olympic model.²⁵ The NCAA's

System May Cure the Problem, 78 ST. JOHN'S L. REV. 1239-1242 (2004).

¹⁸ *Id.* at 1235-39.

¹⁹ While this Comment does not discuss this method, undesired agent behavior may be eliminated through penalties enacted by the various professional player associations.

²⁰ See Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1398 (2010).

²¹ *History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Nov. 8, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history>; see also SHROPSHIRE & DAVIS, *supra* note 2, at 122-24.

²² "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA MANUAL, *supra* note 3, § 2.9.

²³ See generally *id.* § 12.1.2 (discussing amateur status).

²⁴ Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 349 (2007) (discussing *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992) ("[T]he regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.")).

²⁵ "A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA MANUAL, *supra* note 3, § 1.3.1.

Principle of Amateurism reads: “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”²⁶ Thus, the bylaws most often used to enforce NCAA rules focus on preserving amateurism by prohibiting impermissible benefits.

A student-athlete who violates an NCAA bylaw becomes ineligible to participate in athletic contests.²⁷ Under the principle of institutional control, which is discussed in Bylaw 14.11.1, it is the school’s obligation to enforce the applicable NCAA rule to the student-athlete and withhold him or her from intercollegiate competition.²⁸ Failure to comply with NCAA rules results in significant penalties for both the student-athlete²⁹ and the member institution.³⁰ Once the school complies with its obligations, it may appeal to the Committee on Student-Athlete Reinstatement to have the student-athlete’s eligibility restored.³¹ One obligation that all institutions and athletes must comply with under NCAA rules is detailed in Bylaw 12, which deals with the principle of amateurism.

1. NCAA Bylaw, Article 12 – Amateurism Principles

Article 12 of the NCAA Bylaws governs the principles of amateurism. Under this rule, only amateur student-athletes may compete in intercollegiate athletics.³² Amateur athletes do not receive compensation for competing. Thus, amateur athletes cannot be paid³³ or they risk losing

²⁶ *Id.* § 2.9 (stating the Principle of Amateurism).

²⁷ *See id.* § 14.11.4 (discussing ineligible participation).

²⁸ *Id.* §§ 14.11.1, 14.12.

²⁹ “Penalty for Ineligible Participation or Receipt of Improper Aid. A student-athlete who practices or competes in intercollegiate athletics and/or receives institutional financial assistance (based in some degree on athletics ability) while ineligible for such aid, practice or competition per Bylaw 14.3 shall be charged with the loss of one year of eligibility for practice and varsity competition for each year gained improperly. The student-athlete shall be declared ineligible at the time it is determined that eligibility was gained improperly. Prior to declaring the student-athlete ineligible, the institution may provide the student-athlete an opportunity for a hearing. The institution may appeal to the Committee on Student-Athlete Reinstatement for a reduction in the period of ineligibility.” *Id.* § 14.11.4.2.

³⁰ *Id.* § 14.11.3.

³¹ *Id.* § 14.11.1.

³² *Id.* § 12.01.1.

³³ “Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.” *Id.* § 12.02.2.

eligibility.³⁴ Athletes are prohibited from accepting benefits from certain external sources, including prospective agents or other third parties, while still an amateur.³⁵

Amateurism means that an athlete will not sign an agreement to compete professionally,³⁶ which includes playing for compensation. A collegiate athlete will also lose eligibility if he or she agrees to be represented by an agent while still an amateur.³⁷ An agent may also disqualify an athlete from intercollegiate competition by furnishing him or her with any number of benefits, a concept that is discussed below.³⁸ This rule applies to the athlete as well as the athlete's family or friends.³⁹ Thus, terminating eligibility on the basis of receiving impermissible benefits, especially when the athlete claims to not have any knowledge of the alleged impermissible benefit, may quickly become a complicated scenario.

2. NCAA Bylaw, Article 16 – Extra Benefits

The bylaw governing impermissible or extra benefits is located in Article 16, which is entitled “Awards, Benefits and Expenses for Enrolled Student-Athletes.”⁴⁰ Simply put, the rule prohibits a student-athlete from receiving any extra benefit.⁴¹ “The term ‘extra benefit’ refers to any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide the student-athlete or his or her relatives or friends with a benefit not expressly authorized by NCAA legislation.”⁴² The bylaw allows the student-athlete to escape punishment “if it is demonstrated that the same benefit is generally available to the institution’s students or their relatives or friends or to a particular segment of the student body.”⁴³

The NCAA may easily find a student-athlete guilty of receiving an impermissible extra benefit. An athlete may break this rule by receiving something as minor as a free meal from a college coach⁴⁴ or a free set of

³⁴ *See id.* § 12.1.2.1.

³⁵ *See id.* § 12.3.

³⁶ *Id.* § 12.2.5.

³⁷ *Id.* § 12.3.1.

³⁸ *Id.* § 12.3.1.2.

³⁹ *Id.*

⁴⁰ *See id.* § 16.

⁴¹ *Id.* § 16.01.1.

⁴² *Id.* § 16.11.2.1.

⁴³ *Id.* § 16.02.3.

⁴⁴ PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 24 (2009).

sporting event tickets from a third party.⁴⁵ Upon receiving the impermissible benefit, a student-athlete loses his or her eligibility. Following an appeals process, however, the NCAA may reinstate the student-athlete.⁴⁶ Situations may also arise where a student-athlete requests or receives impermissible benefits during the recruitment process.⁴⁷ With the increasing commercialization of collegiate athletics, this is an area that may receive additional attention from the NCAA as it revises its bylaws.

3. NCAA Bylaw, Article 12.3.3 – Athletics Scholarship Agent

Article 12.3.3, which governs student-athlete recruitment, also plays a crucial role in preserving amateurism. The rule, as currently implemented, prohibits a prospective student-athlete from paying a third party to place the athlete in a collegiate institution that will provide the athlete with financial aid.⁴⁸ This rule may be applied to anyone who seeks out representatives on behalf of the student-athlete, not just the athlete or the family, with or without the athlete's knowledge of the solicitation.⁴⁹

Retaining an athletic scholarship agent is an issue that member institutions must confront, and it provides a new twist to the "pay-to-play" scheme. In many cases, amateur athletes demand compensation once they have established themselves as premier performers on a particular team. Furthermore, the increasing value of college basketball and football has left many amateur athletes feeling disenfranchised as stakeholders within the college athletics landscape before they even become collegiate athletes. The athlete's failure to receive any monetary benefit (other than financial aid) from college sports may cause an athlete to demand compensation prior to enrolling into an institution or, as seen below, attempt to sell his services to the highest bidder. Once these stakeholders enroll in their respective universities, member schools are counted on to help enforce NCAA rules and preserve amateurism.

⁴⁵ *Id.*

⁴⁶ See NCAA MANUAL, *supra* note 3, §§ 14.11-12.

⁴⁷ See *Alabama Looking Into Illegal Recruiting Accusations*, SPORTING NEWS (Apr. 9, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-04-09/alabama-looking-into-illegal-recruiting-accusations>.

⁴⁸ "Any individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual's athletics ability or reputation." *Id.* § 12.3.3.

⁴⁹ See *infra* Part V.

B. Enforcement of NCAA Bylaws

NCAA bylaws are only effective in preserving amateurism to the extent that its member schools enforce them. The NCAA has limited control over policing unethical athlete-agent conduct, as it is a volunteer organization with jurisdiction only over those entities and individuals that submit to its authority.⁵⁰ The NCAA's true power lies in its ability to directly sanction member institutions for violating NCAA rules.⁵¹ This policing mechanism is consistent with the fundamental notion of institutional control and governance codified in the NCAA's Constitution.⁵²

NCAA bylaws require that member institutions control all aspects of their athletic programs. Therefore, under the concept of institutional control, the school assumes responsibility for the conduct of every amateur athlete and any outside person or entity that may come into contact with the athletic program.⁵³ In the event of player, school, or agent misconduct, the NCAA may directly punish the offending institution rather than the actual misbehaving person. Past examples of such punishment include forcing a university to vacate wins accrued while an ineligible player participated on the team,⁵⁴ forfeiting monies generated while an ineligible athlete was playing in games,⁵⁵ losing scholarships,⁵⁶ and, in grave circumstances,

⁵⁰ Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences* 19 (Wake Forest University Legal Studies Research Paper Series, 2006) (stating that “[a]s a private association, the NCAA lacks any authority to regulate the agent industry”).

⁵¹ SHROPSHIRE & DAVIS, *supra* note 2, at 132.

⁵² *Id.* at 132. See generally NCAA MANUAL, *supra* note 3, § 6.

⁵³ NCAA MANUAL, *supra* note 3, at § 6.4. See also *id.* § 6.01.1 (stating that “[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control.”).

⁵⁴ For an example, see the NCAA penalties levied against former University of Southern California star Reggie Bush. Greg Beacham, *NCAA Drops the Hammer on USC Football*, NBCSPORTS.COM (June 10, 2010), http://nbcsports.msnbc.com/id/37621070/ns/sports-college_football/Cite_Bush.

⁵⁵ *Michigan Imposes Sanctions, Including '03 Postseason Ban*, CBSSPORTS.COM (Nov. 7, 2002), <http://www.cbssports.com/collegebasketball/story/5867946>; Jack Cavanaugh, *UMass and UConn Lose '96 Honors*, THE NEW YORK TIMES (May 9, 1997), <http://www.nytimes.com/1997/05/09/sports/umass-and-uconn-lose-96-honors.html?scp=2&sq=marcus%20camby%20ncaa&st=cse>.

⁵⁶ David Borges, *Jim Calhoun Responds to NCAA Penalties, Said He Takes the Ultimate Blame*, THE MIDDLETOWN PRESS (Feb. 26, 2011), <http://middletownpress.com/articles/2011/02/26/sports/doc4d688d580eac6052474782.txt>; *NCAA Throws Out Arkansas State Wins*, ESPN.COM (Mar. 11, 2011), <http://sports.espn.go.com/ncf/news/story?id=6207321>; John Zenor, *Alabama Hit With Two-*

disbanding a team for a period of years.⁵⁷ All of these penalties have a cumulative effect intended to punish the institution financially so the school will vigilantly enforce the NCAA's amateurism requirements.

The NCAA is not always the proper body to penalize an offending party. For example, unethical agent conduct often results in an NCAA violation. The NCAA, however, cannot directly impose discipline on agents who violate NCAA bylaws because most agents have not consented to the NCAA's governing authority. The NCAA must instead punish the school, and the school is thus the damaged party, which must then seek an alternative route for legal redress. When a school is victimized by unethical agent conduct, it must bear the penalty imposed by the NCAA and take matters into its own hands.⁵⁸

For years, aggrieved parties were forced to seek recovery against agents through common law causes of action, agency law, and such federal laws as the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁵⁹ For example, schools in the past have asserted breach of contract or tortious interference with contractual relations claims against agents who allegedly interfered with the contractual relationship established between the student-athlete and the scholarship-granting university.⁶⁰ These lawsuits, however, did not deter unethical athlete-agent conduct for a variety of reasons, particularly because of the substantial commissions agents receive once their elite athletes sign large contracts at the next level.⁶¹ As a result, the Uniform Athlete Agent Act and the Sports Agent Responsibility and Trust Act have emerged as more workable and effective regulatory systems of athlete-agent conduct.

Year Bowl Ban by NCAA, CINCINNATI ENQUIRER (Feb. 2, 2002), http://www.enquirer.com/editions/2002/02/02/spt_alabama_hit_with.html.

⁵⁷ This is commonly referred to as "the death penalty."

⁵⁸ When that party is a student-athlete, however, institutions seldom pursue lawsuits because it is bad publicity. Such an action harms the school's reputation and its ability to recruit. Instead, a university would be better served spending its efforts and finances on educating athletes on relevant NCAA rules and reexamining the institution's protocols designed to prevent rules violations. For a discussion, see Willenbacher, *supra* note 17, at 1246-49.

⁵⁹ See *id.* at 1239-42; see also SHROPSHIRE & DAVIS, *supra* note 2, at 148.

⁶⁰ See SHROPSHIRE & DAVIS, *supra* note 2, at 151 (stating that "courts have overwhelmingly recognized the relationship between student athlete and his or her college as contractual in nature").

⁶¹ Willenbacher, *supra* note 17, at 1243-44 (stating that civil and criminal penalties will not deter unethical agent conduct because the potential financial rewards of signing a high draft pick outweigh the potential consequences of violating amateurism rules).

C. *The Uniform Athlete Agent Act*

The Uniform Athlete Agent Act (“UAAA” or the “Act”) embodies over four years of research by the legal community and feedback from stakeholders within college athletics on how to curtail unethical athlete-agent conduct.⁶² One major function of the Act is to protect the interests of the student-athlete and academic institution.⁶³ The UAAA is intended to deter NCAA athlete recruitment while athletes are still considered amateurs, provide disclosure, and give those damaged by dishonest agents a tangible civil remedy against the offending party. Additionally, the Act serves as a model statute for state legislatures, which have adopted almost identical legislation across the nation. Prior to 2000, at least twenty-eight states had implemented some form of agent regulation statute,⁶⁴ but each state statute varied, making uniform enforcement difficult. The UAAA resolves this enforcement problem. The entity responsible for drafting the UAAA, the National Conference of Commissioners on Uniform State Laws, urges states to adopt the proposed Act.⁶⁵ As of January 1, 2011, forty states have adopted some form of the UAAA.⁶⁶

The Act attempts to professionalize the sports agent field by instituting various requirements and safeguards upon anyone seeking to enter the athlete-agent business. Those falling within the UAAA’s authority must comply with elaborate registration, certification, and renewal requirements,⁶⁷ furnish registration and renewal fees,⁶⁸ as well as submit to state agency authority to revoke or suspend the agent’s registration.⁶⁹ The Act also increases the agent’s disclosure requirements to both the student-athlete⁷⁰ and the educational institution.⁷¹ The UAAA is not concerned with shielding professional athletes; it instead focuses on protecting amateur athletes and institutions.

One major function of the Act is the heightened disclosure and

⁶² The entire sporting profession came together to help promulgate the UAAA. See SHROPSHIRE & DAVIS, *supra* note 2, at 157–59.

⁶³ *Id.* at 157.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 158.

⁶⁶ *FAQ on Uniform Athlete Agents Act*, NCAA.ORG (Jul. 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act>.

⁶⁷ Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, DARTMOUTH L.J. 246, 252 (2009).

⁶⁸ UNIF.ATHLETE AGENTS ACT § 9 (2000) [hereinafter UAAA].

⁶⁹ *Id.* § 7.

⁷⁰ Heitner, *supra* note 67, at 252 (citing UAAA).

⁷¹ UAAA, *supra* note 68, § 11.

registration requirements it imposes on both agents and runners.⁷² Both agents and their runners are prohibited from lying and from providing a potential client with anything of value prior to entering into an agency contract. In other words, anyone trying to recruit an athlete must conduct himself or herself honestly. The heightened disclosure requirements of the Act also force agents to include specific provisions in a proposed agency contract, including a conspicuous notice in close proximity to the signature page that discloses to the athlete the ramifications of signing an agency contract.⁷³ This requirement ensures the amateur athlete understands the consequences of his actions and that his actions may damage the athlete's university or the athlete himself. If the agent or runner violates the Act, it provides the aggrieved party with specific remedies.⁷⁴

Those damaged by prohibited athlete-agent conduct now have a specific remedy under the Act. The UAAA gives NCAA member institutions a civil remedy against agents who cause student-athletes to lose eligibility.⁷⁵ The Act also allows both state and federal actors to pursue civil and criminal claims.⁷⁶ Athletes, however, are not granted a statutory remedy under the Act. Instead, athletes may void an agency contract if the executed contract fails to comply with the Act's enumerated provisions.⁷⁷ As a result of the fact that the UAAA does not codify a cause of action for an amateur athlete injured by unethical athlete-agent conduct, the Act's focus is on protecting the interests of NCAA institutions, not those of the student-athlete. Recently enacted federal legislation focuses more on student-athletes.

D. The Sports Agent Responsibility and Trust Act

The Sports Agent Responsibility and Trust Act ("SPARTA") is a federally enacted statute that governs the recruiting and signing of amateur athletes.⁷⁸ SPARTA punishes unscrupulous agents whose conduct damages amateur athletes and NCAA member universities.⁷⁹ In particular, SPARTA regulates dishonest athlete-agent conduct intended to induce an athlete to sign an agency contract by prohibiting an agent from giving false or misleading information or making false promises to a student-athlete or anyone associated with the student-athlete before he or she enters into the

⁷² *Id.* § 5.

⁷³ *Id.* § 10.

⁷⁴ *See id.* §§ 15-17.

⁷⁵ *Id.* § 16(a).

⁷⁶ *Id.* §§ 15-16.

⁷⁷ *Id.* § 10(d).

⁷⁸ *See generally*, Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7801 (2011).

⁷⁹ *See Willenbacher, supra* note 17, at 1233-34.

agency contract.⁸⁰ Violations of SPARTA are treated as unfair or deceptive acts, regulated by the Federal Trade Commission.⁸¹

Like the UAAA, SPARTA emphasizes the duties of honesty and disclosure. Potential signees must be warned of the consequences of signing an agency contract, and universities must be notified in the event an athlete signs an agency contract.⁸² Under SPARTA, both the agent and the athlete, within close time proximity of the signing, possess a duty to notify the athlete's university of the agency contract.⁸³ In addition, athlete-agents must provide the potential client (or the athlete's parent or legal guardian if he or she is under the age of eighteen) with a disclosure document that explains the consequences of signing with an agent.⁸⁴ This disclosure requirement almost mirrors the UAAA⁸⁵ and must be in boldface type letters in close proximity to the signature of the student-athlete.⁸⁶ If the athlete-agent engages in a prohibited act or fails to provide all required stakeholders with disclosure as required, several actors may pursue a remedy against the offending party.⁸⁷

SPARTA authorizes both federal and state causes of action for various affected parties. Under the statute, a state attorney general in the state in which the cause of action arose may act on behalf of the state's residents. The Federal Trade Commission may also act and treat the agent's conduct as an unfair or deceptive act or practice.⁸⁸ An educational institution may also pursue a civil remedy through SPARTA for damages. The institution is limited to receiving damages for actual losses and expenses incurred as a result of the athlete agent's conduct.⁸⁹ Such losses are generally sustained as a result of NCAA, conference, and/or self-imposed sanctions.⁹⁰ SPARTA further allows other federal claims and equitable remedies to aggrieved parties seeking damages.⁹¹

⁸⁰ 15 U.S.C. § 7802(a) (2011).

⁸¹ See Willenbacher, *supra*, note 17, at 1234.

⁸² See 15 U.S.C. § 7805(a) (2011).

⁸³ The athlete agent and the student-athlete must notify either the athletic director or a high-ranking member of the athletic department within seventy-two hours after entering into the contract or before the next athletic event, whichever occurs first. *Id.*

⁸⁴ See 15 U.S.C. § 7802(b)(3) (2011).

⁸⁵ UAAA, *supra* note 68, § 10.

⁸⁶ 15 U.S.C. § 7802(b)(3) (2011).

⁸⁷ See 15 U.S.C. §§ 7803-04 (2011).

⁸⁸ 15 U.S.C. § 7803 (2011).

⁸⁹ 15 U.S.C. § 7805 (2011).

⁹⁰ Gary Klein & David Wharton, *NCAA Sanctions Could Cost USC Millions*, L.A. TIMES (Jun. 10, 2010), <http://articles.latimes.com/2010/jun/10/sports/la-sp-0611-usc-ncaa-sanctions-20100611>.

⁹¹ 15 U.S.C. § 7806 (2011).

Both the UAAA and SPARTA are important tools that help curtail unethical athlete-agent conduct because, unlike NCAA rules, they directly reach agents attempting to act on behalf of a student-athlete in a variety of capacities. These statutes, however, only regulate athletes currently playing college sports, and their application in any other context is nebulous. Enterprising individuals may still exploit amateur athletes in a variety of ways without the threat of liability under NCAA bylaws or these statutes. Dealing with such exploitation is a complex legal and regulatory issue.⁹² Part III will illustrate this complexity through the example of the recruitment of 2010 Heisman Trophy winner quarterback and national champion Cam Newton.

III. FACTUAL DISCUSSION OF THE “CAM NEWTON” LOOPHOLE

Nobody could have predicted Cam Newton’s rise to the pinnacle of college football when he originally signed his letter of intent with the Florida Gators in 2007. As a true freshman, the highly coveted Newton served as Florida’s backup quarterback.⁹³ Newton’s freshman campaign, however, abruptly ended after he suffered a season-ending ankle injury.⁹⁴ A few months after the injury, the elite quarterback prospect faced academic misconduct allegations, and Newton was accused of stealing another student’s laptop, arrested and suspended from the team.⁹⁵ This event signaled the end of Newton’s affiliation with the University of Florida, as he transferred shortly after the fall 2008 semester.⁹⁶

Newton began rehabilitating his football career by enrolling at Blinn College, a junior college located in Texas.⁹⁷ The addition of Newton

⁹² Steve Wieberg, *NCAA Boss: Closing Cam Newton Loophole is ‘Complex’*, USA TODAY (Dec. 14, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/ncaa-boss-says-cam-newton-case-could-cause-rule-change/1> (quoting NCAA President Mark Emmert).

⁹³ Antonya English, *Cameron Newton Will Back up Tebow*, TAMPABAY.COM (Aug. 25, 2007), <http://www.tampabay.com/blogs/gators/content/cameron-newton-will-back-tebow>.

⁹⁴ Newton, however, received a medical redshirt.

⁹⁵ See *Report: Cam Newton Cheated at Florida*, ESPN.COM (Nov. 10, 2010), <http://sports.espn.go.com/nfl/news/story?id=5783051>; see also Jeremy Flower, *Backup QB Cameron Newton Arrested for Stealing Laptop, Suspended From Team*, THE ORLANDO SENTINEL (Nov. 21, 2008), http://blogs.orlandosentinel.com/sports_college_uf/2008/11/backup-qb-camer.html.

⁹⁶ Jeremy Flower, *Exclusive: QB Cam Newton to Transfer to Texas JC*, THE ORLANDO SENTINEL (Jan. 5, 2009), http://blogs.orlandosentinel.com/sports_college_uf/2009/01/exclusive-qb-ca.html.

⁹⁷ David Jones, *Florida Quarterback Newton Headed for Junior College*, USA TODAY

quickly turned Blinn's football team into a powerhouse, and the squad went on to win the NJCAA National Football Championship.⁹⁸ Newton's performance at Blinn College reaffirmed his status as a blue-chip recruit, and he sought to re-enter Division I college football. Going into the 2010 recruiting season, Newton was the nation's number one junior college prospect.⁹⁹

Ultimately, Newton signed with Auburn University with marginal fanfare.¹⁰⁰ Newton quickly became a bona-fide Heisman Trophy candidate under center of the Tigers' offense. As the season teetered towards its conclusion, however, Newton found himself in the middle of separate NCAA and FBI investigations focusing on his recruitment from Blinn back into Division I Football.¹⁰¹ The investigations quickly gained media notoriety as they brought to light alleged dealings between Newton's father, Cecil Newton, and individuals linked to an agency named Elite Football Preparation, an agency purported to be involved in Newton's recruitment to a Division I Football program.¹⁰²

Newton's "pay-to-play" recruiting controversy surfaced in November 2010, as the college football regular season was approaching its conclusion. After former Mississippi State University quarterback John Bond submitted a statement to the Associated Press, various news reports surfaced alleging that during Newton's recruitment, individuals claiming to represent the athlete and his family demanded a payment of \$180,000 by Mississippi

(Jan. 13, 2009), http://www.usatoday.com/sports/college/football/sec/2009-01-13-florida-newton_N.htm.

⁹⁸ Tony Adame, *Blinn's Late TD Stuns Fort Scott*, THE WICHITA EAGLE (Dec. 7, 2009), <http://www.kansas.com/2009/12/07/1086794/blinns-late-td-stuns-fort-scott.html>.

⁹⁹ *Juco Top 50 2010 Prospect Ranking*, RIVALDS.COM (Dec. 13, 2009), <http://rivals.yahoo.com/ncaa/football/recruiting/rankings/rank-2511>.

¹⁰⁰ *Auburn Football Signs JUCO Quarterback Cameron Newton to National Letter of Intent*, AUBURNTIGERS.COM (Dec. 31, 2009), <http://auburntigers.cstv.com/sports/m-footbl/spec-rel/123109aad.html>.

¹⁰¹ Pete Thamel, *Heisman Front-Runner is Focus of Investigation*, THE NEW YORK TIMES (Nov. 4, 2010), http://www.nytimes.com/2010/11/05/sports/ncaaf/05auburn.html?_r=1&scp=1&sq=thamel%20newton&st=cse; Naimah Jaball-Nash, *Cam Newton Scandal: FBI Joins Recruitment Investigation of Auburn Heisman Hopeful*, CBSNEWS.COM (Nov. 10, 2010), http://www.cbsnews.com/8301-504083_162-20022371-504083.html.

¹⁰² Michael Rosenberg, *Newton Story Takes on New Life, but it's Hard to Know What to Believe*, SPORTS ILLUSTRATED.COM (Nov. 10, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/11/10/cam.newton/index.html; see also Thamel, *supra* note 101; *Cam Newton: 'I did it the right way'*, ESPN.COM (Dec. 10, 2010), <http://sports.espn.go.com/nfc/news/story?id=5903485&campaign=rss&source=ESPNUHeadlines>.

State University to secure Newton's services.¹⁰³ Officials from the Mississippi State Athletics Department and the SEC were made aware of the alleged solicitation.¹⁰⁴

As the facts began to unfold, it became clear that Newton's father was responsible for the "pay-to-play" demands placed on potential schools in exchange for his son's services. The younger Newton had let his father decide where he would play,¹⁰⁵ and the elder Newton allegedly used this opportunity to indirectly contact potential schools to solicit six-figure payoffs to steer his son toward that institution.¹⁰⁶ Although Mississippi State was the only confirmed school that Newton propositioned with the "pay-to-play" demand, speculation abounded whether other schools received the same, or a similar, request.

As a result of these allegations, Auburn suddenly found itself in the middle of a recruitment scandal. The school had to answer whether it paid Newton's family to land the prized recruit. Auburn's spectacular season was on the brink of disaster, as the team faced the possibility that it had marched to an undefeated record with a star quarterback who was ineligible under NCAA rules. A finding that Newton competed while ineligible would render Auburn's miraculous season void, and other repercussions would surely follow.

Cam Newton denied any knowledge that his representatives improperly solicited payments from schools seeking to secure his services.¹⁰⁷ Cam deflected the assertions to the senior Newton and his associates. Newton's father, however, also denied any wrongdoing.¹⁰⁸ The Newton scandal placed the NCAA in a difficult position. Cam Newton's story and his performance on the field made for compelling viewership. Nevertheless, the allegations were serious and, regardless of the player's popularity, the NCAA needed to conduct a diligent investigation.

After a month-long investigation, the NCAA declared that a violation of the amateurism rules had occurred, thereby making Newton ineligible for

¹⁰³ *Cam Newton Scandal: Rep Sought Cash from MSU*, CBSNEWS.COM (Nov. 5, 2010), <http://www.cbsnews.com/stories/2010/11/05/sportsline/main7025408.shtml>; Pete Thamel, *supra* note 101.

¹⁰⁴ Pat Forde, Chris Low and Mark Schlabach, *Cash Sought for Cam Newton*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/nfc/news/story?id=5765214>; *see also* Joe Shad, *Sources: Newtons Talked of Pay Plan*, ESPN.com (Nov. 11, 2010), <http://sports.espn.go.com/nfc/news/story?id=5786315>.

¹⁰⁵ Rosenberg, *supra* note 102; *see also* Thamel, *supra* note 101 (stating that Newton told Sports Illustrated that he ultimately left the decision to his father).

¹⁰⁶ Shad, *supra* note 104.

¹⁰⁷ *Cam Newton Says He's Innocent*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/nfc/news/story?id=5768636>.

¹⁰⁸ *Id.*

competition.¹⁰⁹ The investigation confirmed that Cam's father did indeed contact Mississippi State to solicit a cash payment in return for his son playing there, and Auburn subsequently declared Newton ineligible.¹¹⁰ Auburn immediately filed to have Newton reinstated, as the Southeastern Conference ("SEC") Championship Game was only days away.¹¹¹ The NCAA reinstated Newton with enough time for him to play in the SEC Championship Game.¹¹²

The rationale to reinstate Newton was based on a lack of evidence necessary to substantiate the rumors that Newton knew of the scheme. The NCAA released a statement addressing why it declared Newton eligible, saying that although Newton's father did market the hot prospect in "a pay-for-play scenario . . . [b]ased on the information available to the reinstatement staff at this time, [the NCAA does] not have sufficient evidence that Cam Newton or anyone from Auburn was aware of this activity, which led to his reinstatement."¹¹³

Although there was enough evidence to find Cecil Newton and his associates guilty of culpable conduct, the NCAA claimed it lacked the evidence necessary to implicate the all-star quarterback. Thus, by claiming ignorance, Cam Newton successfully maintained his innocence throughout the investigation.¹¹⁴ Three days after the NCAA's statement, Newton led the Tigers to a dominating victory over the South Carolina Gamecocks and a berth in the BCS National Championship Game against the University of Oregon.¹¹⁵ Newton would go on to quarterback Auburn to a dramatic win over Oregon in the title game.¹¹⁶

¹⁰⁹ David Paschall, *NCAA Deems Auburn's Newton Eligible*, CHATTANOOGA TIMES FREE PRESS (Dec. 1, 2010), <http://www.timesfreepress.com/news/2010/dec/01/ncaa-deems-auburns-newton-eligible/>.

¹¹⁰ *Cam Newton Cleared to Play*, ESPN.COM (Dec. 3, 2010), <http://sports.espn.go.com/nfl/news/story?id=5870788>.

¹¹¹ *Id.*; see also *NCAA Rules Cam Newton Eligible To Play in SEC Title Game*, HUFFINGTON POST (Dec. 1, 2010), http://www.huffingtonpost.com/2010/12/01/cam-newton-eligible_n_790508.html.

¹¹² *Id.*

¹¹³ *NCAA Addresses Cam Newton's Eligibility*, NCAA.ORG (Dec. 1, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/NCAA+addresses+eligibility+of+Cam+Newton> [hereinafter *NCAA Statement*].

¹¹⁴ The attorney representing the Newton family claimed, "No money has been offered to Cam Newton. Cam Newton [hasn't] asked for any money." *NCAA Rules Cam Newton Eligible To Play in SEC Title Game*, *supra* note 111; see also *Cam Newton Says He's Innocent*, *supra* note 107.

¹¹⁵ *Cam Newton's 6-TD day Leads Auburn to SEC Championship and BCS Title Game*, ESPN.COM (Dec. 4, 2010), <http://sports.espn.go.com/nfl/recap?gameId=303382579>.

¹¹⁶ *Auburn Claims SEC's Fifth Straight National Title by Dropping Oregon on Late Field*

Newton's exoneration and subsequent reinstatement was heavily criticized. Critics were skeptical of Newton's argument that he lacked any knowledge of the play-to-play scheme. Schools throughout Division I football and the media expressed concern over the shortage of accountability and minimal consequences for the offending parties.¹¹⁷ Further, detractors wondered why the NCAA allowed Newton to compete even though it found that his father had actually solicited bids from other schools.¹¹⁸ Had Cecil Newton succeeded, and Newton's associates received a six-figure payment, there would have been an imputed impermissible benefit to Newton, clearly rendering him ineligible. The fact that no money changed hands, critics argued, should not negate culpability for the solicitations.

One particularly harsh voice of the NCAA's decision not to further penalize Newton or Auburn was USC Athletic Director, Pat Haden. "I was always told the parent is the child," Haden said in reference to imputed benefits.¹¹⁹ "That's what we've been telling our kids. If the parent does something inappropriate the child suffers the consequences."¹²⁰ USC's football team recently received major sanctions in large part because of improper benefits received by the parents of former star Reggie Bush.¹²¹ Haden's comments exemplified the feelings of many disillusioned individuals who demanded an explanation from the NCAA for the difference in its handling of the Bush and Newton scandals.¹²²

Goal, ESPN.COM (Jan. 10, 2011), <http://scores.espn.go.com/nfc/recap?gameId=310102483>.

¹¹⁷ Erick Smith, *Big Ten's Jim Delany Upset at NCAA's Cam Newton Decision*, USA TODAY (Dec. 3, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/big-tens-jim-delany-upset-at-ncaas-cam-newton-decision/1>; see also Gene Wojciechowski, *The Cam Newton Affair Still Stinks*, ESPN.COM (Jan. 21, 2011), http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&page=wojciechowski/110121&sportCat=nfc; see also Pete Thamel, *Ruling on Newton is Drawing Criticism*, THE NEW YORK TIMES (Dec. 2, 2010), http://www.nytimes.com/2010/12/03/sports/ncaafotball/03auburn.html?_r=1&ref=sports.

¹¹⁸ See Thamel, *supra* note 117.

¹¹⁹ Erick Smith, *USC's Pat Haden on Newton Decision: 'I was Always Told the Parent is the Child'*, USA TODAY (Dec. 1, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/uscs-pat-haden-on-newton-decision-i-was-always-told-the-parent-is-the-child/1>.

¹²⁰ *Id.*

¹²¹ Erick Smith, *NCAA Hammers Southern Cal's Football Program with Two-Year Postseason Ban*, USA TODAY (June 10, 2010), <http://www.usatoday.com/communities/campusrivalry/post/2010/06/ncaa-hammers-southern-cals-football-program-with-two-year-postseason-ban/1>.

¹²² The authors compare, contrast and discuss the Newton saga with several cases,

Current NCAA bylaws and state and federal statutes will not regulate another Newton-type situation. Newton was allegedly unaware of his father's actions and did not actually receive an impermissible benefit from anyone, neither from an agent nor a university representative. This key fact – lack of receipt of an impermissible benefit¹²³ – prevents SPARTA or a state implemented version of the UAAA from punishing those involved with such conduct. In order to discipline Newton or Auburn under current NCAA bylaws, Newton would have had to either form a relationship with a representative while still an amateur athlete,¹²⁴ retain a representative to assist him in a pay-to-play scheme,¹²⁵ or receive some form of compensation from an impermissible source.¹²⁶ While the evidence suggests that Newton's family violated fundamental amateurism rules, no mechanism currently exists to punish Newton's family. The lack of available mechanisms to deter this conduct has created an amateurism loophole in this area.

This “Cam Newton Loophole” has led the NCAA to reexamine its current rules. As a result of the backlash the NCAA encountered from deciding not to severely punish Newton and Auburn, NCAA President Mark Emmert is attempting to quell the crescendos claiming hypocrisy. In a statement made one day after Newton's reinstatement, Emmert acknowledged that, “[w]e recognize that many people are outraged at the notion that a parent or anyone else could ‘shop around’ a student-athlete and there would possibly not be repercussions on the student-athlete's eligibility”.¹²⁷ The NCAA's new president went on to say that he is “committed to further clarifying and strengthening [the NCAA's] recruiting and amateurism rules so they promote appropriate behavior by students, parents, coaches and third parties. We will work aggressively with our members to amend our bylaws so that this type of behavior is not a part of

including the Bush case. *See infra* notes 130-144.

¹²³ *See Mark Emmert Addresses Backlash*, ESPN.COM (Dec. 3, 2010), (“If a student-athlete does not receive tangible benefits, that is a different situation from a student-athlete or family member who receives cash, housing or other benefits or knowingly competes and is compensated as a professional athlete.”), <http://sports.espn.go.com/nca/news/story?id=5876716>.

¹²⁴ NCAA MANUAL, *supra* note 3, § 12.3.1.1.

¹²⁵ NCAA MANUAL, *supra* note 3, § 12.3.3.

¹²⁶ NCAA MANUAL, *supra* note 3, §§ 12.3.1.2, 16.

¹²⁷ Mark Emmert, *Statement by NCAA President Mark Emmert on Cam Newton Eligibility*, NCAA.ORG (Dec. 2, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/Statement+by+NCAA+President+Mark+Emmert+on+Cam+Newton+Eligibility>.

intercollegiate athletics.”¹²⁸

As part of the NCAA’s commitment, Emmert has pledged to close the “loophole” that allowed Newton to continue playing because there was no evidence he or Auburn were involved and no impermissible benefit was realized.¹²⁹ Despite these assurances by NCAA senior members, the NCAA lacks the power and authority to enact comprehensive reform. Instead, all stakeholders involved in amateur athletics will need to work together to create a framework that discourages individuals from pursuing the same strategies as Newton’s father.¹³⁰

IV. COMPARING AND CONTRASTING THE “LOOPHOLE” WITH SIMILAR CASES

When comparing and contrasting previous NCAA decisions, it is important to note the differences and similarities between the NCAA and a state or federal court. The main difference is that the NCAA does not have the power to subpoena witnesses or perform discovery in the way that a plaintiff may in a court of law.¹³¹ Witnesses who are neither student-athletes nor employed by an institution of higher education may also get away with divulging untruthful statements to the NCAA in an investigation without any threat of punishment for perjury.¹³²

Although the NCAA’s enforcement powers are more limited than a court’s enforcement of state and federal laws, the NCAA is similar to the judicial system in that it heeds precedent in making its enforcement decisions.¹³³ It is extremely rare, however, that any two cases are exactly

¹²⁸ *Id.*

¹²⁹ Steve Wieberg, *NCAA President Emmert Sets No-Nonsense Tone in Address*, USA TODAY (Jan. 14, 2011), http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert_N.htm.

¹³⁰ See Ted Lewis, *Scandal, Strife Have Taken Cheer Out of Holiday Bowl Season*, THE TIMES-PICAYUNE (Dec. 26, 2010), http://www.nola.com/sugarbowl/index.ssf/2010/12/scandal_strife_have_taken_chee.html (asking whether it is time for a summit within college football to address amateurism concerns).

¹³¹ Michelle Brutlag Hosick, *Many NCAA Infractions Cases Move Quickly, but Complications can Slow the Process*, NCAA.ORG (Dec. 1, 2010), <http://ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/How+We+Work/Enforcement+process/>.

¹³² *Id.*

¹³³ See The NCAA News, *Infractions Appeals Committee Upholds Alabama Penalty*, NCAA.ORG (Mar. 23, 2010), http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/division+i/infractions+appeals+committee+upholds+alabama+penalty_03_23_10_ncaa_news.

alike. When the facts of cases differ (even slightly), the NCAA must have the ability to differentiate between the particular facts of each and demand a logical punishment (if any) for the case at hand. As of the 2010 Southeastern Conference Championship Game, the facts regarding the above-discussed Cam Newton case were that:

- (1) There was no evidence that Cam Newton or his father received any money from any entity interested in having him enroll in a particular institution of higher education;
- (2) There was no evidence that Cam Newton had actual knowledge that any person was actively soliciting money for the apparent right to attain his services as a football player at an institution of higher education; and
- (3) There was no evidence that Cam Newton enrolled in an institution of higher education where he or a third party solicited money in return for the apparent right to attain his services as a football player.¹³⁴

It would be inequitable for the NCAA to punish Cam Newton based on precedent from a case that did not have substantially similar facts to the case at hand. In the wake of the allegations regarding the solicitation of money in exchange for Cam Newton's commitment, many prominent media figures compared Newton's lack of punishment to prior incidents involving star athletes Reggie Bush and Damon Stoudamire.¹³⁵ As described below, the NCAA correctly distinguished Newton's situation from Bush's and Stoudamire's and refused to have its judgment clouded by precedent that lacked true relation.

A. Comparing Bush to Newton

There is no denying the many factual similarities between Reggie Bush and Cam Newton. They were both outstanding college football players, both won the Heisman Trophy, and both are African American. They each had parents who had no qualms about trying to earn money based on their son's football ability. Newton played for Auburn. Bush played for USC. Each school contended for a National Championship while the players were student-athletes. Not a single one of these shared characteristics, however, count as grounds on which the NCAA can punish a student-athlete.

The differences between Bush's and Newton's collegiate careers are

¹³⁴ Mike Slive: *Right Ruling on Cam Newton*, ESPN.COM (Dec. 4, 2010), <http://sports.espn.go.com/nfc/news/story?id=5882933>.

¹³⁵ See notes 130–144.

also clear. Bush and his parents accepted, received, used, and benefited from improper third party support.¹³⁶ The Bush family established a partnership with third parties to create a sports agency.¹³⁷ An NCAA report reveals that those third parties later provided money and other benefits to Bush and his family while Bush was a student-athlete at USC.¹³⁸ The benefits included: 1) thousands of dollars towards a vehicle and wheel rims, 2) money appropriated for a car alarm and audio system, 3) no-cost limousine service, 4) free room and board at a Las Vegas resort, 5) roughly ten-thousand dollars for furniture, 6) a washer and dryer, and 7) one year of rent-free living.¹³⁹

In contrast, as of the 2010 Southeastern Conference Championship Game, there was no proof that Newton or his father accepted, received, used, or benefited from any third party support, including financial support, outside of the NCAA student-athlete scholarship plan, from an institution of higher education. In fact, other than a single report from an Atlanta, Georgia television station, there were no allegations that Newton's father admitted to soliciting funds in return for his son signing at a specific institution of higher education.¹⁴⁰ For the purposes of this article, however, assume that Newton's father had solicited funds from at least one institution of higher education. This assumption would not make Newton's situation any more similar to Bush's case.

Even if Newton's father made a genuine attempt to form a relationship with an institution of higher education with the motive of offering his son's services in return for consideration, no NCAA report proves that any partnership or relationship was conceived or that anything of value was ever exchanged. Additionally, while Bush had knowledge of his and his parent's acceptance of money from third parties, there is no proof that Newton understood or was ever notified that his father was shopping him around to institutions of higher education in an attempt to find the highest bidder.

The NCAA determined that Bush's actions necessitated a firm response. Bush's and his family's actions resulted in far-reaching consequences,

¹³⁶ Charles Robinson and Jason Cole, *Should Bush Lose His Heisman Trophy?*, RIVALDS.COM (June 10, 2010), <http://rivals.yahoo.com/ncaa/football/news?slug=ys-heisman061010>.

¹³⁷ Nakia Hogan, *Reggie Bush Investigation Results in Major Sanctions for Southern Cal*, THE TIMES-PICAYUNE (June 11, 2010), http://www.nola.com/saints/index.ssf/2010/06/reggie_bush_investigation_resu.html.

¹³⁸ *Id.*

¹³⁹ Kevin Scarbinsky, *At This Time, Cam Newton Isn't Another Reggie Bush*, THE BIRMINGHAM NEWS (Dec. 3, 2010), http://www.al.com/sports/index.ssf/2010/12/scarbinsky_cam_newton_isnt_ano.html.

¹⁴⁰ See Mark Winnie, *Exclusive: Cam Newton's Dad Admits Money Talks, Says Source*, WSBTV.COM (Nov. 15, 2010), <http://www.wsbtv.com/sports/25778803/detail.html>.

including USC: 1) forfeiting a chance to compete in a college football postseason bowl game for two years, 2) relinquishing thirty scholarships over three years, and 3) vacating the team's 2004 championship season victories, including its national title.¹⁴¹ The NCAA, however, did not penalize Auburn or Mississippi State, the two schools considered possible targets of Newton's father. Nor should anything be taken from those institutions, until evidence reveals that Newton's father or a third party with Newton's father's authority requested money, and the institution gave money to Newton's father or the third party. As stated by NCAA President Mark Emmert, "[M]any in the media and public have drawn comparisons between recent high-profile NCAA decisions while ignoring the important differences among the cases . . . If a student-athlete does not receive tangible benefits, that is a different situation from a student-athlete or family member who receives cash, housing or other benefits . . ." ¹⁴² NCAA bylaws, as currently written, require the actual receipt of benefits to violate amateurism principals.¹⁴³ When viewing applicable laws from a plain meaning perspective, the actors involved in the Newton investigation required a different response from those in the Bush scandal.

B. Comparing Stoudamire to Newton

Damon Stoudamire's situation was more closely related to Bush's than to Newton's. Stoudamire was a talented student-athlete at the University of Arizona in the 1990s. As in Bush's case, a relative of Stoudamire's accepted impermissible benefits from a third party.¹⁴⁴ While both of Bush's parents allegedly received money and benefits, only Stoudamire's father supposedly received a benefit from a third party.¹⁴⁵ Sports agent Steve Feldman provided Stoudamire's father with a plane ticket.¹⁴⁶ Like Newton, Stoudamire claimed that he had no knowledge of the free plane ticket.¹⁴⁷

The primary difference between the Stoudamire and Newton cases is that Stoudamire's father admitted to receiving the plane tickets for no consideration.¹⁴⁸ As with Bush and his parents, Stoudamire's father

¹⁴¹ Beacham, *supra* note 54.

¹⁴² See Emmert, *supra* note 127.

¹⁴³ See NCAA MANUAL, *supra* note 3, §§ 12.1.2.1.1, 12.3.1.2, 12.3.3, 16.02.3.

¹⁴⁴ Jeff Schultz, *Stop Whining: NCAA Got it Right on Cam Newton, Auburn*, ATLANTA J. CONST. (Dec. 1, 2010), <http://blogs.ajc.com/jeff-schultz-blog/2010/12/01/stop-whining-ncaa-got-it-right-on-cam-newton-auburn/?cp=28>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (The agent, Steve Feldman, admitted that Stoudamire's father accepted the airplane

accepted, received, used and benefitted from third party support, in the form of free airline tickets. Unlike both the Stoudamire and Bush cases, there is no proof that Newton's father ever accepted, received, used or benefited from any consideration originating with an institution of higher education. Thus, Newton would not deserve even the nominal one-game suspension that Stoudamire received for his father's actions.

V. SUGGESTED SOLUTIONS TO CLOSE THE "PAY TO PLAY" LOOPHOLE

As discussed above, the NCAA released a statement addressing its decision on Newton's eligibility. It stated:

[t]he student-athlete's father and an owner of a scouting service worked together to actively market the student-athlete as a part of a pay-for-play scenario in return for Newton's commitment to attend college and play football. NCAA rules (Bylaw 12.3.3) do not allow individuals or entities to represent a prospective student-athlete for compensation to a school for an athletic scholarship.¹⁴⁹

Yet, Newton retained his student-athlete eligibility, avoided suspension, and was permitted to compete for the National Championship. In late 2010, Kevin Lennon, NCAA vice president for academic and membership affairs, explained why Newton's case did not fall under the guise of NCAA Bylaw 12.3.3. He stated:

In determining how a violation impacts a student-athlete's eligibility, we must consider the young person's responsibility. Based on the information available to the reinstatement staff at this time, we do not have sufficient evidence that Cam Newton or anyone from Auburn **was aware of this activity**, which led to his reinstatement. From a student-athlete reinstatement perspective, Auburn University met its obligation under NCAA bylaw 14.11.1. Under this threshold, the student-athlete has not participated while ineligible.¹⁵⁰

Lennon's statement implies that for a student-athlete to avoid punishment when someone solicits third-party compensation on behalf of the athlete, but does not accept any compensation, the athlete must not have knowledge of the solicitation. This loophole, if left unchecked, will let

ticket provided to him).

¹⁴⁹ *NCAA Statement*, *supra* note 113.

¹⁵⁰ *Id.* (emphasis added).

student-athletes avoid punishment by claiming ignorance when third parties solicit benefits on their behalf. This type of behavior must be prohibited. However, it is not always the athlete who is proposing the “pay to play” scheme. Sometimes the athlete is truly ignorant and the third party can avoid consequences due to the player’s lack of knowledge. The following recommendation can result in a complete resolution of the problems caused by this loophole.

A. Creation of Federal Registry of All Agents and Runners

SPARTA is the only federal statute that directly regulates sports agents.¹⁵¹ Unfortunately, however, SPARTA is extremely limited in its focus. The definition of “athlete agent” is limited to someone who “enters into an agency contract with a student-athlete, or directly or indirectly recruits or solicits a student-athlete to enter into an agency contract.”¹⁵² Further, the statute is strictly concerned with agency contracts, and even with such a limited scope, specifically states that a spouse, parent, sibling, grandparent, or guardian of the student-athlete is excluded from being labeled as an athlete-agent.¹⁵³ The federal statute should be expanded to include other types of agent activity, and include regulations for the student-athlete’s relatives.

A student-athlete’s parent(s) and/or a third party who is given permission to bargain on behalf of a student-athlete should be labeled an athlete-agent and thus be held accountable for his or her actions. The NCAA is not the proper body to penalize these middlemen. Even if the Association tried to levy punishment on the middlemen, enforcement would be impossible, as it has no jurisdiction over these individuals. Consequently, the NCAA is limited to threatening the student-athlete with forfeiture of eligibility. But, if the student-athlete genuinely has no knowledge of others claiming authority on his or her behalf, it would be a mistake to penalize the student-athlete for the third party’s actions. Punishing the student-athlete would do nothing to deter future similar actions by third parties. Including third parties under the federal statutory definition of athlete agents and threatening them with civil and criminal penalties for their illegal actions could serve as a meaningful deterrent. Many self-interested parents would cease shopping around their children for their own benefit without care of the potential consequences, because actual consequences would finally exist.

¹⁵¹15 U.S.C. §§ 7801–7807 (2011).

¹⁵²15 U.S.C. § 7801.

¹⁵³*Id.*

The authors suggest amending the definition of “athlete-agent” to include family members and expanding SPARTA to include other types of agent activity prohibited by the statute, such as soliciting and/or receiving funds through a “pay-to-play” scheme. Knowledge of such a scheme should not be the requisite *mens rea* for culpability and lack of knowledge should not mitigate potential penalties. The actor seeking impermissible benefits on behalf of an athlete should be the focus of this amended statute. To give these new provisions teeth, both state attorney generals and the Federal Trade Commission shall also be able to pursue SPARTA offenders.

B. Amend the NCAA Bylaws

Suppose Cam Newton was aware that his father or another third party was soliciting money from an entity interested in having him enroll in a particular institution of higher education. It should not matter whether a student-athlete has knowledge of a family member’s intent, motive, desire or act to profit off of the athlete’s value. Why should knowledge be the *mens rea* to constitute an NCAA violation? Instead, the requisite *mens rea* should be purpose. Purpose triggers penalization of the third party seeking to profit off the athlete. If a university acquiesces and provides the third party with compensation or engages in any type of negotiation regarding compensation, then that institution should also be penalized. However, if the athlete only has knowledge of this arrangement and does not actively partake in any negotiations concerning a third party’s receipt of compensation, he or she should not be punished. Society does not put the son of a father in jail because the father attempts to commit a robbery, even if the father was robbing the store to provide for his son and the son knew that his father was going to commit the crime before it actually occurred. The son has no legal responsibility to prevent the crime from occurring or to warn others that the robbery will take place. A student-athlete’s knowledge of his father’s actions should be similarly distinguished from a student-athlete acting as an accomplice or in a conspiracy with his father.

Bylaw 12.3.3, titled “Athletics Scholarship Agent,” reads: “[a]ny individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual’s athletics ability or reputation.”¹⁵⁴ One possibility for amending this bylaw so that it is applicable to a student-athlete’s family members is the addition of a clause that specifically states that covered individuals include a student-

¹⁵⁴ NCAA Manual, *supra* note 3, § 12.3.3.

athlete's parents, guardians, and immediate family. Alternatively, the bylaw could be amended to include an even larger class. Instead of limiting individuals to a student-athlete's parents, guardians or immediate family, it could be broadened to incorporate any individual associated with a prospective student-athlete.

Broadening the bylaw's language to include any individual associated with a prospective student-athlete makes sense in this case because it harmonizes this vague area of NCAA recruiting with language as it pertains to recruitment in men's basketball.¹⁵⁵ Men's basketball has a more expansive definition of those associated with the prospective student-athlete due to the sometimes complicated nature of men's basketball recruiting.¹⁵⁶ While this updated definition to Bylaw 12.3.3 would enable the NCAA to justify punishment based on the actions of a wide variety of third parties, it might also open the door to more challenges and public scrutiny, since there are many different definitions of the word "associated." If, however, an "individual associated with a prospective student-athlete" is understood to have the same meaning as it does in men's basketball, the phrase would include parents, guardians, family members, coaches and all others associated with the student-athlete based on his ability to perform, reputation, or participation in men's basketball.¹⁵⁷

Updating NCAA Bylaw 12.3.3 as proposed would still be only partially effective. Since it is a volunteer institution, the NCAA can only discipline an actor if the actor submits to its jurisdiction. However the proposed changes would allow for federal regulation. Therefore, the authors believe that the NCAA must work in concert with state and federal entities in order to effectively eliminate this emerging "pay to play" phenomenon.

C. Implementing Proposed Solution Would Have Yielded Different Results

Implementing the above-discussed proposed changes to SPARTA and the NCAA bylaws prior to the Cam Newton recruitment investigation would have led to significantly different results. The NCAA and local authorities would have worked together to investigate these allegations.

¹⁵⁵ John Infante, *Closing the Cam Newton Loophole*, NCAA.ORG (Dec. 7, 2010), <http://www.ncaa.org/blog/2010/12/closing-the-cam-newton-loophole/>.

¹⁵⁶ NCAA DIVISION I BOARD OF DIRECTORS, IMPLEMENTATION PLAN FOR RECOMMENDATIONS FROM BASKETBALL FOCUS GROUP AND ACADEMIC AND MEMBERSHIP AFFAIRS STAFFS ON SOLUTIONS TO CURRENT ISSUES IN MEN'S BASKETBALL RECRUITING, SUPPLEMENT NO. 5 (2009), available at http://fs.ncaa.org/Docs/DI_MC_BOD/DI_BOD/2009/October/SUPP_05_MBB_priorities.pdf.

¹⁵⁷ Infante, *supra* note 155.

The NCAA's only role in this matter would be confined to levying potential discipline against Cam Newton and any university found to have participated in a "pay to play" arrangement if improper benefits truly were received pursuant to NCAA bylaw 12.1.2.1.1, 12.3.1.2, 12.3.3 and 16.02.3. Any repercussions for Cecil Newton would have been handled through SPARTA. Had a university been found to have participated in negotiations concerning a "pay to play" arrangement, but not actually transferred any benefit to a third party, the educational institution could still be penalized, but Cam Newton would not have suffered any direct consequences.

Under the new SPARTA guidelines, Cecil Newton would have been considered an "athlete-agent," thus subjecting him to SPARTA's jurisdiction. Newton's act of soliciting Mississippi State for a six-figure payout in order to steer his son to the institution would have allowed either the Federal Trade Commission or Alabama State Attorney General to pursue a remedy. If Cam Newton knew of this proposed arrangement, but had no intent to personally profit, he should escape discipline. The only actors receiving discipline should be the participating parties. Participation by the university must be something more than receipt of a verbal or written offer. There needs to be responding correspondence or evidence of the same in order to bring the institution under the guise of the proposed new NCAA bylaws. These repercussions should be significant enough to deter future "pay to play" schemes.

VI. CONCLUSION

Since its foundation, the NCAA has striven to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."¹⁵⁸ The NCAA has gone to great lengths to distinguish players who receive compensation for their performance from those who are strictly "motivated by education and by the physical, mental and social benefits."¹⁵⁹ Many players would like to fall somewhere in between the two classifications, and third parties threaten to disrupt the NCAA from restricting student-athletes' access to impermissible benefits.

While a workable scheme should be implemented to reward student-athletes for their on-field efforts, amateurism cannot withstand an influx of monetary benefits. Thus, student-athletes who act with the purpose to receive an impermissible benefit through a "pay to play arrangement" with

¹⁵⁸ NCAA MANUAL, *supra* note 3, § 1.3.1.

¹⁵⁹ See NCAA MANUAL, *supra* note 3, § 2.9.

a third party must be disciplined. Amateurism will cease to exist without a formal and reliable system of rules and regulations that may be referenced by those who hand out discipline. It is vital that the “Cam Newton Loophole” be closed through revising applicable statutes and NCAA bylaws to better encompass the increasing number of hypothetical violations that might occur. The proposed amendments, however, should not change the outcome for players who do not purposefully work with third parties (even fathers) in furtherance of receiving impermissible benefits. Federal law should step in to regulate family members, but not the athlete, who act for the purpose of obtaining an impermissible benefit.

It is inequitable to permit a loophole that allows a student-athlete to deflect any discipline by placing the blame on a third party despite the student-athlete’s intent to profit. However, the current bylaws as written do not allow the NCAA to levy a tangible punishment upon any actor other than the athlete or university. The NCAA’s focus should be on punishing the educational institution for engaging in any “pay to play” scheme, but without proving the athlete’s purpose, the NCAA bylaws should not punish the student-athlete for the actions of third parties.

Punishing student-athletes for the wrongdoings of parents and agents will not eliminate the practice of family members seeking benefits. Beyond actions taken by the NCAA against its member institutions, parents and agents need to be held accountable for their actions, and the federal government should be tasked with the duty to include provisions within their laws to accommodate for this scenario.



Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications

Andrew B. Carrabis*

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"Now that I'm getting older, I start thinking about it more. In 10 years, am I going to be one of those guys that's suffering?"—Denver Broncos defensive end Vonnie Holliday.

I. BACKGROUND

According to the Center for Disease Control and Brain Injury Research Center, nearly four million sports-related concussions will occur in the United States this year.² The New York Times has reported that since 1997, over fifty football players high school age or younger nationwide have been killed, or have sustained serious brain injuries, on the football field.³ In the past few years, there has been increasing awareness of the number of concussions sustained, and their long-term effects, especially in the National Football League (NFL).⁴ Because of this high incidence rate and the recent increase in awareness, there is a real need for the NFL and institutions, such as the National Collegiate Athletic Association (NCAA), to implement stricter policies regarding violent hits in the game of football, if not for the protection of their players, then for the protection of their pocketbooks.⁵ Organizations facilitating football games now need to consider concussion-related lawsuits in their planning efforts.⁶ Sound

¹ The Associated Press, *NFL Players' Quotes About Concussions*, INDIANAPOLIS RECORDER, Nov. 18, 2009, <http://www.indianapolisrecorder.com/articles/2009/11/30/sports/doc4b0477984c528868691612.txt>.

² Sarah Hoyer, *NJ Governor Signs Concussion Law*, Dec. 8, 2010, <http://www.cnn.com/2010/HEALTH/12/07/nj.concussion.law/index.html>.

³ Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, NY TIMES, Sept. 15, 2007 <http://www.nytimes.com/2007/09/15/sports/football/15concussions.html?ex=1347508800&en=18ad44b2401a598c&ei=5090> [hereinafter *Silence*].

⁴ Knowledge @ Wharton, *Tackling the Concussion Issue: Can the NFL Protect Both Its Players and Its Product?*, Nov. 10, 2010, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2628> [hereinafter *Wharton*].

⁵ See generally Wharton, *supra* note 4 at 1.

⁶ Jackson Lewis, Special Report, *Concussions in Athletes: Where We Are and What to do Now?*, Jan. 2010, <http://www.oshalawblog.com/uploads/file/Concussions%20in%20Athletes%20->

policies are needed to protect the financial interests of football organizations who face this rising number of lawsuits.

American football has always been a violent game. In modern America's litigious environment, the NFL must engage in a delicate balancing act when creating policies regarding concussions. The NFL must protect its interests in minimizing concussion-related injuries and any resulting litigation, while still giving their fan base what they want – a hard-hitting, violent game.⁷ In sum, the NFL must find a way to protect their players without limiting the aggression inherent in the game if it wants to insulate its multi-billion dollar industry.⁸

II. ORIGINS OF THE CONCUSSION

From high school leagues to the NFL, football players are becoming bigger, faster, and stronger, thereby increasing the force of collisions that occur during a game and increasing the potential for serious injuries. The brain is a soft organ, surrounded by cerebrospinal fluid and protected by the tough, bony skull.⁹ Normally, the fluid around the brain serves as a protective cushion for the brain, isolating it from direct impact to the skull.¹⁰ When the head suffers violent impact, the brain can hit the skull, causing the brain temporarily to stop working normally.¹¹ This is called a concussion.¹²

%20SPECIAL%20REPORT.pdf.

⁷ Wharton, *supra* note 4 at 1.

⁸ Adam Fraser, *NFL Negotiating New Multi-Billion Dollar Deals*, SPORTS PRO BLOG, http://www.sportspromedia.com/notes_and_insights/nfl_in_negotiations_for_new_multi-billion_dollar_deals (last visited Apr. 23, 2011).

⁹ Cheryl A. Frye, *Functional Neuroanatomy*, STATE UNIVERSITY OF NEW YORK - ALBANY, <http://www.albany.edu/faculty/cafrye/apsy601/Ch.03StructureoftheNervousSystem.html> (last visited Apr. 23, 2011).

¹⁰ Kenneth Saladin, *Anatomy and Physiology: The Unity of Form and Function* 520 (McGraw Hill 2007).

¹¹ *Traumatic Brain Injury: A Guide for Patients*, VA San Diego Healthcare System, Mental Health, <http://www.mentalhealth.va.gov/docs/tbi.pdf>. There are many possible side effects to a traumatic brain injury including “impaired physical, cognitive, emotional, and behavioral functioning.”

¹² See generally *The Human Brain*, THE FRANKLIN INSTITUTE, <http://www.fi.edu/learn/brain/head.html> [hereinafter Franklin Institute].

More serious injuries occur after the initial concussion. A concussion causes brain cells to become depolarized and allows neurotransmitters to behave in an abnormal fashion, causing such symptoms as memory loss, nausea, and confusion.¹³ After the initial concussion, when the brain is not fully healed, it is very fragile and susceptible to minor accelerative forces. Thus, subsequent minor hits may cause traumatic and permanent brain injury.¹⁴ This is the heart of the problem: players returning to the football field before allowing their initial concussion to heal fully. When the player returns to the field too early, he is at risk for what is known as Second Impact Syndrome (SIS).¹⁵ SIS is the event that ensues when there is a subsequent brain impact before the initial concussion has been given time to heal.¹⁶ Additionally, when concussions occur¹⁷ with high frequency, a disease called Chronic Traumatic Encephalopathy (CTE) may occur in the brain.¹⁸ “CTE is a progressive neurodegenerative disease caused by

¹³ Sam Goldsmith, *Concussions Deserve More Attention*, YALE DAILY NEWS, Oct. 7, 2010, <http://www.yaledailynews.com/news/2010/oct/07/concussions-deserve-more-attention/?print>. See generally Nigel A. Shaw, NEUROPHYSIOLOGY OF CONCUSSION: THEORETICAL PERSPECTIVES, Part I (2006), <http://www.springerlink.com/content/k7xp40310537020r/>.

¹⁴ Franklin Institute, *supra* note 12. See generally Alan Schwarz, *Lawsuit Cites Mishandling of Football Concussions*, N.Y. TIMES, Mar. 18, 2010 at B12, available at <http://www.nytimes.com/2010/03/19/sports/football/19concussions.html> [hereinafter *Mishandling*].

¹⁵ Terry Zeigler, *Second Impact Syndrome*, May 21, 2010, <http://www.sportsmd.com/Articles/id/38.aspx>.

¹⁶ Robert L. Clayton & Bradford T. Hammock, *Concussion in Athletes: The La Salle University Settlement and Beyond*, Jan. 1, 2010, <http://www.hackneypublications.com/sla/archive/000975.php>.

¹⁷ As of March 29, 2010 Major League Baseball has added a “7 Day Concussion” Disabled List category for players recovering from concussions. Alan Schwarz, *7 Day D.L. Established to Aid in Recovery From Concussion*, N.Y. TIMES, Mar. 30, 2011 at B13, available at <http://www.nytimes.com/2011/03/30/sports/baseball/30concussion.html>.

¹⁸ Stephanie Smith, *Dead athletes’ brains show damage from concussions*, CNN.com (Jan. 26, 2009), http://articles.cnn.com/2009-01-26/health/athlete.brains_1_concussions-brain-damage-traumatic-encephalopathy?_s=PM:HEALTH (“[T]he Center for the Study of Traumatic Encephalopathy (CSTE), at the Boston University School of Medicine, is shedding light on what concussions look like in the brain. The findings are stunning. Far from innocuous, invisible injuries, concussions confer tremendous brain damage. That damage has a name: chronic traumatic encephalopathy (CTE).”).

repetitive trauma to the brain which eventually leads to dementia.”¹⁹ While CTE was originally diagnosed most commonly in boxers, it is now regularly found in football players. Of all sports related injuries, concussions are the injuries that most often go unnoticed and untreated, especially in football. The rising number of concussions in football has resulted in lawmakers trying to implement policies in their states to protect the interests of players and teams.

III. DONATE YOUR BRAIN

In 2008, Boston University created the Boston University School of Medicine Center for the Study of Traumatic Encephalopathy (the Center) as a joint venture between the Boston University School of Medicine and the Sports Legacy Institute.²⁰ The Center currently has a brain registry where former athletes may donate their brains for research after death.²¹ More than one hundred and fifty current athletes have signed up, including over forty retired NFL players.²²

The NFL has disassociated itself from the Center since its inception in 2008. In fact, in an initial Congressional Hearing in October of 2009, one year after the Center was opened, NFL Commissioner Roger Goodell went so far as to deny any link between permanent brain injury and the sport of American football.²³ However, in January of 2010, Commissioner Goodell made a dramatic turnaround by stating that repeated head trauma in the sport of football may lead to permanent brain damage.²⁴ Since this

¹⁹Bruce Klopfleisch, *Football Players and Concussions: Players Suffer Long-Term Effects from Multiple Head Injuries*, Dec. 18, 2009, <http://www.suite101.com/content/football-players-and-concussions-a181232>.

²⁰ Boston University, *Boston University Annual Report 2010: Concussion Repercussion*, <http://www.bu.edu/ar/2010/research/>.

²¹See Klopfleisch, *supra* note 19.

²²*Id.*

²³*Legal Issues Relating to Football Head Injuries (Parts I & II)*, 111th Cong. 1–2 (2009, 2010) (statement of NFL Commissioner Roger Goodell), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53092.pdf.

²⁴ Terry Zeigler, *Former NFL Players Call for Concussion Education*, Jan. 5, 2010, <http://www.suite101.com/content/former-nfl-players-call-for-concussion-education-a185834>.

statement, the NFL has voluntarily donated resources to the Center and has come under intense public pressure to study, and to provide education about, the neurological implications of concussions and their long-term effects after players leave the field.²⁵ It has been reported that repeated hits to the cranium might bring on dementia in retired NFL players as early as forty years of age.²⁶

The Center is currently studying the brains of deceased NFL football players.²⁷ So far, it has examined eleven posthumous brains and found that all eleven showed signs of severe degradation.²⁸ The level of degradation found should not exist in humans naturally.²⁹ More alarmingly, the study found that former NFL players between the ages of thirty and forty-nine experienced memory loss at a rate nineteen times higher than the average population.³⁰ In direct response to these findings and statistics, in January 2010, the NFL released its first public service announcement illustrating the importance of awareness of concussions and promoting the policy that no athlete should return to play without being cleared by medical staff after suffering from a concussion.³¹

IV. CONCUSSION CARE AND NFL LAWSUIT LIABILITY

The current standard of care regarding concussion-related injuries on the football field keeps the player from returning to the game in which the injury occurred, and subsequently forbids any physical activity or contact until all symptoms of the injury subside.³² This has not always been the

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* Chris Nowinski, Co-Director of Boston University Brain Center: “[h]itting your head thousands of times appears to create a disease that slowly and quietly causes your brain cells to die.”

²⁸ Zeigler, *supra* note 24.

²⁹ Klopfleisch, *supra* note 19.

³⁰*Id.*

³¹*Id.*

³² Mishandling, *supra* note 14. See generally Daniel J. Kain, “It’s Just A Concussion:” *The National Football League’s Denial of a Causal Link Between Multiple Concussions and Later-life Cognitive Decline*, 40 Rutgers. L. J. 697 (2009).

standard. The previous rule in the NFL was to hold a player out of the game only until all concussion symptoms subsided.³³ However, because the full damage of a concussion could not be evaluated until forty-eight hours after the incident and initial injury, this policy was ill-advised. Physicians were unable to diagnose the real severity of concussions on the sidelines of a game.³⁴ The current standard has been implemented by the NFL amid concerns that, if a player sustains another head injury too soon after a concussion, he is much more susceptible to greater and permanent brain damage.³⁵ Playing with even a mild concussion places an athlete at a significant risk for fatal head injury and prolonged and permanent risk of brain damage, including, but not limited to, confusion, disorientation, inability to focus, and inability to maintain balance.³⁶ In light of this new standard, players cannot go back onto the field as quickly as they used to. Accordingly, with financial incentives and bonuses at stake, players may hide concussion symptoms from team personnel in order to return to the playing field. This is a dangerous incentive. Consequently, a player who returns to a game when the full extent of a concussion injury is not known could likely sue for negligent treatment by his team and staff, in addition to willful and reckless conduct.

A. Case Study: Merrill Hoge and the Chicago Bears

A decade before the NFL took concussions and their effects seriously, the first and only successful concussion lawsuit against the NFL was by NFL player Merrill Hoge of the Chicago Bears.³⁷ “While concussion cases [usually] exist in the contexts of product liability, insurance coverage, and traditional medical negligence,” only one case on record involves an athlete successfully suing the NFL and a team, namely the Chicago Bears.³⁸

In a case of first impression, Hoge successfully sued former trainer Dr.

³³ Klopfleisch, *supra* note 19.

³⁴ *Id.*

³⁵ Mishandling, *supra* note 14.

³⁶ Dr. David S. Kushner, *Concussion in Sports: Minimizing the Risk for Complications*, AMERICAN FAMILY PHYSICIAN, Sept. 15, 2001, available at <http://www.aafp.org/afp/2001/0915/p1007.html>.

³⁷ Kain, *supra* note 32 at 713.

³⁸ *Id.*

John Munsell of the Chicago Bears.³⁹ The case involved an NFL physician's duty to warn an athlete about the risks inherent in the return to a football game too quickly after sustaining an initial concussion injury.⁴⁰ Hoge played in the NFL for eight seasons.⁴¹ In a 1994 preseason game against the Kansas City Chiefs, Hoge suffered his first concussion, characterized as an "earthquake."⁴² After staying on the field for two more plays, Hoge eventually took himself out of the game complaining of concussion symptoms.⁴³ Six weeks later, Hoge again suffered a concussion against the Buffalo Bills and incurred lingering post-concussion symptoms such as headaches, dizziness, and memory deficiency for ten days after the game.⁴⁴

According to Hoge, the Chicago Bears stated it was just a concussion, and it warranted little treatment from the team. In Hoge's claim, he alleged the Chicago Bears and team trainer Dr. Munsell failed to warn Hoge of the risks associated with subsequent concussions.⁴⁵ In response to Hoge's complaint, the Chicago Bears and Dr. Munsell stated that Hoge knew of the foreseeable risks inherent in playing NFL football and Hoge explicitly assumed the risk of this type of injury – an assumption of risk defense.⁴⁶ However, the assumption of the risk doctrine requires knowledge or awareness of the *particular hazard* that caused the injury. Hoge argued that he lacked such particular and adequate information of the risks of playing with subsequent concussions.⁴⁷ He lacked this information because the Chicago Bears and Dr. Munsell failed to provide it. Hoge stated he

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 713–14.

⁴³*Id.* at 714.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 715–16. Assumption of the risk is a defense, facts offered by a party against whom proceedings have been instituted to diminish a plaintiff's cause of action or defeat recovery to an action in negligence, which entails proving that the plaintiff knew of a dangerous condition and voluntarily exposed himself or herself to it. Assumption of risk, LAWYERS.COM, <http://research.lawyers.com/glossary/assumption-of-risk.html> (last visited Apr. 6, 2011).

⁴⁷ Kain, *supra* note 32, at 716.

permanently suffered from post concussion symptoms and requested \$2.2 million as an estimate of his lost earnings and monies needed for future care.⁴⁸ Consequently, the jury found in favor of Hoge and awarded him \$1.45 million for the two remaining years on his NFL contract and additional \$100,000 for pain and suffering.⁴⁹ What are the implications of the verdict in *Hoge* a decade later as concussions in the NFL have become forefront in the news media? The *Hoge* verdict, coupled with the new evidentiary link of football's concussions to permanent brain damage, provides an incentive for the NFL to tackle the legal ramifications of concussions and implement new policies to protect itself from players who may sue in the future.

B. The NFL Discourages Head-to-Head Hits and the NCAA Follows

In an effort to protect its players and deep pockets, the NFL has taken immediate steps towards protecting current players who suffer concussions by implementing stricter guidelines for returning to play and providing teams with independent neurologists on the sidelines of all games.⁵⁰ Currently, a player is not permitted to return to a game in which that player leaves with a concussion related injury.⁵¹ As mentioned above, the former practice allowed a player to return to the game when his concussion symptoms subsided.⁵² The National Collegiate Athletic Association (NCAA) currently lets individual college teams make their own decisions about concussions; some conferences have uniform policies while others do

⁴⁸*Id.* at 717.

⁴⁹*Id.* See generally A. Jason Heubinger, *Beyond the Injured Reserve: The Struggle Facing Former NFL Players in Obtaining Much Needed Disability Assistance*, 16 SPORTS LAW J. 279 (2009).

⁵⁰ Gary Mihoces, *NFL Launches New Guidelines for Assessing Concussions*, USA TODAY, Mar. 30, 2011 at 1C, available at http://www.usatoday.com/sports/football/nfl/2011-03-29-concussions-protocol_N.htm

⁵¹ Ohm Youngmisuk, *Caution on Concussions*, N.Y. DAILY NEWS, Dec. 3, 2009 at 69, available at http://www.nydailynews.com/sports/football/2009/12/03/2009-12-03_roger_goodell_says_nfl_players_who_show_concussion_systems_cannot_return_to_play.html.

⁵² Alan Schwarz, *N.F.L. Issues New Guidelines on Concussions*, N.Y. TIMES, Dec. 2, 2009, <http://www.nytimes.com/2009/12/03/sports/football/03concussion.html>.

not.⁵³ However, this will change soon. Following the NFL's lead, the NCAA is considering a similar rule that would prohibit an NCAA student athlete from returning to a game in which the player leaves with a concussion.⁵⁴

C. The Section 88 Plan

With the adamant denials by the NFL throughout its history that the sport and the resulting concussions cause brain degradation, it was quite a surprise in 2006 when the NFL and the National Football League Players Association (NFLPA) agreed on a Collective Bargaining Agreement (CBA) that included a provision for financial compensation for retired NFL players who suffer from brain injuries and dementia.⁵⁵ That portion of the CBA is called "The Section 88 Plan." Players have argued that Section 88 serves as a constructive admission by the NFL that the game is linked to brain injuries.⁵⁶

Specifically, to be eligible for the Section 88 Plan, the retired NFL player must demonstrate that he suffers from dementia.⁵⁷ Section 88, which was named after retired football player John Mackey who wore the number 88 and who also currently suffers from dementia, allows \$88,000 per year to retired NFL players for in-house nursing home care if the care is related to dementia.⁵⁸ While Commissioner Roger Goodell initially denied any link between football concussions and permanent brain damage, he did not oppose the creation of The Section 88 Plan. Section 88 is jointly funded by each NFL team and is mutually administered by the NFLPA and the NFL.⁵⁹ Sadly, prior to 2006, the NFL had made only four payments in its entire

⁵³ Klopfleisch, *supra* note 19.

⁵⁴ *Id.*

⁵⁵ See generally L. Elaine Halchin, *Former NFL Players: Disabilities, Benefits, and Related Issues*, Apr. 8, 2008, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key_workplace.

⁵⁶ Kain, *supra* note 32, at 726.

⁵⁷ *Id.*

⁵⁸ *Id.* at 726–727.

⁵⁹ *Id.* at 726.

history for medical claims related to dementia to its retired players.⁶⁰

V. THE LA SALLE CONCUSSION LAWSUIT AND SETTLEMENT

A. La Salle University

The NCAA is not immune from concussion related lawsuits stemming from the football field. In October 2005 La Salle University football player Preston Plevretes sustained a concussion during a football practice.⁶¹ Plevretes indicated to the coaching staff that he had been having headaches since the October 4 practice.⁶² Plevretes went to the Student Health Center at La Salle after the game and was examined by a nurse who explained that he had, in fact, sustained a Grade 1 concussion.⁶³ After having a CT scan, Plevretes was not cleared to play again until October 16, 2005.⁶⁴

On November 5, 2005, Plevretes suffered a second helmet-to-helmet collision at a game at Duquesne University.⁶⁵ During a play, Plevretes was momentarily knocked unconscious.⁶⁶ After regaining consciousness, Plevretes collapsed and then lapsed into a coma due to swelling of the brain.⁶⁷ Upon arrival at the hospital, Plevretes's brain was so swollen that part of his skull had to be removed.⁶⁸ Plevretes needs constant treatment and has difficulty walking and speaking.⁶⁹ He brought suit against La Salle University; the case ultimately settled for \$7.5 million.⁷⁰

⁶⁰*Id.* at 728.

⁶¹ Alan Schwarz, *La Salle Settles Lawsuit With Injured Player for \$7.5 Million*, N.Y. TIMES, Dec. 1, 2009, at B4 [hereinafter La Salle].

⁶² Clayton and Hammock, *supra* note 16.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵ La Salle, *supra* note 62.

⁶⁶*Id.*

⁶⁷ Sam Wood, *La Salle to Pay Brain Injured Footballer \$7.5 Million*, Nov. 30, 2009 http://articles.philly.com/2009-11-30/news/24988280_1_second-impact-syndrome-brain-injuries-concussion.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

B. The NCAA's Response

Since the La Salle University settlement, the NCAA has taken drastic measures to adopt concussion policies for its football leagues. For the past decade, the NCAA Sports Medicine Handbook (“Handbook”) had only a few pages about concussions, which merely listed some of the most common symptoms.⁷¹ The Handbook simply stated that the student athlete should not return to athletics until symptoms subside and instructed that student athletes should be “ready” to return to athletics, without defining the word “ready.”⁷² On December 16, 2009, the NCAA Committee on Competitive Safeguard and Medical Aspects of Sports added new rules relating to concussion treatment in intercollegiate athletics.⁷³ Some of these additions include the following:

- (1) An athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as unconsciousness, amnesia, headache, dizziness, confusion, or balance problems), either at rest or exertion, shall be immediately removed from practice or competition and shall not return to play until cleared by a physician or her/his designee.
- (2) Athletes who are rendered unconscious or have amnesia or persistent confusion shall not be permitted to continue for the remainder of the day. These athletes shall not return to any participation until cleared by a physician.
- (3) Any athlete exhibiting an injury that involves significant symptoms, long duration of symptoms or difficulties with memory function should not be allowed to return to play during the same day of competition.
- (4) It has been further demonstrated that retrograde amnesia, post-traumatic amnesia, and the duration of confusion and mental status changes are more sensitive indicators of injury severity, thus an athlete with these symptoms should not be allowed to return to play during the same day. These athletes should not return to any participation until cleared by a physician.

⁷¹ National Collegiate Athletic Association, 2009–10 Sports Medicine Handbook, 52-55(2009) [hereinafter Handbook].

⁷² Schwarz, *supra* note 61. *See also id.*

⁷³ Handbook, *supra* note 71 at 52–55.

- (5) It is essential that no athlete be allowed to return to participation when any symptoms-persist, either at rest or exertion.⁷⁴

As these new guidelines imply, the NCAA took the same path as the NFL and ordered that student athletes who sustain concussions may not return to the same game or practice in which they sustained the concussion. Perhaps more importantly, the Handbook now arguably puts student athletes on notice not only of the symptoms of concussions, but also of their potential damaging and long lasting effects when a student athlete returns to the playing field too soon. Legally, by giving student athletes notice of concussions' harmful effects through the new guidelines in the Handbook, the NCAA may have afforded itself strong assumption of risk and waiver defenses, if an injured athlete decided to file a lawsuit.

VI. THE TRICKLE DOWN EFFECT

A. Concussion Lawsuits on the High School Level

As the NFL and NCAA continue to deal with concussion issues, there is a discernable effect on high school football. Time Magazine has estimated that this year there will be between 43,000 and 67,000 concussions in high school football.⁷⁵ However, few high schools have implemented policies to deal with concussion related injuries.⁷⁶ Unlike the NFL and NCAA, most high schools cannot afford to hire doctors to be at practices and games. Therefore, there needs to be a uniform effort across the nation by high school football coaching staffs to recognize and treat concussion-related symptoms in a cost-effective and convenient manner.

⁷⁴ Clayton and Hammock, *supra* note 16.

⁷⁵ Sarah Kliff, *Heading Off Sports Injuries*, Newsweek.com (Feb. 5, 2010), <http://www.newsweek.com/2010/02/04/heading-off-sports-injuries.html>.

⁷⁶ Sarah Hoye, *New Jersey Law Sidelines Student Athletes Who May Have A Brain Injury*, CNN HEALTH, Dec. 8, 2010 <http://www.cnn.com/2010/HEALTH/12/07/nj.concussion.law/index.html>. See also Brain and Spinal Cord, *New Jersey Imposes Concussion Rules for High School Athletes*, <http://www.brainandspinalcord.org/blog/2010/03/30/new-jersey-imposes-concussion-rules-high-school-athletes> (explaining that four states have implemented brain and concussion high school student athlete policies).

The case of Zachary Frith illustrates the consequences of not treating concussions properly at the high school level. On October 15, 2005, Frith suffered a concussion while playing in a high school football game.⁷⁷ Despite the injury and symptoms, the coaches permitted Frith to finish the game. The coaches did not notify Frith's parents of the injury, and Frith continued to practice the following week and also played in the next week's game.⁷⁸ However, Frith's parents noticed behavioral changes in their son and took him to a neurologist. The doctor diagnosed Frith with post-concussion syndrome resulting from an initial concussion and subsequent traumatic blows to his head that caused permanent brain damage.⁷⁹ The school's lack of a concussion guideline policy increased Frith's chances of permanent injury. Frith's parents filed suit on behalf of their son, which the school district settled for \$3 million.⁸⁰

B. State Laws Implemented to Combat Concussions and Subsequent Lawsuits

1. Washington and New Jersey Take the Lead

There are only eleven states that have enacted concussion laws to protect their student athletes.⁸¹ In response to cases like Frith's, New Jersey

⁷⁷ Shamberg, Johnson & Bergman, *Football Concussion Results in \$3 Million Settlement with High School Coaches and Administrators in Brain Injury Case*, <http://www.sjblaw.com/CM/Newsletters/2009-spring.pdf> (2009).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The lawsuit named the high school football coach and administrator as individuals. Most states provide sovereign immunity for suits against the state, and by naming the coach and administrator as defendant's Zach's parents were able to avoid the capped amount of \$300,000 under Missouri law. Mo. Stat. § 537.610. Whether or not a state university enjoys sovereign immunity for purposes of the Eleventh Amendment turns on whether the university is considered an arm of the state or whether it is an independent political subdivision. 15A Am. Jur. 2d Colleges and Universities § 46. Therefore, sovereign immunity does not apply to private universities. When a state entity has sovereign immunity, it cannot be sued for damages without its consent.

⁸¹ Bryan Toporek, *NFL Encourages All States to Adopt Student-Athlete Concussion Laws*, EDUCATION WEEK, Feb. 25, 2011, http://blogs.edweek.org/edweek/schooled_in_sports/2011/02/nfl_encourages_all_us_states_to_adopt_student-athlete_concussion_laws.html.

Governor Chris Christie signed into law a new concussion bill that requires public and private school coaches to remove any athlete from play who shows signs of a concussion.⁸² Washington enacted a similar statute entitled the Lystedt Law in May 2009.⁸³ The Lystedt Law contains three essential elements:

(1) Athletes, parents and coaches must be educated about the dangers of concussions each year; (2) If a young athlete is suspected of having a concussion, he/she must be removed from a game or practice and not be permitted to return to play; and (3) A licensed health care professional must clear the young athlete to return to play in the subsequent days or weeks.⁸⁴

While the Lystedt Law is a step in the right direction, actual implementation may be complicated. Few junior varsity and varsity football teams on the high school level have physicians on standby. Furthermore, school administrators and coaches do not always enforce the law properly on the sidelines. Since these statutes were enacted, NFL Commissioner Roger Goodell sent a letter to over forty governors across the United States urging them to follow New Jersey and Washington's lead to enact legislation on appropriate concussion care and management.⁸⁵

VII. CONCLUSION

What is the next step? What can be done to safeguard NFL players' health and pee-wee players' health alike? Physiological evidence continues to accumulate, linking repeated head trauma to concussions, and

⁸² A.B. 2441, 214th Leg., (N.J. 2010). *See also* Associated Press, *Christie Signs Strict Concussion Law for NJ Schools* (Dec. 7, 2010), http://abclocal.go.com/wabc/story?section=news/local/new_jersey&id=7829067.

⁸³ H. B. 1824, 61st Leg., 2009 Regular Session (W.A. 2009). *See also* Stephania Bell, *Concussions a Public Health Issue* (Feb. 7, 2010), <http://sports.espn.go.com/espn/otl/columns/story?id=4886868>.

⁸⁴ Wash. Rev. Code § 28A.600.190(2009). *See also* Associated Press, *Goodell Urges Governors to Adopt Concussion Law* (May 23, 2010), <http://www.foxnews.com/sports/2010/05/23/goodell-urges-governors-adopt-concussion-law>.

⁸⁵ Toporek, *supra* note 81.

concussions to permanent brain injury in football. These permanent physiological changes in the brain need to be taken seriously. States should implement appropriate management guidelines to treat these injuries.

This article proposes the following. In all levels of organized football, it is important to ban high-risk practice drills, provide in-depth training to coaches and staff, and adopt a standardized return-to-play policy at all levels. It is also essential to make clear written disclosures to players and parents, alerting them to the risks associated with playing American football. By doing this, the lawsuit liability of organized football will decrease, while players and parents will have a better idea of the danger they and their children face when they play American football.

Furthermore, athletic programs and associations at all levels should implement full and aggressive concussion management programs to ensure their athletes' safety. There is a need to create protocol independent of all existing medical concussion policies. For example, key staff members need to be trained on concussion management. All football team staff members should attend mandatory concussions summits and seminars. Organized football associations, from the NFL to youth football, ought to institute mandatory brain baseline testing for all football players, comparing "normal brains" to those which have suffered concussions. Additionally, there needs to be a policy which allows a whistleblower to report anonymously when staff or doctors pressure players to play and violate policy.

As to products liability, football associations should consider switching to helmets designed to reduce the risks of concussion. However, NFL teams have not been willing to pay for these higher priced designs until there is more data that they really do reduce the number of concussions.⁸⁶

The policies mentioned in this article ought to be implemented for the safety of all players and their future health – and also to protect football organizations from lawsuits. As national attention turns to how players with concussions are treated, the NFL should spearhead a national policy and take the lead role in concussion management education by enforcing their own stricter return to play standards. Change needs to start at the top.

⁸⁶ Shelly Anderson, *New Helmet Designs Have Concussions in Mind*, PITTSBURGH POST-GAZETTE, July 28, 2002, at D11, available at <http://www.post-gazette.com/steelers/20020728helmets0728p4.asp>.