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A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime

Marc Edelman¹

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I. INTRODUCTION

America is in the midst of a “fantasy sports revolution” that is changing the way sports fans interact with one another.² With more than 30 million Americans playing fantasy sports,³ today’s sports fans spend as much time predicting the performance of professional athletes as Wall Street investors spend predicting stocks and bonds.⁴

Some fantasy sports contests, such as the World Championship of Fantasy Football, charge participants entry fees in the thousands of dollars, and offer grand prizes upwards of \$300,000.⁵ Meanwhile, other business ventures, such as Bloomberg Sports, sell fantasy participants “analytical tools” and “expert advice.”⁶ One insurance carrier, Fantasy Sports Insurance, has even begun to offer fantasy participants insurance policies against injury to their star fantasy players.⁷

Nevertheless, with the rapid and unexpected emergence of fantasy sports, few have devoted time to understanding how U.S. law applies to fantasy sports businesses and their participants. Thus, many have misconceptions about the law of fantasy sports.

This article explains how U.S. law regulates the emerging fantasy sports industry. Part I of this article provides an overview of the history of

² Neil Janowitz, *Bet on Football*, DEMOCRAT & CHRON. (Rochester, NY), Sept. 16, 2005, at I28, available at 2005 WLNR 26900861; see also *infra*, notes 159 - 169 and accompanying text.

³ See Gene Wang, *Fantasy Football Gets Benched*, WASH. POST, May 29, 2011, at D3 (estimating about 30 million participants in fantasy football); Tom Van Riper, *A Guy’s Fantasy*, FORBES, Feb. 28, 2011, at 23 (estimated the entire fantasy sports marketplace at 30 million participants).

⁴ See generally *Fantasy Football Website Aims to Choose the Best Athletes Using a Formula Derived from Wall Street. Its Creators are Most Definitely Bullish on Fantasy Sports*, FLA. SUN-SENTINEL, Aug. 26, 2009, at 1D (drawing comparisons between the selection of fantasy sports teams and investment portfolios).

⁵ See Chris Dempsey, *Fantasy Revolution Online Craze is Intoxicating to Americans, and Expanding Outside the Sports World*, DENV. POST, Sept. 9, 2007, at B3 (describing the entry fees and prizes involved in the World Series of Fantasy Football); Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, LOY. L.A. ENT. L. REV. 53, 64 (2008) (describing “the rise of hyper-competitive fantasy leagues offering cash prizes as high as \$100,000”); Childs Walker, *Dream Teams: Tired of Second Guessing How Your Favorite Sports Clubs Are Managed? Fantasy Leagues Let You Take Charge of the Action*, THE BALT. SUN, March 6, 2006, at 1D (“You can find high-stakes national games with top prizes in the hundreds of thousands of dollars.”).

⁶ See *infra*, notes 161 -164 and accompanying text.

⁷ See *infra* notes 165 - 169 and accompanying text.

fantasy sports leagues. Part II explores the fantasy sports industry today. Part III explains how U.S. laws apply to fantasy sports host sites. Part IV discusses how U.S. laws apply to fantasy sports participants. Finally, Part V applies U.S. laws to businesses that provide ancillary services to fantasy sports host sites and participants.

II. THE HISTORY OF FANTASY SPORTS LEAGUES

A. Before Fantasy Sports

For the American sports fan, professional sports once meant simply an opportunity to attend games, root for teams, and second-guess “the men who ran [the] teams.”⁸ Then, in the 1920s, the company Ethan Allen released a “table game” called All-Star Baseball, which allowed baseball fans to simulate team management by choosing a “team” from a collection of player cards and selecting the team’s lineup.⁹ Each player’s performance in All-Star Baseball was determined by probabilities that were derived from the players’ actual past performances, in conjunction with the random event of rotating a spinner over these cards.¹⁰

For almost forty years, All-Star Baseball was seen as the best way for sports fans to simulate team management.¹¹ Then, in 1961, Hal Richman, a Bucknell University mathematics student, devised a more complex simulation game.¹² Richman’s game, Strat-O-Matic Baseball, included one play-

⁸ Walker, *supra* note 5.

⁹ David G. Roberts Jr., Note, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 CASE L. REV. 223, 231 (2007); see also *Triple Play: Personal Reviews, Op-Ed Pieces, and Polemics from Outside the Purview of the Umpires*, NINE, Sept. 22, 2006, at 110, available at 2006 WLNR 24732952.

¹⁰ See *Triple Play*, *supra* note 9.

¹¹ *Id.*

¹² See Van Riper, *supra* note 3 at 24; Stuart Miller, *Strat-O-Matic Devotees Celebrate Its 50th Anniversary*, N.Y. TIMES, Feb. 14, 2011, at D5 (“In his 20s, after discouragement from his father and rejection from numerous companies, Richman borrowed money from friends and started [Strat-O-Matic] on his own.”); Cody Derespina, *Strat-O Turning the Big 5-Ob!*, NEWSDAY, Feb. 13, 2011, at A73 (further noting that “Richman began to develop the game as an 11-year-old in 1948 after becoming dissatisfied with the statistical randomness present in other baseball games of the era. He found that using dice added an element of predictability that jibed with the results of actual ballgames.”); *Calling All SABR Geeks*, N.Y. DAILY NEWS, Feb. 6, 2011, at 73; Mike James, *Extra Bases: Strat Stretches Board Game History to 50 Years*, USA TODAY, Jan. 11, 2011, at 8C; Rich Freeman, *Strat-O-Matic Still Going Strong*, TRENTON TIMES, Jul. 7, 2010, at B2.

ing card for each Major League Baseball player.¹³ Each card contained various ratings and result tables that corresponded to dice rolls.¹⁴ For each game, Strat-O-Matic participants would select teams and batting orders, roll the dice, and then review charts to determine game results.¹⁵

By the 1980s, many other companies had joined Ethan Allen and Strat-O-Matic in the simulation sports market, with some companies, such as Micro League Baseball and Avalon Hill, providing their games digitally via the computer.¹⁶ One of the benefits of playing sports simulation games on the computer was the increased range of managerial options.¹⁷ However, much like the earlier “table games,” the computer sports simulations still had one significant limitation: they did not allow participants to showcase managerial prowess by predicting future events.¹⁸

B. *A New Game is Created*

With both traditional “table games” and “computer simulation games” failing to provide sports fans with a way to predict players’ future performances, some highly educated sports fans began to experiment with ways of creating sports simulation games that incorporated future events.¹⁹ One of the first people to construct a forward-looking baseball simulation game was Bill Gamson, a psychology professor at Harvard University and the University of Michigan.²⁰ Gamson’s game, which he called “The Baseball Seminar,” included a series of participants who paid a ten-dollar entry

¹³ See Miller, *supra* note 12.

¹⁴ *Id.*; see also Freeman, *supra* note 12; Rob Biertempfe, *MLB Q&A: Talking with Hal Richman*, PITT. TRIB. REV., May 30, 2010, available at 2010 WLNR 11122984.

¹⁵ See Miller, *supra* note 12; Biertempfe, *supra* note 14.

¹⁶ See generally Miller, *supra* note 12 (noting how computer-based simulation games began to replace card-based games).

¹⁷ See Micro League Baseball Instructions, <http://www.stadium64.com/manuals/microleaguebaseball.htm> (noting that Micro League Baseball participants were able to make players steal bases and bunt).

¹⁸ See generally Amorak Huey, *What if Sports Provides Surfers with Dream Matchups*, GRAND RAPIDS PRESS, Mar. 8, 2005, at D2 (comparing fantasy sports with simulation sports games).

¹⁹ *Id.*

²⁰ See Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law*, 31 T. JEFFERSON L. REV. 317, 323 (2008); Sam Allis, *Lord of the Games: Fantasy Baseball Indebted to Two Innovators*, BOSTON GLOBE, Mar. 6, 2006, at A3; Bill Shea, *Yes, They are Playing Fantasy Sports at Work, but is that Bad? Some Executives Bet Not*, CRAIN’S DETROIT BUS. J., Mar. 17, 2008, at 11, available at 2008 WLNR 5404899.

fee to “draft” a team of baseball players.²¹ The winner of Gamson’s game was the participant who, over the course of an actual Major League Baseball season, selected players who earned the most points in a pre-determined set of statistical categories.²²

One of Gamson’s “Baseball Seminar” participants was Robert Sklar, a retired reporter for the *Los Angeles Times* who, at the time, taught journalism and film studies at the University of Michigan.²³ In 1965, Sklar mentioned “The Baseball Seminar” to one of his mentees, Daniel Okrent.²⁴ Almost fifteen years later, while working as a journalist for *Texas Monthly*, Okrent decided to revive “The Baseball Seminar” as a fun competition among some of his journalist and advertising friends.²⁵

Okrent first proposed the game to his friends in November 1979, over lunch at a now-defunct New York French bistro, La Rotisserie Francaise.²⁶ After his friends expressed enthusiasm, Okrent contacted Sklar, who, by this time, was teaching film studies at New York University’s Tisch School of

²¹ See Hancock, *supra* note 20; Allis, *supra* note 20 (noting that Bill Gamson called his game a “Seminar” to reduce any association between it and illegal gambling).

²² See Hancock, *supra* note 20; Allis, *supra* note 20; Shea, *supra* note 20.

²³ See Hancock, *supra* note 20 at 324. See generally William Grimes, *Robert Sklar, 74, Historian Who Put Films in Context* (Obituary), N.Y. TIMES, Jul. 12, 2011, at A20 (noting that Sklar was best known as a scholar for his 1975 book “Move-Made America,” which “was one of the first histories to place Hollywood films in a social and political context, finding them a key to understanding how modern American values and beliefs have been shaped.”).

²⁴ See Van Riper, *supra* note 3 at 24; Hancock, *supra* note 20 at 324; *Fantasy Baseball’s Reality Defies Belief*, DETROIT NEWS, Apr. 17, 2005, at C1, available at 2005 WLNR 2698158.

²⁵ See Walker, *supra* note 5; see also; *Fantasy Sports Born on 1979 Flight to Texas*, MYRT. BEACH SUN NEWS (Myrtle Beach, SC), Dec. 18, 2005, at B8, available at 2005 WLNR 20423098; Dave Cunningham, *Still Cookin’: Rotisserie Baseball Celebrates its 20th Year*, ORL. SENTINEL, Mar. 26, 2000, at C10; Brad Townsend, *It Began as a Pastime Among New York Literati, But Rotisserie Baseball Soon Wound up Firing up a Fantasy World*, DALL. MORNING NEWS, Sept. 19, 2003, at 1C; Patrick Hruby, *The Case Against Fantasy Sports*, WASH. TIMES, Apr. 29, 2003, at C1 (describing Daniel Okrent’s creation of Rotisserie Baseball on a plane flight from New York, NY to Austin, TX).

²⁶ See *Fantasy Sports Born on 1979 Flight to Texas*, *supra* note 25; see also Mike Hale, *The Few Who Founded Fantasy Baseball*, N.Y. TIMES, Apr. 20, 2010, at C4 (describing the role of an inaugural owners meeting at La Rotisserie Francaise); Fred Ferretti, *For Major-League Addicts, A Way to Win a Pennant*, N.Y. TIMES, July 8, 1980, at 8.

the Arts.²⁷ With Sklar's help, Okrent updated the game's rules and announced the founding of the original Rotisserie League.²⁸

C. *The First Rotisserie League Baseball Auction*

In April 1980, Okrent and his friends returned to the La Rotisserie Francaise restaurant, along with Sklar, to conduct the first-ever Rotisserie League baseball player auction.²⁹ For purposes of this auction, each of the league's ten participants posted a \$260 entry fee.³⁰ Each participant then used his \$260 entry fee to bid on players from Major League Baseball's National League rosters.³¹

According to the original Rotisserie League rules, each participant earned points based on his selected players' real-life performances in eight statistical categories: four based on hitting, and four on pitching.³² At the end of the Major League Baseball season, the Rotisserie League participant

²⁷ See *Fantasy Baseball's Reality Defies Belief*, *supra* note 24 (providing a profile of the original Rotisserie League team owners); Grimes, *supra* note 23 (noting Robert Sklar's appointment by New York University).

²⁸ See Josh Robbins, *Geek Games: It's Been 25 Years Since 11 Fans Held the First Rotisserie Auction*, ORL. SENTINEL, Jun. 8, 2005, at D1 (discussing Daniel Okrent's role in creating, and then reshaping, the Rotisserie League rules); see also Allis, *supra* note 20 at A6 (describing Sklar as the link between Gamson's Baseball Seminar and Okrent's Rotisserie Baseball).

²⁹ See generally Dan Raley, *Living in a Fantasy World: Rotisserie Leagues have Turned Fans into Fanatics*, SEATTLE POST-INTELLIGENCER, Apr. 6, 1996, at D1 (noting that "Fantasy or Rotisserie League baseball [began with] exactly 11 people in 1980"); see also Townsend, *supra* note 25; Ethan Skolnick, *It's All Geek to Them*, PALM BEACH POST, May 16, 1999, at 11B; Ferretti, *supra* note 26 at 8 (noting that the full group of inaugural owners in the Rotisserie League included: "Cork Smith, an editor at Viking and owner of the Smith Coronas; Bruce McCall, an advertising writer, the McCall Collects; Bob Sklar, a film and television critic, the Sklargazers; Tom Guinzberg, former Viking editor, the Burghers; Michael Pollet, a lawyer, the Pollet Burros; Miss Salembier, associate publisher of Ms. magazine; Mr. Fleder, an editor at Esquire; Mr. Waggoner, an assistant vice president of Columbia University; Mr. Eisenberg, a writer at Esquire, and Dan Okrent, a freelance writer, owner of the O Fenokees, and league commissioner.").

³⁰ See Skolnick, *supra* note 29; Fred Mitchell, *Rotisserie Baseball Isn't Just a Passing Fantasy*, CHI. TRIB., Apr. 11, 1989, at 1.

³¹ See Skolnick, *supra* note 29.

³² *Id.* (noting the original four hitting categories included runs scored, runs batted in home runs and steals; the original four pitching categories included earned run average, wins, saves and strikeouts); see also Cunningham, *supra* note 25; Ferretti, *supra* note 26.

whose team earned the most points would receive a cash prize, as well as a dousing in the chocolate drink Yoo-Hoo.³³

D. Rotisserie Baseball Grows in Popularity

The original Rotisserie League began “almost as a tongue-in-cheek exercise,”³⁴ and as an attempt by hard-working New Yorkers to have “some goofy, albeit at times absurdly competitive, fun.”³⁵ However, because many members of the Rotisserie League were also members of the media, the Rotisserie League garnered national attention.³⁶

Several members of the press published stories about the Rotisserie League during its inaugural 1980 season.³⁷ For example, just four months after the league’s inaugural auction, *New York Times* reporter Fred Ferretti published an article that detailed the league’s participants and performance.³⁸ Then, a few weeks later, the *CBS Morning News* produced a story on the league.³⁹ Shortly thereafter, members of the Rotisserie League even agreed to publish a book to “introduce the game to the masses.”⁴⁰

As baseball fans came to learn about the Rotisserie League, their game began to develop a cult following among statistically-oriented sports fans.⁴¹ Like any new game, different groups added their own nuances to the rules.⁴²

³³ See Cunningham, *supra* note 25; Skolnick, *supra* note 29.

³⁴ Walker, *supra* note 5.

³⁵ Townsend, *supra* note 25.

³⁶ See Tim Feran, *Back in the Game: Major League Baseball Trying to Reattract Fantasy Players with New Online Forum*, COLUMBUS DISPATCH, Apr. 3, 2006, at 2006 WLNR 5582002; see also Hale, *supra* note 26 (“Most of those team owners were writers, editors or publishers, which guaranteed publicity.”).

³⁷ See *infra* notes 38 - 39 and accompanying text.

³⁸ See Ferretti, *supra* note 26 at 8; Townsend, *supra* note 25 at 1C.

³⁹ Townsend, *supra* note 25 at 1C.

⁴⁰ Walker, *supra* note 5, at 1D.

⁴¹ See Cunningham, *supra* note 25 at C10; see also *A Whole Different Ball Game*, ATLANTIC, June 1, 1985, at 30, available at 1985 WLNR 1370459 (noting that by 1985, the Rotisserie League Baseball Association included 157 leagues, across 48 states); Craig Davis, *The Paper Tigers: Americans’ Teams Just Read the Box Scores: It’s Not Whether they Win or Lose but How they Played Last Game*, FLA. SUN-SENTINEL, Mar. 22, 1988, at 1C (noting that by 1988 there were really 1,000 fantasy baseball leagues in America and 15,000 to 20,000 team owners).

⁴² See Paul White, *Fantasy Leagues Variations Keep Game Fresh*, USA TODAY, Aug. 24, 1990, at C6 (discussing various innovations to the Rotisserie League baseball rules that emerged in the 1980s); cf. Marc Edelman, *Why The Single Entity Defense can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports*,

Some early participants added a fifth statistical category for both batters and pitchers.⁴³ Others replaced the player auction with a draft to select players.⁴⁴ Still others replaced the points-based scoring system with a head-to-head system in which fantasy team-owners played against different fantasy teams each week.⁴⁵ However, even as individual leagues added their own nuances, most leagues adopted the original Rotisserie League's core rules.⁴⁶ These core rules were thereafter adopted into fantasy games revolving around other sports.⁴⁷

E. The Internet Boom

By the early 1990s, America was already in the midst of a growing fantasy sports revolution, featuring “[fantasy] magazines, season guides, radio shows, statistical services, management groups, sportswear and newsletters.”⁴⁸ Yet to many, fantasy sports were seen as “activit[ies] for outcasts [and] engaged [in] by those presumed to be overly bookish and socially challenged.”⁴⁹ One of the drawbacks to playing fantasy sports was the

18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 898 (2008) (noting a similar process of moving toward standardized rules also takes place in real sports, such as professional baseball).

⁴³ See Cunningham, *supra* note 25 at C10. See generally Walker, *supra* note 5 at 1D (mentioning the ten-category league format).

⁴⁴ See Cunningham, *supra* note 25 at C10; see also Frank Clancy, *For Rotisserie Baseball Fanatics, A Grand Sham*, L.A. TIMES, Apr. 30, 1986, at 1 (mentioning, as early as 1986, that some fantasy baseball leagues had moved from an auction to a draft format); White, *supra* note 42 at C6 (also discussing the option of a league draft).

⁴⁵ See Cunningham, *supra* note 25 at C10; see also White, *supra* note 42 at C6 (noting that by 1990 some fantasy baseball leagues had moved to a head-to-head format); Ed Spaulding, *Charpentier's Fantasy Football Digest Now a Real Winner*, HOUS. CHRON., Jul. 21, 1991, at 16 (mentioning the head-to-head format of fantasy sports).

⁴⁶ See Cunningham, *supra* note 25 at C10; *c.f.*, Robert Thomas Jr., *Sports World Specials: A Team of One's Own*, N.Y. TIMES, Aug. 20, 1984, at C2 (discussing the creation of a book, formalizing the core rules for Rotisserie baseball).

⁴⁷ *Id.*

⁴⁸ Cunningham, *supra* note 25 at C10.

⁴⁹ See Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RES. & REV. J. 29, available at 2005 WLNR 6724835.

amount of paperwork involved in calculating both individual player statistics and team statistics.⁵⁰

Then, in 1994, the Internet came along and changed everything.⁵¹ The Internet boom brought a “broad demographic shift in fantasy sports participation”⁵² because it enabled fantasy sports participants to instantaneously download tabulated statistics.⁵³ Thus, fantasy sports participants no longer needed pads of paper and calculators.⁵⁴ In addition, the Internet brought participants together from around the globe, whereas before fantasy sports participants had “to scramble to find playmates.”⁵⁵

With the Internet’s facilitation of fantasy sports, by the mid-1990s a number of traditional sports and entertainment companies had begun to enter the online fantasy sports marketplace.⁵⁶ The first of these companies to provide fantasy sports games on the web was the Entertainment Sports Programming Network (“ESPN”), which in 1995 launched its first entirely Internet-based fantasy baseball game.⁵⁷ By the year 2000, ESPN had ex-

⁵⁰ See Dennis Lynch, *Software Helps Handle Hassles of Running a Fantasy League*, CHI. TRIB., Sept. 17, 1998, at 7 (explaining that even though millions participate in fantasy sports leagues, “the major drawback of such play has been the paperwork involved,” and that “[t]he process of compiling statistics and sending out standings is time-consuming and tedious.”).

⁵¹ See *infra* notes 52 - 58 and accompanying text; see also Nicholas Bamman, *Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL’Y 231, 232 (2010) (noting that Internet gambling today is a \$24 billion annual industry, with about 25 percent of revenues derived from the United States); Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 71 (2010) (noting that Americans today spend roughly \$7 billion per year on Internet gambling).

⁵² Bernhard & Eade, *supra* note 49; see also Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 210 DUKE L. & TECH. REV. 2, ¶ 1 (2010) (“This phenomenal growth [in fantasy sports] can be explained in two words: the internet.”); Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited*, 39 SAN DIEGO L. REV. 201, 202 (2002).

⁵³ See *Fantasy Sports: A Booming Business*, MISS. LINK, Sept. 17, 2003, at B1, available at 2003 WLNR 13365412.

⁵⁴ *Id.*

⁵⁵ Greg Johnson & David G. Savage, *Supreme Court Calls Fantasy Baseball Safe, Refuses to Hear Major League’s Argument to Protect Statistics*, L.A. TIMES, Jun. 3, 2008, at A1.

⁵⁶ See *infra* notes 123 - 136 and accompanying text.

⁵⁷ See Regis Behe, *Fantasy Sports Leagues Put Armchair Quarterbacks in the League*, PITT. TRIB. REV. (Greensburg, PA), Dec. 14, 2002, available at 2002 WLNR 12019633.

panded its fantasy sports offerings into football, basketball, hockey, NASCAR, soccer, golf, and even fly fishing.⁵⁸

III. THE FANTASY SPORTS INDUSTRY TODAY

A. *Different Types of Fantasy Games*

Fantasy sports today represent approximately a \$5 billion per year industry.⁵⁹ Given the size of the fantasy marketplace, fantasy games are now subcategorized based on three attributes: (1) sport; (2) way of initially allocating players; and (3) season length.⁶⁰

⁵⁸ *Id.*; see also Patrick Hruby, *The Case Against Fantasy Sports*, WASH. TIMES, Apr. 29, 2003, at C1; Steve Brearton, *Fantasy Sports, Real Money: How the Fantasy Sports Leagues went from a Cute Office Diversion to a \$3 Billion (U.S.) Industry, Providing Daydreams for up to 30 Million North American Sports Fanatics*, GLOBE & MAIL (Toronto, Canada), Apr. 24, 2009, at 56 (noting that in 2009 FLW Outdoors Fantasy Fishing offered \$10 million in prizes during its Fantasy Fishing for Millions competition); Chris Dempsey, *Fantasy Revolution Online Craze is Intoxicating to Americans, and Expanding Outside the Sports World*, DENV. POST, Sept. 9, 2007, at B3 (“Fantasy NASCAR is growing, as is fantasy golf. There is fantasy tennis, fantasy soccer (who is Chelsea’s top midfielder again?), fantasy lacrosse, fantasy cricket and fantasy bass fishing.”); *c.f.* Anthony Vecchione, *Fantasy Sports: Has Recent Anti-Gambling Legislation ‘Dropped the Ball’ by Providing a Statutory Carve-Out for the Fantasy Sports Industry*, 61 SMU L. REV. 1689, 1693 (2008) (“A survey of fantasy sports players published in a 2003 article showed that 65% had football teams, 27% had baseball teams, 24% had basketball teams, 11% had hockey teams, 9% had NASCAR teams, and 3% had golf teams”).

⁵⁹ See Zach O’Malley Greenburg, *Get Real*, FORBES, Mar. 16, 2009, at 70 (“Add all these betting sums to revenues from magazine sales and stat-service subscriptions and you get \$468 per player, reports the Fantasy Sports Trade Association. That makes for a \$5 billion industry, not including undisclosed amounts from ads.”). *Cf.*, Mike Klis, *NFL Preview ‘07 Football Nation: Fantasy Football*, DENV. POST, Sept. 6, 2007, at J8 (“Fantasy football grosses more than \$1 billion a year, and that doesn’t include the private pots accumulated from the 4 million players in the free Yahoo.com league.”); Tim Feran, *Back in the Game: Major League Baseball Trying to Reattract (sic) Fantasy Players with New Online Forum*, COLUMBUS DISPATCH, Apr. 3, 2006, available at 2006 WLNR 5582002 (A 2006 “survey produced for the [Fantasy Sports Trade Association] indicates that more than \$3 billion is spent annually on publications, league fees, commissioner services, transaction fees and the purchase of fantasy-sports-site content.”).

⁶⁰ See *infra* notes 61 - 100 and accompanying text.

1. Different Fantasy Sports

Today's fantasy participants play games in a wide range of different sports.⁶¹ Fantasy football is currently the most popular, with an estimated 20 million participants per year.⁶² Indeed, at present “[t]he [fantasy] football season generates more revenue than the rest of the sports combined.”⁶³

Fantasy baseball is second in terms of popularity, with approximately 11 million annual participants.⁶⁴ While most sports fans consider fantasy baseball to be the original fantasy sport, one of the challenges in building its popularity is the extended length of the Major League Baseball season, and the need for fantasy baseball owners to monitor their teams on a more frequent basis than owners in other fantasy games.⁶⁵

Immediately behind fantasy baseball in popularity lie fantasy racing, basketball, and hockey.⁶⁶ According to the Fantasy Sports Ad Network, as of August 2006 there were 4.6 million participants in fantasy racing games (including fantasy NASCAR), 3.2 million participants in fantasy basketball games, and 1.9 million participants in fantasy hockey.⁶⁷

⁶¹ See *infra* notes 62 - 71 and accompanying text.

⁶² See Mike Vaccaro, *NFL Strife is Leaving Fans Awash in Denial*, N.Y. POST, May 13, 2011, at 72 (noting that in 2010 nearly 20 million people played fantasy football); see also Larry Copeland, *Americans Give Thumbs Up to Free Time – Mostly TV*, USA TODAY, Dec. 23, 2010, at 4A (noting that between 20 million and 30 million Americans play fantasy football); Gene Wang, *High-Stakes League Offers Camaraderie - and Agony of Defeat*, VIRGINIAN PILOT & LEDGER STAR (Norfolk, VA), Nov. 25, 2010, at 7.

⁶³ Gene Wang, *Fantasy Football Gets Benched*, WASH. POST, May 29, 2011, at D3.

⁶⁴ See *This is Not a Fantasy: Baseball Takes Legal Twist, Players Turn to Lawyers to Mediate League Disputes*, S. FLA. SUN-SENTINEL, Apr. 2, 2010, at A1 (noting that there are more than 11 million fantasy baseball participants in the United States); Richard Wilner, *Opening Day – Bloomberg Brings Numbers Game to Baseball Statistics*, N.Y. POST, Mar. 21, 2010, at 38.

⁶⁵ See Chuck Corder, *Small Talk*, PENSACOLA NEWS, Aug. 23, 2005, at D1, available at 2005 WLRN 27180356 (discussing “daily transactions” as the downfall of fantasy baseball).

⁶⁶ See *This is Not a Fantasy*, *supra* note 64 at A1 (referencing “fantasy basketball” and “fantasy NASCAR”); Childs Walker, *No More Chilly Reception for Fantasy Hockey Leagues*, BALT. SUN, Sept. 21, 2006, at E2; see also, *infra*, note 67 and accompanying text).

⁶⁷ See *About Fantasy Sports*, Fantasy Sports Ad Network, at <http://www.fantasysportsadnetwork.com/aboutfantasy.htm> (last visited Oct 17, 2011).

Finally, one other fantasy game worth noting is fantasy golf.⁶⁸ Fantasy golf is a niche game with a limited number of participants.⁶⁹ However, because the demographics of golf fans skew toward the higher income brackets, fantasy golf games often include high entry fees and high prize pools.⁷⁰ To meet the needs of golf fans, companies such as Fantasy Pro Tour Golf have recently begun to offer fantasy golf contests with prizes up to \$3,000 per season.⁷¹

2. Different Ways to Initially Allocate Players

For each type of fantasy sport, there are four potential ways to initially allocate players.⁷² The original way to allocate players in fantasy sports was through an auction.⁷³ Traditional auctions, the type used by the Rotisserie League, involve a bidding process among participants for players, one player at a time.⁷⁴ Each player is ultimately assigned to the participant that bids the greatest amount from a fixed sum of money for that player.⁷⁵ This continues until every team has “purchased” a full roster of players.⁷⁶

A second way to allocate players is through a “modified auction.”⁷⁷ In a modified auction, the price of each player is determined before the competition begins, and multiple participants in a single league may select the same player.⁷⁸ The modified auction is especially popular in short-duration leagues because it does not require all of the league’s participants to simulta-

⁶⁸ See Bill Pennington, *A Fantasy Fulfilled, Including Yelling at the TV*, N.Y. TIMES, Jun. 9, 2009, at D6.

⁶⁹ *Id.*

⁷⁰ See Josh Bousquet, *Minor Moves May Help Signal Bargain Values*, WORCHESTER TELEGRAM & GAZETTE, Jan. 14, 2009, at C4.

⁷¹ *Id.*

⁷² See Walker, *supra* note 5 at 1D.

⁷³ See *supra* note 29 and accompanying text (describing original Rotisserie League auction).

⁷⁴ See Walker, *supra* note 5, at 1D.

⁷⁵ See Bernhard & Eade, *supra* note 49.

⁷⁶ See Walker, *supra* note 5, at 1D.

⁷⁷ See *infra* notes 78 - 79 and accompanying text (describing modified auction leagues).

⁷⁸ For fantasy sports games that allocate players in this manner, see, e.g., *Rules, DRAFTSTREET*, <http://www.draftstreet.com/rules.aspx> (follow “Draft Styles” hyperlink; then follow “Salary Cap Leagues” hyperlink) (last visited Nov 7, 2011) (describing these leagues as “salary cap” leagues); *Salary Cap Football*, YAHOO! SPORTS, <http://football.fantasysports.yahoo.com/salcap> (last visited Nov. 7, 2011).

neously select players.⁷⁹ However, the downside to a modified auction is that it removes the element of “trading” from fantasy sports because trading players would not make sense if a particular player is already on more than one team’s roster.

A third way that some fantasy sports leagues allocate players is through a league draft.⁸⁰ Draft leagues take their inspiration from the way in which new players are allocated in the majority of real, professional sports leagues.⁸¹ Most fantasy sports leagues that begin their season with a draft adopt a “snake format draft,” meaning that participants select players in rotation, often with the same owner who selected first in round one, selecting last in round two, and vice-versa.⁸² The initial draft order is often determined by a random event.⁸³ However, in some of the more comprehensive fantasy sports competitions, owners have the opportunity to express their preference for a particular draft position before the draft begins.⁸⁴

Finally, in some rare cases, fantasy participants agree to have players allocated to their teams randomly by software provided by the league’s host site.⁸⁵ For example, a growing number of host sites (such as ESPN.com), provide an “Autopick Draft Option,” in which a computer program, rather

⁷⁹ See, e.g., *Rules*, *supra* note 78.

⁸⁰ For an example of a league that initially allocates players via draft, see, e.g., *Fantasy Football 2011*, CBS SPORTS.COM, http://football.cbssports.com/splash/football/spln/single/rules#rules_single_leagues (last visited Nov 7, 2011) (Oct. 18, 2011) (discussing the “live draft” and “automated draft” options).

⁸¹ See Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 N.W. J. INT’L L. & BUS. 403, 406–7 (2009) (“The first-year player draft in [American professional sports leagues] is a procedure under which clubs allocate negotiating rights to prospective players in inverse order of the clubs’ previous season on-the-field performance. . . . [T]he team with the poorest playing-field record during the previous season has the first choice of a player seeking to enter the league for the following season. The team with the next poorest record has the second choice, and so on until the team with the best record has picked. . . . These rounds continue until an appropriate number of players is selected.”).

⁸² See Walker, *supra* note 5, at 1D.

⁸³ See, e.g., *Fantasy Football 2011*, *supra* note 80 (stating that “[t]he order of the draft will be randomly generated between midnight and 6:00 AM ET either the day of, or the day before the draft.”).

⁸⁴ See, e.g., *Official Rules and Regulations of the NFBC*, NAT. FANTASY BASEBALL CHAMPIONSHIP, http://nfbc.stats.com/baseball/375_slow_rules.asp (noting the league’s draft format allows participants to express a preference for a particular slot in the draft order) (last visited Nov 7, 2011).

⁸⁵ See *infra* note 86 and accompanying text.

than a participant, “automatically drafts players to each team in the league on a scheduled draft date.”⁸⁶ Despite the efficiency of the “Autopick Draft Option,” this option remains relatively unpopular because it removes all skill from the drafting of players.

3. Different Season Lengths

Fantasy sports leagues also differ based on the lengths of their fantasy seasons.⁸⁷ Seasonal leagues (also known as “redraft leagues”) are the most common fantasy-season length.⁸⁸ In a seasonal league, the fantasy competition begins on the first day of a professional sport’s regular season, and concludes on the last day.⁸⁹ Thus, none of the fantasy team’s rosters or information carries over from one year to the next.⁹⁰ Rather, at the end of the season, the league ceases to exist.⁹¹ If the league’s participants thereafter wish to compete against each other for another season, the participants will need to conduct an entirely new player auction or draft before the following season begins.⁹²

Somewhat less common than seasonal leagues are perennial leagues (also known as “keeper leagues”) that extend beyond a single professional sports season.⁹³ The two main types of perennial leagues are dynasty leagues and rollover leagues.⁹⁴ In a dynasty league, each fantasy participant’s entire roster is carried over through the off-season, so fantasy participants are able to make player trades with one another during the off-season time period.⁹⁵ Meanwhile, in a rollover league, “each team can ‘keep’ a set number of

⁸⁶ *ESPN Fantasy Football 2011: Rules*, ESPN.COM, <http://games.espn.go.com/ffl/resources/help/content?name=drafts-autopick> (last visited Nov. 7, 2011).

⁸⁷ *See Definitions of the Various Fantasy Sports Leagues*, SPORTS FANATICS FANTASY BASEBALL, (Dec. 26, 2002), http://www.sportfanatics.net/Articles/General/Types_Of_Fantasy_Sport_Leagues.htm.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*; *see also* Liz Farmer, *Web Sites Offering Arbitration for Fantasy Sports Disputes*, DAILY REC. (Baltimore, MD), Sept. 10, 2007 (describing leagues where teams keep players beyond a given season as “keeper leagues”).

⁹⁴ *See Definitions of the Various Fantasy Sports Leagues*, *supra* note 87.

⁹⁵ *See id.*, *supra* note 87. *See also* David Kendrick, *Pure Fantasy*, SAN ANTONIO EXPRESS-NEWS, Jan. 6, 2007, at 2C (describing a “dynasty league” as one where a fantasy participant can keep a player on his team for as many years as he wants); *see*

players at the end of each season to be on their roster for next year,” with each participant filling in the remainder of his roster through a supplemental auction or draft.⁹⁶

Finally, some fantasy sports seasons last for less than one full professional sports season.⁹⁷ Of these partial season leagues, the most popular are daily leagues, which involve participants joining, paying entry fees, selecting players, and receiving prize money, all in a single day.⁹⁸ According to Brian Schwartz, the founder of the daily fantasy league website DraftStreet.com, daily fantasy sports leagues “appeal to aggressive fantasy sports players looking for more instant gratification than traditional fantasy leagues can offer.”⁹⁹ However, as *Wall Street Journal* fantasy sports reporter Nando DiFino has noted, daily games have struggled to “shake off the stigma of gambling.”¹⁰⁰

B. The Stakeholders

Within each of these types of fantasy sports games, there are six different stakeholder groups involved in the action.¹⁰¹

1. Participants

Participants are the individuals who compete in the fantasy sports leagues.¹⁰² In 2010, there were more than twenty-five million fantasy sports

also Cathy Fazio, *The Tribe Has Spoken, Liven up Your League*, GRAND RAPIDS PRESS, Jan. 20, 2005, at D2.

⁹⁶ See *Definitions of the Various Fantasy Sports Leagues*, *supra* note 87.

⁹⁷ See *Left Tackle LLC Subsidiary Announces Business Gains, Expansion*, DAILY PAK BANKER (Pakistan) Jan. 24, 2011, available at 2011 WLNR 1483977 [hereinafter *Left Tackle*] (referring to these games as the “short-term fantasy sports model” or “short-duration leagues”); Nando DiFino, *Everyday Fantasies*, WALL STREET JOURNAL ONLINE, Mar. 5, 2010, <http://online.wsj.com/article/SB10001424052748703915204575103652233621286.html>.

⁹⁸ See, e.g., FANTASY SPORTS LIVE, <https://www.fantasysportslive.com/contests.html> (last visited Nov. 7, 2011); DRAFT STREET, *supra* note 78. See generally Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, CONTRA COSTA TIMES (Walnut Creek, CA), Sept. 26, 2010, at 9A (discussing growing interest among fantasy sports participants in daily fantasy sports games).

⁹⁹ See *Left Tackle*, *supra* note 97.

¹⁰⁰ DiFino, *supra* note 97.

¹⁰¹ See *infra* notes 102 - 169 and accompanying text.

¹⁰² See Shea, *supra* note 20, at 11.

participants.¹⁰³ The typical fantasy sports participant is a male, in his middle to late 30s, with a bachelor's degree, and a household income of between \$75,000 and \$80,000.¹⁰⁴ He lives in the suburbs, spends between \$450 and \$500 per year playing fantasy sports, and competes mainly against friends he knows from real life.¹⁰⁵

There are also a number of important sub-segments of fantasy sports participants.¹⁰⁶ One of these sub-segments includes the "high-stakes participants," who play in several fantasy sports leagues per season, play in leagues with entry fees that exceed \$1,000 per season, and dedicate 10 or more hours per week to their fantasy team rosters.¹⁰⁷ High-stakes fantasy participants come from a wide range of different backgrounds. One example of a high-stakes fantasy participant is a small business owner from Oshkosh, WI, who, in a recent interview with his local newspaper, explained that he spends 15 to 20 hours per week attending to his fantasy sports teams and up to 30 hours per week researching players for his fantasy football drafts.¹⁰⁸

¹⁰³ See FANTASY SPORTS TRADE ASSOCIATION, <http://www.fsta.org> (last visited Nov. 7, 2011); see also Tom Mulhern, *Fantasy Becomes Reality: Three Businesses Based in Madison are Riding a Recession-Proof Wave of Web-Based Fantasy Sports*, WIS. ST. J., June 27, 2010, at F1, available at 2010 WLNR 13369828 (noting that according to a 2008 report from the Fantasy Sports Trade Association, "[i]t is estimated 25.1 million Americans age 12 and older played fantasy sports in 2008"); BRAD R. HUMPHRIES & DENNIS TAMSAY HOWARD, *THE BUSINESS OF SPORTS: PERSPECTIVES ON THE SPORTS INDUSTRY* 269 (2008) (estimating the number of people who have tried fantasy sports to be as high as 35 million).

¹⁰⁴ See Mulhern, *supra* note 103; see also Jeremy Fowler & Chris Silva, *Living in a Fantasy World: 'General Managers' Take Their Sports Leagues Seriously*, FLA. TODAY (Melbourne, FL), Jun. 29, 2003, at 1, available at 2003 WLNR 18145423; Lee, *supra* note 5, at 69-70 (describing the typical fantasy sports contestant as being educated and having disposable income); cf. Patti Waldmeir, *Protect the Facts for Fantasy*, FIN.TIMES, Oct. 23, 2007, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto102320071306479921&page=2 ("[A]ny American whose social group includes 20- or 30-something men with a broadband connection can attest to the popularity of sports fantasies online: at every cocktail party or backyard barbecue, talk soon turns to the fantasy leagues.").

¹⁰⁵ See Mulhern, *supra* note 103; see also Fowler & Silva, *supra* note 104.

¹⁰⁶ See *infra* notes 107 - 110 and accompanying text.

¹⁰⁷ See generally Josh Bousquet, *Hopefuls Span Age and Gender*, WORCESTER TELEGRAM & GAZETTE, Aug. 22, 2008, at C4 ("Another group that is being caught up in the fantasy world is composed of high rollers. If any of you upper-crust members happen to come across these words, I direct you to the Fantasy Football Open Championship.").

¹⁰⁸ *Fantasy Footballers Cash In*, POST-CRESCENT (Appleton, WI), Jan. 16, 2009, at A1 (referencing fantasy sports participant Dave Gerczak).

Another example is an associate professor of computing and software systems at the University of Washington.¹⁰⁹ In an interview with the *New York Times*, he explained that he “spends about 10 hours a week handling the budgets of fantasy teams in high-stakes events,” and pays a \$1,300 entry fee each year to compete in the National Fantasy Baseball Championship.¹¹⁰

A second sub-segment of fantasy sports participants are female participants.¹¹¹ According to a recent survey by the Fantasy Sports Trade Association, female participants are the fastest growing sub-segment of fantasy sports participants.¹¹² While once representing just two percent of all fantasy sports participants, females now compose between 15 and 20 percent of the overall fantasy marketplace.¹¹³ When compared to fantasy sports participants overall, female participants are often described as being more interested in the social component of fantasy leagues.¹¹⁴ In addition, many female participants prefer to obtain their fantasy sports advice from websites geared toward women, such as Jordan Zucker’s *Girls Guide to Fantasy Football*.¹¹⁵

¹⁰⁹ See Vincent M. Mallozzi, *In Fantasy Sports, It Helps Being a Rocket Scientist*, N.Y. TIMES, Apr. 15, 2007, available at 2007 WLNR 7152547 (referencing fantasy sports participant Clark Olson).

¹¹⁰ *Id.*

¹¹¹ See Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is now Implicitly Legal Under State Law, and now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L. J. 1257, 1259 (2008) (noting that “[o]ut of the 8.5 million people who play fantasy football, 1 million are women”); see also Jonathan Beer, *Media World: Ranks of Women Fantasy Football Players Growing*, DAILY FINANCE, Aug. 13, 2009, <http://www.dailyfinance.com/story/media/media-world-ranks-of-women-fantasy-football-players-growing/19125945> (noting that Yahoo! estimates about 12 percent of its fantasy sports contestants are women).

¹¹² See Anna Kim, *Women Share the Fantasy on Football Draft Day: Local All-Female Group Reflects Trend of a New Audience Tracking the NFL in Leagues of their Own*, BUFFALO NEWS, Sept. 9, 2009, at D1; *Games People Play*, GRAND RAPIDS PRESS, Sept. 4, 2008, at D8.

¹¹³ *Calling All Fantasy Sports Widows - When His Fantasy is His Sports Team and Not You*, BUS. WIRE, Aug. 27, 2009, <http://www.businesswire.com/news/home/20090827005154/en/Calling-Fantasy-Sports-Widows---Fantasy-Sports> (estimating the percentage of women fantasy participants at 15 percent); Kim, *supra* note 112 at D1; *Games People Play*, *supra* note 112, at D8 (noting that women currently make up 15 percent of all participants, compared to 3 percent in 2000).

¹¹⁴ *Cf.* Kim, *supra* note 112, at D1 (noting the number of all-woman leagues has increased steadily, as well as the number of women participating in workplace leagues).

¹¹⁵ See Beer, *supra* note 111 (noting that Jordan Zucker is an actress and female fantasy sports participant, who previously appeared on the television sitcom

A final sub-segment of the fantasy sports participants are those who compete in “family friendly” or educational leagues.¹¹⁶ Participants in family friendly leagues seek to participate within “an online environment where grownups and kids can enjoy fun and interactive features that are educational.”¹¹⁷ In stark contrast to the high-stakes participants, family gamers are generally unconcerned with league entry fees and prize money.¹¹⁸ Rather, they care primarily about the interactive experiences their games provide.¹¹⁹

2. Host Sites

For each type of fantasy league, one of the first league decisions involves choosing a “host site.” “Host sites” are the websites that store league data and serve as the place where participants make changes to their rosters.¹²⁰ These sites provide a platform for real-time statistical updates and tracking.¹²¹ In addition, some host sites collect league entry fees, distribute prize money, manage message boards, and provide expert analysis.¹²²

In terms of market share, there are currently three dominant host sites in today’s fantasy sports marketplace: ESPN, Yahoo!, and CBS Sports.¹²³ Both the ESPN and Yahoo! sites offer only one type of hosting: a basic, free service available to all users.¹²⁴ By contrast, CBS Sports offers three types of

“Scrubs”); *see also* GIRLS GUIDE TO FANTASY FOOTBALL, <http://girlsguidetofantasyfootball.com> (last visited Oct. 17, 2011).

¹¹⁶ *See infra* notes 117 - 119 and accompanying text.

¹¹⁷ FAMILY FANTASY SPORTS WEBSITE, <http://familyfantasysports.com/about-us> (last visited Oct. 17, 2011).

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See* *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *1 (D.N.J. June 20, 2007) (noting that host sites obviate the need of early fantasy sports participants to compile lineups and update player statistics manually).

¹²¹ *See id.*

¹²² *See id.*

¹²³ *Cf.* Wang, *supra* note 3, at D3 (“Yahoo is the most visited fantasy football site, according to recent data compiled by Experian Hitwise, a leading Internet analytics service provider. Yahoo, which offers free team scoring but charges for its enhanced game tracker function, claimed nearly 46 percent of all fantasy football visits in September 2010, with ESPN next at 34 percent.”).

¹²⁴ *See* *ESPN Fantasy Baseball 2011: Rules*, ESPN.COM, <http://games.espn.go.com/flb/content?page=flbrulesindex2011> (last visited Oct. 17, 2011). Note, however, that both ESPN and Yahoo charge users for the purchase of premium add-on services. For example, Yahoo sells four premium-add on-services:

hosting: Free, Commissioner, and Premium.¹²⁵ The CBS Commissioner service costs participants \$179.95 per league (\$17.99 per team in a 10-team league), and gives participants the ability to view live game scoring, as well as “complete control of . . . rules, scoring, and overall setup.”¹²⁶ Meanwhile, the CBS Premium service costs anywhere from \$29.99 to \$499.99 per team and includes a cash prize for the league winner that ranges from 50% to 70% of the league’s total entry fees.¹²⁷ Thus, fantasy sports participants that select CBS’s Premium hosting service do not need to privately collect entry fees or pay prize money.¹²⁸

In addition to these three dominant host sites, most professional sports leagues offer free hosting services through their own centralized league,¹²⁹ and a number of niche businesses operate host sites for specialized participant groups.¹³⁰ For example, high-stakes participants today have a variety of web-hosted competitions from which to choose.¹³¹ One such competition is the World Championship of Fantasy Football (“WCOFF”), which offers an annual, approximately 600-participant, fantasy football tournament with a \$1,800 entry fee and a \$300,000 grand prize.¹³² Another competition, the Fantasy Football Players Championship (“FFPC”), offers a somewhat smaller

a league counting report; a trade review service; a fantasy sports guide; and team-management and recommendation software. See *Yahoo Fantasy Baseball Premium Add-Ons*, YAHOO! SPORTS, <http://baseball.fantasysports.yahoo.com/b1/premiumaddons>.

¹²⁵ See *Fantasy Baseball 2011*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/single/chart> (last visited Oct. 17, 2011).

¹²⁶ *Fantasy Baseball 2011 Commissioner*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/mgmt> (Oct. 17, 2011).

¹²⁷ See *Fantasy Baseball Premium Games 2011*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/single> (last visited Oct. 17, 2011).

¹²⁸ See *Fantasy Baseball Premium Games 2011*, *supra* note 127.

¹²⁹ See, e.g., *Major League Baseball’s Fantasy Baseball*, MLB.COM, http://mlb.mlb.com/mlb/fantasy/?tcid=nav_mlb_fantasy (last visited Oct. 17, 2011); *National Football League’s Fantasy Football*, NFL.COM, <http://www.nfl.com/fantasy> (last visited Oct. 17, 2011).

¹³⁰ See *infra* notes 132 - 136 and accompanying text.

¹³¹ See *infra* notes 132 - 134 and accompanying text.

¹³² See Wang, *supra* note 62 at 7; see also *Fantasy Footballers Cash In*, POST-CRESCENT (Appleton, WI), Jan. 16, 2009, at A1 (noting that the World Championship of Fantasy Football most recently consisted of 600 total teams); Mark St. Amant, *When Fantasy Players Go All In*, N.Y. TIMES, Aug. 2, 2007, at 16 (“The WCOFF is this country’s original high-stakes fantasy football league, the Super Bowl of the hobby. The entrance fee alone is almost \$2,000 . . . including a whopping \$300,000 champion’s purse.”).

fantasy football tournament, where all league entry fees are placed into an escrow account.¹³³ Meanwhile, the National Fantasy Baseball Championship (“NFBC”) offers a high-stakes fantasy baseball contest, which includes over 300 teams, a \$1,300 per participant entry fee, and a grand prize of more than \$100,000.¹³⁴

Finally, for the family-oriented segment of fantasy sports participants, Family Fantasy Sports provides hosting services for games that are free to enter.¹³⁵ While many of the Family Fantasy Sports games have prizes for the winners, these prizes “are focused on kids and families,” and are intended to encourage healthy lifestyle behaviors such as fitness and saving money for college.¹³⁶

3. Commissioners

In addition to selecting an appropriate hosting service, every fantasy sports league also needs to select a commissioner.¹³⁷ “Commissioners” are those who manage fantasy sports leagues by establishing league rules and resolving disputes over rule interpretations.¹³⁸ In many high-stakes commercial leagues (e.g., the WCOFF, FFPC and NFBC), the competition pro-

¹³³ See *Fantasy Footballers Cash In*, *supra* note 108, at A1.

¹³⁴ See Mike Rainey, *Want to Make a Bet . . . On Fantasy Baseball?*, ST. LOUIS POST-DISPATCH, Mar. 12, 2007, at C2.

¹³⁵ See FAMILY FANTASY SPORTS, <http://familyfantasysports.com/fantasy-leagues/prize-rules/> (last visited Oct. 17, 2011).

¹³⁶ *Id.*

¹³⁷ See *infra* notes 138 - 143 and accompanying text.

¹³⁸ See Walker, *supra* note 5, at 1D; see also Bernhard & Eade, *supra* note 49, at 30 (“The commissioner manages the league by establishing league rules and resolving disputes over rule interpretations. Commissioners may also be responsible for publishing league standings (or selecting the Internet service that will do so), ensuring that all fees are paid, and organizing drafts, league parties, and/or award ceremonies.”); Hancock, *supra* note 20, at 325 (“Using online websites to host the league, the ‘commissioner’ of the league gathers each gamer’s entry fee to create a cash prize.”).

vides a league commissioner.¹³⁹ In most private fantasy leagues, one of the league's participants is nominated to serve in that role.¹⁴⁰

In recent years, there has been movement in both commercial and private fantasy leagues to outsource some of the commissioner's responsibilities to a third-party dispute resolution business, such as SportsJudge.com.¹⁴¹ While the decisions of these third-party dispute resolution businesses are not inherently legally binding, a fantasy league could write into its league constitution an arbitration clause that would give these rulings a binding effect.¹⁴² For example, the SportsJudge.com Model League Constitution recommends that fantasy sports participants adopt language in their league rules that states "[a]ny and all disputes amongst league members about any of the rules and terms related to either this league or the league constitution shall be resolved, in a final and binding manner, by SportsJudge.com."¹⁴³

4. Treasurers

Fantasy sports leagues with entry fees and prize money also must select a treasurer to collect money at the beginning of the season, and to distribute it to the winners at the season's end.¹⁴⁴ In high-stakes commercial leagues, an employee of the host site serves in this role.¹⁴⁵ In private leagues, this job

¹³⁹ See, e.g., *National Fantasy Baseball Championship Rules*, NAT. FANTASY BASEBALL CHAMPIONSHIP, http://nfbc.stats.com/baseball/nfbcdoubleplay_rules.pdf (discussing throughout the role of the NFBC's internal commissioner) (last visited Oct. 17, 2011); cf. Talalay, *supra* note 64, at 1A. ("Fort Lauderdale-based CBSSports.com gets daily inquiries but encourages players to resolve their own disputes unless they are playing premium games in which the company, rather than a league member, serves as commissioner.").

¹⁴⁰ See *Fantasy Sports: A Booming Business*, *supra* note 53 ("In addition to owners, each league carries a commissioner, someone responsible for managing the league.").

¹⁴¹ See SPORTSJUDGE, <http://www.sportsjudge.com> (last visited Oct. 17, 2011) (discussing SportsJudge's role in providing outside dispute resolution to fantasy sports leagues); Waldmeir, *supra* note 104 ("But, as always, where two or three people gather together online there will be disputes and, as fantasy sports continue to grow, there are likely to be more and more of them. Mr. Edelman has set up a website, www.SportsJudge.com, to arbitrate these virtual disputes online. All this legal activity is a sure sign that fantasy sports have finally come of age. Even alternative realities need some rules to live by.").

¹⁴² See *infra* note 143 and accompanying text.

¹⁴³ See Sample SportsJudge.com League Constitution (document on file).

¹⁴⁴ See *infra* notes 145 - 154 and accompanying text.

¹⁴⁵ See, e.g., *National Fantasy Baseball Championship Rules*, *supra* note 139 at 11.

is often performed by one of the participants.¹⁴⁶ Like with commissioner services, however, a growing number of private leagues are outsourcing the treasury role to third parties.¹⁴⁷

The most well-known of these third-party treasury sites is LeagueSafe, which was launched in March 2008.¹⁴⁸ LeagueSafe allows fantasy sports participants to transfer funds directly from their bank accounts to the website.¹⁴⁹ Once LeagueSafe receives league funds, it deposits them into an interest-generating, FDIC-insured bank account with either U.S. Bank or The Bancorp Bank.¹⁵⁰ At the end of the season, LeagueSafe disperses these funds “in accordance with [each fantasy] league’s rules.”¹⁵¹ In exchange for its services, LeagueSafe charges users who wish to transfer money (by paper check or through an “electronic funds transfer”) a \$3 fee.¹⁵²

Another company that provides third-party treasury services to fantasy sports leagues is Fantasy Sports Vault (“FSV”), which declares on its website that its mission is “to provide a secure, efficient, flexible, easy to use and neutral 3rd party proprietary virtual treasurer system to manage your fantasy league’s money.”¹⁵³ According to the FSV website, like LeagueSafe, “FSV secures . . . money into one of two holding accounts, both located at FDIC insured banks.”¹⁵⁴ However, the FSV website does not prominently disclose which banks hold the participant funds.

¹⁴⁶ See *How to Eliminate Those Roto Dump Trades*, CINCINNATI POST, Aug. 11, 1998, at 5D (suggesting that every fantasy league should select one of its participants to serve as its treasurer).

¹⁴⁷ See *infra* notes 148 - 154 and accompanying text.

¹⁴⁸ See Steve Bills, *Offering Real Security to Fantasy Leagues*, AM. BANKER, Oct. 5, 2008, at 5, available at 2008 WLNR 18602682.

¹⁴⁹ See *How It Works*, LEAGUESAFE.COM, <https://www.leaguesafe.com/HowItWorks> (last visited Nov. 9, 2011).

¹⁵⁰ *Id.*; see also Bills, *supra* note 148.

¹⁵¹ See *How It Works*, *supra* note 149.

¹⁵² See *Payment Provider Offers Prepaid Cards for Fantasy Sports*, CARDLINE, Oct. 3, 2008, at 3, available at 2008 WLNR 18808298.

¹⁵³ *Why Fantasy Sports Vault*, FANTASYSPORTSVAULT.COM, <http://www.fantasysportsvault.com/View/whyfsv.aspx> (last visited Nov. 9, 2011).

¹⁵⁴ *FAQs*, FANTASYSPORTSVAULT.COM, <http://www.fantasysportsvault.com/View/Faqs.aspx> (last visited Nov. 7, 2011).

5. Strategic Advisors

Then there are the strategic advisors, who make their living by providing advice to other fantasy sports participants.¹⁵⁵ Much like stock analysts on Wall Street, fantasy sports advisors devote their careers to following the performances of professional athletes in far greater detail than the average working professional could do independently.¹⁵⁶

The range of services provided by fantasy sports advisors varies significantly.¹⁵⁷ Some advisory websites provide generalized information about premier players. For example, the advisory sites of Sandlot Shrink and Roto Experts provide information about specific players they believe are likely to perform well.¹⁵⁸ Other sites, such as Rotowire.com, provide news wire updates on a broader range of players, many of whom still compete on a minor league level.¹⁵⁹ Still other websites provide a call-in line, to which fantasy sports participants may call and pay by the minute to speak with a self-proclaimed fantasy sports “expert.”¹⁶⁰

Finally, the newest form of fantasy sports advice occurs through “analytical tools” that assist participants in drafting players and optimizing their weekly lineups.¹⁶¹ One such provider of fantasy advice via “analytical tools” is Bloomberg Sports: a division of the financial services company Bloomberg L.P.¹⁶² In 2010, Bloomberg Sports launched its analytical tools business to help fantasy participants optimally draft their teams at the beginning of the season, and then analyze trade offers and potential roster moves during the season.¹⁶³ Today, the Bloomberg Sports advisory software “syncs with CBSSports.com, ESPN and Yahoo! to read the settings and teams in those

¹⁵⁵ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁶ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁷ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁸ See *Subscription Info*, THE SANDLOT SHRINK, <http://www.sandlotshrink.com> (last visited Nov.7, 2011); see also ROTOEXPERTS, <http://www.rotoexperts.com/sjowbranch.php?id=94> (last visited Nov.7, 2011).

¹⁵⁹ See ROTOWIRE, <http://www.rotowire.com> (last visited Nov. 9, 2011).

¹⁶⁰ See ADVISOR FANTASYSPORTS GURU, <https://www.keen.com/details/Advisor-FantasySports-Guru/Fantasy-Sports/5300988> (last visited Nov. 9, 2011).

¹⁶¹ *Front Office 2011*, BLOOMBERG SPORTS, <http://bloombergsports.com/frontoffice/about> (last visited Nov. 9, 2011).

¹⁶² *Frequently Asked Questions*, BLOOMBERG SPORTS, <https://www.bloombergsports.com/faq> (last visited Nov. 9, 2011).

¹⁶³ *Id.*

leagues and customize rankings, recommendations and analysis to the settings of the league.”¹⁶⁴

6. Insurers

Finally, there is even an emerging insurance market to protect high-stakes fantasy sports participants from monetary loss in the event of an injury to a player on one’s fantasy sports team.¹⁶⁵ The first insurance company to get into the business of fantasy sports was Fantasy Sports Insurance (“FSI”), which is based out of Long Island, NY.¹⁶⁶ Like all traditional insurance policies, FSI insurance policies are underwritten by an A-rated carrier, Lloyd’s of London.¹⁶⁷

Currently, FSI policies insure fantasy participants for up to \$1,900 in losses of league entry fees, league transaction fees, and fantasy magazine subscriptions, if the purchaser of the policy has a player on his fantasy team that misses more than a certain number of games in a season due to injury.¹⁶⁸ In at least one instance, FSI has partnered with a high-stakes fantasy sports host site, the National Fantasy Baseball Championship, to provide contest participants with the ability to immediately insure one of their players drafted in that contest.¹⁶⁹

IV. LEGAL RISKS FOR FANTASY SPORTS HOST SITES

Although some fantasy sports stakeholders would like their games to be free from government regulation, the fantasy sports industry today is indeed subject to a wide range of federal and state laws.¹⁷⁰ Most directly,

¹⁶⁴ *Id.*

¹⁶⁵ See Nando Di Fino, *A New Kind of Protection*, WALL ST. J., Sept. 1, 2009, <http://online.wsj.com/article/SB10001424052970203550604574360691019757738.html>.

¹⁶⁶ See *id.*; see also Alex Prewitt, *This NFL Insurance Policy is No Fantasy*, USA TODAY, Aug. 26, 2009, http://www.usatoday.com/sports/football/fantasy/2009-08-24-insurance_N.htm?csp=34.

¹⁶⁷ See Di Fino, *supra* note 165; see also Prewitt, *supra* note 166.

¹⁶⁸ See *Fantasy Baseball*, FANTASY SPORTS INSURANCE.COM, <http://www.fantasysportsinsurance.com/fantasy-baseball.aspx> (last visited Nov. 9, 2011) (noting that Fantasy Sports Insurance offers insurance policies to protect against injury to a single player, two players, or three players).

¹⁶⁹ See *Fantasy Sports Insurance*, NAT. FANTASY BASEBALL CHAMPIONSHIP, <http://nfbcb.com/baseball/insurance.asp> (last visited Nov. 9, 2011).

¹⁷⁰ See *infra* notes 172 - 305 and accompanying text.

fantasy sports host sites must follow federal and state laws related to gaming activities and intellectual property rights.¹⁷¹

A. State Gambling Law

State gambling law is perhaps the most relevant area of law pertaining to fantasy sports host sites.¹⁷² According to the *Merriam-Webster Online Dictionary*, “to gamble” is defined as “to play a game for money or property,” or “to bet on an uncertain outcome.”¹⁷³ However, in most states, not every “game for money” or “bet on an uncertain outcome” is defined as illegal gambling.¹⁷⁴ Rather, most states maintain explicit carve-outs that permit certain activities, such as stock trading, that otherwise would seemingly fall under the category of gambling.¹⁷⁵

1. Is Fantasy Sports Illegal Gambling under State Law?

In most states, a plaintiff can make a *prima facie* claim of illegal gambling by showing that an activity involves three elements: “consideration,”

¹⁷¹ See *infra* notes 172 - 305 and accompanying text.

¹⁷² See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1202 (2007) (“[The] natural approach to accessing the legality of fantasy sports is to begin with an analysis of state laws for two reasons. First, most federal gambling laws were enacted to help states enforce their own gambling laws. Second, given the complementary [sic] or supplemental nature of federal gambling laws to state gambling laws, those that first look to the federal laws can sometimes miss the larger theoretical framework underlying these federal laws.”).

¹⁷³ *Gamble Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gamble> (last visited Nov. 9, 2011).

¹⁷⁴ See, e.g., MONT. CODE ANN. §23-5-802 (2010) (permitting under gambling law certain fantasy sports games); see also *S.E.C. v. J.W. Howrey Co.*, 328 U.S. 293, 298-99 (1946) (noting that Congress, under the Securities Act of 1933, has insulated from state gambling liability “investment contracts,” which the Supreme Court has defined as contracts pertaining to transactions “whereby a person [(i)] invests his money [(ii)] in a common enterprise and [(iii)] is led to expect profits [(iv)] solely from the efforts of the promoter or a third party . . .”).

¹⁷⁵ See Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U.L. REV. 371, 373 (2006) (“To characterize investing as gambling has become a trite and toothless analogy. However, most worn-out proverbs remain in the conventional wisdom because a kernel of truth continues to resonate with those who need them. In fact, the stereotype of an investor as a gambler seems particularly well deserved.”).

“reward,” and “chance.”¹⁷⁶ Each of these elements has its own distinct definition.¹⁷⁷

The element of “consideration” is described as a “*quid pro quo*,” or something in exchange for something else.¹⁷⁸ Most courts have construed the term “consideration” narrowly in the context of gambling, limiting its definition to instances in which a participant provided money or a valuable item of property in exchange for the chance of greater winnings.¹⁷⁹ However, a minority of courts have adopted the true contract-law meaning of the word “consideration,” and found that “consideration” involves any legal detriment, even non-monetary in value, in exchange for the chance to win a prize.¹⁸⁰

¹⁷⁶ See *Geis v. Cont'l Oil Co.*, 511 P.2d 725, 727 (1973) (noting, for example, that under Utah law “the statutory elements of a lottery are: (1) prize; (2) chance; and (3) any valuable consideration.”); see also *McKee v. Foster*, 347 P.2d 585, 590 (1959) (noting same under Oregon law); *Valentin v. El Diario Prensa*, 427 N.Y.S.2d 185, 186 (N.Y.C. Civ. Ct. 1980) (noting that in New York State, three elements are needed to constitute an illegal lottery: (1) consideration, (2) chance, and (3) a prize); *People v. Hunt*, 162 Misc. 2d 70, 71 (N.Y.C. Crim. Ct. 1994) (“Gambling occurs when a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”) (internal citations and quotations omitted).

¹⁷⁷ See *infra* notes 178 - 188 and accompanying text.

¹⁷⁸ CORBIN ON CONTRACTS § 110; see also RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for. . .The promise may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.”); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CONTRACTS: CASES, PROBLEMS AND MATERIALS 137-38 (5th ed. 2008).

¹⁷⁹ See, e.g., *Albertson's, Inc. v. Hansen*, 600 P.2d 982, 986 (Utah 1979); *Cudd v. Aschenbrenner*, 377 P.2d 150, 155-56 (Or. 1962) (finding that participant's expending of time, effort or inconvenience do not amount to consideration for purposes of Oregon's anti-gambling statute); *Glick v. MTV Networks*, 796 F. Supp. 743, 747 (S.D.N.Y. 1992) (noting the New Jersey Attorney General's position that under the current New Jersey gambling statute, “legislative intent was to exclude from the statutory elements composing the gambling offense the sort of personal inconvenience which will constitute consideration sufficient to support a contract.”).

¹⁸⁰ See *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 953-54 (Wash. 1969) (en banc) (applying simple contract theory as a basis to find consideration in the gaming context); see also *Affiliated Enters., Inc. v. Walker*, 5 A.2d 257, 259-60 (Del. Super. Ct. 1939) (using Professor Williston's classic definition of con-

Similarly, the element of “reward” is the prize that one gets for winning a bet. Courts have held that a reward must be tangible in form.¹⁸¹ However, something tangible, even of small value, is sufficient to constitute a reward.¹⁸²

Finally, the element of “chance” is defined as “something that happens unpredictably without discernible intention or observable cause.”¹⁸³ In other words, courts have found that the element of chance requires that a game’s result be driven *not* by “judgment, practice, skill or adroitness,” *but rather* by factors entirely outside of the participant’s control.¹⁸⁴ To determine whether a particular activity satisfies the gambling element of chance, courts will traditionally apply one of three tests: the “predominant purpose test,” the “any chance test,” or the “gambling instinct test.”¹⁸⁵ The “predominant purpose test,” which is applied by most states, deems an activity to be one of chance where “greater than 50 percent” of the result is derived

sideration in the contract law context to determine whether consideration was present in a gambling context).

¹⁸¹ See, e.g., *State v. 26 Gaming Machs.*, 356 Ark. 47, 57 (2004) (noting that an intangible reward, such as viewing a nude woman on a video strip poker game, does not qualify as a reward for purposes of gambling law).

¹⁸² See, e.g., *South Carolina Law Enforcement Div. v. 1 Speedmaster S/N 00218*, 2001 WL 2139081, at *4 (May 25, 2011).

¹⁸³ *Chance Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/chance> (last visited Nov. 7, 2011).

¹⁸⁴ *State v. Gupton*, 30 N.C. 271, 273-74 (1848); see also *Valentin v. El Diario Prensa*, 427 N.Y.S.2d 185, 187 (N.Y. Civ. Ct. 1980) (noting that a game is best defined as one of chance if “[t]he winners are not chosen on their personal qualities, but rather on whether or not their loved ones can get together enough money to beat the competition in buying sufficient seventeen(¢)-cent coupons.”); *People v. Hunt*, 616 N.Y.S.2d 168, 170 (N.Y. Crim. Ct. 1994) (finding that a “contest of chance is defined as any contest, game, gambling scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”) (internal citations omitted); *Utah State Fair Ass’n v. Green*, 249 P. 1016, 1020 (Utah 1926) (noting that a Utah state statute describes a game of chance as “a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, are thwarted by chance; a game in which hazard entirely predominates”).

¹⁸⁵ Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 390-94 (2009) (noting a fourth test, the “material element test,” which seems to conflate with the predominant purpose test).

from chance.¹⁸⁶ By contrast, the “any chance test” finds that an activity is based on chance if “a particular game contains any chance that influences the outcome of the game,”¹⁸⁷ and the “gambling instinct test . . . looks to the nature of an activity to determine if it appeals to one’s gambling instinct.”¹⁸⁸

2. Is Fantasy Sports Illegal Gambling? (Majority View)

A majority of states adopt a liberalized definition of “consideration” and the “predominant purpose test” as the measure of chance. In these states, a host site’s risk of liability under state gambling law varies based on the rules and structure of that particular fantasy sports game.¹⁸⁹

On one end of the spectrum, host sites that offer free league entry are unlikely to violate state gambling laws because those games fail to meet the element of “consideration.”¹⁹⁰ Similarly, fantasy sports games that do not provide prizes to winners are not likely to violate state gambling laws because they fail to meet the element of “reward.”¹⁹¹ Meanwhile, seasonal and perennial fantasy sports leagues that initially allocate players via a traditional auction are probably legal because the results of these games are driven primarily based on skill, rather than chance.¹⁹²

By contrast, other forms of pay-to-play fantasy sports games present greater legal risk.¹⁹³ For example, “modified auction,” “draft,” and “autopick” leagues are more likely to be categorized as games of chance because fantasy participants in these leagues are denied the strategic opportunity to bid up the price of certain players based on their presumptions

¹⁸⁶ *Id.* at 392 (citing *Dep’t of Corr. v. Worker’s Comp. Appeals Bd.*, 90 Cal. Rptr. 2d716, 720 (Cal. Ct. App. 1999) (defining the term “predominant” as “greater than 50 percent”).

¹⁸⁷ *Id.* at 393.

¹⁸⁸ *Id.* at 393–94.

¹⁸⁹ See *Cabot & Csoka*, *supra* note 172, at 1207 (arguing that whether a fantasy sports game is illegal under state gambling law “varies based on the method of play of the fantasy game at issue”).

¹⁹⁰ See, e.g., *Humphrey*, WL 1797648 at *10 (noting that a minimal entry fee paid by a fantasy sports participant to a host site to compete in a fantasy sports game was not consideration for gambling purposes but rather consideration merely for the day-to-day statistical services provided by the website).

¹⁹¹ See *supra* notes 178 - 180 and accompanying text.

¹⁹² See *supra* notes 181 - 182 and accompanying text.

¹⁹³ See *supra* notes 183 - 188 and accompanying text.

about competitor preference.¹⁹⁴ In addition, the “draft” method of initially allocating players includes an additional element of chance with respect to a participant’s selection order in the fantasy league’s draft.¹⁹⁵ Meanwhile, the “autopick” method is based exclusively on chance, as participants are not making any independent decisions about player allocation.¹⁹⁶

Along these same lines, pay-for-play fantasy sports leagues that extend for less than a full professional sports season involve substantially greater levels of chance than full season leagues, and thus also present heightened risks under state gambling law.¹⁹⁷ This is because short-season fantasy sports games do not extend over a period of time sufficient in length for a fantasy sports participant’s strategic and negotiating skills to offset “chance factors such as the physical and mental conditions of players, potential problems between team members, and the game-time weather conditions.”¹⁹⁸ In addition, team-owners in one-day fantasy sports leagues lack the opportunity to participate in strategic gamesmanship, such as negotiating trades with other owners, or engaging in other “team management” activities, such as adding or dropping players.¹⁹⁹

3. Stricter Views Toward Fantasy Sports

Fantasy sports games, meanwhile, face a far greater risk of liability in a minority of states that adopt one of four alternative positions.²⁰⁰ First, in

¹⁹⁴ See Cabot & Csoka, *supra* note 172, at 1209 (noting that in auction-based fantasy sports games, “the fantasy owner must use strategy in assessing the other team owners. For example, do you risk bidding on players that you do not want simply to drive up their price and to reduce the amount of money that other teams have to bid on players that you want? Further, the team owner must prepare to make adjustments in the course of the draft to accommodate the players chosen and the price paid.”).

¹⁹⁵ See *supra* notes 181 - 182 and accompanying text.

¹⁹⁶ See *supra* notes 181 - 182 and accompanying text.

¹⁹⁷ See *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 629 (N.C. Ct. App. 2007) (noting that the length of a game is also an important issue in poker, as in the short term the game is primarily one of chance, whereas in the long term skill seems to predominate); cf. Geoffrey T. Hancock, Note, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law*, 31 T. JEFFERSON L. REV. 317, 349 (2008) (noting that in regular, full-season fantasy sports contexts, the “prolonged period” of the competition may lead to the conclusion that less luck is involved).

¹⁹⁸ Boswell, *supra* note 111, at 1265.

¹⁹⁹ See Cabot & Csoka, *supra* note 172, at 1210.

²⁰⁰ See *infra* notes 201 - 231 and accompanying text.

states such as Delaware,²⁰¹ Kansas,²⁰² Michigan,²⁰³ Ohio,²⁰⁴ Wisconsin,²⁰⁵ Washington,²⁰⁶ and Vermont,²⁰⁷ fantasy sports encounter a greater risk of liability because courts in these states have adopted the true contract-law meaning of the word “consideration.” Thus, in these states, the gambling-law element of “consideration” is met, even absent an entry fee, so long as the contest participant expends substantial time or effort that benefits the contest’s host in some way.²⁰⁸ Stated in terms of fantasy sports, even if a host site offers a free fantasy sports game, the game may run afoul of state gambling law if the elements of “chance” and “reward” are both met.²⁰⁹

Second, fantasy sports host sites face greater risk of liability in states such as Arkansas,²¹⁰ Iowa,²¹¹ and Tennessee,²¹² which interpret the element of “chance” as outlawing games that require any chance (“The Any Chance Test”).²¹³ In these states, all fantasy sports games would violate the state’s pertinent gambling laws because even the most intricate fantasy sports game

²⁰¹ See, e.g., *Affiliated Enters.*, 5 A.2d at 261 (Del. Super. 1939) (finding that filling out a registration and appearing at a particular lobby, at a particular time, is sufficient to constitute consideration to enter a free contest).

²⁰² KAN. STAT. ANN. § 21-6403(c) (West 2011).

²⁰³ See *Sproat-Temple Theater Co. v. Colonial Theatrical Enters.*, 267 N.W. 602, 603 (Mich. 1936) (finding that there is consideration even in a free entry contest when it induces someone to attend an event that they would not otherwise attend).

²⁰⁴ See *Kroger Co. v. Cook*, 244 N.E.2d 790, 797 (Ohio Ct. App. 1968) (finding that the element of “consideration” may be met even when entering a free contest merely based on the advertising benefits derived by the contest’s host).

²⁰⁵ *State ex. rel. Regez. v. Blumer*, 294 N.W. 491, 492 (Wis. 1940) (defining “consideration” as “the disadvantage to the one party or the advantage to the other” and determining the travel to a store to fill out a free entry for a prize met this definition).

²⁰⁶ See *State ex. rel. Schillberg*, 450 P.2d at 953–56 (Wash. 1969).

²⁰⁷ See, e.g., *State v. Wilson*, 196 A. 757, 758–59 (Vt. 1938) (noting that in Vermont the element of consideration is met as long as some participants pay an entry fee, even if all participants do not need to pay entry fees).

²⁰⁸ See *supra* notes 201 - 207 and accompanying text.

²⁰⁹ See *supra* notes 201 - 207 and accompanying text.

²¹⁰ See *State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992).

²¹¹ See *Parker-Gordon Importing Co. v. Benakis*, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa gambling law finds it irrelevant whether a particular game is predominantly based chance or skill).

²¹² See TENN. CODE ANN. § 39-17-501 (2010) (defining “gambling,” subject to a number of exceptions, as “risking anything of value for a profit whose return is to any degree contingent on chance”).

²¹³ See *infra* note 214 and accompanying text.

involves at least some level of chance with respect to weather conditions and player injuries.²¹⁴

Third, fantasy host sites face greater risk of gambling liability in the states of Florida and Louisiana because, in these states, their attorneys general have already issued advisory opinions cautioning against certain fantasy games.²¹⁵ In Florida, former Attorney General Robert A. Butterworth published an advisory opinion in January 1991 that concluded it was illegal to “participat[e] in a [draft-based] fantasy sports league whereby contestants pay a fee for the opportunity to select actual professional sports players.”²¹⁶ Meanwhile, in Louisiana, former Assistant Attorney General Thomas A. Warner III issued an advisory opinion in April 1991 stating that a commercial fantasy sports game with prizes, which was entered into by the participants dialing a 1-900 telephone number that charged a fee of \$2.00 per minute, violated Louisiana’s state gambling law.²¹⁷

Finally, fantasy sports host sites face a greater risk of liability in Arizona and Kansas because these states call into doubt the legality of certain fantasy sports games on their state websites.²¹⁸ Specifically, Arizona’s Department of Gaming Guide to Off-Reservation Gambling states that “fantasy sports team games are illegal if the host of the event receives a fee for services provided or if all the pooled money doesn’t go back to the participants.”²¹⁹ In other words, “[i]f the host takes a percentage of the pooled money, the Fantasy Sports Team contest is illegal.”²²⁰ Meanwhile, Kansas’s Racing and Gaming Commission website states that “as with any other illegal gambling matters, if a fantasy sports league involves the elements of (1) prize, (2) chance, and (3) consideration, then it is an illegal ‘lottery’ prohib-

²¹⁴ See Cabot et. al., *supra* note 185, at 393.

²¹⁵ See Fla. Op. Att’y Gen. 91-3 (1991), *available at* 1991 WL 528146; La. Op. Att’y Gen. 91-14 (1991), *available at* 1991 WL 575105.

²¹⁶ See Fla. Op. Att’y Gen., *supra* note 215.

²¹⁷ See Fla. Op. Att’y. Gen., *supra* note 215; *see also* LA. REV. STAT ANN. §14:90(A)(1)(a)(2011) (stating that “[g]ambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.”). *See generally* Jan Moller, *Bill to Legalize Online ‘Fantasy’ Sports Games Dies in House*, THE TIMES-PICAYUNE, May 10, 2010, http://www.nola.com/politics/index.ssf/2010/05/bill_to_legalize_online_fantas.html.

²¹⁸ See *infra* notes 219 - 223 and accompanying text.

²¹⁹ *Guide to Off-Reservation Gaming*, ARIZONA DEPARTMENT OF GAMING, *available at* <http://www.gm.state.az.us/misc-pdf/TopGamingViolations.pdf>.

²²⁰ *Id.*

ited by Kansas criminal law.”²²¹ However, because in the Commission’s opinion “chance predominates over skill in fantasy sports leagues,” “if a fantasy sports league has a buy-in (no matter what it is called) for its managers and gives a prize, then all three elements of an illegal lottery are satisfied.”²²² The language of both the Arizona and Kansas websites indicates that, in those states, CBS Premium fantasy sports games, as well as many of the existing high-stakes fantasy sports competitions, are likely illegal.²²³

4. Montana’s Alternative Test of Fantasy Sports

Finally, the State of Montana provides a different, and perhaps more insightful, way to test the legality of a particular fantasy sports game.²²⁴ Under Montana State Code 23-5-802, it is lawful to conduct or participate in a fantasy sports league as long as no wagers take place by either the telephone or internet.²²⁵ The Code further defines “fantasy sports leagues” to include games that meet the following requirements:

any fees for adding or trading players, in total, are less than the league entry fee;²²⁶

the total value of payouts to all league members equals the amount collected for entrance, administrative, and transactions fees, minus payment for administrative expenses;²²⁷ and

the administrative fee for conducting a fantasy sports league, if any, is not more than 15% of the amount charged as a participant’s entrance fee.²²⁸

²²¹ *Frequently Asked Questions*, Kansas Racing & Gaming Commission, [http://krgc.ks.gov/index.php?id=42#Fantasy Sports](http://krgc.ks.gov/index.php?id=42#Fantasy%20Sports) (citing KAN. STAT. ANN. § 21-4303 (West 2011)).

²²² *Id.* (stating that, “We do not argue that there are some elements of skill involved in fantasy leagues. Particularly, fantasy managers must be knowledgeable of player statistics, and must execute some strategy in selecting the best players for their fantasy team. On the other hand, a manager leaves to chance a number of things, including: (1) how a drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player’s actual team in a given week executes a game plan that fits the player’s talents; whether the coach calls plays that favor the player; and (4) how opponents of the actual player (who may be drafted by another manager) actually play. For those reasons, chance predominates over skill in fantasy sports leagues.”).

²²³ See *supra* notes 218 - 222 and accompanying text.

²²⁴ See *infra* notes 225 - 231 and accompanying text.

²²⁵ MONT. CODE ANN. § 23-5-802 (2011).

²²⁶ § 23-5-801(3).

²²⁷ § 23-5-805(1).

²²⁸ § 23-5-805(2)(a).

When applying the Montana State Code to existing fantasy sports games, the ESPN and Yahoo! games seem to be free from any liability because they do not charge entry fees to participants.²²⁹ However, the CBS Sports Premium games seem to violate the Montana code because the difference between the total entry fees charged to participants and the total amount paid back to participants in the prize pool exceeds the 15% maximum threshold permissible for administrative fees.²³⁰ The same problem may also apply to some of the other high-stakes fantasy sports competitions.²³¹

B. Federal Gambling Law

In addition to state gambling laws, fantasy sports host sites also may face risks under federal gambling laws. Federal gambling laws serve an important role in preventing individual states from having their anti-gambling laws circumvented by gambling businesses that are based outside of state lines.²³² While these statutes supplement state gambling law,²³³ they do not create immunity from, or reduce the reach of, any individual state's laws.²³⁴

1. Interstate Wire Act of 1961

One federal statute that is relevant to fantasy sports host sites is the Interstate Wire Act of 1961 ("Wire Act").²³⁵ The Wire Act bars "engaging in the business of betting or wagering [through the knowing use of] a wire communication for the transmission in interstate or foreign commerce."²³⁶

²²⁹ See *supra* notes 225 - 228 and accompanying text.

²³⁰ See *supra* notes 225 - 228 and accompanying text.

²³¹ See *supra* notes 225 - 228 and accompanying text.

²³² See Mitchell E. Kilby, Note, *The Mouse that Roared: Implications of the WTO Ruling in US - Gambling*, 44 TEX. INT'L L.J. 233, 240 (2008); see also Schneider v. United States, 459 F.2d 540, 542 (8th Cir. 1972) (noting that "[g]ambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense.").

²³³ See *Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 861 (N.Y. 1999) (discussing overlap between federal and state gambling law).

²³⁴ 18 U.S.C. § 1084(c) (1994).

²³⁵ 18 U.S.C. § 1084; see also Kilby, *supra* note 232, at 239 (discussing implications of the Wire Act).

²³⁶ 18 U.S.C. § 1084(a) (stating that two elements must be present for a violation of the Wire Act: (1) that information transmitted via wire assisted in placing of bets or wagers; and (2) the defendant during such time was engaged in businesses of wagering or betting).

According to at least one court, “wire communications” may include not only telephone communications, but also Internet transactions.²³⁷ Violators of the Wire Act are subject to both fines and imprisonment for a period of up to two years.²³⁸

While there are many instances where courts have found that sports bookies have violated the Wire Act, there have not yet been any cases that have applied the Wire Act to fantasy sports leagues.²³⁹ Nevertheless, if a given fantasy sports website were to develop a commercial fantasy sports game that was deemed to be a “game of chance,” then that website would potentially face liability under the Wire Act.²⁴⁰

2. Illegal Gambling Business Act

A second statute that potentially places fantasy sports host sites at risk of liability is the Illegal Gambling Business Act (“Gambling Act”).²⁴¹ The Gambling Act, which was passed by Congress in 1970, states that “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years.”²⁴² According to the Gambling Act, activities of “gambling” include, but are not limited to, “pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries policy, bolita or number games, or selling chances therein.”²⁴³

In certain respects, the Gambling Act encompasses a broader range of conduct than does the Wire Act.²⁴⁴ For example, the Gambling Act prohibits certain gambling activities even if they occur without the use of wire technology.²⁴⁵ Thus, even if a particular court were to find a wireless In-

²³⁷ See *Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 860 (N.Y. 1999) (“To the contrary, the Wire Act, Travel Act and Paraphernalia Act all apply despite the fact that the betting instructions are transmitted from outside the United States *over the Internet.*) (emphasis added).

²³⁸ 18 U.S.C. § 1084(a).

²³⁹ See, e.g., *Truchinski v. United States*, 393 F.2d 627, 631 (8th Cir. 1968).

²⁴⁰ See generally *United States v. Bergland*, 209 F. Supp. 547, 548 (E.D. Wis. 1962).

²⁴¹ 18 U.S.C. § 1955.

²⁴² 18 U.S.C. § 1955(a).

²⁴³ 18 U.S.C. § 1955(b)(iii).

²⁴⁴ See *infra* notes 245 - 246 and accompanying text.

²⁴⁵ See 18 U.S.C. § 1955.

ternet transaction to lie outside the scope of the Wire Act, the same transaction might fall within the scope of the Gambling Act.²⁴⁶

In other respects, however, the Gambling Act's scope is narrower than that of the Wire Act.²⁴⁷ For example, the Gambling Act only targets "illegal gambling activities of major proportions."²⁴⁸ Thus, the Gambling Act exempts gambling activities that produce less than \$2,000 in daily gross revenues.²⁴⁹ As a result, it is highly unlikely that any fantasy sports enterprise that avoids Wire Act liability would meet the threshold for liability under the Gambling Act.²⁵⁰

3. Professional and Amateur Sports Protection Act

A third federal statute that could potentially apply to fantasy sports host sites is the Professional and Amateur Sports Protection Act ("PAPSA").²⁵¹ After a successful lobbying effort by the professional sports industry, Congress passed PAPSA in 1992 in response to "growing concerns over state sponsored gambling on sports."²⁵² PAPSA, in pertinent part, makes it illegal for any private person to operate a wagering scheme based on a competitive game in "which professional or amateur athletes participate."²⁵³ PAPSA, however, includes a grandfather clause that exempts previously authorized government sponsored games as well as casino-style wagering from liability.²⁵⁴

On its face, it may seem that all fantasy sports lie within the scope of PAPSA.²⁵⁵ However, that would be an absurdity, as America's premier professional sports leagues were the chief lobbyists for PAPSA,²⁵⁶ and most

²⁴⁶ *Id.*

²⁴⁷ See *infra* notes 248 - 250 and accompanying text.

²⁴⁸ *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

²⁴⁹ 18 U.S.C. § 1955(b)(iii).

²⁵⁰ *Id.*

²⁵¹ 28 U.S.C. § 3701 (1992).

²⁵² See Lee, *supra* note 5, at 78.

²⁵³ 28 U.S.C. § 3702(2).

²⁵⁴ See Lee, *supra* note 5, at 78.

²⁵⁵ 28 U.S.C. § 3702.

²⁵⁶ See Mike Freeman, *Congress Told Sports Lotteries Threaten Teenagers, Games*, WASH. POST, Jun. 27, 1991, at B5 (noting the "passionate testimony" in support of PAPSA by commissioners of Major League Baseball, the National Basketball Association and the National Football League).

American professional sports leagues both host and endorse seasonal fantasy sports.²⁵⁷

It is far more likely, however, that PAPSA could be used against daily and weekly fantasy sports games, as these games have never been formally endorsed by the professional sports industry. In addition, the substantial emphasis on buy-ins and payouts in daily fantasy sports games make it more probable that such games could be viewed as wagering schemes.²⁵⁸

4. Uniform Internet Gambling Act

Finally, in 2006, Congress passed the Uniform Internet Gambling Enforcement Act (“UIGEA”), which made it illegal for those “engaged in the business of betting or wagering” to “knowingly accept” funds “in connection with the participation of another person in unlawful Internet gambling.”²⁵⁹ The primary purpose of the UIGEA is to supplement “traditional [gambling] law enforcement mechanisms” and to facilitate the regulating of “gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”²⁶⁰

Pursuant to the UIGEA, the term “unlawful Internet gambling” involves knowingly transmitting a bet or wager, by means of the Internet, where the bet or wager is otherwise illegal under the laws of the place where the bet or wager is “initiated, received, or otherwise made.”²⁶¹ Thus, if a person located in a state where gambling is illegal places a bet over the Internet, any business that knowingly accepts a financial instrument in connection with that bet, irrespective of the gambling business’s location, would unambiguously be violating the act.²⁶²

Whether the Uniform Internet Gambling Enforcement Act applies to certain fantasy sports host sites remains unsettled.²⁶³ On the one hand, the UIGEA includes an explicit carve-out for “fantasy sports games” that meet three criteria: (1) the “value of the prizes is not determined by the number of participants in the game or the amount of fees paid by the participants;”

²⁵⁷ See *supra* note 129 and accompanying text (showing that most professional sports leagues even operate their own fantasy sports host sites).

²⁵⁸ See 28 U.S.C. § 3702 (1992).

²⁵⁹ 31 U.S.C. § 5363 (2006).

²⁶⁰ *Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (3d. Cir. 2009).

²⁶¹ 31 U.S.C. § 5362(10)(A).

²⁶² See *Interactive Media Entm’t & Gaming Ass’n* 580 F.3d at 116.

²⁶³ See *infra* notes 264 - 266 and accompanying text.

(2) “[a]ll winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting events”; and (3) no winning outcome is based on the outcome of the score of games or on the single performance of an individual athlete in a single, real-world event.²⁶⁴

Nevertheless, it is possible that not all fantasy sports games fulfill this three-part test. For instance, in daily and weekly fantasy games, “winning outcomes [may not] reflect the relative knowledge and skill of the participants” because the limited duration of these games heightens the importance of luck in game results.²⁶⁵ Further, as a matter of public policy, Congress may not want to provide special protection to short-duration fantasy sports games because the shortened duration of these games may feed the desires of compulsive and addicted gamblers.²⁶⁶

C. Intellectual Property Laws

In addition to the risk of liability under federal and state gambling law, fantasy sports host sites also risk liability under intellectual property laws, including patent law, copyright law, trademark law, and right to publicity laws.²⁶⁷

1. Patent Law

Patent law, in general, relates to technological innovations.²⁶⁸ A patent is a form of intellectual property protection that is granted by the federal government to an inventor to exclude others from making, using, or selling a particular invention.²⁶⁹ Modern patent law takes root in Article 1, Section

²⁶⁴ 31 U.S.C. § 5362(1)(E)(ix)(I)-(III) (2006).

²⁶⁵ 31 U.S.C. § 5362(1)(E)(ix) (II).

²⁶⁶ Boswell, *supra* note 111, at 1272 (noting that, prior to the creation of short-duration fantasy sports games, fantasy sports leagues may have been viewed as innocuous to society because “these games could only have a substantial negative affect on the crime rate and the economy if every participant were to compete in a great number of fantasy games [and such] an occurrence would be logistically impossible due to the amount of time that it takes to effectively compete in a single fantasy league.”)

²⁶⁷ See *infra* notes 268 - 305 and accompanying text.

²⁶⁸ See *infra* notes 269 - 270 and accompanying text.

²⁶⁹ See UNITED STATES PATENT AND TRADEMARK OFFICE, *What is a Patent?*, <http://www.uspto.gov/patents/index.jsp> (last modified Sep 28, 2011).

8 of the U.S. Constitution, which grants the U.S. government the power “to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁷⁰

Courts have held that certain aspects of fantasy sports games are indeed patentable.²⁷¹ For example, in *Fantasy Sports Properties, Inc. v. ESPN/Starwave Partners*, the Federal Circuit found a genuine issue of relevant fact as to whether CBS Sports (F/K/A Sportsline) infringed on a patent relating to “a method of and apparatus for playing a ‘fantasy’ football game on a computer,” whereby players earned “additional points awarded beyond those given in an actual football game for unusual scoring plays, such as when a player scores in a manner not typically associated with his position.”²⁷²

Based on the court’s reasoning in *Fantasy Sports Properties*, all fantasy sports host sites need to ensure that their products do not allow users to exploit scoring methods that have already been patented.²⁷³ In addition, fantasy sports games that adopt unusual methods of scoring may wish to seek patent protection for their own methodologies as a way to secure a comparative advantage over competitor host sites.²⁷⁴

2. Copyright Law

Copyright law, meanwhile, relates to content.²⁷⁵ Like a patent, a copyright is a form of intellectual property protection grounded in the U.S. Constitution.²⁷⁶ A copyright protects “original works of authorship fixed in a tangible medium of expression.”²⁷⁷ While a copyright covers both published and unpublished works, it does not protect “facts, ideas, systems, or methods of operation.”²⁷⁸

Fantasy sports host sites do not have to worry about copyright issues when publishing player statistics because player statistics are factual in na-

²⁷⁰ U.S. CONST. art. I, § 8, cl. 8.

²⁷¹ See *infra* notes 272 - 274 and accompanying text.

²⁷² 287 F.3d at 1111, 1114 (Fed. Cir. 2002).

²⁷³ See *supra* notes 271 - 272 and accompanying text.

²⁷⁴ See *supra* notes 271 - 272 and accompanying text.

²⁷⁵ See *infra* notes 276 - 278 and accompanying text.

²⁷⁶ See *Copyright in General (FAQ)*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-general.html> (revised Jul. 12, 2006).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

ture, and once published are deemed to lie within the public domain.²⁷⁹ Nonetheless, fantasy sports host sites still need to ensure that their additional content, such as stories and illustrations, do not violate another site's copyright.²⁸⁰ In addition, if a fantasy sports host site believes another website is violating its copyrighted material, it is imperative for the fantasy host site to immediately send out a cease-and-desist letter (commonly known as a "notice and take down" letter) and to not sit on its rights.²⁸¹

3. Trademark Law

Trademarks are a third form of intellectual property protection that provides consumers with a sense of certainty about a particular product's source, and allows holders to "develop and control the goodwill associated with a given product."²⁸² A federal cause of action for trademark infringement typically accrues under Section 32(1) of the Lanham Act where "a person uses (1) any reproduction . . . of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive."²⁸³ In addition, some courts have found that, even absent the element of confusion, the Lanham Act prevents both individuals and businesses from capitalizing on the goodwill of another's trademark.²⁸⁴

²⁷⁹ See *C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007) ("The information used in CBC's fantasy baseball games is all readily available in the public domain.").

²⁸⁰ Cf. *Copyright in General (FAQ)*, *supra* note 276.

²⁸¹ See Joy Butler, *Responding to Stolen Content with a DMCA Take-Down Letter*, GUIDE THROUGH THE LEGAL JUNGLE, <http://www.guidethroughthelegaljungleblog.com/2009/04/responding-to-stolen-content-with-a-dmca-take-down-letter.html> (intellectual property attorney and Harvard Law School graduate Joy Butler discusses best practices for responding to the use of "stolen content" on the Internet).

²⁸² See Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 MARQ. SPORTS L. REV. 283, 284 (2004). "Goodwill" is not an easily defined term. *Id.* at 288. However, one court has defined it as "the favorable consideration shown by the purchasing public to goods known to emanate from a particular source." *White Tower Sys. v. White Castle Sys. Of Eating Houses Corp.*, 90 F.2d 67, 69 (6th Cir. 1937).

²⁸³ *Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg. Inc.*, 510 F.2d 1004, 1009-10 (5th Cir. 1975).

²⁸⁴ *Id.* at 1012-13 (preventing Dallas Cap & Emblem Manufacturing from using NHL team trademarks on apparel); *Univ. of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535, 1547 (11th Cir. 1985) (preventing a wholesaler of novelty beers from

Sports teams have been one of the more successful parties at using the courts to prevent the misappropriation of the goodwill of their marks.²⁸⁵ Most notably, in *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing*, the National Hockey League teams convinced the U.S. Court of Appeals for the Fifth Circuit that the court should award trademark protection against the unauthorized use of their logos on sportswear apparel, even though consumers were not necessarily confused about the apparel's source or origin.²⁸⁶ In that case, the court concluded that trademark protection extends to the need to protect "the major commercial value of [sports teams'] emblems [which is] derived from the efforts of [the teams]."²⁸⁷

Nevertheless, trademark protection rarely extends to the use of another's mark for purposes of non-commercial speech, which is deemed by the courts to be "fair use."²⁸⁸ While the fine line separating commercial speech from fair use has often been a source of more confusion than clarity,²⁸⁹ the U.S. Court of Appeals for the Second Circuit currently applies a balancing

using a symbol of an English bulldog wearing a sweater emblazoned with the letter "G" because it appeared too similar to the University of Georgia Bulldogs logo).

²⁸⁵ See *infra* notes 286 - 287 and accompanying text.

²⁸⁶ *Boston Prof'l Hockey Ass'n.*, 510F.2d at 1012-13 (5th Cir. 1975).

²⁸⁷ *Id.* at 1011; see also *Univ. of Ga. Athletic Ass'n.*, 756 F.2d at 1546-47 (noting that a likelihood of confusion may be demonstrated by showing confusion among consumers as to the sponsorship of the mark). In *University of Georgia Athletic Association*, the Eleventh Circuit upheld the finding of a Lanham Act violation against Bartlin' Bulldog Beer for distributing a novelty beer with a logo that strongly resembled the Georgia Bulldog. *Id.* at 1536-39. According to the court, "confusion stems not from the defendant's unfair competition with the plaintiff's products, but from the defendant's misuse of the plaintiff's reputation and good will as embodied in the plaintiff's marks." *Id.* at 1547. In addition, no disclaimer can save a party that misuses the reputation of good will of another's marks because "[o]nly a prohibition of the unauthorized use will sufficiently remedy the wrong." *Id.*

²⁸⁸ 4 CALMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES §22.59 (4th ed. 2011); see also *Atlanta Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228, 1233, n. 6 (N.D.Ga. 1997) ("Congress acknowledged the first amendment problems with banning non-commercial use of trademarks"); *JA Apparel Corp.*, 682 F. Supp. 2d at 309 ("The fair use defense, which allows for some level of confusion, is an absolute defense to claims of trademark infringement, trademark dilution, and false designation of origin."). See generally *id.* at 309-10 (citing *Car-Freshner Corp. v. S.C. Johnson & Sons, Inc.*, 70 F.3d 267, 269 (2d. Cir. 1995)) (holding that a court will assess three factors in order to determine "fair use": (1) whether the mark is used descriptively; (2) whether the mark is used to indicate the origin of consumer products; and (3) whether the mark is being used in good faith).

²⁸⁹ Compare *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d. Cir. 1989) (using a balancing test to weigh "the public interest in avoiding consumer confusion" against the public interest in free speech) with *Facenda v. NFL Films, Inc.*, 542 F.3d

test that weighs the public's interest in avoiding consumer confusion, against the public's interest in free expression.²⁹⁰ Meanwhile, the U.S. Court of Appeals for the Third Circuit has expressed support for a test that places a somewhat stronger burden on the non-trademark holding party.²⁹¹

With lingering disagreement among the circuits about where depreciation of a trademark holder's goodwill ceases and fair use begins, fantasy sports host sites are best advised to minimize their legal risk under the Lanham Act by avoiding the use of actual sports teams' logos without a license.²⁹² Additionally, in instances where fantasy sports host sites seek to identify a professional sports team by name, the host site should either obtain a license, or reference the team's name in small print, while having its own site's name and marks appearing far more conspicuously.²⁹³

4. Right to Publicity

Finally, state "right of publicity" laws govern the use of names and identifying characteristics of famous individuals.²⁹⁴ Right of publicity laws are derived from the common law right to privacy, which is grounded in both property law and tort law.²⁹⁵ Today, publicity rights are defined by *Black's Law Dictionary* as "the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent."²⁹⁶ In addition, according to the Supreme Court, the right of publicity serves as "an economic incentive for [one] to

1007, 1018 (3d. Cir. 2008) ("[W]e need not reach the issue whether our Court will adopt the *Rogers* test.").

²⁹⁰ See *Rogers* 875 F.2d at 999.

²⁹¹ See *Facenda*, 542 F.3d at 1019.

²⁹² Cf., *supra*, notes 288 - 291 and accompanying text.

²⁹³ See *JA Apparel Corp.*, 682 F.Supp. 2d at 313-14, 316 (noting that where a company places its own trademark in far larger and more noticeable font than another's trademark, it "arguably removes the likelihood of any confusion").

²⁹⁴ See William Sloan Coats & Kenneth Maikish, *The Right of Publicity: Proper Licensing of Celebrity Endorsements*, 1025 PLI/Pat 269, 279 (2010) (noting that "[c]urrently, nineteen states, including California and New York, protect the right of publicity via statute . . . an additional twenty-eight states recognize the right via common law."); see also *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 822 ("An action based on the right of publicity is a state-law claim.").

²⁹⁵ See generally *Keller v. Electronic Arts Inc.*, No. C 09-1967 CW., 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010) ("The statutory right of publicity complements the common law right of publicity, which arises from the misappropriation tort derived from the law of privacy.").

²⁹⁶ BLACK'S LAW DICTIONARY (9th ed. 2009).

make the investment required to [perform a skill] of interest to the public.”²⁹⁷

Whether a fantasy sports game’s unauthorized use of players’ names and statistical information would violate state right of publicity laws remains an unsettled issue on which the Supreme Court has not yet spoken.²⁹⁸ The strongest argument that the unlicensed use of players’ names and statistics in a fantasy sports game violates athletes’ publicity rights comes from *Gridiron.com v. National Football Players Association*, a case in which the U.S. District Court for the Southern District of Florida rejected the argument that a website operator may use players’ names and images for the purposes of selling football memorabilia and operating a fantasy sports game.²⁹⁹

By contrast, the strongest argument in favor of a fantasy sports host site’s right to use players names and statistics without a license comes from the 2008 case *C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media*, in which the U.S. Court of Appeals for the Eighth Circuit held that the First Amendment trumps Major League Baseball players’ assignable right to publicity in their names and statistics.³⁰⁰ This split in

²⁹⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1976); *see also* *Haelan Lab. Inc. v. Topps Chewing Gum, Inc.*, 202 F.3d 866, 877 (2d. Cir. 1953) (“[I]t is common knowledge that many prominent persons far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant, which barred any other advertiser from using their pictures.”).

²⁹⁸ *See infra* notes 299 - 301 and accompanying text.

²⁹⁹ 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (“Plaintiff actively sought out and obtained over 150 NFL Player’s publicity rights, and now argues that the information the websites produce are entitled to Free Speech protection. Plaintiff’s argument is not persuasive.”).

³⁰⁰ 505 F.3d 818 (8th Cir. 2007). According to the Eighth Circuit view, the First Amendment trumped the right of publicity in fantasy sports cases for three reasons. First, the information used in the fantasy baseball games is already in the public domain. *Id.* at 823. Second, baseball players whose names appear in these games “are rewarded separately for their labors.” *Id.* at 824 (noting, in separate paragraphs, the athletes’ compensation through their salaries and compensation through other endorsement opportunities). Finally, consumers of fantasy products are not misled by the use of baseball players’ names and information into believing the players are endorsing a particular fantasy sports game. *Id.* at 824. Thereafter, in *CBS Interactive Inc. v. National Football League Players Association*, the U.S. District Court for the District of Minnesota (a lower court within the Eighth Circuit) held that a fantasy sports host site did not need a license to use National Football League

authority has not only led to some confusion for fantasy sports businesses, but also potentially invites the practice of “forum shopping” by plaintiffs.³⁰¹

In addition, even if a court were to conclude that the First Amendment trumps the right of publicity with respect to the use of professional athletes’ names and statistics, that same court might rule differently where the fantasy sports game involves college athletes.³⁰² This is because, unlike professional athletes, who “are rewarded separately for their labors,”³⁰³ collegiate athletes are not otherwise compensated based on their fame.³⁰⁴ Thus, the American legal system has an especially strong interest in protecting the proprietary nature of the collegiate athlete’s right to publicity.³⁰⁵

players’ names and statistics in its fantasy football game. See 259 F.R.D. 398, 419 (D. Minn. 2009) (“Because the Eighth Circuit’s decision in *C.B.C. Distribution* is controlling, CBS Interactive is entitled to judgment as a matter of law.”).

³⁰¹ Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. OF ART & ENT. L. 227, 244 (1999). Absent the creation of a unified, federal right to publicity, there indeed are a number of possible ways that a court could determine which state’s right to publicity laws should apply, including: (1) the player’s domicile; (2) the location where the players union is located; (3) the location of the alleged infringement; or (4) simply the law of the forum. See, e.g., Keller, 2010 WL 530108, at *2 (N.D. Cal. Feb. 8, 2010) (“Plaintiff alleges that NCAA violated his Indiana right of publicity. He argues that Indiana law applies to NCAA because its headquarters are located in Indiana and the alleged violation occurred in Indiana.”) (emphasis added). It is interesting to note that in the class action suit *Keller v. Electronic Arts*, the plaintiff class, which brought suit in the U.S. District Court for the Northern District of California, argued not only a breach of California’s statutory and common law right to publicity law, but also those of Indiana: presumably based on the belief that Indiana’s law, based on its broad purported applicability, would apply to all class members. See Complaint, *Keller v. Electronic Arts*, LEXSEE 2009 U.S. Dist. Pleadings 368791, at *26-27, ¶ 17-28 (May 5, 2009).

³⁰² See *infra* notes 303 - 305 and accompanying text; see also Christian Dennie, Note, *Tebow Drops Back to Pass: Videogames have Crossed the Line, but Does the Right of Publicity Protect Student-Athlete’s Likeness When Balanced Against the First Amendment?*, 62 ARK.L. REV. 645, 673 (2009) (“The fact that student-athletes are not paid may actually work in favor of a student-athlete’s argument that he or she is entitled to right-of-publicity protection.”).

³⁰³ *C.B.C. Distrib. & Mktg. Inc.*, 505 F.3d at 824.

³⁰⁴ See Marc Edelman, Note, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REFORM 861, 862 (2002).

³⁰⁵ See *Zacchini*, 433 U.S. at 573 (noting “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment”).

V. LEGAL RISKS FOR FANTASY SPORTS PARTICIPANTS

While fantasy sports host sites face numerous legal issues related to their business practices,³⁰⁶ they are not the only stakeholder group potentially subject to liability for their engagement in fantasy sports.³⁰⁷ Fantasy sports participants also face some degree of legal risk, albeit to a far lesser extent.³⁰⁸

A. Criminal Liability under Gambling Laws

Unlike fantasy sports host sites, fantasy league participants have minimal risk of violating federal gambling laws because they are unlikely to be deemed to be “engaged in the *business* of wagering or gambling.”³⁰⁹ Much like the operators of their host sites, however, fantasy sports participants bear some risk, albeit small, of running afoul of states’ criminal gambling statutes.³¹⁰

The earliest known criminal lawsuit involving a fantasy sports participant took place in Fort Lauderdale, Florida in 1991, when a local firefighter and fantasy baseball player, Randy Bramos, was charged with a misdemeanor gambling offense for running a 12-team fantasy baseball league involving \$5,000 in league entry fees.³¹¹ These charges, however, were eventually dropped.³¹² Since then, there have not been any other instances of charges filed against fantasy sports participants.³¹³

³⁰⁶ See *supra* notes 172 - 305 and accompanying text.

³⁰⁷ See *infra* notes 309 - 359 and accompanying text.

³⁰⁸ See *infra* notes 309 - 331 and accompanying text.

³⁰⁹ 18 U.S.C. § 1084(a) (1994) (emphasis added); see also *United States v. Becker*, 461 F.2d 230, 232 (2d. Cir. 1972), *vacated on other grounds by* 417 U.S. 903 (1974) (internal citations and quotations omitted) (noting that illegal “conduct” under the Illegal Gambling Business Act “does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet); Kilby, *supra* note 232 at 240–41 (noting that the Wire Act only applies to those “engaged in the business of betting” and not to individual gamblers). *But see generally* *United States v. Crockett*, 514 F.2d 64, 75 (5th Cir. 1975) (noting that customers who are in effect partners in the operation of an illegal gambling business are within the scope of the Illegal Gambling Business Act).

³¹⁰ See *infra* notes 311 - 313 and accompanying text.

³¹¹ See Skolnick, *supra* note 29 at 11B.

³¹² *Id.*

³¹³ See *id.*; see also Robert J. Nobile, HUMAN RESOURCES GUIDE § 5:12.50 (Dec. 2010) (“While technically illegal, it is virtually unheard of for someone to get arrested, prosecuted and convicted for taking part in an office pool.”).

B. Civil Liability for Gambling Activities

Fantasy sports participants also risk disgorgement of their gambling winnings under civil anti-gambling statutes.³¹⁴ These civil anti-gambling statutes, which derive from England's 1710 Statute of Queen Anne,³¹⁵ assert that, as a matter of public policy, a gambling winner "shall not be protected in his unlawful gains," and a gambling loser or gambling informer "may sue to recover back the money lost."³¹⁶ In addition, most states that recognize disgorgement statutes refuse to allow gamblers to opt out of their home state's choice of gambling law.³¹⁷ This is because states that enforce disgorgement statutes are trying to prevent gambling losers from becoming wards of the state due to their risky financial behavior.³¹⁸

Although one recent case has held that fantasy sports host sites are immune from civil liability because they are neither "participants" nor "winners" in gambling activities,³¹⁹ the same conclusion does not necessarily extend to fantasy participants in leagues that, under state law, are deemed to be gambling (meaning those found to involve consideration, chance, and reward).³²⁰

C. Violating Company Anti-Solicitation Policies

Fantasy sports participants, on a more remote level, also are subject to termination of their employment if found to be soliciting other employees

³¹⁴ See, e.g., Ga. Code Ann. § 13-8-3(b) (West 2011); OHIO REV. CODE ANN. 3763.02 (West 2011).

³¹⁵ *Humphrey*, 2007 WL 1797648, at *3.

³¹⁶ *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 478 (2008).

³¹⁷ See, e.g., *In re Baum*, 386 B.R. 649, 657 (Bankr. N.D. Ohio 2008) (noting some courts that do not enforce anti-gambling contracts will not allow gamblers to uphold these contracts based on out-of-state choice-of-law clauses).

³¹⁸ See generally *supra* note 317 and accompanying text.

³¹⁹ *Humphrey*, 2007 WL 1797648, at *9-10; see also *id.* at *7 (noting that fantasy sports host sites are not winners in a gambling activity but rather are "neutral parties in the fantasy sports games" that do not compete for prizes, and are indifferent about who wins the prizes.").

³²⁰ See generally *Salamon v. Taft Broadcasting Co.*, 475 N.E.2d 1292, 1297 (Ohio Ct. App. 1984) (noting that Ohio's civil anti-gambling statute gives a stranger to a particular gambling transaction the "right to recover only the money actually lost, and only from the winner").

to participate in their fantasy sports games during work hours, in violation of company policy.³²¹

While some employers might oppose fantasy sports games based on the lost productivity of workers who spend time looking at their fantasy sports teams during the work day,³²² other employers may disallow soliciting membership in fantasy sports leagues for reasons grounded in labor law.³²³

According to the *Human Resources Handbook*, any employer that seeks to disallow union solicitations in the workplace must, pursuant to the National Labor Relations Act, maintain a broader, content-neutral ban on solicitations.³²⁴ Such a broad, content-neutral ban would logically extend to fantasy sports.³²⁵ For instance, in *Webco Industries, Inc. v. NLRB*, the U.S. Court of Appeals for the Tenth Circuit upheld a National Labor Relations Board finding that a no-solicitation policy was “selectively enforced with discriminatory intent” and thus impermissible because a company disallowed employees from soliciting union membership, but allowed employees to solicit each other for “recreational activities (such as sporting event pools, fantasy football, and baseball leagues).”³²⁶

D. Bankruptcy

Finally, even if fantasy sports participants are insulated from gambling prosecution under most federal and state laws, high-stakes fantasy sports participants still run a heightened risk of bankruptcy based on their financially risky behavior.³²⁷ One of the reasons why some fantasy sports participants may run a heightened risk of bankruptcy is because, like compulsive poker players and slot machine users, they “get addicted” to the gambling aspects of fantasy sports and gamble incessantly on short-duration fantasy

³²¹ Nobile, *supra* note 313.

³²² Vecchione, *supra* note 58 at 1698.

³²³ See *infra* notes 324 - 326 and accompanying text.

³²⁴ See Nobile *supra*, note 313 (“Although a company’s non-solicitation policy may not be violative of the NLRA, if it selectively enforces this policy by tolerating some solicitation (such as solicitations for office pools, fantasy sports, etc.) but not union solicitation, it will likely – with some limited exceptions – be found to have violated the NLRA by discriminating against the union.”).

³²⁵ See Nobile, *supra* note 313.

³²⁶ 217 F.3d 1306, 1312 (10th Cir. 2000).

³²⁷ See *In re Baum*, 86 B.R. 649 (Bankr. N. D. Ohio Feb 29, 2008) (case in which a parties’ excessive Internet gambling led to bankruptcy); see also Hancock, *supra* note 20, at 348 (“Studies show increased debt in areas of legalized gambling.”).

sports contests.³²⁸ Indeed, “pathological gambling” is one of the few forms of addiction currently recognized by the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).³²⁹

Other fantasy sports participants, meanwhile, may wager incessantly on short-duration fantasy sports contests because they suffer from Internet addiction, which “can be a symptom of other mental illness, or conditions like autism.”³³⁰ Although Internet addiction is not a recognized form of addiction under DSM-IV, Dr. Jerald Block of the Oregon Health Sciences University in Portland notes that “[a]mong psychiatrists there is general recognition that many patients have difficulty controlling their impulses to chat online, or play computer games.”³³¹

VI. LEGAL RISKS FOR ANCILLARY FANTASY SPORTS BUSINESSES

Finally, various ancillary fantasy sports businesses also may risk legal liability if their business owners fail to knowledgably structure business activities.³³²

A. Fantasy Sports Treasury Sites

Fantasy sports treasury sites bear two forms of potential liability: suits from fantasy sports participants for failure to turn over contested winnings, and challenges from a broader range of plaintiffs alleging a Wire Act violation.³³³

Where a fantasy sports treasury site fails to turn over contested winnings to the proper league participant, liability may follow.³³⁴ This is because the treasurer/participant relationship is comparable to one of bank and

³²⁸ *Fantasy Sports: A Booming Business*, *supra* note 53, at B1; *c.f.* King, *supra* note 51, at 71 (Advocates of banning online gaming argue that it “is harmful to minors, a source or bankruptcy and addiction among adults, and a means for illegal money laundering.”).

³²⁹ *Genes Play a Role in Problem Gambling*, MYADDICTION.COM (Jun. 9, 2010), <http://www.myaddiction.com/news/gambling-addiction-news/genes-play-a-role-in-problem-gambling>.

³³⁰ Nicholas K. Geranios, *Treatment One Click at a Time: Internet Addiction*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 4, 2009, at 1A, *available at* 2009 WLNR 17614750.

³³¹ *Id.*

³³² *See infra* notes 333 - 359 and accompanying text.

³³³ *See infra* notes 335 - 338 and accompanying text.

³³⁴ *See infra* notes 335 - 336 and accompanying text.

customer, in which “the bank is indebted to the customer and promises to debit his account only at [the customer’s] direction.”³³⁵ Thus, “[i]f the bank pays, on an instrument drawn by its customer, any person other than the designated payee or a person to whom the instrument is negotiated, the bank’s indebtedness to the customer is not diminished.”³³⁶

In addition, if a particular fantasy sports game is deemed to be gambling, there is a remote argument that the affiliated fantasy sports treasury website, in collecting and dispersing funds, may be found to be in violation of the Wire Act.³³⁷ This is based on the argument that by collecting league entry fees and distributing prize money over a wired Internet, these treasury sites are “engaging in the business of betting or wagering.”³³⁸

B. *Fantasy Sports Advisors*

Fantasy sports advisors, meanwhile, risk liability under both tort law and contract law, if they fail to meet promised standards.³³⁹ Under tort law, fantasy sports advisors risk liability if they negligently supply misinformation that is used in a business transaction, even if that information is not sold directly to the party that suffers a financial loss as a result.³⁴⁰ For example, Section 552 of the Restatement of Torts describes the tort of “information negligently supplied for the guidance of others” as occurring if “[o]ne who in the course of his business or profession supplies information for the guidance of others in their business transactions [and] fails to exercise that care and competence . . . which its recipient is justified in expecting.”³⁴¹

Under contract law, if a fantasy sports participant purchases advisory services that are not performed as warranted, the fantasy sports participant

³³⁵ *Cooper v. Union Bank*, 9 Cal. 3d 371, 377 (1973).

³³⁶ *Id.*

³³⁷ *See id.*

³³⁸ 18 U.S.C. § 1084(a) (1994). Two elements must be present for a violation of the Wire Act: (1) that information transmitted via wire assisted in placing of bets or wagers; and (2) the defendant during such time was engaged in businesses of wagering or betting. *Truchinski*, 393 F.2d at 630.

³³⁹ *See infra* notes 340 - 348 and accompanying text.

³⁴⁰ *See generally* RESTATEMENT (FIRST) OF TORTS § 552 (2011) (discussing the tort of “Information Negligently Supplied for the Guidance of Others”); *see also* *Oddi v. Avco Corp.*, 947 F.2d 257 (7th Cir. 1991) (finding financial advisor liable for an error in “simple number crunching”).

³⁴¹ RESTATEMENT (FIRST) OF TORTS § 552 (2011).

may attempt to sue their advisors for breach of an express warranty.³⁴² In addition, where an advisory service provides advice in the form of an analytical tool, such a tool might be deemed to be a “good” under the Uniform Commercial Code,³⁴³ and thus the purchaser may sue additionally if the tool fails to meet either an implied warranty of merchantability,³⁴⁴ or an implied warranty of fitness for a particular purpose.³⁴⁵

Given these contract-law risks, fantasy sports advisors are always best advised to try to minimize their potential liabilities by drafting clear “disclaimers.”³⁴⁶ One of the better disclaimers of liability in the context of fantasy sports advice appears on the Bloomberg Sports website under its Terms and Conditions of Service.³⁴⁷ This disclaimer requires all users to “bear all risks associated with the use of such material, including, without limitation, any reliance on the accuracy, completeness, or usefulness of such material,” and to agree that “neither Bloomberg nor its affiliates make any warranty of any kind, express or implied, as to the services or results to be attained . . . [and] disclaims all express or implied warranties.”³⁴⁸ In many courts such a disclaimer if clear and conspicuous would be deemed valid.

³⁴² See *CBS Inc. v. Ziff-Davis Publ. Co.*, 75 N.Y.2d 496, 503 (1990) (defining a contractual warranty as “an assurance by one party to a contract of the existence of a fact upon which the other party may rely”).

³⁴³ Many courts have held that computer software qualifies as a “good” under Article 2 of the Uniform Commercial Code (UCC) and thus contracts for analytical tools, such as those provided by Bloomberg Sports, will most likely be interpreted based on the UCC, where adopted by the relevant state. See, e.g., *Advent Sys., Ltd. v. Unisys Corp.*, 925 F.2d 670, 675 (3rd Cir. 1991) (finding computer software subject to Article 2 of the UCC because the fact that a computer program “may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace”); *but see Pearl Invs., LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 353 (D. Me. 2003) (If the computer software in question is custom designed, a court may find the predominant purpose of the transaction was the design services).

³⁴⁴ U.C.C. § 2-314 (1992).

³⁴⁵ U.C.C. § 2-315 (1992).

³⁴⁶ See U.C.C. §§ 2-316, (noting, in the context of goods, the possibility of disclaiming warranties); *Burr v. Sherwin Williams Co.*, 268 P.2d 1041, 1049 (1954) (If a merchant wishes to do so, he must disclaim warranties in a way that makes it clearly known to the buyer.).

³⁴⁷ BLOOMBERGSPORTS.COM, <https://www.bloombergsports.com/frontoffice> (click on terms of service) (last visited October 21, 2011).

³⁴⁸ *Id.*

C. Fantasy Sports Insurance

Similarly, fantasy-sports insurance businesses need to ensure that their services are deemed, under state law, to be bona fide insurance contracts and not a disguised form of illegal gambling.³⁴⁹ Under most state laws, bona fide insurance contracts must conform to two doctrines: the “doctrine of insurable interest” and the “principle of indemnity.”³⁵⁰ The “doctrine of insurable interest” requires that any insurance contract involve “some significant relationship between the insured and the person, the object, or the activity that is the subject of an insurance transaction.”³⁵¹ Thus, in applying the “doctrine of insurable interest,” a court will void an insurance contract “where an insurance policy is obtained by a party who has no interest in the subject of the insurance.”³⁵² In addition, the principle of indemnity requires that “the amount of insurance benefits paid when a loss is sustained by an insured party is not to exceed the economic measure of the loss.”³⁵³ According to one treatise on insurance law, “among the potential evils that were originally regarded as an undesirable consequence of insurance contracts which permitted a net gain by an insured was the prospect that such transactions would be used for gambling.”³⁵⁴

Fantasy sports insurance presents a close call under the “doctrine of insurable risk.”³⁵⁵ On the one hand, sports participants have no direct relationships to the lives or health of the players on their fantasy sports teams.

³⁴⁹ Robert E. Keeton & Alan I. Widiss, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* §8.1(a), 930 (Student ed., West Publ. Co., 1988) (“In the United States, administrative regulation of insurance has been and continues to be primarily the responsibilities of state authorities.”).

³⁵⁰ See *infra* notes 351 - 354 an accompanying text.

³⁵¹ Keeton & Widiss, *supra* note 349, at 135–36.

³⁵² *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. 556, 561 (N.Y. 1861) (voiding an insurance policy where the party taking the policy has no interest in the life of the insured).

³⁵³ Keeton & Widiss, *supra* note 349, at 135 (noting that it “is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest.”).

³⁵⁴ Keeton & Widiss, *supra* note 349, at 136- 37 (“[I]nsurance transactions that appeared to be wagers generally were declared to be illegal in the United States by judicial action, even though there was usually no basis for these decisions in statutory prohibitions.”).

³⁵⁵ *Id.* at 135-36.

However, fantasy sports participants seem to have a real financial stake in a property right pertaining to the statistical output of these athletes.

Fantasy sports insurance also presents some uncertainty under the “doctrine of indemnity.”³⁵⁶ To meet the requirements of this doctrine, fantasy sports insurance agencies need to make sure that their ultimate payout never exceeds the difference between the expected winnings of a given fantasy sports owner if a particular player remains healthy throughout the season, and the expected winnings of that same fantasy sports owner given the occurrence of the insurable event.

D. Fantasy Sports Dispute Resolution

Finally, fantasy dispute resolution services face the lowest risk of legal liability among ancillary fantasy sports businesses.³⁵⁷ Any decision provided by a fantasy sports dispute resolution service may be challenged in the courts, on the basis that the dispute arbitrator acted arbitrarily, capriciously, fraudulently, or in violation of public policy.³⁵⁸ Nevertheless, the courts will probably look favorably upon fantasy sports dispute resolution services because these services not only allow courts to avoid using their limited resources on resolving fantasy sports disputes, but also allow courts to avoid “becom[ing] marred down in what has been called the ‘dismal swamp’” of a particular private association’s rules.³⁵⁹

VII. CONCLUSION

When Daniel Okrent hosted the inaugural Rotisserie League baseball draft in April 1980, there was little need for him to consider how legal risks applied to his “goofy” competition.³⁶⁰ However, with the fantasy sports industry today valued at \$5 billion, an understanding of the legal risks that apply to fantasy sports games has become imperative.

³⁵⁶ *Id.* (noting that it “is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest.”).

³⁵⁷ See *infra* notes 358 - 359 and accompanying text.

³⁵⁸ See, e.g., *Aviles v. Charles Schwab & Co.*, 2010 WL 1433369 (S.D.Fla 2010), at *7 (discussing grounds for challenging a neutral arbitrator’s decision both under the Federal Arbitration Act and under common law).

³⁵⁹ *Crouch v. National Ass’n for Stock Car Auto Racing*, 845 F.2d 397, 403 (2d. Cir. 1988).

³⁶⁰ Townsend, *supra* note 25, at 1C.

For fantasy sports host sites, one source of legal risk emerges from U.S. gambling laws. While there are few court opinions that address how gambling laws apply to fantasy sports host sites, host sites can nevertheless minimize their potential liability under gambling laws by structuring contests in a way that either (1) does not award prizes *or* (2) allocates players through a “traditional auction,” and lasts for at least a full professional sports season.

Another source of legal risk comes from intellectual property laws. Host sites can minimize their intellectual property risks by ensuring that their game scoring systems do not infringe on existing patents and that their written and illustrated content does not infringe on existing copyrights, as well as by obtaining licenses from the requisite players associations before using player names in their games, and obtaining licenses from the requisite sports leagues before using individual team trademarks.

For fantasy sports participants, the main source of legal risk entails the possible disgorgement of fantasy winnings under Queen Anne statutes, which disallow winners in gambling contests from keeping prize money. Fantasy sports participants should avoid competing in high-stakes fantasy leagues in states that maintain Queen Anne statutes.

Fantasy sports participants are also at a potentially heightened risk of unemployment and bankruptcy. Thus, fantasy sports participants should familiarize themselves with workplace policies related to participating and soliciting participation in fantasy sports leagues, as well as with how, if at all, fantasy sports entry fees would compromise their personal finances.

For ancillary fantasy sports businesses, their main legal risks relate to gambling laws, as well as traditional contract and tort law. Specifically, fantasy sports treasury sites risk liability if they fail to properly turn over winnings or they collect and dispense funds in a way that violates the Wire Act. Fantasy sports advisory sites risk liability under both tort and contract law if their websites make inaccurate representations about their services. Fantasy sports insurance businesses risk liability under gambling law if their insurance policies are found to not serve a legitimate purpose of insurance, but rather to be a disguise for illegal gambling. Meanwhile, fantasy sports dispute resolution businesses run the risk of having their arbitration decisions challenged in federal court.

Recognizing all of these legal risks, it is no longer fair to view fantasy sports as simply a “tongue-in-cheek exercise.”³⁶¹ However, for the many professional sports fans who wanted to experience a true simulation of the professional sports marketplace, they now have it: legal risks and all.

³⁶¹ Walker, *supra* note 5, at 1D.



Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy

by Aaron J. Moss¹ and Kenneth Basin² *

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I. INTRODUCTION

On January 1, 2013, the first generation of copyright transfers made under the 1976 Copyright Act will become eligible for statutory termination, enabling creators of copyrighted properties and their heirs to unwind their own transactions and reacquire potentially valuable rights to long-since transferred works. The implications for successful, enduring franchises created after 1978 could be dramatic.³ For example, when rights to *The*

³ High-profile disputes over pre-1978 copyright transfers that are already subject to termination have already proven big news — and big business — in the entertainment industry. In 2008, the heirs of Superman co-creator Jerome Siegel famously recaptured a portion of the copyright to the iconic superhero. *Siegel v. Warner Bros. Entertainment Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008). Similarly, shortly after media giant Disney announced its \$4 billion acquisition of Marvel Entertainment, it received 45 notices of copyright termination from the heirs of Jack Kirby, co-creator of many of Marvel's most valuable franchises, including Spider-Man, X-Men, and the Fantastic Four. Brooks Barnes & Michael Cieply, *A Supersized Custody Battle Over Marvel Superheroes*, N.Y. TIMES, Mar. 20, 2010, *availa-*

Terminator film franchise went up for sale in December 2009, speculation that James Cameron might eventually seek to recapture the copyright in the franchise raged, and potentially depressed the franchise's value at auction.⁴ More recently, in August 2011, the former lead singer of 1970s disco group the Village People made headlines by serving notice on the publishing companies that manage the group's catalog that he intended to recapture his purported share of the copyright in the iconic hit "Y.M.C.A."⁵

But many artists, writers, and other content creators who attempt to recapture rights in previously transferred works may be in for a rude surprise. Artists who, for tax reasons, have utilized so-called "loan-out corporations" (entities by which artists "loan out" their own personal services to employers) may find that they have unwittingly nullified their own copyright termination rights by rendering their creative efforts "works for hire," and therefore ineligible for termination.

This article examines, and seeks to reconcile, the conflict between the widespread use of loan-out corporations in the entertainment industry and the 1976 Copyright Act's restriction on artists' termination rights. Part II reviews the background, policy rationale, and general legal structure of the termination rights, as embodied in the Copyright Act. Part III offers a brief summary of the history and rationale of loan-out corporations and explains in greater detail the challenges they pose to statutory termination rights. Part IV explores and critiques the legal arguments that lawyers and litigants might use to invoke termination rights for artists who have relied on loan-out corporations. Part V assesses options for legislative and contractual amendments that would alleviate the conflict between loan-out corporations and termination rights. Part VI concludes.

ble at <http://www.nytimes.com/2010/03/21/business/21marvel.html>; Michael Cieply & Brooks Barnes, *Disney Faces Rights Issues Over Marvel*, N.Y. TIMES, Sept. 20, 2009, available at <http://www.nytimes.com/2009/09/21/business/21marvel.html>. In July 2011, the Southern District of New York granted summary judgment in Marvel's favor, finding that the Kirby heirs' termination notices were invalid because Kirby's contributions had been works for hire. *Marvel Worldwide, Inc. v. Kirby*, 756 F. Supp. 2d 461 (S.D.N.Y. 2011). An appeal is likely.

⁴ Matthew Garrahan, *Puzzle Posed by Terminator Auction*, FIN. TIMES, Dec. 11, 2009, available at <http://www.ft.com/cms/s/0/86151482-e67f-11de-98b1-00144feab49a.html>.

⁵ Larry Rohter, *A Village Person Tests the Copyright Law*, N.Y. TIMES, Aug. 16, 2011, available at <http://www.nytimes.com/2011/08/17/arts/music/village-people-singer-claims-rights-to-ymca.html>.

II. COPYRIGHT TERMINATION UNDER THE 1976 COPYRIGHT ACT

A. A Brief History of Statutory Termination Rights

By passing the Copyright Act of 1976, Congress abandoned the unwieldy and procedurally unforgiving two-term system set forth in the previous 1909 Act, in favor of a unitary term of protection for new works created on or after January 1, 1978. Under the prior Act, copyright protection lasted for twenty-eight years from the date of first publication, plus an additional twenty-eight years upon a timely renewal, resulting in a maximum protection of fifty-six years.⁶ If the copyright owner did not renew on time (or neglected to clear various other procedural hurdles⁷), the work would fall into the public domain.⁸

In theory, the 1909 Act's renewal system was designed to benefit authors and their heirs, by giving those authors who sold their works for comparatively small sums the exclusive right to recapture the copyright for the renewal term, thereby sharing in any long-term success of the work.⁹ In practice, however, authors with little bargaining power were often required to assign both the initial and renewal copyright terms to publishers in advance. The Supreme Court upheld this practice in *Fred Fisher Music Co. v. M. Witmark & Sons*.¹⁰ As a result, Congress's intent to confer the benefit of the renewal term on authors and their heirs was, in the words of one Supreme Court justice, "substantially thwarted."¹¹

⁶ Act of March 4, 1909, ch. 320, 35. Stat. 1075, as amended and codified (hereinafter "1909 Act") § 23.

⁷ Formal registration was required to secure federal copyright protection for unpublished works. 1909 Act § 12. For published works, publication without proper statutory notice of copyright caused the work to automatically fall into the public domain. *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1166 (9th Cir. 1996).

⁸ *LaCienega Music Co. v. ZZ Top*, 53 F.3d 950, 954 (9th Cir. 1995), *superseded by statute on other grounds*, 17 U.S.C. § 303(b) (2006) (under 1909 Act, "[f]ailure to renew a copyright after 28 years irrevocably injects the work at issue in the public domain").

⁹ H.R. REP. NO. 2222, at 14 (1909) ("It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term.").

¹⁰ 318 U.S. 643 (1943).

¹¹ *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 185 (1985) (White, J., dissenting).

The 1976 Copyright Act took effect on January 1, 1978. The 1976 Act replaced the two-term system with a single term for new works that endured for the life of the author, plus fifty years.¹² In the case of already subsisting copyrights, the 1976 Act extended the second term of protection by nineteen years, from twenty-eight to forty-seven years (the “Extended Renewal Term”), thereby extending the total term of protection from fifty-six years to seventy-five years.¹³

Congress recognized that many authors and their heirs would have no opportunity to share in the fruits of this Extended Renewal Term because they had previously assigned away their copyright interests, including all renewal term rights, in perpetuity.¹⁴ In order to allow these heirs to reap the financial benefit of the additional nineteen-year term, the 1976 Act created a new right of termination, enabling authors and certain specified heirs to recapture, for the Extended Renewal Term, rights in works that had previously been granted to third parties. The House Report accompanying the 1976 Act explained that “[a] provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹⁵

Of course, this was the same rationale that underpinned the decision to give authors the benefit of the renewal term under the 1909 Act.¹⁶ In order to prevent publishers from requiring authors to waive their termination rights in advance, as they had with renewal rights, the termination provisions permit an author or his heirs to terminate a grant and any right under it “notwithstanding any agreement to the contrary.”¹⁷ At the same time,

¹² 17 U.S.C. §302(a) (1994) (amended 1998). In 1998, Congress added an additional twenty years of protection. Works created on or after January 1, 1978 are now protected for the life of the author plus seventy years. 17 U.S.C. § 302(a) (2006). 17 U.S.C. §302(a) (1994) (amended 1998).

¹³ 17 U.S.C. § 304(b); see H.R. REP. NO. 1476, at 135, 139–40 (1976); see also, S. REP. NO. 94-473 at 117, 122 (1975). The duration of copyright for works created prior to January 1, 1978 is now 95 years. 17 U.S.C. §§ 302(a), 303(a).

¹⁴ H.R. REP. NO. 1476, at 140–41; S. REP. NO. 94-473, at 123–24.

¹⁵ H.R. REP. NO. 1476, at 124.

¹⁶ See *supra* note 9.

¹⁷ 17 U.S.C. § 203(a)(5) (grants executed on or after effective date of Act); § 304(c)(5) (grants executed before effective date of Act). In practice, courts have suggested that, in some circumstances, parties may mutually agree to contract around the termination right. See *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005); *Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008); Michael J. Bales, Note, *The Grapes of Wrathful Heirs: Terminations of Transfers of Copyright and “Agreements to the Contrary,”* 27 CARDOZO ARTS & ENT. L.J. 663, 669 (2010).

the termination statute was intended to reflect “a practical compromise that [would] further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.”¹⁸ Therefore, unlike the previous renewal system, reversion through termination is not automatic under the current Act. Termination may only be effected through affirmative action on the part of the author or his statutory successors, who must serve an advance notice on the current copyright owner “within specified time limits and under specified conditions.”¹⁹

B. Mechanics of Termination²⁰

In general, termination is effected by serving an advance written notice upon the grantee or the grantee’s successor in title, signed by all of those entitled to terminate the grant,²¹ or by their duly authorized agents.²² The notice must be served at least two years, but not more than ten years, before the effective date of termination stated in the notice, and a copy of the notice must be recorded in the Copyright Office before the effective date of termination.²³

For grants executed on or after January 1, 1978, Section 203 of the Copyright Act applies. Section 203 gives authors and their statutory successors the right to terminate a qualifying grant any time during a five-year period, which begins to run thirty-five years after the grant’s execution. If the grant covers the right of publication, the period begins at the end of

¹⁸ H.R. REP. NO. 1476, *supra* note 14, at 124.

¹⁹ 17 U.S.C. § 203(a)(4); H.R. REP. NO. 1476, at 124.

²⁰ A detailed explanation of the mechanics of termination is 5 outside the scope of this article and has been covered extensively elsewhere. Indeed, the passage of the 1976 Copyright Act was followed almost immediately by a flurry of scholarly activity exploring the mechanisms governing these new rights. *See, e.g.*, Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947 (1977); Marc. R. Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Thorny Problems for the Copyright Bar*, 24 UCLA L. REV. 1141 (1977); Benjamin Melniker & Harvey D. Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y.L. SCH. L. REV. 589 (1976). *See also* Timothy K. Armstrong, *Sbrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359 (2010); Anthony Cheng, *Lex Luthor Wins: How the Termination Right Threatens to Tear the Man of Steel in Two*, 34 COLUM. J.L. & ARTS 261 (2011).

²¹ 17 U.S.C. §§ 203(a)(1)–(2), 304(c)(1)–(2) (identifying heirs entitled to termination rights) (2006).

²² 17 U.S.C. §§ 203(a)(4), 304(c)(4).

²³ 17 U.S.C. §§ 203(a)(4)(A), 304(c)(4)(A).

thirty-five years from the date of publication, or at the end of forty years from the date of execution of the grant, whichever ends first.²⁴

For grants of renewal term interests executed before January 1, 1978, Section 304(c) governs. Section 304(c) gives authors and their statutory successors the right to terminate the grant at any time during a five-year period that begins on January 1, 1978, or fifty-six years after the date statutory copyright was originally secured, whichever is later.²⁵ Section 304(d), which was added by Congress as part of the Sonny Bono Copyright Term Extension Act of 1998 (which increased the term of all subsisting copyrights by twenty years), provides a termination right for the extended twenty-year period to authors or successors whose original termination rights, under Section 304(c), had, as of October 26, 1998, expired without being exercised. Termination of the grants subject to Section 304(d) may be effected at any time during a period of five years, beginning at the end of seventy-five years from the date copyright was originally secured.²⁶

Once termination is effected, the persons owning the termination interests (the author or his statutory successors) will own all rights provided by the Copyright Act with respect to the work that was subject to the grant, regardless of the particular termination statute that applies. There is, however, an important exception: any derivative works prepared under authority of the grant before its termination may continue to be utilized after termination.²⁷ This means, for example, that a screenwriter who has successfully terminated his assignment to a motion picture studio of the right to make films based on his or her screenplay may prevent the studio from making new motion pictures based on the screenplay, but cannot prevent the studio from exploiting any motion pictures created while the grant was in effect.

Grants executed prior to January 1, 1978 have been subject to termination for several decades, and the efforts to terminate such grants have been the subject of several high profile Circuit Court opinions.²⁸ The first generation of copyright transfers subject to Section 203 of the Copyright Act (i.e.,

²⁴ “This alternative method of computation [was] intended to cover cases in which years elapse between the signing of a publication contract and the eventual publication of the work.” H.R. REP. NO. 1476, at 126.

²⁵ 17 U.S.C. § 304(c)(3).

²⁶ 17 U.S.C. § 304(d)(2).

²⁷ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

²⁸ See, e.g., *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005) (termination claim involving A.A. Milne’s Winnie the Pooh); *Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008) (termination claim brought by heirs of novelist John Steinbeck); *Classic Media, Inc. v. Winifred Knight Mewborn*, 532 F.3d 978 (9th Cir. 2008) (termination claim involving rights to Lassie).

all post-January 1, 1978 grants, which necessarily include all new works created after the 1976 Act went into effect) will begin entering their termination windows on January 1, 2013.²⁹ The period for providing notice of termination of such grants has already opened. Over the next several years, numerous grants in popular works are anticipated to become subject to termination.³⁰

C. *The Special Role of the Work-for-Hire Doctrine in the Termination Analysis*

The termination provisions apply to any “transfer” of copyright,³¹ including assignments, exclusive licenses,³² and nonexclusive licenses.³³ While this covers a broad array of grants, the termination statutes expressly

²⁹ This January 1, 2013 date is the date thirty-five years after the earliest possible date of execution of grants/transfers subject to the copyright termination mechanisms described in Section 203(a) of the Copyright Act. In practice, many grants of books, screenplays, and other creative works include the right of publication, and therefore will not be eligible for termination until thirty-five years have passed from the date of publication, which will often be up to several years after the date the grant was executed. 17 U.S.C. § 203(a)(3) (2006). In the event a work is not published within five years of the date the grant is executed, the grant may be terminated forty years from the date of execution. *Id.* at § 203(a)(3), 304(c)(4)(A).

³⁰ See generally *supra* notes 4–6. See also Barnes & Cieply, *supra* note 3 (quoting Stanford Professor Paul Goldstein as opining that “[a]ny young lawyer starting out today could turn what [copyright termination specialist attorney Marc Toberoff is] doing into a real profit center” because “[a] new wave of copyright termination actions is expected to affect the film, music and book industries as more works reach the 56-year threshold for ending older copyrights, or a shorter period for those created under a law that took effect in 1978.”); Eriq Gardner, *Copyright Battle Comes Home*, IP LAW & BUSINESS, LAW.COM (Oct. 8, 2009), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202434372952>.

³¹ 17 U.S.C. §§ 203(a), 304(c) (2006).

³² A “transfer of copyright ownership” includes “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. § 101.

³³ 17 U.S.C. §§ 203(a), 304(c). See also STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG. REP. ON COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REP. OF THE REG. OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 73 (H. Comm. Print 1965), (“Non-exclusive grants were included in the right on the strength of the argument that, otherwise, there would be nothing to prevent a transferee from avoiding the effect of the [termination] provision by compelling the author to grant him a perpetual non-exclusive license along with a statutorily limited transfer of exclusive rights.”).

provide that a grant in a “work made for hire” is *not* subject to statutory termination under Section 203 or Section 304(c) of the Copyright Act. To understand fully the importance of this exception, and its implications in light of the manner in which most content in the entertainment industry is created and transferred, it is necessary to first explore the nature of works made for hire under both the 1909 and 1976 Copyright Acts.

1. Works for Hire Under the 1909 Act

The 1909 Copyright Act continues to govern works created prior to January 1, 1978, and, by extension, works made for hire during that period. The 1909 Act mentioned works for hire only in the definition section of the statute, which provided that “[i]n the interpretation and construction of this title . . . the word ‘author’ shall include an employer in the case of works made for hire.”³⁴ Neither the term “employer” nor “work for hire” was defined by the 1909 Act, leaving courts to determine the contours of the concept.

Throughout much of the life of the 1909 Act, courts applied the work-for-hire doctrine only to “traditional”³⁵ hierarchical relationships in which the employee created the work as part of “the regular course of business” of the employer.³⁶ During the last decade that the 1909 Act was in effect, courts expanded the concept to include less traditional relationships, as long as the work was made at the hiring party’s “instance and expense,”³⁷ and the hiring party had the right to “direct or supervise” the artist’s work.³⁸

Even under this broader conception, however, when interpreting the 1909 Act, courts looked to the actual relationship between the hiring and hired parties to determine whether a copyrighted work was created within

³⁴ 1909 Act at § 62.

³⁵ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

³⁶ *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1327 (9th Cir. 2000) (quoting MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.03[B][1][a][i] (1999)).

³⁷ *See Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (applying work for hire doctrine for where individual was commissioned to produce a work as an independent contractor); *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966) (independent contractor is an “employee” and a hiring party is an “employer” for purposes of the work-for-hire statute if the work is prepared at the hiring party’s “instance and expense”).

³⁸ *See Donaldson Publ’g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972).

the course of a true employment relationship. Where a putative employer had no right to direct, supervise or control his “employee,” no employment relationship existed, notwithstanding the parties’ use of the word “employment” in a contract governing the relationship.³⁹ Likewise, a putative employee’s dominant role in the corporation, his freedom to engage in profitable outside activities without sharing the proceeds with the “employer,” and the absence of any fixed salary weighed against a finding that the hired party was a true employee.⁴⁰

The clearest application of this principle can be found in the Second Circuit’s opinion in *Marvel Characters, Inc. v. Simon*.⁴¹ In *Marvel Characters*, comic book writer and artist Joe Simon sought to terminate his transfer (to the predecessors-in-interest of Marvel Comics) of the copyrights for the iconic Captain America character and his earliest adventures.⁴² However, in a 1969 settlement agreement to an earlier dispute between the parties, Simon acknowledged that his contribution to the Captain America character and comics “was done as an employee for hire of [Marvel’s predecessor].”⁴³ Relying on that acknowledgment, Marvel filed for a declaratory judgment that Simon’s termination notices were invalid, and the Southern District of New York granted summary judgment in Marvel’s favor.⁴⁴ The lower court determined that, based on the language in the 1969 settlement agreement, the Captain America copyrights fell within the work-for-hire exception to copyright termination under Section 304(c) of the Copyright Act.⁴⁵ The Second Circuit reversed, holding that “an agreement made after a work’s creation stipulating that the work was created as a work for hire constitutes an ‘agreement to the contrary’ which can be disavowed pursuant to the statute.”⁴⁶ The court noted that, in assessing work-for-hire status, “[i]t is the relationship that in fact exists between the parties, and not their description of that relationship, that is determinative.”⁴⁷ The Second Circuit therefore remanded to the lower court for trial on the issue of whether the Captain America stories were, in fact, created as works for hire (and therefore

³⁹ *Donaldson*, 375 F.2d at 641–43.

⁴⁰ *Id.*

⁴¹ 310 F.3d 280, 291 (2d Cir. 2002) (quoting MELVILLE B. NIMMER & DAVID NIMMER, § 11.02[A][2] (2000 ed.)).

⁴² *Id.* at 282–84.

⁴³ *Id.* at 284.

⁴⁴ *Id.* at 285.

⁴⁵ *Id.* at 284–85.

⁴⁶ *Id.* at 290.

⁴⁷ *Id.* (quoting NIMMER & NIMMER, *supra* note 41, § 11.02[A][2]).

whether Simon had the right to terminate).⁴⁸ The Second Circuit’s ruling and rationale in *Marvel Characters* remains one of the most comprehensive and widely adopted statements of the law governing contractual agreements and works for hire under the 1909 Act. Simply stated, parties may not engage in an after-the-fact characterization in order to avoid the prospect of statutory termination.

2. Works for Hire Under the 1976 Act

Unlike the previous 1909 Act, the 1976 Copyright Act, which governs works created on or after January 1, 1978, explicitly defines “work made for hire.” To qualify as a work made for hire under the 1976 Act, the work must either be: (1) “prepared by an employee within the scope of his or her employment,” or (2) be one of certain enumerated works that are specially ordered or commissioned, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁴⁹

a. Works for Hire Created By Employees

If a hired party is determined to be an employee, the copyright in a work created within the course and scope of the employment relationship

⁴⁸ *Id.* at 293.

⁴⁹ The full definition of a “work made for hire” under the 1976 Copyright Act is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (2006).

will be considered a work made for hire.⁵⁰ Like the 1909 Act, the 1976 Act did not define the term “employee.” In *Community for Creative Non-Violence v. Reid*, however, the Supreme Court unanimously ruled that Congress intended to invoke common law agency principles to determine whether the hired party is an “employee” for purposes of the Copyright Act.⁵¹ The Court’s inquiry in *Reid* focused on the hiring party’s right to control the “manner and means” by which the copyrighted work was accomplished.⁵² Under the Court’s test, for the hired party to be considered an “employee,” the hiring party must have control over the *process* by which the product was created. The right to control the work product is not solely determinative of employment.⁵³

To aid its inquiry into employment status, the Court enumerated an illustrative list of factors, including: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when, and for how long, to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.⁵⁴

While the Supreme Court in *Reid* counseled that “[n]o one of these factors is determinative,”⁵⁵ subsequent cases have accorded certain factors greater weight than others.⁵⁶ Indeed, in *Aymes v. Bonelli*, the Second Circuit

⁵⁰ *Id.*

⁵¹ 490 U.S. 730, 751 (1989).

⁵² *Reid*, 490 U.S. at 751.

⁵³ *Id.* at 741.

⁵⁴ *Id.* at 751–52.

⁵⁵ *Id.* at 752.

⁵⁶ See, e.g., *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 110–11 (2d Cir. 1998) (“Not all the *Reid* factors will be significant in every case, and we must weigh in the balance only those factors that are actually indicative of agency in the particular circumstances before us.”); *Marco v. Accent Publ’g Co.*, 969 F.2d 1547 (3d Cir. 1992) (holding that photographer was an independent contractor while ignoring some *Reid* factors and noting that some were “indeterminate” and should not be considered); *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769 (3d Cir. 1991) (holding that a computer programmer could be an independent contractor without addressing several of *Reid* factors); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) (holding that a drafting service operated as an independent contractor to a builder based on only eight factors, ignoring others).

accorded particular weight to five out of twelve factors: “(1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.”⁵⁷ Of those, the *Aymes* court suggested that consideration of only two of the factors — employee benefits and the tax classification of the hired party — would be “highly indicative” of whether a hired party should be considered an employee or, conversely, an independent contractor.⁵⁸ Later cases have avoided narrowing the list of relevant factors as far as the *Aymes* court did, but have validated the focus, at least in the copyright context, on the five factors initially enumerated in *Aymes*.⁵⁹

b. Works for Hire Created By Independent Contractors

If the hired party is determined to be an independent contractor, the work will only be considered a work made for hire if it falls within one of the categories of qualifying “specially ordered or commissioned” works set forth in Section 101 of the Copyright Act.⁶⁰ Even then, the parties must agree, in a writing signed by both parties, that the work shall be considered a “work made for hire.”⁶¹ Courts have generally refused to require that any specific words be used in such a writing (not even the term “work for hire” need appear), although it must appear from the document that the parties

⁵⁷ 980 F.2d 857, 861 (2d Cir. 1992).

⁵⁸ *Id.* at 862–63.

⁵⁹ See, e.g., *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 636 n.21 (2d Cir. 2004); *Langman Fabrics*, 160 F.3d at 110–11; *Price v. Fox Entm’t Group, Inc.*, 473 F. Supp. 2d 446, 456 (S.D.N.Y. 2007) (referring to the list of five factors highlighted by *Aymes* as the “*Reid-Aymes* factors”); *Cf. Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 115–16 (2d Cir. 2000) (declining to adopt *Aymes* court’s weighing of *Reid* factors in assessing employee status for purposes of Title VII discrimination claim).

⁶⁰ 17 U.S.C. § 101 (2006). Of primary importance to the entertainment industry, Section 101 identifies works that are commissioned “as a part of a motion picture or other audiovisual work” — which would encompass contributions from screenwriters, directors, cinematographers, composers, actors, or virtually anyone else involved in the production of a motion picture — as eligible for work-for-hire status.

⁶¹ *Id.*; *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368–69 (9th Cir. 1980).

both intended that the work be considered a work for hire.⁶² So long as this intent exists prior to the work's creation, many courts have held that the writing evidencing this agreement may be executed after the work is created.⁶³

If the work does not fall within one of the enumerated categories set forth in Section 101, however, it will not qualify as a work for hire unless the hired party was an employee of the hiring party.⁶⁴ Two notable examples of non-qualifying works are photographs⁶⁵ and sound recordings.⁶⁶ Unless they qualify as "contributions to a collective work" (or, perhaps, if they can be pigeonholed into another category in the statute's enumerated list⁶⁷), such works created by independent contractors would not qualify as works for hire, notwithstanding any agreement between the hiring party and the commissioned party purporting to treat them as such.

⁶² Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 (9th Cir. 2003).

⁶³ Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 559 (2d Cir. 1995) (while parties cannot retroactively agree to render a work a work for hire, they may create the written memorialization of such an agreement after the fact); Compaq Computer Corp. v. Ergonome Inc., 210 F. Supp. 2d 839 (S.D. Tex. 2001) (noting that "[t]he Fifth Circuit has deemed the Second Circuit to be 'the *de facto* Copyright Court of the United States'" and following *Playboy Enters., Inc. v. Dumas*) (quoting *Easter Seal Soc. for Crippled Children and Adults of La., Inc. v. Playboy Enter.*, 815 F.2d 323, 325 (5th Cir. 1987)). *But see* Schiller & Schmidt v. Nordisco Corp., 969 F.2d 410, 412-13 (7th Cir. 1992) (holding the opposite).

⁶⁴ *Reid*, 490 U.S. at 741 ("Section 101 plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works, which fall within one of the nine enumerated categories and are the subject of a written agreement.").

⁶⁵ SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 312 (S.D.N.Y. 2000) ("[P]hotographs are not included in the § 101 list of subject matters permitting a work-for-hire agreement with independent contractors."); R. Scott Miller, Jr., *Photography and the Work-for-Hire Doctrine*, 1 Tex. Wesleyan L. Rev. 81, 103102 (1994).

⁶⁶ For a more detailed discussion, see, e.g., Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 378-90 (2002). The serious practical consequences of this exclusion, as it relates to copyright termination in particular, has also been the subject of analysis and discussion. See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387 (2001).

⁶⁷ See *SHL Imaging, Inc.*, 117 F. Supp. 2d at 312.

3. Works for Hire and Copyright Termination

The House Report to the 1976 Act expressly notes that one of the principal reasons the definition of the term “works made for hire” assumed importance in the Act’s development was because the right of termination would not apply to such works.⁶⁸ This decision was one of the primary means by which Congress sought to strike an appropriate balance between the rights of artists and producers/employers. Congress evidently reasoned that the employers or commissioning entities of genuine works for hire (presumably) had meaningfully contributed resources and/or facilities towards the works’ creation, and were therefore entitled to reap the benefits of that investment for the full life of the resulting copyrights. In contrast, such protection would not be afforded to entities that merely acquired creative works that had been generated through the efforts and investment of artists working without their support.

The interminable status of works for hire also follows from the 1976 Act’s explicit recognition that copyright vests initially in the author or authors who created the work.⁶⁹ In the case of works for hire, however, the employer or person for whom the work was prepared, not the individual who created the work, is considered the author from inception.⁷⁰ Because only authors and their specified heirs may terminate copyright transfers, the legal fiction of the work-for-hire doctrine ensures that neither the actual creator of the work nor his heirs will ever possess termination rights.

The practical consequences of a work’s characterization thus become clear: if a writer assigns his or her post-January 1, 1978 copyright in a screenplay to a studio, he or she may terminate this grant as early as thirty-five years later. If, on the other hand, the screenwriter is determined to be an “employee” of the studio, or if the studio has commissioned the writer to prepare the screenplay on its behalf, the studio is deemed to be the author of a screenplay as a work made for hire, and the statutory termination provisions will never apply. Work-for-hire agreements are extremely common in the entertainment industry,⁷¹ and the many works created by studio em-

⁶⁸ H.R. REP. NO. 94-1476, at 125 (1976).

⁶⁹ 17 U.S.C. § 201(a) (2006).

⁷⁰ 17 U.S.C. § 201(b).

⁷¹ See generally GENEVIEVE JOLLIFFE & CHRIS JONES, *THE GUERRILLA FILM MAKER’S HANDBOOK* 123 (2004) (advising filmmakers to “have work-for-hire agreements with anyone on your crew that makes a creative contribution that could be copyrightable”); HARVEY RACHLIN, *THE TV AND MOVIE BUSINESS: AN ENCYCLOPEDIA OF CAREERS, TECHNOLOGIES, AND PRACTICES* 332 (1991) (explaining significance of work-for-hire contractual arrangements in the entertainment industry);

ployees in the scope of their employment, or by specially commissioned screenwriters, will never be subject to statutory termination.

This loss of termination rights seemingly should not come into play with respect to preexisting works of freelance writers, directors and other artists created prior to entering into a relationship with a studio or production company. While studios will often attempt to characterize such preexisting works as having been made for hire,⁷² the absence of an agreement made contemporaneously with the work is likely to defeat the studio's characterization should a dispute arise. Perhaps recognizing this fact, studios routinely insert "belt and suspenders" language in their contracts with screenwriters, providing that if the work being acquired is for any reason not deemed to be a work for hire, the writer will also convey his rights in the work via an assignment.⁷³ Such assignment language does ensure, at least initially, that the studio becomes the owner of all preexisting works upon which a hit film is based. Unlike a work made for hire, however, a mere assignment will be subject to statutory termination. This means that while a studio may own the copyright in perpetuity for a film or other derivative work based on a preexisting screenplay, the writer could retain the ability to terminate rights in the screenplay itself, or at the very least, in whatever underlying notes or materials the writer had already prepared before com-

RANDALL D. WIXEN, *THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING* 23 (2005) (noting that, in the world of music, "[w]ork-for-hire agreements are most common in film and television composing, where the studio wants to own and control the whole collaborative result and not have to keep checking with the owners of the incorporated elements").

⁷² See Michael H. Davis, *The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is "Pitched," a Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93, 114 (2000).

⁷³ See *id.* See also Alexander Lindey, LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 6:33 (3d ed. 2009) ("All material written under this agreement (the 'Material') constitutes work that is a contribution to a motion picture or other audio visual work under this agreement, and accordingly shall be deemed to be a work made for hire for Producer. Producer shall be considered the author of the Material for all purposes and the sole and exclusive owner of all copyrights, patents, trademarks, and all other right, title, and interest in and to the Material and each and every part of it, including all incidents, plots, dialogue, characters, action, and titles forming a part of the Material. Writer will, upon request, execute, acknowledge, and deliver to Producer such additional documents as Producer may deem necessary to effectuate Producer's rights under this agreement, and Writer hereby grants to Producer the right, as its attorney-in-fact, to execute, acknowledge, deliver, and record in the U.S. Copyright office or elsewhere any and all such documents. In the event that the work is deemed to not be a work made for hire, writer hereby assigns all right, title, and interest in and to said work to Producer.") (writing services agreement).

mitting his or her ideas to a more fully fleshed-out form.⁷⁴ Upon recapturing these rights, the writer or his heirs would have the exclusive right to create new films and other derivative works based on the screenplay or underlying materials.⁷⁵

However, many artists could nevertheless be unwittingly deprived of their valuable termination rights, by creating their works while nominally employed by their own single-employee loan-out corporations. As discussed in greater detail below, the 1976 Copyright Act's copyright termination provisions create an interesting irony: the law prevents studios or producers from using draconian agreements to divest artists of their valuable termination rights. Yet many artists may inadvertently suffer the same fate at their own hands, simply by using a corporate structure created by, for, and with the sole purpose of *benefitting* the artist.

III. THE UNFORESEEN CHALLENGES OF LOAN-OUT CORPORATIONS

In principle, copyright termination rights should function in a straightforward manner. The mechanics of copyright termination are

⁷⁴ See Davis, *supra* note 72, at 109 (“[S]creenwriters who show up at the producer’s office with preexisting work — whether it be a pitch written on note cards, an outline, or a treatment — can certainly produce a future work as a specially commissioned work that will not be subject to a termination right as a work for hire. However, the pitch, outline, or treatment itself will never be a work for hire, and will always be subject to the author’s termination right.”).

⁷⁵ A “mutual block” scenario could arise, depending on how closely the eventual production, based on the screenwriter’s original concept or screenplay, actually resembled the underlying materials:

[I]n theory, any number of spinoffs, sequels, or character developments are possible. This is because although the derivative work is safe from the author’s termination rights, to the extent that the underlying preexisting work was well-developed and to the extent that the derivative work is truly based upon the underlying work, the author, having regained copyright in that work, has the right to create, or license others to create, new derivative works based on the original work. On the other hand, there will no doubt be severe, perhaps even fatal, limits upon the author’s freedom to exploit the underlying work to the extent that the prepared derivative work(s) adopted new character names, a new title, and, especially, to the extent new matter was added. A canny producer might succeed in limiting the author’s freedom by creating during the rewrite process names, titles, and other matter to which public recognition attaches. Such new expressive features, created within the work-for-hire relationship, become parts of the specially commissioned work for hire.

Id. at 98–99.

spelled out clearly by the Copyright Act itself, while the work-for-hire doctrine, a commonly used and understood concept in the entertainment industry and a well-entrenched and widely litigated legal doctrine, serves to limit the scope of copyrighted works and transfers that are eligible for termination. Yet few people seem to realize that this seemingly simple scheme has been complicated dramatically, and perhaps even undermined altogether, by artists' widespread use of so-called "loan-out corporations."

A. *What Is a Loan-Out Corporation?*

A loan-out corporation is a legal fiction employed for the financial benefit of successful artists and entertainers. It is a duly organized corporation, typically wholly owned by an artist, the sole function of which is to "loan out" the services of the artist-owner to producers and other potential employers.⁷⁶ Loan-out arrangements typically involve two primary contractual relationships: (1) an agreement between the artist and his wholly owned corporation by which the artist agrees to provide services to that corporation, often exclusively, in exchange for a fixed or contingent salary; and (2) an agreement between the loan-out corporation and a producer or other employer to furnish the artist's services to said producer for a given project.⁷⁷

Loan-out corporations offer two primary benefits to the artists who use them: limited personal liability and beneficial tax treatment. By contracting through a separately organized corporation, artists are able to limit their liability to the corporation's assets, and avoid personal liability that might otherwise arise out of the corporation's dealings. Despite the fact that an artist and his loan-out corporation are effectively one and the same, the distinction is nevertheless meaningful. In one widely publicized case, actress Kim Basinger successfully appealed an \$8 million breach of contract judgment against her because the court had relied on a special verdict find-

⁷⁶ For more detailed descriptions of the nature and function of loan-out corporations, see, e.g., George G. Short, *The Loan-Out Corporation in Tax Planning for Entertainers*, 44 LAW & CONTEMP. PROBS. 51, 51 (1981); Marilyn Barrett, *Independent Contractor/Employee Classification in the Entertainment Industry: The Old, the New and the Continuing Uncertainty*, 13 U. MIAMI ENT. & SPORTS L. REV. 91, 108 (1995); Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879, 880-83 (1995); Robert A. Cohen, *To Incorporate or Not to Incorporate? That Is the Question*, 2 TEX. REV. ENT. & SPORTS L. 113, 114 (2001).

⁷⁷ Short, *supra* note 76, at 51.

ing that Basinger “and/or” her loan-out corporation were liable for the breach (as opposed to a specific finding as to Basinger individually).⁷⁸

More fortunate artists will never have to avail themselves of such limited liability, but can nevertheless achieve significant tax savings by using loan-out corporations. Artists who pass their income through loan-out corporations may enjoy better liquidity/cash flow, can coordinate their income distribution by fiscal year, enjoy lower corporate tax rates, and can further shield themselves from taxes by using qualified pension, profit-sharing, and employer medical reimbursement plans.⁷⁹ The Internal Revenue Service, however, is well aware of the tax-shielding properties of loan-out corporations. Indeed, it has engaged in a decades-long game of cat-and-mouse with artists (and their tax attorneys), revising the tax code and periodically stepping up tax enforcement efforts in an effort to reclaim much of the revenue that loan-out corporations have allowed artists to retain.⁸⁰

B. *Loan-Out Corporations in the Courtroom*

Loan-out corporations and the legal battles they create date back at least as far as the 1930s. In 1938, Fontaine Fox, a prominent and celebrated cartoonist of the era, clashed with the IRS, which had disregarded his loan-out corporation as a mere dummy and claimed that Fox’s income had been improperly assigned to the corporation.⁸¹ Fox ultimately prevailed before the Board of Tax Appeals, the predecessor to today’s U.S. Tax Courts.⁸² The next year, stage and film actor/screenwriter/producer/director Charles Laughton successfully fended off a similar IRS challenge to his use of a loan-out corporation.⁸³ Over the years that followed these early cases, the IRS

⁷⁸ *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244, at *1 (Cal. Ct. App. 1994). The lessons learned by the industry from this case, however, may have substantially undermined the limited liability benefits of loan-out corporations in the long run: savvy studios and producers now routinely demand the artists personally guarantee the obligations of their loan-out corporations.

⁷⁹ Short, *supra* note 76, at 52–65; LaFrance, *supra* note 76, at 883–904; Cohen, *supra* note 76, at 118–26.

⁸⁰ DANIEL SANDLER, *THE TAXATION OF INTERNATIONAL ENTERTAINERS AND ATHLETES: ALL THE WORLD’S A STAGE* 158–61 (1995); Kathryn Michaelis, *IRS Tightens Grip on Hollywood Deductions*, 6 DEPAUL-LCA J. ART & ENT. L. 178, 178 (1995); SCHUYLER M. MOORE, *TAXATION OF THE ENTERTAINMENT INDUSTRY* 115–16 (9th ed. 2008); Short, *supra* note 76, at 65–74; Barrett, *supra* note 76, at 8–14; LaFrance, *supra* note 76, at 904–54; Cohen, *supra* note 76, at 127–32.

⁸¹ *Fox v. Comm’r*, 37 B.T.A. 271 (1938).

⁸² *Id.*

⁸³ *Laughton v. Comm’r*, 40 B.T.A. 101 (1939).

and the courts have remained at odds with respect to the legitimacy of the loan-out corporations (and the associated beneficial tax treatment enjoyed by those who use them).

The IRS first successfully attacked loan-out corporations in *Sargent v. Commissioner*, 93 T.C. 572 (1989), a case in which the Service challenged the use of loan-out corporations by two hockey players for the National Hockey League's Minnesota North Stars. North Stars players Gary Sargent and Steven Christoff had contracted with their club via "personal services corporations" (or "PSCs"). Applying the common law definition of "employer and employee", the U.S. Tax Court found that the players were not truly employees of their PSCs, but of the club itself, which (through the team's coach) controlled the players' on-ice services; as a result, the Tax Court disallowed deductions taken by the players for pension plan contributions.⁸⁴

The IRS's victory, however, was short-lived. The Eighth Circuit reversed, holding that, for a loan-out corporation to be deemed a true controller of the service-providing individual: (1) the service provider must be "an employee of the loan-out corporation, whom the corporation has the right to direct or control in some meaningful sense" and (2) there must exist between the loan-out corporation and the service recipient "a contract or similar indicia recognizing the loan-out corporation's controlling position."⁸⁵ The court went on to uphold the legitimacy of the hockey players' loan-out arrangements, and the bona fide status of the players as employees of their respective PSCs. Among other things, it relied on the bona fide contracts between the players and their PSCs and the PSCs and the North Stars club, as well as the recognition accorded to the arrangement by the club, the NHL, and the Minnesota Office of Administrative Hearings.⁸⁶ The IRS, however, was undeterred, stating in a 1991 Action on Decision that, in other circuits, it would not follow the Eighth Circuit's holding in *Sargent*. In doing so, the IRS signaled that it intended to continue to aggressively pursue taxes from loan-out arrangements like that in *Sargent*.⁸⁷

⁸⁴ *Sargent v. Comm'r*, 93 T.C. 572 (1989).

⁸⁵ *Sargent v. Comm'r*, 929 F.2d 1252, 1256 (8th Cir. 1991).

⁸⁶ *Id.* at 1260. Not everyone was as convinced. In a dissenting opinion, the Eighth Circuit's Judge Arnold observed, "The idea that the coach issued orders to Sargent and Christoff in their capacity as corporate officers, which orders they then relayed to themselves as corporate employees, is fanciful." *Id.* at 1261 (Arnold, J., dissenting).

⁸⁷ *Sargent v. Comm'r*, 929 F.2d 1252, 1256 (8th Cir. 1991), action on dec., CC-1991-022 (Oct. 22, 1991); Marilyn Barrett, *Loan-Out Corporations*, CEB CALIFORNIA CAL. BUS. LAW REPORTER 125, 125-28. (1995).

The IRS made good on that promise a few years later, bringing an action against Houston Rockets guard Allen Leavell for taxes from revenues paid by the club to his loan-out corporation.⁸⁸ Acknowledging the Eighth Circuit's previous decision in *Sargent*, the Tax Court dismissed that court's reasoning as being too focused on the contracts presented by the players, noting,

[w]hile we agree that contract terms are important in determining whether a personal service corporation is to be recognized as the true employer of the individual service provider, we do not believe that the mere existence of such terms in a contract is sufficient when the reality of the relationship is otherwise.⁸⁹

Considering Leavell's personal guarantee of the contract between his loan-out and the Rockets club, as well as the authority of both the Rockets and the National Basketball Association to directly control Leavell's services (by, for example, taking disciplinary action, such as leveling fines and suspensions), the Tax Court concluded that Leavell was an employee of the Houston Rockets, and the income paid to his loan-out should be imputed to him personally.⁹⁰

Outside of the world of the U.S. Tax Courts, however, judges have shown much greater inclination to respect loan-out arrangements. For example, the Ninth Circuit has gone so far as to hold that a doctor was an employee of his own loan-out corporation even where "[t]here is no documentary evidence in the record demonstrating that [the doctor] is an employee of [his loan-out] or that [the loan-out] has the right to control the activities of [the doctor]."⁹¹

Yet despite the ever-present risk of scrutiny from tax authorities, in the more than seventy years since Fontaine Fox and Charles Laughton first tangled with the IRS, loan-out corporations have achieved near-ubiquity in the entertainment industry: they have been broadly adopted by talent in multiple fields and are even a regular topic in mass-market entry-level texts about the industry.⁹²

⁸⁸ *Leavell v. Comm'r*, 104 T.C. 140 (1995).

⁸⁹ *Id.* at 154.

⁹⁰ *Id.* at 157–59.

⁹¹ *Idaho Ambucare Cent. Inc. v. United States*, 57 F.3d 752, 755 (9th Cir. 1995).

⁹² See generally RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW 338–41 (Robert Nirkind et al. eds., 1999); DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING: NEGOTIATING TALENT

C. Loan-Out Corporations and Copyright Termination

Typically, the agreement between an artist and his loan-out corporation provides that the results and proceeds of the artist's services are "works made for hire" for the corporation, and are therefore owned by the loan-out corporation. For example, an employment agreement between artist and loan-out may provide:

(b) Artist hereby grants, transfers and assigns to Corporation, and Corporation shall be entitled to and shall own solely and exclusively, forever, without limitation and for all purposes, each, every and all rights and interests of any and every kind and character whatsoever in and to all of the results and proceeds of Artist's services hereunder. . . .

(e) To the extent that the work is considered: (i) contributions to collective works and/or (ii) as parts or components of audio-visual works [*sic*], the parties hereby expressly agree that the work shall be considered 'works made for hire' under the United States Copyright Action [*sic*] of 1976, as amended (17 U.S.C. § 101 *et seq.*). In accordance therewith, the sole right of copyright in and to the work shall be the sole and exclusive property of Corporation in perpetuity. To the extent that the work is deemed works other than contributions to collective works and/or parts or components of audio-visual works, Artist hereby assigns to Corporation all rights, title and interest in and to the copyrights of such work and all renewals and extensions of the copyrights that may be secured under the laws now or hereafter in force and effect in the United States of America or any other country or countries. Artist shall execute, verify, acknowledge, deliver and file any and all formal assignments, recordation and any and all other documents which Corporation may prepare and reasonably call for to give effect to the provisions of this Agreement.⁹³

There are two primary reasons why artists choose to deem the results and proceeds of their work a "work made for hire" for their loan-out corporation. First, a producer who enters into an agreement with an artist's loan-out corporation looks to the corporation for the same broad grant of rights the producer would otherwise seek from the artist directly. Consequently,

AGREEMENTS 125 (2002); GAIL RESNIK & SCOTT TROST, ALL YOU NEED TO KNOW ABOUT THE MOVIE AND T.V. BUSINESS 200-01 (1996).

⁹³ Cohen, *supra* note 76, at 142-44 (rights language drawn from sample "Employee Loan-out Agreement" prepared by practicing California attorney). Note that this language first assigns all results and proceeds, then specifies that, to the extent possible, the results and proceeds shall be considered "works made for hire," and then again assigns all results and proceeds not captured within the "work made for hire" designation. While such language is, strictly speaking, redundant, such a "belt and suspenders" approach is typical of contractual rights language employed in the entertainment industry.

the loan-out corporation must acquire all rights to the artist's services in order to convey them to the producer. Second, in order to avoid a challenge by the IRS on the basis that the loan-out corporation is a mere sham, the artist's employment agreement with the corporation must involve a facially legitimate exchange of rights and services for appropriate compensation.

Notably, not all such agreements necessarily rely expressly on the "work made for hire" approach. For example, one prominent treatise offers a form that relies solely on assignment language without express reference to the work-for-hire doctrine.⁹⁴ Even in the absence of express work-for-hire language, however, the employee-employer relationship between an artist and his or her loan-out corporation would still likely give rise to an inference that the results and proceeds of the artist-employee's services are a "work made for hire" for the corporation.⁹⁵ For example, in the only published case to address the subject, the Second Circuit held that several ballets choreographed by well-known dancer-choreographer Martha Graham while Graham was affiliated with her own Center were, in fact "works made for hire" (under both the 1909 and 1976 Copyright Acts) and were therefore owned by the Center.⁹⁶

Ironically, however, the very rights arrangement by which artists make their loan-out corporations effective and legitimate also potentially destroys

⁹⁴ See DONALD C. FARBER & PETER A. CROSS, ENTERTAINMENT INDUSTRY CONTRACTS, Form 7-1, ¶ 11 (2009) ("Employee hereby grants, transfers and sets over to Corporation, and Corporation shall be entitled to and shall own solely and exclusively, forever and without limitation and for all purposes, each and every and all rights and interests of any and every kind and character whatsoever in and to all of the results and proceeds of Employee's services hereunder."). Notably, however, the commentary to this form observes that "[w]hen such clauses are included in lending agreements with production companies, the purpose of the provision is to ensure that the production company obtains all the fruits of the employee's labors for which it is paying" and that "the grant of rights by the employee to loan-out corporation must encompass all rights which the production company may require," and suggests that the results and proceeds of the artist's services under the loan-out agreement represent a work made for hire. *Id.* at Form 7-1, Comment to ¶ 11, n.4 (citing to Nimmer's discussion of works made for hire).

⁹⁵ See *infra* Part IV.B.2.

⁹⁶ *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 639–42 (2d Cir. 2004). The court's decision was based, in large part, on a detailed analysis of the precise agreement between Graham and the Center — for instance, the court found that works created during an earlier period when Graham's contractual obligations to the Center were less intensive were *not* works for hire, in part because the contract in effect at that time made no reference to choreography as being within the scope of Graham's duties. *Id.* at 637–39.

their copyright termination rights. This is because, under Section 203(a) of the Copyright Act, as works made for hire, the works created by artists for their loan-out corporations are apparently rendered ineligible for copyright termination.⁹⁷ As Mary LaFrance explains, regarding the recording industry:

[M]any of the performers who have made the greatest contributions to sound recordings may already have forfeited their termination rights in those recordings. Those recording artists who render their services through loan-out corporations are in fact employees of those corporations, and any performances they render in that capacity are already works made for hire. When the loan-out corporation contracts with a record label to “lend” the performer’s exclusive services in carrying out the recording contract, the artist is creating a work made for hire as an employee of the loan-out, which is, therefore, the author of the artist’s contribution to the recording. The loan-out assigns its copyright interest to the record label, although it remains the author. Because the recording is already a “work made for hire” under the “employee” prong of the [Copyright Act Section] 101 definition, however, the recording artist’s contribution to the work is now completely ineligible for termination rights, which do not apply to any works created as works made for hire. Thus, when an artist performs on a sound recording as a loan-out employee, neither the artist nor his or her loan-out corporation has any termination rights in that recording.⁹⁸

The few commentators who have addressed this question, although declining to delve deeply into the underlying legal issues, have reached conflicting conclusions. Citing the *Martha Graham* case, Daniel Gould agrees with Mary LaFrance in concluding that artists who use loan-out corporations “cannot regain their works under § 203, solely because of the presence of an intermediary party, even though that party is a corporation of which they are sole owner.”⁹⁹ At least one other commentator, Michael H. Davis, is

⁹⁷ See *supra* Section II.C.1.

⁹⁸ LaFrance, *supra* note 66, at 403–04. Interestingly, LaFrance suggests that artists who wish to preserve their copyright termination rights (albeit at the expense of some tax benefits) replace their loan-out corporations with limited liability companies (“LLCs”); by this arrangement, LaFrance says, “[t]he artist can then function as an independent contractor rather than an employee, but the LLC structure will still provide limited liability.” *Id.* at 404 n.108. Such options are discussed in greater detail in Part V, *infra*. While this approach may represent a potential “best practices” suggestion for future artists, however, it offers little consolation to those who have long relied on loan-out corporations and who have therefore already put their termination rights at risk.

⁹⁹ Daniel Gould, *Time’s Up: Copyright Termination, Work For Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 114 (2007).

decidedly more optimistic, reasoning that while the employer-employee relationships embodied in loan-out arrangements are sufficient to satisfy the tax code, they do not meet the more rigorous common law agency rules articulated by *Reid*, and therefore do not cause artists to lose their termination rights.¹⁰⁰

In any event, there is no question that, on their face, the employer-employee relationships created in loan-out situations appear to render artists and writers' creative efforts works for hire. And the Second Circuit's decision in the *Martha Graham* case indicates that courts are willing to so find, even where the consequences are both potentially antithetical to sound creative arts policy and contrary to the express wishes of the artist or his or her estate.¹⁰¹

D. Why Should We Care?

Although there are no official statistics on the proportion of artists who rely on loan-out corporations, their widespread use in the entertainment industry suggests that a sizable percentage — perhaps even a majority — of artists may have inadvertently forfeited their copyright termination rights.¹⁰² If this is the case, one of the significant policy tenets enshrined in the 1976 Copyright Act will be substantially undermined, likely contrary to Congressional intent.¹⁰³ In fact, nothing in the legislative record indicates

¹⁰⁰ Davis, *supra* note 72, at 116–17. Davis eschews a complete analysis on this point; we address it directly in greater detail in Part IV.A, *infra*. For his part, however, Davis is so confident of the survival of writers' copyright termination rights, even in the loan-out context, as to open his article with the statement, "It is probably not quite fraud, though it comes terribly close to it, when motion picture and television production companies convince their writers to part with the rights to their stories when they sign with the companies." *Id.* at 93.

¹⁰¹ *Martha Graham*, 380 F.3d at 640 (ruling against Martha Graham's testamentary heir and rejecting arguments based on creative arts policy as "a matter of legislative choice for Congress in the future, not statutory interpretation for a court at present").

¹⁰² To be clear, film and television writers who work on specific commission or assignment from hiring producers, or who are regularly employed members of a "writer's room" staff, would likely be writing on a work-for-hire basis whether or not they were employed via loan-out corporations. The issue addressed here is principally salient for writers, musicians, and other creative individuals who work independently on a "spec" basis, and who then sell their independently developed or created works.

¹⁰³ See *supra* Section II.A.; See also Gould, *supra* note 99, at 114 ("It is doubtful that Congress intended these artists to be denied their termination rights.").

that Congress ever discussed or contemplated the impact that loan-out corporations, and the work-for-hire status of works created thereunder, might have on artists' termination rights. Moreover, *Martha Graham* notwithstanding, at least one court (applying the 1909 Act) has demonstrated a reluctance to construe an artist's involvement with his own closely held corporation so as to destroy valuable statutory rights under the Copyright Act.¹⁰⁴

One could argue that the loss of termination rights occasioned by an artist's use of a loan-out corporation is a fair exchange for the benefits the loan-out corporation offers in terms of limited liability and beneficial tax treatment. Indeed, to the extent that one views the use of a loan-out corporation as a "legal fiction" or a "manipulation," an artist's loss of termination rights might be viewed as not merely a fair trade, but just punishment. Furthermore, because of their start-up and insurance costs, loan-out corporations are generally more prevalent among better-established talent. As a result, it may be argued that the fundamental policy rationale espoused by Congress in providing copyright termination rights — protecting the rights and financial prospects of artists with little bargaining power who give up their work for sometimes minimal compensation — applies with less salience to the artists facing this quandary.

Yet, except perhaps for the most wildly successful among them, talent who use loan-out corporations are almost inevitably beholden to powerful studios, networks, recording companies, or financiers. Moreover, Congress recognized that the unequal bargaining power burdening authors resulted not only from their status, but also from the inherent impossibility of determining a work's value until it has been exploited.¹⁰⁵ This concern remains equally salient to authors of all statures. And whatever one's view of the ethics or social desirability of loan-out corporations, it is clear that Congress never intended to allow for copyright termination rights to be subject to such trade-offs. Similarly, one cannot credibly assume that artists who have elected to form loan-out corporations (or their representatives) have ever been mindful of such an implicit exchange. Rather, as the legislative record demonstrates, the 1976 Copyright Act's copyright termination provisions represent a considered legislative judgment on creative arts policy. The

¹⁰⁴ *Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967) (preserving an author's copyright renewal rights, to be exercised by his heirs, by finding that the author was not an "employee" of his own closely-held corporation because the corporation did not exercise sufficient control over the author or pay him a regular salary).

¹⁰⁵ H.R. REP. NO. 1476, at 124 (1976).

broad use of loan-out corporations, and the legal intricacies involved therein, seem to specifically and powerfully undermined both that legislative judgment and the delicate balance between creative individuals and major corporate entities embodied in the Copyright Act.¹⁰⁶

IV. POTENTIAL WAYS TO RESCUE ARTISTS' TERMINATION RIGHTS IN THE LOAN-OUT CONTEXT

In light of the foregoing, it is apparent that artists' reliance on loan-out corporations jeopardizes their copyright termination rights by bringing their creations within the scope of the work-for-hire carve-out. The challenge, then, is to find a way to give effect to Congress's manifest intent to afford artists the benefit of these copyright termination rights, and thereby bridge the divide between industry practice and social policy.

A. *Reading Reality Into the Copyright Act: Preserving Termination Rights By Statutory Interpretation*

One way to try to preserve artists' termination rights without jeopardizing the other benefits that artists enjoy from loan-out corporations is to look to the language of the Copyright Act itself for a reading that would preserve such rights even in a loan-out-based work-for-hire situation. While such an approach is initially appealing, in fact, it seems difficult, if not impossible, to generate a plain language reading of the relevant provisions of the Copyright Act that would hold up to serious scrutiny.

As described in greater detail above, loan-out arrangements in the entertainment industry involve two basic contractual relationships: the first between an artist and his or her loan-out corporation, and the second be-

¹⁰⁶ This may also, in fact, be part of a broader trend toward curtailing copyright termination rights. Professors Peter S. Menell and David Nimmer have argued that recent decisions in the Second and Ninth Circuits interpreting the 1976 Copyright Act's statutory termination provisions have already "undermine[d] the provisions of the Copyright Act that guarantee the right of reversion to authors and statutorily designated successors" and that, in so doing, "they disrupt the overall statutory scheme, block authors' statutory successors from realizing their congressionally mandated interests, and cast clouds of uncertainty and confusion over the ownership of many valuable copyrights." Peter S. Menell & David Nimmer, *Poob-Poobing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 857 (2010). Menell and Nimmer call for legislative reform while offering a "comprehensive framework for restoring the integrity and clarity of the termination of transfer provisions." *Id.* at 799.

tween the loan-out corporation and a producer.¹⁰⁷ As a result, an artist's proprietary copyright interest in a work is actually involved in two separate contractual movements, from the artist to his or her loan-out as a work for hire,¹⁰⁸ and from the loan-out to the producer via assignment.¹⁰⁹ It may be possible to salvage artists' copyright termination rights in the loan-out context by focusing on these transfers as independent acts. In effect, the argument is that, in determining the terminability of a copyright transfer, the court need only look *to the transfer being terminated*. By this reasoning, because the transfer from loan-out corporation to producer is the transfer at issue, it would be eligible for termination because it is not, itself, a work-for-hire arrangement, and any preceding work-for-hire arrangement is irrelevant.

The source of this argument is the very first sentence of Section 203(a) of the Copyright Act, which reads: "*In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . is subject to termination.*"¹¹⁰ The first clause of this provision can be arguably read to mean, effectively, "in the case of *any transfer of interest other than a work-for-hire arrangement.*" With this reading, to preserve his termination rights, an artist need only establish that the transfer of rights from the loan-out corporation to the producer was not a work-for-hire arrangement. In cases where the work at issue predated the agreement between loan-out and producer, this should be an easy showing to make.

This argument has obvious appeal. In the first place, it offers a four-corners reading of the plain language of the Copyright Act that preserves the legislative intent embodied in the Act's copyright termination provisions: protecting artists with limited bargaining power and foresight from copyright transfers that, in hindsight, turn out to be obviously undercompensated.¹¹¹ In addition to representing sound creative arts policy, this

¹⁰⁷ See *supra* Section III.A.

¹⁰⁸ Although strictly speaking, this is not a *transfer* as such because, in a work-for-hire situation, the employer is deemed to be the legal author of the work, in practice, the contractual work-for-hire arrangement represents a transfer of the legal interest in the work.

¹⁰⁹ As previously noted, many producers include work-for-hire language in their agreements with the loan-out corporations as a "belt and suspenders" measure. See *supra* note 75 and accompanying text. However, the law is clear that contractual work-for-hire language is not sufficient to transform an assignment of *preexisting* work into a work made for hire.

¹¹⁰ 17 U.S.C. § 203(a) (2006) (emphasis added).

¹¹¹ See *generally supra* Section II.A.

approach empowers courts to achieve socially desirable results without resorting to nebulous common law principles or a direct legislative fix-it job.¹¹²

It would not be unprecedented for a court to take a narrow view of the relevant transaction to achieve a result that preserves its understanding of Congress's intent. For example, in *Larry Spier, Inc. v. Bourne Co.*, the Second Circuit (reversing the district court) held that a songwriter's testamentary grant of renewal copyrights did not preclude the songwriter's family from terminating an earlier assignment of such renewal copyrights to a corporation under Section 304(c).¹¹³ In so holding, the court reasoned that the legislative history of Section 304(c) demonstrated a legislative intent to specifically protect the rights of authors' widows and children, which partially justified the court's narrowed focus on the songwriter's original assignment of rights (i.e., the grant which the songwriter's heirs then sought to terminate) and its refusal to consider the songwriter's later testamentary grant.¹¹⁴ To be sure, this case represents an imperfect analogy. As between the two grants by the songwriter, the court in *Larry Spier, Inc.* allowed termination of the first in time and ignored the potentially contrary implications of the second. In the loan-out context, however, a court would have to allow termination of the *second* grant in time and ignore the potentially contrary implications of the first. Nevertheless, it does demonstrate the dominant role played by legislative intent in judicial analysis of copyright termination rights, as well as the willingness of some courts to adopt a narrow focus to preserve that intent.¹¹⁵

Ultimately, however, this nuanced reading of the Copyright Act's statutory termination provisions is unlikely to prevail because, while it preserves the *general* legislative intent behind copyright termination, this *particular* reading of Section 203(a) actually seems contrary to the legislative record. The language of Section 304(c) — the sister provision to Section 203(a) that governs pre-1978 copyright transfers — is revealing. The analogous precatory language of Section 304(c) reads, “[i]n the case of *any copyright subsisting in either its first or renewal term on January 1, 1978, other than a*

¹¹² See *infra* Part V.A.

¹¹³ *Larry Spier Inc. v. Bourne Co.*, 953 F.2d 774, 779–80 (2d Cir. 1992).

¹¹⁴ *Id.* at 779–80. The lower court, on the other hand, had justified its rejection of the author's family's termination rights as effectuating the apparent testamentary intent of the songwriter, who had made his mistress (together with his widow and children) one of the beneficiaries of his will. *Larry Spier, Inc. v. Bourne Co.*, 750 F. Supp. 648, 651 (S.D.N.Y. 1990).

¹¹⁵ See *also infra* Part IV.B.1 (discussing *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1967)).

copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it . . . is subject to termination .”¹¹⁶ The language of Section 304(c) is quite clear that the phrase, “in the case,” refers to *copyrights* that are works-for-hire, *not* to *transfers* that are works for hire, as would be necessary to preserve termination rights in the loan-out context. Further, there is simply no indication that Congress intended copyright termination rights to function so differently under Section 203 (for post-1978 transfers) and Section 304(c) (for pre-1978 transfers). In light of the foregoing, a reading of Section 203 that is so plainly inconsistent with the clearer language of Section 304(c) seems dubious at best.¹¹⁷

Relying on such statutory interpretation to preserve termination rights would create another major logistical complication: assuming that copyright termination rights survive a loan-out based transaction, who or what entity would hold them? Because the grant being terminated is that from loan-out corporation to producer, and because under the work-for-hire doctrine the loan-out corporation is deemed the legal author of the work from inception, it stands to reason that the loan-out corporation (and not the artist personally) would therefore hold the termination rights.¹¹⁸ Yet such a result is

¹¹⁶ 17 U.S.C. § 304(c) (2006) (emphasis added).

¹¹⁷ Of course, it could be argued that this discrepancy actually *supports* a reading of Section 203(a) that, contrary to the plain language of Section 304(c), preserves copyright termination rights, in that the variation in language between the two sections (which are otherwise largely identical) evidences an intent to produce divergent substantive results. *Cf. Larry Spier, Inc. v. Bourne Co.*, 953 F.2d 774, 779 (2d Cir. 1992) (“Significantly, Section 203 and Section 304 are different provisions involving different rights. . . . Section 304(c) is designed to protect a new family property right that does not exist under Section 203, and references to the history of Section 203 therefore are inappropriate here.”). However, there is a far less substantively significant explanation for the linguistic discrepancy between Sections 203(a) and 304(c): because Section 304(c) deals with termination rights for pre-1978 grants, it must address the status of common law copyrights (and grants thereof), which are not a factor for Section 203(a) in light of the 1976 Copyright Act’s broad preemption of common law copyrights. *See* 17 U.S.C. §§ 301, 303(a). Section 304(c)’s more specific reference to “any copyright subsisting in either its first or renewal term,” then, is more likely meant to inform the status of grants of common law copyright (which are not eligible for termination at all) than it is to indicate an intention that the work-for-hire limitation be construed differently for Section 203(a) vs. Section 304(c) terminations. 17 U.S.C. § 304(c); *See* NIMMER & NIMMER, *supra* note 36, § 11.02[A][1] (2006).

¹¹⁸ Of course, this quirk is also avoidable if the grant of rights from the artist to his loan-out corporation is itself terminable, which would have the effect of terminating all further grants of rights in the chain-of-title. However, because we con-

clearly contrary to what is contemplated by the plain language of Sections 203 and 304(c), which demonstrates a clear congressional intent to limit termination rights to actual authors/natural persons and their families, and not corporate entities.¹¹⁹ The only apparent way to reconcile this conflict would be to find that the loan-out corporation holds the copyright termination rights in a constructive trust for the natural author as beneficial owner. There is precedent for such judicial machination with respect to the Copyright Act. For example, courts have used judicially imposed constructive trusts to protect copyrighted works from inadvertently falling into the public domain as a result of the rigid and sometimes harsh rules on copyright notice, renewal, and indivisibility under the 1909 Act.¹²⁰ However, the fact that this interpretation of the Copyright Act would require such further judicial contortionism seems to weigh against its plausibility or viability.

In light of the foregoing, reading Section 203(a)'s provision, "[i]n the case of *any work other than a work made for hire*" to mean "in the case of *any transfer of interest other than a work-for-hire arrangement*" seems to be an obvious *post facto* manipulation of the statute's plain language. While it would offer a result that is both consistent with sound creative arts policy and with Congress's *general* intent in enacting the Copyright Act's termination provisions, this reading is ultimately too problematic to succeed.

clude that any attempt to attack the work-for-hire status of loan-out corporation services is unlikely to succeed, *see infra* Part IV.B, it necessarily follows that an artist would have no more success terminating his grant of rights to his loan-out corporation than he would terminating the grant of rights from the loan-out to the actual purchasing entity.

¹¹⁹ See 17 U.S.C. §§ 203(a), 304(c) (referencing "widow[s]" and "children," and giving extremely detailed statutory instructions regarding the inheritability of copyright termination rights among an author's descendants).

¹²⁰ See, e.g., *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 399–403 (2d Cir. 1970) (where author has no apparent intention to donate work to public, publication of author's work in a magazine bearing a copyright notice in magazine's name did not inject work into public domain under 1909 Act because magazine held copyright registration in constructive trust for author as beneficial owner); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1469–70 (9th Cir. 1988) (same); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) (under the 1909 Act, "if one of several authors took out the copyright in his own name upon a joint work, the copyright was valid, but the copyright owner held it upon a constructive trust for the other authors"). (citing *Maurel v. Smith*, 271 F. 211 (2d Cir. 1921)).

*B. Unraveling the Legal Fiction: Attacking the Work-for-Hire Status of
Loan-out Corporation Services*

Given that the language of the Copyright Act itself probably cannot be reasonably read to guarantee termination rights to artists creating works for hire on behalf of their own loan-out entities, alternative approaches are needed. One option is to try to determine whether the works created by these artists are truly works made for hire. As discussed above,¹²¹ the titles or descriptions used by the parties, while often persuasive, are not determinative of the existence of an employment or other for-hire relationship. The question is whether, under either the 1909 or 1976 Acts, courts will disregard a loan-out entity specifically created to employ the artist, and nevertheless find that the artist is not an employee for hire.

1. Work-for-Hire Status of Loan-out Corporation Services
Under the 1909 Act

Courts deciding the status of a work made prior to January 1, 1978 examine whether the work was created at the hiring party's "instance and expense."¹²² This test is satisfied "when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out."¹²³

In applying the 1909 Act test, courts have taken a fairly liberal view of the degree to which a hiring party must be involved in the creation of a work, whether at the inducement or preparation stage. For example, in holding that certain of Martha Graham's choreographed dances were works made for hire, and were therefore owned by a non-profit corporation of which she was the artistic director, the Second Circuit counseled that:

¹²¹ See *supra* Section II.C.1.

¹²² *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966).

¹²³ *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 634–35 (2d Cir. 2004). See also *Playboy Enters, Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (instance and expense test met "when the motivating factor in producing the work was the employer who induced the creation.") (quoting *Siegel v. Nat'l Periodical Publ'ns, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974)); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1326–27 (9th Cir. 2000) ("instance" test is shaped in part by the degree to which the "hiring party had the right to control or supervise the artist's work") (quoting *NIMMER & NIMMER*, *supra* note 36, § 5.03[B][1][a][i]).

[t]here is no need for the employer to be the precipitating force behind each work created by a salaried employee, acting within the scope of her regular employment. Many talented people, whether creative artists or leaders of major corporations, are expected by their employers to produce the sort of work for which they were hired, without any need for the employer to suggest any particular project.¹²⁴

Likewise, as other courts have noted, the hiring party's right to control or supervise the creator's work is one that need not actually be exercised in order to result in a work made for hire.¹²⁵

The *Martha Graham* court was willing to find the affiliated Martha Graham Center for Contemporary Dance the owner of her choreographed dances notwithstanding that she was, in fact, the motivating force in creating any given artistic work. The Center, however, was not a loan-out corporation, and did bear the hallmarks of a legitimate non-profit. For example, Graham herself was ultimately answerable to a separate and independent board of directors.¹²⁶

If there is any relationship that is capable of not yielding a work made for hire under the 1909 Act's "instance and expense" test, the typical loan-out corporation would seem to be a good candidate. Notwithstanding the nominal right of the loan-out "employer" to direct the activities of its "employee," there is usually in reality no true employer at all — nor supervising party, nor board of directors — that has the ability to control the work of the "employee," let alone one that actually exercises this power.

There is some precedent for finding that works created by an artist-controlled entity are not "for hire" under the 1909 Copyright Act. In *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*,¹²⁷ the Second Circuit was called upon to determine whether the renewal copyright interests in songs written by Walter Donaldson were owned by his heirs or by a publishing company which bore Donaldson's name and of which he had been the president. The answer depended on whether the songs were works made for hire,

¹²⁴ *Martha Graham*, 380 F.3d at 640–41.

¹²⁵ See, e.g., *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975) (explaining that the hallmark of "an employment for hire" is whether the employer "could have exercised the requisite power to control or supervise [the creator]'s work") (emphasis added).

¹²⁶ *Martha Graham*, 380 F.3d at 640.

¹²⁷ 375 F.2d 639 (2d Cir. 1967).

which in turn hinged on whether Donaldson was an employee of the publishing company.¹²⁸

In arguing that Donaldson was an employee for hire, the publishing company's successor in interest pointed to language in his contract providing that Donaldson "shall have a drawing account against your royalties of \$300. [sic] per week during the first six months of your employment."¹²⁹ The court, however, rejected the argument that this language evidenced the parties' intent that Donaldson would be an employee or that his drawing account was equivalent to a salary. The actions of the parties and the construction of the agreement instead demonstrated that Donaldson was not an employee for hire. For example, Donaldson was free to engage in outside writing activities for independent income that he need not share with the corporation. Moreover, "[n]o power to control or supervise Donaldson's performance was reserved to the corporation or exercised by it."¹³⁰ The reference to "employment" in Donaldson's agreement was dismissed as a shorthand way of saying "the period during which you will be writing songs to which the corporation has certain rights and will have certain royalties coming to you from such songs."¹³¹

While not discussed by the Court, *Donaldson* could be seen as another example of an effort to interpret the language and circumstances of the parties' relationship in a manner that preserves congressional intent.¹³² Had the court held that Donaldson were an employee for hire of the defendant music publishing company, the renewal rights in Donaldson's copyrighted works would have been held by the corporation. Donaldson's children would have been deprived of these rights, in contravention of congressional intent to confer the benefit of the renewal term on authors and their heirs.¹³³

It would be risky to read too much into *Donaldson*, however. First, other than the rather oblique reference to "employee" contained in the agreement, there was no evidence that either Donaldson or the defendant music publishing company intended to enter into an employment relationship, and the employer did not have the right to direct and control the employee's work, which is a hallmark of such a relationship. The unstated

¹²⁸ Under the 1909 Act, an employer for whom a copyrighted work is made for hire held renewal rights in the work. 1909 Act, at § 24; see also *Donaldson*, 375 F.2d at 641.

¹²⁹ 375 F.2d at 641 n.4.

¹³⁰ *Id.* at 642–43.

¹³¹ *Id.* at 642.

¹³² See *supra* Section II.A.

¹³³ See *supra* notes 13–16 and accompanying text.

suggestion was that, had the language of the contract and the parties' course of dealings more persuasively evidenced an employment relationship, this would have been upheld by the court, notwithstanding the heirs' loss of renewal rights.¹³⁴

Indeed, the Second Circuit later noted in *Graham* that, even though Martha Graham was a self-motivator and likely would have choreographed her dances even if the Martha Graham Center of Contemporary Dance had never existed, this was beside the point: "Where an artist has entered into an explicit employment agreement to create works, works that she creates under that agreement cannot be exempted from the work-for-hire doctrine on speculation about what she would have accomplished if she had not been so employed."¹³⁵

Given that artists are required to be employed by their loan-out corporations in order to obtain the favorable tax treatment for which those corporations are designed,¹³⁶ artists attempting to circumvent their loan-out corporations face a daunting tightrope to walk: they must convince a court that they are employees in the eyes of the IRS, but not in the eyes of the Copyright Act. This could be an extremely difficult task. Indeed, we are not aware of any reported decision under the 1909 Act in which an individual who expressly intended to be the employee of a corporation was nevertheless able to convince a court that he was an independent contractor for the purpose of circumventing the work-for-hire doctrine.

2. Work-for-Hire Status of Loan-out Corporation Services Under the 1976 Act

As required by *CCNV v. Reid*, an analysis of whether an artist is an employee of his or her loan-out corporation under the 1976 Act will depend upon the application of common law agency principles, the most important of which are: (1) the corporation's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the

¹³⁴ A later court of appeals distinguished *Donaldson*, finding that the creator of a book of menus was an employee for hire where the book was published at the insistence of defendant corporation and where the corporation had the right to direct and control plaintiff's work — even though the corporation "delegated" its right of supervision to the employee itself and even though the "precise nature" of the parties' putative employment relationship was unclear. *Murray v. Gelderman*, 566 F.2d 1307, 1310–11 & n.6 (5th Cir. 1978).

¹³⁵ *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 640 (2d Cir. 2004).

¹³⁶ See *supra* Section III.A.

tax treatment of the hired party; and (5) whether the corporation has the right to assign additional projects to the hired party.¹³⁷

Although styled as an employer-employee relationship, the typical loan-out's employee is an employee in name only. While nominatively drawing a salary and benefits from the corporation, the loan-out company's employee will personally decide (often with the help of an agent or manager not separately or formally employed by the loan-out) which types of projects to create. There is usually no direction or guidance from an employer, because there is usually no true employer at all — nor supervising party, nor board of directors — that can exercise control over the “employee's” work.

Yet in order to achieve the tax benefits that the loan-out corporation is designed to accomplish, the contract between the artist and his loan-out corporation must give lip service to the corporation's ability to exercise control, however unrealistic this may be in practice. Indeed, as discussed above, the artist must demonstrate the existence of a genuine employment relationship with the loan-out corporation, in accordance with common law agency principles — the same principles utilized by the *Reid* court in its work-for-hire analysis — in order for the loan-out arrangement to pass muster with the IRS.¹³⁸ Corporate lawyers would be advised to ensure that these principles are written into every contract.

Thus, a modern employment contract between an artist and his loan-out company will usually be quite clear about the rights the company has vis-à-vis the artist and will give lip service to all of the important *Reid* factors. The contract will provide that the employee will be paid a fixed salary by the company (along with bonuses to be paid in the company's sole discretion), which will be subject to withholding taxes; that the employee will receive benefits, including vacation time, health insurance, pension and profit-sharing; and that the employee shall render such services as the company may reasonably require, and shall do so under the company's direction, supervision, and control.¹³⁹ As discussed above, the agreement may even confirm the parties' intention that all works performed by the artist on behalf of the company be considered works made for hire under the Copyright Act.¹⁴⁰ In other words, under the 1976 Copyright Act, an artist whose representatives craft a loan-out arrangement which is designed to withstand IRS scrutiny will, necessarily, create a loan-out arrangement which will

¹³⁷ See *supra* Section II.C.2.

¹³⁸ See *supra* Section III.A.

¹³⁹ See Farber & Cross, *supra* note 94, Form 7-1.

¹⁴⁰ See *supra* Section III.C.

compel a conclusion that the artist's works are works made for hire in favor of the loan-out corporation.

Ultimately, because of the unambiguous language of such agreements, artists wishing to avail themselves of statutory termination rights will be placed in the unenviable position of having to explain to a court that the contractual language did not represent the true state of affairs and was designed only to take advantage of otherwise unavailable favorable tax laws.

3. Conclusion: Challenges to the Work-for-Hire Status of Loan-out Corporation Services Will Be Difficult

For artists wishing to retain both favorable tax treatment and statutory termination rights, the unfortunate truth is that the conditions that a loan-out must satisfy in order to withstand IRS scrutiny are the very factors that weigh in favor of an employment relationship for copyright purposes. Courts have *required* that a service provider be an employee of the loan-out corporation, and that the corporation have the right to direct or control the service provider in some meaningful sense.¹⁴¹ Cognizant of the suspicion with which these loan-out relationships are met by the taxing authorities, and wanting to stay one step ahead in their ongoing game of cat-and-mouse with the IRS, lawyers have taken to drafting agreements for artists that are designed to leave no question that the artist is employed by his loan-out corporation.¹⁴² The corporation is given the absolute right to direct and control the artist's professional activities, whether or not this right is actually exercised or could ever realistically be exercised. The other common law agency principles counseling in favor of an employment relationship are satisfied, if only nominally. And if the artist-employee later tries to distance himself from this contractual language, he risks revealing the loan-out as a sham, possibly subjecting himself to a host of adverse tax consequences and penalties.

In short, artists hoping to avoid the loss of statutory termination rights by piercing their own corporate veils face uncertain prospects of success, as well as a variety of unintended consequences which could very well outweigh the benefits of making such arguments.

¹⁴¹ See *supra* note 85 and accompanying text.

¹⁴² See *supra* notes 139–140 and accompanying text.

V. BACK TO THE DRAWING BOARD: LEGISLATIVE REFORM AND INDUSTRY BEST PRACTICES

Given the general lack of awareness of the unintended impact of loan-out corporations on artists' copyright termination rights, and the continued widespread use of such corporations, the conflict explored in this article is likely to become more and more pervasive with time. As the discussion above makes clear, while there are arguments available to artists who wish to preserve their copyright termination rights notwithstanding their use of loan-out corporations. However, their odds of success are uncertain at best, and they are likely to be met with fierce resistance by industry players with strong vested interests in shielding themselves and their investments from the potentially costly nuisance of copyright termination. Consequently, having already looked backward to explore how to preserve the legislative intent embodied in the Copyright Act's termination provisions for those artists who have already inadvertently jeopardized their termination rights by using loan-out corporations, we must now look forward at how to mitigate this problem in the future.

A. *Potential Revisions to the Copyright Act*

Perhaps the most obvious solution is to simply return to the text of the Copyright Act itself, and amend the language of Sections 203 and 304(c) to ensure that an artist's use of a loan-out corporation does not destroy his or her termination rights.

This change could be effected by inserting a single, narrowly tailored parenthetical into the relevant provisions. Section 203(a), for example, would read as follows:

In the case of any work other than a work made for hire (unless the legal author of such work made for hire is a corporation which is owned in whole or in majority part by the individual author of the work, in which case such individual author shall be deemed the legal author of the work for purposes of this subsection), the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions

Section 304(c) would be similarly amended by adding the same new parenthetical after the phrase "other than a copyright in a work made for hire."

This change is drafted as narrowly as possible under the circumstances, thereby avoiding the kind of unintentional disruptions to other contractual relationships or elements of the copyright law implicated by the broader

statutory interpretation explored in Section IV.A above.¹⁴³ The revision protects termination rights in cases where the “legal author” — i.e., loan-out corporation serving as employer/commissioning entity — is owned *in whole or in majority part* by the individual author of the work. This phraseology captures loan-out corporations in which the author, for tax, management, or personal reasons, shares ownership of his or her loan-out corporation with a family member or agent, manager, or other representative. Finally, because Sections 203 and 304(c) clearly contemplate that termination rights are to be held only by *natural persons* (artists) and their families/descendants, and not corporate entities, this revision expressly deems the individual author to be the legal author of the work for purposes of the Copyright Act’s termination provisions. This ensures that the rescued termination rights vest in the artists themselves, rather than in their loan-out corporations.

The appeal of this approach is clear. An amendment to the Copyright Act’s termination provisions that is addressed specifically to the role of loan-out corporations in copyright-intensive industries would resolve the existing conflict with deliberative policymaking, rather than judicial wrangling. It would unambiguously reconcile legislative intent with industry realities, and provide a key legislative clarification and/or affirmation of national creative arts policy.

In the short-term, however, it would be unwise for artists and their representatives to rely on legislative change alone to come to their rescue. While performing artists have demonstrated some sway when acting cohe-

¹⁴³ A similar, but somewhat broader and more aggressive approach, would be to insert a slightly adapted version of the parenthetical suggested here directly into the definition of “work made for hire” in Section 101 of the Copyright Act, thereby altogether excluding works created under loan-out arrangements from work-for-hire status. This would have broader-reaching consequences for copyrights created under loan-out arrangements, such as altering the term of copyright protection and rendering such copyrights subject to greater so-called “moral rights” protections. There is some appeal to this approach, simply because the difference between works created by artists in their fully individual capacities vs. through loan-out corporations is no more compelling with respect to their treatment under these provisions of the Copyright Act than it is with respect to their treatment for termination purposes, nor is there any indication that Congress intended the use of loan-out corporations to affect the status of the subject copyrights with respect to term, moral rights, or otherwise. Nevertheless, in an effort to narrowly tailor our solution to the problem explored in this article, and to avoid any unintended externalities from taking a more expansive approach, we have foregone actually changing the definition of “work made for hire” here.

sively as a policy-oriented interest group,¹⁴⁴ legislative reform is inevitably a trying, time-consuming, and compromise-filled proposition. It would surely be influenced, if not altogether stymied, by significant counter-lobbying efforts from powerful industry elements who would benefit immensely from exploiting the “loan-out loophole” in the copyright termination regime. Moreover, except for the major ground-up reform effort embodied in the 1976 Copyright Act and subsequent heavily lobbied-for amendments extending the term of copyright, Congress has seemed largely content to allow the courts to resolve the gaps and ambiguities of copyright law.¹⁴⁵ In this context, artists and their lawyers must take proactive steps to adopt new “best practices” that adapt to the copyright law as it is, rather than waiting indefinitely for the copyright law to become what they think it should be.

B. *Contractual Solutions to Legislative Problems*

Pending such specifically tailored legislative intervention, there are nevertheless steps that savvy, issue-conscious lawyers may be able take to protect their clients’ interests. While existing elements of tax and copyright law render these solutions imperfect in their own right, these simple steps would offer some progress in protecting and effectuating the apparent legis-

¹⁴⁴ In 1999, in response to intense lobbying from the record industry, and with little analysis or debate, Congress adopted a “technical amendment” that expressly added sound recordings to the list of specifically enumerated works eligible for work-for-hire status under the Copyright Act. The change was met with an immediate, highly public, and intensely disapproving reaction from artists, including well-known musicians like Don Henley and Sheryl Crow, and after convening a brief hearing, Congress quickly retroactively repealed the amendment. See LaFrance, *supra* note 66, at 375–90.

¹⁴⁵ For example, the major developments in copyright law meant to adapt to the Internet era of copyright exploitation and infringement have almost uniformly originated with the courts, rather than with Congress. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (announcing new “inducement” theory of copyright liability for manufacturers of devices or services with both legitimate and copyright-infringing functions); *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) (longstanding case on equipment manufacturers’ potential liability as contributory copyright infringers revised by the Supreme Court in *Grokster*); *In re Aimster*, 334 F.3d 643 (7th Cir. 2003) (Seventh Circuit’s effort to grapple with digital age contributory copyright infringement case by adopting “willful blindness” theory of liability; superseded by Supreme Court in *Grokster*); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (landmark decision holding that Internet file-sharing service could be held liable on contributory and/or vicarious copyright infringement theories).

lative intent of the Copyright Act's termination provisions in the loan-out context.

1. Alternative Organizational Forms

While the vast majority of artists rely on loan-out *corporations*, there are other organizational structures available which may allow artists to avoid putting their termination rights at risk. For example, Mary LaFrance has suggested that artists may loan out their services through Limited Liability Companies (or "LLCs")¹⁴⁶ in order to preserve their termination rights.¹⁴⁷ When rendering services for an LLC in which the artist is the managing member, the artist may work as an independent contractor rather than as an employee of the LLC. In so doing, the artist avoids converting his or her creative work into a work for hire for which the loan-out entity is the legal author, thereby preserving his or her termination rights.

It is not uncommon for artists to rely on different corporate forms for different purposes. For example, most American artists, athletes, and entertainers organize as C corporations. However, when an American actor works in Canada, Canadian tax law creates a risk of "double taxation" — i.e., taxation of income received by the loan-out corporation and then again when the same income is distributed to the actor.¹⁴⁸ To compensate, Ameri-

¹⁴⁶ Limited Liability Companies began entering into widespread use in the 1990s, in response to demand from small business owners for an organizational form that better met their needs. While the precise contours of the form vary from state to state, in general, LLCs are understood to combine four basic features: (1) limited liability (similar to corporations); (2) "pass-through" tax treatment (similar to partnerships); (3) chameleon management (i.e., the ability to choose between centralized and direct member-management); and (4) creditor protection. For a general primer on LLCs, see, e.g., Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378 (1992); Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995).

¹⁴⁷ See LaFrance, *supra* note 66, at 404 n.109.

¹⁴⁸ See Mark Jadd, Norman Bacal, & Kay Leung, *Performing in Canada: Taxation of Non-Resident Artists, Athletes, and Other Service Providers*, 56 CANADIAN TAX J. 589, 596 (2008) ("[T]he use of a loan-out company creates the possibility of double taxation. A loan-out company is generally not taxable in the United States (since its net income is generally nil); consequently, it cannot take advantage of any foreign tax credits in respect of taxes paid by it in Canada. Furthermore, since actors performing services in Canada through a loan-out company historically have not paid Canadian income tax (generally, only the source deductions in respect of payments to the loan-out company are remitted to the Canadian tax authorities), they have not been able to claim a tax credit against US tax on the salaries received from the loan-out company. This problem is obviated, when possible, by either using a US fis-

can actors working in Canada often contract with employers directly or use separate S corporations for their Canadian services, and may bifurcate their employment agreements and compensation based on the geography of their various services on a single project.¹⁴⁹

Converting to LLCs is, however, at best a deeply imperfect solution. While the LLC offers the artist substantially (but not completely) the same “limited liability” benefit as a loan-out corporation would,¹⁵⁰ the tax treatment of such companies makes them significantly less beneficial to entertainers who rely on their loan-out corporations primarily for their financial benefits (which, in turn, derive primarily from their tax-shielding properties). This is because LLCs, like partnerships, are subject to so-called “pass-through” tax treatment — that is, the entity itself is not taxed, but the underlying members are taxed on the entity’s income as if it was their own.¹⁵¹ Put another way, “For federal income tax purposes, the LLC is not a separate taxpaying entity and is not subject to tax at the entity level. Instead, the LLC’s members report their respective distributive shares of LLC income, gain, loss, and deduction and credit on their individual federal in-

cally transparent entity (such as a qualified subchapter S corporation) as the loan-out company, or having the actor personally enter into the contract for the provision of Canadian services. The latter arrangement has sometimes resulted in an odd situation for Canadian productions, where rehearsal services in the United States or acting services outside Canada are provided by the actor through the loan-out company while Canadian acting services are provided by the actor personally, under separate contracts.”)

¹⁴⁹ *Id.*

¹⁵⁰ Indeed, LaFrance has noted that the limited liability offered by LLCs actually potentially undermines the argument that limited liability offers an adequate nontax motivation for an entertainer’s decision to render services through a C corporation, although the scope of that limited liability is comparatively incomplete. See LaFrance, *supra* note 76, at 923–24 n.150 (“The argument that pursuit of limited liability is an adequate nontax motivation for forming a personal service corporation might also be unpersuasive where the taxpayer has the option, under state law, of forming a limited liability company (‘LLC’), which could enjoy limited liability without being classified as a corporation for federal income tax purposes. However, because it is uncertain whether an LLC enjoys limited liability with respect to its activities in jurisdictions that do not recognize its LLC status, many taxpayers still have a reason to prefer incorporation.”).

¹⁵¹ See Cohen, *supra* note 76, at 116–17 (“[T]he structures of a limited liability company (‘LLC’) . . . will not provide the desired tax benefit to an entertainer” because “‘limited liability companies . . . are treated for tax purposes as conduits whose income and deductions pass through to the partners or members as they are realized, with the various items retaining their original character in the process.’”) (quoting STEPHEN A. LIND ET AL., *FUNDAMENTALS OF CORPORATE TAXATION* 703 (4th ed. 1997)).

come tax returns.”¹⁵² As a result, an artist who works through an LLC effectively has the same treatment as an artist working without any loan-out entity, losing out on the lower corporate tax rates and more aggressive cost deduction against income taxes that come with the traditional corporate form. Moreover, in California (where most major participants in the entertainment industry reside), LLCs with total annual California income in excess of \$250,000 are subject to significantly higher annual statutory fees than traditional corporations would be.¹⁵³ In essence, then, trading a loan-out corporation for an LLC means, in effect, preserving one’s termination rights at the cost of less advantageous tax treatment and higher fees. It is not a tradeoff that every artist will be prepared to make.

2. Contractual Copyright Ownership Arrangements

An author utilizing a loan-out corporation may be able to eliminate or ameliorate some of the potentially draconian consequences discussed in this article through careful draftsmanship. Specifically, rather than (as is the common current practice) explicitly providing that the author’s contributions to his or her loan-out employer are works made for hire, the author’s agreement with his loan-out could instead provide that ownership of any copyrights is expressly reserved to the artist, but such copyrights are *assigned* to the loan-out.¹⁵⁴ The effect would be the same, in that the loan-out company would own the copyright in the work and could thereafter assign it to third parties. But the author would be able to subsequently terminate the initial assignment (thereby breaking the chain of transfers that followed, effectively terminating the assignment to the purchasing entity).

In principle, the 1909 and 1976 Copyright Acts both permit this type of contractual deviation from the default presumptions of copyright owner-

¹⁵² CONTINUING EDUCATION OF THE BAR OF CALIFORNIA, FORMING AND OPERATING CALIFORNIA LIMITED LIABILITY COMPANIES § 5.7 (2d ed. 2009).

¹⁵³ Compare *id.* at § 5.5 (statutory fees ranging from \$900 to \$11,790 depending on annual income), with CAL. REV. & TAX CODE § 23153 (West 2011) (no minimum franchise tax in a corporation’s first year, \$500 in the corporation’s second year, and \$800 per year thereafter).

¹⁵⁴ As discussed in Part IV.B.2, *supra*, the same common law agency principles that determine the capacity of loan-out corporations to withstand IRS scrutiny form the basis of the “employment” test used to determine work-for-hire status under the 1976 Copyright Act. Consequently, it is not enough to simply eliminate the explicit “work-for-hire” language from a loan-out employment agreement, as the default presumption under the law is nevertheless that any works created in the course and scope of an artist’s employment are deemed works made for hire as a matter of law.

ship that apply in employer-employee relationships. An employer and employee can prospectively agree, for example, that the copyright in all works prepared by the employee during the course of the employment relationship belong to the employee instead of the employer.¹⁵⁵ As the Second Circuit held in *Eisenberg v. Advance Relocation Storage, Inc.*:¹⁵⁶

By contract, a worker and a firm may agree that the worker will or will not have intellectual property rights to items that she makes while working for the firm. Such agreements are controlling regardless of whether, in their absence, a worker would be characterized as an employee or an independent contractor. Indeed, in copyright work-for-hire cases, the question of whether a worker is an employee or an independent contractor arises only after the court has determined that the parties did not agree on the allocation of intellectual property rights [A] worker and a firm can enter into a contract that explicitly delineates who holds intellectual property rights to worker-created items.

Nevertheless, such an agreement may only serve to vest the artist with *ownership* of the copyrighted work, and not *legal authorship* of such work — and, as discussed above, the availability of statutory termination rights depends on the latter rather than the former.¹⁵⁷ Specifically, if the loan-out employer is deemed the “author” of a work created in the course and scope of an artist’s employ, such work may not be terminable even if the employer and employee agree that copyright ownership will vest in the employee.

¹⁵⁵ See, e.g., *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810 (9th Cir. 1962); *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363 (9th Cir. 1980). Indeed, under the 1909 Act, employers and employees could enter into even more particular agreements governing copyright ownership — for instance, by agreeing that the copyright in all works prepared by the employee during the course of the employment relationship (whether or not within the scope of employment) belonged to the employer. See NIMMER & NIMMER, *supra* note 36, § 5.03 [B][1][b][i], at 5–33 (“The parties may expressly agree that the employee shall be deemed to own the copyright in all works produced in the employment relationship. Likewise, the parties may expressly agree that all works produced by the employee during the period of the employment relationship shall belong entirely to the employer.”). This result, however, would not obtain under the 1976 Act, under which a work prepared by an employee must be prepared within the “scope of his or her employment” to be considered a work for hire, unless the work falls within one of the specifically enumerated categories of specially commissioned works and the parties sign a writing evidencing an intent that the work be created for hire. See *supra* Section II.C.2.

¹⁵⁶ *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 116 (2d Cir. 2000). See also *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 994 (N.D. Cal. 2006).

¹⁵⁷ See *supra* Section II.C.3.

Where an employer and employee (or, under the appropriate circumstances under the 1909 Act, an independent contractor¹⁵⁸) agree that the copyright in a work created by an employee will be owned by that employee, the cases interpreting the 1909 and 1976 Acts are, at best, ambiguous as to whether such a work should be considered “for hire” from inception. If such a work *is* “for hire” from inception, later transfers for that work are not subject to termination, even if the parties agree that the copyright in the work would initially be owned by the employee. As disputes regarding works for hire (and agreements contradicting the presumption of the work for hire doctrine) have principally concerned themselves with ownership and control, and not with questions of authorship (as distinct from ownership) and/or the often-distant prospects of statutory termination, we are not aware of any case which confronts this issue directly. On the one hand, certain courts and commentators have reasoned that the “works for hire” doctrine “is based on the presumed mutual intent of the parties, and does not operate as a matter of law.”¹⁵⁹ On the other hand, the Second Circuit’s decision and rationale in *Marvel Characters* suggests that a “work for hire” exists in such a state from inception, regardless of any agreement or characterization made by the parties — essentially, that such a work is, by its very existential and unalterable nature, a “work for hire.”¹⁶⁰ This interpretation finds support in Section 201(b) of the 1976 Act, which states:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.¹⁶¹

¹⁵⁸ *Estate of Burne Hogarth v. Burroughs*, 342 F.3d 149, 160, 163 (2d Cir. 2003) (holding that, as long as the “instance and expense” test was satisfied, there was no “distinction in the case law under the 1909 Act between an employee and an independent contractor” because “the purpose of the [1909 Act] is not to be frustrated by conceptualistic formulations of the employment [sic] relationship.”) (citing *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1217 (2d Cir. 1972)).

¹⁵⁹ *May*, 618 F.2d at 1368–69 (“[I]n practice there was no question but that an employer and employee might agree, and often did agree that the rights under the copyright would remain in the employee (without any requirement of an assignment by employer to employee) subject to a right of the employer to be exclusively licensed to use the work in particular media. The provision of former Sec. 26 . . . must be read as creating a presumption of copyright in the employer which may be rebutted only by a preponderance of evidence of a contrary agreement as between the parties.”) (quoting *NIMMER & NIMMER*, *supra* note 36, § 5.03(D)).

¹⁶⁰ See *supra* Section II.C.1.

¹⁶¹ 17 U.S.C. § 201(b) (2006).

This language, including the use of the conjunction “and” to separate two evidently disparate statements, implies a separation between the concepts of copyright *ownership* and copyright *authorship* and suggests that parties may contract only around default rules of the former, not the latter.

If an employee and employer are not permitted to legally agree that a work created in the course and scope of employment is authored (as opposed to owned) by the employee, they will need to employ even more idiosyncratic contractual devices to preserve termination rights. For example, the employment agreement between an artist and his loan-out could specify that the creation of copyrighted works is expressly outside the scope of the artist’s employment, and therefore would not be deemed “authored” by the loan-out employer. However, such a loan-out arrangement would likely be viewed with intense skepticism by the taxing authorities when, as in the case of a professional writer, the artist’s entire career normally involves the creation of copyrighted works.¹⁶² Indeed, if such an artist does *not* transfer ownership of his copyrighted works to the loan-out, it is difficult to express what service the artist actually renders, or benefit the artist actually provides, to justify the salary that artist draws from his or her so-called “employer.”¹⁶³

3. Contractual Reservation of Termination Rights

Finally, an artist who wishes to make a last-ditch attempt to preserve his or her termination rights might simply seek to do so via express contractual reservation, either as between the artist and his or her loan-out corporation, or as between the loan-out corporation and the purchaser. In practice, however, this too is unlikely to resolve the issue in artists’ favor.

In the first place, the notion of “contractual reservation of statutory termination rights” is a non sequitur in this context. Termination rights are created — or not created — by the terms of Copyright Act.¹⁶⁴ If a work

¹⁶² See *supra* Sections III.A–III.B.

¹⁶³ Nor does this concern vanish if the artist prevails in the legal argument that the contractual reservation of copyright between employee and employer affects authorship as well as ownership. The rather byzantine structure that would arise out of such an arrangement — by which the artist effectively transfers copyright ownership from the loan-out to him or herself (by contradicting the legal presumption of work-for-hire status) but immediately assigns the same copyright back to the loan-out — seems likely, in its own right, to draw the scrutiny and ire of already wary tax authorities.

¹⁶⁴ 17 U.S.C. § 304 (2006). See also *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, 202–04 (2d Cir. 2008) (discussing provisions of the Copyright Act

created and sold via a loan-out corporation is a work for hire from inception, copyright termination rights are simply never created, and therefore, there is nothing to reserve. Consequently, an artist cannot actually “save” his or her statutory termination rights by contractual reservation, but can only hope to create contractual termination rights which (presumably) would operate on the same terms.

Moreover, any enterprising attorney who includes such a provision in an agreement between a client’s loan-out and purchasing entity is unlikely to get very far. The business realities of the entertainment industry are such that, in all but the most extreme and unique cases, producers and other buyers extract for themselves maximum rights with minimum limitations.¹⁶⁵ Indeed, it was the tendency of the industry to, virtually monolithically, make such all-encompassing demands that compelled Congress to make statutory termination rights (unlike copyright renewal terms under the 1909 Act) inalienable by contract or otherwise.¹⁶⁶ It is, in short, virtually impossible to imagine that producers would actually accept any effort by artists or their lawyers to create for themselves contractual termination rights to replace their undermined statutory rights.

Nor can artists avoid the resistance of buyers by burying contractual termination provisions in their agreements with their own loan-out corporations (which are typically not directly scrutinized by producers or other purchasing entities). In practice, any customary option or sale of intellectual property rights inevitably requires the seller to make a variety of representations and warranties, including that the seller has the rights it purports to grant, that those rights are unencumbered, and that the seller has not done and will not do anything to undermine the grant of rights to the purchasing entity. Where the seller is a loan-out corporation, these representations and warranties are typically subject to a personal guarantee by the artist himself. Any effort by an artist to terminate the rights of a producer by exercising contractual termination rights stealthily incorporated into the employment agreement between the artist and his or her own loan-out corporation will

which explicitly contemplate both the creation and the loss of statutory termination rights).

¹⁶⁵ For instance, an option or sale of motion picture and television rights in an existing property, such as a novel, is typically drafted not as an assignment of solely those motion picture/television rights (as well as customary allied and ancillary rights), but rather, as an assignment of the *entire* copyright interest and all underlying rights, subject only to the reservation of certain specifically enumerated categories of rights (such as publishing, author-written sequels, and, in some cases, rights in stage or other media).

¹⁶⁶ See *supra* Section II.A.

be inevitably and promptly met with a lawsuit from the producer for breach of those representations and warranties. Further, the damages suffered by the producer as a result of such a breach will be precisely the value of the work reclaimed by the terminating artist.

VI. CONCLUSION

The complex and surprising interaction between the 1976 Copyright Act's copyright termination provisions, on the one hand, and the widespread use of loan-out corporations, on the other hand, is a ticking time bomb for copyright-intensive industries whose timer is about to hit zero. Although, as explained in this article, there is a dearth of legal authority on many of the key issues in this arena, as more and more copyright termination notices are issued under the 1976 Act in the years to come, that vacuum is unlikely to remain in place. Yet the conflict between copyright termination rights and loan-out corporations is not simply an academic question — rather, it is a reminder that, where social policy and business reality intersect, legal abstractions can collide head-on with very real rights. Ultimately, while creative lawyers have a number of arguments available to them in hopes of avoiding the draconian unintended consequences of their longstanding advocacy of loan-out corporations, it is clear that only disciplined, targeted reform will suffice to truly reconcile the practices of the modern entertainment industry with the policies enshrined in the Copyright Act. In short, a legislative solution is the most straightforward and practical method of ensuring that termination rights are not inadvertently lost, while at the same time recognizing the legitimate expectations of the parties to true work-for-hire relationships, to whom these termination rights were never intended to apply.



How the Expressive Power of Title IX Dilutes Its Promise

Dionne L. Koller¹

ABSTRACT

Title IX is widely credited with shaping new norms for the world of sports by requiring educational institutions to provide equal athletic opportunities to women. The statute and regulations send a message that women are entitled to participate in sports on terms equal to men. For several decades, this message of equality produced dramatic results in participation rates, as the number of women interested in athletics grew substantially. Despite these gains, however, many women and girls, especially those of color and lower socio-economic status, still do not participate in sports, or remain interested in participating, in numbers comparable to their male counterparts. Indeed, in recent years the gains in participation rates brought about by Title IX seemingly have leveled off while the childhood obesity crisis, especially among girls, has grown. Title IX scholarship and popular advocacy efforts often focus on greater Title IX enforcement as the way to continue attracting women and girls to participate in competitive sports.

This Article examines whether greater enforcement of Title IX's equality mandate is the answer, by looking at the signals the statute and regulations send to prospective female athletes. In doing so, this Article explains that a key feature of Title IX theory is that discrimination in the form of fewer opportunities for women as compared to men, as well as sub-par conditions for participation, "sends a message" to girls that discourages them

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from participating. This negative message is the prevailing explanation for why women still do not participate in sports at rates comparable to men. Implicit in this argument is that strong Title IX enforcement can produce the opposite result, continuing to signal that women are entitled to participate in sports on terms equal to men, and that such a positive message will stimulate interest in participation. This Article seeks to push beyond such assumptions to examine with more nuance how Title IX speaks to women about sports and how the law's expressive content affects women's interest in participating. Using the expressive theory of the law, this Article takes the position that Title IX powerfully "speaks" beyond its remedies, and the message today is much more complex than that of simply empowering women through a message of equality. Instead, this article asserts that Title IX in fact sends a mixed message, communicating both that women and girls are entitled to participate in athletics under the same conditions as their male counterparts, but also that such participation opportunities are within a model for athletics that serves to exclude those who lack the interest, ability and/or resources to meet its demands. As a result, while Title IX communicates an empowering message that can in many cases stimulate women's interest in sports, it also sends a message that drives many more women, especially those of color and lower socio-economic status, away.

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I. INTRODUCTION

Recently, I taught a class on Title IX² to students in a Law and Feminism course. In preparation, I imagined that I need not spend much time on the benefits of Title IX or its justifications, as I often do when I teach Title IX in other courses. I concluded, incorrectly and perhaps in hindsight unfairly, that the women in Law and Feminism would not need to be “sold” on Title IX. I was wrong. In reading the reflection essays I assigned to gauge the students’ understanding of the readings, I was alarmed at how many women saw Title IX in a negative light. It wasn’t that they believed that Title IX unfairly hurt men — a common critique of Title IX opponents — it was that among these largely twenty-something women, Title IX offered nothing for them. Specifically, the women wrote about resentment at being pushed to excel in sports and the perception that competitive sports were only for those who were uniquely talented. Some discussed having little or no access to sports that gained popularity post-Title IX, such as soccer, lacrosse and softball. Only the woman in class who was old enough to remember that growing up in her Midwestern town, women’s basketball was a half-court game, found Title IX to be an important topic. The rest were quite skeptical of its inclusion as a topic in the class, as for them, Title IX was largely irrelevant.

Of course, not every woman thinks so. Since its enactment in 1972, Title IX’s ability to change the culture surrounding women’s participation in athletics and bring steadily-increasing numbers of women into sports has been dramatic.³ Courts have consistently upheld Title IX’s mandates,⁴ and statistics have demonstrated powerfully that creating opportunities for girls and women in athletics inspires them to participate. Before Title IX, fewer

² 20 U.S.C. §§ 1681–1688 (2006).

³ Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 16–18 (2001).

⁴ See *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 102 (W.D. Va. 2007).

than 32,000 women participated in intercollegiate athletics.⁵ Now, there are more than 174,000 female intercollegiate athletes.⁶ Female participation in interscholastic athletics has grown by more than 920%,⁷ with about 294,000 girls participating in high school athletics in 1971, and over 3 million in 2007-2008.⁸ Yet despite more than three decades of growth in women's participation in sports, it seems that Title IX has not continued to have the wide-ranging impact on women's sports participation that would produce equivalent participation rates to men. Social science research shows that while large numbers of girls participate in sports during the elementary and middle school years, many stop participating in adolescence.⁹ Perhaps most troubling, many more girls and women do not participate at all.¹⁰ This is especially true for girls and women of color and those from disadvantaged socio-economic backgrounds.¹¹ For women and girls with disabilities,

⁵ Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233, 242 (2003).

⁶ DENISE M. DEHASS, NCAA, PARTICIPATION:1981-82-2006-07 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 61 (2008), available at <http://www.ncaapublications.com/p-4124-participation-rates-1981-82-2006-07-ncaa-sports-sponsorship-and-participation-rates-report.aspx>.

⁷ See Samuels, *supra* note 5, at 242; NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2007-2008 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 48 (n.d.), available at <http://www.nfhs.org/content.aspx?id=3282>.

⁸ NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *supra* note 7, at 48.

⁹ DON SABO & PHIL VELIZ, WOMEN'S SPORTS FOUNDATION, GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 128 (2008), available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play>.

¹⁰ *Id.* at 133; see also B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 3 (2010); NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 10 (2008), available at <http://ncwge.org/PDF/TitleIXat35.pdf>.

¹¹ ANGELINA KEWALRAMANI ET AL., NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN EDUCATION OF RACIAL AND ETHNIC MINORITIES 92 (2007), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007039> ("White females were more likely to participate in interscholastic sports (51 percent) than were females of any other race/ethnicity, while Black females (40 percent) were more likely than Hispanic (32 percent) or Asian/Pacific Islander females (34 percent) to take part in these sports."); Matthew J. Taylor et al., *The Impact of Sports Participation on Violence and Victimization among Rural Minority Adolescent Girls*, 19 WOMEN SPORT & PHYSICAL ACTIVITY J., Spring 2010, at 3, 7 (In this study, 50.6% of white girls, 30.4% of African American girls, and 36.5% of Hispanic girls participated in structured sports in and outside of school); Will J. Jordan, *Black High School Students' Participation in School-Sponsored Sports Activities: Effects on School Engagement and Achievement*, 68

sports opportunities are almost non-existent.¹² For all of these women and girls, as it was for most of the students in my class, Title IX seemingly is more irrelevant than empowering.

Title IX discourse focuses on discrimination against female athletes as the reason why women still do not show an interest in sports participation at the same rate as men.¹³ As a result, many Title IX supporters assert that the remedy for women's persistent lack of participation in sports is greater Title IX enforcement. They particularly emphasize proportional representation of women in college athletic programs and upgrades to athletic offerings and facilities that will "send a message" that women's athletics are as valued as men's.¹⁴ This is, without question, important to achieving equality for those women who choose to participate in sports, and that work is certainly far from done. However, in my previous work, I examined whether Title

J. NEGRO EDUC. 54, 60 (showing similarly-tiered White, African American, and Hispanic participation rates for both males and females); Minda Monteagudo, *Why Too Few Hispanic Girls Play Sports — and What To Do About It*, FAIR GAME NEWS (June 3, 2010, 5:56 AM), <http://fairgamenews.com/2010/06/why-hispanic-girls-rarely-play-sports-and-what-to-do-about-it/> ("According to the NCAA, Hispanic females make up just 3.9 percent of college athletes (Hispanics are more than 8 percent of college enrollments)."); JEFFREY OWINGS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, WHO REPORTS PARTICIPATION IN VARSITY INTERCOLLEGIATE SPORTS AT 4-YEAR COLLEGES? 2-3 (Dec. 1996), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=97911> ("Among members of the 8th-grade class of 1988 . . . High socio-economic status (SES) students were 10 times as likely to report participation at Division I schools as were low SES students (5.0 percent compared to 0.5 percent). Black students were just as likely as white students to report participation in intercollegiate sports at Division I schools (2.5 percent for blacks and 2.3 percent for whites). Among the high school graduates from the 8th-grade class of 1988 . . . Three out of each 10 (30.4 percent) elite high school varsity athletes from advantaged backgrounds (high SES) reported participation in intercollegiate sports at 4-year colleges. Among elite high school varsity athletes, those from more advantaged backgrounds . . . were 3.5 times more likely to report intercollegiate athletic participation at NCAA Division I schools as were those from less advantaged backgrounds . . . 14.7 percent as compared to 4.1 percent." Examining intercollegiate athletic participation by SES reveals "5.0 percent of high SES cohort members reported participation [in intercollegiate athletics] as compared to 1.5 percent for middle SES and 0.5 percent for low SES 8th-grade students . . . High SES students were 10 times as likely to report participation in intercollegiate athletics as were low SES students.").

¹² NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 11.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 7 (stating that "improved enforcement of Title IX and diligent efforts to advance women and girls in sports are still necessary to achieve truly equal opportunity on the playing fields").

IX's conception of equality was up to the task of continuing to generate women's interest in sports participation. I concluded that in many cases, Title IX could not effectuate what is thought to be its full promise because its anti-discrimination mandate requires girls and women to assimilate into a model for sports that was developed and is administered primarily by and for men.¹⁵ The result, I argued, was an "interest paradox," whereby Title IX served to extinguish interest in sports participation among the very population it was meant to serve.¹⁶

This Article takes the discussion one step further by explaining how the interest paradox takes shape. Using the expressive theory of law, this article explains that Title IX has a significant expressive dimension beyond its sanctions, so that the statute, regulations and cases interpreting them communicate with girls and women in a way that shapes norms for sports participation. While it is widely believed that Title IX signals to females that they are entitled to and should participate in athletics, in fact its expressive meaning amounts to a mixed message. This Article asserts that by deferring to educational institutions to define the content of their sports programs — as long as opportunities for women are equivalent to those for men — participation opportunities created in the name of Title IX send a second signal to girls and women that dilutes the law's empowering message. Shaped by the socio-economic context of the varieties of women who might participate in sports, this message is that there is an exclusive, and for many women unattainable, conception of who a student-athlete can be. This message, like the signals sent by gender discrimination, contributes to discouraging many women and girls from participating in sports.

Part I of this article provides a brief overview of Title IX and its theoretical underpinnings which assume that creating opportunities for women to be student-athletes in the current model for education-based sports programs will encourage more women to participate. Part II seeks to explain how Title IX's expressive dimension sends a dual message to females about sports participation. This part asserts that while an important and enduring message sent by Title IX is that women are entitled to participate in sports on terms equal to men, Title IX also powerfully communicates the social construction of who a qualified student-athlete is. This part explains how this dual message can contribute to an "interest paradox," so that opportunities created in the name of Title IX actually can serve to discourage participation in sports by those the law should inspire. Part III offers suggestions

¹⁵ Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 439-40 (2010).

¹⁶ *Id.*

for a new sport policy that can help shape new norms for education-based sports programs and send a message that better aligns with the goal of gender equity in sports.

II. TITLE IX OVERVIEW

A. *The Statute and Regulations*

Congress enacted Title IX in 1972 to prohibit discrimination on the basis of gender in all education programs receiving federal financial assistance.¹⁷ The purpose of the statute is to guarantee that all students have equitable opportunities to participate in an educational program.¹⁸ Title IX neither targets nor mentions athletics programs. The statute states quite simply that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹⁹ The statute itself does not detail the content of an equitable education-based sports program. Indeed, the issue of discrimination against women in education-based athletics programs was only a brief part of the congressional debates on Title IX.²⁰ Efforts to limit Title IX’s effect on athletic programs failed,²¹ and Congress subsequently directed the Department of Health, Education, and Welfare²² to prepare regulations implementing Title IX, including in the area of “intercollegiate athletic activities.”²³ These regulations provide the framework for gender equity in sports. The final regulations, which went into effect in 1975, provide that:

¹⁷ Gayle I. Horwitz, *Athletics*, 5 GEO. J. GENDER & L. 311, 312-13 (2004).

¹⁸ Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Nancy S. Footer, General Counsel, Bowling Green State Univ. (Jul. 23, 1998), available at <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

¹⁹ 20 U.S.C. § 1681(a) (2006).

²⁰ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (citing 117 CONG. REC. 30,407 (1971) (statement of Sen. Birch Bayh)); 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh).

²¹ For instance, Senator Tower attempted to limit the coverage of Title IX to non-revenue producing sports. 120 CONG. REC. 15,322-23 (1974) (statement of Sen. Tower).

²² In 1979, the Department of Health, Education, and Welfare split into the Department of Education, which now has the authority to enforce Title IX, and the Department of Health and Human Services. See 20 U.S.C. §§ 3401-3510 (2006).

²³ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient²⁴

Title IX does not require that covered educational programs give preferential treatment to women.²⁵ Instead, Title IX requires entities that receive federal financial assistance to “provide equal athletic opportunity for . . . both sexes.”²⁶ This does not require educational institutions to have gender-integrated sports teams or the same teams for men and women. However, where a school has separate programs for men and women, Title IX requires that those separate opportunities be equitable.²⁷

To determine whether a school provides equal athletic opportunity, the regulations state that it must be determined “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”²⁸ In 1979, the Department of Health, Educa-

²⁴ 34 C.F.R. § 106.41(a) (2011).

²⁵ Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 95 (D.D.C. 2003); Pederson v. La. State Univ., 912 F. Supp. 892, 908 (D. La. 1996) (“After establishing that sex discrimination is prohibited, Title IX then proceeds to clarify that efforts to remedy historical sex discrimination shall not include preferential or disparate treatment of one sex over another.”); Neal v. Bd. of Trs., 198 F.3d 763, 771 (9th Cir. 1999) (“After all, § 1681(b) states that Title IX does not *require* any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity”); Cohen v. Brown Univ., 101 F.3d 155, 164 (1st Cir. 1996) (“Title IX also specifies that its prohibition against gender discrimination shall not be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist between the total number or percentage of persons of that sex participating in any federally supported program or activity, and the total number or percentage of persons of that sex in any community, State, section, or other area.”) (internal quotation marks omitted).

²⁶ 34 C.F.R. § 106.41(c).

²⁷ Cantú, *supra* note 18.

²⁸ 34 C.F.R. § 106.41(c). The regulations list ten factors to consider in determining whether equal opportunities exist: “(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.” *Id.*

tion and Welfare issued a Policy Interpretation which explained that, for purposes of athletics, Title IX compliance was measured in three areas that directly impact the student-athlete experience: (1) athletic scholarships; (2) other program areas (represented by factors two through ten as listed in the regulations);²⁹ and (3) accommodating the interests and abilities of male and female students (derived from the first factor of the regulations).³⁰

Effective accommodation of male and female students' interests and abilities in terms of participation opportunities is measured by compliance with the well-known "three-part test," outlined in the 1979 Policy Interpretation, which provides that an institution effectively accommodates the interests and abilities of its male and female students if it meets any one of three benchmarks:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion . . . whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³¹

²⁹ Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (noting that "the governing principle" in determining compliance is that "male and female athletes should receive equivalent treatment, benefits and opportunities.")

³⁰ Claims in this area are often referred to as "accommodation" claims and "relate to a school's allocation of athletic participation opportunities between its female and male students." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004). Most cases have dealt with this area of compliance. *Id.*

³¹ Policy Interpretation, 44 Fed. Reg. at 71,418. In 1996, the Department of Education issued a Policy Clarification which explained that the first prong of the test is a "safe harbor" and not a requirement. Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Dep't of Educ., to Colleague (Jan. 16, 1996), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

Every court to consider the issue has held that the regulations and Policy Interpretation are entitled to deference.³² Courts have stated that “the degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”³³ Moreover, every court to consider the issue has held that the regulations and Policy Interpretation are constitutional.³⁴ Importantly, however, while the equality mandate itself has been defined through interpretations of Title IX and its implementing regulations and policy clarifications, the content of the equality mandate is left to be defined by the institutions sponsoring athletic programs.³⁵

As explained in Part II below, because Title IX case law and regulations defer to institutions to shape their athletic programs, the definition of an athlete deserving of equal athletic opportunity is given meaning not by the law, through Title IX, but by the institutions subject to Title IX. This meaning is subsequently communicated to prospective female athletes in a variety of ways. The method this Article is concerned with is how Title IX incorporates the social construction of an athlete entitled to equal athletic opportunity and sends a message that can shape norms for women’s sports participation and, as a result, women’s interest in participating.

B. Why Title IX is Important and How it Purports to Work

Title IX’s goals are said to be two-fold. First, the statute and regulations seek to guarantee equal athletic opportunity for women and girls currently participating in education-based sports programs. The second goal is to send a message through equal athletic opportunity to prospective female athletes, on the theory that providing gender equity in athletics will develop

³² *McCormick*, 370 F.3d at 290; *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 273 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist.*, 998 F.2d 168, 171 (3d Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1996); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 102 (W.D. Va. 2007).

³³ *McCormick*, 370 F.3d at 289 (internal citations omitted).

³⁴ *Equity in Athletics, Inc.*, 504 F. Supp. 2d at 102.

³⁵ The Office of Civil Rights has explained that the three-part test allows institutions to “maintain flexibility and control over their athletic programs” Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Colleague (April 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

women's interest in participation. This has been called the "trickle down" theory³⁶ and it is assumed that in this way Title IX will not simply guarantee equality, but will also shape norms for sports participation in a way that inspires women and girls to participate.³⁷

Social scientists and scholars have long pointed out that equitably distributing education-based³⁸ sports opportunities is important because sports participation provides significant and well-documented lifetime benefits.³⁹ As a result, the importance of Title IX and the urgency to provide gender equity in sport is premised on the fact that participation in sports⁴⁰ can provide important life lessons and help develop significant life skills — lessons and skills that have long been enjoyed by males.⁴¹ Indeed, a substantial body of literature documents the benefits of sport participation. For instance, sports participation is said to "help all young people learn important lessons" such as discipline, teamwork, time management and leadership that "further long-term personal growth, independence and well-being."⁴² Studies have demonstrated that students who participate in high school sports perform better academically and have an increased probability of at-

³⁶ Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 116 (1991).

³⁷ Brake, *supra* note 3.

³⁸ Although sports participation occurs in many different settings, such as through private clubs, AAU leagues and the like, it is sport in the educational setting that has the greatest impact because high schools and colleges/universities support most organized sports programs in the United States. It is this setting, of course, to which Title IX applies because most high schools, colleges and universities receive the federal funding that is a condition precedent to application of the statute.

³⁹ Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 458 (2004).

⁴⁰ Some scholars recently have begun to question whether this type of varsity, competitive sports opportunities are necessary to provide these benefits. George, *supra* note 10.

⁴¹ Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 1–2, 10–17 (1997) (describing a Nike advertisement in which girls on a swing set ask boys to let them play so they can reap the benefits of athletics too; discussing the documented benefits of athletics for women); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 444–45 (2000) (explaining that without equal athletic opportunity women will "be dependent upon men for care and protection" and "will necessarily be dominated by their physically more developed and stronger [male] mates").

⁴² Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 235 (2008).

tending college.⁴³ Moreover, athletic participation is said to create numerous benefits for women and girls, including better physical and mental health, higher self-esteem, a lower rate of depression, a more positive body image, greater educational success, and stronger inter-personal skills.⁴⁴ Research shows that physical activity reduces female risk of cardiovascular disease,⁴⁵ and physically active women are less likely to get diseases such as breast cancer.⁴⁶ Research also shows that participation in athletics promotes positive social behaviors, including better academic performance,⁴⁷ lower rates of smoking, drug use and pregnancy, and higher levels of self-esteem. Sports participation also provides social benefits that are carried throughout life,⁴⁸ including a woman's professional life.⁴⁹ Given the growing numbers

⁴³ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71 (2008).

⁴⁴ Samuels, *supra* note 5, at 242; *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 12 (1995) (statement of Norma Cantú, Assistant Secretary, Office for Civil Rights, Department of Education) (“[G]irls who participate in sport are three times more likely to graduate from high school, 80 percent less likely to have an unwanted pregnancy, and 92 percent less likely to use drugs”); Marcia D. Greenberger & Neena K. Chaudhry, *Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Courts, Congress and the Federal Agencies*, 55 CLEV. ST. L. REV. 491, 492 (2007) (explaining that “[f]emales who participate in athletics benefit from greater academic success, responsible social behaviors, a multitude of health benefits, and increased personal skills” and noting that “[f]emale student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers”).

⁴⁵ WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS* 8 (2004).

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 30; *see also* Council on Sports Med. and Fitness and Council on Sch. Health, Am. Acad. of Pediatrics, *Active Healthy Living: Prevention of Childhood Obesity Through Increased Healthy Living*, 117 PEDIATRICS 1834, 1836 (2006) (discussing the health benefits of athletics for all children from weight reduction, to insulin sensitivity, to blood pressure, to self-esteem); *Cardiovascular Benefits of Daily Exercise in School Children Are Evident Even After One Year*, SCIENCE DAILY, May 10, 2009, <http://www.sciencedaily.com/releases/2009/05/090508045318.htm>.

⁴⁸ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 183–199 (1995) (statement of Donna A. Lopiano, Executive Director, Women's Sports Foundation) [hereinafter *Amateur Sports Act: Hearings*]; *see* Council on Sports Med. and Fitness and Council on Sch. Health, Am. Acad. of Pediatrics, *supra* note 47.

⁴⁹ Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 444 (2000) (“80% of women identi-

of children, and especially girls, who are overweight and suffering the resultant lifelong physical and emotional effects, sports participation — both encouraging an interest in it and sustaining it — is an important public policy issue.

Title IX addresses this issue by prohibiting discrimination on the basis of gender in education-based sports programs. In doing so, scholars have explained that Title IX goes beyond a formal equality approach to achieve a kind of substantive equality as well,⁵⁰ so that Title IX “take[s] an approach to sex equality that is markedly different from the dominant approach reflected in sex discrimination law generally.”⁵¹ This is because, as courts and scholars have long recognized, a purely formal equality interpretation of Title IX would achieve little, as differences between men’s and women’s interest in athletics are the result of discriminatory social relationships and institutional practices that “construct” such differences.⁵² Historically, only men had the opportunity to develop the interest and ability to participate in sports. Women were conditioned not to seek athletic opportunities or participate in sports, and opportunities for them to do so were severely limited.⁵³ As a result, the law had to account for the fact that women naturally would not have the same interest and ability to engage in sports because of significant past discrimination. Title IX is said to do so by taking a substantive equality approach. This approach is sometimes referred to as

fied as key leaders in Fortune 500 companies participated in sports during their childhood and have self-identified as ‘tomboys.’ . . . Several studies describing the glass ceiling in corporations conclude that women’s lack of competitive team sports experience disadvantages them for career advancement.”)

⁵⁰ David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 263 (2005) (stating that “Title IX, on the other hand, looks beyond formal equality and reaches into the realm of substantive equality”); Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 5 (1994) (noting that “some substantive equality advocates favor equal treatment in some situations and special accommodation in others, insisting, for example, on equal access for women to men’s athletic teams, private clubs, and colleges, but on separate teams, clubs, and colleges for women to meet their special needs”); Brake & Williams, *supra* note 42, at 212–213.

⁵¹ Brake, *supra* note 3, at 24.

⁵² Brake, *supra* note 3, at 28–29 (“Feminists working within both relational and anti-subordination approaches have focused on how gender difference is socially constructed. One school of thought, particularly relevant for Title IX analysis, is loosely identified as structuralism, or new structuralism . . . it analyzes differences not as inherent, but as constructed through social relationships and institutional practices.”)

⁵³ Erin Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 825 (2006).

“structuralism,”⁵⁴ or “structural equality,” and it is based on the notion that women’s expressed “interest” in athletics cannot be weighted equally with men’s because such “interest” might instead be the result of social factors which discourage women’s athletic participation, rather than the result of real choices.⁵⁵ Instead, the theory has been that changing the structure of athletics by creating opportunities for women to participate and removing stigmas against such participation is what is needed to develop women’s interest in sports.⁵⁶

Title IX incorporates this substantive, or “structural,” approach to equality primarily through the so-called “three-part test”⁵⁷ for compliance. Through the three-part test, schools are required to create opportunities for girls and women to participate in sports to stimulate females’ interest in participating.⁵⁸ Title IX therefore does not require gender-neutral assessments of athletic ability, but instead allows institutions to offer separate

⁵⁴ Brake, *supra* note 3, at 29–30 (writing that “a structuralist interpretation of discrimination law centers the legal analysis on how institutions and organizations construct sex difference and inequality”); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 64 (2003) (explaining that Title IX doctrine is “‘structuralist’” in orientation because the courts in these cases seem to appreciate the important role that the current structure of athletic programs and opportunities play in creating interest among students to participate in sports”).

⁵⁵ Brake, *supra* note 3, at 29–30 (“Structuralist approaches are reluctant to center equality law around the equal valuation of women’s preferences when those preferences themselves may be the products of social constraint rather than authentic choices.”).

⁵⁶ Horwitz, *supra* note 17, at 314–15. As commentators have explained:

Any measure that purports to compare the interest of women and men participating in sports will be affected by the present mix of opportunities for men and women. For example, the answers given by high school students to questions about what college sports they want to participate in will inevitably be affected by what sports they have had a chance to play in high school. These answers, in turn, will have been influenced by their opportunities for college athletic scholarships and the mix of sports offered at the college level.

Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 79 (1996).

⁵⁷ Brake, *supra* note 3, at 49–50.

⁵⁸ Brake & Williams, *supra* note 42, at 213–14; Buzuvis, *supra* note 53, at 826; Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 537 (2007).

male and female teams.⁵⁹ More than that, Title IX has a substantive equality element in that it does not require institutions to offer the same sports for men and women and grants women greater rights to try out for a men's team (and is much more restrictive in allowing men to try out for a women's team) because of the history of discrimination against women in sports.⁶⁰ As a result, Title IX has been applauded for taking a "more comprehensive view of equality" than the Equal Protection clause.⁶¹

Courts frequently have endorsed the "structural" equality elements of Title IX,⁶² often citing the overwhelming statistics indicating that simply creating opportunities for women to participate in sport has led to increased interest.⁶³ For instance, in the landmark case of *Cohen v. Brown University*, the court stated that

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is . . . to ignore the fact that Title IX was enacted to remedy discrimination that results from stereotyped notions of women's interests and abilities.⁶⁴

The court in *Brown* went on to explain that women's lower rate of participation in sports resulted not from an inherent lack of interest, but because historically, opportunities for such participation have been limited.⁶⁵ Other

⁵⁹ DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 15 (2010).

⁶⁰ *Id.* at 42.

⁶¹ Cohen, *supra* note 50, at 260.

⁶² Brake, *supra* note 3, at 50–51; Buzuvis, *supra* note 53, at 825 (explaining that the Department of Education's Office of Civil Rights and courts "have recognized that social structures, including colleges and universities, have constructed women's interests in sports").

⁶³ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) ("The participation of girls and women in high school and college sports has increased dramatically since Title IX was enacted. In 1971, before Congress enacted the statute, approximately 300,000 girls and 3.67 million boys played competitive high school sports nationwide. In 2002, 2.86 million girls and 3.99 million boys played competitive high school sports nationwide."); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 119 (2d Cir. 1999) ("Statistics show that by 1992, in comparison to when Title IX was enacted, the number of young women participating in sports had multiplied six times.")

⁶⁴ *Cohen v. Brown Univ.*, 101 F.3d 155, 178–79 (1st Cir. 1996).

⁶⁵ *Id.* at 179.

courts have endorsed this view.⁶⁶ Thus, courts, scholars, and Title IX advocates have emphasized that Title IX works to eliminate gender discrimination by providing women the opportunity to participate in athletics and thereby generating interest in athletic participation. I have argued previously that, while necessary, Title IX's equality mandate is limited in its effectiveness in stimulating females' interest in athletic participation, as it guarantees women the right merely to assimilate into a male model of sport.⁶⁷ The following section of this article extends this analysis by explor-

⁶⁶ For instance, the court in *Pederson v. Louisiana State University* echoed these themes, stating that:

[LSU] argues brazenly that the evidence did not indicate sufficient interest and ability in fast-pitch softball at LSU . . . The heart of this contention is that an institution with no coach, no facilities, no varsity teams, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team before a court can find [a Title IX violation].

213 F.3d 858, 878 (5th Cir. 2000). In *Neal v. Board of Trustees of the California State Universities*, the court similarly discounted assertions that women were not as interested as men, stating that:

[A] central aspect of Title IX's purpose was to *encourage* women to participate in sports: The increased roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships . . . Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes.

198 F.3d 763, 769 (9th Cir. 1999). The court further explained:

[M]en's expressed interest in participating in varsity sports is apparently higher than women's at the present time — although the "interest gap" continues to narrow — so permitting gender-conscious remedies until the proportions of students and athletes are roughly proportional gives universities more remedial freedom than permitting remedies only until expressed interest and varsity roster spots correspond.

Id. at 767; *see also* *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993) ("Acceptance [of Colorado's] argument also would implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics."). Moreover, in testimony before Congress, one college athletic administrator stated that "[a]fter Title IX was passed, and opportunities became available, women's participation skyrocketed. If we have learned anything from this experience, it is that women are interested in playing sports and that interest expands as opportunities expand . . ." *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 201 (1995) (statement of Peggy Bradley Doppes, Nat'l Ass'n of Collegiate, Women Athletic Adm'rs).

⁶⁷ Koller, *supra* note 15.

ing how Title IX's equality framework communicates with or "sends a message" to women in a way that can affect their interest in sports participation.

III. TITLE IX AND THE EXPRESSIVE POWER OF THE LAW

Title IX's ability to continue to effect change in female athletic participation rates can be evaluated by looking at its theoretical foundation combined with its expressive effects. Expressive theories of the law focus on the "statements" made by the law and how those statements might affect social norms.⁶⁸ Indeed, a significant amount of Title IX's legal and popular discourse is focused on the messages sent to women and girls about sports participation. Understanding fully the ways in which Title IX can send messages to girls and women about sports is therefore crucial to appreciating the ways in which the law can stimulate interest in participating, or not, in sports. Accordingly, since the premise behind Title IX's theory of structural equality is that increased participation opportunities will encourage females to take up and continue engaging in sports, it is important to examine what and how opportunities created in the name of Title IX communicate with women to determine whether the law's message is consistent with its goals.

While examining Title IX's expressive dimension, it is important to note that the law in general, and Title IX in particular, is of course only one influence on girls' and women's interest in sports. Therefore, it might be suggested that other factors are at work which encourage, or discourage, participation in sports. This is certainly true,⁶⁹ and it would be a mistake to assume that the law has the sole effect on women's motivation to participate in sports. However, it is still important to look at the law's role in shaping women's interest in sports for two reasons. First, Title IX historically has had a significant impact on women's participation, and its status in popular culture has carried an important message that, statistics clearly demonstrate, can affect women's interest in sports. Second, given that Title IX has always strongly communicated that women are entitled to participate in sports, it is important to explore whether a message of equality and entitlement to participate is still sufficient to actually develop the interest in participating, and if not, what role might the law play in stimulating even more broad-based interest.

In this respect, an examination of Title IX's message to prospective female athletes is a useful exercise, not just theoretically but practically. As

⁶⁸ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1995).

⁶⁹ George, *supra* note 10, at 25–29.

will be explained below, such an examination reveals that Title IX now signals two different, and likely for many potential female athletes, conflicting messages. The first and most prominent is that girls and women can, should, and are entitled to participate in athletics on a basis equal to boys and men. The second and less-examined message is that such participation opportunities are contingent upon meeting the demands of the socially-constructed model for sports that dominates in our educational institutions, and serves to exclude many. As new generations of women grow up knowing they are legally entitled to participate in sports, it is this second message that takes on greater significance in shaping women's desire to participate in sports.

A. *The Expressive Power of the Law*

Scholars have explained that “there can be no doubt that law, like action in general, has an expressive function” and that its expressive dimension goes beyond its coercive effects.⁷⁰ Thus, the expressive theory of the law “focuses on what law says rather than the sanctions law threatens.”⁷¹ Law is said to create public meanings and shared understandings between the government and public.⁷² As a result, many scholars have explained that the law has the power to shape social norms⁷³ and influence behavior.⁷⁴

⁷⁰ Cass R. Sunstein, *Law, Economics and Norms: In the Expressive Function of Law*, 144 U. PA. L. REV. 2051 (1996) (“Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.”); *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339 (2000) (“Legal theorists sometimes posit that law affects behavior ‘expressively’ by what it says rather than by what it does.”); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 37 (2002).

⁷¹ Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1046 (2005).

⁷² Anderson & Pildes, *supra* note 70, at 1571.

⁷³ As Richard McAdams has stated:

“The expressive effect thus gives law a significant potential for managing norms. One of the necessary conditions of a norm is that people generally realize that others will, at the least, approve or disapprove of them for engaging in certain conduct. Where the approval pattern is not well known, a legislative proclamation can publicize it and create a norm. Even where the approval pattern is already known and the norm exists, legislation can still strengthen the norm by causing individuals to adjust upward their beliefs about the strength of the consensus underlying the norm . . . [T]hose who observe the signal will update their prior beliefs about public

However, expressive meanings are not determined in isolation, but are “socially constructed,” so that the meanings are given shape by the other norms, practices and understandings in a particular community.⁷⁵

For instance, law has the ability to communicate important value judgments⁷⁶ and can serve to educate individuals about socially preferred or harmful behavior. Law then may cause individuals to change their behavior by “signaling the underlying attitudes of a community or society.”⁷⁷ Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law can cause individuals to change their behavior to conform with popular norms.⁷⁸ Court decisions also have an expressive effect, because they, too “often reflect public attitudes.”⁷⁹ Accordingly, because individuals value approval,⁸⁰ law can affect behavior by signaling what behavior will generate approval,⁸¹ causing individuals “to update their prior beliefs about the approval pattern.”⁸² A notable example of this involved workplace sexual harassment.⁸³ Catharine MacKinnon has

attitudes in the direction of expecting more disapproval for behavior the law condemns. Expecting disapproval for the behavior provides an incentive, independent of legal sanctions, to comply with the law.”

McAdams, *supra* note 70, at 371–72.

⁷⁴ Geisinger, *supra* note 70, at 37 (“[S]cholars note that laws affect behavior not only by making the behavior more costly, but also by affecting social norms and, consequently, by changing an individual’s preferences for undertaking particular acts.”); McAdams, *supra* note 70, at 389 (“In a democratic society, legislation and other law can change what people believe about the approval patterns in their community or society; the law operates as a signal of popular opinion.”); Sunstein, *supra* note 70 (arguing that the expressive function of law shapes social norms).

⁷⁵ Anderson & Pildes, *supra* note 70, at 1525.

⁷⁶ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 949 (1996).

⁷⁷ McAdams, *supra* note 70, at 340.

⁷⁸ Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Sunstein *supra* note 70, at 2022.

⁷⁹ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341 (2000).

⁸⁰ McAdams, *supra* note 70, at 343 (“There are at least two reasons why approval motivates behavior. An individual may value approval intrinsically because it satisfies a preference for esteem or instrumentally because it helps achieve other ends.”).

⁸¹ McAdams, *supra* note 70, at 342.

⁸² *Id.* at 359.

⁸³ Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

explained that court decisions changed the social meaning of sexual harassment by labeling it a form of gender discrimination.⁸⁴

Feminist scholars have long highlighted ways that law's expressive effect can play a role in subordinating women. For example, Nadine Taub and Elizabeth Schneider have explained that:

[B]eyond its direct, instrumental impact, the insulation of women's world from the legal order also conveys an important ideological message to the rest of society . . . the law's absence devalues women and their functions . . . In short, the law plays a powerful role, though certainly not an exclusive role, in shaping and maintaining women's subordination.⁸⁵

Law therefore has served to "legitimate and perpetuate oppressive social systems through its expressive function by sending messages about the kind of people and the institutions that we value."⁸⁶ Likewise, information about the kind of athletes that are valued by education-based sports programs is communicated forcefully in the name of Title IX.

B. *The Expressive Power of Title IX*

The first step in understanding Title IX's expressive dimension is to understand the mechanism by which Title IX communicates or creates understandings about women and sports. On the surface, it is clear that Title IX as applied to sports does little "speaking" through its own provisions. The statute itself does not address sports programs and the legislative history is sparse.⁸⁷ We know, at least intuitively, however, that Title IX does communicate in a way that shapes norms for women's sports participation. Indeed, Title IX is said to be the "first federal law to have achieved true pop status."⁸⁸ The words "Title IX" have become synonymous with female ath-

⁸⁴ *Id.* at 407–08.

⁸⁵ Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* (David Kairys ed., 3d ed. 1998).

⁸⁶ Andrew A. Taslitz, *What Feminism has to Offer Evidence Law*, 28 *SW. U. L. REV.* 171, 179 (1999).

⁸⁷ Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 *YALE L.J.* 1254, 1255 (1979).

⁸⁸ Nancy Levit & Robert R.M. Verchick, *FEMINIST LEGAL THEORY: A PRIMER* 107 (2006). *See also* Brake, *supra* note 59, at 1, 13 (stating that "appeals to Title IX resonate broadly in American Popular culture" and that "Title IX has remained a remarkably popular law precisely because it has been so effective in changing cultural norms to support greater opportunities for girls and women in sports").

letic achievement and power.⁸⁹ There is even a company named “Title IX” which markets upscale women’s athletic clothing. Moreover, although the actual requirements of the statute and regulations are often not widely understood,⁹⁰ there is no question that Title IX communicates beyond its sanctions.⁹¹

Therefore, despite statutory language that does not address sports programs, Title IX carries important messages about sports participation through its equality mandate. This is because the statute and its implementing regulations require only that women’s sports programs be equivalent to men’s. Accordingly, the regulations contemplate and courts give great deference to educational institutions to define the content of their athletic programs. In this way, Title IX sends messages, or “speaks,” through the educational institutions which create participation opportunities in the name of Title IX compliance. In addition, Title IX speaks through Congress, courts, and other government actors who speak in the name of Title IX when supporting and enforcing the law. Both of these mechanisms shape the understandings that have developed about Title IX and work to create the messages sent about Title IX and women’s athletics. As will be explained in the next part, Title IX has signaled two different, and likely for many potential female athletes, arguably conflicting messages. The first message is one of equality and empowerment: that girls and women are entitled to participate in athletics on a basis equal to boys and men. The second, less-examined message is far more complex. It is that the natural and expected goal of sports participation is to be a highly skilled athlete capable of winning. Unpacking this message and how it is interpreted by different groups of women is critical to understanding Title IX’s ability to continue developing women’s interest in sports.

⁸⁹ NAT’L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 7.

⁹⁰ For instance, popular media reports often state that Title IX requires “equal funding” for men’s and women’s athletics. BRAKE, *supra* note 59, at 2.

⁹¹ Note, *supra* note 87, at 1267 (explaining sport’s “symbolic role” and stating that “the symbolic importance of sports in American society is undoubted”). See also SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORTS 251 (1994) (explaining that Title IX’s equality principle had an impact outside of the federally-funded institutions to which the statute applies).

1. Title IX's First Message: Equality, Empowerment and Entitlement to Participate

Title IX has been said to be “a symbol of hope for women and sports . . .”⁹² Indeed, much of what has made Title IX successful is its expression of new norms for women’s sports participation.⁹³ One is that women can be athletes. Another is that women are entitled to participate in sports with dignity and under conditions equal to men. At the time Title IX was enacted, such notions were nearly revolutionary. Prior to the passage of the statute, the message to females, taken as a seemingly natural understanding and reinforced by the law, was that sports were for boys and men only.⁹⁴ Sports programs played a “symbolic role” in reinforcing these gender stereotypes⁹⁵ by signaling that sports participation by women was not normal.⁹⁶ An early case involving a girl seeking to join a Little League baseball team illustrates this well. Just after Title IX was passed, in 1974, Allison Fortin was denied the opportunity to join the Pawtucket, Rhode Island Little League team on the basis of gender. She brought suit alleging violations of her Fourteenth Amendment rights to Equal Protection. The district court denied her claim, stating that the exclusion of girls was perfectly rational, because if girls were to play Little League baseball, there was too much of a risk that they might be hurt.⁹⁷ The district court credited the testimony of an orthopedic surgeon who admitted that he had little experience with female athletes, but nevertheless opined that girls were “more sedentary” and “likely to be in poorer condition than boys.”⁹⁸ He also concluded, among other things, that girls “lacked the capacity to throw over-

⁹² Olson, *supra* note 36, at 106.

⁹³ BRAKE, *supra* note 59, at 7.

⁹⁴ Note, *supra* note 87, at 1254 (“Intercollegiate athletics have been and continue to be a male domain that is particularly vulnerable to charges of sex discrimination.”); EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* (2008).

⁹⁵ Note, *supra* note 87, at 1265.

⁹⁶ McDONAGH & PAPPANO, *supra* note 94, at 247; M. Marie Hart, *On Being Female in Sport, in OUT OF THE BLEACHERS: WRITINGS ON WOMEN AND SPORT* 24 (Stephanie L. Twin ed., 1979) (“Although we have isolated and studied ‘Women in Sport,’ we have not so separated ‘Men in Sport’ as a special topic. This is because the latter is accepted, rather than the exception, in sport discussions.”); Buzuvis, *supra* note 53, at 821.

⁹⁷ Fortin v. Darlington Little League, 514 F.2d 344, 346 (1st Cir. 1975).

⁹⁸ *Id.* at 349.

hand.”⁹⁹ The doctor’s opinions were also based on the fact that “it was the normal activity of a young lady to keep off baseball fields and play with dolls.”¹⁰⁰ Similarly, in 1976, one year after Title IX’s regulations went into effect, Victoria Ann Cape brought suit under the Equal Protection Clause challenging the Tennessee Secondary School Athletic Association’s rules that required six instead of the usual five players on each girls’ basketball team, restricted the game to half-court and permitted only forwards to shoot the ball.¹⁰¹ The state claimed several rationales for the rule, including that it sought to protect the female players “who are weaker and incapable of playing the full-court game from harming themselves”; “to provide the opportunity for awkward and clumsy student athletes to play defense only”; and to ensure a better game for the fans and continued fan support, because the fans were “accustomed to a split-court game.”¹⁰² The athletic association ultimately prevailed, as the court held that there was “no evidence of any intent to discriminate against” female high school basketball players.¹⁰³

This once natural understanding that it was not normal or safe for women to participate in sports was strongly reinforced by the state in that government-funded institutions, the primary provider of sports opportunities in the United States, had little or no participation opportunities for women. The effect of this sex discrimination was to dampen women’s interest in sports “often to the extent that they d[id] not even consider the possibility of participation.”¹⁰⁴ Through Title IX and its implementing regulations, Congress and the Executive Branch established sanctions for discriminating against women in educational programs, and also hoped to express and cultivate a new norm for sports participation that ended such sex stereotyping. The result is that Title IX is widely credited with sending a message that encourages women’s participation in sports.¹⁰⁵

Title IX expressed a new definition of who an athlete can be in several ways. To begin, Congress firmly endorsed gender equity in sports, by supporting the regulations drafted by the Department of Health, Education, and Welfare (now administered by the Department of Education) and re-

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 350.

¹⁰¹ *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793, 794 (6th Cir. 1977).

¹⁰² *Id.* at 795.

¹⁰³ *Id.*

¹⁰⁴ Note, *supra* note 7, at 1265.

¹⁰⁵ See DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, ED 409 618, TITLE IX: 25 YEARS OF PROGRESS (1997).

peatedly rejecting efforts by male sports advocates that argued Title IX would unfairly shift resources from male sports programs to women's programs.¹⁰⁶ Moreover, proposed amendments to Title IX that would have exempted revenue-producing intercollegiate sports (specifically men's football and basketball) from Title IX consistently were rejected as well.¹⁰⁷ Congress again sent the message that gender equity in sports was important with the Civil Rights Restoration Act of 1987, passed in response to the Supreme Court's decision in *Grove City College v. Bell*,¹⁰⁸ which limited Title IX's application to sports programs by holding that the statute only applied to specific programs which received federal financial assistance, not an entire institution. This effectively suspended application of Title IX to education-based sports programs, because few, if any athletic departments received direct federal aid. Congress rejected this outcome, mandating that if any part of the institution received federal financial assistance, Title IX applied to the entire institution. Courts have said that the Act "mak[es] it crystal clear that Title IX applies to athletic programs operated by any school receiving federal funding for any of its educational programs and activities, and not just to those athletic programs which directly received federal dollars,"¹⁰⁹ and emphasized that the subject of "[a]thletics featured . . . prominently" in Congress's decision to reject the Supreme Court's *Grove City* ruling.¹¹⁰ This message was buttressed by courts unanimously upholding the regulations defining Title IX's requirements with respect to athletics and rejecting constitutional challenges to its application,¹¹¹ finding that ending discrimina-

¹⁰⁶ *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999) (stating that "[a]n extensive survey of Title IX's legislative history and the regulations promulgated to apply its provisions to college athletics concluded that boosters of male sports argued vociferously before Congress that the proposed regulations would require schools to shift resources from men's programs to women's programs, but that Congress nevertheless sided 'with women's advocates' by deciding not to repeal the . . . regulations"(quoting MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS 171-76 (1996))).

¹⁰⁷ *See Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 95 (W.D. Va. 2007) (citing 120 CONG. REC. 15,322-23 (1974)).

¹⁰⁸ 465 U.S. 555 (1984).

¹⁰⁹ *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82, 94 (D.D.C. 2003).

¹¹⁰ *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 103 (W.D. Va. 2007).

¹¹¹ *Id.* at 101-03 (explaining that "every circuit, in reviewing the Three-Part Test set forth in the 1979 Policy Interpretation, has concluded that it is entitled to substantial deference" and that "[l]ikewise, every Circuit, which has considered the constitutionality of the proportionality prong of the Three-Part Test, has held that

tion in education-based athletic programs is an important government interest.¹¹² Similarly, courts repeatedly have rejected challenges to Title IX brought by male athletes.¹¹³

In addition, courts have recognized Title IX's expressive value in shaping new norms for women's participation in sports. For instance, as the court stated in *Neal v. Board of Trustees of California State Universities*, "a central aspect of Title IX's purpose was to *encourage* women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships."¹¹⁴ The court explained that this would effect change in that

[t]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels.¹¹⁵

Title IX also encourages women and girls to participate in sports by sending the message that women are entitled to participate in sports with dignity, and on terms equal to men, through cases that recognize the expressive

it does not offend constitutional principles of equal protection."); *See also* Blake, *supra* note 3, at 49–50 (asserting the same and citing *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), *remanded to*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 117 (2d Cir. 1999); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 335–36 (3d Cir. 1993); *Pederson v. La. St. Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767–68 (9th Cir. 1999); *Roberts v. Colo. St. Bd. of Agric.*, 998 F.2d 824, 828–29 (10th Cir. 1993)).

¹¹² *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) (stating that "[t]here is no doubt but that removing the legacy of sexual discrimination . . . in the provision of extra-curricular offerings such as athletics — from our nation's educational institutions is an important governmental objective").

¹¹³ *See e.g.*, *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Neal*, 198 F.3d 763 (9th Cir. 1999).

¹¹⁴ 198 F.3d at 768.

¹¹⁵ *Id.* at 769 (further explaining that "Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes").

harms¹¹⁶ inherent in second-class treatment of female athletes. Cases involving claims of “equal treatment” emphasize “the message” sent to female athletes who, for instance, must train or compete in inferior facilities or during non-traditional seasons.¹¹⁷ A case involving disparities between facilities for a girls’ high school softball team and the boys’ baseball team make this point well. In *Daniels v. School Board of Brevard County, Florida*, the court recognized numerous harms that were present through the negative messages the disparate facilities sent. The court stated that:

As with all the differences the Court addresses in this Order, the fact that the boys have a scoreboard and the girls do not sends a clear message to players, fellow students, teachers and the community at large, that girls’ varsity softball is not as worthy as boys’ varsity baseball.¹¹⁸

The court further explained with respect to the bleachers on the girls’ softball field that photographs submitted by the softball players:

starkly illustrate that the bleachers on the girls’ softball field are in worse condition and seat significantly fewer spectators, than the bleachers on the boys’ field Again, the message this sends the players, spectators and community about the relative worth of the two teams is loud and clear.¹¹⁹

¹¹⁶ Pildes, *supra* note 78, at 755 (“An expressive harm is one that results from the ideas or attitudes expressed through a government action rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does.”).

¹¹⁷ *Alston v. Va. High School League*, 144 F. Supp. 2d 526, 536 (W.D. Va. 1999) (plaintiffs characterized their alleged harm partially in terms of the “negative message” the high school athletic association’s actions sent). Other cases reflect this discourse. See, e.g., *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 295 (explaining that “[s]cheduling the girls’ soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys”); *Daniels v. Sch. Bd. of Brevard Cnty.*, 985 F. Supp. 1458, 1461 (M.D. Fla. 1997) (explaining that the disparity between the girls’ softball fields and the boys’ baseball fields, including the lack of lighting at the girls’ field, “sen[t] a clear message to players, fellow students, teachers and the community . . . that girls’ varsity softball [was] not as worthy as boys’ varsity baseball”); *Mason v. Minn. State High School League*, No. Civ.03-6462(JRT/FLN), 2004 WL 1630968 (D. Minn. Jul. 24, 2004) (noting that it was a question of fact for the trier to determine whether the choice of venue for girls hockey games sent a negative message to girls hockey players and their fans); *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1381 (Wash. 1987) (stating that “[t]he message came through loud and clear, women’s teams were low priority”).

¹¹⁸ *Daniels*, 985 F. Supp. 1458 at 1461.

¹¹⁹ *Id.*

In entering the preliminary injunction, the court concluded that:

Each day these inequalities go unredressed, the members of the girls' softball team, prospective members, students, faculty and the community at large, are sent a clear message that girls' high school varsity softball is not as worthy as boys' high school varsity baseball, i.e., that girls are not as important as boys . . . the harm associated with that treatment as second-class athletes is significant.¹²⁰

The power of the message sent by Title IX and its immediate effect on female athletes was captured by scholar Erin Buzuvis on the "Title IX Blog" in reference to a case involving locker room facilities at several high schools in North Carolina. In those cases, the schools ultimately complied with Title IX by upgrading their facilities to be equivalent to those provided to boys' teams. The girls' basketball coach was quoted as stating about the upgraded facilities that "[m]y girls probably just felt like second-class citizens because the boys had such nice facilities, but now they feel like first-class citizens."¹²¹ As Professor Buzuvis explained, this feeling or message is directly attributable to Title IX:

To me, this quote epitomizes the intent and effect of Title IX No group should be stigmatized by second-class treatment. Discrimination in athletics, whether it be in the number of participation opportunities for each sex, or the quality of their playing fields and locker rooms, sends a clear message to students about whose athletic experience society appreciates, expects, and respects¹²²

Court decisions in the decades since Title IX was enacted continue to send the message that women and girls are entitled to participate in athletics on terms equal to men and boys. The result is that Title IX has steadily eroded the stigma that formerly attached to women's participation in sports and shifted the dynamic, so that an ever greater stigma attaches to institutions and individuals who discriminate against women athletes, at least with respect to participation.¹²³ The case of *Pederson v. Louisiana State University*¹²⁴

¹²⁰ *Id.* at 1462.

¹²¹ Erin Buzuvis, *First-Class Locker Rooms Remedy Title IX Violations at N.C. High Schools*, TITLE IX BLOG (November 28, 2010, 9:00 AM), <http://title-ix.blogspot.com>.

¹²² *Id.*

¹²³ To be sure, Title IX cases continue to demonstrate that there is not enough stigma attached to at least some forms of discrimination against women in sports, such as through sub-par facilities, game scheduling and other conditions of participation.

¹²⁴ 213 F.3d 858 (5th Cir. 2000).

illustrates this well. In that case, the athletic director refused to establish a women's softball team despite considerable interest and the athletic department being severely out of compliance with Title IX. The case included testimony that the athletic director thought soccer was a "more feminine sport" and that some at LSU were concerned about adding fast-pitch softball because the women "might get hurt."¹²⁵ Although these views of women athletes once were mainstream, the fact that norms for women's sports have changed could be seen by the fact that the institution did nothing to defend them. Instead, the university ultimately defended itself by arguing that its athletics personnel were simply "ignorant" of the law's requirements.¹²⁶

Indeed, Title IX's effect on changing norms for sports participation and stigmatizing those who would deny women the right to participate can be seen in opponents' arguments as well as public reaction to attempted changes to the law. Title IX critics often state that they agree with the principles of equality and entitlement to participate, but that Title IX's regulatory implementation has gone too far. Moreover, efforts to roll back Title IX's equality mandate have often been attempted quietly and not in full view to avoid public outcry. For instance, in 2002, the Department of Education formed a "Commission on Opportunities in Athletics" with the purpose of studying Title IX and making recommendations for changes to the implementing regulations. The Commission was widely criticized as favoring male athletic interests and Title IX opponents. The Commission issued a report in 2003 that recommended changes to Title IX enforcement that would have significantly limited Title IX's equality mandate. The reaction to the Commission's report was "public outrage,"¹²⁷ and the Department of Education ultimately rejected the Commission's recommendations. Two years later, however, the agency quietly issued a "Clarification" of Title IX's regulations that adopted two of the Commission's recommendations and allowed schools to gauge women's athletic interest via e-mail surveys. This change was resoundingly criticized and subsequently eliminated by the Obama Administration, reaffirming the message that women are entitled to participate in sports on terms equal to men.

¹²⁵ *Id.* at 881.

¹²⁶ *Id.* at 881–82.

¹²⁷ NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 13. Former Senator Birch Bayh, who played a significant role in Title IX's enactment, stated that the reaction to the Commission's report was a "firestorm" and that the political process had been "harness[ed]" so that the proposed changes to Title IX which were backed by the Bush Administration were defeated. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 470 (2007).

Thus, the increase in women and girls' participation in sports in the aftermath of Title IX illustrates that the expressive effect of the statute and regulations both eroded the stigma of women's participation in sports and discouraged discrimination in sports based on gender as institutions attempted to comply with the law and avoid sanctions, but also avoid the perception that they held outmoded views about women athletes. Title IX therefore has carried important moral weight that convinced people that the existing norms for sports participation which excluded women were wrong and deserved to be replaced.¹²⁸ These messages had the consequence of encouraging women to participate in sports. The expressive meaning of Title IX therefore seemingly achieved both effects — discouraging discrimination and encouraging interest — simultaneously. These consequences are still thought to be the logical result of Title IX's anti-discrimination mandate. However, this assumption is no longer warranted in the face of women's persistent, lagging participation rates, especially among certain populations. Therefore, the next part considers whether Title IX's empowerment message can still have the dual effect of discouraging discrimination and encouraging women's participation in athletics. In doing so, it is important to consider whether the empowerment message resonates with diverse groups of girls and women. As will be explained below, a more complex message is being sent in the name of Title IX, and it is one that can have a significant impact on whether women and girls decide to participate in athletics. This signal is that the prevailing norms of the student-athlete experience — training to win and cultivate spectator appeal — are the natural goal of participation in sports, and that certain women and girls are more able to reach that goal than others.

2. Title IX's Second Message: The Exclusive Conception of Who Can Be an Athlete

Understanding Title IX's expressive content more fully is crucial to determining how its message of empowerment and entitlement to participate might resonate for some women but be diluted for others. To do this, we must first understand the model for athletics in which Title IX's opportunities are created. At the time Title IX was passed there were significant, troubling questions about education-based sports programs in the United States.¹²⁹ The prevailing model emphasized winning and commercialism

¹²⁸ See Sunstein, *supra* note 68, at 2031.

¹²⁹ Peter Adler & Patricia Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, 58 SOC. OF EDUC. 241 (Oct. 1985) (“[T]he

more than participation and academics. And, of course, the model openly excluded women. While Title IX caused individuals and institutions to update their views of women participating in sports, the law's equality framework did nothing to update the model that was constructed by men for the male student-athlete.¹³⁰ Time has shown that this model is one that is more readily accessed by upper-middle class white women who can assimilate into it more easily because they have the resources to meet its demands. As a result, Title IX developed a second, and far less examined message that must be taken into account when determining how best to achieve gender equity in sports.

a. The Model for Sport in Educational Institutions

Examining the model for sports that exists in our educational institutions is essential to understanding Title IX's expressive dimension because opportunities created for women in this model are created in the name of Title IX. This is because Title IX allows institutions to construct their sports programs as they see fit, adhering only to the principle of gender equality. Institutions therefore define which female athletes have sufficient "ability" to claim a participation opportunity and which women's sports will be offered in an effort to comply with Title IX. Moreover, education-based sports opportunities have important symbolic force, as these education-based athletics programs provide the most significant number of athletic participation opportunities in the United States.¹³¹ Scholar Deborah Brake has explained that Title IX implicitly incorporates the model of "elite competitive sports as the baseline measure of equality."¹³² This model is "dominant"¹³³ in our educational institutions today. It is also a model that

structure of universities with big-time athletic programs and the athletes' patterned experiences within these universities undermine their attainment of the professed goals of the educational system . . . [M]ost studies of college athletes have found a negative relationship between athletic participation and academic performance.").

¹³⁰ See e.g., Koller, *supra* note 15, at 439; Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Sport*, 17 DUKE J. GENDER L. & POL'Y 1, 1 (2010).

¹³¹ See e.g., Olson, *supra* note 36, at 105 (stating that "colleges, universities and high schools" are the "loci of female athletes' most visible exclusion and inferiority"); Note, *supra* note 87, at 1265 (explaining the importance of the "symbolic role of intercollegiate sports").

¹³² Brake, *supra* note 58, at 541.

¹³³ *Id.* at 542.

was constructed by men, for the purpose of masculinizing males.¹³⁴ In my previous work, I explained that this model was left unchanged by Title IX, so that women seeking to participate in education-based sports programs must assimilate into the model for athletics that was built on the male norm.¹³⁵ Thus, because opportunities generated by Title IX's requirements operate within this framework, it is important to examine specifically the characteristics of that model and how it might speak to women in the name of Title IX.

The overarching characteristic of the model for athletics in our educational institutions today is its preference for high-level athletes.¹³⁶ Colleges are spending ever-increasing funds to recruit elite athletes, including female athletes, for their athletic programs.¹³⁷ Colleges and universities now emphasize winning more than ever, with athletic directors paid bonuses if they produce teams that win championships.¹³⁸ Spending on athletics has grown by double digits over the last decade, as schools see sports as a marketing tool, and with television contracts for even minor sports, athletic directors say they want viewers and alumni to see winning teams.¹³⁹ The emphasis on elite ability in educational institutions is also underscored by the fact that it can serve other national interests, with members of Congress and sports leaders expressing the sentiment that educational institutions have an important role to play in training Olympic athletes. For example, in a 1995 hearing on the Amateur Sports Act, the executive director of the United States Olympic Committee, Richard Schultz, explained that a priority for the USOC was partnering with the NCAA to preserve and enhance col-

¹³⁴ See Koller, *supra* note 15.

¹³⁵ *Id.*

¹³⁶ See e.g., CAHN, *supra* note 91, at 9–11; Pete Thamel, *Coaches Finding No Tolerance for Losing*, N.Y. TIMES, April 1, 2010, at B12 (“‘If you get fired for cheating, you can get hired right back again,’ he said. ‘If you get fired for losing, it’s like you’ve got leprosy.’”).

¹³⁷ Libby Sander, *Have Money, Will Travel: The Quest for Top Athletes*, CHRON. OF HIGHER EDUC., Aug. 1, 2008, available at <http://chronicle.com/article/Have-Money-Will-Travel-the/28750/>.

¹³⁸ Joe Drape & Katie Thomas, *As Colleges Compete, Major Money Flows to Minor Sports*, N.Y. TIMES, Sept. 2, 2010, <http://www.nytimes.com/2010/09/03/sports/03cup.html>.

¹³⁹ *Id.*

legiate programs in Olympic sports and protect the pipeline of Olympic athletes that come from college programs.¹⁴⁰

Of course, achieving elite ability can only come from intense training and skill development. As a result, a prospective athlete today is best positioned to claim one of the limited positions on a high school and, most importantly, college or university team if he or she starts participating in competitive sports at an early age,¹⁴¹ specializes in one sport during childhood and trains year-round. Title IX scholars have noted as much, observing that there is an “increasingly competitive environment for women’s intercollegiate sports where there are very few opportunities for female college athletes to ‘walk on’”¹⁴² to a sports team. This competitive environment means that, as a practical matter, “it takes years and years of competitive play to have the necessary skill to take advantage of the sports opportunities Title IX has created at the college level,”¹⁴³ with training regimens that often could be considered extreme even for adults.¹⁴⁴ Indeed, the medical community has taken note, by urging parents and coaches to exercise restraint in pushing young athletes.¹⁴⁵ One of the negative aspects

¹⁴⁰ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 41 (1995) (statement of Richard Schultz, Executive Director, U.S. Olympic Games).

¹⁴¹ James White & Gerald Masterson, *Problems in Youth Sports*, FAMILY RESOURCE, available at www.familyresource.com/parenting/sports/problems-in-youth-sports (“Starting ages for youth in competitive sports have lowered dramatically in the past two decades . . . [and an estimated] 40 million children are involved in competitive sports. It’s not just the numbers that are staggering, but the manner in which kids are playing.”).

¹⁴² Brake & Williams, *supra* note 42, at 201.

¹⁴³ *Id.*

¹⁴⁴ COMM. ON SPORTS MED. AND FITNESS, AM. ACAD. OF PEDIATRICS, *Intensive Training and Sports Specialization in Young Athletes*, 106 PEDIATRICS 154, 154 (2000). See also Andrew Ferguson, *Inside the Crazy Culture of Kids Sports*, TIME, July 12, 1999, available at <http://www.time.com/time/magazine/article/0,9171,991464,00.html>; Steven W. Gray, *Sport Specialization by Children*, TOWNSHIP LACROSSE June 16, 2009, available at http://www.townshiplacrosse.com/uploads/Sport_Specialization.pdf (“A main reason for the rise in sport specialization by children athletes is the increasing commercialization of sport.”); Detavius Mason, *Age of Specialization: One Sport Vs. Multisports*, GUILFORD ORTHOPAEDIC AND SPORTS MED. CTR., http://www.guilfordortho.com/age_of_specialization.htm; Bob Condor, *Living Well: How Much is Too Much in Youth Sports*, SEATTLE POST – INTELLIGENCER, Sept. 26, 2004, available at http://www.seattlepi.com/health/192359_condor27.html.

¹⁴⁵ COMM. ON SPORTS MED. AND FITNESS & COMM. ON SCH. HEALTH, AM. ACAD. OF PEDIATRICS, *Organized Sports for Children and Preadolescents*, 107 PEDIATRICS 1459 (2001).

is early specialization and overtraining, with numerous reports of girls in sports like basketball and soccer training year-round and suffering the injuries that almost inevitably result.¹⁴⁶ One youth sports organization has summed up the problems by explaining that “[o]ne of the biggest issues in youth sports today is the professionalization of children’s sports . . . [including] adults pressuring kids to win at early ages, along with single-sport specialization and year-round training.”¹⁴⁷ Sport specialization is defined as “athletes limiting their athletic participation to one sport which is practiced, trained for and competed in throughout the year.”¹⁴⁸ Social scientists have long discussed the “alarming trend” of specialization, which has been described as “simply inconsistent with a high school’s educational goals and objectives.”¹⁴⁹ While high school coaches and administrators are charged with providing a sound athletic program to augment educational goals, they are also expected to field teams that win.¹⁵⁰ It is also believed that specialization will make athletes more competitive for a college scholarship.¹⁵¹ Nevertheless, social scientists have noted that although “specialization enhances individual and team performance, it undermines the basic purpose of high school athletics.”¹⁵² Indeed, while it is generally accepted that sports participation is a beneficial activity, there are “numerous negative effects”

¹⁴⁶ Jack Kelly, *More Girls In Sports Means More Injuries*, PITTSBURGH POST-GAZETTE, May 28, 2008, available at <http://www.post-gazette.com/pg/08149/885201-114.stm> (“Girls are specializing in a sport much younger than they have been in the past . . . Constant pressure to perform is putting them at greater risk [for injury].”); B.J. Koubaroulis, *Scholarships With a Cost: Soccer Standouts Play Year-Round at Frenetic Pace*, WASH. POST, May 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/20/AR2009052003308.html> (noting that “pressures from parents, coaches and other athletes often cause players to over-indulge [in grueling practice and playing schedules] during such a critical developmental stage”).

¹⁴⁷ NCAA, ALLIANCE ISSUES ‘POOR GRADES’ ON NATIONAL YOUTH SPORTS REPORT CARD (2005), available at <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/Alliance%2BIssues%2BPoor%2BGrades%2Bon%2BNational%2BYouth%2BSports%2BReport%2BCard.html> (internal quotation marks omitted).

¹⁴⁸ Jay Watts, *Perspectives on Sport Specialization*, 73 J. PHYS. ED. RECREATION & DANCE 32 (2002).

¹⁴⁹ *Id.*

¹⁵⁰ David Susanj & Craig Stewart, *Specialization in Sport: How Early . . . How Necessary?*, COACHES INFO, http://www.coachesinfo.com/index.php?option=com_content&id=303&Itemid=170 (last visited Nov. 9, 2011).

¹⁵¹ Watts, *supra* note 148.

¹⁵² Susanj & Stewart, *supra* note 150.

from sport specialization,¹⁵³ including “burnout,” where an athlete simply quits participating in all sports.

Aside from the effects on the child-athlete, the model for sports that predominates in our educational institutions is also one that is costly for parents and caregivers. Countless blogs and news stories have detailed the enormous costs of youth sports participation, as most athletes who hope to claim a position on a high school or college team also participate in private or “club” sports in an effort to develop their talents to the highest level possible. Such costs can amount to thousands of dollars per year.¹⁵⁴

Of course, the result of fielding specially-trained, highly skilled athletes is that such athletes support the commercial interests of the institution. This is the case because better athletes — and athletes whose primary focus is sports — are more likely to win. Social scientists have long pointed out that winning has taken center-stage in the model for high school and college sports because winning sports programs provide spectator interest and commercial appeal.¹⁵⁵ As explained by one observer, “high school and college programs have concentrated the vast majority of their resources on sports for which there is considerable public interest and the prospect of professional sports opportunities.”¹⁵⁶ This has led to the well-known, now familiar issue of playing-to-win subverting academic pursuits in the lives of student-athletes.¹⁵⁷ Title IX does nothing to change this phenomenon, and in fact even reinforces it. Because Title IX serves to ensure that girls will not be denied

¹⁵³ Watts, *supra* note 148.

¹⁵⁴ Karen Datko, *The High Cost of Youth Sports*, MSN MONEY (May 10, 2011), <http://money.msn.com/saving-money-tips/post.aspx?post=673566d4-b94f-4f33-a1bf-39fb416498f4>; Laura T. Coffey, *Ten Ways to Get a Grip on Sports Costs for Kids*, MSN TODAY MONEY (July 30, 2010), <http://today.msnbc.msn.com/id/32063374/ns/today-money/t/ways-get-grip-sports-costs-kids/#.TqhqnFffn0>; Don Delco, *Youth Sports Become Big Time at Big Cost*, THIS WEEK NEWS (August 6, 2008), http://www.thisweeknews.com/content/stories/dublin/news/2008/08/06/0807duclubsp_sp.html.

¹⁵⁵ Joe Drape & Katie Thomas, *As Colleges Compete, Major Money Flows to Minor Sports*, N.Y. TIMES, September 2, 2010, <http://www.nytimes.com/2010/09/03/sports/03cup.html>. This feature of the male model for sports in educational institutions was recognized by women’s sports leaders who were concerned that women’s sports programs would take the same direction. CAHN, *supra* note 91, at 247 (noting that women’s sports leaders were concerned with the “crass commercialism, corruption and win-at-all-costs attitudes” of intercollegiate sports.).

¹⁵⁶ *Amateur Sports Act: Hearings*, *supra* note 48, at 187 (statement of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

¹⁵⁷ This familiar assessment now applies to some women’s sports, as well, with reports that women’s basketball players are having “widespread” problems with academics. Ian Begley & Mitch Abramson, *Girls Game Gone Wild: Increased Opportu-*

the same opportunity for commercialized athletics participation as men, the regulations state that a school cannot “limit the potential for women’s athletic events to rise in spectator appeal.”¹⁵⁸

b. How the Model Can Become Title IX’s Message

To understand how Title IX’s equality and empowerment message could be diluted, it is important to understand how the model for sports prevailing in our educational institutions speaks in the name of Title IX, so that the model in effect becomes one of Title IX’s messages. It is important to appreciate how such powerful and clear signals to women and girls about their ability or entitlement to participate in sports can be overshadowed to the point where the law’s message is not just one of encouragement, but for some women and girls, a signal that sports are not for them. The reason lies in the fact that “expressive meanings are socially constructed,” and are “a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community.”¹⁵⁹ Context matters,¹⁶⁰ and Title IX itself contemplates that the context for the equality and empowerment message the law seeks to send will be shaped by administrators of education-based sports programs. Of course, to some extent, the message of equality and entitlement to participate has been diluted by the foot-dragging and cynical attempts at Title IX compliance that many institutions have engaged in since the statute was passed. This continuing, albeit more subtle, discrimination against women in sports cannot be discounted as a reason why some women do not participate in sports. However, this explanation does not account for the fact that Title IX’s expressive content includes a message of exclusion not based in gender discrimination, but in discrimination by institutions against those who cannot meet the prevailing norms of the student-athlete culture.

This type of discrimination is fully contemplated by Title IX, because Title IX does not articulate a vision or define standards for education-based sports programs beyond gender equality. The statute and regulations instead give deference to educational institutions to define the content of their

nity on Court Brings Familiar Pitfalls Off of it, N.Y. DAILY NEWS, Nov. 26, 2008, available at lexisnexis.com.

¹⁵⁸ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

¹⁵⁹ Anderson & Pildes, *supra* note 70, at 1525.

¹⁶⁰ *Id.* at 1507.

athletic programs.¹⁶¹ For instance, perhaps most notably, institutions are permitted to determine whether to allow males and females to participate together on teams in “contact sports.”¹⁶² Moreover, as stated most recently in a 2010 OCR Dear Colleague letter, and repeatedly emphasized, “the three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs”¹⁶³ The 1996 Policy Clarification makes a similar point, stating that “the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with non-discriminatory opportunities to participate”¹⁶⁴ Additionally, prongs two and three of the three-part test state that institutions are responsible for effectively accommodating the athletic “interest” and “ability” found in the “underrepresented” gender. There is no standard by which interest and ability is judged, but it is instead given meaning by the institutions themselves, whose coaches and administrators have the final word on whether a potential athlete has the requisite interest and ability to be a member of a team. Thus, while they must use non-discriminatory methods of assessment to determine the interests and abilities of potential female student-athletes, institutions still may use “methods of their choosing.”¹⁶⁵ In addition, in determining whether a given sport “counts” for Title IX purposes, OCR defers to the NCAA and other organized sports regulatory bodies by using a rebuttable presumption that sports which are so recognized will be acceptable for Title IX purposes.¹⁶⁶ If an activity is not so recognized, OCR uses several factors to evaluate the activity, including whether the activity is “structured and administered in a manner consistent with established intercollegiate or inter-scholastic varsity sports in the institution’s athletic program.”¹⁶⁷

¹⁶¹ See *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651 (6th Cir. 1981); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 112 (W.D. Va. 2007) (explaining that schools should be permitted “to chart their own course in providing athletic opportunities without judicial interference or oversight”).

¹⁶² 34 C.F.R. § 106.41(b) (2010).

¹⁶³ Ali, *supra* note 35.

¹⁶⁴ Cantú, *supra* note 31.

¹⁶⁵ Ali, *supra* note 35. In addition, assessing ability includes “opinions of coaches, administrators and athletes at the institution regarding whether interested students . . . have the potential to sustain an intercollegiate team.” *Id.*

¹⁶⁶ Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, to Colleague (Sept. 17, 2008) (on file with Department of Education).

¹⁶⁷ *Id.*

Because Title IX did not change the model for sports operating in educational institutions, and in fact its equality mandate guarantees women the same quality of participation opportunities as those provided for men, Title IX's expressive content includes not just the message of equality and empowerment, but also the signals sent by the types of opportunities created by institutions in an effort to comply with Title IX. Therefore, educational institutions and their athletics programs speak in the name of Title IX. It is apparent that the model for sports operating in most educational institutions expresses meanings about sports and who an athlete can be. This more nuanced message is reinforced by the rhetoric often used by courts and other government officials in discussing Title IX. This rhetoric, likely an effort to spur more women to participate in sports, often highlights women athletes' skill and athletic achievements and it is part of the message sent by Title IX.¹⁶⁸

1. The Rhetoric of Athletic Achievement in Title IX Cases

Title IX rhetoric did not always emphasize women's athletic skill and achievement. In the early cases involving claims of gender equity in sports,¹⁶⁹ courts often did not highlight the fact that the female athlete plaintiffs were highly skilled or elite-level, but instead stressed the athletes' desire simply to participate and play the game. For instance, when Allison Fortin sought to play Little League baseball, the court made no mention of any particular talent Allison may have had with respect to baseball. The case instead centered on her interest in the sport.¹⁷⁰ Similarly, in *Force v. Pierce City*, the plaintiff sought to try out for the boys' football team.¹⁷¹ Although the court noted that the plaintiff was interested in athletics¹⁷² and that it would not be unsafe for her to participate in the football program,¹⁷³ it was not emphasized that she had any particular athletic talent or elite ability. Other early cases similarly reflect the emphasis on the plaintiff's interest in sports, and not necessarily a unique ability to play at a high

¹⁶⁸ McAdams, *supra* note 71, at 341 (explaining that court decisions have an expressive effect).

¹⁶⁹ Such claims were made under Title IX as well as the Equal Protection Clause.

¹⁷⁰ *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 350 (1st Cir. 1975).

¹⁷¹ *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1021 (W.D. Mo. 1983).

¹⁷² *Id.* at 1022 ("Nichole Force mentioned to her mother that she was greatly looking forward, that coming fall, to trying out for the seventh grade football team . . . Nichole had already been involved to a considerable extent in athletics . . .").

¹⁷³ *Id.* at 1028.

level.¹⁷⁴ Of course, the fact that these early plaintiffs generally were not highly skilled athletes was a sign of the times – women had difficulty achieving such status because they were generally denied any meaningful opportunity to participate in sports. However, Title IX’s message of empowerment reflected in cases and commentary over the last forty years has been accompanied by what is perhaps an even more powerful signal about the type of athlete — one who is a highly skilled winner — that is most valued and therefore entitled to participate.¹⁷⁵ This signal is clearly seen in the Title IX cases which emphasize the plaintiff’s athletic talent and the goal of athletic achievement.

For example, in an early Title IX case challenging the exclusion of two high school golfers from the school team because of their gender, the court stated that “here two gifted female children are asking for the same attention that is received by their brothers. When a possible future Partii Berg or Nancy Lopez reaches out to the courts for help, the court must examine its power and authority carefully to see if there is a way to help.”¹⁷⁶ Similarly, a court explained with respect to a girl seeking to play on the boys’ basket-

¹⁷⁴ See *Morris v. Mich. State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (describing the plaintiffs as girls who had the “desire” to play high school tennis); *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292 (8th Cir. 1973); *Neb. Sch. Activities Ass’n*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *Haffer v. Temple Univ.* 524 F. Supp. 531 (E.D. Pa. 1981); *Jones v. Okla. Secondary Schs. Activities Ass’n*, 453 F. Supp. 150 (W.D. Okla. 1977); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975); *Israel v. W. Va. Secondary Schs. Activities Comm’n*, 388 S.E.2d 480 (W. Va. 1989). Even early cases involving boys seeking the right to play on girls’ teams illustrate the fact that an athlete with exceptional skill was not the norm in education-based sports programs. See *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 170 (noting that plaintiff boy had athletic skills that were “average”).

¹⁷⁵ Brian Porto explains this aspect of Title IX’s message well. In his book *A New Season*, he tells the story of Nicci Rinaldi, a gifted basketball player who accepted a scholarship to play basketball at Auburn University in Alabama. Rinaldi was one of the top women’s basketball players in the country and she had been recruited to play for several accomplished women’s basketball programs. Rinaldi began her college basketball career excited to play in the highly competitive and high profile Southeastern Conference. She was what many courts and Title IX advocates would call a Title IX success story. Unfortunately, she was immensely unhappy with the day-to-day life of being a college basketball player, describing her grueling practice schedule and isolation from the college experience as “hell.” Rinaldi subsequently transferred to Dartmouth College, which, as part of the Ivy League, forbids athletic scholarships. There, she played basketball for the love of the game and participated fully in college life. BRIAN PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* 1–2 (2003).

¹⁷⁶ *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376, 1379 (1981).

ball team that “Karen O’Connor is an extraordinarily gifted basketball player.”¹⁷⁷ Cases involving scheduling of high school sports also often highlight the talent of the female athletes, with plaintiffs successfully arguing that scheduling their sport in an “off season” or “non-traditional” season amounts to discrimination because the scheduling of sports can affect girls’ visibility and access to college recruiters, a benefit long-afforded to boys’ teams and one that is relevant to the most highly skilled athletes.¹⁷⁸ For instance, in a case involving disparate athletic facilities for girls’ softball players as compared to boys’ baseball players, the court recognized the harm that the unequal treatment had on the plaintiffs in that it would jeopardize their ability to play at the highest levels. The court stated that “[the plaintiffs] are seeking athletic scholarships, many of which, [p]laintiffs maintain, are not decided until after the softball season is over. Accordingly, it is critical that the two girls do their best during their final season.”¹⁷⁹ Another Title IX high school sports scheduling case illustrates how courts communicate that being a highly skilled athlete, instead of one who simply values participation, is the ideal. In *McCormick v. School District of Mamaroneck*, a group of female athletes challenged the scheduling of soccer in the spring for girls, while it was scheduled in the fall for boys. The court held that the players demonstrated that they were “irreparably harmed” by being forced to play in the spring season, which necessarily meant that they could not compete for the state championship.¹⁸⁰ Notably, the court highlighted the fact that the plaintiffs were part of the Olympic Development program for “girls with exceptional ability in soccer.”¹⁸¹ It was also noted that the girls participated on elite “club” soccer teams and that spring soccer, instead of fall soccer, made competing on both teams difficult. In addition, it was alleged that playing soccer in the spring disadvantaged the girls in terms of college recruiting, because many coaches recruit at club games in the spring. Girls who are playing both for their club and their high school team in the spring are therefore “not at their best” because they have not been able to practice as much with their club team, they are injured from

¹⁷⁷ *O’Connor v. Bd. of Educ. of Sch. Dist. 23*, 545 F. Supp. 376 (N.D. Ill. 1982).

¹⁷⁸ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291–96 (2d Cir. 2004); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 848–50, 855–57 (W.D. Mich. 2001), *aff’d*, 459 F.3d 676 (6th Cir. 2005).

¹⁷⁹ *Daniels v. Sch. Bd. of Brevard Cty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fl. 1997).

¹⁸⁰ *McCormick*, 370 F.3d at 299 n. 25.

¹⁸¹ *Id.* at 281.

“playing too much soccer” and, at that point in the year, “many are burned out.”¹⁸² Also of note is that in *McCormick*, the school district argued that the plaintiffs’ claim reflected an unhealthy “single mindedness” with respect to soccer. The court rejected this argument and praised the athletes, stating “many would include ‘single mindedness’ in a list of those traits possessed by great athletes. Few would choose the trait ‘well-rounded.’”¹⁸³

Similarly, in *Biediger v. Quinnipiac University*, the plaintiffs challenged the university’s decision to eliminate its varsity volleyball team. The court explained in great detail who the affected athletes were in terms of ability, starting with the recruitment process for intercollegiate volleyball, noting that “the recruiting process for Division I volleyball can begin as early as a player’s sophomore year in high school.”¹⁸⁴ To reach the level of being recruited, the athletes testified that they “began playing volleyball on a competitive basis in fourth or fifth grade. In addition to playing volleyball for their high school teams, the recruited plaintiffs played for club teams during the off-season, traveling to interstate competitions on the weekends and thereby maintaining a year-round commitment to volleyball.”¹⁸⁵ Moreover, the plaintiffs testified that they chose Quinnipiac because they felt a “bond” with the team, which was crucial because “playing Division I volleyball is a time-intensive activity, akin to a full-time job.”¹⁸⁶ The court noted that, “[g]iven the number of hours spent practicing, playing and traveling with the team,” athletes’ relationship with the coach and each other was important.¹⁸⁷ The court ultimately entered a preliminary injunction prohibiting the university from eliminating the volleyball team, noting that the plaintiffs would suffer irreparable harm because of the

loss that even a year of competition would have on the skills and competitiveness of elite Division I athletes such as the student plaintiffs in this case [who] have devoted a significant portion of their lives to training for the opportunity to compete on a Division I volleyball team in college, spending countless hours competing on high school and club teams and participating in the rigorous and time-consuming recruiting process As explained above, losing a year of competition would cause unquantifiable harm to their elite volleyball training and skill development.¹⁸⁸

¹⁸² *Id.* at 282.

¹⁸³ *Id.* at 296.

¹⁸⁴ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d. 277, 282 (D. Ct. 2009).

¹⁸⁵ *Id.* at 282.

¹⁸⁶ *Id.* (internal quotation marks omitted).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 292.

The emphasis on elite-level achievement as the natural goal of sports participation is also seen in the rhetoric of cases and commentary celebrating Title IX for this very fact. For instance, part of the Title IX narrative has long been the recitation of the number and success of elite female athletes on the Olympic and World Championship level. For example, the court in *Cohen v. Brown University* stated:

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX¹⁸⁹

Another court upholding Title IX explained that “this past summer, 90,185 enthusiastic fans crowded into Pasadena’s historic Rose Bowl for the finals of the Women’s World Cup Soccer match [T]he victory sparked a national celebration and a realization by many that women’s sports could be just as exciting, competitive, and lucrative as men’s sports. . . .”¹⁹⁰

Other cases similarly highlight the plaintiff-athlete’s skill at her sport.¹⁹¹ Accordingly, while courts uniformly have upheld Title IX’s mandates, they often have done so by using rhetoric reinforcing the norm that athletic skill and accomplishment is what is most valued about sports participation. In this respect, courts have sent the message that Title IX opportunities are for highly-skilled, elite athletes focused on winning. In the words of the Second Circuit, “a primary purpose of competitive athletics is to strive to be the best.”¹⁹²

¹⁸⁹ *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (emphasis added).

¹⁹⁰ *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999).

¹⁹¹ *Brust v. Regents of Univ. of Cal.*, No. 2:07-cv-1488 FCD/EFB 2007 WL 4365521, at *1 (E.D. Cal. Dec. 12, 2007) (explaining that the plaintiffs are all “highly skilled athletes” who had been involved in their sports since childhood); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1120 (M.D. Al. 1997) (highlighting plaintiff as a “skilled” volleyball player); *Roberts v. Colo. State Univ.*, 814 F.Supp. 1507, 1517 (D. Col. 1993) (noting plaintiffs’ “dedication” to softball and significant “talent”).

¹⁹² *McCormick v. Sch. Dist. of Mamaroneck* 370 F.3d 275, 295 (2d Cir. 2004).

2. The Rhetoric of Athletic Achievement and Title IX by Government Officials

The rhetoric used by government officials in support of Title IX also has reinforced the seemingly natural norm of elite athletic achievement as the goal of sports participation in the many reports and speeches given about Title IX's value and success. For example, in its report titled "Title IX: 25 Years of Progress – June 1997," the Office of Civil Rights highlighted women's basketball as an example of Title IX's success. OCR's report noted:

In 1972, 132,299 young girls played high school basketball. In 1994-95 the number had increased to 412,576, an increase of over 300 percent. In the last two years, women's basketball has come of age with the gold-medal victory of the American women's basketball team at the 1996 Olympics, the increased media attention to the NCAA women's basketball tournament, and the development of two professional women's basketball leagues.¹⁹³

Similarly, the report highlighted women's success in soccer, stating:

In one sport that is more and more a favorite for young girls — soccer — the results have led to a World Cup Championship. In 1996, the U.S. National soccer team captured the first-ever women's Olympic medal in this sport before a crowd of 76,481, and in doing so, established its position as the world's premier women's soccer program.¹⁹⁴

Title IX's statement about the type of athletes that are valued — those who are highly skilled and can cultivate spectator appeal (and by extension, institutional prestige) — is also communicated through statements about Title IX's connection to the United States' Olympic aspirations. One of the hoped-for effects of Title IX, at least to many members of Congress, was that it would help increase our pipeline of female Olympians. As stated by Norma Cantú, former Assistant Secretary for Civil Rights at the Department of Education:

Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX. In 1984, on the Senate floor, he observed that there were few, if any, Senators who did not want "Title IX implemented so as

¹⁹³ U.S. DEP'T OF EDUC.: TITLE IX: 25 YEARS OF PROGRESS – JUNE 1997, *available at* <http://www2.ed.gov/pubs/TitleIX/part5.html>.

¹⁹⁴ *Id.*

to continue to encourage women throughout America to develop into Olympic athletes”¹⁹⁵

Finally, and perhaps most pointedly, Title IX’s dual message clearly can be seen every year, when presidents welcome NCAA champions to the White House. For example, in 2010, after its second consecutive national championship win, the University of Connecticut Women’s basketball team visited the White House for its photo opportunity with President Obama. The President praised the team, as he had done with the 2010 Men’s champion, stating that

This team has had an unbelievable run . . . seven of the last sixteen NCAA titles; [s]ix undefeated regular seasons; [f]our undefeated championship seasons 39-0 is pretty good.

These women beat their own NCAA record to become the first women’s basketball team in history to win 78 games in a row over the past two years, which is just a staggering achievement.¹⁹⁶

This photo opportunity illustrates the complex nature of Title IX’s message to women. On the one hand, the President’s ceremony signaled that women’s athletic accomplishments were just as important as men’s, because the women’s NCAA champion had been invited to the White House just as the men’s champion had. Moreover, the president rightly praised the enormous athletic accomplishment and skill of the team members. On the other hand, the presidential photo opportunity (and the great ceremony surrounding the president’s yearly completion of his “March Madness” men’s and women’s tournament brackets) signals that what is most valued about education-based athletics is being a highly skilled athlete who is also a winner.

All of this rhetoric by courts, Congress, and government officials is seemingly in service of Title IX’s message of empowerment. Those highlighting extraordinary female athletic achievement are presumably doing so with the intent that such rhetoric will communicate that women athletes are as valued as male athletes, and that profiling high-performing female athletes will inspire greater numbers of women and girls to participate in sports. While that is certainly one aspect of the message sent by Title IX, the rhetoric of athletic achievement that has become associated with the law

¹⁹⁵ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 12 (1995) (statement of Norma Cantú, Assistant Secretary, Office for Civil Rights, Department of Education).

¹⁹⁶ Rich Elliott, *President Obama Speaks*, CONN. POST BLOGS (May 17, 2010), available at <http://blog.ctnews.com/elliott/2010/05/17/president-obama-speaks>.

has also helped shape the collective understanding¹⁹⁷ that sports participation is for those who have both the talent and the means to develop into the kind of elite athlete that generates institutional prestige and commercial appeal. In contrast, athletes who participate in sports but resist the demands of the student-athlete culture are not nearly as celebrated in the Title IX rhetoric or the day-to-day reality of Title IX's equality mandate. Thus, Title IX's deference to educational institutions to define a worthy student-athlete combined with courts' interpretations and the government's Title IX rhetoric reflect and reinforce what now seems to be the natural, largely invisible understandings that make Title IX's message more complex than it is assumed. The next part will explore the ways that Title IX's second message can shape women's choices to participate, or not, in sports.

c. How Title IX's Expressive Content Shapes Norms for Sports Participation

Just as Title IX's message of equality, empowerment and entitlement to participate in sports has motivated women to participate in sports, so too can Title IX's signals about the type of women that can be athletes shape norms for sports participation. Thus, the message of athletic achievement and the exclusive conception of who can be an athlete is internalized differently by different groups of women. The first group of women to whom Title IX speaks are those with the socio-economic means to realistically participate in the prevailing model for education-based sports. These girls and women enjoy the financial resources, access to facilities, coaching, and parental support necessary to achieve the skill level required of most educational institutions. For these women and girls, Title IX's message can be at once empowering and overwhelming, as this group has the means to participate in the prevailing model for sport, but its demands often lead to burnout and abandonment of sport altogether. The second group of girls and women to whom the model speaks are those who do not have such resources. For many of these women, the message sent is that the barriers to participation are insurmountable. For this group of women and girls, sports participation is not about being on equal footing with male athletes. For many, it is an irrelevant indulgence because these girls and women are not on equal footing with their more privileged female counterparts. In this way, Title IX's exclusive conception of gender equity in sports can at once empower some women to participate while discouraging others.

¹⁹⁷ Sunstein, *supra* note 68, at 2050–51 (explaining that the law shapes norms through, among other things, “clarifying and supporting statements by politicians”).

Scholars have examined the ways in which the law shapes behavior. As Richard Pildes has explained, government action does not simply reflect our collective understandings. It “also shapes and reconstitutes them. Governmental actions can express — and sustain — a reaffirmation or a rejection of these norms.”¹⁹⁸ Importantly, expressive meanings have power when they “fit with” other community norms and practices.¹⁹⁹ There are several explanations for how the expressive content of the law shapes norms and affects behavior.²⁰⁰ Expressive law scholars have explained that law affects behavior, not just because of the sanctions imposed by the law, but also “by affecting social norms and, consequently, by changing an individual’s preferences for undertaking particular acts.”²⁰¹ Law causes individuals to update their understandings of behavior that will gain community approval or disapproval.²⁰² Because individuals are sensitive to what others think and act to minimize damage to their reputations, the understandings signaled by the law will cause individuals to act in accordance, separate from any sanction or requirement of the law itself.²⁰³

The inclination to conform to social norms is particularly strong in the area of athletics, because sport is a powerful social institution.²⁰⁴ Moreover, Title IX’s ability to shape norms and affect individual attitudes towards sports participation is significant because the sheer popularity of the law and its place in our culture make it a substantial symbol that resonates far beyond its legal sanctions. Such expressive power can convey important attitudes about women’s sports participation that cause women and girls to internalize²⁰⁵ not just the message of empowerment, but also the message that the only athletes who are entitled to athletic opportunity and garner community approval are those who have the socio-economic means and willingness to cultivate and sustain the high level of athletic achievement that is

¹⁹⁸ Pildes, *supra* note 70, at 725, 755.

¹⁹⁹ Anderson & Pildes, *supra* note 70, at 1525 (“The expressive meaning of a norm does not inhere in that norm in isolation, but is a product of interpreting the norm in the full context in which it is adopted and implemented.”).

²⁰⁰ Geisinger, *supra* note 70, at 35.

²⁰¹ *Id.*

²⁰² McAdams, *supra* note 70, at 339.

²⁰³ *Id.* at 339–40.

²⁰⁴ See Note, *supra* note 87, at 1267 (explaining that the “underlying power of sport as a social institution” and that “as a socializing agent, sport requires “conformity to certain normative values and behaviors”) (quoting E. GERBER ET AL., *THE AMERICAN WOMAN IN SPORT* 406 (1974)).

²⁰⁵ See McAdams, *supra* note 70, at 343–45 (explaining how approval-seeking motivates individual behavior).

prized by educational institutions and fans.²⁰⁶ Thus, Title IX's equality, empowerment and entitlement message has been diluted by Title IX's second message in two ways. First, the type of opportunities created in the name of Title IX sends a message that sports participation is only for those who have the ability and willingness to become highly skilled athletes. Second, Title IX's empowerment message is diluted because for some communities, such as women of color and lower socio-economic status, the message sent by the law does not fit within the context of their lives. This results in a kind of dissonance,²⁰⁷ where many women today interpret the message of what it takes to be an athlete as a message that athletics is not for them.

The internalization of these messages has measurable consequences. For those women who have access to sports opportunities, social science data show that many who try to meet the demands of our education-based sports culture experience "burnout" and abandon sports rather than try to forge an athletic identity that differs from the win-at-all-costs norm.²⁰⁸ Many more women do not participate at all.²⁰⁹ Perhaps most troubling, however, is the message sent by Title IX that is interpreted as one of exclusion of women who do not enjoy the resources to access the opportunities that Title IX provides. Thus, social science data shows that the message of empowerment and its stimulus to participate is communicated most powerfully to upper-middle class white women and girls.²¹⁰ This is through the selection of

²⁰⁶ Olson, *supra* note 36, at 108 (noting that society "accepts superwomen" athletes with elite talent but not women who want to "play purely for fun" or simply participate for the sake of participation).

²⁰⁷ Sunstein, *supra* note 68, at 2035–36 ("[P]eople often try to bring norms into accord with existing information. When there is conflict between the two, people may experience dissonance. The result of the dissonance may produce new norms or new understandings of existing information.").

²⁰⁸ Koller, *supra* note 15, at 440–41.

²⁰⁹ *Id.*; George, *supra* note 10, at 15–16.

²¹⁰ For instance, NCAA data for 2009–2010 shows that the overall percentage of female college athletes who are black is 11.6% and Hispanic is 4%. The overwhelming majority is white. ERIN ZGNOC, NCAA, STUDENT-ATHLETE ETHNICITY: 1999–2000 - 2009–2010 NCAA STUDENT-ATHLETE ETHNICITY REPORT 55 (2010), available at <http://www.ncaapublications.com/p-4214-student-athlete-ethnicity-2009-10-ncaa-student-athlete-ethnicity-report.aspx>. See BRAKE, *supra* note 59, at 113; Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 308–09 (2008); A. Jerome Dees, *Access or Interest: Why Brown has Benefited African-American Women More than Title IX*, 76 U. MO. KAN. CITY L. REV. 625, 636–638 (2008); Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L. REV. 239, 241–43 (1996); Olson, *supra* note 36, at 127–28 ("[T]he African-American woman has been largely absent

sports offered by educational institutions and the women who play them.²¹¹ For example, nearly all of the sports offered by educational institutions at the high school and collegiate level for girls and women are those played by white women with the socio-economic means to cultivate their talent. These sports are: lacrosse, soccer, softball, volleyball, field hockey, tennis and golf.²¹² Black and Hispanic females are largely concentrated in basketball (32.8% black, 2.5% Hispanic) and indoor track and field (21.5% black and 3.3% Hispanic).²¹³ Moreover, most so-called “emerging sports,” or those that the NCAA is trying to develop to championship status, typically have few participants of color or from disadvantaged backgrounds, such as equestrian (0.7% of participants are black and 1.9% are Hispanic) and the formerly “emerging” and now championship sports of rowing (2.8% black and 4.2% Hispanic) and ice hockey (0.4% black and 0.8% Hispanic).²¹⁴ In contrast, most women of color are clustered into the sport of bowling (40.8 % black and 2.4 % Hispanic).²¹⁵

While it is certainly possible that women of color are not “interested” in sports like lacrosse or soccer and instead choose to focus — when they do

from sport in two ways. First, African-American women are an overwhelmingly small proportion of those participating in collegiate sports. Second, when they do participate, African-American women are usually typecast into only a handful of sports.”). See also WOMEN AND SPORTS IN THE UNITED STATES 202 (Jean O’Reilly and Susan K. Cahn, eds.) (2007) (explaining cultural barriers to sports participation for Hispanic women and girls); Andrew Ferguson et al., *Inside the Crazy Culture of Kids Sports*, TIME, July 12, 1999, at 52 (showing the necessary time, equipment and cost necessary for children to participate in various sports).

²¹¹ BRAKE, *supra* note 59, at 113 (stating that part of the reason for the disparity in participation by women of color “is that much of the growth in women’s sports in recent years has been in sports that are disproportionately played by white women”).

²¹² See ZGNOC, *supra* note 210, at 55. For instance, the most recent NCAA data show that for women’s soccer, 3.8% of the participants are black, while 5% are Hispanic. *Id.* For lacrosse, 2.4% are black and 1.8% are Hispanic. *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also BRAKE, *supra* note 9, at 114 (“[T]he women’s sports with the most growth in recent years are the so-called country club or suburban sports, which are played primarily by girls from suburban, largely white communities and are less available in urban areas and poorly funded high schools. High-growth sports like rowing, softball, swimming, and lacrosse frequently require large investments of time and money outside school and are inaccessible to many students.”).

²¹⁵ See ZGNOC, *supra* note 210, at 55. See also BRAKE, *supra* note 59, at 114 (explaining that women of color make up the majority of participants in bowling but that relatively few participation opportunities in bowling have been added in the last decade).

participate — on sports such as basketball or track and field, the structural theory of equality upon which Title IX's regulations are premised reminds us that preferences can be socially constructed, so that women are conditioned not to seek athletic opportunities or develop an interest in participation where opportunities seem out of reach. This is the case for many opportunities offered through Title IX, because the model preferences athletes who are highly trained and skilled, something that generally only comes from years of private coaching and competitive opportunities that require substantial parental involvement, enormous financial resources, and access to training and facilities.²¹⁶ The best explanation, then, for the fact that most sports offered by our high schools and universities are played by white women is that the model for sports offered in the name of equality and Title IX sends a message to some women that discourages rather than develops their interest in participation. This is particularly true because the critique that Title IX leaves out women and girls who would participate in sports for recreational reasons and women and girls of color is not new.²¹⁷ At some point, and for some women, Title IX's persistent shortcomings have become one of its messages.

Accordingly, one of the "approval patterns" signaled by Title IX is that white women with the willingness, talent and means to become highly skilled athletes are most valued in American education-based sports programs.²¹⁸ This message carries particular force because of the legitimacy and moral weight that Title IX enjoys in popular opinion.²¹⁹ Moreover, the unique effects of peer pressure on children and teens means that they likely will not risk trying to change the prevailing norms for sports participation²²⁰ but will instead simply reject participation completely. This effect of discouraging participation is uniquely problematic in the case of women and girls because there is no stigma for women and girls who fail to participate in sports. There is, however, a stigma associated with being an athlete who

²¹⁶ BRAKE, *supra* note 59, at 114 ("[M]any of the new women's sports added in recent years are sports girls grow up playing in private club and youth sport programs rather than in public schools.").

²¹⁷ Olson, *supra* note 36, at 116, 118, 127–130.

²¹⁸ McAdams, *supra* note 71, at 364–66 (stating that legislation reflects public opinion and approval).

²¹⁹ *See id.* at 374 (explaining that legislation carries particular force when the public believes that the government operates "legitimately").

²²⁰ *See* Sunstein, *supra* note 68, at 2033–34 (explaining how social norms affect risk-taking behavior, especially among young people).

is not talented or “in it to win it.”²²¹ As one gender equity advocate explained, our prevailing sport culture has “unintentionally created [the following] outcomes[:] . . . sports programs with little diversity with regard to numbers and types of sports — thereby decreasing the likelihood that children will be exposed to a sport which matches up to their skills, abilities and interests” and we have created “a generation of non-participants who feels that sports participation is only for the most skilled and physically talented.”²²² Indeed, perhaps the most telling reflection of how Title IX’s mixed message has shaped women’s preferences and behaviors with respect to sports is research that repeatedly confirms women’s growing interest in sports as *fans*. Statistics show that women’s interest in sports in general, that is, in being a sports fan, is now roughly equal to men’s.²²³ Thus, while women’s participation in sports has leveled off, their interest in being a sports spectator or fan has continued to grow.²²⁴ This suggests that opportunities for elite athletes at higher levels such as the college ranks do not encourage women to participate in sports as much as it engages them in being a part of the culture that values elite athletic achievement and strengthens the belief that sports participation is for the talented, privileged few and not all.

The expressive power of Title IX has therefore taken on a new significance, beyond sending the message that female athletic participation is valued on terms equal to men. By incorporating the norms of the prevailing model for education-based sport, Title IX sends signals that can discourage women’s interest in sports participation in that the law incorporates a model of athletics that is not appealing to or attainable by many women. Although nowhere in the statute and regulations, Title IX is thereby convey-

²²¹ Of course, the fact that a component of Title IX’s message to women within our educational institutions emphasizes winning and highly-skilled athletes might not be a matter of great concern if the model served equally to dampen the interest of potential male athletes. To some extent, it likely does. However, in my previous work, I explained how the model can uniquely injure women’s desire to participate in sports, because the model was constructed by and for the male athlete. See *generally* Koller, *supra* note 15.

²²² *Amateur Sports Act: Hearings supra* note 48, at 189-190 (statement of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

²²³ ANDREI MARKOVITS, *SPORTS CULTURE AMONG UNDERGRADUATES: A STUDY OF STUDENT-ATHLETES AND STUDENTS AT THE UNIVERSITY OF MICHIGAN*, <http://www.andreimarkovits.com/docs/SportsCultureAmongUndergraduates.pdf>. ; Rich Luker, *Women are Sports Fans Too*, BRANDWEEK, December 2, 1996, at 20 (“Women are the driving force in the growth in interest in sports in the ‘90s. In 1994, 79% of all women were fans. That number increased to 85% of women in 1996.”).

²²⁴ MARKOVITS, *supra* note 223; Luker, *supra* note 223, at 20.

ing the value judgment that the competitive, commercial and elite model of sports is better than sports for the sake of participation, health and fitness or simply social reasons. Through the mix of sports and level of play largely accessible only by white, upper-middle class women, Title IX has conveyed an exclusive conception of who can be an athlete and implicitly signaled the judgment that equality for some women is the equivalent of equality for all. Just as the picture of the typical 1970s athlete as a male deterred women from playing sports, so too does the stereotypical image of today's female athlete. These messages contribute to the "interest paradox,"²²⁵ steering many young women away from sports instead of encouraging them to participate. Accordingly, Title IX's message of empowerment has been diluted by the more subtle, but palpable messages about who is entitled to participate in education-based sports programs and what the cost of that participation will be.

IV. POTENTIAL SOLUTIONS

The socio-economic snapshot of education-based sports and the types of women that benefit most, and least, from Title IX discussed in the previous section is not a new revelation.²²⁶ However, using an expressive theory of the law provides a fresh way of understanding these outcomes and can therefore enrich our thinking about potential solutions. As a starting point, then, we must acknowledge that for some women and girls, Title IX's message is part of the problem and not the solution. Accordingly, the first step in achieving a solution for the conflicting messages sent about athletics participation to women and girls in the name of Title IX is to recognize that Title IX cannot and should not be the sole policy for developing women's interest in sports. Despite Title IX's many important successes, it is not a cure-all and we must not assume that it can provide the type of comprehensive policy solution needed to effectively bring a diverse group of women and girls into sports and allow them to reap the benefits. Indeed, it is not realistic or fair to expect that Title IX can continue shaping norms for sports participation in a way that meets the needs of a diverse population of women. As an anti-discrimination statute, the rights it provides are crucial to opening the door for women to the world of sports. But while essential, Title IX is limited. The statute and regulations mandate equality and do

²²⁵ See Koller, *supra* note 15, at 439–47.

²²⁶ See Olson, *supra* note 36, at 116–19, 127–30 (highlighting the fact that women who simply seek recreation or participation for its own sake as well as women of color are left out of Title IX's success story).

not articulate any particular content for education-based sports programs. Accordingly, while Title IX does not allow schools to assume that women are not as interested in sports as men, it does allow schools to assume that the only athletes worth providing with equality are those who have the socio-economic means and desire to assimilate into the model for sports that predominates in education-based athletics programs. As a result, an equality framework is not enough to develop interest in sports participation among many groups of women and girls because it has had no power to check the evolution of sport to the point where the conditions of participation for many women operate as an insurmountable barrier. Those conditions, which favor highly skilled athletes and tend to select for those with the resources to meet them, send a powerful message in the name of Title IX, and the message must be changed. Women and girls who would benefit from sports participation (and, obesity rates show, need it more than ever) deserve more.

However, in seeking to change the negative messages sent to many women in the name of Title IX, we need not eliminate or change Title IX. First, it is clear that for many women, Title IX and its enforcement sends an inspiring message that does develop interest in sports participation. Title IX's message and its substantive guarantees align in a way that resonates for such women, and for this reason it should not be abandoned or weakened. And, even if the law has not had as significant an impact on sports participation for some women, its equality message expresses a common understanding of the value of women's sports participation that should not be changed.²²⁷ Additionally, there is an important consequentialist justification for Title IX. However imperfect the law is, an argument can be made that it is more beneficial overall to provide athletic opportunity to some women because doing so makes all women better off. This is the case because having some women achieve the highest levels of sport erodes the stigma of women's sports participation and breaks down socially-constructed stereotypes that serve as barriers to participation for all women.

Moreover, unlike in the Equal Protection context, where laws can be deemed unconstitutional where they express divisive, hostile or contemptuous messages toward citizens,²²⁸ the conclusion that Title IX's empowerment message resonates with only some, but not all, women and girls does not mean that Title IX should be eliminated. This is because the failure of

²²⁷ See Sunstein, *supra* note 68, at 2027–28 (explaining that laws can be understood by the public as expressing societal principles and commitments).

²²⁸ Anderson & Pildes, *supra* note 70, at 1533 (explaining the ways in which Equal Protection doctrine incorporates expressive concerns).

Title IX's message to inspire and empower some women and girls, and especially of color or lower socio-economic status, arguably is not stigmatizing them, because there currently is little stigma associated with women and girls who do not participate in sports. However, an expressive account of Title IX does reveal that it is perpetuating a kind of expressive harm to such women by sending messages of exclusion that, with the formidable socio-economic barriers such women face, serve to deter their participation in sports. While some scholars suggest that these outcomes are not to be attributed to Title IX,²²⁹ it is clear that Title IX's expressive power has, in the case of girls and women of color and lower socio-economic status, crossed the line from simply neglecting these women's needs to shaping norms for sports participation that do not include them. Moreover, such long-standing outcomes in the name of Title IX serve to express an attitude that fails to show equal concern and respect for those left out of Title IX's success.²³⁰ Thus, while the solution is not to eliminate Title IX and its anti-discrimination mandate, we must focus on legal changes that send a consistently empowering message to all girls and women about who an athlete can be.

In doing this, we should create a sport policy that eliminates the dissonance between the message of equality and empowerment for female athletes and the inequalities that prevent many girls and women from participating.²³¹ We must focus on formulating a policy for education-based sports programs that shows equal concern and respect²³² for all women who are left

²²⁹ See BRAKE, *supra* note 59, at 115 ("It would be a mistake to blame Title IX for suppressing sports opportunities for women of color. Title IX did not introduce racism or racial disparities in access to sports, nor did it worsen these problems. Rather, the law neglects racial inequality in sports in its quest to equalize women's opportunities.").

²³⁰ Alan Strudler, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, 60 MD. L. REV. 492, 495-96 (2001).

²³¹ It might be that when Title IX was enacted and its implementing regulations put into place, which sought to change the social meaning behind who an athlete (based on gender) could be, it was determined that the costs would be too great to also attempt to change the prevailing model for education-based sports and the even more entrenched views that sports participation was for winning, not just participation. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 998 (1995) ("[S]ocial meanings act to induce actions in accordance with social norms, and *thereby* impose costs on efforts to transform social norms. They present, then, a particularly harsh collective action problem, for not only is there little incentive for an individual to contribute to a new collective good, but there is a punishment — the cost of deviance — for any individual who wishes to contribute to a new collective good[.]")

²³² See generally Anderson & Pildes, *supra* note 70; Strudler, *supra* note 230.

out of sports participation and suffer the consequences. That is, sending a message that women and girls have the right to participate in sports must be aligned with norms that value participation for the sake of participation, and move away from a group-based²³³ remedy that allows some women to stand in the shoes for all.

In this respect, a new policy could pick up where Title IX has left off, by influencing social norms about the meaning and goals of sports participation²³⁴ through programs that encourage participation for the many instead of opportunities for the relatively elite few. Of course, by simply addressing the issue of sports programs in schools in a way that it never has before, Congress can send an important signal that sports participation for all children is important. Congress can enhance this message by developing an education-based sports policy that does several things. First, and most importantly, a new education-based sports policy should move beyond an equality framework and instead focus on removing barriers to sports participation besides discrimination on the basis of gender. It is no longer enough to hope for a “trickle down” effect to generate interest in sports participation. While it is true that creating opportunities for women to participate at the college and university level can spur participation among young girls by showing that women and girls can be athletes, this is no longer enough. Significant socio-economic barriers to sports participation mean that many of today’s elite women athletes do not represent the circumstances and needs of many potential female athletes. Indeed, the possibility of an opportunity in college tomorrow means little to a middle school girl who does not have the means or access to quality sports programs today. Increased public funding for community-based sports programs and expansion of sports programs into grade schools and middle schools should therefore be a priority. Title IX’s emphasis on opportunities at the college level comes too late for the women and girls who have not had the means to develop as athletes in their childhood. Moreover, opportunities at the college level will always be too few as compared with those in grade, middle and high schools, which can potentially touch every individual, not just those with the ability to go to college.

In addition, institutions receiving federal financial assistance should be incentivized to create sports programs that appeal primarily to participants and not simply fans. A new sport policy should reward institutions for find-

²³³ See generally Note, *supra* note 87 (opining that the social policy behind Title IX demands further efforts to increase overall participation in sports).

²³⁴ See Sunstein, *supra* note 68, at 2026 (“[A]n appropriately framed law may influence social norms and push them in the right direction.”).

ing ways to create a wide range of sports programs that value commitment, discipline, social connection and participation over solely spectator appeal and training for college scholarships, conference championships or the professional ranks. Moreover, creative uses of sports programs which enhance the educational mission of the school and do not rely on substantial parental commitments and resources should be favored over programs that require their athletes to have year-round, private training to be at the level to make the school team.

To support this, spending on athletic programs at the high school and college level should be regulated. Such restrictions could include limiting disproportionate expenditures on certain sports (i.e., football and basketball), or limiting expenditures on recruiting, for instance. Limits could also be placed on revenue generation through education-based sports programs or requiring equal funding for men's and women's sports programs. Whatever the specifics, Congress could craft legislation which emphasizes the academic and health benefits of sports participation and minimizes the need for schools to attempt to capitalize on the commercial appeal and revenue aspects of athletics that drive the current culture.

In addition, Congress should authorize the Department of Education to establish pilot programs to experiment with gender integration in education-based sports programs. Gender segregation, especially at the grade school, middle school and even high school levels of sport is not in most cases necessary to protect the health and safety of athletes. In contrast, gender integration can have significant benefits in furthering the cause of gender equity in sports. Although many will object that gender integrated sports teams might further turn women away from sports, it is difficult to measure what the impact would be because girls are segregated from boys at the very earliest ages of sports participation. Thus, if girls at a young age developed their skills alongside boys, fears that girls would be kept off teams based on talent or driven from sports because boys shut them out might be unfounded. In addition, if programs emphasized development of skills and values other than achieving the very highest levels of athletic performance as measured exclusively by the male norm, boys and girls would have a better chance of playing together safely and equitably. Gender integration in education-based sports programs also would free up resources to offer more sports teams and opportunities for greater numbers of students to participate.

Additionally, Congress should address the need for sports participation opportunities for physically challenged students. The exclusive conception of who can be an athlete is perhaps seen most clearly in our neglect of physi-

cally challenged individuals, particularly women.²³⁵ The Paralympic program as well as programs through the United States military demonstrate that there are a number of meaningful ways that individuals with disabilities can participate in sports and reap the substantial emotional and physical benefits. Moreover, a small percentage of high schools are developing opportunities for disabled students to participate in sports, but those opportunities are primarily for boys.²³⁶ As it did for women in general with Title IX, the law has an important role to play in shaping norms for sport participation for individuals with disabilities.

Finally, Congress should set reasonable limits on colleges' and universities' ability to run sports programs that train future professional athletes and Olympians. This group of athletes needs no additional external motivation for participating and remaining committed to sports. Moreover, organizations such as professional sports leagues and the United States Olympic Committee can better address issues which might affect participation rates and talent development. Thus, if we need more Olympic volleyball players or want athletes to be better prepared for the National Football League, it is these organizations that should address the issue. College and university sports should be left to develop programs best suited to educating students. All of these reforms would be a significant step in the right direction, both through the actual programs that would be created and affected by them, and also because it would mean putting the government's imprimatur on participation-focused sports programs in schools. This would go a long way toward sending the message that sports participation is for all and not the chosen few.

V. CONCLUSION

Decades after Title IX was passed, women and girls still do not participate in sports at rates equal to their male counterparts. Data show that this is particularly true for women and girls of color and disadvantaged socioeconomic backgrounds. The current theory for the persistent lag in participation rates centers on the continuing presence of discrimination against female athletes and a culture that devalues the female athlete's sport experience. The remedy is often said to be greater Title IX enforcement. Yet in

²³⁵ See WOMEN AND SPORTS IN THE UNITED STATES, *supra* note 210, at 172–73 (discussing the needs of physically challenged women as an “overlooked issue of diversity in women’s sport”).

²³⁶ NAT’L FED’N HIGH SCH. ASS’NS, 2009–10 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 51, *available at* <http://www.nfhs.org/content.aspx?id=3282>.

arguing for more of what Title IX has to offer, we may be missing an opportunity to critically examine the model for sports operating in our educational institutions, and specifically how that model is endorsed by Title IX. To that end, this Article examined Title IX's expressive dimension to better understand how it communicates with potential female athletes and how this might affect their interest in participating in athletics.

It is apparent that Title IX's message that women and girls are entitled to participate in sports on terms equal to men and boys is an essential and enduring one. However, through its anti-discrimination framework, which gives substantial deference to educational institutions to structure their athletic programs, Title IX expresses more than just a message of equality and empowerment. Instead, it signals to potential female athletes that the athletes who are most valued and legitimate are those who meet the demands of the prevailing student-athlete culture which values winning and spectator appeal and often requires elite-level talent. These demands serve to filter out many potential female athletes who do not have the resources or access to programs which will support their development as athletes. As a result, the expressive content of Title IX amounts to a mixed message, both telling women and girls that they should take up sports, but signaling that if they do, the cost will be high and the potential rewards in terms of participation opportunities limited. Perhaps most troubling, it signals to some women and girls that they have little chance to become athletes at all. In this way, Title IX's expressive dimension unintentionally can serve to turn girls and women away from sports, keeping them as far from realizing the benefits of gender equity as they were before the statute was passed.

A new sport policy can act to change the social construct of education-based sports so that a message is sent to potential female athletes that more clearly aligns with Title IX's message of equality, empowerment, and entitlement to participate. Such a policy should not rely on an anti-discrimination framework, but should instead define the content of education-based sports programs to include values that will attract the greatest numbers of women and girls as well as men and boys. Thus, we should not amend or eliminate Title IX, but supporters of gender equity in sports should work to augment it, by ensuring that our federally-funded educational institutions create programs that produce greater numbers of female athletes instead of simply female athletic fans.



Transitioning to the NBA: Advocating on Behalf
of Student-Athletes for NBA
& NCAA Rule Changes

Warren K. Zola¹

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I. INTRODUCTION

The landscape of professional basketball in the United States is in considerable disarray. The most recent collective bargaining agreement (CBA) between the NBA and its union expired at midnight on July 1, 2011 and there were genuine disagreements as to the financial viability of the current

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league structure.² Unfortunately for fans around the globe, the NBA closed its doors for the third time in league history as teams locked out their players just one week after the NBA held its draft.³ The lockout lasted 149 days as the two sides, led by NBA Commissioner David Stern and National Basketball Players Association (NBPA) Executive Director Billy Hunter, debated the framework in which professional basketball would operate before agreeing upon a new CBA.⁴

At the time of this publication it appears that the end result of this labor strife is that the league will lose approximately a half a billion dollars and teams will play a 66 game schedule, down from the traditional 82 games, beginning on Christmas Day.⁵ As a sign of the times, the NBA is not alone in enduring labor strife. The NFL's lockout lasted 130 days during the spring and summer of 2011, and both MLB and the NHL are in the last year of their collective bargaining agreements (CBAs).⁶

² *NBA Lockout Timeline*, LOS ANGELES TIMES, (Nov. 26, 2011, 9:55 AM), <http://articles.latimes.com/2011/nov/26/sports/la-sp-nba-lockout-timeline-20111127>. One of the contentious disagreements has to do with whether or not teams are, in fact, losing revenue. The NBA claims that 22 teams (out of 30) are losing money on an annual basis, lending credence to the argument that there may be little incentive for an NBA season under the parameters of the recently expired CBA. Larry Coon, *Is the NBA Really Losing Money?*, ESPN.COM (July 12, 2011, 12:39 AM), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBA_Financials-110630.

³ *Id.*

⁴ *Tentative Deal Moves the NBA Lockout Closer to End*, WALL ST. J. (Nov. 26, 2011, 10:07 AM), <http://online.wsj.com/article/AP38298437eeef4ccd8316e33797017f04.html>.

⁵ *Id.*

⁶ The NFL lockout began on March 11, 2011, and ended on July 25, 2011. See *NFL Locks out Players, Who File Suit*, ESPN.COM (Mar. 12, 2011, 4:26 PM), <http://sports.espn.go.com/nfl/news/story?id=6205936>; *Sources: Deal to end Lockout Reached*, ESPN.COM (July 25, 2011, 12:14 AM), http://espn.go.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say. The current CBA between the NHL and NHLPA is set to expire on September 15, 2012. See Liz Mullen, *Their Turn: NHL a Year out from Expiration of CBA*, SPORTSBUSINESS-DAILY.COM, (Sept. 12, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/09/12/Labor-and-Agents/NHL-CBA.aspx>. The CBA between MLB and MLBPA is set to finish even sooner, on December 11, 2011 although there are rumors of a tentative deal at the time of this writing. See Bob Nightengale, *MLB May Get Early Start on Labor Deal, Which Expires Dec. 11*, USATODAY.COM, (Feb. 22, 2011, 11:29 PM), http://www.usatoday.com/sports/baseball/2011-02-21-mlb-labor-talks_N.htm.

Many sports fans across the country have spent as much time and energy in the past year reading about court decisions and the intricacies of labor law as they have watching games. This most recent standoff further highlights the fact that professional basketball is indeed a business. The National Collegiate Athletic Association (NCAA) governs intercollegiate athletics and, as such, defines the rules under which college basketball is played and operated. While the NBA and its players struggle to negotiate appropriate rules to govern its operations, the NCAA, which has full control of its workforce, appears safe from future work stoppages.⁷

And while NCAA reform is once again a topic of great conversation⁸ (including a roundtable panel discussion in front of members of Congress),⁹ so long as student-athletes are not classified as employees and thus unable to unionize, the NCAA will safely maintain its monopoly on college athletics.¹⁰ The revenues for intercollegiate sports continue to rise, as schools competing in the Football Bowl Subdivision (FBS) generated median revenue of \$48 million in 2010.¹¹ While the NCAA does not receive money directly from football bowl games, the popularity of men's college basketball allowed it to secure a 14-year, \$10.8 billion television rights agreement with CBS and Turner Broadcasting to cover "March Madness" beginning in 2011.¹²

⁷ A legal challenge to the NCAA's definition of "amateurism" can be found in the *O'Bannon v. NCAA* class action lawsuit, now called *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-01967 CW, 2011 WL 3240518 (N.D. Cal. Jul. 28, 2011).

⁸ For the latest article generating much debate on college reform, see Taylor Branch, *The Shame of College Athletics*, THEATLANTIC.COM, October 2011, <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>.

⁹ *Hypocrisy or Hype? The Impacts of Back-Room Deals, Payoffs, and Scandals in American Collegiate Student Athletics: Before Rep. Bobby L. Rush*, Nov. 1, 2011, <http://rush.house.gov/event/hypocrisy-or-hype-impacts-back-room-deals-payoffs-and-scandals-american-collegiate-student>.

¹⁰ During the beginning of August 2011 the NCAA held a "NCAA Reform Retreat" as 50 college and university leaders addressed potential changes to the NCAA. Doug Lederman, *New Wave of NCAA Reform?*, INSIDEHIGHERED.COM (Aug. 11, 2011), http://www.insidehighered.com/news/2011/08/11/ncaa_presidents_to_propose_increased_academic_standards_tougher_penalties_more_athletic_aid.

¹¹ *NCAA Division 1 Intercollegiate Athletics Report*, NCAAPUBLICATIONS.COM, <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf> (last visited Oct. 25, 2011).

¹² *Time Warner Joins CBS in \$10.8 Billion March Madness TV Deal*, FOXBUSINESS.COM (Apr. 22, 2010), <http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/>.

Clearly the NBA and NCAA, as the overseers of business operations, are the dominant players in shaping the multi-billion dollar basketball industry in our country. In contrast to NBA players, who have the NBPA to represent their business interests, college basketball players lack representation. Thus, while NCAA executives, NBA owners, NBA players and the NBPA govern and negotiate changes in the basketball world, there is no advocacy group speaking on behalf of those individuals who represent the sport's future—student-athletes in college and high school now.

Seen as a fungible commodity with no voice in the direction and operation of their sport, the manner in which college athletes enter the professional market of basketball has significantly deteriorated over the past several decades. The transition from college to the NBA has become more fraught with challenges and misinformation than ever before, a fact likely to lead to a wide range of mistakes by countless student-athletes trying to evaluate whether and when to enter professional basketball.

This Article calls attention to the challenges that men's college basketball players face when trying to make a fully informed decision as they evaluate whether or not to enter the NBA draft and forgo remaining college eligibility.¹³ Unfortunately this difficult decision is not unique to men's basketball, but highlights a broader trend showing that colleges, conferences, and the NCAA have done shockingly little to provide guidance and counsel to student-athletes who are navigating the transition from college to the professional leagues.¹⁴

This Article will address both how we developed the current legal rules governing the NBA draft and the NCAA's role in overseeing college athletes. With this recent trend in mind, this Article will then turn its attention to a recent NCAA rule change that unambiguously illustrates the fact that the best interests of the student-athlete are marginalized, if not ignored, in the process of making the leap from college to the NBA. Finally, to foster dialogue, this Article will propose solutions on how to address the hardships college student-athletes face during this transition period.

¹³ For a wonderful position piece advocating on behalf of student-athletes in the sport of men's basketball, see Marc Isenberg, *Proposed New NBA Deadline Ignores Players' Best Interests*, MONEYPLAYERSBLOG.COM, http://www.moneyplayersblog.com/files/bt_com_a16_c_041911.pdf (last visited Oct. 25, 2011).

¹⁴ For a comprehensive discussion of this topic, please refer to Glenn Wong, Warren K. Zola and Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L. J. 3, 553-607 (2011).

II. THE NBA AND ITS PLAYER ENTRY DRAFT

As is the case for virtually every sport, the process of entering the NBA is often confusing to those considering this move. Unfortunately, unbiased guidance to navigate this morass is, for the most part, nonexistent in this transition process. For college seniors, the NBA entry draft is the day either when their basketball dreams come true or when they face the harsh reality that their career in professional basketball – at least in the NBA – may be over before it even began. The dynamics of this process have changed considerably over the past several decades, as we have seen a decrease in the number of college seniors selected in the draft and an increase in the number of underclassmen and European players selected. In fact, over the past six years (2006 through 2011), a total of 37 seniors have been taken in the first round of a draft out of a total of 180 selections, meaning that underclassmen and international players comprise 80% of first round draft picks.¹⁵ How did we arrive at this point? To answer that question, the history and evolution of amateur player distribution in the NBA must be understood.

Strangely enough, professional basketball in America owes its start to professional hockey, as basketball was originally promoted as a way to keep hockey arenas filled when home teams were on the road. As hockey gained popularity in the middle of the 20th Century, ice rink owners considered different ways to keep their arenas occupied while their hockey teams were traveling. It was Walter Brown, owner of the Boston Garden, who determined that hosting basketball games would provide the Garden with additional revenue when hockey was not played. This determination led to the formation of the Basketball Association of America (BAA) on June 6, 1946, the first professional basketball league in the United States.¹⁶

The BAA was comprised of eleven teams and included the Boston Celtics and New York Knickerbockers in its inaugural 1946-47 season.¹⁷ In 1949, after three successful years, the BAA merged with a competing league, the National Basketball League (NBL), and the resulting league was

¹⁵ *Historical Drafts*, THE DRAFT REVIEW.COM, http://thedraftreview.com/index.php?option=com_content&task=category§ionid=5&id=15&Itemid=103 (last visited Oct. 25, 2011).

¹⁶ ZANDER HOLLANDER, *THE MODERN ENCYCLOPEDIA OF BASKETBALL* 281 (Dolphin Books 2d ed. 1979).

¹⁷ The teams included the Boston Celtics, Chicago Stags, Cleveland Rebels, Detroit Falcons, New York Knicks, Philadelphia Warriors, Pittsburgh Ironmen, Providence Steamrollers, St. Louis Bombers, Toronto Huskies and Washington Capitols. See Hollander, *supra* note 16 at 281.

rebranded as the National Basketball Association (NBA).¹⁸ Since that time, the NBA has been the predominant professional basketball league in the world. Today it consists of thirty franchises scattered throughout North America.¹⁹

Notwithstanding the recent labor dispute, the league has enjoyed surging popularity with fans around the world over the past several decades. Innovative global marketing, rule changes, visionary leadership, technology advances and colorful individuals have helped professional basketball grow into a financial success. Individual teams claim to be struggling financially as expenses rise, yet the league announced that an audit of the 2010-11 financials showed there was a 4.8% increase in basketball related income (BRI) this past year, bringing league revenues to \$ 3.82 billion—up from \$ 3.65 billion for the 2009-10 season.²⁰ This audit found that average player salary rose to \$ 5.2 million this past year and total player compensation was \$ 2.18 billion, making 2011 the sixth consecutive season of salary increases.²¹

Having an audience, both in person and on television, is what generates revenue, and close competition draws in more viewers.²² The success of any league is largely determined by competitive balance—the concept that the outcome of a particular game is unknown at the onset, thereby sparking interest in fans to watch the contest. While a variety of factors go into a team's ability to compete, the most important factor is the skills of the individual players who compete. Accordingly, the allocation of this talent is the lifeblood that helps ensure and maintain a league's competitive balance—and, thus, its popularity.

While the concept of competitive balance is widely accepted as necessary, the manner in which to best distribute amateur talent to specific teams

¹⁸ Hollander, *supra* note 16.

¹⁹ *Teams*, NBA.COM, <http://www.nba.com/home/teams/> (last visited Oct. 25, 2011).

²⁰ John Lombardo, *NBA Reports Increase in Salaries, Basketball-Related Income for '10-11*, SPORTSBUSINESSDAILY.COM (July 25, 2011), <http://www.sportsbusinessdaily.com/Daily/Morning-Buzz/2011/07/25/NBA-Finance.aspx?hl=basketball%20financials&sc=0>.

²¹ *Id.* Perhaps a fairer way to evaluate the distribution of money to players would be median, rather than mean, salary in the NBA, which is “only” \$ 2.3 million. Steve Aschburner, *NBA's 'Average' Salary - \$5.15M - A Trendy, Touchy Subject*, NBA.COM (Aug. 19, 2011, 11:03 AM), http://www.nba.com/2011/news/features/steve_aschburner/08/19/average-salary/index.html.

²² Henry Abbott, *What Good is Parity?*, ESPN.com, (June 21, 2011, 4:30 PM), http://espn.go.com/blog/truehoop/post/_id/30539/what-good-is-parity.

has always been a challenge for professional sports leagues.²³ This is true both legally under antitrust and labor law as well as strategically, as leagues seek the fairest way to ensure an appropriate allocation of talent amongst all competing teams. The solution, now widely accepted in professional sports leagues, is the amateur entry draft. This draft allows existing teams to select new players with whom they may replenish their teams' talent pools. As the talent and skills of older players erode, younger players are brought in to replace them, allowing the league to maintain competitive balance.²⁴

Of course, the draft mechanism causes tension between the league and its players as it limits amateur players from negotiating with multiple teams, thereby intentionally keeping salaries below free market rates. Under the rules of every professional sports' league draft, a single team is granted the exclusive rights to negotiate with the players it selects. If a drafted player doesn't want to play for that team or live in that particular city under the proposed financial package offered, that player may "hold out," but under no circumstances is he allowed to negotiate with other teams.

Not surprisingly, this player restraint has led a number of players to bring legal challenges under antitrust law over the past several decades, attacking player entry drafts as illegal restraints of trade.²⁵ Despite these challenges, however, it appears drafts themselves will remain part of the landscape of professional leagues for the foreseeable future.²⁶ What has emerged from this litigation is a careful balancing test between the pro- and anti-competitive effects resulting from this restraint of trade.²⁷ The result has been a sharp decrease in the number of draft rounds and the length of time a team can retain exclusive players' rights before allowing them to

²³ This is chronicled in a number of legal challenges against professional sports league drafts. *See, e.g.,* *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (D. Cal. 1971) (player brings suit against age eligibility requirement for the NBA draft); *Robertson v. National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977) (antitrust lawsuit filed by player against the NBA's draft system); *Clarett v. NFL*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²⁴ For a more thorough discussion on competitive balance and the role of player drafts see Scott R. Rosner & Kenneth L. Shropshire, *THE BUSINESS OF SPORTS*. (Jones & Bartlett Learning 2d ed. 2011). Chapter 2, Leagues: Structure & Balance.

²⁵ *See supra* note 23 and accompanying text.

²⁶ As of the time of this Article, the CBAs for professional baseball, basketball, football, and hockey all have provisions for player entry drafts moving forward.

²⁷ The "rule of reason" was developed by the Supreme Court in 1911, in *Standard Oil Co. of N.J. v. United States*. *See* 221 U.S. 1 (1911) (holding only combinations and contracts that unreasonably restrain trade are illegal under antitrust laws).

enter free agency.²⁸ Player unions have, for the most part, accepted these stipulations as they reduce the perceived restraint on free markets and have been reached as a negotiated component of CBA discussions.²⁹

As the summer of 2011 illustrated with lockouts in both basketball and football, the business of professional sports leagues has radically changed in the past century. The power of players—through their unions—has grown dramatically, primarily as a result of the expanded role of collective bargaining. When the NBA was created in 1949, there was no players' union. The National Basketball Players Association (NBPA) was formed in 1954.³⁰

Bob Cousy, a Hall of Fame point guard and member of the Boston Celtics, was a driving force behind the development of the NBPA. Cousy identified an established player from each NBA team and urged those selected to begin to act in solidarity.³¹ Armed with their support, Cousy met with NBA President Maurice Podoloff before the 1955 NBA All-Star Game and shared a list of the players' concerns.³² Podoloff promised various improvements in playing conditions, the creation of a pension plan, and the acknowledgment of the legitimacy of the union.³³ Unfortunately, the players' demands were ignored as Podoloff stalled the implementation of these promises.³⁴ Finally, Cousy contacted AFL-CIO leadership about the creation of a union.³⁵ At that point, the league relented and began to bargain in good faith. Finally, in 1957, the first NBA CBA was executed.³⁶

²⁸ Steve Aschburner, *As NBA Draft Grows Increasing Specialized, Uncertainty Remains*, SPORTS ILLUSTRATED (June 8, 2009, 11:06 AM), http://sportsillustrated.cnn.com/2009/writers/steve_aschburner/06/08/draft.process/index.html. See also Zach Lowe, *Does NBA's 'Franchise Tag' Do Enough to Help Incumbent Teams*, SPORTS ILLUSTRATED (Nov. 23, 2011, 11:07 AM), <http://nba-point-forward.si.com/2011/11/23/does-nbas-franchise-tag-do-enough-to-help-incumbent-teams/>.

²⁹ The NHL CBA settlement in 2005 included the negotiation of the reduction of two rounds in the entry draft—from nine to seven. See *Collective Bargaining FAQs*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26366> (last visited October 29, 2011).

³⁰ *About the NBPA*, NBPA.ORG, <http://www.nbpa.org/about-us> (last visited Nov. 7, 2011).

³¹ Robert Bradley, *Labor Pains Nothing New to the NBA*, APBR.ORG, <http://www.apbr.org/labor.html> (last visited Oct. 4, 2011).

³² *Id.*

³³ OSCAR ROBERTSON, *THE BIG O: MY LIFE, MY TIMES, MY GAME*, 179-80 (2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Because the NBA formed without a vehicle for negotiations between the league and its players, the league was able to unilaterally devise the initial draft system.³⁷ Thus, until 1957, teams in the NBA continued selecting players until the clubs determined that there was no one else worthy of being picked.³⁸ The second iteration of the draft came when the “round” system was instituted in 1957.³⁹ Under this scheme, the draft consisted of between fourteen and twenty-one rounds.⁴⁰ This iteration lasted until 1961.

In 1962, a unique draft mechanism called the “territorial choice” system was introduced with the intention of sparking local interest in the NBA. The “home market” of an NBA team was defined as being within a fifty-mile radius from its home arena.⁴¹ Any player who played in college within that geographic area could be selected by the home team if the team chose to forfeit its first round pick.⁴²

This territorial concept was successful. By 1966, teams had made twenty-two territorial picks; eleven of those individuals have been inducted into the Naismith Memorial Basketball Hall of Fame, including notable players such as Tom Heinsohn, Wilt Chamberlain, Oscar Robertson, and Jerry Lucas.⁴³ In 1965 Bill Bradley was the last player selected under the territorial pick system.⁴⁴ By 1966, after watching Red Auerbach and the Boston Celtics win eight consecutive NBA championships, the league eliminated the territorial pick system and modified the allocation of amateur players by formally adopting a straight, ten round draft.⁴⁵

In addition to the territorial choice system, the league also implemented age eligibility rules. In 1961 the NBA unilaterally instituted a rule

³⁷ See *supra* note 30.

³⁸ John C. Graves, *Controlling Athletes with the Draft and Salary Cap: Are Both Necessary?*, 5 SPORTS L. J. 185, 187 (1998).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Peter A. Coclanis & Alex Coclanis, *Home Cooking: Reliving the NBA's Territorial Draft*, SLAM ONLINE (June 21, 2011, 4:08 PM), <http://www.slamonline.com/online/nba/2011/06/home-cooking/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS ENT. L.J. 126 (2004). See also Percy Allen, *How the NBA Draft Became a Lottery*, The Seattle Times, May 21, 2007, http://seattletimes.nwsourc.com/html/nba/2003715404_lotterytimeline21.html. Also taken from NBA webpage highlighting NBA draft history – now taken down during lockout.

requiring that “a player could not make himself available” for the draft until four years after his high school graduation.⁴⁶ These rules came under fire when Spencer Haywood brought suit against the league, claiming the requirement was a restraint of trade.⁴⁷ Because this age requirement was never collectively bargained, Haywood claimed that this rule was a clear violation of antitrust law.⁴⁸ Ultimately, in 1971, the District of California agreed with Haywood, finding that the age requirement was a per se illegal boycott.⁴⁹ This debate as to whether sports leagues can mandate a minimum age requirement has continued over the past 40 years.⁵⁰

As a result of Haywood’s lawsuit, a “hardship draft” was conducted in 1972 for individuals who could show financial hardship.⁵¹ After one year, this supplemental “hardship draft” was eliminated, and beginning in 1973, anyone wishing to declare hardship was automatically included in the regular draft.⁵² Finally, in 1976, the hardship requirement was eliminated entirely and the “early entry” procedure was adopted.⁵³ This provision allowed any athlete with college eligibility to enter the NBA draft by sending the Commissioner a letter formally forfeiting his remaining NCAA eligibility at least forty-five days before the draft.⁵⁴ As a result, three high school players, Moses Malone, Darryl Dawkins, and Bill Willoughby, entered the NBA draft in the 1970s.⁵⁵ While all three of these players enjoyed

⁴⁶ Graves, *supra* note 38.

⁴⁷ *Denver Rockets*, 325 F. Supp. at 1049.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ For a more thorough law review article on this topic, see Michael McCann & Joseph Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006).

⁵¹ Graves, *supra* note 38, at 193. See also *Legends Profile: Spencer Haywood*, NBA.COM (Aug. 9, 2011), <http://www.nba.com/history/legends/spencer-haywood/index.html>, [hereinafter *Legends Profile*]; John Rohde, *Sonic’s Spencer Haywood Helped Clear the Way for Kevin Durant*, NEWSOK.COM, (Jan. 11, 2010), <http://newsok.com/john-rohde-sonics-spencer-haywood-helped-clear-path-for-kevin-durant/article/3431142>.

⁵² *Legends Profile*, *supra* note 51.

⁵³ Graves, *supra* note 38, at 193.

⁵⁴ *Legends Profile*, *supra* note 51.

⁵⁵ Chris Broussard, *Why Pros Spent 20 Years Shunning High Schoolers*, N.Y. TIMES, (Nov. 16, 2003), <http://www.nytimes.com/2003/11/16/sports/why-pros-spent-20-years-shunning-high-schoolers.html>.

success in the NBA, it would be 20 years until the next high school student would bypass college for the NBA draft.⁵⁶

The 1983 CBA reduced the draft was from ten to seven rounds, beginning in 1985.⁵⁷ The 1985 draft was also the first year the league instituted a “draft lottery” in which the worst seven teams (as determined by NBA records the previous year) were entered to determine the first seven picks in the draft.⁵⁸ This modification was devised to address the perception that teams were intentionally losing games at the end of the season to enhance their draft prospects.⁵⁹ Finally, as negotiated in the 1983 CBA, the number of rounds in the draft was further reduced to three rounds in 1988 and to the current two round system beginning in 1989.⁶⁰

While the “modern” NBA draft rules have been in place since 1989, how NBA franchises use the draft has changed significantly since then. The largest shift is that teams have moved away from selecting college seniors, instead looking at “upside” and “potential” when evaluating draft prospects. In 1995, twenty years after Malone, Dawkins and Willoughby skipped college; Kevin Garnett followed their path and entered the NBA draft directly from high school.⁶¹ He was followed in 1996 by Kobe Bryant and thereafter by Amar’e Stoudemire, Dwight Howard and LeBron James, just to name a few of the most visible of the NBA stars who entered the NBA directly from high school in the decade between 1995 and 2004.⁶²

⁵⁶ Bob Carter, *‘Da Kid’ Progressed Quickly*, ESPN CLASSIC, http://espn.go.com/classic/biography/s/Garnett_Kevin.html.

⁵⁷ 1983 *Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. X.

⁵⁸ *Id.*

⁵⁹ McCann, *supra* note 50 at 126. See also Graves, *supra* note 38, at 193.

⁶⁰ See 1983 *Collective Bargaining Agreement*, *supra* note 57.

⁶¹ Shawn Kemp was actually drafted by the NBA in 1989 without playing college basketball as well. He verbally committed to the University of Kentucky during his senior year of high school. However, allegations of theft kept him away from Kentucky and he enrolled in Trinity Valley Community College in Texas for one semester. He did not play basketball there and submitted his name for the NBA draft in 1989, when he was chosen by the Seattle SuperSonics with the 17th overall pick in the first round. *Sports People; Kemp Leaves Kentucky*, N.Y. TIMES (Nov. 8, 1988), <http://www.nytimes.com/1988/11/08/sports/sports-people-kemp-leaves-kentucky.html?pagewanted=1>; *Shawn Kemp NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/k/kempsh01.html> (last visited Oct. 17, 2011).

⁶² *NBA Draft History*, NBA.COM (Aug. 16, 2011, 09:51 AM), <http://www.nba.com/history/draft/index/index.html>.

Kevin Garnett, after earning MVP honors during the 2004 NBA All-Star game, stated “I want to thank Spencer Haywood. . .for leading the way. Without Spencer Haywood there would be no Bill Willoughby, Darryl Dawkins, Moses Malone or myself.”⁶³

The success of these players who skipped college to go straight to the NBA created a wave in which a total of thirty-nine players were drafted by the NBA immediately out of high school between 1995 and 2005.⁶⁴ As this process evolved, and more and more early entrants declared for the NBA draft, the focus of talent evaluation shifted sharply. While other factors certainly play a role, it is glaringly obvious that player evaluation for the draft is now heavily focused on a young player’s potential rather than the talent and maturity that a player displays in the college game.⁶⁵ General managers are now loathe to bypass a young player in the draft who may turn into an all-star within a few years but often skip more seasoned college players, rationalizing that those college players have already reached their potential. The unfortunate byproduct of this paradigm shift is that each year a student-athlete plays in college, his value actually decreases as he loses the ability to claim “upside” or “potential.”⁶⁶

Amidst the increase in players bypassing college for the NBA, the league’s Commissioner David Stern publicly argued for an age limit of twenty before an individual could be draft eligible.⁶⁷ Certainly the NCAA was in favor of high profile basketball stars being diverted to college, as having them on campus would help the NCAA’s visibility and increase the value of its basketball media rights.⁶⁸ Therefore, the NBA paid careful attention when Maurice Clarett challenged the NFL’s draft eligibility rules in

⁶³ Jayda Evans, *A Long Rise Back for Spencer Haywood*, SEATTLE TIMES, (Feb. 25, 2007), http://seattletimes.nwsource.com/html/nba/2003588104_haywood250.html.

⁶⁴ Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit’s Decision in Clarett v. NFL*, 3 DEPAUL J.SPORTS L.& CONTEMP.PROBS. 103 (2005).

⁶⁵ A wonderful article describing the radical shift to drafting “tremendous upside” was written in 2005. Bill Simmons, *What the TUP is Going On?*, ESPN.COM (June 27, 2005, 11:20 AM). <http://sports.espn.go.com/espn/page2/story?page=simmons/050627&num=0>.

⁶⁶ Sam Amico, *Once Again Seniors Slide in the NBA Draft*, FOXSPORTS.COM (May 23, 2011, 11:26 AM). http://www.foxsports.com/05/23/11/Will-seniors-be-pushed-back-in-the-draft/landing_cavaliers.html?blockID=527538.

⁶⁷ *Stern Wants NBA Age Limit Raised to 20*, ESPN.COM (Apr. 13, 2005, 9:38 PM), <http://sports.espn.go.com/nba/news/story?id=2035132>.

⁶⁸ *History of Basketball*, THEPEOPLEHISTORY.COM, <http://www.thepeoplehistory.com/basketballhistory.html> (last visited Oct. 25, 2011).

2003.⁶⁹ In his lawsuit, Clarett challenged the requirement that a player be three seasons removed from high school before becoming draft eligible as violating § 1 of the Sherman antitrust laws.⁷⁰ When the Second Circuit's decision to strike down the district court's decision and uphold the NFL draft eligibility rules was released in 2004, the NBA and NBPA were quick to meet and negotiate.⁷¹

In 2005 the NBA and NBPA ultimately agreed upon a provision, which was then incorporated into the league's CBA, for the 2006 draft requiring that a player be "at least nineteen years of age during the calendar year in which the Draft is held."⁷²

This provision set the age requirement for the NBA. Because it had been collectively bargained, the labor exemption protects it from future legal challenges. This provision, however, only applies to players from the United States, as the NBA defines draft eligibility slightly differently for international players.⁷³ With respect to players from the United States, the CBA states:

"Players who are 19 years or older and are one year removed from high school graduation are automatically eligible for the NBA draft if they meet any of the following criteria:

1. They have completed four years of their college eligibility;
2. They graduated from high school in the United States; did not enroll in a U.S. college or university, and four years have passed since their graduation or, if they did not graduate, their high school class graduated;
3. They have signed with a professional basketball team outside of the NBA, anywhere in the world, and have played under that contract."⁷⁴

While this Article does not focus on the rules regarding international players, they are generally automatically eligible for the NBA draft if:

1. They are 22 years old during the calendar year of the draft; or

⁶⁹ *Clarett v. NFL*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1728 (Apr. 4, 2005).

⁷⁰ *Id.* at 390.

⁷¹ Kevin J. Cimino, *The Rebirth of the NBA – Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National Basketball Association*, 108 W. Va. L. Rev. 830 (2006).

⁷² 2005 *Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. X § 1(b)(i).

⁷³ *Id.* at art. X § 1(g).

⁷⁴ *Id.* at art. X § 1(b)(ii).

2. They have signed a contract to play professional basketball outside of the NBA but within the United States, and played under that contract.⁷⁵

Since this provision was passed in 2005, fifty-two international players have declared for the NBA draft.⁷⁶ Here is the breakdown for each year:

2005	2006	2007	2008	2009	2010	2011
11	10	6	5	9	5	6

Additional draft rules state that if a player, domestic or international, is drafted, the rights to that player are held by the team for one calendar year after the draft.⁷⁷ Should the player sit out one year without signing a contract, he is automatically reentered into the NBA draft. If an individual sits out another full year after the second draft then he is declared a free agent.⁷⁸

The age requirement has become known as the “one and done rule” and has radically changed college basketball.⁷⁹ The NBA rule essentially mandates that every domestic basketball player go to college where he must abide by the rules and regulations of the NCAA.⁸⁰ This “one and done” rule does not consider whether the college environment is right for every player.

⁷⁵ *Id.* at art. X § 1(b)(ii)(G).

⁷⁶ *International Early Entry Players who Remained in the Draft*, REALGM.COM, http://basketball.realgm.com/nba/draft/early_entry/by_type/International/Early_Entrants (last visited Aug. 18, 2011).

⁷⁷ See *2005 Collective Bargaining Agreement*, *supra* note 72, at art. X § 4.

⁷⁸ *Id.* at art. X § 3(b).

⁷⁹ For an essay thoroughly examining age eligibility rules in the NFL and NBA, refer to Michael A. McCann and Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006).

⁸⁰ One notable exception is Brandon Jennings, who, after graduating high school in 2007, spent the 2008 season playing professionally overseas before returning to the NBA in the 2009 NBA Draft. Chris Broussard, *Exchange Student*, ESPN.COM (Dec. 8, 2008, 9:44 AM), <http://sports.espn.go.com/espnmag/story?id=3715746>. The other interesting example of taking this rule to the extreme was the case of Jeremy Tyler—a high school standout from San Diego who decided after his junior year to play overseas in 2009. This decision meant that he would be paid for two years and then was draft eligible for the 2011 draft—selected in the 2nd round by the Charlotte Bobcats. See Pete Thamel, *Basketball Prospect Leaving High School to Play in Europe*, N.Y. TIMES (Apr. 22, 2009), <http://www.nytimes.com/2009/04/23/sports/ncaabasketball/23prospect.html>.

III. THE NCAA

College athletics have evolved considerably in the past century, as have the rules governing participation and competition for student-athletes. The impetus behind regulating college sports began when President Theodore Roosevelt's son Ted broke his collarbone while playing football for Harvard University in 1905.⁸¹ This injury brought to President Roosevelt's attention the number of serious injuries sustained during athletic competition at the intercollegiate level. Consequently, President Roosevelt conducted meetings at the White House in which he urged the presidents of Harvard, Princeton, and Yale to address the issue of athlete safety.⁸² As a result, the Intercollegiate Athletic Association of the United States (IAAUS) was established on March 31, 1906, and in 1910 the IAAUS became the National Collegiate Athletic Association (NCAA).⁸³

The NCAA defines itself as "a voluntary organization through which the nation's colleges and universities govern their athletics programs."⁸⁴ The NCAA is comprised of member schools, each of which is categorized into one of three Divisions (I, II, and III). Schools often further align themselves into conferences to create a sense of stability and further alliance among, at least historically, similarly situated institutions of higher learning.⁸⁵ While the landscape of conference memberships has changed over time, a conference is still, as defined by the NCAA, merely a "group of colleges and/or universities that conducts competition among its members and determines a conference champion in one or more sports."⁸⁶

⁸¹ JOHN J. MILLER, *THE BIG SCRUM: HOW TEDDY ROOSEVELT SAVED FOOTBALL* (2011) (chronicling the President's efforts to save college football through the creation of the NCAA).

⁸² *See id.*

⁸³ *NCAA History* NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history> (last visited Nov. 28, 2011).

⁸⁴ *About the NCAA*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/index.html (last visited Oct. 25, 2011).

⁸⁵ For an interesting history of NCAA conference realignment, refer to *History of Conference Realignment*, NBCSPORTS.COM, <http://nbcsports.msnbc.com/id/37689691/> (last visited Oct. 9, 2011).

⁸⁶ NCAA Academic and Membership Affairs Staff, *NCAA, 2011-12 NCAA Division I Manual* (2011) [hereinafter *DI Manual*], available at <http://www.ncaapublications.com/productdownloads/D112.pdf>.

Since the NCAA's inception in 1910, large numbers of student-athletes at colleges and universities across the country have dreamt of pursuing a career in professional athletics. With the growth of technology, the visibility of professional athletes has soared over the past century. Correspondingly, the expansion in the popularity of professional athletics, domestically and internationally, has translated into greater interest on behalf of students-athletes in entering the professional leagues.

The NCAA governs college eligibility and the concept of amateurism for all student-athletes for every college and university across the country.⁸⁷ Because the NCAA is a non-profit with voluntary membership, its ability to impose rules and restrictions on student-athletes is virtually absolute.⁸⁸ The 2011-12 Division I NCAA Manual consists of 426 pages of operating and administrative bylaws that define the manner in which all college players must: 1) gain initial eligibility; 2) maintain their academic and athletic eligibility; 3) follow the constraints of the NCAA's self-defined "amateur" status; and 4) continue to represent their university and the NCAA on the court.⁸⁹

One important caveat is that the NCAA is not a centralized governing body. Rather, the "NCAA" is truly a membership. While its headquarters may implement rules and policies, by and large the people who work for the NCAA are merely implementing policies created and pushed forward on behalf of the member institutions.⁹⁰ It has become easy to blame the NCAA officials who enforce its policies, despite the fact they often individually oppose those policies. But it is the colleges themselves that have fashioned and allowed this system to evolve. Higher education thus has no one to blame but itself for the burdensome regulations imposed—not some bureaucracy in Indianapolis.

Under the auspices of protecting amateurism, the NCAA membership has very clearly established lines that define the rules by which all student-athletes who transition from college to professional athletics must abide if

⁸⁷ *Id.*

⁸⁸ *NCAA's Tax-Exempt Status*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/NCAATMaxxemptstatus> (last visited Oct. 9, 2011).

⁸⁹ These specific principals are discussed in the DI Manual, both in Article 1.2 (Purposes) and Article 2 (Principles for Conduct of Intercollegiate Athletics). See DI Manual, *supra* note 86, at 1.2.2.

⁹⁰ *How We Work: NCAA Membership & the National Office*. NCAA.ORG. <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/how+we+work/ncaa+membership+and+the+ncaa+national+office>.

they are to maintain their NCAA eligibility.⁹¹ Any player who hopes to play in the NBA must comply with these rules, as NBA rules now force players to attend a minimum of one year of college.⁹²

Because of this one-year requirement, colleges and universities face an increasing number of student-athletes whose sole reason for attending school is to build their brand and pass the time before declaring for the NBA draft.⁹³ The NCAA acknowledges this reality and, to its credit, has developed policies that define how these individuals may evaluate their NBA prospects while maintaining their college eligibility should they so choose.

The NCAA rules governing men's basketball players and the NBA draft have been modified over time, partly in response to changes in the NBA's collective bargaining agreement. What has remained consistent, however, is that a basketball player may "inquire of a professional sports organization about eligibility for a professional-league player draft or request information about the individual's market value without affecting his . . . amateur status."⁹⁴ Thus, under NCAA rules, a men's basketball player may always contact the NBA to determine his draft status.

While student-athletes may inquire about their draft status at any time, their ability to declare for the draft while retaining their collegiate eligibility is an entirely different story. This distinction is of critical importance is because NBA teams often don't evaluate potential prospects until they declare themselves draft eligible. With approximately 4,100 students participating in Division I men's college basketball across the country every year, NBA teams simply cannot adequately scout all potential players until they know who is coming out in any given year.⁹⁵ Thus, the only way to

⁹¹ *Id.*

⁹² 2005 *Collective Bargaining Agreement*, *supra* note 72, at art. X § 1(b)(i). Note that this could change with the new collective bargaining currently underway between the NBA and the NBPA.

⁹³ Zack Lowe, *Age Limit on Back Burner in Labor Negotiations*, http://nba-point-forward.si.com/2011/11/02/age-limit-on-back-burner-in-labor-negotiations/?sct=hp_wr_a2&eref=sihp (last visited Nov. 3, 2011). One recent example of a student-athlete being forced to attend college because of the "one and done" rule was Kansas University's Josh Shelby. Pat Forde, *Josh Selby Story Exposes One-and-Done*, ESPN.COM (April 22, 2011), http://sports.espn.go.com/ncb/columns/story?columnist=forde_pat&id=6407176.

⁹⁴ DI Manual, *supra* note 86 at 12.2.4.1 (Draft and Inquiry).

⁹⁵ There are 344 schools competing in Division I men's basketball and approximately 12 players per team. Thus, dividing by four, there are approximately 1,032 college seniors each year, to say nothing of the international evaluation necessary as well. 2011-12 Division I Men's Basketball. NCAA.ORG. http://stats.ncaa.org/team/inst_team_list?sport_code=MBB&division=1.

gauge a player's true professional potential is to declare for the draft while following NCAA rules so that he doesn't lose his amateur eligibility.

The NCAA's strict time constraints further restrict a player's ability to make an informed decision about his future. The NCAA has radically changed the deadline for pulling one's name out of the draft in a way that shows power resides with the college coaches—not with university presidents, athletic directors or the NCAA officials, each of whom may be more concerned with evaluating what is in the “best interests of the student-athlete.”⁹⁶

The NCAA imposes few restrictions on student-athletes before they enroll in college basketball. One such rule generically states:

“[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement.”⁹⁷

One other requirement imposed on student-athletes before enrollment has to do with professional representation. The NCAA has rules related to agents for all sports that specify when selecting a professional agent for representation causes a student-athlete to permanently lose his or her college eligibility.⁹⁸ The general amateurism rules regarding agents apply to all student-athletes and clearly states that an athlete will permanently lose his or her eligibility should he or she agree—either verbally or in writing—to be represented by an agent.⁹⁹

While the rules regarding agents are steadfast, an exception has evolved when securing advice about a proposed professional contract in either baseball or hockey.¹⁰⁰ Because the MLB and NHL allow individuals to be drafted directly out of high school,¹⁰¹ the NCAA has developed a distinction in its rules that allows a student-athlete and his parents to “receive advice from a lawyer or other individual concerning a proposed professional

⁹⁶ Eamonn Brennan, *The New NBA Draft Deadline is Ridiculous*. ESPN.COM. http://espn.go.com/blog/collegebasketballnation/post/_id/30366/the-new-nba-draft-deadline-is-ridiculous.

⁹⁷ DI Manual, *supra* note 86 at 12.2.5 (Contracts and Compensation).

⁹⁸ See *id.* at 12.3 (Use of Agents).

⁹⁹ *Id.*

¹⁰⁰ DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel).

¹⁰¹ *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association* (July 22, 2005), 17 (8.4 Eligibility for Claim); *First Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 7, 2011).

sports contract.”¹⁰² However, this “advisor” is not allowed to represent the individual directly in negotiations over the contract.¹⁰³

This advice provision means that a player selected in either the MLB or NHL draft is allowed to have a lawyer review a proposed contract, but the lawyer may not represent the individual during any negotiations to improve the terms of the deal. Any direct contact (defined as any conversation in person or phone, text message, or email) with a professional sports team immediately turns the advisor into an agent under NCAA rules, thereby making the student-athlete ineligible.¹⁰⁴ If an individual receives assistance from an advisor, the student-athlete is required to pay him or her “normal rate” for such services.¹⁰⁵ Unfortunately, the NCAA has not yet decided to allow advisors in the sport of men’s basketball.

With respect to the NBA draft, NCAA rules draw a firm line for players. After enrolling in college:

“An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:

1. The individual asks that his name be withdrawn from the draft list prior to the actual draft;
2. The individual’s name remains on the list but he or she is not drafted; or
3. The individual is drafted but does not sign an agreement with any professional athletics team.”¹⁰⁶

¹⁰² DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel). Also, the NCAA sends a letter to all individuals who compete in either baseball or men’s ice hockey that clearly explains their definition of “advisors.” For an example, see Rachel Newman-Baker and Steve Mallonee, *Memorandum to Men’s Ice Hockey Student-Athletes with Remaining Eligibility*, NCAA (Mar. 17, 2011), available at <http://graphics.fansonly.com/schools/mwc/graphics/pdfs/compliance/032211-nhl-ed-doc.pdf>.

¹⁰³ DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel). In an interesting case, a baseball player had an advisor who directly negotiated with a baseball team in violation of these direct NCAA rules. Ultimately, he was deemed to be ineligible. He appealed this ruling in *Oliver v. Natl. Collegiate Athletic Assn.*, 920 N.E.2d 203 (2009).

¹⁰⁴ DI Manual, *supra* note 86 at 12.3.2.1 (Presence of a Lawyer at Negotiations).

¹⁰⁵ Newman-Baker, *supra* note 102 at 5.

¹⁰⁶ DI Manual, *supra* note 86 at 12.2.4.2 (Draft List).

IV. THE NCAA & NBA EVALUATION PERIOD

This Article has discussed why the changes in the NBA draft eligibility rules have forced individuals to attend college in greater numbers since 2006, resulting in large numbers of student-athletes on college campuses who want to leave early. These student-athletes face the unenviable predicament of being squeezed between the rules and regulations of both the NBA and NCAA. It is during this time, referred to as the “evaluation period,” that a student-athlete may assess his true potential in the NBA.

The combination of money and the change in the way that NBA teams evaluate talent virtually dictates that players turn professional as early as possible, greatly affecting the landscape of college basketball as a result. The elite NBA players who have completed four years of college have all but disappeared.

Looking at the players who have played in the NBA All-Star game shows how the League has evolved over the past two decades. Every player in the 1991 NBA All-Star game spent at least two years in college.¹⁰⁷ Ten years later, in the 2001 NBA All-Star game, four of the twenty-four participants had skipped college altogether – Tracy McGrady, Kobe Bryant, Kevin Garnett and European star Vlade Divac.¹⁰⁸

By 2011 NBA All-Star Game, fourteen of the twenty-four players came into the league from high school, from overseas, or with only one year of college on his resume.¹⁰⁹ In fact, only one player, Tim Duncan, had spent four years in college.¹¹⁰ These data show that while four-year college players certainly can make it into the NBA, their numbers are meager and, by and large, they are not perceived to be at the pinnacle of their profession.

This “one and done” reality is a common complaint amongst college basketball fans. The premature departure of an underclassman from school is viewed with disdain by the institution’s alma mater, academia, and even their own coaches. These players are criticized for either a lack of allegiance or chasing an early payday. But the system forcing them to make this decision was devised by the NBA and NCAA membership; the players are simply acting accordingly.

¹⁰⁷ *1991 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_1991.html (last visited Oct. 25, 2011).

¹⁰⁸ *2001 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_2001.html (last visited Oct. 25, 2011).

¹⁰⁹ *2011 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_2011.html (last visited Oct. 25, 2011).

¹¹⁰ *Id.*

The NCAA attempted to address this “one and done” situation by developing an “evaluation period” whereby student-athletes could declare for the NBA draft, evaluate their prospects, and return to college with their eligibility intact, so long as they followed certain rules. The creation of this evaluation period began in 1994, when the NCAA carved out an exception for men’s basketball players under rule 12.2.4.2.1, which states that:

“[A]n enrolled student-athlete (as opposed to a prospective student-athlete) in the sport of basketball may enter a professional league’s draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares his or her intention to resume intercollegiate participation within 30 days after the draft.”¹¹¹

The intent behind this rule was to benefit the student-athlete by giving him the ability to return to college (and hopefully pursue his degree) should he make the mistake of declaring early when the NBA did not perceive him as ready for professional basketball. During the time in which a student-athlete is allowed to consider this transition, both the NCAA and NBA lose a modicum of control.

The negative response to this rule’s adoption in 1994 was immediate and harsh. In an article published by *The Los Angeles Times*, many basketball experts weighed in on this controversy.¹¹² Rick Majerus, then head coach at the University of Utah, declared, “You can tell [the rule] was done by the NCAA and not the NBA . . . [b]ecause the NCAA doesn’t know what the hell it’s doing. The ramifications of this rule are mind-boggling.”¹¹³ Then Commissioner of the Big East Conference Mike Tranghese agreed when he stated this rule is “absolutely, in my view, one of the worst rules ever adopted.”¹¹⁴ The response from the NBA towards this rule was also negative. Jerry Reynolds, director of player personnel of the Sacramento Kings, and Pat Williams, general manager of the Orlando Magic, spoke out against this rule.¹¹⁵

¹¹¹ DI Manual, *supra* note 86, at 12.2.4.2.1 (Exception—Professional Basketball Draft). Note that this rule was adopted in 1994 and was revised in 1995, 1997, and 2003.

¹¹² Gene Wojciechowski, *NCAA Change Dumb to Some: Basketball: New rule that allows undergraduates to return to school after testing NBA draft stirs controversy*, L.A. TIMES, June 28, 1994, http://articles.latimes.com/1994-06-28/sports/sp-9497_1_nba-draft.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Despite its criticism, however, the rule did have an impact on student-athletes choosing the early entry process. A total of 674 individuals have declared themselves for the NBA draft as “early entrants” since 2005, 476 of those being college freshman, sophomores, and juniors (the balance are international players).¹¹⁶ The yearly breakdown of college players declaring early is as follows:

2005	2006	2007	2008	2009	2010	2011
61	63	59	70	74	80	69

Over the past seven years, an average of 68 NCAA underclassmen with eligibility remaining have indicated that they would like to be considered for the NBA draft. But a full 42% (198 out of 476) of those who declare early later remove their names from that year’s NBA draft.¹¹⁷ Thus, over the past seven years, although an average of sixty-eight players enter their names early for the NBA draft, only an average of forty choose to remain in the draft.

The following chart provides the specific number of early entry submissions who stayed in the draft for the last seven years:

Year	2005	2006	2007	2008	2009	2010	2011
Underclassmen staying in the draft	39	37	32	39	38	51	42

Between 2005 and 2010, 174 individuals returned to college after initially declaring their intention to enter the NBA draft. It should be noted that over 20% of those returning players (36 out of 174, or 20.7%) were drafted in subsequent years.¹¹⁸ This Article will return to these data to discuss when entering the draft is considered a “good decision.”

Randolph Morris highlighted the ramifications of these rules in 2005. Morris was a high school All-American after his senior year, and he gave serious thought to skipping college entirely and entering the NBA draft.¹¹⁹ Instead he joined future NBA players Joe Crawford and Rajon Rondo, becoming part of the top rated recruiting class in the country when the three

¹¹⁶ See *Historical Drafts*, THE DRAFT REVIEW.COM, *supra* note 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Adrian Wojnarowski, *The Problematic Prospect*, YAHOO!SPORTS.COM (Dec. 11, 2006, 2:25 PM), <http://sports.yahoo.com/nba/news?slug=aw-morris121106>.

enrolled at Kentucky.¹²⁰ After a successful freshman season, Morris chose to leave school, hired an agent, and entered the NBA Draft, only to go undrafted.¹²¹

After the draft, Morris decided to return to Kentucky rather than try out for the NBA as an undrafted free agent. To do so, Morris petitioned the NCAA to restore his college eligibility. Because Morris had signed with an agent prior to the draft, the NCAA initially served him with a one-year suspension.¹²² However, after the NCAA found that Morris had a “clear intent to retain his college eligibility while declaring for the NBA draft,” it reduced his full season suspension to just the first fourteen games of the 2005-06 basketball season.¹²³ Morris thus found himself in a unique situation, floating between NCAA and NBA rules.

Under the rules of the NBA’s CBA, Morris was ineligible to re-enter a future NBA draft and was therefore immediately declared a free agent.¹²⁴ As a free agent, he could be signed at any time.¹²⁵ However, Morris also had college eligibility granted by the NCAA to play for Kentucky. As a result, Morris could leave Kentucky at any time he wished. Not surprisingly, once Kentucky was eliminated from the NCAA Tournament in 2006, Morris chose to leave college mid-semester, signing a two-year, \$1.6 million contract with the New York Knicks.¹²⁶

Neither the NCAA nor the NBA was happy with this outcome. The NCAA determined in 2009 that it would change its rules relative to declar-

¹²⁰ *Rivals.com Top 25 for 2004*, RIVALDS.COM, <http://rivalshoops.rivals.com/content.asp?SID=910&CID=297763> (last visited Oct. 17, 2011). Note that this class also included Ramel Bradley and transfer Patrick Starks.

¹²¹ Howard Beck, *Knicks Sign Center Who Was Undrafted but Not Unnoticed*, N.Y. TIMES, Mar. 24, 2007, <http://www.nytimes.com/2007/03/24/sports/basketball/24garden.html?fta=y>.

¹²² *NCAA Reduces Morris Suspension*, ESPN.COM (Dec. 15, 2005, 7:36 PM), <http://sports.espn.go.com/espn/wire?section=ncb&id=2260093>. Publicly, Morris stated “in exploring my NBA options I made poor choices . . . [t]hose choices included accepting bad advice while putting distance between me and my coaches and teammates.”

¹²³ See John Clay, *Getting Legal Help Not a Good Thing for UK, Morris Case Dragging out*, LEXINGTON HERALD LEADER, Nov. 16, 2005, at C1; *Wildcats’ Morris Has Penalty Reduced*, ORLANDO SENTINEL, Dec. 16, 2005, at D5; See Jerry Tipton, *Morris Will Be Back on Jan. 10: Confidential Evidence and Fax Change season*, LEXINGTON HERALD-LEADER, Dec. 16, 2005, at A1.

¹²⁴ Beck, *supra* note 121.

¹²⁵ Wojnarowski, *supra* note 119.

¹²⁶ *Knicks Sign Kentucky Center Morris to 2-year Deal*, ESPN.COM, <http://sports.espn.go.com/nba/news/story?id=2809958> (last visited Nov. 11, 2011).

ing for the NBA draft while retaining amateur status.¹²⁷ This rule change meant that college players needed to decide whether or not they would remain in the draft before the draft was held—thus forcing them to guess their draft status rather than waiting for the results and then deciding. The rule is intended to benefit college basketball coaches who want to know what their rosters will look like for the upcoming year, which helps them on the recruiting trail.

The language of this rule is as follows:

“In men’s basketball, an enrolled student-athlete may enter a professional league’s draft one time during his collegiate career without jeopardizing eligibility in that sport, provided:

1. The student-athlete requests that his name be removed from the draft list and declares his intent to resume intercollegiate participation not later than the end of May 8th of the year in which the draft will occur;
2. The student-athlete’s declaration of intent is submitted in writing to the institution’s director of athletics; and
3. The student-athlete is not drafted.”¹²⁸

This rule results in the following timeline: a student-athlete plays their college basketball season, which hopefully includes a deep run into the NCAA’s “March Madness” Tournament, traditionally ending the first Monday in April. Those who have exhausted their four years of college eligibility (i.e. seniors) are automatically eligible for the NBA draft. Underclassmen typically declare their intention to enter the upcoming draft by formally submitting their name to the NBA’s league office.

Under NBA rules, teams are prohibited from having any direct contact with draft ineligible players.¹²⁹ This restriction makes sense, as allowing teams to contact high school or college players would be a nightmare. As a result of this restriction, the underclassmen who submit their names for the

¹²⁷ Andy Katz, *Rule Change Would Alter Draft Process*, ESPN.COM, http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/4086305 (last visited Nov. 11, 2011).

¹²⁸ DI Manual, *supra* note 86, at 12.2.4.2.1.1 (Exception—Basketball—Four-Year College Student-Athlete, Men’s Basketball).

¹²⁹ Ken Berger, *Knicks-Thomas Reunion Against NBA Rules. . .and a Horrible Idea*, CBSSPORTS.COM, <http://www.cbssports.com/nba/story/13731440/knicksthomas-reunion-against-nba-rules-and-a-horrible-idea> (last visited Nov. 11, 2011); *see also* Adrian Wojnarowski, *Sources: N.Y. Scout Led Improper Workouts*, YAHOO! SPORTS, <http://sports.yahoo.com/nba/news?slug=aw-knicksdraft102610> (last visited Nov. 11, 2011).

upcoming draft cannot be contacted by any NBA team until the NBA officially publishes its “final” list.

Many student-athletes spend the better part of March traveling for high profile conference tournament games, and then to NCAA sites around the country for March Madness. These tournaments generate tremendous amounts of money for the NCAA and its member institutions.¹³⁰ (One need not point out the money and attention these tournaments bring to the NCAA and its member institutions.) The student-athletes then return to campus as their academic year is winding down and final examinations are beginning. It is during this time that players have approximately a three-week window in which to decide whether to submit their name for the NBA draft.¹³¹ Not surprisingly, many opt to submit and make their true decision later.

Once a player decides to declare, he must navigate the legal regulations established between the NBA and NCAA. It takes some level of expertise to properly advise student-athletes as to what they are allowed to do during this time period if they wish to obtain an evaluation of their prospects, yet retain their college eligibility. Unfortunately, the availability of unbiased guidance is rare on college campuses. Far too few schools take advantage of the Professional Sports Counseling Panel legislation aimed at assisting student-athletes in entering professional athletics with real assistance.¹³²

The NCAA has rules specifically targeted towards men’s basketball players “testing the waters” while pursuing a career in professional basketball. First, as already noted, college basketball players may enter their names into the NBA draft one time during their college career without jeopardizing their eligibility. However, under NCAA amateurism rules, these students may not sign with an agent at any point and retain their

¹³⁰ Brad Wolverton, *NCAA Agrees to \$10.8-Billion Deal to Broadcast Its Men’s Basketball Tournament*, THE CHRONICLE, <http://chronicle.com/article/NCAA-Signs-108-Billion-De/65219/> (last visited Nov. 11, 2011).

¹³¹ In 2011, the date by which to declare for the draft was April 24, 2011. *2011 NBA Draft Early Entry Analysis*, CBSSPORTS.COM, <http://www.cbssports.com/collegebasketball/story/14878964/nba-draft-early-entry-commitments> (last visited Nov. 11, 2011).

¹³² DI Manual, *supra* note 86, at 12.3.4 (Professional Sports Counseling Panel). For greater analysis of the benefits and uses of these panels, see Wong et al., *supra* note 14.

college eligibility.¹³³ Additionally, these players must withdraw their name from the draft by a certain date should they want to return to college.¹³⁴

During this evaluation period NBA teams may meet with potential draftees. In fact, players may tryout with NBA teams, at the NBA team's expense, so long as the student-athletes are enrolled full-time and do not miss any classes.¹³⁵ Prospects may also submit their names to the NBA's "Undergraduate Advisory Committee," which is composed of NBA team executives, and receive a confidential projection of their likely draft position.¹³⁶

The challenge is that the evaluation received from this Committee is neither an exact science nor particularly helpful because of the variance in the feedback of NBA scouts and executives. An assessment indicating that a player may be taken "between the middle of the first round and the middle of the second round," while an honest appraisal, provides no true insight as to whether an individual should make this jump. The difference between a first round selection and a second round selection is enormous. The first round pick is provided, under the recently expired CBA, a guaranteed three year contract, while the second round pick is guaranteed nothing.¹³⁷ Consequently, without considering a player's individual circumstances, the standard interpretation is that a player who leaves early and is selected in the first round made a "good" choice, while one who is either drafted in the second round or undrafted made a "mistake."

To help ease the concerns that student-athletes might have with returning to college when a professional career in the NBA is available to them, the NCAA created the Exceptional Student-Athlete Disability Insur-

¹³³ DI Manual, *supra* note 86, at 12.3.1 (Use of Agents).

¹³⁴ *NCAA Makes Rule Changes*, ESPN.COM (May 1, 2011, 12:53 PM), <http://sports.espn.go.com/ncaa/news/story?id=6444510>.

¹³⁵ DI Manual, *supra* note 86 at 12.2.1.3.1 (Exception for Predraft Basketball Camp).

¹³⁶ Dana O'Neil, *Coaches, Fans Hold Their Breath as More Players Flirt with NBA*, ESPN.COM (Apr. 30, 2008), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=3373696.

¹³⁷ *2005 Collective Bargaining Agreement*, *supra* note 72, at art. VIII § 1. The CBA discusses the minimum contract requirements that must be offered a first round selection. There is no restriction, either as a minimum or maximum offer, that an NBA team must offer a second round selection. They may be treated as any other free agent with the exception that they are only able to negotiate with the team that drafts them.

ance (ESDI) program.¹³⁸ This program allows student-athletes with a future in professional athletics the ability to insure against debilitating injury during their college careers.¹³⁹ The program, offered for the first time by the NCAA in 1990 for football and men's basketball, now includes men's ice hockey, baseball, and women's basketball.¹⁴⁰

Student-athletes who have demonstrated that they have the potential to be selected in the first round of the NBA draft are eligible for the program. If the athlete suffers a permanent total disability, the policy provides the student-athlete with a lump sum payment.¹⁴¹ It is important to note that permanent total disability typically requires that the athlete be completely unable to perform his or her profession or sport for an entire twelve-month period after the initial injury.¹⁴²

In theory, the evaluation process seems to make sense. An undergraduate student-athlete can seek to evaluate his NBA potential in a variety of ways. He can submit his name to the NBA draft indicating his intention to join that year's class. He can interview agents, so long as he doesn't agree to sign with one. He can get a confidential assessment of his draft status from the NBA. He can try out with teams. In all of these areas, the NCAA has shown some leniency and common sense in understanding the magnitude of the decision a student-athlete faces at this critical time in his life. The intent behind these rules seems admirable under a cursory examination, but one must look deeper.

Unfortunately, the "evaluation period" that the NCAA affords its student-athletes to determine what is in their best interests – an immediate career in the NBA or a return to college – has been severely hampered by the dates and restrictions that the NCAA, not the NBA, has imposed. In

¹³⁸ See *Exceptional Student-Athlete Disability Insurance Program*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (last visited Nov. 11, 2011).

¹³⁹ Jerome Solomon, *NCAA to OK Financial Allowances for Athletes*, HOUS. CHRON., Apr. 26, 2001, <http://www.chron.com/sports/college/article/NCAA-to-OK-financial-allowances-for-athletes-2053063.php>.

¹⁴⁰ See *Exceptional Student-Athlete Disability Insurance Program*, *supra* note 138.

¹⁴¹ *Id.*

¹⁴² For more information on a related argument, that the NCAA should seek to revise its current exceptional student disability insurance policy program whereby elite student-athletes should have the ability to obtain insurance for partial, not merely permanent disability coverage, see Glenn M. Wong & Chris Deubert, *The Legal and Business Aspects of Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473 (Spring 2010).

2011 the deadline to apply for early-entry for the NBA draft was April 24, 2011. On that day, the NBA released its official list of “draft eligible” prospects, and NBA team officials were allowed to have contact with potential draftees, including scheduling tryouts. Under NBA rules, the first date that NBA teams could hold workouts for early-entry players was April 28, 2011. The date by which these potential draftees must withdraw their names from the draft in order to maintain their NCAA eligibility was May 8, 2011.

These deadlines resulted in only eleven days during which time a student-athlete was permitted to receive an appraisal from the NBA, from which he must make a career defining decision. Add to that timeframe the fact that NCAA regulations prohibit a student-athlete from missing any classes in order to travel or tryout with NBA teams.¹⁴³ This regulation is strictly enforced, despite the fact that the NCAA appears unconcerned by the number of classes these individuals miss in the month of March while promoting their school at various conference and NCAA tournaments. Furthermore, the NCAA permits a student-athlete to miss class time to interview for any job outside of professional athletics.

Additionally, while the NBA draft is an important talent-recruitment mechanism for the league, sixteen NBA teams are beginning the playoffs during this period, making it virtually impossible for these teams to concentrate on providing accurate player evaluations. The front offices of NBA teams have limited personnel, and staff are preoccupied by the team’s playoff run. The result is that NBA teams truly do not have a sense of where potential players may be selected two months before the draft. It is not until they have had adequate time to concentrate on and evaluate these college players – something that realistically happens much closer to the day of the draft – that NBA teams have any sense of a player’s likely draft prospects.

Why are there are so few days during which a real assessment of an individual’s potential is allowed? Blame must be placed on the most powerful cohort within the NCAA—the college coaches. While many NCAA rules take into account the well-being of the student-athlete, the coaches ultimately carry more weight.

Between 2009 and 2011, the NBA tryout period was reduced from fifty days to just eleven days. The reason behind this change is that coaches want to know which of their players are returning. College coaches, particularly those at the traditional basketball power schools, felt they were being

¹⁴³ One interesting note is that few in academia would think twice about an outstanding student in the field of accounting or finance leaving campus – and missing classes – to interview in Boston or New York.

held hostage as their players waited to decide whether to return to their institution.¹⁴⁴ The perception was that this uncertainty left roster spots and scholarships unused for an upcoming season, potentially preventing a team from maximizing its pool of talent.¹⁴⁵

In 2010 and 2011, 149 NCAA student-athletes declared for the NBA draft as early-entry participants. A total of fifty-seven of them (or 38%) decided to return to college—either because of a poor reception from the NBA or not having enough time to properly evaluate this decision. However, only 42% of the original 149 student-athletes were drafted so, in retrospect, another thirty players should have pulled their names from the NBA draft. Furthermore, if you add the twenty underclassmen drafted in the second round, a total of fifty of the 149, or 34%, probably would have been better served by returning to school.¹⁴⁶

Given the high numbers of individuals improperly evaluating their NBA prospects, it seems right for the NCAA to consider a better process with more time for students to make this decision. But for 2012 and beyond, according to the NCAA – or at least high profile college coaches – the NCAA will not consider such a change. In fact, in 2011 a new proposal was submitted to the NCAA which would make the time frame for a student-athlete to “request that his name be removed from the draft list and declares his intent to resume intercollegiate participation no later than the end of the day before the first day of the spring National Letter of Intent signing period for the applicable year.”¹⁴⁷

The legislation itself, put forth by the men’s basketball coaches of the ACC – most ardently by UNC’s Roy Williams, according to many¹⁴⁸ – provides some background into their thinking when it states:

¹⁴⁴ Andy Katz, *Time For the Annual Draft Deadline Changes*, ESPN.COM (Apr. 14, 2011, 1:50 PM), http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/6354169 [hereinafter Katz, Annual Draft]; see also Andy Katz, *Should Early-Entry Withdrawal Date Move?*, ESPN.COM (Jan. 21, 2011, 1:11 PM), http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/6045445 [hereinafter Katz, Should Early-Entry].

¹⁴⁵ *Id.*

¹⁴⁶ Note: these numbers does not take into account those who for academic reasons could not return to school.

¹⁴⁷ 2011 *Division I Official Notice: Legislation for Consideration at the January and April 2011 NCAA Division I Legislative Council and NCAA Division I Board of Directors Meetings*, 46, http://fs.ncaa.org/Docs/AMA/legislative_actions_issues/Division%20I/2011%20Official%20Notice/2011%20DION.pdf (last visited Nov. 4, 2011).

¹⁴⁸ Bob Geary, *NBA Lockout? We’ve Got Your Pro Basketball Right Here*. INDYWEEK.COM (Nov. 23, 2011, 2:35 PM), <http://www.indyweek.com/indyweek/nba-lockout-weve-got-your-pro-basketball-right-here/Content?oid=2712306>.

“Before the adoption of the current rule, student-athletes had approximately 50 days to decide whether to remain in the draft and tryouts with NBA teams could occur only in the last 20 days. During that period, collegiate head coaches were often in limbo regarding the status of their rosters for the upcoming season. Further, student-athletes typically spent a large part of that time away from campus training for pre-draft workouts, which resulted in academic concerns. The current legislation reduced the problem by setting the withdrawal deadline May 8, which is 40 days earlier than the previous withdrawal deadline but still 22 days after the first day of the National Letter of Intent late signing period for men’s basketball in April. This year, NBA teams did not spend money to have workouts with student-athletes until the withdrawal deadline passed. By moving the withdrawal deadline, *coaches will have flexibility to address roster issues at the beginning of the spring signing period while viable prospects are still available*. Evaluations by professional scouts and others during preseason practices, regular season games and postseason games should provide student-athletes with adequate information to credibly determine NBA draft status.”¹⁴⁹

Two high profile coaches, Kentucky’s John Calipari and Syracuse’s Jim Boeheim, argued against the implementation of this rule. With 34 years of coaching experience at his alma mater, Boeheim declared “I don’t think it’s a good thing. I’m not sure who actually was in favor of that or why it got in.”¹⁵⁰ Calipari further argued on behalf of the student-athletes when he said, “All this stuff: For the good of college basketball? This should be about these kids. . . . They’ve done their good for college basketball. This should be about, ‘How can we help these kids make a good decision?’”¹⁵¹ Even Gary Williams, the coach at ACC member school, the University of Maryland, opposed this rule change. He declared: “[f]or the basketball players, it’s a little quick to make that decision, especially after the NCAA tournament. If you have a tough loss, it’s not enough time to calm down and make a good decision.”¹⁵² As Mike DeCourcy wrote in *The Sporting News* on February 14, 2011, “[t]he ACC coaches who allowed this proposal to escape with their names attached should be, each and every one of them, ashamed. Not all supported it as ardently as North Carolina’s Roy Williams

¹⁴⁹ 2011 Division I Official Notice, *supra* note 147.

¹⁵⁰ Todd Dybas, *Dybas: Early Withdrawal Rule Penalizes College Basketball*, SPORTSPRESS N.W. (June 30, 2011, 7:00 AM), <http://uwhoops.sportspressnw.com/2011/06/30/dybas-early-withdrawal-rule-penalizes-college-basketball/>.

¹⁵¹ Mike DeCourcy, *NCAA Would Be Wrong to Move up Early Entry Date*, SPORTING NEWS (Apr. 13, 2011), <http://aol.sportingnews.com/ncaa-basketball/story/2011-04-13/ncaa-would-be-wrong-to-move-up-early-entry-date>.

¹⁵² See Katz, *Annual Draft*, *supra* note 144.

and Florida State's Leonard Hamilton, but neither did they successfully intervene to stop it."¹⁵³

After careful evaluation, as is part of the NCAA's legislative process, the Amateurism Cabinet reviewed the proposal. Its response, also found in the legislation as a position statement, was as follows:

"The cabinet opposes the proposal. The cabinet notes that the current rule requiring a student-athlete to withdraw his name by May 8 has only been in effect for one year and that the current rule needs further evaluation. Reducing the current time period might put student-athletes at a disadvantage by not allowing them sufficient time to gather adequate information, as well as taking away opportunities for student-athletes to participate in pre-draft workouts. Finally, there is no evidence of an academic impact on student-athletes under the current timeline."¹⁵⁴

This statement shows the NCAA Amateurism Cabinet is arguing on behalf of the welfare of student-athletes, and opposing the wishes of the ACC men's basketball coaches. However, the NCAA's "Men's Basketball Issues Committee" responded to this proposal by simply declaring "the committee supports the proposal."¹⁵⁵ Nevertheless, the Committee did express some concern as to whether an earlier date would create distractions for student-athletes at the conclusion of the regular season. Despite these concerns from groups within the NCAA, this rule passed and took effect on August 1, 2011.¹⁵⁶

What this new rule means for the 2012 draft class is unclear. What is clear is that a player needs to remove his name from the NBA draft list "no later than the end of the day before the first day of the spring National Letter of Intent signing period."¹⁵⁷ That date in 2012 is April 11.¹⁵⁸ The National Championship game in men's basketball will be played on April 2, 2012.¹⁵⁹ Thus, players either have one week to make this decision, or they must be thinking about the decision long before the end of their season in

¹⁵³ Mike Decourcy, *Making a Bad Early Decision Worse*, SPORTING NEWS (Feb. 14, 2011), <http://periodicals.faqs.org/201102/2280688401.html>.

¹⁵⁴ 2011 *Division I Official Notice*, *supra* note 147.

¹⁵⁵ Katz, *Annual Draft*, *supra* note 144 (quoting NCAA proposed legislation).

¹⁵⁶ 2010-2011 NCAA Legislation (as of August 26, 2010) available at http://www.mvc-sports.com/media/pdf/Compliance/2010-11_NCAA%20Legislation.pdf.

¹⁵⁷ *Id.*

¹⁵⁸ National Letter of Intent, National Collegiate Athletic Association, <http://www.ncaa.org/wps/wcm/connect/nli/nli> (last visited November 3, 2011).

¹⁵⁹ *March Madness 2012*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.com/march-madness> (last visited Nov. 12, 2011).

March. This is certainly not an ideal situation, and it is only exacerbated by the fact that the NBA prohibits contact with college players until they have announced their decision to come out for the draft.

Another problem with a short decision-making window is determining who can provide guidance to student-athletes during this critical period. As mentioned, under current NCAA rules, men's basketball players may not receive guidance from advisors in the way that baseball and hockey players do.¹⁶⁰ Additionally, there is a true dearth of Professional Sports Counseling Panels on college campuses around the country. These panels are allowed under NCAA rules but, by and large, are not adopted by schools. As a result of this lack of trustworthy guidance, many men's basketball players turn to their AAU coaches for advice – a scary proposition.

Since no one seems to be speaking out on behalf of these student-athletes while they are in college, their professional representatives are now doing so publicly. As Andy Katz states in his blog:

“It is a further impediment to the athlete and his ability to analyze his options, said agent Bill Duffy, whose firm, BDA Sports Management, represents NBA players such as Steve Nash, Yao Ming and Rajon Rondo. ‘It is definitely self-serving for the institutions. I don’t think it impacts prospects in the top 10 but mid-to-late first-rounders looking to position themselves higher in the draft are harmed significantly.’”¹⁶¹

Mark Bartelstein, CEO of Priority Sports & Entertainment, and agent to over thirty NBA players,¹⁶² said he “regularly fields calls from players’ families seeking information on a player’s draft status.”¹⁶³ “He also said “in his daily talks with NBA general managers he’s been told [that NBA teams] are in no position to [give] draft advice in January or February since the draft is too far away.”¹⁶⁴ “It will be a disaster because college coaches will be wondering why players are distracted,” Bartelstein said.¹⁶⁵ He went on to say:

¹⁶⁰ *Example Letter Sent to Basketball Student-Athletes*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, (Jul. 20, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Example+letter+sent+to+basketball+student-athletes>. Note: similar letter was sent to men's ice hockey players as well.”

¹⁶¹ See Katz, *Should Early-Entry*, *supra* note 144.

¹⁶² *Mark Bartelstein*, PRIORITY SPORTS & ENTERTAINMENT, <http://www.prioritybasketball.biz/basketball/MarkBartelsteinBB.html> (last visited Nov. 16, 2011).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Katz, *Should Early-Entry*, *supra* note 144.

"I've been a huge proponent for years to let the players focus on the season. I've told them they'll have plenty of time to figure out what the right thing to do is because there are no sure answers in January, February or March. No one knows in even late April what's happening [with the draft]. You're asking kids to make decisions without accurate information. Teams don't know what they're doing. It's going to be a nightmare for college coaches. . . . [Moving the date to early April will bring] all kinds of people telling [players] what they want to hear and don't have the real answer."¹⁶⁶

Many players are opposed to this legislation as well. Butler University star Matt Howard commented on moving up the date to withdraw from the NBA draft this past spring, "For players, I just don't see how that helps them a whole lot. . . . It almost makes it pointless to put your name out and not sign with an agent."¹⁶⁷

V. PROPOSALS

What is clear is that student-athletes in the sport of basketball are caught in a quagmire of rules and regulations that significantly impede their ability to properly evaluate their NBA prospects. The restraints on the manner and timing of entry into the NBA have evolved over the past several decades, as both the NBA and NCAA have developed rules that reflect their own economic self-interests. The byproduct of these rules is an inefficient marketplace for players entering the NBA from college, as demonstrated by the significant number of players that leave early yet remain undrafted.

As this Article has highlighted, many seemingly insignificant rule changes by both the NBA and NCAA have impacted student's entry into professional basketball. While each specific rule may have addressed a single issue that needed clarity at the time of creation, the result is a mess of obstacles throughout the transition period. The inefficiencies are compounded by the fact that the NBA and NCAA each react to the other's policies rather than developing better practices in tandem.

Because self-interest directs the actions of the sport's governing bodies the resulting outcome is that, in reality, there is no true advocacy group for the welfare of student-athletes in assisting their transition into the professional environment. This is not to argue that the NCAA and its members are not concerned about the general welfare of student-athletes. The NCAA is quick to point out that it has over 380,000 student-athletes and just

¹⁶⁶ *Id.*

¹⁶⁷ *NCAA Makes Rule Changes*, ESPN.COM (May 1, 2011, 12:53 PM), <http://sports.espn.go.com/ncaa/news/story?id=6444510>.

about every one of them will turn professional in something other than sports.¹⁶⁸ While this declaration is true, it ignores the small minority of student-athletes who do have the opportunity to make this transition, yet have no unbiased support at the institutional level and no advocacy group within the professional industry they hope to enter.

Unequivocally, both the NBA and NCAA have every right, and in fact a duty, to develop rules that govern their organizations and seek to further their purpose and goals. However, in so doing, a true voice for the participating individuals (i.e. student-athletes) is muted or ignored in the process. In theory, member institutions are tasked with the responsibility of advocating on behalf of the student-athlete. Yet, when student-athletes have limited legal standing to challenge inequities,¹⁶⁹ schools (or more likely high profile coaches) are free to trade the students' best interests in for financial gain for their institution or conference.¹⁷⁰

In challenging economic times one cannot disagree with the decision that when balancing the rights of a few high profile athletes against the potential revenue stream for an entire institution, schools are quick to choose revenue. Nevertheless, the end result is that we are left with an environment of rules¹⁷¹ that generate billions in revenues from amateur athletics without truly compensating the participants.¹⁷² One result of this

¹⁶⁸ NCAA Public Service Announcement: Basketball, YOUTUBE (Apr. 24, 2008), <http://www.youtube.com/watch?v=G40g9RTxurw>. NCAA Public Service Announcement developed by Young & Rubicam for JoJo Rinebold, the NCAA's managing director of brand strategies and events.

¹⁶⁹ Waldrep v. Tex. Emp'rs. Ins. Assoc., 21 S.W.3d 692 (Tex. App. 2000).

¹⁷⁰ Michelle Kaufman, *College Conference Realignment All About the Money*, INDIANAPOLIS STAR, Oct. 4, 2011, <http://www.indystar.com/article/20111004/SPORTS/110040362/College-conference-realignment-all-about-money>.

¹⁷¹ See generally DI Manual, *supra* note 86, at 16.1 (Awards). This section of the NCAA manual discusses the ability and restrictions on providing athletic scholarships to student-athletes. It should be noted that this paper does not support the argument that we should be "paying" student-athletes other than a revision to the rules to allow schools to provide the full cost of attendance. See DI Manual, *supra* note 86, at 15.02.2 (Cost of Attendance) (inability of schools to provide full cost of attendance in all circumstances).

¹⁷² An example of the revenue available to the NCAA is in their recent television contract to broadcast their Division I Men's Basketball Tournament. See Thomas O'Toole, *NCAA Reaches 14-year Deal With CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for now*, USA TODAY, Apr. 22, 2010, <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1>.

perception is the growing support amongst many to refute the NCAA's concept of amateurism and pay student-athletes.¹⁷³

Returning to the numbers helps to illustrate the importance of the evaluation period. Interpreting both NCAA legislation and NBA draft eligibility rules under the recently expired CBA, in 2011 a college athlete needed to declare for the draft, evaluate his chances, and return to college within a window of ten days.¹⁷⁴ Many critics have debated over the rule that the NBA passed in 2005 requiring basketball players be nineteen years old before they are draft eligible, yet so far the rule remains.¹⁷⁵ Of additional note is the reality that both the NBA and NBPA seem to be ignoring this matter in their current labor negotiations.¹⁷⁶

Ignoring the legal opinions, the argument that high school graduates are unprepared or too immature to compete in the NBA can be refuted with the success of LeBron James, Kobe Bryant and Kevin Garnett, among others.¹⁷⁷ Most germane to this argument is the fact that the age requirement really only affects a limited number of people. Specifically, during the decade between 1995 and 2005, only thirty-nine players skipped college to enter the NBA.¹⁷⁸ This does not mean that every one of those thirty-nine individuals made the right choice, only that it comparatively wasn't a tremendously large number of people choosing to bypass college.

The number of college students considering a transition, however, is much larger. During the seven years between 2005 and 2011, a total of 490 college underclassmen participated in this "evaluation period."¹⁷⁹ This number indicates that greater attention must be paid to the evaluation period of the amateur draft and the interests of student-athletes during this crucial time. Given the new NCAA legislation that was put through during the 2011 summer, student-athletes will need to make a decision within a

¹⁷³ Branch, *supra*, note 8.

¹⁷⁴ The NCAA Championship game will be played on April 2, 2012, and the NLI date by which a student-athlete is now required to remove his name from the upcoming NBA draft is April 11, 2012. *March Madness 2012*, *supra* note 159.

¹⁷⁵ Scoop Jackson, *NBA's Age Restriction Won't Change*, ESPN.COM (Jan. 18, 2010), <http://sports.espn.go.com/espn/commentary/news/story?id=4836818>.

¹⁷⁶ Lowe, *supra* note 93.

¹⁷⁷ For a recent article questioning the perception that high school players do not succeed in the NBA, see Tom Haberstroh, *Impact of the One-and-Done Rule*, ESPN.COM (Oct. 28, 2011, 6:27 PM), http://insider.espn.go.com/mens-college-basketball/preview2011/story/_id/7156333/state-game-impact-one-done-rule-nba-college-basketball.

¹⁷⁸ *Historical Drafts*, *supra* note 15.

¹⁷⁹ *Id.*

week after the NCAA Men's Basketball Championship game, and before getting official feedback from the NBA, making this critical time period more important now than ever before.

It would be negligent to identify problems in this process without proposing some recommendations that would truly benefit the student-athletes. Accordingly, in order for student-athletes making this transition from college to the NBA to receive an honest appraisal of their potential, it is necessary for both the NBA and NCAA to modify their rules such that student-athletes are able to make an informed decision on whether to enter professional basketball. While direct collaboration between the NBA and NCAA may well be deemed illegal,¹⁸⁰ each organization has the ability to make some rule changes that benefit the student-athlete without harming its own mission. As such, the following proposals are offered:

1. The NBA should adopt draft eligibility rules similar to those in MLB. In baseball, high school graduates are automatically draft eligible and need not petition or declare their intention for the draft. A drafted high school player has until August 15 to decide whether he will sign with the major league team or attend college.¹⁸¹ The player is allowed an "advisor," but not an agent, to help him assess both a proposed contract and the decision to enter professional baseball.¹⁸² So long as he has not accepted money, or broken NCAA rules in another way, the player has retained his amateur status and has the option of attending college—either a four-year college or junior college.

Once a player enrolls in school, the team that drafted him immediately loses all right to the player.¹⁸³ Furthermore, the player is not eligible for the MLB draft again until after his junior year (unless he enrolls in a junior college), meaning a minimum of three years of college.¹⁸⁴

¹⁸⁰ 15 U.S.C.A. § 1. Unfortunately, the ability of these two organizations to work together will be restricted by antitrust laws that govern conspiracy. Specifically, §1 of the Sherman Act declares that "Every 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 declared to be illegal." By agreeing to restrictions that may limit the market for wages and the ability to earn a living, the NBA and NCAA are limited in their ability to agree upon rules.

¹⁸¹ *First Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 7, 2011).

¹⁸² DI Manual, *supra* note 86, at 12.3.2 (Legal Counsel).

¹⁸³ *First Year Player Draft*, *supra* note 181.

¹⁸⁴ *Id.*

While MLB's structure, specifically its minor league system, is quite different from the NBA, its draft eligibility rules appear transferable. History has proven that talented high school players can succeed in the NBA, and NBA teams should be allowed to draft high school seniors. This would also ensure that those players who go to college do so by choice—not because of regulations established by the NBA or NCAA.

If a player decides to attend college, NBA rules should require that the player not be draft eligible for two years—after a player's sophomore year of college. This revision would allow players two years of a college education, and provide some level of stability for the NCAA. These provisions should ideally be part of the ongoing CBA discussions between the NBA and NBPA.

2. As outlined earlier, just as the NCAA allows in baseball and hockey,¹⁸⁵ NBA rules should encourage potential players to hire an “advisor” to assist during this challenging period. If the NBA draft eligibility rules do change to permit the drafting of high school players, the rules should allow advisors to contact teams and assist these individuals in the evaluation of their NBA prospects, and ultimately, with their decision of entering the draft or attending college. The abilities of advisors to properly counsel their clients shouldn't be neutered by antiquated NCAA amateurism guidelines. It is important to allow student-athletes to receive valuable advice during this critical period in their lives.

The relationship can be strictly limited in scope to the procurement of draft potential information and the negotiation of the tryout calendar with NBA teams. These services can be billed to the student-athlete, just as advisors are required to receive compensation in baseball and hockey, at the going rate.¹⁸⁶

3. The NCAA should expand and shift the number of days during which student-athletes may explore their potential as an NBA player while maintaining their college eligibility.

The benefits of this proposal are obvious. With a longer time to engage in this process, student-athletes can continue with their academic

¹⁸⁵ DI Manual, *supra* note 86, at 12.3.2 (Legal Counsel).

¹⁸⁶ *Sample letter Sent to Baseball Student-Athletes: Letter from Chris Fitzpatrick to Selected Division I Baseball Sports Information Contacts; and Selected Television and Broadcast Outlets*, May 30, 2011, available at http://www.ncaa.org/wps/wcm/connect/7682fa8046f91bbb87e5e7ac20c3c72c/DI_BSB_Reg_Broadcast_Rights_Memo.pdf?MOD=AJPERES&CACHEID=7682fa8046f91bbb87e5e7ac20c3c72c.

responsibilities and ensure compliance and eligibility should they return to campus in the fall. Additional time seems like a simple and easy accommodation on behalf of the NCAA.

While time to make a sound decision is necessary, the period of evaluation often occurs during the end of the spring semester. Thus, the actual timing of this evaluation period should be shifted as well. Rather than forcing student-athletes to declare and return in the first week of April, when many NBA teams are distracted and not fully evaluating potential talent, this period should be pushed back to the middle of May. This change would bring with it several important benefits.

First, college student-athletes can finish their academic studies without additional distraction. The NCAA should seemingly be in favor of allowing more time for student-athletes pursue their educations. Second, a later time period coincides with a time when the NBA is better prepared to do a thorough evaluation of potential players.

Certainly conferences, schools and basketball coaches will object because such an extension of time, during which a student-athlete remains undecided on his future, keeps the fall roster for a particular program up in the air. It may even impact recruiting. However, there are a limited number of programs that would disproportionately be affected by this change. Further, the potential negative impact on these elite programs could be good for the concept of "competitive balance" in college basketball. Ultimately, the goal should be to allow student-athletes the ability to get a better sense of their true draft prospects. Thus, any pressure on a particular college coach or program must be weighed against the ability of an individual to make an irrevocable decision about his future.

4. Coupled with additional time to evaluate the decision on leaving early, the student-athletes should have a real opportunity to determine their draft potential directly from the NBA in a timely fashion. In this regard, NBA rules could be changed to allow:
 - a) Allow student-athletes in the sport of basketball have to access to advisors under NCAA rules as discussed earlier;
 - b) Permit direct contact between the league and Professional Sports Counseling Panels during an identified time period far greater than the current 11 days; and
 - c) The creation of a true "NBA Combine" – similar to the NFL Combine – within the time frame the NCAA permits tryouts that enable all underclassmen to compete and perform in front of NBA personnel. This initiative will reduce travel time for college students and allow for a greater comparison between individual players.

Presently there is an NBA combine, but it consists only of measurements – height, weight, and a few workouts – no 5 on 5 competition.¹⁸⁷ Game competition is something that would be tremendously valuable for both the NBA and participants in assessing their true draft prospects. While game participation could be optional, all prospects should be required to attend the combine for physical measurements and interviews.

The NFL holds a combine in February in which the entire league gets to evaluate potential players two full months before the draft. The NFL's combine has turned into a tremendous success.

The selection process for the NFL Scouting Combine is clearly outlined by the NFL: a "Selection Committee," which includes the Directors of both National and BLESTO scouting services, is joined by members of various NFL player personnel departments.¹⁸⁸ All draft eligible players are evaluated and voted on by the Committee. The most highly sought after prospects – numbered somewhere in the neighborhood of 300 – are then invited to the Combine. The NFL's intention is to predict those college football players that they anticipate being selected in the upcoming NFL Draft.¹⁸⁹ And while it's highly likely that the players selected in the first several rounds will be invited, it is not an exact science. Being invited to the NFL Scouting Combine is by no means a guarantee of hearing your name in the April draft, just as failing to be invited is not a determinative sign that you will not be drafted or make it to the NFL.

The NFL Scouting Combine has grown in hype each year, and now is fully televised by the NFL Network.¹⁹⁰ What used to be a reasonably quiet tryout for a select number of college players now gets hundreds of media members in attendance and millions more watch-

¹⁸⁷ Bjorn Zetterberg, *2011 NBA Draft Combine: Day 1 Workout Notes and Analysis*, BLEACHERREPORT.COM, <http://bleacherreport.com/articles/704727-2011-nba-draft-combine-day-1-workout-notes-and-analysis> (last visited Nov. 7, 2011).

¹⁸⁸ *How are players selected for the NFL Combine?*, NFL.COM, <http://www.nflcombine.net/faq/how-are-players-selected-for-the-nfl-combine> (last visited Nov. 7, 2011).

¹⁸⁹ *Id.*

¹⁹⁰ *NFL Network & NFL.com Programming Notes (2/23-3/1)*, NFL.COM, <http://www.nfl.com/news/story/09000d5d81e7561f/article/nfl-network-and-nflcom-combine-coverage> (last visited Nov. 7, 2011).

ing at home.¹⁹¹ At the Combine, representatives from every team are in attendance, from owners to general managers, head coaches, position coaches and area scouts. Probably the most important part of this intense, four-day job interview is the medical evaluations, as team doctors determine the physical and mental capabilities of these young men.

This additional information can only help student-athletes in men's basketball make a more educated choice.

5. Colleges and universities should invest in Professional Sports Counseling Panels ("PSCPs") so that student-athletes can get unbiased guidance during this critical period of their lives.¹⁹² Schools have the ability under NCAA rules to provide support to student-athletes when making the transition from college to professional leagues but, for the most part, this ability has been ignored.¹⁹³ If schools do not have the ability – either in financial resources or intellectual talent – on campus to provide this level of guidance, it should be done at the conference level.

Just as funding for PSCPs needs to be increased by member institutions, the NCAA needs to increase funding to combat these problems. A clear source of this funding could be the television deals the NCAA and the conferences have negotiated.¹⁹⁴ As pointed out in the Wong article, funding at the NCAA level could be used in a variety of ways, including: grants to support PSCPs at individual schools, a repository of best practices in the industry, education on a conference or national level to student-athletes, and proper disability insurance protection.

¹⁹¹ Frank Tadych, *Strength in Numbers? Media Crush at Combine*, NFL.COM <http://blogs.nfl.com/2011/02/24/strength-in-numbers-media-crush-at-combine/> (last visited Nov. 7, 2011).

¹⁹² Wong et al., *supra* note 14, at 575-76.

¹⁹³ *At Some Schools, Advisers Help Navigate Going Pro*, ESPN.COM (Oct. 14, 2011, 4:17 PM), <http://sports.espn.go.com/espn/wire?section=ncf&id=7101951>.

¹⁹⁴ In April of 2010, CBS and the NCAA reached a new 14-year, \$10.8 billion deal. See John Ourand and Michael Smith, *NCAA's Money-making Matchup*, SPORTSBUSINESSDAILY.COM (Apr. 26, 2010), <http://www.sportsbusinessjournal.com/article/65533>. In July 2010, ESPN and the Atlantic Coast Conference (ACC) reached a 12-year, \$1.86 billion deal. Just two years earlier, CBS and ESPN agreed to television deals with the SEC for a total of 15-years and \$3.075 billion. See Zach Berman, *Under New TV Deal with ESPN, ACC Schools to See Increased Payout*, WASH. POST, July 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070803383.html>.

6. The NBA and the NCAA should jointly revise the rules relative to the NBA draft, whereby any student-athlete who declares himself eligible has the ability, if not selected in the first round of the NBA draft and thus guaranteeing himself a contract under the latest CBA, to return to college. Teams should have little vested in someone they don't value as a first round pick. These student-athletes, so long as they haven't committed other NCAA infractions, would then have the opportunity to continue on towards a college degree while honing their craft and promoting their schools with another year of college basketball.
7. Student-athletes should be encouraged to graduate with financial incentives from the NBA for those who have spent additional years in college. It would be possible to grant free agency earlier if a player has completed his college degree or offer a slightly higher NBA minimum salary for those with college degrees. Either financial incentive could be enough to help a marginal prospect decide to invest in another year of college education. However, it is also feasible that the additional financial burden would be enough to impact the value of a particular player to an individual team.

One potential solution to this conflict is the creation of a separate league-wide pool that doles out "graduation bonuses." A set amount could be provided to anyone on an NBA roster who earns – or subsequently obtains – his college degree. This "bonus" could be reserved for those with a completed season of service.

The purpose of this enticement is to encourage student-athletes to further their education. However, a side benefit would be enjoyed by college athletics, as star players remain eligible for NCAA competition longer. There is no reason why the NCAA couldn't contribute funds to this league pool from the revenue it obtains from television contracts for March Madness. There is symmetry in allowing the student-athletes who generate the interest in the NCAA tournament to receive some financial return on their participation.

VI. CONCLUSION

The NBA and NCAA have each developed a regulatory framework that supports their own organizational missions. Unfortunately, the welfare of student-athletes is not a priority for either institution. The result is that when NCAA student-athletes consider their entry into professional basketball, the rules that govern this transition significantly hamper their ability to properly evaluate their options. Although the NBA and NCAA certainly

should maintain their own priorities, this Article has suggested a few easy remedies that would significantly enhance the ability of individual student-athletes to increase the likelihood that they are making the right decision during this life-changing decision period.



The Prospects for Protecting News Content Under the Digital Millennium Copyright Act

Priya Barnes*

ABSTRACT

The DMCA was enacted to provide adequate legal safeguards against piracy so that content producers, such as music, software, movie and other media producers, would be incentivized to embrace the digital medium. The antitrafficking provision, in particular, imposes civil and criminal sanctions on technology manufacturers who offer the means to circumvent content producers' digital access controls.

Since its enactment, the DMCA's antitrafficking provisions have been invoked against hackers of digital music, movies and software. This article weighs the prospects for applying the antitrafficking provisions against news aggregators who access password protected digital news content for redistribution. It concludes that while the case law is mixed on specific interpretations of the DMCA's antitrafficking provisions, its protections could be invoked against news aggregators that bypass access controls without a news website's authorization to do so.

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I. INTRODUCTION

In the modern era of digital news, once content leaves the confines of an access-controlled website, traditional legal remedies come too late. The unlimited ability to copy and distribute digital content means the content is irretrievably lost. Traditional copyright law provides little or no safeguard against the appropriation of a newspaper's protected digital content.

In a hard copy world, newspapers had little reason for concern when readers, critics, and commentators re-used content because the newspapers' ability to distribute printed copies was inherently limited. Besides, such re-use was, more often than not, permissible because it promoted important fair use principles. And if commercial entities with a wider reach appropri-

ated newspaper content, traditional copyright law provided newspapers with adequate remedies.¹

The critics and commentators of today's digital era are vast numbers of bloggers, micro-bloggers, and ordinary social media users. The Internet enables them to distribute appropriated news content on a vast scale at virtually no cost. Important fair use principles are still at stake, but the widespread dissemination of news content endangers the sustained ability of newspapers to produce quality journalism. Their investment in reporting is neither returned through controlled sales to subscribers and advertisers nor recovered through licenses to authorized bloggers and users. Further up the news chain, commercial news aggregators divert audiences from newspaper websites and profit from the resulting traffic through advertising sales.²

Can newspapers prevent news aggregators from appropriating online content by using new laws targeting digital piracy? Contrary to popular belief, The Digital Millennium Copyright Act's (DMCA's) anticircumvention provisions³ protect more than just movies, music, and videogames from piracy. Congress intended the act to protect a wide range of digital content, including news.⁴ Nonetheless, scholarly debate to date on the DMCA's anticircumvention provisions has typically featured digital music or videos in its illustrations of the scope and magnitude of the piracy problem.⁵ This article is the first to apply the DMCA's anticircumvention provisions to digital news content. Specifically, it assesses the prospects for applying the DMCA's antitrafficking provisions to news aggregators. Part II highlights the tension between the social policies underpinning the antitrafficking provisions, which have the potential to stem the continued decline of the news

¹ See Leonard Downie, Jr. & Michael Shudson, *The Reconstruction Of American Journalism*, 48 COLUM. JOURNALISM REV. 28, 40 (2009) (explaining that current copyright law has not kept up with new issues raised in digital publishing).

² See, e.g., Martin C. Langeveld, *Online Payola? Rocking the ASCAP Mode*, 143 ED. & PUB. 10, 10 (2010); Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 978-79 (2008).

³ 17 U.S.C. §§ 1201-1205 *et seq.* (2000).

⁴ See S. REP. NO. 105-190, at 2, 8 (1998).

⁵ See generally Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49, 60-65 (2006) (discussing digital rights management systems for music and video industries); R. Polk Wagner, *Reconsidering the DMCA*, 42 HOUS. L. REV. 1107 (2005) (discussing the DMCA's effect in limiting the development of digital rights management technologies); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 293 (2003) (discussing the propertization of copyright in the music and video industries).

industry, and the fair use value of news aggregators in disseminating information. Part III describes the historical circumstances leading up to the enactment of the DMCA, its purpose and structure, and the case law interpreting the statute. Particular attention is paid to paragraph (a)(2) within subsection 1201(a), which is the provision that potentially would apply to news aggregators. Part IV assesses whether the simplest of technologies commonly used by news websites, password protection schemes, are protectable under the DMCA. This paper concludes that liability under paragraph (a)(2) could attach to a news aggregator that circumvents a password protection scheme on a news website.

II. SHOULD THE LAW PROTECT THE NEWS INDUSTRY AGAINST NEWS AGGREGATORS?

A. *The State of the News Industry*

While the many obituaries that have been written about the newspaper industry are premature, virtually every trend for the industry, be it circulation, revenue, or employment, points to an existential crisis. Total paid circulation for U.S. daily newspapers peaked in 1987 at sixty-three million.⁶ Circulation in 2009 stood at forty-six million, a twenty-seven percent decline over twenty-two years.⁷ Total advertising revenues for newspapers peaked in 2000 at \$49 billion but declined to \$26 billion in 2010, representing a forty-seven percent reduction over half as much time.⁸ Full-time employment in America's newsrooms has declined by twenty-six percent since 2001,⁹ bringing their totals to a level last seen in the mid-1970s.¹⁰ Newspapers have struggled to respond. Recognizing the audience-shift from print to online media, newspapers went online as quickly as they

⁶ *Newspaper Circulation Volume*, 1940–2009, 2010 ED. & PUB. INT'L Y.B., reprinted in NEWSPAPER ASS'N OF AM., <http://www.naa.org/Trends-and-Numbers/Circulation/Newspaper-Circulation-Volume.aspx> (last visited November 10, 2011).

⁷ *Id.*

⁸ See NEWSPAPER ASS'N OF AM., *Advertising Expenditures*, 1950–2010, <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx> (last updated March 1, 2011).

⁹ See AM. SOC'Y OF NEWSPAPER EDS., *2011 Newsroom Census*, http://asne.org/key_initiatives/diversity/newsroom_census/table_n.aspx (last visited November 10, 2011).

¹⁰ Press Release, American Society of Newspaper Editors, Decline in Newsroom Jobs Slow, (April 11, 2010) (on file with author).

could.¹¹ They projected their advertising-based business model to an online world and awaited the turnaround in advertising revenues. It never came. In fact, the advertising-driven model for online journalism appears unlikely to be viable at the same pre-digital levels due to a massive oversupply of advertising venues.¹²

At stake in the industry's shift to a digital product is the continued flow of vital information that allows citizens to participate in a healthy civic and social life.¹³ The press has always played a pivotal role in American democracy. Even though the decline of newspaper audiences has been matched by an increase in audiences for online and cable news sources, the role of the newspaper as the primary source of independent, local news reporting remains unmatched.¹⁴ Policymakers, observers, and academics have recognized the serious implications for democratic society if newspaper industry declines continue at their current pace. Congress held three hearings in 2009 seeking solutions for the industry.¹⁵ A 2009 *CQ Researcher* report on the future of journalism identified the crux of the concern: "[T]he decline of newspapers will leave citizens without sufficient information for effective self-government . . . and the fragmented nature of the Internet . . . could turn the clock back to [a time when] readers read only publications with which they agreed," leading to a society primarily characterized by divisive partisanship.¹⁶

¹¹ See Tom Price, *Future of Journalism*, 19 *CQ RESEARCHER* 273, 286 (2009).

¹² Online ad revenue for newspapers was \$3 billion in 2010, only twelve percent of its total advertising revenue. See NEWSPAPER ASS'N OF AM., *supra* note 8. Newspaper ad revenue represented about a tenth of the total market for online advertising, reported to be \$26 billion in 2010 by the Interactive Advertising Bureau. INTERACTIVE ADVER. BUREAU, *IAB Internet Advertising Revenue Report: 2010 Full Year Results*, 1, 6 (April 2011), available at http://www.iab.net/media/file/IAB_Full_year_2010_0413_Final.pdf; see also Paul Farhi, *Build That Pay Wall High*, 31 *AM. JOURNALISM REV.* 22, 24 (2009); Price, *supra* note 11 at 276.

¹³ See Downie & Shudson, *supra* note 1, at 40.

¹⁴ See, e.g., Adam Lynn et al., *Traditional Content Is Still King As The Source of Local News and Information* (May 21, 2008)(conference paper presented to the Int'l Comm. Ass'n) (available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/3/3/1/4/pages233147/p233147-1.php) (analyzing survey data on media usage compiled by the Federal Communication Commission and a survey of Internet web sites involved in the dissemination of local news).

¹⁵ Bruce W. Sanford et al., *Saving Journalism With Copyright Reform and the Doctrine of Hot News*, 26 *COMM. LAW.* 8, 8 (2009).

¹⁶ Price, *supra* note 12, at 275.

Some in the news industry have pointed to the rise of news aggregators as the driving force behind the industry's decline.¹⁷ Newspapers charge that news aggregators violate their copyrights and engage in unfair competition by copying and redistributing their stories without authorization or, more importantly, payment.¹⁸ News organizations complain that commercial news aggregators' unauthorized and uncompensated use of their content threatens the newspaper industry's ability to produce quality journalism.¹⁹

B. *The Relationship Between News Aggregators and News Websites*

A news aggregator is a website that gathers information from multiple primary sources to display it in a single site.²⁰ *Google News*,²¹ *Yahoo News*,²² *HuffingtonPost.com*,²³ and *RealClearPolitics.com*²⁴ are a few examples of commercial news aggregators. News aggregators have been categorized as either feed aggregators or specialty aggregators.²⁵ Feed aggregators compile news items from multiple sources across a wide variety of topics, while specialty aggregators compile news items from multiple sources focused on a single

¹⁷ See, e.g., Downie & Shudson, *supra* note 1, at 40.

¹⁸ See, e.g., Jeffrey D. Neuburger, *A Brief History of AP's Battles with News Aggregators*, PBS MEDIASHIFT (May 26, 2009), <http://www.pbs.org/mediashift/2009/05/a-brief-history-of-aps-battles-with-news-aggregators146.html>; *Editorial: Righting Copyright*, 142 ED. & PUB. 12, 12 (2009).

¹⁹ See Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenges of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 110–11 (2009).

²⁰ KIMBERLEY ISBELL, *The Rise Of the News Aggregator: Legal Implications And Best Practices 2* (The Berkman Ctr. for Internet & Soc'y at Harv. Univ. ed., 2010).

²¹ GOOGLE NEWS located online at <http://news.google.com/>, describes itself as "a computer-generated news site that aggregates headlines from news sources worldwide, groups similar stories together and displays them according to each reader's personalized interests." GOOGLE NEWS, http://news.google.com/intl/en_us/about_google_news.html (last visited December 5, 2011).

²² YAHOO NEWS is located online at <http://news.yahoo.com/>.

²³ HUFFINGTON POST, located online at <http://www.huffingtonpost.com/>, also creates original content.

²⁴ REALCLEARPOLITICS, located online at <http://www.realclearpolitics.com/>, describes its method as follows: "RealClearPolitics features the most comprehensive coverage online by selecting the best pieces, publishing columns from top syndicated authors and producing original content. RealClearPolitics editorial staff writes over 30% of the daily content." REALCLEARPOLITICS.COM, <http://www.realclearpolitics.com/about.html> (last visited December 5, 2011).

²⁵ See ISBELL, *supra* note 20, at 2–3.

topic, partisan orientation, or geographic location.²⁶ News aggregators can also be either pure-play aggregators or hybrids. Pure-play aggregators republish or link to source website content, while hybrid aggregators equally combine republishing and linking with original reporting and commentary. *RealClearPolitics.com* is an example of a mostly pure-play, specialty aggregator. The large majority of its headlines, ledes,²⁷ and full news stories are gathered and displayed from multiple sources for political news.

RealClearPolitics.com derives revenue from advertising based on traffic to its website and mobile applications. For some stories, a reader may click through from a headline to a deep link within the source website, bypassing the source website's home page. In other cases, a reader may read the entire story on *RealClearPolitics.com* without ever visiting the source website. From the source website's perspective, the diversion of audiences from its home page in the case of deep links, or its entire website in the absence of any links, represents lost advertising revenue.²⁸ Audiences satisfied with *RealClearPolitics.com's* snippets may never visit the source website at all, further eroding the newspaper's advertising revenues.²⁹

Two additional factors are relevant in understanding the relationship between news websites and news aggregators. First is the normative expectation that a newspaper's website content should be free. Ironically, consumer expectations that online news content should be free were set by newspapers themselves. Unlike the motion picture industry, which initially resisted rushing to meet the demand for digital delivery without first ensuring that adequate legal and technological safeguards existed to protect against unauthorized access,³⁰ the newspaper industry entered the digital delivery business without parallel concerns. Newspaper industry leaders viewed digital delivery as a new distribution channel capable of driving advertising revenue growth.³¹ And from the start, consumers and intermediaries, like search engines and news aggregators, were able to access a

²⁶ *Id.*

²⁷ A lede is the introductory section of a news story that is intended to entice the reader to read the full story. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 709 (11th ed. 2003).

²⁸ Netanel, *supra* note 2, at 979.

²⁹ *See id.*

³⁰ For example, the movie industry had pioneered the development of CSS, or the Content Scramble System, to safeguard against unauthorized access of DVDs even before the DMCA was passed. *See* Pamela Samuelson, *DRM {and, or, vs.} the Law*, 46 COMM'NS OF THE ACM 41, 42-43 (2003).

³¹ *See* Downie & Shudson, *supra* note 1, at 32.

newspaper's digital content without being blocked by access control schemes.

Second, news sites may strike licensing deals with news aggregators to recapture lost revenues. Many newspapers have adopted licensing strategies as a solution that seeks to equalize the high cost of news production borne by newspapers with the low cost of distribution enjoyed by news aggregators.³² The DMCA's penalty provisions may give the newspaper industry powerful leverage in vigorously pursuing a licensing strategy with news aggregators.³³

To date, no DMCA antitrafficking claims have been brought against news aggregators for circumventing a technological protection measure. The few online copyright infringement lawsuits that have been brought against news aggregators have been settled out of court.³⁴ At least one such agreement, between GateHouse Media and the parent company of the *Boston Globe*, made reference to antitrafficking boundaries through the use of specific terms of art from the DMCA.³⁵ The use of these terms of art suggest that the industry is starting to include the DMCA in its store of legal strategies to protect against online infringement.

C. *The Social Value of News Aggregators*

News aggregation tools like Google News increase citizen access to the "marketplace of ideas."³⁶ A competitive marketplace of ideas, characterized by a wide number of antagonistic sources and the wide dissemination of

³² See Rick Edmonds, *The Yahoo Partnership—Big Deal or No Big Deal?*, POYNTER.ORG (Mar. 3, 2011), <http://www.poynter.org/uncategorized/79437/the-yahoo-partnership-big-deal-or-no-big-deal/>.

³³ See 17 U.S.C. §§ 1203, 1204 (2010) (providing civil and criminal penalties for the unauthorized circumvention of technology measures protecting copyrightable works).

³⁴ See, e.g., Neuberger, *supra* note 18 (discussing the New York Times Co.'s recent settlement with GateHouse Media from copyright litigation over the excerpting of GateHouse content on Boston.com, and the Associated Press's settlement from its copyright infringement lawsuit against the *Moreover* news aggregation service owned by Verisign); ISBELL, *supra* note 20, at 4 (discussing the settlement agreement between Agence France Presse (AFP) and Google News from a lawsuit alleging that Google News had infringed upon AFP copyrightable content).

³⁵ The settlement agreement between the New York Times Co. and GateHouse Media used the terms "technological protection measure" and "circumvention," both key terms in section 1201 of the DMCA. See *infra* p. 218–219.

³⁶ See Stucke & Grunes, *supra* note 19, at 105–06.

information, plays a central role in our democracy.³⁷ The truth is most likely to be revealed, and our social, political and cultural health most assured, when more ideas compete.³⁸ News aggregators, by definition, are not content creators. Nor do they necessarily increase the number or variety of primary sources when they republish or rebroadcast information. They do, however, extend the reach of these sources. More people receive information, which, in turn, spurs greater dialogue and discourse. News aggregators' precise role in creating an engaged and informed electorate has not been conclusively documented. Even so, its pipeline characteristic of increasing the reach of information among the electorate should be a fair use concern.

Studies have shown that media markets characterized by less competition in ideas and low audience feedback are prone to supply-side bias.³⁹ That is, markets in which one media voice dominates tend to have less objective coverage of political issues.⁴⁰ In such markets, a news aggregator's effect of providing greater access to news sources may become vitally important. By increasing consumers' choice of access to the same information, news aggregators may provide a balancing pressure for dominant media to be less biased in their coverage.

News aggregators also represent consumer interests by increasing the variety and reach of information produced by large media corporations among viewers, readers, and listeners. Policies that favor news aggregators arguably protect these consumer interests over the interests of large media corporations.⁴¹ Policies that protect newspapers against commercial news aggregators assume that media corporations are the proper beneficiaries of

³⁷ *Id.* at 106.

³⁸ Accordingly, the Supreme Court has advocated broad constitutional protections for free expression, invalidating state actions that encroach on the widest possible dissemination of information. *See, e.g., Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (identifying “the continued building of our politics and culture” as a *raison d’être* for the right to freedom of expression and the basis for invalidating a city ordinance prohibiting school picketing); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” in rejecting a public official’s libel action against a newspaper in the absence of a showing of actual malice).

³⁹ *See Stucke & Grunes, supra* note 19, at 119.

⁴⁰ *See id.*

⁴¹ This argument presumes that news aggregators are not large media corporations themselves.

free press protections.⁴² But defining commercial news aggregators' use of primary news sources as fair use makes consumers, such as bloggers and other users, the beneficiaries of press freedoms.

On the other hand, an increasing number of specialty aggregators that are highly partisan in their selection of news sources⁴³ can lead to their on-line audiences experiencing even narrower, more distorted views of the world.⁴⁴ Fueled by the natural human tendency to associate with like-minded people, partisan specialty aggregators contribute to a closed "echo-chamber" effect, in which audiences subscribing to a particular worldview grow more entrenched in their positions and farther apart from those with competing views.⁴⁵ Without the tempering effect of neutral news sources, commentators worry that the echo chamber effect increases the rancorous tenor of political discourse and ultimately prevents political compromise and bipartisanship.⁴⁶ Moreover, if news aggregators do indeed threaten the primary source's ability to produce quality information,⁴⁷ news aggregators may also contribute to the lowering of the level discourse in our democracy by reducing the number of primary sources.

As the newspaper industry redefines its business model for the digital age, one of the tools at its disposal is the Digital Millennium Copyright Act (DMCA). The act was intended to protect digital content producers against the unauthorized use and distribution of their copyrighted content. Newspapers have constitutionally mandated copyright protection for their originally compiled content. Their interest in receiving fair compensation, and indeed survival, must be balanced with the public's interest in the widespread dissemination of information. The news industry's use of the DMCA to enforce restrictions on news aggregator access could be permissible because the public interest served by aggregators is not prevented from being achieved in other ways.

⁴² See Stucke & Grunes, *supra* note 19, at 106.

⁴³ For example, HUFFINGTONPOST.COM is liberal and the DRUDGEREPORT.COM is conservative. Eric Lawrence, John Sides & Henry Farrell, *Self-Segregation or Deliberation? Blog Readership, Participation, and Polarization in American Politics*, 8 PERSP. ON POL. 141, 147 (2010).

⁴⁴ Price, *supra* note 11, at 278–79.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *supra* p. 204–206.

D. *The Newspaper Industry Response*

Like the movie and music industries in the 1990s, newspapers are now revisiting the idea of digital access controls. Their experiments with establishing protective technology and licensing standards recalls the movie and music industries' experience with similar controls.⁴⁸

In the music and movie industries, digital access control measures have taken the form of encryption schemes,⁴⁹ password and handshake routines,⁵⁰ pay walls,⁵¹ and flag-based schemes.⁵² Newspapers have made preliminary advances in establishing similar access control measures. For example, major news websites condition full access to news content on a user's creation of a password-protected account.⁵³ A few general interest newspapers, like the *New York Times*, have launched digital pay walls to protect their content.⁵⁴

⁴⁸ See, e.g., Zachary M. Seward, *Who, Really, is The Associated Press Accusing of Copyright Infringement?*, NIEMAN JOURNALISM LAB (Aug. 14, 2009), <http://www.niemanlab.org/2009/08/who-really-is-the-associated-press-accusing-of-copyright-infringement/>; Samuelson, *supra* note 30, at 43 (noting that digital rights management can be mandated in two ways, a standard-setting process or public legislation).

⁴⁹ Digital content protected by an encryption algorithm can only be unlocked by designated or approved devices. For example, at one time Apple prevented users from playing digital music downloaded through its iTunes online music store on any device other than Apple iPods through the use of an encryption-based digital rights management system. Press Release, *Apple Unveils Higher Quality DRM-Free Music on the iTunes Store*, APPLE (Apr. 2, 2007), available at <http://www.apple.com/pr/library/2007/04/02Apple-Unveils-Higher-Quality-DRM-Free-Music-on-the-iTunes-Store.html>.

⁵⁰ Handshake routines require a device to transmit a secret handshake code, which when recognized by a remote server, unlocks digital content. For example, a streaming video player like RealPlayer transmits a recognized handshake to a server (RealServer) before video streaming can commence. See *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, *2–3 (W.D. Wash. Jan. 18, 2000).

⁵¹ Pay walls condition access to copyrightable digital content upon payment of a subscription fee. For example, the Thomson Reuters' Westlaw website is guarded by a pay wall that grants users access to content only upon payment of the requisite subscription fee.

⁵² Flag-based schemes require a hardware device to respond to digital flags or codes embedded in transmitted data in a prescribed manner. For example, a broadcast flag may require a video receiver to prevent display of unauthorized broadcast content.

⁵³ See, e.g., THE WASHINGTON POST, <http://www.washingtonpost.com>.

⁵⁴ Arthur Sulzberger, Jr., *Letter to Our Readers: Times Begins Digital Subscriptions*, N.Y. TIMES (Mar. 28, 2011), <http://www.nytimes.com/2011/03/28/opinion/l28times.html>.

Others are striking deals with device manufacturers, like Apple, to make exclusively licensed content available on their devices, like Apple's iPad.⁵⁵

On the legal front, news organizations are beginning to utilize the anticircumvention protections of the DMCA. The recent case of appropriated online articles from GateHouse Media's "Wicked Local" sites provides an example.⁵⁶ GateHouse Media publishes geographically targeted print newspapers for the Waltham, Needham and Newton communities in Massachusetts, along with corresponding online newspapers commonly known as the Wicked Local sites for each community.⁵⁷ In 2008, the Globe Newspaper Company ("Globe") started displaying the headlines and ledes from the Wicked Local sites on *Boston.com*, including deep links to the Wicked Local sites.⁵⁸ GateHouse Media brought a copyright infringement action against Globe.⁵⁹ The suit was eventually settled out of court.⁶⁰ While the action was not brought under the DMCA, the settlement agreement outlined broad provisions for ongoing compliance with preventative technological measures, as defined under the DMCA.⁶¹

Newspaper industry leaders are attempting to build industry-wide support for uniform digital rights management standards. Their efforts parallel the momentum leading up to the agreement between the motion picture and consumer electronics industries to adopt CSS, or Content Scrambling System, as the *de facto* encryption standard for controlling the distribution of home movies on DVDs.⁶² For example, in 2006, a coalition of international publishers announced the creation of Automated Content Access Protocol ("ACAP"). ACAP consists of digital code embedded in news websites to instruct search engines on copyrighted content use.⁶³ In 2009, *Associated*

⁵⁵ *News Corp., Apple Join to Launch iPad-Exclusive News App 'The Daily'*, FOX NEWS (Feb. 2, 2011), <http://www.foxnews.com/scitech/2011/02/02/news-corp-apple-prepare-unveil-ipad-news-service-daily/>.

⁵⁶ Amended Complaint at 2–3, *GateHouse Media Mass I, Inc. v. N.Y. Times Co.*, No. 1:08-12114-WGY, 2009 WL 301807 (D. Mass. Jan. 22, 2009).

⁵⁷ *Id.*

⁵⁸ *Id.* at 9–10.

⁵⁹ *Id.* at 4.

⁶⁰ Settlement Agreement, *GateHouse Media Mass I, Inc. v. N.Y. Times Co.*, No. 1:08-12114-WGY (D. Mass. Jan. 25, 2009).

⁶¹ *Id.* at § 1 (memorializing the parties' agreement to implement "commercially reasonable technological solutions" that neither party would "directly or indirectly circumvent").

⁶² See Samuelson, *supra* note 30, at 43.

⁶³ Noam Cohen, *Paying for Free Web Information*, N.Y. TIMES, Dec. 10, 2007, at C4.

Press (“AP”) announced the creation of a digital news registry using a microformat known as hNews.⁶⁴ A microformat is a type of digital code that allows a news website’s content to be tagged with copyright management and other information.⁶⁵ Most recently, AP announced the creation of an independent rights clearinghouse to manage the licensing of news content using its digital news registry.⁶⁶

Over the last decade, courts have considered the scope of protection for many of these forms of technological protections under the anticircumvention provisions of the DMCA, mostly in the context of the movie, gaming, and music industries. Whether a court will allow a newspaper to make a DMCA claim against a news aggregator remains to be seen.

III. THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. *History and Purpose of the DMCA*

The Digital Millennium Copyright Act (DMCA) was the entertainment industry’s response to digital pirates. Entertainment industry fears of mass piracy stemming from the ease and speed of sharing digital files, like MP3s and DVDs, prompted Congress to pass the DMCA.⁶⁷

Congress also desired to update the U.S. copyright regime to suit the demands of a new era.⁶⁸ Accordingly, the anticircumvention provisions of

⁶⁴ Press Release, Associated Press, AP to Build News Registry to Protect Content (July 23, 2009) (on file with author).

⁶⁵ See Langeveld, *supra* note 2, at 10.

⁶⁶ Press Release, Associated Press, AP to Pursue Creation of Rights Clearinghouse to Help News Organizations License Digital Content (Oct. 18, 2010) (on file with author). ACAP, hNews, and the AP digital news registry are technologies that clearly respond to section 1202 of the DMCA. Section 1202 prohibits the falsification, alteration, or removal of copyright management information in digital content. 17 U.S.C. §§ 1202(a)– (b) (2006).

⁶⁷ See, e.g., H.R. REP. NO. 105-551, pt. 2, at 23 (1998); S. REP. NO. 105-190, at 7 (1998).

⁶⁸ H.R. REP. NO. 105-551, pt. 1, at 10 (1998). Another impetus for the DMCA was the need to comply with two international treaties dealing with copyright in a borderless digital era. See *id.* at 11. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty contain substantively identical anti-circumvention provisions as the DMCA. For instance, Article 11 of the Copyright Treaty provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty of the Berne

the DMCA introduced new legal deterrents against unauthorized access of digital works.⁶⁹ Its goal was to modernize traditional copyright law, which targeted only the unauthorized copying or distribution of digital files.⁷⁰ The DMCA targets individuals or organizations that break digital controls designed to prevent unauthorized access of files. It is an attempt to protect the locks on the proverbial barn door in order to prevent the content horse from leaving in the first place. Traditional copyright still protects the content horse, but now the DMCA also protects the locks on the barn door. Under the DMCA, it is illegal to circumvent “technological measures” intended to “control access” and “protect rights” to copyrighted works in digital form.⁷¹

The drafters specifically had DVDs encrypted with CSS in mind while drafting section 1201. Movie industry executives saw the enormous potential of CSS-encrypted DVDs, which were launched in the late 1990s. Encrypted DVDs allowed them to retain full control of home movie releases of their movie because only licensed hardware manufacturers could produce the CSS-encrypted DVDs.⁷² But movie industry executives also realized that the encryption scheme inevitably would be hacked. They went to Congress for help in securing added legal assurances that made the civil and criminal cost of hacking high.⁷³ These assurances simply did not exist in then-current copyright law.

The movie industry’s worst nightmare came true almost immediately. In 1999, a Norwegian teenager developed “DeCSS.” DeCSS allows a user to decrypt the contents of a CSS-encrypted DVD.⁷⁴ Combined with advancements in video file compression and peer-to-peer digital distribution, DeCSS effectively circumvented the movie industry’s supposedly airtight technol-

Convention and that restrict acts, in respect of their works, which are not authorized by authors concerned or permitted by law.

WIPO Copyright Treaty, art. 11, Apr. 12, 1997, S. TREATY DOC. NO. 105-17.

⁶⁹ 17 U.S.C. §§ 1201–1205 (2006).

⁷⁰ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

⁷¹ See §§ 1201–1205. The Federal Circuit has said that prior to the passage of Title I of the Digital Millennium Copyright Act in 1998, “a copyright owner would have had no cause of action against anyone who circumvented any sort of technological control, but did not infringe.” *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1195–96 (Fed. Cir. 2004).

⁷² *Armstrong*, *supra* note 5, at 61 n.49.

⁷³ 17 U.S.C. § 1203 creates civil remedies and § 1204 provides criminal sanctions for DMCA violations.

⁷⁴ See *Armstrong*, *supra* note 5, at 61 n.49.

ogy scheme.⁷⁵ At that point, reprogramming of DVD players to defeat DeCSS was an expensive and impractical solution for an industry deeply invested in the existing system.⁷⁶ The movie industry filed one of the first major DMCA lawsuits against a defendant who had posted a link to DeCSS on a website popular with the hacking community. A New York district court ruled in favor of the movie industry in *Universal City Studios, Inc. v. Reimerdes*, and the Second Circuit affirmed the decision in *Universal City Studios, Inc. v. Corley*.⁷⁷ These early cases provided a swift kick-off for the rich and checkered series of judicial interpretations of the DMCA's antitrafficking provisions over the next decade.

Although Congress drafted the DMCA with CSS-encrypted DVDs in mind, the anticircumvention protections apply to the wider variety of online content traditionally protected under the Copyright Act.⁷⁸ The legislation's aim was to "protect[] and create[] the legal platform for launching the global digital online marketplace for copyrighted works[,]. . . [including] movies, music, software, and *literary works*."⁷⁹ News articles qualify as "a work protected under this title"⁸⁰ as compilations that reflect an author's original expression and that are more than discovered facts alone.⁸¹

Like prior major amendments to the copyright regime, the DMCA reflects the constitutionally derived balance that Congress sought to strike between the rights of content owners with the rights of viewers, readers, and listeners. But unlike prior amendments, the DMCA regulated devices for the first time.⁸² In fact, the DMCA's reach over device regulation led to a

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

⁷⁸ See S. REP. NO. 105-190, at 1 (1998).

⁷⁹ *Id.* (emphasis added).

⁸⁰ 17 U.S.C. § 1201(a)(1)(A) (2006).

⁸¹ 17 U.S.C. § 102(a) (1994) defines copyrightable subject matter to include "original works of authorship fixed in any tangible medium of expression . . . includ[ing] (1) literary works" and §102(b) clarifies that copyright protection is not extended to "discovery" or facts. See also *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918) (identifying news articles with a "particular form or collocation of words in which the writer has communicated [the substance of the information]" as being unquestionably the subject of copyright).

⁸² In a Sept. 16, 1997, letter to Congress, sixty-two copyright law professors expressed their concerns about the bill being "an unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct

struggle for control over the bill between the House Judiciary Committee, which typically oversees intellectual property, and the House Commerce Committee, which viewed device regulation as its turf.⁸³

One issue that attracted substantial commentary surrounded what then-Senator Ashcroft described as “the specter of moving our nation towards a ‘pay-per-use’ society.”⁸⁴ As the Ninth Circuit has explained, “Congress was particularly concerned with encouraging copyright owners to make their works available in digital formats such as ‘on-demand’ or ‘pay-per-view,’ which allow consumers effectively to ‘borrow’ a copy of the work for a limited time or a limited number of uses.”⁸⁵ In comparison, when consumers used to buy the videocassette of a movie or the audiocassette of an album, they were not restricted to playing them only a specified number of times or on specified types of devices. Ashcroft’s “specter” of a pay-per-use society was a reference to the way in which the DMCA would usher in a fundamentally different era that could greatly favor the copyright owner at the expense of the copyright user. Today, the digital age permits content producers to market their products incrementally, thereby maximizing their ability to generate revenues from the same products. The copyright industry wanted Congress to solidify this possibility in the originally drafted version of the bill.

The original bill leading up to the DMCA was far more pro-copyright owner than what was finally enacted; it granted greater fair use protections for copyright users by the time the bill made its way through the House Judiciary and Commerce Committees. One such change was delegating au-

which traditionally has fallen outside the regulatory sphere of intellectual property law.” H.R. REP. NO. 105-551, pt. 2, at 31 (1998).

⁸³ The Commerce Committee had unsuccessfully sought to remove the anti-circumvention provisions from Title 17 altogether on the grounds that it had nothing to do with copyright:

H.R. 2281, as reported by the Committee on the Judiciary, would regulate—in the name of copyright law—the manufacture and sale of devices that can be used to improperly circumvent technological protection measures. The Committee on Commerce adopted an amendment that moves the anti-circumvention provisions out of Title 17 and establishes them as freestanding provisions of law. The Committee believes that this is the most appropriate way to implement the treaties, in large part because these regulatory provisions have little, if anything, to do with copyright law. H.R. REP. NO. 105-551, pt. 2, at 23–24 (1998).

⁸⁴ 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).

⁸⁵ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 947 (2011).

thority to the Librarian of Congress for authorizing fair use exceptions every three years.⁸⁶ As Senator Ashcroft summarized:

Under the compromise embodied in the conference report, the Librarian of Congress would have authority to address the concerns of libraries, educational institutions, and other information consumers potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today. I trust that the Librarian of Congress will implement this provision in a way that will ensure information consumers may exercise their centuries-old fair use privilege to continue to gain access to copyrighted works.⁸⁷

The Librarian of Congress has identified several exceptions in the last decade, including the recent widely reported exception permitting jailbreaking the iPhone or other cell phone operating systems to run unauthorized apps upon switching cellular service providers.⁸⁸ The jailbreaking exception reflected the policy of prohibiting the improper use of copyright law to control the after-sale use of devices.

Even though the concern for protecting fair use is both expressly enunciated in section 1201 as well as supported in the legislative reports, critics continue to hold that the DMCA fair use safeguards are inadequate. The two competing policy paradigms that Congress weighed in drafting the DMCA are playing out in today's pay-per-view model of news delivery: one, that fair use is a remnant of a time when small uses could not be efficiently managed and paid for, a problem that is overcome in the digital world; the other, that fair use of copyrighted material must be especially protected in a pay-per-view digital world.⁸⁹ Legislative compromises made during the DMCA's enactment were partially intended to mitigate the latter concern, described as "the specter . . . of a 'pay-per-use' society" by Senator Ash-

⁸⁶ 17 U.S.C. § 1201(a)(1)(C) (2006).

⁸⁷ 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft). One of Senator Ashcroft's key concerns was to also "ensure that . . . section 1201(a) did not inadvertently make it unlawful for parents to protect their children from pornography . . . or have unintended legal consequences for manufacturers of products designed solely to enable parents to protect their children in this fashion." S. REP. NO. 105-190, at 13. Senators Ashcroft, Leahy and Hatch sponsored the exception for the protection of minors contained in § 1201(k).

⁸⁸ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,831 (July 27, 2010).

⁸⁹ David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 967 (2002).

croft.⁹⁰ But Congress also recognized that technological advancements could make the pay-per-use model practical, efficient, and equitable.⁹¹ As David Nimmer has argued, the pay-per-use model was not rejected because Congress outlawed it but because of technology limitations; future developments in technology could still make it practicable.⁹² Scholars who place a high value on authors' rights praise the fact that the DMCA's protection for technological measures has fostered new business models to bring content to consumers at a variety of price point options.⁹³ These scholars argue that critics' fears of content being locked up behind digital walls simply have not materialized⁹⁴ or that the DMCA, by now permitting microconsent through technology—something that though possible was impractical to do through traditional licensing contracts—increases the incentives for creation and expands product diversity.⁹⁵

Ultimately, the DMCA received the support of a wide variety of stakeholders with otherwise divergent interests.⁹⁶ Signed into law in October

⁹⁰ 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).

⁹¹ The House Commerce Committee, which was particularly concerned with preserving fair uses, described the importance of developing a legal framework that was flexible enough to keep pace with technological advancements:

[A] plentiful supply of intellectual property—whether in the form of software, music, movies, literature, or other works—drives the demand for a more flexible and efficient electronic marketplace. As electronic commerce and the laws governing intellectual property (especially copyright laws) change, the relationship between them may change as well. . . . [For] example, an increasing number of intellectual property works are being distributed using a “client-server” model, where the work is effectively “borrowed” by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a *pay-per-view basis*). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy. H.R. REP. NO. 105-551, pt. 2, at 23 (emphasis added).

⁹² Nimmer, *supra* note 89, at 967–68.

⁹³ Jane C. Ginsberg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11, 12 (2005).

⁹⁴ *Id.*

⁹⁵ See Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 293–96 (2003).

⁹⁶ Senator Kohl's statement reflects the scale of the collaboration that was involved across many industries beyond the content owning industries:

1998 by President Clinton, the DMCA took the form of five titles. Section 1201, contained in the first title, is codified in Title 17 of the U.S. Code. It aimed to provide a remedy for digital piracy by creating an anticircumvention right for copyright owners who use technological measures to protect their works.⁹⁷ It also prohibited trafficking in devices that allow the public to circumvent protected works.⁹⁸ Section 1202 gives copyright owners enforcement rights for misuse of copyright management information included in their digital works.⁹⁹ Title II, added to Section 512 of the Copyright Act, immunizes Internet service providers from circumvention liability when they cooperate with copyright owners to detect and deal with online infringement.¹⁰⁰ Titles III and IV deal with exemptions from the anticircumvention provisions for service and repair, libraries and archives engaged in preserving works, and providers transmitting ephemeral reproductions.¹⁰¹

B. Content and Structure of Subsection 1201(a)(2)

Paragraph (a)(2) and more specifically (a)(2)(A), which prohibits trafficking in devices that circumvent access controls,¹⁰² is the main focus of this article. Paragraph (a)(2)(A) reads:

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

[The DMCA] is the product of intensive negotiations between all of the interested parties—including the copyright industry, telephone companies, libraries, universities and device manufacturers. And virtually every major concern raised during that process was addressed.

144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Kohl).

⁹⁷ See 17 U.S.C. § 1201(a)(1) (2006).

⁹⁸ See § 1201(a)(2).

⁹⁹ See § 1202 (2006).

¹⁰⁰ See 17 U.S.C. § 512 (2006).

¹⁰¹ 144 CONG. REC. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Leahy). Additionally, Title IV protects webcasting rights for sound-recording copyright owners, and Title V protects boat hull design rights. *Id.*

¹⁰² This is the second of three main prohibitions created in section 1201. The first bans the *act* of circumvention to gain access to a copyrighted work. § 1201(a)(1)(A). The third bans trafficking in devices that enable someone to circumvent a technological measure protecting a rights control in a copyrighted work. § 1201(b)(1)(A).

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title[.]¹⁰³

Paragraph 1201(a)(2) bans trafficking in devices designed to permit someone to circumvent a technological measure protecting *access* to a copyrighted work.¹⁰⁴ The plain language of the statute does not explicitly require an underlying copyright violation for anticircumvention liability to attach under any of the circumvention prohibitions of the DMCA.¹⁰⁵ The true focus of the DMCA is therefore not the copyrighted work itself, but rather the lock on the barn door.¹⁰⁶ Nevertheless, the protection can only be invoked when the right protected by the lock is a work protected under the Copyright Act.¹⁰⁷

News aggregators potentially fall within the scope of paragraph (a)(2) as traffickers if their programs allow users to access copyrighted news content protected by a technological measure against unauthorized access. Liability under paragraph (a)(2) requires a plaintiff to show that news aggregators meet the following elements:

- (1) Offer to the public, or provide any technology
- (2) Primarily produced for circumventing a technological measure
- (3) Effectively controls access
- (4) A copyrighted work.¹⁰⁸

¹⁰³ § 1201(a)(2)(A)

¹⁰⁴ § 1201(a)(2).

¹⁰⁵ See §§ 1201(a)–(b).

¹⁰⁶ In this sense, the DMCA is a new protection. Recently, the Ninth Circuit recognized that because neither subsection 1201(a)(1) nor 1201(a)(2) “explicitly refers to traditional copyright infringement under § 106[,] . . . we read this term as extending a new form of protection, i.e., the right to prevent circumvention of access controls, broadly to works protected under Title 17, i.e., copyrighted works.” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 945 (9th Cir. 2011). The Federal Circuit has, however, declined to go as far as recognizing a separate right in the anti-circumvention provisions, characterizing it as simply a new way that property owners can secure their property against “digital trespass.” *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1193–96 (Fed. Cir. 2004). The practical significance of this distinction has yet to play out fully in the courts, but it reflects the classic tension between the rights of copyright owners versus the rights of copyright users.

¹⁰⁷ 17 U.S.C. § 1201(a)(1)(A); see also *Chamberlain*, 381 F.3d at 1199; *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004).

¹⁰⁸ See *MDY Indus.*, 629 F.3d at 953 (identifying six elements of a paragraph (a)(2) claim, which are collapsed into four in this paper).

Two additional provisions are relevant here. Paragraph (a)(3)(A) defines “circumventing a technological measure” to mean “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner[.]”¹⁰⁹ The statute does not define “technological measure”, but paragraph (a)(3)(B) provides the criteria to be used to determine whether a technology measure controls access to a work: “[A] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”¹¹⁰

Also relevant to news aggregators are the fair use provisions of the DMCA. Paragraph 1201(c)(1) states, “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including *fair use*, under this title.”¹¹¹

C. *The Fair Use Concern*

News aggregators may argue that excerpting news articles along with a link to the original source constitutes fair use. Fair use is a pedigreed body of common law that was codified in the 1976 Copyright Act.¹¹² It circumscribes the exclusive rights of a copyright holder by allowing others to make use of portions of the copyrighted work for certain purposes.¹¹³ Courts apply a four-factor test to determine whether a particular use is justified as fair use. The factors, codified in law, are:

1. The purpose and character of the use, including whether it is of a commercial nature or for nonprofit, educational purposes
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect of the use upon the potential market for or value of the copyrighted work.¹¹⁴

¹⁰⁹ § 1201(a)(3)(A).

¹¹⁰ § 1201(a)(3)(B).

¹¹¹ § 1201(c)(1) (emphasis added); the doctrine of fair use is codified in 17 U.S.C. § 107.

¹¹² See 17 U.S.C. §107 (1994).

¹¹³ See *id.* Section 107 lists such purposes as “criticism, comment, news reporting, teaching . . . scholarship, or research.” *Id.*

¹¹⁴ *Id.*

Fair use concerns made frequent appearances during Congress's deliberations on the DMCA.¹¹⁵ Access control protections were intended to ensure that copyright owners received payment for the access.¹¹⁶ But Congress also sought to ensure that the anticircumvention provisions in Section 1201 did not undermine the fair use of information protected under the Copyright Act.¹¹⁷ Paragraph 1201(c)(1) expressly states that the DMCA leaves the fair use defense fully in force with regard to digital content.¹¹⁸ The Senate Judiciary Committee further clarified that paragraph (c)(1):

[d]oes not amend section 107 of the Copyright Act, the fair use provision. The Committee determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, *the fair use doctrine is fully applicable in the digital world as in the analog world.*¹¹⁹

While fair use immunizes direct acts of circumvention by users, it does not immunize the facilitation of circumvention by device manufacturers.¹²⁰ Paragraph 1201(a)(1), which covers direct acts of circumvention, contains several fair use exemptions and procedures.¹²¹ Courts have viewed the placement of these fair use provisions under paragraph (a)(1) and their omission under paragraph (a)(2), which covers trafficking in circumvention devices, as evidence of Congress's intent that a device is not exempted from circumvention liability by virtue of its permitting fair uses.¹²² The House

¹¹⁵ The term "fair use" appears nine times in the House Judiciary Committee Report, twenty-one times in the House Commerce Committee Report, and fourteen times in the Senate Report.

¹¹⁶ See H.R. REP. NO. 105-551, pt. 1, at 10 (1998).

¹¹⁷ *Id.* at 26.

¹¹⁸ 17 U.S.C. § 1201(c)(1) (2006) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."). Subsection (c)(4) also provides that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products." § 1201(c)(4). The Senate Judiciary Committee clarified that "these provisions are intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute." S. REP. NO. 105-190, at 30 (1998).

¹¹⁹ S. REP. NO. 105-190, at 23-24 (1998) (emphasis added).

¹²⁰ H.R. REP. NO. 105-551, pt. 2, at 18 (1998).

¹²¹ § 1201(a)(1)(B)-(E).

¹²² See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001) (explaining that authorization granted by a copyright owner for a direct act of circumvention cannot be a defense to a trafficking claim); *Universal City Studios, Inc.*

Committee on the Judiciary noted that the net effect of the law for consumers is that they “would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which [they have] acquired lawfully.”¹²³ Therefore, individual consumers of news content would not be prevented from circumventing access controls for fair uses of the news content. However, device manufacturers would have no immunity flowing to them from a user’s circumvention for permissible fair use purposes.

Opinion has diverged on the DMCA’s aims as it pertains to fair use. Some critically observe that the law grants content owners perpetual protection by permitting them to lock up their works in combination with public domain works behind digital pay walls.¹²⁴ They argue that the resulting protection is overbroad as it violates the constitutional mandate to free content for public access after a limited period of exclusive control.¹²⁵ Others argue that Congress intended to protect content owners’ emerging business models in the digital age, including pay-per-use models that had become possible through advancements in technology for collecting micropayments efficiently.¹²⁶

v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000) (explaining that the substantial noninfringing uses that a consumer could make with the trafficking device cannot absolve a trafficking claim), *aff’d*, 273 F.3d 429 (2d Cir. 2001). *But see* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1196 n.13 (Fed. Cir. 2004) (explaining that “[f]or obvious reasons, § 1201(a)(2) trafficking liability cannot exist in the absence of § 1201(a)(1) violations”). In *Chamberlain*, the Federal Circuit’s view of 1201(a)(2)(A) trafficking liability as a form of indirect or vicarious liability is neither consistent with plain language nor congressional intent. It is also not reconcilable with § 1201(c), which identifies “[o]ther rights, etc., not affected” and states in part that “[n]othing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.” § 1201(c).

¹²³ H.R. REP. NO. 105-551, pt. 1, at 18 (1998) (explaining that subsection (a)(1) does not apply to subsequent acts after the user has gained access to the work).

¹²⁴ See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 711-12 (2000).

¹²⁵ See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 524 (1999).

¹²⁶ See Ginsberg, *supra* note 93, at 12.

D. Overview of Case Law on (a)(2)(A)

The DMCA is only a decade old.¹²⁷ While the case law on the DMCA is still in its infancy, numerous district courts and circuits have interpreted its antitrafficking provisions. The following elemental analysis parallels the four elements required for a paragraph 1202(a)(2) violation, as enumerated in section II (B) above.¹²⁸

1. Offer, Provide, or Otherwise Traffic in Any Technology

An (a)(2)(A) claim requires that the defendant “offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof.”¹²⁹ The *Reimerdes* court offered the following common-meaning explanation of the verbs in this provision:

To “provide” something, in the sense used in the statute, is to make it available or furnish it. To “offer” is to present or hold it out for consideration. The phrase “or otherwise traffic in” modifies and gives meaning to the words “offer” and “provide.” In consequence, the anti-trafficking provision . . . is implicated where one presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it.¹³⁰

The anticircumvention provisions don’t just implicate physical devices. While Congress did state that this language was “drafted carefully to target ‘black boxes,’”¹³¹ the statute is explicitly worded to reach a broad variety of technologies, from hardware devices to software programs and components.¹³² A broad range of technologies fall within the orbit of the antitrafficking provision. Automated bot programs that allow users to play online games by circumventing access controls count as trafficking.¹³³ Mere posting and hyperlinking may also count as providing or trafficking within the

¹²⁷ Enacted in the 105th Congress in 1998, the DMCA went into effect January 1, 2000.

¹²⁸ See *supra* p. 220.

¹²⁹ 17 U.S.C. § 1201(a)(2) (2006).

¹³⁰ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000), *aff’d*, 273 F.3d 429 (2d Cir. 2001).

¹³¹ S. REP. NO. 105-190, at 29 (1998).

¹³² H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

¹³³ See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953 (9th Cir. 2011) (finding *Glider*, a bot program that facilitates playing the online game, *World of Warcraft*, to be a circumventing technology).

meaning of the DMCA.¹³⁴ In *Corley*, the Second Circuit held that a defendant violated the DMCA by posting hyperlinks to the DeCSS program on a website devoted to the hacking community.¹³⁵ More recently, a California district court held that an Internet browser tool, requiring human interaction, that allowed users to buy tickets in bulk from a variety of websites, was a trafficking technology.¹³⁶

2. Primarily Produced for Circumventing a Technological Measure

Paragraph (a)(2)(A) requires that the defendant's technology be "primarily designed or produced for the purpose of circumventing a technological measure" ¹³⁷ A plaintiff must prove that its technological protection measure was the primary target of the defendant's circumventing technology.¹³⁸ The Ninth Circuit in *MDY Industries v. Blizzard Entertainment* held that the automated program, Glider, was primarily designed to circumvent a technological measure because it was marketed that way and because it did not have any other use or purpose than to circumvent the plaintiff's World of Warcraft access-restriction technology.¹³⁹

But what is a "technology measure?" The DMCA does not provide a definition for the term. Congress deliberately sought to avoid defining specific standards for technology protection measures.¹⁴⁰ In Congress' judg-

¹³⁴ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 454 (2d Cir. 2001).

¹³⁵ See *id.*

¹³⁶ *Ticketmaster, LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1111–12 (C.D. Cal. 2007).

¹³⁷ 17 U.S.C. § 1201(a)(2)(A) (2006).

¹³⁸ *Id.*; see also *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004) (explaining that the plaintiff has this burden of proof).

¹³⁹ *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 953 (9th Cir. 2011). These two grounds—any other use/purpose and method of marketing—implicate § 1201(a)(2)(B) and (C), respectively.

¹⁴⁰ The concern is evident in numerous references to preserving industry's voluntary process for establishing technology standards in the Senate Judiciary Committee report on the DMCA. See S. REP. NO. 105-190, at 37–38, 52 (1998). Senator Leahy further elaborated this concern during debates on the DMCA that its provisions should not be interpreted to establish "a precedent for Congress to legislate specific standards or specific technologies to be used as technological protection measures, particularly with respect to computers and software" and adding that "[g]enerally, Congress should not establish technology specific rules; technology develops best and most rapidly in response to marketplace forces." 144 Cong. Rec. S11887-01 (daily ed. Oct. 8, 1998) (statement of Sen. Leahy).

ment, such standards were better left to market forces.¹⁴¹ In its view, minimalist technological measures, like password protection schemes, could qualify for anticircumvention protection. One of the first examples of circumventing a technological measure cited by the Senate Judiciary Committee was the evasion of password protection:

For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.¹⁴²

Courts also recognize that password protection schemes qualify as technological protection measures. The Second Circuit in *Corley* noted that password protection schemes are technological measures within the meaning of the DMCA.¹⁴³ Two California district courts have ruled that CAPTCHA routines, which are designed to ensure that only human users—and not automated or robot programs—are technology protection measures.¹⁴⁴ For instance, in *Craigslist v. Naturemarket*, Craigslist sued the operators of Power posting.com for enabling users to automate their classified advertising by quantity, frequency, and location.¹⁴⁵ The district court held that Power posting.com's automated software circumvented Craigslist's CAPTCHA routine.¹⁴⁶

District courts in New York and Ohio have also held password protection schemes to be technological measures in two cases, although neither

¹⁴¹ 144 Cong. Rec. S11887-01 (daily ed. Oct. 8, 1998).

¹⁴² S. REP. NO. 105-190 at 11 (1998) (footnote omitted).

¹⁴³ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001).

¹⁴⁴ *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010) (holding that the defendant's posting programs had illegally circumvented Craigslist CAPTCHA program by automatically posting classified advertisements on Craigslist.com); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1112 (C.D. Cal. 2007) (holding that the defendant's internet browser tool was used to illegally circumvent Ticketmaster's CAPTCHA program to purchase large quantities of tickets). Plaintiffs in both cases also had explicit terms of use on their respective websites forbidding the specific type of circumvention alleged in each.

¹⁴⁵ *Craigslist*, 694 F. Supp. 2d at 1048–49.

¹⁴⁶ *Id.* at 1056.

court found that these schemes were circumvented.¹⁴⁷ In the New York case, an advertising tracking service that sold its product through a password-protected website to clients sued a competitor for using a password obtained from a third party to copy components of its tracking service.¹⁴⁸ The Southern District of New York acknowledged that password protection schemes could be technological measures.¹⁴⁹ However, the court declined to find a section 1201 violation because the “[d]efendant did not surmount or puncture or evade any technological measure to [access the plaintiff’s protected website]; instead, it used a password intentionally issued by [the] plaintiff to another entity.”¹⁵⁰ An Ohio district court followed its New York counterpart’s reasoning in a data-processing software case.¹⁵¹ In that case, a credit union gave the password it used to access a data-processing software system to a vendor developing a competing system; the data-processing software company sued.¹⁵² The Ohio court found that the credit union “did not circumvent or bypass any technological measures of the [plaintiff’s] software—it merely used a username and password—the approved methodology—to access the software.”¹⁵³

One possible way to reconcile the different results between the CAPTCHA and password protection cases is to interpret circumvention as including only acts that are characteristically automated or non-human interactions. However, such an interpretation is not explicit in either the plain language of the statute or the congressional record.

The key to finding circumvention is not the technological nature of the access, but whether the access was authorized. A device circumvents a technological measure if it “descramble[s] a scrambled work, . . . decrypt[s] an encrypted work, or otherwise . . . avoid[s], bypass[es], remove[s], deactivate[s], or impair[s] a technological measure, *without the authority of the copyright owner*. . . .”¹⁵⁴ Consistently, the Southern District Court of New York in *Reimerdes* emphasized that decryption or avoidance of an access control

¹⁴⁷ See *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 878 (N.D. Oh. 2009); *I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d 521 (S.D.N.Y. 2004).

¹⁴⁸ *I.M.S. Inquiry*, 307 F. Supp. 2d at 523.

¹⁴⁹ *Id.* at 531.

¹⁵⁰ *Id.* at 532–33.

¹⁵¹ *R.C. Olmstead*, 657 F. Supp. 2d at 889.

¹⁵² See *id.* at 884.

¹⁵³ *Id.* at 889.

¹⁵⁴ 17 U.S.C. § 1201(a)(3)(A) (2006) (emphasis added).

measure is not circumvention unless it is also unauthorized.¹⁵⁵ The object of the authorization is the access-control technology, not the usage rights granted by the copyright holder to users. The proper question to be asked is: Did the copyright holder give authorization to circumvent the access control? In reviewing the *Reimerdes* decision, the Second Circuit agreed that while the purchaser of a DVD has the authority of the copyright owner to view the DVD, the authority for decrypting the DVD's CSS control using nonlicensed software cannot be implied from such purchase.¹⁵⁶ Therefore, purchase alone does not imply authorization to circumvent an access control.

In *Craigslist* and *Ticketmaster*, two California district courts correctly focused on the issue of authorization to the access control technology.¹⁵⁷ For example, Craigslist's website's terms of use explicitly forbade automated circumvention of its live posting functionality.¹⁵⁸ The court based Powerposting.com's violation on that explicit denial of authorization.¹⁵⁹ Further, the fact that postings were a generally permitted use was not material in the court's analysis. This interpretation is consistent with the *Reimerdes* court's reasoning in which authorization for a consumer to decrypt and view the DVD using a licensed DVD player did not imply authorization for the defendant to post the circumventing DeCSS code on a website.¹⁶⁰

Some courts have, however, incorrectly focused on authorization for consumer use instead of analyzing whether the access control was circumvented without authorization, explicit or otherwise.¹⁶¹ When a court confuses authorization for bypassing an access-control technology with authorization for use, it amounts to an additional requirement of underlying infringement that is contrary to the plain language of the DMCA. The Federal Circuit's opinion in *Chamberlain* reflected this confusion when it de-

¹⁵⁵ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 n.137 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

¹⁵⁶ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001).

¹⁵⁷ See *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d, 1096, 1112 (C.D. Cal. 2007). It should be noted that neither the New York nor the Ohio district courts in *I.M.S. Inquiry* and *R.C. Olmstead*, analyzed the correct issue—authorization for circumvention of an access control—but instead analyzed the inappropriate issue of authorization for use.

¹⁵⁸ *Craigslist*, 694 F. Supp. 2d at 1048.

¹⁵⁹ *Id.* at 1056.

¹⁶⁰ See *Corley*, 273 F.3d at 444 (reviewing the *Reimerdes* decision).

¹⁶¹ See, e.g., *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1193 (Fed. Cir. 2004) (suggesting that proof of authorized usage, or copying of a software in that case, is an element of an anticircumvention claim).

clared that “[d]efendants who traffic in devices that circumvent access controls in ways that *facilitate infringement* may be subject to liability under § 1201(a)(2). . . . [And] defendants whose circumvention devices do not *facilitate infringement*, are not subject to § 1201 liability.”¹⁶² If the Federal Circuit meant that evidence of actual infringement was required, the requirement would be at odds with congressional intent and the vast majority of opinions dealing with paragraph (a)(2). While the majority of courts have upheld the requirement that the protection measure must control access to a copyrightable work, no other court has also required an underlying infringement. The confusion over authorization for use versus circumvention is also reflected in a circuit split related to the requirement of an underlying infringement. Unlike the Federal Circuit, the Second Circuit,¹⁶³ along with the Ninth Circuit, do not require an underlying infringement to bring an (a)(2)(A) cause of action. In *MDY Industries*, the Ninth Circuit observed that two of the acts listed in paragraph (a)(3)(A), which defines circumvention, do not necessarily result in infringing activity.¹⁶⁴ Both descrambling and decrypting may permit non-infringing viewing of protected works without permitting infringing distributing or copying. The Ninth Circuit was, therefore, satisfied that Congress did not intend an infringement nexus.¹⁶⁵

3. Effectively Controls Access

A plaintiff must prove that the technological protection measure employed “effectively controls access to a work protected under this title.”¹⁶⁶ A measure effectively controls access when, “in the ordinary course of its operation, [it] requires the application of information, or a process or a treat-

¹⁶² *Id.* at 1195 (emphasis added). The Federal Circuit rejected Chamberlain’s assertion that it had not provided Skylink with permission because it rested on the faulty underlying assumption that “Chamberlain is entitled to prohibit legitimate purchasers of its embedded software from ‘accessing’ the software by *using* it.” *Id.* at 1202 (emphasis added). This is further evidence of the Federal Circuit’s confusing of authorization for consumer use with authorization for Skylink’s access. *See id.* at 1202.

¹⁶³ In *Reimerdes*, the New York district court observed, “Whether defendants did so in order to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for purposes of Section 1201(a)(2).” *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000), *aff’d*, 273 F.3d 429 (2d Cir. 2001).

¹⁶⁴ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 (9th Cir. 2011).

¹⁶⁵ *Id.*

¹⁶⁶ 17 U.S.C. § 1201(a)(2)(A) (2006); *Chamberlain*, 381 F.3d at 1202.

ment, with the authority of the copyright owner, to gain access to the work[s].”¹⁶⁷

In *Lexmark v. Static Control Components*, the Sixth Circuit interpreted “effectively controls access” to mean that the access control must directly protect the copyrightable work and not a function.¹⁶⁸ The court declined to find an (a)(2) violation for a program that controlled access to use of a printer without controlling the literal copyrightable software code in the program.¹⁶⁹ But the court confused its explanation when it stated that restricting one avenue while leaving another wide open rendered the program ineffective and thus outside the scope of DMCA protection.¹⁷⁰ Under this reading of “effectively,” only one form of access to material is controlled, or access is controlled to only a certain subset of people, the partial access control would not be protectable under the DMCA.

The Ninth Circuit offers some clarity here. It interpreted “effectively” to mean that the access control measure must protect the copyrighted work consistently in terms of both a spatial and temporal connection between the access control measure and the work being protected.¹⁷¹ In the case of the component non-literal elements of the computer game *World of Warcraft*, such as its visual and aural parts, the Ninth Circuit held that *Warden*, the asserted access control, was ineffective because a player could access them at any time without encountering *Warden*.¹⁷²

However, *Warden* was an access control within the meaning of the DMCA for the game’s dynamic non-literal elements, such as the game experience, because a player encountered it, albeit not always, during play.¹⁷³ Both the Sixth and Ninth Circuits seem to be saying that the access control measure must be consistently connected to the copyrightable work in order to meet the effectiveness standard. The Sixth Circuit’s example of leaving

¹⁶⁷ § 1201(a)(3)(B).

¹⁶⁸ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546 (6th Cir. 2004).

¹⁶⁹ *Id.* at 546–47.

¹⁷⁰ *Id.* at 547 (explaining that “the DMCA not only requires the technological measure to ‘control[] access’ but also requires the measure to control that access ‘effectively,’ and it seems clear that this provision does not naturally extend to a technological measure that restricts one form of access but leaves another route wide open”) (citations omitted).

¹⁷¹ See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953–54 (9th Cir. 2011).

¹⁷² *Id.* at 952.

¹⁷³ *Id.* at 954

the back door open while locking the front door¹⁷⁴ would be a better explanation reframed as expecting the entire house to be protected when only a door to an inside room had been locked.

Further, courts have clarified that the phrase “effectively controls access to a work” does not require that the protection be sufficiently strong or even actually work; rather, a protection effectively controls access if its *function* is to control access.¹⁷⁵ Therefore, whether the password-protection scheme is technically the strongest or the best type of measure that could control access is immaterial in the analysis.

The Second Circuit in *Corley* and the district courts in *Craigslist* and *Ticketmaster* emphasized that a measure is an access control when it literally prevents a user from experiencing or perceiving the site “in the ordinary course of operation.”¹⁷⁶ These courts did not impose additional requirements, such as the protection being consistently operational¹⁷⁷ or that no other backdoor means of access exist.¹⁷⁸ For example, the *Craigslist* court held that a CAPTCHA scheme protected copyrightable material by virtue of simply controlling access to experiencing the website in general.¹⁷⁹

4. A Copyrighted Work

The antitrafficking provision applies to “work[s] protected under this title.”¹⁸⁰ Accordingly, the Federal Circuit has clarified that anticircumvention technologies are only implicated if they “bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”¹⁸¹ In *Chamberlain*, the Federal Circuit correctly declined to extend the reach of the DMCA to products that had an indirect connection to copyrightable subject matter by virtue of having software simply embedded

¹⁷⁴ See *supra* note 170

¹⁷⁵ E.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 318 (S.D.N.Y.), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

¹⁷⁶ See also 17 U.S.C. § 1201(a)(3)(B) (2006).

¹⁷⁷ See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 953–54 (9th Cir. 2011).

¹⁷⁸ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004).

¹⁷⁹ *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1056 (N.D. Cal. 2010).

¹⁸⁰ § 1201(a)(2)(A)

¹⁸¹ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004).

somewhere in a product.¹⁸² However, the court went too far in requiring an infringement nexus for a 1201(a)(2) claim.¹⁸³ The Federal Circuit also stated that (a)(2) liability could not attach without the existence of (a)(1) liability, much like contributory infringement cannot exist without direct infringement.¹⁸⁴ But an (a)(2) violation does not require an underlying act of copyright infringement per the plain language of the statute. Additionally, there is nothing in the statute to justify the analogy to contributory liability.¹⁸⁵

The Federal Circuit's real concern in *Chamberlain* was to prevent a plaintiff from using the DMCA to make an end-run around the doctrine of copyright misuse and antitrust law.¹⁸⁶ In *Chamberlain*, a garage door manufacturer sought an injunction against the maker of a universal transmitter, Skylink, on grounds that Skylink had impermissibly used Chamberlain's "rolling code" to enable its transmitter to be used with Chamberlain's garage door opener.¹⁸⁷ The court held that no DMCA violation had occurred because the circumventing access by a competitor's garage door opener was a legitimate use and did not infringe on a right protected under the Copyright Act.¹⁸⁸ It therefore foreclosed severing "access" from "protected right" out

¹⁸² *Id.*

¹⁸³ *Id.* at 1195.

¹⁸⁴ *Id.* at 1196 n.13.

¹⁸⁵ See *supra* note 122.

¹⁸⁶ Chamberlain had made the argument that the DMCA now made all uses of products containing copyrighted software to which a technological measure controlled access *per se* illegal unless the manufacturer provided consumers with explicit authorization. The Federal Circuit observed that Chamberlain's interpretation would grant manufacturers broad exemptions from both the antitrust laws and the doctrine of copyright misuse:

In a similar vein, Chamberlain's proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial "encryption" scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words, Chamberlain's construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit. *Chamberlain*, 381 F.3d at 1201 (footnote omitted) (citations omitted).

¹⁸⁷ See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1183 (Fed. Cir. 2004).

¹⁸⁸ *Id.* at 1201–03.

of a broader concern for allowing an end-run around antitrust and copyright misuse laws.¹⁸⁹

The Sixth Circuit's denial of a DMCA claim in *Lexmark* may have been informed by similar policy concerns. The court was concerned about permitting a printer manufacturer to use the DMCA to lock up its market for toner cartridges. However, the Sixth Circuit denied Lexmark's claim on the narrower grounds that no access control had been circumvented.¹⁹⁰ The court found that Lexmark's Printer Engine Program simply did not control access to the literal code of the program; rather, it was the act of purchasing a Lexmark printer that controlled this access.¹⁹¹ The court reasoned that because anyone who purchased the printer could access the literal code, no access control had been circumvented.¹⁹²

E. *Overview of Fair Use Case Law*

Section 107 identifies four factors to be used to determine whether a use is exempted as fair use. The first factor relates to the purpose and character of the use, including whether it is of a commercial nature or for non-profit, educational purposes.¹⁹³ The Supreme Court has clarified that the key "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹⁹⁴

The second factor, the nature of the copyrighted work, "calls for the recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."¹⁹⁵

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹⁹⁶ The amount used in percentage terms alone does not determine the outcome.¹⁹⁷ Qualitative con-

¹⁸⁹ *Id.*

¹⁹⁰ *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546–47 (6th Cir. 2004).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 17 U.S.C. § 107(1)(1994).

¹⁹⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹⁹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹⁹⁶ § 107(3).

¹⁹⁷ *See Campbell*, 510 U.S. at 586.

siderations also matter.¹⁹⁸ For example, a major proportion of the copyrighted work may be fairly used in a parody owing to the very nature of parody.¹⁹⁹ But the same proportion excerpted for another type of use may not.²⁰⁰

The final factor, the effect of the use upon the potential market for or value of the copyrighted work, requires asking “‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”²⁰¹

In *Chamberlain*, the Federal Circuit expressed several concerns about giving content owners the unlimited right to hold circumventers liable even for content that was fairly accessible to the public.²⁰² One of those concerns was about the vast right it would give copyright owners “through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work.”²⁰³

The Ninth Circuit recently expressly disagreed with the Federal Circuit’s listing of concerns, including those surrounding the locking up of fair use.²⁰⁴ It criticized the Federal Court for going beyond the plain language of the statute to reach policy judgments best left to Congress.²⁰⁵

Despite that disagreement, courts have generally declined to immunize device manufacturers from circumvention liability on the basis of individual users’ fair use rights.²⁰⁶ Case law supports the principle that a circumvention device is illegal even if it restricts some fair uses, as long as fair use avenues are still otherwise available to a user.²⁰⁷ In *United States v. Elcom*, the court found that the defendant had violated the DMCA by manufacturing

¹⁹⁸ See *id.* at 587.

¹⁹⁹ See *id.* at 588–89.

²⁰⁰ See *id.*

²⁰¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2] (1993)).

²⁰² *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1200 (Fed. Cir. 2004).

²⁰³ *Id.* at 1202.

²⁰⁴ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 948–50 (9th Cir. 2011).

²⁰⁵ *Id.* at 950.

²⁰⁶ See *e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001); *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2002).

²⁰⁷ This principle has been seen in several key anti-circumvention cases, including *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000);

and marketing software that allowed users to disable the plaintiff's eBook controls on copying and printing.²⁰⁸ Finding that fair use was not affected, the court in *Elcom* explained that while “[t]he fair user may find it more difficult to engage in certain fair uses with regard to electronic books, . . . fair use is [nevertheless] still available.”²⁰⁹ For instance, users could conceivably make screen captures of eBook content or they could manually copy excerpts from the book for their fair use purposes, among other ways.

**IV. WHEN A NEWS AGGREGATOR DISTRIBUTES A NEWS
WEBSITE'S PASSWORD-PROTECTED CONTENT,
DOES SUBSECTION (A)(2)(A) APPLY?**

A. § 1201(a)(2)(A) Analysis

1. Offer, Provide Or Otherwise Traffic In Any Technology

A news aggregator's automated technology for reading a news website's RSS²¹⁰ feed content is likely to qualify as “any technology”²¹¹ within the meaning of the DMCA. RSS is a web-based technology that allows the syndication of online content, hyperlinks, and other information.²¹² Commonly found on websites generally, RSS feeds enable news websites to make their content available to a wide variety of standalone newsreaders or web-based portals.²¹³ For consumers, RSS feeds offer the convenience of content customized to their interests. They can set their browsers and mobile devices to fetch and display RSS feed content according to their individual preferences.²¹⁴ While individuals often use newsreaders, like Google Reader, to access RSS feed content individually, a news aggregator like

Corley, 273 F.3d 429; and *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

²⁰⁸ *Elcom*, 203 F. Supp. 2d at 1123–24.

²⁰⁹ *Id.* at 1134–1135; *see also Corley*, 273 F.3d at 459 (“Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.”)

²¹⁰ RSS stands for Really Simple Syndication.

²¹¹ 17 U.S.C. § 1201 (a)(2) (2006).

²¹² John N. Malala, *Upsbot of RSS Technology on Website Promotion*, 2 J. WEBSITE PROMOTION 5, 6 (2006).

²¹³ *See id.*

²¹⁴ *Id.*

Google News fetches and displays information for larger audiences.²¹⁵ The displayed content can take the form of headlines, abstracts, full-text articles, or links. The news aggregator's automated software for fetching content from source news websites and its subsequent display of that content on its own web portal or standalone newsreader is the technology implicated in this analysis. The antitrafficking provision is in play if the news aggregator "presents, holds out or makes a circumvention technology . . . available, knowing its nature, for the purpose of allowing others to acquire it."²¹⁶ If the news aggregator's automated technology of fetching and displaying content in a web-based or standalone application can be acquired by others, it is sufficient to bring it within the scope of subsection (a)(2).²¹⁷

2. Primarily Produced For Circumventing A Technological Measure

A news website must also show that the news aggregator's automated fetch and display technology is primarily designed to bypass its own technology protection measure: a password protection scheme.²¹⁸ The case law, which is buttressed in explicit legislative history, squarely supports the conclusion that a news website's password protection scheme can be a technology protection measure within the meaning of the DMCA.²¹⁹

However, courts are likely to diverge on the question of whether the aggregator's fetch and display technology rises to the level of circumvention. Jurisdictions following the *I.M.S. Inquiry* and *R.C. Olmstead* line of cases may decline to find circumvention where a news aggregator did not "surmount or puncture or evade" a technological measure.²²⁰ After all, a person representing the news aggregator could simply set up a password-protected account to gain legitimate access to the website's content. The news aggregator's access, thereafter, for automated aggregation purposes would be unlikely to constitute circumvention because no technology measure had to be evaded.

²¹⁵ See *infra* p. 238.

²¹⁶ See *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000).

²¹⁷ See *id.*

²¹⁸ 17 U.S.C. § 1201(a)(2)(A) (2006).

²¹⁹ See *supra* p. 234.

²²⁰ *I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d 521, 531-32 (S.D.N.Y. 2004); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 878, 889 (N.D. Oh. 2009).

The key to finding circumvention, as explained in subsection (a)(3)(A), is whether access was authorized.²²¹ However, a news website's anticircumvention claim against a news aggregator should not be disallowed on the basis of lack of authorization for a consumer's use, because this view is unsupported in the plain language of the statute. The proper basis is the absence of authorization for circumvention of an access control.²²² Jurisdictions choosing to follow the Federal Circuit would not find circumvention where users had the authority to otherwise use the news website's content.²²³ But the Second²²⁴ and Ninth²²⁵ Circuits would not require proof of underlying infringement, only that an access control that prevented a user from perceiving a site was circumvented.

Further, jurisdictions following the *Craigslist* and *Ticketmaster* line of cases would find circumvention where an explicit term of use on a website prohibited the news aggregator's specific type of access.²²⁶ Assuming there is an explicit lack of authorization for automated fetch and display technologies of news aggregators, DMCA liability would attach on the circumvention element.²²⁷

News websites commonly publish RSS feeds that RSS readers like Google Reader can read for personal, noncommercial use. *The New York Times* website, www.NYTimes.com, provides an example. Its RSS page contains the following terms to emphasize the noncommercial scope of its permission:

Terms & Conditions: We encourage the use of NYTimes.com RSS feeds for personal use in a *newsreader* or as part of a non-commercial blog. We require proper format and attribution whenever New York Times content is posted on your web site, and we reserve the right to require that you

²²¹ See *supra* p. 227.

²²² See § 1201(a)(3)(A).

²²³ See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1193 (Fed. Cir. 2004).

²²⁴ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319, *aff'd*, 273 F.3d 429 (2d Cir. 2001).

²²⁵ *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 951 (9th Cir. 2011).

²²⁶ See, e.g., *Craigslist Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1048–49 (N.D. Cal. 2010) (enjoining defendant *powerpostings.com* from facilitating automated ad postings on *craigslist.com* in violation of the site's terms of use forbidding unauthorized automated postings).

²²⁷ See, e.g., *id.*; *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1092, 1112 (C.D. Cal. 2007).

cease distributing NYTimes.com content. Please read the Terms and Conditions for complete instructions.²²⁸

A newsreader, in contrast to a news aggregator, is a standalone or web-based portal that allows a user to receive organized and personalized information according to his or her preferences.²²⁹ News aggregators often populate their sites using the same RSS feed code prepared by news websites for use with a newsreader.²³⁰ While newsreaders and aggregators function in the same manner and deliver similar benefits of organization and convenience, they are substantially different. A newsreader is used by individuals to receive personalized news content.²³¹ A news aggregator, on the other hand, is a commercial entity that gathers content to attract a large number of individuals, typically deriving revenue directly or indirectly from the resulting traffic.²³²

While the explicit grant of permission by www.NYTimes.com for personal use in a newsreader explicitly precludes commercial use by blogs, many other news websites do not have similarly explicit terms.²³³

The existence of the password protection scheme alone may not be a sufficient basis for a court to find an implied lack of authorization for news aggregators within the meaning of the anticircumvention provisions. In *Chamberlain*, the Federal Circuit affirmed the district court's finding that unconditioned sales by a maker of garage door openers implied authorization for a competitor to sell a compatible transmitter because it never restricted its customers' use of competing transmitters.²³⁴ The district court declined to read an implicit restriction from the absence of any discussion of competing products on the plaintiff's website.²³⁵ A news website must present evidence of additional explicit terms prohibiting news aggregator access in its

²²⁸ RSS, N.Y. TIMES, available at <http://www.nytimes.com/services/xml/rss/index.html> (emphasis added). The detailed Terms and Conditions page referenced expands on terms for individual use and does not explicitly address authorization (or nonauthorization) for commercial news aggregators. *RSS Terms and Conditions*, N.Y. TIMES, available at www.nytimes.com/services/xml/rss/termsconditions.html.

²²⁹ Annette Lamb & Larry Johnson, *Web Feeds Delivered To Your Digital Doorstep*, 36 TCHR. LIBR. 66, 66 (2009).

²³⁰ *Id.*

²³¹ *Id.*

²³² See Netanel, *supra* note 2, at 979.

²³³ See e.g., WASH POST, <http://www.washingtonpost.com> (last visited Apr. 14, 2011) (website does not contain similar terms of use for its RSS feeds).

²³⁴ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1187 (Fed. Cir. 2004).

²³⁵ *Id.*

website's terms of use to meet the DMCA's authorization test. A showing of explicit terms of use that prohibit aggregators from harvesting its news content for commercial purposes may prove that a news aggregator's use of the password protection system is unauthorized.

3. Effectively Controls Access

The case law is mixed here on the question of whether password protection "effectively controls access"²³⁶ to a news website's content. A jurisdiction following the Sixth Circuit's reasoning in *Lexmark* may hold that the password protection scheme does not effectively control access to the news website's content because it does not raise a specific barrier against automated access by the news aggregator's software. For one, a password control measure is designed to allow access to individuals who create user accounts with the news website. Anyone can obtain and use the same content by simply going online and creating a password-protected account for instance.²³⁷ Where one avenue of access is controlled but another is unrestricted, a court following the *Lexmark* line of reasoning could conclude that the password protection scheme did not effectively control access.

However, *Lexmark's* reasoning should not be interpreted to require a qualitatively effective access control, as clarified by the Ninth Circuit in *Blizzard*. Such a requirement is not evident in the plain language of the statute. And, as the *Reimerdes* court recognized, if the DMCA could only be applied where protection was always effective, it would lead to the absurd result of the law offering protection in situations where it was least needed and withholding it where it was most essential.²³⁸ It is because access controls are inevitably breached that piracy exists in the first place. Like the Second Circuit in *Corley* and the district courts in *Craigslist* and *Ticketmaster*, a court should view a news website's password scheme to be an access con-

²³⁶ See 17 U.S.C. § 1201(a)(2)(A) (2006).

²³⁷ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546–47 (6th Cir. 2004).

²³⁸ Declining to adopt the defendant's view of "effectively controls," the *Reimerdes* court explained:

[d]efendants' construction, if adopted, would limit the application of the statute to access control measures that thwart circumvention, but withhold protection for those measures that can be circumvented. In other words, defendants would have the Court construe the statute to offer protection where none is needed but to withhold protection precisely where protection is essential. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 318, *aff'd*, 273 F.3d 429 (2d Cir. 2001).

trol because it literally prevents a user from experiencing or perceiving the site “in the ordinary course of its operation.”²³⁹

4. A Copyrighted Work

The news industry’s products are undoubtedly works protected under the Copyright Act. In contrast, the Sixth Circuit’s decision favoring the defendant in *Lexmark* largely rested on the fact that the product implicated simply was not a subject of the Copyright Act: a functional lock-out code for toner cartridges.²⁴⁰ The Sixth Circuit may have been concerned about permitting a printer manufacturer to use the DMCA to lock up its market for toner cartridges.²⁴¹ *Lexmark* ostensibly argued that the defendant toner cartridge manufacturer had unlawfully gained access to its copyrighted Printer Engine Program, which checked toner levels before allowing access to printer functions.²⁴² *Lexmark*’s real purpose was to prevent rival toner cartridge manufacturers from marketing refurbished *Lexmark* toner cartridges without payment to *Lexmark*.²⁴³ Here, there is no similar concern of misusing copyright law to control markets for products unrelated to the Copyright Act. This critical distinction ought to weigh in the news industry’s favor.²⁴⁴

B. Fair Use Analysis

News aggregators will inevitably raise a fair use defense. They are likely to argue that it is common practice for bloggers and news aggregators to repurpose and republish news content for commercial purposes without attribution or payment.²⁴⁵ *Contributor Corporation’s Fair Syndication Consortium* found that, in just one month in 2009, over 75,000 unlicensed websites had reused U.S. newspaper content.²⁴⁶ Nearly 112,000 unlicensed

²³⁹ § 1201(a)(3)(B).

²⁴⁰ *Lexmark*, 387 F.3d at 529.

²⁴¹ *See id.*

²⁴² *Id.*

²⁴³ *See id.* at 530–31.

²⁴⁴ *See* 17 U.S.C. § 1201(a)(2)(A) (2000) (stating that liability attaches only when “a work protected under this title” is implicated).

²⁴⁵ *Netanel*, *supra* note 2, at 978–79.

²⁴⁶ *Fair Syndication Consortium, Fair Syndication Consortium Research Brief: How U.S. newspaper content is reused and monetized online*, *ATTRIBUTOR* (Dec. 1, 2009), Link to report available at <http://www.tributor.com/index.php/blog/2009/12/01/9-newspaper-content-matters>

full copies of news articles were detected during the study, with Google and Yahoo! ad networks commercializing the largest share of such content.²⁴⁷ Such re-use arguably deserves fair use protection because it promotes important fair use values. A key inquiry will therefore be to determine whether such re-use and repurposing, when conducted by commercial news aggregators, constitutes fair use.

A news aggregator's argument based on protection of individual users' fair use rights will not immunize it from circumvention liability.²⁴⁸ Further, drawing a parallel between news aggregators' use of news content to search engines' use of the same content on valuable fair use grounds will be unlikely to withstand close examination. Courts have exempted the cataloging of digital content by search engines from copyright liability on fair use grounds, even when the content is cataloged for commercial purposes.²⁴⁹ Although a search engine, like Google, may sell advertising based on search terms resulting in the display of copyrighted news articles, the search engine's commercialization of news content nevertheless outweighs a plaintiff's copyright interest. The key to the search engine fair use conclusion is the transformative value of the indexing and information-location functions to the public, which cannot be accomplished by individuals in any other way. But even the Senate Committee on the Judiciary noted that search engines could be "obvious infringe[rs]" if their links to infringing sites reflected actual knowledge of infringement and their use went beyond mere indexing to qualify as fair use.²⁵⁰ News aggregators like *Google News* or *Yahoo! News* may similarly be found to be obvious infringers if the news aggregation operation itself is purposefully designed to distribute another news source's access-controlled content to the subscriber without authorization or payment.

²⁴⁷ *Id.*

²⁴⁸ *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (clarifying that § 1201(c)(1) targets the act of circumvention and not the use of the materials after the circumvention has occurred); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1123–25 (N.D. Cal. 2002) (explaining that an individual user is permitted to circumvent for the purposes of engaging in fair use, but that trafficking in tools that allow fair use circumvention is unlawful).

²⁴⁹ *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–20 (9th Cir. 2003) (reasoning that a search engine's commercial use of thumbnail images of a photographer's portfolio was sufficiently transformative because it enhanced the public's ability to gather information without superseding the photographer's purpose for the original content).

²⁵⁰ S. REP. NO. 105-190, at 43–45, 57–58 (1998).

Further, if news aggregators did not exist, individual fair use for the purpose of accessing, customizing, and organizing news content to stay informed would not be affected. The commercial news aggregator is not the only way for users to access, organize or customize news content for fair use purposes. Individuals retain these abilities because they can still use personal newsreaders or directly visit the news website.

As in *Elcom*, fair users will not be precluded from making fair uses of news content if commercial news aggregators are enjoined from marketing their services to consumers.²⁵¹ An injunction on news aggregators would not restrict an individual's ability to make fair use of news content by other means, such as simply registering with the site to access the content directly. It is, therefore, conceivable that a news website's 1201(a)(2)(A) claim will not have to yield to the commercial news aggregators' fair use defense.

Ultimately, however, judges retain the power to interpret the statute in the context of the rules of statutory interpretation while continuing to draw upon the rich body of common law related to fair use. As Nimmer observed, judges adhering to a textualist view could theoretically defend a fair use exemption to the DMCA just as easily as judges wishing to discount it could invoke their common law powers to do so.²⁵²

V. CONCLUSION

The acute tensions between the rights of content producers and the fair use rights of users that dominated the conversation leading up to the enactment of the DMCA continues play out in parallel debates regarding online news content. Today, advancements in technology that permit the distribution of content on a pay-per-use basis have the potential to achieve a new balance between news content producers and users. The same technological advancements could permit the efficient administration of fair use exceptions on an individual basis.

The DMCA as currently drafted provides a legitimate way to prevent and remedy losses incurred by the news industry from the unauthorized distribution of its content. In particular, bypassing a news website's password protection scheme to automatically harvest news content may produce a valid 1201(a)(2)(A) claim against a commercial news aggregator. Many news websites already employ password-protected accounts with CAPTCHA routines to verify that the users are human. With or without CAPTCHA, these schemes are technological measures within the meaning of the DMCA.

²⁵¹ See *Elcom*, 203 F. Supp. 2d at 1123–24.

²⁵² Nimmer, *supra* note 89, at 979–981.

News aggregators that bypass these routines to harvest content may be liable for circumvention under 1201(a)(2)(A) if such circumvention is demonstrably unauthorized. If a news aggregator used a legitimately issued password to access, harvest and republish a news website's content when such use was expressly prohibited in the site's terms of use, as had been done by the plaintiff in *Craigslist*, it would most likely be actionable under 1201(a)(2)(A) of the DMCA.

The Federal Circuit would require absence of authorization for use as well as circumvention for a DMCA claim to be sustained in favor of a news website plaintiff. The Second and Ninth Circuits, in contrast, would require absence of authorization for only circumvention for a DMCA claim to stand. In virtually all circuits a news aggregator's fetch and display technology is unlikely to rise to the level of circumvention of a news website's password protection scheme without the explicit withholding of authorization for such circumvention.

Fair use is unlikely to sustain a news aggregator's defense, especially in circuits where authorization is viewed as pertaining strictly to circumvention, *i.e.*, where authority to circumvent was not explicitly granted by the copyright owner. In circuits that interpret authorization to encompass authority for use, fair use may present a stronger defense. But where fair use of the material is not wholly limited by an anti-circumventing technology, courts generally are unlikely to find fair use to be unreasonably restricted.

If the fair use forces that prompted the news content horse to leave the barn can be efficiently managed through technology, deploying the DMCA to secure the barn door locks may become more commonplace in the news industry.

