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A Post-Brexit Impact: A Case Study on the English Premier League

Karen Perry and Madison Steenson

ABSTRACT

There has been significant debate on the impact of the United Kingdom's decision to leave the European Union on both the United Kingdom itself and the remaining 27 European Union countries. From economists and legal scholars, to industry experts and journalists, individuals from all over the world are speculating on what these changes will look like come March of 2019, as talks progress between the European Union and the United Kingdom. There is uncertainty over how Brexit will impact every industry within the United Kingdom, and this uncertainty extends to the world of sport in terms of player quality, league competitiveness, and ultimately league reputation. Brexit will impact players, coaches, clubs and fans within the United Kingdom. Key areas for the English Premier League which will be negatively impacted by Brexit include increased eligibility restrictions in obtaining European Union players, increased costs to obtain European Union players, and challenges in having minor players qualify as Home Grown. Key areas of the English Premier League which have the potential to be positively impacted by Brexit include an increased ability to protect game day blackout periods, and increased control over the broadcast industry.

I. OVERVIEW

Since June of 2016, when the majority of voters in the UK made their decision to leave the EU, individuals around the world have been speculat-

ing on what changes will occur. For sports scholars, a big question which arises is what impact the British exit (Brexit) will have on the sports industry in the UK. This paper will look to answer a portion of these question by proposing a number of impacts which Brexit will have on the players, coaches, teams, and fans within the English Premier League (EPL)¹ specifically, and UK football² generally. With talks between the UK and the EU ongoing, it considers the UK Government's policy and approach to Brexit. In addition, it considers the impact of EU laws and the regulations set out by the Fédération Internationale de Football Association (FIFA) on the operation of the EPL.

This paper examines a section of key questions that the EPL will face in the years following Brexit. Specifically, it considers:

1. The risk of increased costs in obtaining eligible EU players;
2. The increased restrictions in looking to have eligible EU players qualify for governing body endorsements;
3. Challenges in having EU minor players qualify as Home Grown under EPL rules;
4. The opportunity to protect game day blackout periods; and
5. The opportunity to increase control over the broadcast industry following Brexit.

The remainder of this paper has been broken down into eight sections. Section II sets out the process and timing of the UK's exit from the EU, and section III sets out the regulatory structures for both the EU and football generally. Section IV outlines the role of competition law in sport, and specifically outlines the legal framework through which EU law applies to sport.

The remainder of the paper considers the impacts of Brexit on stakeholders of the EPL. Section V proposes impacts of Brexit generally on UK and EU citizens and the EPL. Section VI outlines the impact of Brexit on player mobility and additional stakeholders within the EPL while section VII looks at the impact of Brexit on EPL clubs both in terms of Financial Fair Play and the development of Home Grown Players. Section VIII considers the impact of Brexit on the EPL's broadcast sector. Finally, section IX outlines our conclusions and recommendations for the EPL moving forward.

¹ See Appendix A – List of Abbreviated Terms.

² In this paper, the term "football" is synonymous with "soccer."

A. Methodology

This paper is comprised primarily of a survey of secondary sources, from which insights and predictions of academics and industry experts have been adapted to guide the research. In order to substantiate the claims made throughout this paper, extensive legal analysis of law in the EU and the UK, as well as the jurisprudence around *lex sportiva*, was conducted. As this is a current topic, with the subject matter developing as the exit approaches, all proposed impacts are based on these claims.

The rules and regulations of FIFA and its entities are also relied upon to accurately determine the extent to which Brexit will impact the EPL.

Primary data analysis has been conducted with regard to nationality statistics and FIFA rankings.³ In addition, interviews with industry experts and academics in the field were conducted to substantiate the claims in this paper. All information is based on the data available on the subject as of the end of December 2017.

II. THE BRITISH EXIT OF THE EUROPEAN UNION

A. The Laws Surrounding the British Exit of the European Union

As of June 2017, the population of the UK was estimated to be approximately 65 million people.⁴ Prime Minister Theresa May has indicated that Brexit will have a direct impact on approximately four million EU citizens living in the UK.⁵

1. The Process of Withdrawing from the European Union

Article 50 of the Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community (hereinafter *Treaty of Lisbon*) outlines the process by which a Member State of the

³ See Appendix B – Player Nationality Statistics.

⁴ Neil Park, *United Kingdom Population Mid-Year Estimate*, OFFICE FOR NATIONAL STATISTICS, (June 22, 2017), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop>, [https://perma.cc/E323-S75R].

⁵ Letter from Theresa May, Prime Minister of the U.K., to Eur. Union Citizens in the U.K., (Oct. 19, 2017), *available at* <https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>, [https://perma.cc/NGV7-RRHL].

EU may withdraw its membership.⁶ The *Treaty of Lisbon* indicates under section 1 that any Member State of the EU may withdraw from the EU, “in accordance with its own constitutional requirements.”⁷

The UK does not have a constitution as a prevailing source of law.⁸ The ability to terminate a treaty in the UK falls under the treaty making prerogative,⁹ is exercisable without legislative authority, and is not reviewable by the courts.¹⁰ The referendum held by the UK in 2016 did not result in a change to the process by which the UK may withdraw from the EU.¹¹ Its effect was of a political nature until the decision was acted on by Parliament.¹²

Under Article 50, section 2 of the *Treaty of Lisbon* a Member State who has decided to withdraw from the EU must notify the European Council of its intention to do so.¹³ The UK’s Prime Minister, Theresa May, wrote a letter to Mr. Donald Tusk, the President of the European Council, on the 29th of March 2017. It provided clear written confirmation to the European Council, in accordance with Article 50(2), of the UK’s intention to withdraw from the EU.¹⁴

B. *The Timeline for Britain’s Exit from the European Union*

Section 3 of Article 49A of the *Treaty of Lisbon* sets out three different possible points in time upon which the *Treaty* may cease to apply to the withdrawing state. The first is based on the date of entry into force of the withdrawal agreement.¹⁵ Second, as a default, the withdrawing state is granted a period of two years following notification prior to the *Treaty* ceasing to apply.¹⁶ The UK provided the European Council with notice of their intention to withdraw on the 29th of March 2017. Based on a two-year period, the Treaties of the EU would cease to apply to the UK on the 29th

⁶ Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter *Treaty of Lisbon*].

⁷ *Id.*

⁸ *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 (appeal taken from 2016 EWHC 2768).

⁹ *Id.* at para. 54.

¹⁰ *Id.* at para. 55.

¹¹ *Id.* at para. 124.

¹² *Id.*

¹³ Treaty of Lisbon, *supra* note 6.

¹⁴ Letter from Theresa May, *supra* note 5.

¹⁵ Treaty of Lisbon, *supra* note 6.

¹⁶ *Id.*

of March 2019. Third, this two-year timeline may be extended by unanimous consent of both the EU and the exiting Member State.¹⁷

The UK remains a member of the EU until the exit process is commenced and completed.¹⁸ The agreement for a future relationship between the withdrawing state and the EU, as outlined in Article 49 of the *Treaty of Lisbon*, is to be based on Article 118 N(3) of the *Treaty on the Functioning of the European Union (TFEU)*.¹⁹

C. The UK Withdrawal Bill

Though Article 49 has been invoked, EU law will still apply until the UK actually leaves the EU. In this two-year period, ongoing negotiations between the UK and the EU are proceeding to attempt a “calm and orderly exit.”²⁰

In order to provide some certainty to the removal process, the UK Parliament is in the stages of drafting legislation for the withdrawal. Bill 2017-19, more commonly known as the EU Withdrawal Bill, as of September 2017, passed the first reading and is currently proceeding through the House of Commons.²¹ The Bill, as it stands, has three principle elements. First, it repeals the *European Communities Act* of 1972, which is the law that brought Britain into the EU. Second, it converts all EU law into UK law to prevent any gaps in the legal structure of the UK post Brexit.²² Section 4 subsection 1 exemplifies this by providing:

Saving for rights etc. under section 2(1) of the ECA

- (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—
 - (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

¹⁷ *Id.*

¹⁸ Trevor Watkins & Angelique Bret, *The Likely Legal Consequences of the UK's Brexit on Sport*, 14 WORLD SPORTS L. REP. (2016).

¹⁹ Treaty of Lisbon, *supra* note 6.

²⁰ *EU Withdrawal Bill: A Guide to Brexit Repeal Legislation*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/uk-politics-39266723>, [<https://perma.cc/V5JP-48DU>].

²¹ PARLIAMENT OF UK (Nov. 3, 2017), <https://www.parliament.uk/about/how/laws/passage-bill/>, [<https://perma.cc/F62Z-XZA7>].

²² Laura Hughes, *What is the Great Repeal Bill*, THE TELEGRAPH (Dec. 12, 2017), <http://www.telegraph.co.uk/news/0/great-repeal-bill-explanation-need-read/>, [<https://perma.cc/3JGS-JRPH>].

(b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).²³

Third, it creates the necessary power for the Minister of the Crown to adapt and change these laws following the British exit.²⁴

D. The Anticipated Type of Exit of the United Kingdom from the European Union

The terms of the impending departure and its options have been continuously referred to as either a “soft” or a “hard” exit. There is no strict definition of these terms, but they are used to refer to the closeness of the UK’s relationship with the EU following the conclusion of Brexit.²⁵

1. A Hard Exit from the European Union

A “hard” Brexit would resemble the situation between the EU and any other third country outside of the EU trading regime. In this scenario, the UK would be excluded from the single market, and its trade relationship with the EU would revert to the default membership of the World Trade Organization.²⁶

Prime Minister Theresa May, upon re-election, remained adamant that “Brexit means Brexit.”²⁷ What this actually means remains to be determined. Preliminary visions from the UK government support a “hard” exit in which the UK surrenders its full access to the single market and customs of the EU and gains full control over its borders, trade deals and the applicable law within its territory.²⁸

²³ European Union (Withdrawal), Act 2018, 2017-8, HC Bill [19] (UK).

²⁴ Hughes, *supra* note 22.

²⁵ Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Dec. 12, 2016), available at <https://www.bbc.com/news/uk-politics-32810887>, [https://perma.cc/V3RA-LL2M].

²⁶ Helen Wallace, *Heading for the Exit: The United Kingdom’s Troubled Relationship with the European Union*, 12 CONTEMP. EUR. RES. 800, 809 (2016).

²⁷ *Id.* at 810.

²⁸ Alexandra Sims, *What is the difference between hard and soft Brexit? Everything you need to know*, INDEP. (Oct. 3, 2016), available at <http://www.independent.co.uk/news/uk/politics/brexit-hard-soft-what-is-the-difference-uk-eu-single-market-free-dom-movement-theresa-may-a7342591.html>, [https://perma.cc/5Z9T-S3SL].

2. Soft Exit from the European Union

A “soft” Brexit would model Norway’s relationship inside the European Economic Area (EEA).²⁹ This would allow the UK to retain access to the single market. The result of a soft exit would ensure the UK’s relationship with the EU remains similar to the existing model.³⁰

The current lack of an outright majority in Parliament supports more of a soft, rather than a hard, exit from the EU.³¹ The final result will dictate how sports law is applied in the UK. The biggest hurdle for sport in this regard will be the application of its inherited law from the Court of Justice of the European Union (CJEU).³²

III. TWO REGULATORY BODIES OF LAW: FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION AND THE EUROPEAN UNION

A. *The FIFA Football Governance Structure*

Football is governed in a hierarchy. FIFA is at the top of this hierarchical pyramid. It is an association founded in 1904, based in Zurich.³³ FIFA acts as the international governing body for football. Its regulations and policies for compliance are required by every league on an international scale,³⁴ and are followed by the national associations of the EU Member States.³⁵ Under FIFA exists the Union of European Football Associations (UEFA), one of six continental confederations. UEFA represents the national football associations in Europe and runs corresponding competitions. The Football Association (FA) falls below UEFA and controls games at a club level.³⁶ At the national level, the FA’s focus is on producing quality players

²⁹ Wallace, *supra* note 26.

³⁰ Sims, *supra* note 28.

³¹ Amit Kara, et al., *Prospects for the UK Economy*, 241 NAT’L INST. ECON. REV 1, 29 (2017).

³² See Steve Lawrence, *Sport in Case of ‘Brexit’: Part 5*, SPORTS THINK TANK (May 22, 2017), available at <http://www.sportsthinktank.com/blog/2017/05/sport-in-case-of-brexit-part-5>, [https://perma.cc/BDF7-466U].

³³ FIFA GOVERNANCE REGULATIONS (2016), <https://www.fifa.com/about-fifa/official-documents/law-regulations/index.html>, [https://perma.cc/NSK5-YW3Q] [hereinafter FIFA Regulations].

³⁴ FIFA Regulations, *supra* note 33.

³⁵ STEPHEN WEATHERILL, EUROPEAN SPORTS LAW: COLLECTED PAPERS 88, (2007).

³⁶ See Borja García, *UEFA and the European Union: From Confrontation to Co-operation?*, 3 J. CONTEMP. EUR. RES. 202, 204 (2007).

to perform well in an international arena. The EPL is the top league in the FA, and below it falls the Championship League and other domestic club teams.

The European Leagues are based on a system of promotion and relegation. With the degree of movement incorporated into the structure, results in one league will affect all club teams, regardless of their League. At the end of each season, the three teams from the EPL with the worst record drop to the Championship League. They are replaced by the top two Championship League teams, and the winner of the promotion playoff between the teams ranked in third to sixth place. In addition, up to seven English teams may be eligible to participate in UEFA Competitions. This includes the top three teams in the EPL, who qualify for the group stage and the fourth placed EPL team who qualifies for a play-off round in the UEFA Champions League.³⁷ The fifth place EPL team qualifies for the group stage of the UEFA Europa League.³⁸

This pyramid of governance for the laws of the game also interplays with domestic and national laws of the UK and the EU. While FIFA is governed under Swiss law, EU law applies to UEFA. The EPL abides by both Swiss and EU law, as well as domestic UK law. Following Brexit, UK domestic law will instruct the EPL.

Sport has its own governing bodies and regulations, and its own court. The Court of Arbitration for Sport (CAS) based out of Switzerland, acts as another means of adjudication for disputes arising in the EPL and UEFA. Parties can bring their claim to CAS instead of domestic courts for remedy.

1. The English Premier League

The EPL began in 1992 with 22 teams and was known as the FA Premier League.³⁹ After numerous name changes, it became the Premier League in the 2016-2017 season.⁴⁰ Since its inaugural year, the EPL has continued to grow in both size and popularity, with 49 different teams to date gaining a berth in the league.⁴¹ Within Europe, football leagues such as

³⁷ *A breakdown of how PL clubs can qualify for UEFA Champions League and Europa League next season*, PREMIER LEAGUE (2018), available at <https://www.premierleague.com/european-qualification-explained>, [https://perma.cc/T8NU-SC8Q].

³⁸ *Id.*

³⁹ *See History*, PREMIER LEAGUE, (2018), available at <https://www.premierleague.com/history>, [https://perma.cc/U57M-8NWG].

⁴⁰ *Id.*

⁴¹ *Id.*

the EPL have gained significantly from the commercialization of sport.⁴² The EPL specifically has benefited from this commercialization, with recorded revenues of £3.6 billion in the 2015-2016 cycle.⁴³

There is good reason for clubs in the Football League Championship to aspire to make it to the EPL. The three clubs promoted to the EPL in the 2016-2017 season generated a combined operating profit of £28 million, after having recorded a cumulative net operating deficit of £47 million only a year earlier.⁴⁴ The median and average salaries for players in the EPL also increased, with the median salary coming in at \$2.4 million in the EPL, while the next highest league wage, the Serie A, came in at \$902,000.⁴⁵

B. *The European Union Governance Structure*

European Union law is sourced from the *TFEU*. This treaty establishes all EU institutions, lists their powers and responsibilities, and outlines the areas governed by EU law. The European Commission (EC) is the legislative body of the EU and the European Court of Justice (ECJ) is the judicial body which interprets EU law.⁴⁶ Together they ensure all Member States adhere to the fundamental freedoms of the EU, which include: freedom of movement for workers, freedom of establishment, freedom to provide services, free movement of goods, and free movement of capital.⁴⁷ These freedoms create a single European market with the intention of contributing to economic prosperity in the region.⁴⁸ Within this system, EU rules are supreme and render any contrary national laws inapplicable.⁴⁹

⁴² Steven Stewart, *The Development of Sports Law in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights*, 16 *SPORTS L. J.* 183, 186 (2009).

⁴³ MICHAEL BARNARD ET AL., *ANNUAL REVIEW OF FOOTBALL FINANCE 2017 AHEAD OF THE CURVE*, 2 (Dan Jones et al. eds., 26th ed. 2017), available at <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/annual-review-of-football-finance.html>, [https://perma.cc/QLQ7-9XE5].

⁴⁴ *Id.* at 3.

⁴⁵ Spencer Jackman, *La Liga Wins the Major Trophies but the EPL is Still the Best League in the World*, *THE 18*, (June 2017), available at <https://the18.com/soccer-news/best-league-europe-soccer-football-premier-league-la-liga-epl>, [https://perma.cc/SU3J-CQ25].

⁴⁶ KLAUS-DIETER BORCHARDT, *THE ABC OF EUROPEAN UNION LAW* 45 (2010).

⁴⁷ *See id.* at 24.

⁴⁸ Asser, *Professional Sport in the Internal Market*, (European Parliament DG Internal Policies of the Union-Directorate A – Economic and Scientific Policy Working Paper No. 11, 2005 [hereinafter Asser]).

⁴⁹ *See id.* at 12.

While conflicting laws of the UK are rendered inoperable, there are numerous instances in which EU legislation directly parallels the national laws of the UK. The competition rules outlined in Articles 101 (restriction of competition) and 102 (abuse of dominant position) of the EC are paralleled by Chapter's I and II of the *UK Competition Act 1988*.⁵⁰

The *TFEU* also sets out restrictions which prohibit a Member State from legislating discriminatory provisions, which would act to limit a citizen's access to the employment market.⁵¹ Article 2 provides for the coordination of economic and employment policies of Member States when an international agreement is made between their home state and the EU.⁵² This can provide benefit to non-EU nationals. For example, Norway, as a member of the EEA, has the benefits of the fundamental freedoms in the *TFEU*, though the country is not a member of the EU.⁵³

The role of the ECJ is to determine the applicability of these principles in the economic market. Sport has fallen under the jurisdiction of the ECJ as outlined in *Walrave and Koch v. Union Cycle Internationale*. The Court found, "having regard to the objectives of the Community, the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the *TFEU*."⁵⁴

The acceptance of sport as an economic activity has created an overlap in sports governance between international sporting bodies and EU law.

C. *The Intersection of Sport and European Union Law*

Sport has been regulated through EU law in two areas: free movement and competition.⁵⁵ With growth in the commercialization of professional sport, football has been scrutinized under EU law and broadened in the extent to which it has been subject to the jurisdiction of EU courts.⁵⁶ This

⁵⁰ Asser, *supra* note 48, at 16. See also Commission Regulation 1/2003 of Dec. 16, 2002, on the Implementing EU competition rules: application of Articles 101 and 102 of the *TFEU*, 2002 O.J. (L 1/4.1).

⁵¹ Asser, *supra* note 48, at 14.

⁵² Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, Art 3, 2012 O.J. (L326/50).

⁵³ Asser, *supra* note 48, at 14.

⁵⁴ SIMON GARDINER ET AL., *SPORTS LAW* 158 (4th ed. 2010).

⁵⁵ Gianni Infantino, *Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?*, UEFA, (Oct. 2, 2006), available at https://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf, [https://perma.cc/RYC6-RWTG].

⁵⁶ Ben Van Rompuy, *The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations*, 2 MCGILL L.J. 179, 183–84 (2015).

increased scrutiny has been welcomed by athletes who face a power imbalance as a result of the pyramidal structure of sports associations and the monopoly held by clubs.⁵⁷ The court's application of competition law has ensured that sports organizations and their governance mechanisms are in line with the fundamental freedoms of the EU.⁵⁸ The UEFA Champions League case has been used to create a formula for leagues wishing to comply with competition law within the EU.⁵⁹

As UEFA regulates football in Europe, its policies align with the EU and must be followed by national organizations. However, FIFA is based in Switzerland and has broader control; thus, some provisions that UEFA and all other governing bodies must comply with have come under scrutiny of the EC.⁶⁰ Independent from EU control, the EC has no recourse to enforce FIFA's compliance.

*Bosman*⁶¹ brought this intersection to the forefront of legal conflicts in the realm of sports law in the EU. Advocate General Lenz called attention to the function of EU competition law to control the private regulatory power of international sports associations.⁶² He indicated that there are other means of obtaining the objective of ensuring a balance between clubs, without affecting the freedom of movement of players within the leagues.⁶³ UEFA in particular was forced to accept the primacy of European law and its application to the activities of football organizations.⁶⁴

In order to enhance the legitimacy of football's governing structures, UEFA has engaged with the EC in policy co-operation.⁶⁵ The EPL has remained cautious of any EU involvement in its operations, other than court settlements and Commission investigations.⁶⁶

Bosman's ruling found that the 3+2 rule, which limited the number of foreign players who could be fielded by each team in a match, was contrary to freedom of movement and discriminatory in practice.⁶⁷ Consequently this nationality clause was abolished. Football governing bodies saw this as an

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ MARK JAMES, *SPORTS LAW* (3d ed. 2017).

⁶⁰ García, *supra* note 36, at 202.

⁶¹ Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-5040.

⁶² *Id.* at I-5065.

⁶³ *THE LEGACY OF BOSMAN. REVISITING THE RELATIONSHIP BETWEEN EU LAW AND SPORT* (Antoine Duval & Ben Van Rompuy eds., 2016) [hereinafter Duval].

⁶⁴ García, *supra* note 36.

⁶⁵ *Id.*

⁶⁶ *Id.* at 202.

⁶⁷ GARDINER ET AL., *supra* note 54.

attack on the system in an area in which the courts lacked sports expertise.⁶⁸ This created a challenge for UEFA as it looked to comply with both the laws of the EU and FIFA regulations.

Following *Bosman*, FIFA's regulations were adapted to comply with EU competition law. UEFA and all its national football associations have accepted the duality of these two sources of regulation.⁶⁹ It has been accepted that a version of supervised autonomy is applied to sport in the economic context of sport as an undertaking.⁷⁰ Any restrictions on trade affecting Member States have the ability to be justified because of the "specificity of sport" which allows for self-regulation by sporting bodies.⁷¹

Though adapted, the law in the EU does not parallel the regulations in FIFA identically. The response to the removal of nationality clauses by both the EPL and UEFA was the implementation of rules for a minimum number of locally trained players per roster.⁷² This is discussed below under Section VII: The Impact of Brexit on Clubs Within the English Premier League.

IV. THE ROLE OF COMPETITION LAW IN SPORT: SPORT AS AN ECONOMIC ACTIVITY

Sport has been considered an area requiring regulation of the ECJ since 1974.⁷³ *Walrave and Koch v. Association Union Cycliste Internationale* established that a sport is subject to European Community law if it is considered "an economic activity within the meaning of Article 2 of the Treaty."⁷⁴ This was the first time that a sporting activity had been interpreted by the European Economic Community (EEC) law.

Currently, there exists a large body of case law that is reflective of the application of EU law in sport. *David Meca-Medina and Igor Majcen v. Commission of the European Communities* established the primacy of EU law over the regulations imposed by specific sports federations.⁷⁵ This set a precedent which required any limitation on competition to be justified through legitimate and proportionate objectives.

⁶⁸ García, *supra* note 36, at 209.

⁶⁹ JAMES, *supra* note 59.

⁷⁰ *Id.* at 304.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Stewart, *supra* note 42, at 230.

⁷⁴ Case C-36/74, *Walrave and Koch v. Union Cycliste Internationale*, 1974 E.C.R. 1405.

⁷⁵ Infantino, *supra* note 55, at 2.

This created the space for EU law to apply legal principles, in the regulation and governance of sport. Brexit will remove the UK from any future EU laws including those that affect sport. This will result in different avenues to bring legal disputes forward domestically for the UK. The foundational principles will still apply, but future decisions will not be required to follow EU law. CAS will still remain the predominant court for sports arbitrations, and it is likely athletes will take their disputes to CAS rather than face unpredictable judgements in UK courts.

V. PROPOSED IMPACTS OF BREXIT ON BRITAIN, EU CITIZENS AND THE ENGLISH PREMIER LEAGUE

A. *The Impact on the United Kingdom Generally*

Following the referendum, numerous changes occurred within the UK. First, the value of the British pound decreased. The British pound fell 7% against the euro following Brexit, and while it has seen some recovery, it has remained lower than its value prior to the referendum.⁷⁶ This decreased value is a positive for foreign investors, who will be able to invest more, and at a better exchange rate in sporting entities within the UK.⁷⁷ Second, the UK has seen net migration fall in the second half of 2016, driven by a decrease in immigration of 12% and an increase in emigration by EU citizens of 23%.⁷⁸ Moving forward, the UK can expect to see unemployment levels fall in the short-term, and correspondingly wage and salaries will face an upward pressure as businesses are left with a constricted talent pool from which to select employees.⁷⁹ As EU nationals comprised 7.3% of employees within the UK during the period of January to March of 2017, further declines in this percentage of workers may present a risk to both employment and output forecasts for the UK.⁸⁰

In particular, the UK will see changes to its immigration policy, affecting areas of freedom of movement of people and competition law. While currently bound by the EU Free Movement Directive, following the With-

⁷⁶ Lara J. Joy Dixon & Hoie Jo, *Brexit's Protectionist Policy and Implications for the British Pound*, 8 INT'L. J. FIN. 7, 8 (2017).

⁷⁷ Watkins, *supra* note 18.

⁷⁸ Kara, *supra* note 31, at 23.

⁷⁹ Dixon, *supra* note 76, at 10.

⁸⁰ Kara, *supra* note 31, at 23.

drawal Agreement, the UK will no longer be bound by this directive.⁸¹ The UK will be able to create and enforce law through its own legislative body.⁸²

In addition, the UK's decision to leave the EU will have a heightened inflationary pressure on the UK economy, and subsequently a depreciation of the British pound beyond what we have seen to date.⁸³ Current forecasts indicate a depreciation of 5.3% for 2017 and 2018, with subsequent increases in the exchange rate of approximately 0.5% per year for the period from 2019 to 2021.⁸⁴

B. *The Impact on European Union Citizens*

The UK has indicated that the referendum is about arrangements moving forward, not about disrupting previous commitments.⁸⁵ Prime Minister Theresa May has stated that "EU citizens living lawfully in the UK today will be able to stay."⁸⁶ However, an in-depth analysis of this indicates a less clear outcome for EU citizens. EU citizens who arrived in the UK prior to the referendum with a belief that they would be able to stay will have that expectation honored by the UK.⁸⁷ This broad statement is subject to numerous qualifications based on the point in time at which an EU national arrived in the UK. Upon the UK's exit of the EU, EU residents in the UK will be provided with a blanket grace period during which time they will be able to remain and work within the UK.⁸⁸ While unset currently, this period of time is expected to be up to two years in length, and will provide EU residents with time to apply for and secure "settled status".⁸⁹

Pursuant to the *Immigration Act* of 1971, individuals who qualify for settled status under UK law will be free to reside within the UK in any capacity and undertake any form of lawful activity.⁹⁰ In order to qualify for settled status, an EU citizen must have been a resident in the UK for a

⁸¹ Home Office, *The United Kingdom's Exit from the European Union, Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*, 2017, Cm 9464, ¶ 22 [hereinafter *UK's Exit*].

⁸² *Id.* at 58.

⁸³ Dixon, *supra* note 76, at 9–10.

⁸⁴ Kara, *supra* note 31, at 29, 33.

⁸⁵ *UK's Exit*, *supra* note 81, ¶ 3.

⁸⁶ Letter October 2017, *supra* note 5.

⁸⁷ *UK's Exit*, *supra* note 81, ¶ 3.

⁸⁸ *UK's Exit*, *supra* note 81, ¶ 24.

⁸⁹ *Id.* at ¶ 26.

⁹⁰ *Id.* at ¶ 6.

period of five years prior to a specified date.⁹¹ Individuals who arrived before the specified date, but who have not accumulated an appropriate continuous residence at the time of UK's exit can apply for temporary status, accumulate the requisite five years, and then apply for settled status.⁹² Individuals who arrive after the specified date may be allowed to remain in the UK for a period of time, but should not anticipate a guarantee of settled status.⁹³

Individual athletes from the EU who qualify for settled status will be free to continue to reside in the UK and play for their respective teams. Players who arrive before the specified date but who have not acquired the requisite five years will be able to apply for temporary status. Challenges will arise when EU players are no longer able to obtain settled status. This will result in a detriment to UK clubs who will begin to face increased restrictions in obtaining and retaining EU players.

The UK immigration rules will apply to hundreds of EU players. Clubs who are looking to sign players from the EU will have to pay considerably more to bring those foreign players over.⁹⁴

C. The Impact of Brexit on the Laws Which Govern the English Premier League

Post-Brexit, the EPL will no longer be bound by the decisions of the ECJ. The direction that future disputes will take may be very different from other leagues still within the ambit of EU law. However, there will still be some indirect influence of EU law on the EPL, as the EC has a role in policymaking and a relationship with UEFA under which the EPL falls. These impacts are considered further under Section VII: The Impacts of Brexit on Clubs Within the English Premier League.

D. The Impact of Currency Choice on the English Premier League Following Brexit

As a result of new Financial Reporting Standards issued by the Financial Reporting Council, the Football Association Premier League Limited Company has, as of 2017, been required to record their foreign currency

⁹¹ “[S]pecified date” will be no earlier than the 29 March 2017, and no later than the date of the UK's withdrawal from the EU.

⁹² UK's Exit, *supra* note 81, ¶ 6.

⁹³ *Id.* at ¶ 6.

⁹⁴ Andrew Osborne, *What a Brexit would mean for football in the UK*, 14 WORLD SPORTS L. REP. 16 (2016).

forward contracts at the spot rate.⁹⁵ The impact of this requirement has been magnified by the decrease in the value of the pound following the announcement of Brexit, and has resulted in a statutory loss after tax of £252.3 million.⁹⁶ The company recognized a loss of £370.8 million during the year in forward foreign currency contracts.⁹⁷ The company also indicated an underlying profit after tax of £628 thousand after adjusting for the impact of the Currency Remeasurements.⁹⁸

The strategic report has indicated that the Company's revenue is substantially derived in US dollars and euros and paid out to EPL teams in pound sterling.⁹⁹ This correlative risk of foreign currency movements on cash flows available for EPL teams is mitigated through the use of foreign currency derivative contracts.¹⁰⁰

For teams and clubs who do not hedge, this devaluation means players paid in euros become more expensive to retain.

VI. BREXIT'S IMPACT ON PLAYER MOBILITY WITHIN THE ENGLISH PREMIER LEAGUE

Freedom of movement enhances team and national performance. Freedom of movement allows the game at a national level to be more competitive as international talent widens the pool of available skilled athletes. Restrictions in movement of these international players result in overall increases in cost to teams and clubs, decreased competition within the league and potential movement of skilled athletes to other EU countries to play.

A. *Current Freedom of Movement*

1. Free Movement Within the European Union Generally

Labor mobility is considered a fundamental right in EC law, and renders inapplicable any national laws which are contrary to EU free movement.¹⁰¹ Article 45 of the EEC requires Member States to allow workers to

⁹⁵ The Football Ass'n Premier League Ltd. Co. Registration No. 02719699, *Report and Financial Statements for the year ended 31 July 2016*, (2017), available at <https://beta.companieshouse.gov.uk/company/02719699/filing-history>, [<https://perma.cc/T3ZL-JRLP>] [hereinafter FAPL Financials].

⁹⁶ *Id.* at 8.

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.*

¹⁰¹ Asser, *supra* note 48, at 11.

move freely within the European Community.¹⁰² This enables EU citizens to move freely between their country of origin and other Member States to offer their services, to work, and to pursue economic activity.¹⁰³

2. Free Movement for Athletes Within the European Union

a. Nationality Restrictions

Player movement, and the restrictions imposed upon it are one of the most common sports disputes brought to the attention of EU law.¹⁰⁴ Player transfers and restrictions are regulated by FIFA's Regulation of the Status and Transfer of Players (RSTP). The EC has found restrictions on freedom of movement are compatible with Community law only if they are "justified by compelling reasons of the general interest and comply with the principle of proportionality."¹⁰⁵ Past transfer rules have been challenged on these grounds many times. For example, the ruling in *Bosman*, that the 3+2 rule restricted free movement of players contrary to EU law, resulted in the reformation of the transfer system to align with the principles of free movement of workers enshrined in Article 45.¹⁰⁶

b. Restrictions on Transfer Rules

Bosman also established that football constitutes an economic activity when the players are gainfully employed and receiving remunerations.¹⁰⁷ UEFA had created transfer fees to compensate the former club for the player's training and development costs.¹⁰⁸ The club "selling" the player would not release them until satisfied by the terms of the offer of the "buying" club.¹⁰⁹

At the time, *Bosman* was playing for RC Liège, a Belgian first division club and refused to sign a renewal contract. This resulted in his placement on the transfer list. Subsequently, he then transferred to US Dunkerque, a

¹⁰² Christina Lembo, *FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major Changes in European Football and the Negative Effect on Minors*, 25 EMORY INT'L L. REV. 539, 548 (2001).

¹⁰³ Stewart, *supra* note 42, at 187.

¹⁰⁴ JAMES, *supra* note 59, at 286.

¹⁰⁵ GARDINER ET AL., *supra* note 54, at 157.

¹⁰⁶ Duval, *supra* note 63, at 52–53.

¹⁰⁷ Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n and others v. *Bosman* and others, 1995 E.C.R. I-5040.

¹⁰⁸ *Id.* at I-5048.

¹⁰⁹ Weatherill, *supra* note 35, at 89.

club in the French second division. Under the rules in place at the time, in order to complete the transaction, a transfer certificate was required from the club to the association. RC Liège did not believe US Dunkerque could pay the transfer fees, withheld the certificate, and suspended Bosman from play. Bosman then legally challenged the transfer fee system.¹¹⁰

The ECJ ruled that such transfer fees and the requirements of a transfer certificate limited player's career choices and gave associations and clubs great power over players. By requiring transfer fees for out-of-contract players and establishing quotas that limited the number of foreign players per team, the regulations were in violation of the fundamental right of freedom of movement of EU workers. The ECJ stated, "provisions which preclude or deter a national of a Member State from leaving his country of origin, in order to exercise his right to freedom of movement, therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned."¹¹¹

Transfer deadlines and transfer windows as a whole have been justified by the ECJ as necessary to secure a legitimate sporting objective, namely to regulate competition.¹¹² *Bosman* outlined the underlying basis for such a justification, stating "[Football] rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and clubs being deprived of the possibility of making use of the chances, with respect to the engagement of players which would be available to them under normal competitive conditions."¹¹³ This ruling still applies today.

B. Increased Restrictions on Foreign Player Transfers Following Brexit

1. Increased Immigration Restrictions

The UK's protectionist policy acts to restrict the labor mobility of EU citizens, and is designed to protect domestic jobs and local workers from foreign competition.¹¹⁴ The origins of immigration law in the UK are derived from the desire to protect the labor market.¹¹⁵ In 1971, the *Immigration*

¹¹⁰ *Bosman*, *supra* note 61, at I-5051.

¹¹¹ *Id.* at I-5069.

¹¹² GARDINER ET AL., *supra* note 54, at 171.

¹¹³ Duval, *supra* note 63, at 82.

¹¹⁴ Dixon, *supra* note 76, at 9.

¹¹⁵ Kevin K. McCormick, *Extraordinary Ability and the English Premier League: The Immigration, Adjudication, and Place of Alien Athletes in American and English Society*, 39 VAL. L. REV. 541-42 (2004).

Act was enacted to fulfil this purpose.¹¹⁶ In 1973, the UK joined the EEC, which effectively created a second set of principles and redefined the role and scope of immigration regulation within the UK.¹¹⁷

In 2015 the United Kingdom Home Office amended its work visa requirements, making them more stringent. Work permits are considered for internationally established athletes “whose employment will make a significant contribution to the development of that particular sport in the UK at the highest level.”¹¹⁸ All players outside of the EU currently require a work visa to play in the EPL. To obtain a visa, a non-EU player needs to apply for a Governing Body Endorsement (GBE) with the FA before the Home Office will consider a permit application.¹¹⁹

The threshold for obtaining a GBE is based on a country’s FIFA rank and match time played. It becomes increasingly difficult for a player to obtain a GBE and subsequently obtain a visa once their country’s FIFA rank falls below the top 50. For players coming from a country in the top 50, since 2015, to meet these requirements, football players must have played between 30% and 75% of their country’s senior international matches over the previous two years, depending on their country’s FIFA ranking.¹²⁰ For players aged 21 and under, this period has been reduced to one year. Players who meets these criteria are automatically granted a GBE under either the Tier 2 (Sportsperson) or Tier 5 (Temporary Worker Creative and Sporting Category) work permit.¹²¹ The objective behind this exception is to make it easier for young, outstanding talent to grow and develop their game in the UK.¹²² The current procedure, with GBE players now dependent on their national team’s FIFA rank is illustrated in Table 1.¹²³

¹¹⁶ *Id.* at 571.

¹¹⁷ *Id.* at 541, 572–73.

¹¹⁸ *Id.* at 576 (internal citation omitted).

¹¹⁹ *What requirements are there for international footballers to have work permits?* IN BRIEF, <https://www.inbrief.co.uk/football-law/footballer-work-permits/>, [<https://perma.cc/XWV8-BJVT>].

¹²⁰ POINTS BASED SYSTEM, GOVERNING BODY ENDORSEMENT REQUIREMENTS FOR PLAYERS, . 2016/2017 THE FOOTBALL ASSOCIATION 2–4, 2018, *available at* (2016) <http://www.thefa.com/-/media/files/thefaportal/governance-docs/registrations/gbe-players-criteria-2018-2019.ashx>, [<https://perma.cc/7JU9-4SGC>] [hereinafter *Football Association*].

¹²¹ *Id.* at 6.

¹²² *See id.*

¹²³ *Id.* at 3.

OFFICIAL FIFA RANKING	REQUIRED % OF INTERNATIONAL MATCHES PLAYED IN THE PREVIOUS TWO YEARS
FIFA 1-10	30% and above
FIFA 11-20	45% and above
FIFA 21-30	60% and above
FIFA 31-50	75% and above

Table 1

Players who do not meet these criteria may still be able to secure a GBE through the Exceptions Panel based on their experience and value.¹²⁴ In making a determination, the Exceptions Panel begins by viewing a first set of objective criteria and if the player scores at least four points in this process, the Exceptions Panel moves on to a subjective review.¹²⁵ These objective criteria consider the Transfer Fee a player receives, awarding three points for players paid in the 75th percentile or two points for a player paid in the 50th to 75th percentile.¹²⁶ The same points are available for a player's wages. A player may secure a single point for playing in 30% or more of the Available Minutes provided their club is a Top League Club, or a single point if they have played 30% or more of the Available Minutes of their club games in Continental Competitions.¹²⁷ A player who fails to meet the first set of objective criteria, may still qualify under a second set of objective criteria provided they score cumulatively more than five points.¹²⁸ If a player meets this criteria, the Exceptions Panel may consider granting a GBE but does not need to. If a player fails to meet these thresholds the Exceptions Panel should refuse to grant a GBE.¹²⁹

Once a player has been granted a GBE, the Home Office will review their application and grant them either a Tier 2 or Tier 5 work permit.¹³⁰ The relevant tier is determined through an examination of the applicant's fluency in English through an approved English language test or via an academic qualification as outlined in the Home Office guidelines.

A Tier 2 visa is designed to allow skilled workers to come to the UK and to fill a gap in the UK labor market.¹³¹ This visa allows a player to stay

¹²⁴ *Id.* at 7.

¹²⁵ *Id.* at 14.

¹²⁶ *Id.* at 15.

¹²⁷ *Id.*

¹²⁸ *Id.* at 18.

¹²⁹ *Id.*

¹³⁰ *Id.*; *Tier 2 Work Permit for Skilled Workers*, UK VISA BUREAU, <http://www.visabureau.com/uk/skilled-work-permit.aspx>, [<https://perma.cc/NT84-RV8G>] (last visited Nov. 24, 2017) [hereinafter *UK Visa Bureau*].

¹³¹ *Id.*

in the UK for three years with the potential of an additional extension of up to three years and fourteen days. After this extension, an individual is required to leave the UK unless he can demonstrate he will be paid a gross annual salary of £159,600 or more.¹³² Above this threshold, the individual can continue to reapply for visas.¹³³ In addition, an applicant must have accumulated a minimum of 70 immigration points. The accumulation of immigration points includes:

- 50 points for an FA endorsement (Certificate of Sponsorship);
- 10 points for proving he has sufficient funding to stay in the UK; and
- 10 points in satisfaction of the English language requirements.¹³⁴

A Certificate of Sponsorship must include the original letter issued by a Governing Body indicating the player is internationally established at the highest level, his employment will make a significant contribution to the development of sport and that the post could not be filled by a suitable settled worker.¹³⁵ Sufficient funds under Tier 2 and Tier 5 migrants are set at £945, or by a rated Sponsor with an associated undertaking of £945.¹³⁶ A Tier 2 player can also obtain points for prospective earnings, with a maximum of 25 points awarded for earnings above £32,000 per year.¹³⁷

Alternatively, under Tier 5 a player can stay in the UK for a period of up to one year. While restricted to a single year, these individuals can sit an English language test and, with satisfactory results, may then apply for Tier 2 status.¹³⁸ If a player with a Tier 5 visa does not automatically qualify for a GBE, their club is required to submit an application for a new GBE, in which they summarize the player's domestic club appearances over the prior year.¹³⁹ The decision to grant a new GBE is then made at the sole discretion

¹³² *Tier 2 (Sportsperson) visa*, GOV.UK, <https://www.gov.uk/tier-2-sportsperson-worker-visa/extend-your-visa>, [<https://perma.cc/S2E6-F3JP>] (last visited Oct. 14, 2018).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Immigration Rules Appendix A: attributes*, GOV.UK (2016), ss. 93, 100(b)(i), (ii), (iii) <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-a-attributes>, [<https://perma.cc/UZ84-YQRF>].

¹³⁶ *Immigration Rules Appendix C: maintenance (funds)*, GOV.UK (2016), <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-c-maintenance-funds>, [<https://perma.cc/7Z6Y-YTLS>].

¹³⁷ *Immigration Points Test for Tier 2 Migration*, UK Visa Bureau, (last visited Oct. 14, 2018).

¹³⁸ *Id.*

¹³⁹ Football Association, *supra* note 119, at 3.3.

of the FA and the EPL representative.¹⁴⁰ A new GBE must also be obtained in the case of a player who changes clubs, or in the case of a temporary transfer of a player from a club outside of England to a club within England.¹⁴¹

If a player doesn't automatically qualify for a GBE through international participation, there is a review process, which is conducted on a points-based system.¹⁴² This system awards points based on the transfer fee paid for the player and the basic salary offered to the player relative to those of the other players in the league. Points are also awarded depending on the level at which the individual played for his previous club.

2. Decreased Player Eligibility

Current EU players make up approximately 34% of the EPL; international players make up another 25% of the league, and the remaining 41% of players are domestic.¹⁴³ If this player nationality breakdown in the EPL remains consistent following Brexit, EU nationals will merge into the international player category, and subsequently 59% of players in the league will require visas to continue to play.¹⁴⁴

Herein lies an issue for clubs: in attempting to ensure a player will be granted a GBE and then a visa, and knowing that more points are distributed if the transfer fee and wages of the player are higher, clubs are incentivized to spend more on international and EU players.¹⁴⁵ For players coming from a country which does not rank in the FIFA top 50, clubs will be encouraged to pay higher transfer fees and wages to have these players qualify through the Exceptions Panel. If these players are not from a current Top League Club and have not played in a Continental Competition in the prior year, clubs will need to pay these players a transfer fee and wages above the 50th percentile for players to qualify for GBEs. While this has not been

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 3.4 and 3.5.1.3.

¹⁴² Jake Cohen & Carol Couse, *Brexit Would Trigger a Battle Between the Premier League and the FA Over the Future of the Game*, INDEP. April 18, 2017, available at <http://www.independent.co.uk/sport/football/news-and-comment/brexit-negotiations-premier-league-fa-football-future-a7688786.html>, [https://perma.cc/28VY-X7HJ].

¹⁴³ See Appendix B.

¹⁴⁴ *Id.*

¹⁴⁵ Huw Davies, *What will Brexit mean for Football? Transfer Trouble, FA joy. . .and Chaos in Football Manager*, FOURFOURTWO, July 11, 2017, available at <https://www.fourfourtwo.com/features/what-will-brexit-mean-football-transfer-trouble-fa-joy-and-chaos-football-manager?page=0%2C1>, [https://perma.cc/XE5D-WF4G].

a concern for players in the League with EU citizenship, once the UK formally leaves the EU, players from the 27 EU countries will need to meet these objective criteria to qualify for a GBE and subsequently obtain a visa.

On average, only 33.2% of players starting games in the EPL are English.¹⁴⁶ Under this new framework of legal application, the freedom of movement for workers will be abolished. It is unlikely that the EPL will see this percentage of English starters increase. In addition, once the UK has left the EU, there is nothing to prevent the UK from reinstating a nationality clause.

For domestic players, this puts them at an advantage. By reducing the number of non-international players who are EU citizens, there will be a corresponding increase in the number of academy players in a team's squad.¹⁴⁷ Left to the mercy of the Home Office for a work visa, restrictions on players will be significant.¹⁴⁸ As demonstrated by the immigration points system, often the ability to obtain a visa is dependent on the availability of funds within a club, and the club's willingness to fund at sufficient levels. This is likely to be less of a concern for players in the EPL. The ability to fund higher wages for players will be of advantage to clubs with higher bottom line revenues, who will be better situated to pay premiums to obtain foreign players. At the lower levels, the changes to immigration will impact the composition of teams. UK players at this level will be more valuable, as they will have no restrictions on their ability to play for any given club or team.¹⁴⁹

C. Practical Application of Increased Restrictions on Football Players

1. Impact on UK Citizens Playing in the EU and EU Citizens Playing in the UK

UK players indicate they are closely following Brexit, as the final negotiations before the exit will indicate their future potential to make playing a sport a viable career and will directly impact their futures. At present, being

¹⁴⁶ *Premier League Home-Grown Percentage Not Bad, says FA*, BBC NEWS, Aug. 12, 2015, available at <https://www.bbc.com/sport/football/33892349>, [https://perma.cc/4QPP-FYZC].

¹⁴⁷ Daniel Geey, *What a Hard 'Red, White and Blue' Brexit may Mean for Domestic Football*, LAW IN SPORT, May 17, 2017, available at <https://www.lawinsport.com/blog/sheridans/item/what-a-hard-red-white-and-blue-brexite-may-mean-for-domestic-football?highlight=WYJicmV4aXQiLCInYnJleGl0IiwYnJleGl0JywiLCJicmV4aXQncyJd>, [https://perma.cc/T7L9-5P83].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

a British passport holder playing football in the EU makes things simple.¹⁵⁰ Bank accounts remain the same, health insurance still applies, and transfers between teams can happen quickly.¹⁵¹

When the UK separates, these benefits will disappear, as playing outside of the UK becomes similar to playing overseas. As a British national, it may be harder to be signed outside of England as transfers will become too expensive.¹⁵² The benefits of EU membership will be withheld from UK players. Work permits are expensive for clubs to obtain, and smaller clubs may be less likely to take on a British player when an equally talented player from the EU can be acquired for less.¹⁵³ The reality is that it all comes down to the financial ability of clubs to attract and keep quality talent.

With a hard Brexit, players anticipate a rush of work permits for non-British players competing and vice-versa for those UK players abroad.¹⁵⁴ This will increase competition, as work permits are limited.

Mirrored issues will be seen for EU players in the UK. Some argue this will provide UK-born players greater opportunity with clubs in the UK following Brexit. UK players will become a valuable entity for leagues with fewer resources.¹⁵⁵

Shifting a focus to developing local talent has been an underlying rationale for Home Grown Player rules. An increase in opportunity for domestic players can increase skill and development, and create a larger local talent pool from which to draw for national competitions.¹⁵⁶ Players who agree with this expect such a shift would create a more competitive Britain on the pitch.¹⁵⁷

In contrast, the idea that benefits are derived as a product of human capital in all industries, including football, suggests stifled competition.¹⁵⁸ In support of this is the thought that the best clubs will always recruit the best national and international players. As a general rule, the richest clubs

¹⁵⁰ Laurie Bell, *Life in the Brexit Balance: A Footballer's Perspective on Leaving the EU*, VICE SPORTS, Dec. 21, 2016, available at https://sports.vice.com/en_ca/article/vw33d/life-in-the-brexite-balance-a-footballers-perspective-on-leaving-the-eu, [<https://perma.cc/HWE4-9YFD>].

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Geey, *supra* note 147.

¹⁵⁶ Davies, *supra* note 142.

¹⁵⁷ Bell, *supra* note 150.

¹⁵⁸ Nauro Campos, *Football and Brexit: How freedom of movement has affected England's chances of winning Euro 2016*, LONDON SCHOOL OF ECONOMICS (June 20, 2016), <http://blogs.lse.ac.uk/europpblog/2016/06>, [<https://perma.cc/Y59J-HSPQ>].

are still in a position to afford the best players, attract the most expensive foreign stars and engage the best local talent.¹⁵⁹ In addition, the importation of foreign international players into a domestic league may improve the skills of the domestic players.¹⁶⁰ Based on this line of reasoning, leagues in the UK can expect a decrease in talent as EU players are picked up by EU leagues.

2. Decreased Ability for European Union Players to Obtain a UK Visa

As well as being considered the best league in the world, the EPL is known for its player diversity. Players in the 2017 season come from 65 different nations. Of the 518 players in the League, for the 2017-2018 season, 67.4% are considered foreign.¹⁶¹ This means these individuals are not British passport holders. Approximately 58% of these foreign individuals are players from the EU. Therefore, the EU contributes approximately 39% of players in the League.¹⁶² These players will require work visas to continue to play with their current teams, and may or may not qualify for settled status depending on their arrival date within the UK. If they do not qualify for settled status and do not meet the visa requirements, they will need to leave the UK and their respective teams following Brexit.

For many of the EU players in the EPL, acquiring a work visa is expected to be a burden on the players and the League. In examining the largest five transfers of the 2017 summer transfer window, it is apparent that obtaining a work visa will constitute a more extensive process for EU nationals following Brexit. The concern for such qualified players is the limited number of work visas issued. Qualifications will not help a player when the Home Office implements a limit to visas issued. Only Manchester City's acquisition of Kyle Walker for £50 million would be exempt from such additional requirements.¹⁶³ Romelu Lukaku to Manchester United, Alvaro Morata to Chelsea, Benjamin Mendy to Manchester City and Alexandre Lacazette to Arsenal, would all require work visas under a hard Brexit.¹⁶⁴ Of

¹⁵⁹ Duval, *supra* note 63, at 60.

¹⁶⁰ *Id.* at 75.

¹⁶¹ *Foreign Players*, TRANSFER MARKET, Nov. 1, 2017, available at https://www.transfermarkt.co.uk/premier-league/gastarbeiterdetail/wettbewerb/GB1/saison_id/gesamt/land_id/26, [https://perma.cc/22JT-4AE8].

¹⁶² *Id.*

¹⁶³ Chris Newell & Patrick Scott, *Premier League Transfers 2017: Every Summer Deal in One Place*, THE TELEGRAPH Sept. 1, 2017, available at <http://www.telegraph.co.uk/football/0/premier-league-transfers-2017-every-summer-deal-one-place/>, [https://perma.cc/GG3P-RG2V].

¹⁶⁴ *Id.*

those four, Benjamin Mendy and players like him would not meet the FIFA prescribed percent of international games necessary to meet the requirements of a Tier 2 visa, in order to be eligible for a Tier 5 work permit.

This is an issue that will need to be addressed post-Brexit. For EU members, this currently is not an issue, but the future requirements to obtain visas for these players, as well as the limited supply of available visas in the two tiers, may inhibit the future success of transfers.

Consider Dimitri Payet's time as a player for West Ham. Under the strict restrictions to obtain a visa, Payet would not qualify. France is ranked seventh in FIFA's world ranking. As a French national on a top 10 ranked team, Payet would be required to have played at least 30% of international matches in the previous two seasons to apply for a GBE. Payet joined West Ham in 2015, however, having not played the required match time in his 2013 and 2014 seasons for the French national team, he would not qualify for a GBE and would not be able to proceed in applying for a visa. His only recourse would be to attempt to secure a GBE through the Exceptions Panel.

A similar situation would arise for N'Golo Kanté of Leicester City. Also a French national, Kanté would not have the required match time to qualify for a GBE. The list of players who would be ineligible and unable to obtain a visa is extensive and would impact players in numerous top teams within the EPL. Players impacted would include: Kurt Zouma and César Azpilicueta of Chelsea; Héctor Bellerín and Francis Coquelin of Arsenal; David de Gea, Juan Mata, Morgan Schneiderlin and Anthony Martial of Manchester United; Eliaquim Mangala, Jesús Navas and Samir Nasri of Manchester City; Simon Mignolet of Liverpool; and Tim Krul of Newcastle.

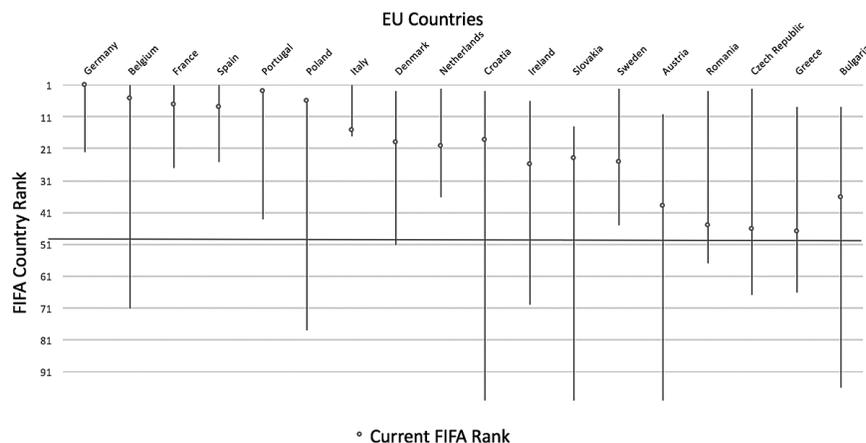
Limiting the talent in the EPL will change the game. The EPL has had some of the best players in the world play on its teams. Cristiano Ronaldo, for example, began his professional career at age eighteen when he joined Manchester United in 2003. As a Portuguese national, Ronaldo, to acquire a GBE and subsequently a visa would be required to have played in 30% of international matches for his national team based on Portugal's current rank of third. At the time of his transfer, Ronaldo would not have met this requirement. Post-Brexit, for a player like Ronaldo to play in the EPL, he would have to attempt to obtain a visa through the Exceptions Panel, or risk not playing in the League at all.

While major actors in the EPL actively support the idea of a creating an exemption for visas for athletes, this does not seem likely given the UK government's stance on immigration, and its firm position in regard to its regulation of borders. One solution to ensure that this large amount of talent is not lost from the League is to implement a tiered player immigration

system.¹⁶⁵ While visa requirements will depend on the deal negotiated, in the case of a hard Brexit, visas will be in high demand, and if the summer 2017 transfer window is any indication, the fees for signing an EU player will continue to increase.

3. Decreased Ability of Players to Obtain a Visa Based on Their Country's FIFA Rank

In addition to the requirement for a player to meet the requisite number of international matches based on their respective FIFA rank, consideration should be given to the international status of individual countries. The current status of EU countries above 50 in the FIFA rank is illustrated in Graph 1 below. As indicated in this graph, there are eighteen EU countries currently in the FIFA top 50, and of those only seven have never fallen below the FIFA 50 threshold. There are another nine countries in the EU who currently fall below the FIFA 50 rank, and they are not displayed on the graph below. Of those nine, seven have been above 50 at some point in the last ten years.



Graph 1

It is more difficult for players to qualify for a GBE if their country's rank falls below 50 and they are forced to go through the Exceptions Panel. Within the EU, ten countries fall below this rank.¹⁶⁶ Of these ten countries,

¹⁶⁵ Geey, *supra* note 147.

¹⁶⁶ Countries below this rank include: Bulgaria, Estonia, Finland, Cyprus, Hungary, Latvia, Lithuania, Luxembourg, Malta and Slovenia. FIFA WORLD RANKINGS, Nov. 25, 2017, available at <http://www.fifa.com/fifa-world-ranking/associations/association=hun/men/index.html>, [https://perma.cc/2PXE-M5G4].

four have current players in the EPL: Ragnar Klavan of Estonia, Niki Maenpaa of Finland, Adam Bogdan of Hungary, and Jon Gorenc Stankovic of Slovenia.¹⁶⁷ While this does not impact a significant number of current players, following Brexit, players from any one of these nine countries will only qualify for a GBE through the Exceptions Panel. Not all the best players are from the FIFA top 50 countries, with powerhouse countries including Italy ranked 7th, England ranked 15th and the Netherlands ranked 20th, failing to qualify for the 2018 FIFA World Cup.¹⁶⁸

In addition, country rankings in FIFA are volatile. Within the top tier of countries, ranked 1 to 10, two countries, Belgium and Poland have fallen below the FIFA 50 in the last ten years, Belgium to 71st spot in 2007 and Poland to 78th spot in 2013.¹⁶⁹ Within the EU, four countries fall within the bottom tier of countries, ranked 31 to 50, where players may still qualify for a GBE without going through the Exceptions Panel. Of these countries Austria, currently ranked 39th, has eight nationals playing in the EPL. They were ranked 105th in 2008 and they have decreased in their FIFA rank from 10th spot in 2015 to 39th spot as of 2017.¹⁷⁰ Should this trend continue, and Austria drop below 50, any Austrian players skilled enough to play in the EPL moving forward will only qualify for a GBE through the Exceptions Panel. The same can be said for the three countries in the EPL hovering right above the FIFA 50 threshold: Romania at 45th spot, the Czech Republic at 46th spot, and Greece at 47th spot.¹⁷¹ These three countries collectively have five players in the EPL. Should they drop below the FIFA 50 threshold, these players will only be able to obtain a GBE through the Exceptions Panel.

D. Additional Stakeholder Impacts

A number of additional stakeholders within the EPL will be impacted by increasingly stringent visa requirements following Brexit. In addition to players, a number of coaches and managers have the potential to be impacted by Brexit. The top five teams in the EPL (Manchester City, Manchester United, Chelsea, Tottenham Hotspur, and Liverpool) are managed by foreigners, and only nine out of twenty EPL team managers are

¹⁶⁷ Transfer Market, *supra* note 161.

¹⁶⁸ FIFA WORLD RANKINGS, *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

British.¹⁷² These individuals will likewise face visa restrictions, and will no longer benefit from free movement principles following Brexit.

VII. THE IMPACT OF BREXIT ON CLUBS WITHIN THE ENGLISH PREMIER LEAGUE

Football clubs in the UK already frequently spend more than they generate in revenue and require external capital injections to continue to operate in their respective leagues. Since the British referendum, the devaluation of the pound has led transfer players to request payment in euros and has placed challenges on the ability of clubs who do not hedge to afford these new players. While the EPL will face increased costs to obtain EU talent, European leagues with the ability to pay players in euros will increase their capacity to obtain and retain talented EU athletes. In addition, as EU players stop qualifying for settled status and begin to be considered international players post Brexit, EPL clubs are going to need to pay more in both salaries and wages to successfully have these players obtain GBEs and subsequently UK visas. This will place additional pressure on the ability of EPL clubs to meet their financial regulations.

A. Financial Fair Play

1. Why we Need Financial Fair Play

Winning involves having better players than those who play for other clubs. To obtain these players, clubs frequently spend more than they generate.¹⁷³ This excess spending is apparent in both UEFA competitions and within the EPL. In 2007 the deficit of UEFA clubs was €0.6 billion.¹⁷⁴ Between 2007 and 2012 this deficit grew to €1.1 billion.¹⁷⁵ The EPL itself

¹⁷² Peter Berlin, *British Football Braces for Life After Brexit*, POLITICAL SPORT, Oct. 5, 2017, available at <https://www.politico.eu/article/british-football-braces-for-life-after-brexit-chelsea-ngolo-kante-english-premier-league/>, [https://perma.cc/6MB4-WYKD]. Only Bournemouth, Burnley, Crystal Palace, Everton, Swansea City, West Bromwich Albion, Stoke City, and West Ham United are managed by UK Nationals, see *Managers*, PREMIER LEAGUE, Nov. 15, 2017, available at <https://www.premierleague.com/managers>, [https://perma.cc/GQC2-NFAT].

¹⁷³ Stefano Bastianon, *The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout?*, 11 COMP. L. REV. 7 (2015).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

has a wage to revenue ratio which is too high.¹⁷⁶ Within the EPL, Manchester City recorded a loss of £197 million over the 2010-2011 accounting period.¹⁷⁷ Chelsea had a loss before tax at the year-end 2016 of £85 million.¹⁷⁸ These losses are not sustainable, and many clubs require external capital injections in order to continue to operate in their respective leagues.¹⁷⁹ Financial Fair Play (FFP) rules act to both stop large financial injections and limit a club's ability to spend at higher than sustainable levels.¹⁸⁰

2. Requirements Under Financial Fair Play and EPL Financial Regulations

UEFA competitions are governed by a different set of FFP regulations than the EPL. However, up to seven teams from the EPL will qualify for 2017-2018 UEFA competitions.¹⁸¹ While these clubs reach UEFA competitions based on sporting merit, they must abide by and observe *UEFA Club Licensing and Financial Fair Play Regulations* to continue to participate in UEFA sanctioned events.¹⁸² As such, both the EPL financial regulations and the UEFA FFP regulations have been outlined below.

a. UEFA Financial Fair Play

FFP regulations are set out in UEFA's 2015 Club Licensing and FFP Regulations. Their intent is to bring 'discipline and rationality' to the fi-

¹⁷⁶ Christopher A. Flanagan, *A Tricky European Fixture: An Assessment of UEFA's Financial Fair Play Regulations and their Compatibility with EU Law*, 13 INT'L. SPORTS L.J. 148,159 (2013).

¹⁷⁷ *Id.* at 149.

¹⁷⁸ David Conn, *Premier League finances: the full club-by-club breakdown and verdict*, THE GUARDIAN, June 1, 2017, available at <https://www.theguardian.com/football/2017/jun/01/premier-league-finances-club-by-club>, [https://perma.cc/8FY-PQEEV].

¹⁷⁹ Bastianon, *supra* note 173.

¹⁸⁰ Flanagan, *supra* note 176, at 159.

¹⁸¹ *A Breakdown of how PL Clubs Can Qualify for UEFA Champions League and Europa League Next Season*, PREMIER LEAGUE, Oct. 17, 2017, available at <https://www.premierleague.com/european-qualification-explained>, [https://perma.cc/L6RH-AN49].

¹⁸² See Union of the European Football Ass's, *UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS 2012*, available at https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf, [https://perma.cc/H6WZ-PUND].

nances of football clubs throughout the EU.¹⁸³ They have been in effect since the 2013-2014 season, and teams wishing to obtain a UEFA license need to adhere to these regulations.¹⁸⁴ They apply to any club competition played under UEFA's umbrella.¹⁸⁵ This includes the top three EPL teams at the end of each season who qualify for the group stage, and the fourth place team who qualifies for a play-off round in the UEFA Champion's League.¹⁸⁶ It also includes the fifth place EPL team, who qualifies for the UEFA Europa League.¹⁸⁷ UEFA's objectives are to achieve FFP in UEFA club competitions.¹⁸⁸ UEFA provides a number of reasons for the implementation of these rules. In particular, FFP was developed to improve the economic and financial capacity of clubs, to increase club transparency, to protect creditors, to introduce more rationality in club football finances, and to encourage clubs to operate within their means so that they can remain viable business entities.¹⁸⁹

By the end of March 31 of each year, a license applicant must prove that they have no overdue payables to another football club as a result of the prior year's transfers.¹⁹⁰ In addition, all licensees who are qualified for UEFA club competitions must comply with the break-even requirement.¹⁹¹ The concept of break-even is that clubs cannot spend more than they earn in a given time frame.¹⁹² The implementation of this requirement acts to limit capital injections into a club by wealthy owners.¹⁹³ The break-even requirement sets an acceptable deviation of €5 million, with an exception of up to €30 million if the excess is covered entirely by contributions from equity participants.¹⁹⁴

In calculating break-even, under Annex X(1) relevant expenses may be decreased if an organization is funding under subsection (g) expenditures on youth development activities.¹⁹⁵ The aim of this deduction is to encourage

¹⁸³ Thomas Peeters & Stefan Szymanski, *Financial Fair Play in European Football*, 29 *ECON. POL'Y* 345, (2014).

¹⁸⁴ Flanagan, *supra* note 176, at 149-150.

¹⁸⁵ See Union of the European Football Ass'n, *supra* note 182, at 1.

¹⁸⁶ See PREMIER LEAGUE, *supra* note 181.

¹⁸⁷ See *id.*

¹⁸⁸ See Union of the European Football Ass'n, *supra* note 182, at 2.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 27.

¹⁹¹ *Id.* at 33.

¹⁹² See Flanagan, *supra* note 176, at 150.

¹⁹³ See *id.*

¹⁹⁴ Union of the European Football Ass'n, *supra* note 182, at 36.

¹⁹⁵ *Id.* at 72.

investment and expenditure on facilities and activities which will provide clubs with benefit in the long run.¹⁹⁶

UEFA clubs who fail to meet the requirements of FFP, including the break-even requirement, face numerous sanctions from simple warnings, to full exclusion from UEFA competitions.¹⁹⁷ One such team, who was sanctioned in 2014 for violating their FFP obligations was Paris Saint-Germain, who spent approximately €100 million more than they earned.¹⁹⁸ As a result of this violation, Paris Saint-Germain had salary freezes put in place, limits set to its next set of transfer spending, and a cap of 21 players instead of the regular 25 players placed on its Champions League roster.¹⁹⁹

As of the 2016-2017 season, only FC Porto was not in compliance with its break-even requirements, and of the five clubs under monitoring for the 2016-2017 season, four had complied with their targets.²⁰⁰

b. The English Premier League Financial Regulations

The EPL has its own regulations on the governance of each of its clubs' finances.²⁰¹ These are outlined in section E of the 2017-2018 Premier League Handbook. Similar to UEFA rules, Premier Clubs must ensure that they have no outstanding compensation fee or loan agreement. They must also ensure that they have no overdue employee fees payable submitted prior to December 31, outstanding as at March 31 of the following year.²⁰² From a profitability stance, the two threshold values which trigger review under

¹⁹⁶ See Flanagan, *supra* note 176, at 152.

¹⁹⁷ See *id.* at 150.

¹⁹⁸ *Could Neymar's record transfer to PSG be stopped by Financial Fair Play regulations?*, THE CONVERSATION, Aug. 3, 2017, available at <http://theconversation.com/could-neymars-record-transfer-to-psg-be-stopped-by-financial-fair-play-regulations-81982>, [https://perma.cc/XL8T-KFUB].

¹⁹⁹ *Id.*

²⁰⁰ *CFCB update on break-even monitoring for 2016/17*, Union of the European Football Ass'n, June 9, 2017, available at http://www.uefa.com/insideuefa/protecting-the-game/club-licensing-and-financial-fair-play/news/newsid=2476788.html#, [https://perma.cc/7ALL-XKAB].

²⁰¹ *What is Financial Fair Play?*, PREMIER LEAGUE, Aug. 16, 2017, available at <https://www.premierleague.com/news/102374>, [https://perma.cc/4AYN-G6WL].

²⁰² Football Ass'n Premier League Ltd., PREMIER LEAGUE HANDBOOK SEASON 2017/18, July 2017, 114, available at <https://www.pulse-static-files.s3.amazonaws.com/premierleague.com/publications>, [https://perma.cc/83NN-8MWL]/document/2018/09/19/ef4c62c9-6b19-4189-a064-d212cbf68ce7/PL_Handbook_2018-19_Digital.pdf, [hereinafter Premier League Handbook].

the Premier League Handbook are £15 million and £105 million respectively.²⁰³

A team who has an aggregated loss in adjusted earnings before tax of over £15 million over T-1 and T-2 must provide evidence of secure and sufficient funding.²⁰⁴ If this loss exceeds £105 million, the Board has the ability to exercise its powers,²⁰⁵ including requiring the Club to submit a budget, and refusing any application by the Club to register any player or new contract, in order to ensure that the Club in question complies with its fiscal obligations.²⁰⁶ The Board may also impose numerous sanctions on teams who fail to meet their financial obligations, including: reprimands, fixed penalties, and the exercise of summary jurisdiction.²⁰⁷

3. Post Brexit Challenges for Clubs to Meet Their Financial Obligations and Still Obtain the Most Talented Players

Following the referendum held on June 23, 2016, the value of the British pound decreased 7% against the euro.²⁰⁸ This resulting devaluation in the pound led some players during the summer transfer window to request funds in euros instead of pounds.²⁰⁹ While wealthier teams in the EPL hedge to decrease their risk when they need to pay in euros, the required funds to pay for big name players may be more than what teams have hedged.²¹⁰ The 2017 summer transfer window for EPL cost the clubs £105 million more than they would have paid prior to the referendum as a result of the decreased value in the pound.²¹¹

Another potential risk is that by paying inflated wages to retain the best talent, clubs will run into a conflict with their obligations under their respective FFP or financial regulations. This is a current concern in UEFA

²⁰³ *Id.* at 114.

²⁰⁴ *Id.* at 120.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 112.

²⁰⁷ *Id.* at 221.

²⁰⁸ Dixon, *supra* note 76, at 8.

²⁰⁹ Tyler Durden, *UK Soccer Players Abandon Pound, Demand Payment in Euros*, ZEROHEDGE, June 3, 2017, available at <http://www.zerohedge.com/news/2017-06-03/brexodus-builds-uk-soccer-players-abandon-pound-demand-payment-euros>, [<https://perma.cc/8RJX-K77G>].

²¹⁰ *Id.*

²¹¹ David Hellier & Scott SochnickSoshnick, *Smaller Premier League Clubs Told New Deal is Still the Best*, BLOOMBERG, Sept. 29, 2017, available at <https://www.bloomberg.com/news/articles/2017-09-29/smaller-premier-league-clubs-told-new-deal-is-still-the-best>, [<https://perma.cc/Q5YR-N3XT>].

regarding the transfer of Neymar from FC Barcelona to Paris Saint-Germain for €222 million. The Spanish governing body La Liga expressed concern that this payment from Paris Saint-Germain would violate their obligations under UEFA FFP rules.²¹²

B. Nationality Clauses: Homegrown Player Rules

1. Overview of Homegrown Player Rules

Following Bosman and the removal of the 3+2 player quota system, UEFA and the EPL introduced locally trained and Home Grown Player restrictions respectively.²¹³ These restrictions on team composition are not based on the nationality of an individual, but rather where they have trained. Owen Hargreaves, as a UK citizen, meets the requirements of nationality; however, he does not meet Home Grown Player requirements, having trained with Bayern Munchen.²¹⁴ These restrictions have not been challenged under EU law. However, FIFPro is currently looking for a player willing to challenge this system.²¹⁵ These requirements present an indirect discriminatory effect on EU youth, with nationals of the UK more likely to fulfill the requirements of Home Grown Players than youth from the EU.²¹⁶ The justification for Home Grown Player rules is that the restrictions are both proportionate and necessary for the proper administration of football.²¹⁷

a. The English Premier League

Within the EPL, a Home Grown Player is a player who has been registered with a club or affiliate for a period of three years prior to his 21st birthday.²¹⁸ An affiliate club is any club affiliated to the FA or the Football Association of Wales.²¹⁹ This means that youth players, irrespective of birth nationality, may qualify as Home Grown Players within the EPL, provided they play three years with an affiliate club prior to reaching the age of 21.²²⁰ In any given league match during a season game, a team within the EPL

²¹² Manoli, *supra* note 198.

²¹³ Lembo, *supra* note 102, at 552–53.

²¹⁴ Duval, *supra* note 63, at 75 fn. 95.

²¹⁵ *Id.* at 95, n. 82.

²¹⁶ GARDINER ET AL., *supra* note 54, at 495.

²¹⁷ JAMES, *supra* note 59.

²¹⁸ Premier League Handbook, *supra* note 202, at 87.

²¹⁹ *Id.*

²²⁰ *Id.*

may have up to 25 players on their roster.²²¹ This roster can comprise of a maximum of seventeen players whom are not Home Grown, which means that each EPL team, to reach their maximum roster limit, must sign at least eight Home Grown Players.²²² There is no restriction on the number of foreign players under the age of 21 who may play for teams.

b. UEFA Competitions

Similar rules are outlined for UEFA competitions under Article 43 of the UEFA Championship League for the 2015 to 2018 Cycle.²²³ UEFA requires teams to retain eight places on their 25 man roster for “locally trained players” and requires no club to have more than four “association-trained players.”²²⁴ Locally trained players are defined as either “club trained” or “association-trained.”²²⁵ Club trained players are individuals, between the age of 15 and 21 spent at least three years training with their current club,²²⁶ while association trained players must have played either with the registered club or an affiliate.²²⁷

2. FIFA Regulations on the Status and Transfer of Players

The RSTP entered into force in September 2001, formalized by FIFA in response to the *Bosman* ruling to regulate the transfer system.²²⁸ This has five main components for the new system:

1. Requirements for the term of players’ contracts;
2. Limitations on international transfers, only permitting them during two designated transfer windows per season;
3. Creation of a registration system to enable FIFA to track transfers;
4. Addition of a section to enhance the protection of minors; and
5. Creation of the FIFA Dispute Resolution Chamber to handle disputes.²²⁹

²²¹ *Id.* at A.1.158.

²²² *Id.*

²²³ See REGULATIONS OF THE UEFA CHAMPIONS LEAGUE 2015-2018 CYCLE (2016).

²²⁴ *Id.* at Article 43.02.

²²⁵ *Id.* at Article 43.03.

²²⁶ *Id.* at Article 43.04.

²²⁷ *Id.* at Article 43.05.

²²⁸ Lembo, *supra* note 102, at 553.

²²⁹ *Id.* at 553–55.

This fifth component is notable as it is referenced through the regulation as the avenue under which to process disputes and therefore bars parties from bringing a dispute to ordinary courts in domestic or international law.²³⁰ Despite the dispute resolution mechanisms, from a legal stance, the agreements setting out RSTPs are vague, would likely not bind the CJEU, and are challengeable in EU law.²³¹

RSTPs only apply to international transfers between national associations.²³² They bind national associations and clubs and as such are not directly applicable to players although the rules affect the employment relationship between the player and the club.²³³ The rationale behind transfer fees is to compensate the club that has provided the player with training to develop their skills as well as any remaining value on their contract.²³⁴ This compensation fee applies to youth players through the implementation of an age restriction of player movement and requires general compensation be paid to clubs for players under the age of 23 who are transferred.²³⁵

3. The Post Brexit Issue of Minor Player Eligibility

Article 19 of FIFA RSTP specifically addresses the protection of minor players.²³⁶ Section two outlines three exceptions to the general rule that international player transfers are not permitted for those under the age of 18.²³⁷

- a) The player's parents move to the country in which the new club is located for reasons unrelated to football;
- b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:
 - i) It shall provide the player with an adequate football education and/or training in line with the highest national standards.
 - ii) It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football educa-

²³⁰ Richard Parish, *Article 17 of the FIFA Regulations on the Status and Transfer of Players*, 22 M. J. 256, (2015).

²³¹ Duval, *supra* note 63, at 94.

²³² GARDINER ET AL., *supra* note 54, at 451.

²³³ Parish *supra* note 230, at 258.

²³⁴ GARDINER ET AL., *supra* note 54, at 452.

²³⁵ Duval, *supra* note 63, at 74.

²³⁶ FIFA, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS, Art 19 (2017).

²³⁷ *Id.* at Art 19(1).

- tion and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.
- iii) It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).
- iv) It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations;
- c) The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border.²³⁸

This exception has allowed many clubs to invest in foreign youth players from EU Member States rather than the local talent.²³⁹ This rule has allowed hundreds of young, talented players to join English academies and has created a loophole for clubs to get around the Home Grown Player rule, by recruiting foreign youth at an age young enough that they meet the requirements to qualify for Home Grown Player status.²⁴⁰ Cesc Fabregas and Francis Coquelin are both EU nationals who took advantage of this FIFA exemption and joined the EPL as minors. Consequently, they both qualified as Home Grown Players.²⁴¹

By leaving the EU, this exception will no longer apply to the UK.²⁴² Other European clubs with similar financial and scouting resources will have “an additional two-year window for which to scout, recruit, and sign the best young players in Europe, as well as those players from South America and elsewhere who have dual citizenship in an EU country.”²⁴³ EU clubs will be able to obtain players with EU nationality starting at the age of 16, while clubs in the UK will have to wait until those players turn 18, and will face transfer fees and visa restrictions to acquire those players.²⁴⁴ This will be a considerable detriment to the youth development and talent acquisition

²³⁸ *Id.* at Art 19(2).

²³⁹ See Geey, *supra* note 147.

²⁴⁰ See *What requirements are there for international footballers to have work permits?* IN BRIEF2017, available at <https://www.inbrief.co.uk/football-law/footballer-work-permits/>, [https://perma.cc/PL2M-66JU].

²⁴¹ Sean Dotson, *How Brexit Could Affect the Premier League and British Players*, THE SPORTS ESQUIRES, June 24, 2016, available at <http://thesportsesquires.com/how-brexit-could-affect-the-premier-league-and-british-players/>, [https://perma.cc/62U9-A4GJ].

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Duval, *supra* note 63.

strategies of the majority of EPL clubs. Development will be restricted to local players only.

If clubs need a player to qualify as Home Grown, they will need to recruit them at the age of 18 in order from the player to train with the club the requisite three years before reaching the age of 21. Following Brexit, players qualifying for Home Grown status will likely be UK nationals, as their recruitment to these clubs will be easier. UK players in other European leagues will face similar consequences. For example, Gareth Bale, a UK national, would fill one of the three non-EU slots available on Real Madrid's roster.²⁴⁵

VIII. THE IMPACT OF BREXIT ON BROADCASTING FOR THE ENGLISH PREMIER LEAGUE

Broadcasting offers an opportunity for the EPL. The UK accounts for 19.8% of the EU broadcasting and cable television market value.²⁴⁶ This market value is defined as "the revenues generated by broadcasters through advertising, subscriptions or public funds."²⁴⁷

In 2016 the UK broadcasting and cable television market had total revenues of £20.2 billion.²⁴⁸ There is very little harmonization of the broadcasting market in the EU; however, post-Brexit, broadcast regulations may be altered to reflect the protectionist stance of the UK and support content producers such as the EPL. This will positively impact the EPL as territorial rights allow more control for the EPL.

A. *English Premier League Broadcast Rights*

Broadcasting represents a significant revenue source for EPL clubs, who recorded £1.6 billion of operating profit over the 2013-2016 broadcasting rights cycle, and who saw an average increase in broadcasting rights for 2016-2017 of £28 million per club.²⁴⁹ The EPL has seen significant TV revenue growth of over £2,000 million in the most recent three-year cycle,

²⁴⁵ Bobby McMahon, *11 Ways Brexit Will Impact the Premier League and Soccer Worldwide*, FORBES, June 24, 2016, available at <https://www.forbes.com/sites/bobby-mcmahon/2016/06/24/this-week-in-soccer-biz-special-11-ways-brexit-vote-will-impact-premier-league-and-soccer-worldwide/#4363e0c37d85>, [https://perma.cc/497B-VVF6].

²⁴⁶ *Broadcasting & Cable TV in the UK*, MARKETLINE 2017 10 (2017) [hereinafter MarketLine Industry Profile].

²⁴⁷ *Id.* at 7.

²⁴⁸ *Id.*

²⁴⁹ Barnard, *supra* note 43, at 3.

increasing from £3,018 million over the period of 2013-2016 to £5,136 million for the period 2016-2019.²⁵⁰

B. Jurisdiction of Broadcasting

1. Territorial Regulation of Broadcasting

Broadcasting is regulated by state territory. For reasons including linguistic borders, rights for programming are sold on this basis. Broadcasting was a national affair until the 1980s with many countries operating monopoly or duopoly organizations within their jurisdictions.²⁵¹ More recently, there has been work to create a European broadcasting regime. To date, the EU has not instituted a regime to include broadcasting in its single market framework. The EC does have the ability to regulate and implement several provisions in broadcasting for EU countries and has used this ability on multiple occasions.²⁵² The effect of this involvement has been to prevent the abuse of dominant positions and to regulate the monopoly that often occurs with broadcasting rights.²⁵³

2. Optional Directives from the European Commission

The framework for the regulation of broadcasting in the EU contains only optional directives which have been implemented with varying degrees of success. The EC has attempted to create a single digital market through the implementation of such directives. The most applicable is the *Audiovisual Media Services Directive* (AVMSD) [which replaced the *Television Without Frontiers Directive*].²⁵⁴ The AVMSD regulates broadcast content directly.²⁵⁵

²⁵⁰ *Premier League TV broadcasting rights revenue from 1992 to 2019 (in million GBP)*, STATISTA, February 2015, available at <https://www.statista.com/statistics/385002/premier-league-tv-rights-revenue/>, [https://perma.cc/56JU-3DJN].

²⁵¹ Evan Ruth, *Media Regulation in the UK*, Article 19 Global Campaign (2016).

²⁵² MarketLine Industry Profile *supra* note 246., at 15. See Case T-528/93, Eurovision I, 1996 E.C.R. II-649. See also Case T-185/00, Eurovision II, 2002 E.C.R. II-3805.

²⁵³ Stewart, *supra* note 42.

²⁵⁴ Council Directive 2007/65/EC, of the European Parliament and of the Council of 11 December 2007 Amending Council Directive 89/552/EC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 2007 O.J. (L 332) (EC) [hereinafter AVMSD].

²⁵⁵ Council Directive 93/83/EEC, of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) (EC).

The AVMSD coordinates certain provisions laid down by law, regulation and administrative action in Member States concerning the provision of audiovisual media services.²⁵⁶ This is an expansion of the *Television Without Frontiers Directive* which only regulated cross-border television broadcasting and recognized the public interest factor in specific event broadcasts to establish fair competition.²⁵⁷

3. Broadcast Regulation in the United Kingdom: Ofcom

In the UK, broadcasting is regulated by the *Broadcasting Act 1996* which empowers the corporation Ofcom to provide industry regulation.²⁵⁸ Some aspects of the AVMSD have been legislated through the *Broadcasting Act* of 1990.²⁵⁹ As the communications regulator in the UK, Ofcom regulates TV, radio and video-on-demand sectors, as well as fixed-line telecoms and wireless networks. They act within their legislative power to ensure competition can thrive and consumers' interests are protected.²⁶⁰ This includes regulation over sports broadcasting rights.

C. *Broadcasting Within the English Premier League*

1. Overview and Territorial Licensing under the AVMSD

In a recent judgement of the ECJ, territorial exclusivity agreements were found in breach of competition law under Article 101 of the *TFEU*.²⁶¹ They effectively provided consumers access to a broader list of sports media providers in the EU.

²⁵⁶ *Id.* at recitals 1–3.

²⁵⁷ Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) (EC) at recital 3 [hereinafter *Television Without Frontiers*].

²⁵⁸ Ruth, *supra* note 251; MarketLine Industry Profile, *supra* note 246.

²⁵⁹ Lorna Woods, *What would be the impact of Brexit on UK media regulation?*, THE LONDON SCH. OF ECON.: MEDIA POL'Y PROJECT BLOG, Sept. 13, 2016, available at <http://blogs.lse.ac.uk/mediapolicyproject/2016/09/13/what-would-be-the-impact-of-brexit-on-uk-media-regulation/>, [https://perma.cc/XP8Y-MDAP].

²⁶⁰ Ofcom, *What is Ofcom?*, <https://www.ofcom.org.uk/about-ofcom/what-is-ofcom/>, [https://perma.cc/9PR3-KRMW] (last visited Oct. 15, 2018).

²⁶¹ C-403/08, *Football Ass'n Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-09083, ¶ 144.

2. Current Ability of UK Consumers to Circumvent EPL Game Day Blackout Periods

Due to increasingly prohibitive subscription based costs, some pubs and bars have opted to show games via satellite feeds from other countries.²⁶² As seen in the case of *Murphy v. Media Protection Services Ltd*, the EPL has been particularly vigilant, albeit unsuccessful in this case, in pursuing unauthorized screening of football rights to which it owns the underlying copyright.²⁶³

Ms. Murphy, a local pub owner, used an imported satellite decoder card to show a Greek television broadcast of EPL games, rather than paying a subscription to view EPL games through the official UK broadcaster, BSkyB, which abided by the blackout periods, and would not show the games live. The CJEU found that the legislation introduced by a Member State which prohibits the importation, sale or use of a decoding device designed for use in another Member State violated Article 56 of the *TFEU*.²⁶⁴ The court found:

The Satellite Broadcasting Directive provides only for minimum harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of broadcasts from other Member States. Unlike the Copyright Directive, this minimum harmonisation does not provide criteria to determine the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen.²⁶⁵

The court concluded that an exclusive licence agreement between the EPL and broadcasters would prohibit the broadcaster from supplying decoding devices outside of the territory covered by the licensing agreement.²⁶⁶ In addition, it was a restriction on competition and subsequently a violation of Article 101 of the *TFEU*.²⁶⁷ This absolute territorial protection failed to produce any corresponding benefit to the wider public.²⁶⁸

²⁶² JAMES, *supra* note 59, at 330–31.

²⁶³ *Id.* at 331.

²⁶⁴ *Id.* at 331–32.

²⁶⁵ *FAPL*, *supra* note 261.

²⁶⁶ JAMES, *supra* note 59 at 332.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

The result of this decision is to provide consumers in the UK with a broader list of sports media providers across the EU and essentially circumvent the EPL's game day blackout periods.²⁶⁹

3. Potential Opportunity for the EPL to Limit Game Day Viewing During Blackout Periods Following Brexit

Ofcom will become the sole regulator of broadcasting content in the UK. In 2016 it closed its investigation of the EPL rights after considering the League's decision to increase the number of matches available for live broadcast in the UK. Starting in the 2019-2020 season, this number will increase to at least 190 per season, which is a minimum of a 22 game increase from the current agreement.²⁷⁰

In its investigation, Ofcom also considered consumer research to understand the preference of both match going fans and those watching on television.²⁷¹ The current framework has created blackout periods in UK broadcasts of live matches. Consumers have successfully circumvented this restriction by obtaining foreign decoders to show foreign broadcasts of the games during game day blackout periods in the UK.²⁷²

Ofcom's research indicated one fifth of fans wanted more matches televised live.²⁷³ Those attending matches live indicated the day and time of the match was important and the weekend matches were ideal.²⁷⁴ At a national level under domestic competition law, Ofcom has recognized the need to strike a balance between the potential benefits of releasing more matches for live broadcast, and the potential disruption on match going fans due to these games being rescheduled and broadcast outside of the 'closed period'.²⁷⁵

²⁶⁹ Marine Montejo, *Brexit and EU law: Beyond the Premier League (Part 2)*, ASSER INTERNATIONAL SPORTS LAW BLOG, July 25, 2016, <http://www.asser.nl/SportsLaw/Blog/post/brexit-and-eu-law-beyond-the-premier-league-part-2-by-marine-montejo>, [https://perma.cc/XEA4-JMGQ] (on file with the Harvard Law School Library).

²⁷⁰ Media Release, OFCOM MEDIA OFFICE, *Ofcom closes investigation into Premier League Football Rights*, Aug. 2016, <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/premier-league-football-rights>, [https://perma.cc/7TU2-VNX9] (on file with the Harvard Law School Library) [hereinafter Ofcom Media Office].

²⁷¹ *Id.*

²⁷² C-403/08, *Football Association Premier League Ltd. and Others v. QC Leisure and Others*, 2011 E.C.R. I-09083.

²⁷³ Ofcom Media Office, *supra* note 270.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

While Ofcom's regulation will maintain the current broadcast structure, the area in which the lack of EU regulation will see change is in consumer viewing options. With technology increasing the ability of consumers to view games, the efforts of the EPL to create a blackout period have been unsuccessful. In 2013, the Football Association Premier League Ltd successfully obtained a blocking order that requires the UK's six main internet service providers to block or impede their customers from a website known to live stream television broadcasts hosted on unofficial or unlicensed user generated content.²⁷⁶ Enforcement of this order and control of broadcasting to ensure blackout periods are imposed will become easier to obtain for the EPL following Brexit.

a. Citizens and Pubs Will be Unable to Obtain Foreign Decoders

The current right of citizens of the UK to circumvent the blackout periods and purchase foreign decoders from other Member States may not be available following Brexit. Domestic law in the UK has not addressed importation of foreign decoders, and the UK does not seem prone to continue to allow for their importation. A football governance discussion in 2011 indicated that while the use of foreign decoders would be beneficial to the pubs showing the games, it would be at the expense of the EPL as the creative rights holders.²⁷⁷ It would also pose a grave risk to the sustainability of clubs throughout the football pyramid.²⁷⁸ The risk posed by the decision in *Murphy* has repercussions beyond the EPL to smaller football clubs such as Macclesfield and Notts County, who have to compete with pubs broadcasting EPL games.²⁷⁹ The prescribed blackout periods promote grassroots football, by encouraging fans to support their local team in a live game, rather than watch an EPL match on television at a pub.

The UK gives "considerable weight to the concerns of" the EPL, based on their interest in the sustainability of football.²⁸⁰ A Hansard report of the European Union Committee on Grass-roots Sport released in 2011, indicated that the decision in *Murphy* could have major implications for the EPL and lead to cheaper viewing arrangements for foreign broadcasters.²⁸¹ The

²⁷⁶ JAMES, *supra* note 59, at 332.

²⁷⁷ Culture, Media and Sport Committee, Football Governance, 2011, HC 792-I, at 101 (UK) [hereinafter HC Culture, Media and Sport].

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 46.

²⁸⁰ *Id.* at 47.

²⁸¹ 732 Parl Deb HL (6th ser.) (2011) col. 421 (UK).

Government was urged “to use its influence within the EU to retain the territorial selling of overseas rights.”²⁸²

The EPL’s concern over the use of foreign decoders in *Murphy* was dismissed based on a violation of the *TFEU*. However, post Brexit, legislation introduced by the UK to prohibit the importation, sale or use of a foreign decoder will not need to comply with EU law. In addition, should the EPL bring a new claim like *Murphy* to the courts of the UK, they should be successful in prohibiting game broadcasts through foreign decoders.

b. Additional Concerns over the Future Value of Television Rights

There are additional concerns that England’s standing in football will diminish if their EU stars go on to play for other countries following Brexit, and that this could lead to a decreased value in future television rights.²⁸³ Cliff Baty, Chief Financial Officer of Manchester United, indicated that the acquisition of Swedish Zlatan Ibrahimovic for £220 thousand a week was worth approximately 10% less when viewed in light of the decreased value of the pound.²⁸⁴ Baty has indicated, as a result of this, concern over a decrease in the competitive balance of EPL teams.²⁸⁵ For teams paying inflated wages to obtain these players, there is concern that the wage expenses will be passed onto fans through increased ticket prices and increased television subscription costs.²⁸⁶

At this time, such claims are speculative. Brexit will allow for increased market control through broadcasting, which will benefit the EPL. Increased television revenues can be used to offset any inflated costs.

D. Broadcasting Rights across Member States

1. The Current Country of Origin Principle

The *AVMSD* provides for a country of origin principle, which means that a provider of audiovisual media services is subject to the law of its country of origin.²⁸⁷ In the preamble of the directive it states its purpose:

²⁸² HC Culture, Media, and Sport, *supra* note 277 at 47.

²⁸³ *Id.* at 11–13.

²⁸⁴ Durden, *supra* note 209.

²⁸⁵ *Id.*

²⁸⁶ Flanagan, *supra* note 176, at 159.

²⁸⁷ Ben Stevenson & Carolyn Pepper, *Brexit, the Legal Profession and the Media and Technology Sector*, 33 ENT. & SPORTS L. 5, 9 (2017).

The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.²⁸⁸

This means another Member State cannot impose any of their own domestic regulations. In effect, this opens borders and promotes the ‘single digital market’. It prohibits Member States from imposing their own domestic regulations on any services it receives from another Member State. It allows for limitations on this principle in the 43rd recital, which states “Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive.”²⁸⁹

2. No Obligation to Offer National Treatment of Audiovisual Services Post Brexit

The AVMSD applies only to the relationship between Member States with regard to audiovisual services. This will have no force or effect in the UK going forward with future trade, post Brexit. The obligation to offer national treatment to audiovisual services will no longer exist. The UK has the opportunity to create regulations that are domestically beneficial, meaning international content could be harder to access. This could also be a problem for broadcasters in the UK engaged in cross-border activities as they may also face stricter regulations. This will impact not only sports broadcasters and rights owners but sports clubs and those who follow sport.²⁹⁰

E. Broadcasting Monopolies

1. Collective Selling

Collective selling occurs when all teams in a competition join together and sell rights typically through a national governing body.²⁹¹ Collective selling of broadcasting rights is a prominent fixture in European sports

²⁸⁸ AVMSD, *supra* note 254, at 27th Recital.

²⁸⁹ *Id.* at 34rd Recital.

²⁹⁰ Montejo, *supra* note 269.

²⁹¹ JAMES, *supra* note 59, at 328.

broadcasting.²⁹² The *TFEU* has allowed this to be dealt with through domestic property laws, and access to broadcasts are handled contractually.²⁹³ This is the selling structure used in the EPL. By using this format to sell broadcast rights the EPL has made access to its matches exclusive. “Exclusivity ensures a rarity to the supply chain, allowing primary rights holders to charge a premium to the broadcaster and to maximise its earning from the rights sale.”²⁹⁴

a. The EU Response

The EC was faced with this issue in the *UEFA Champions League*.²⁹⁵ UEFA had a centralized marketing scheme in place for the commercial rights for the Champions League.²⁹⁶ The revenues were then distributed to the participating clubs. The rights were initially sold exclusively to a free-to-air broadcaster from each of the Member States, with an option for the free-to-air broadcaster to sell the packages to pay-TV.²⁹⁷ These arrangements usually covered a number of years. UEFA argued this improved competition. The EC objected and as a result UEFA amended their selling process.²⁹⁸ A new process allowed for both public and private broadcasters, as well as internet providers, to cover the Champions League.²⁹⁹ The collective arrangements in the League were eventually recognized in 2003, as the organization of matches in the season schedule.³⁰⁰ The Commission found this qualified collective selling as a justifiable restraint on trade.

b. The English Premier League's Approach

A similar agreement between the EC and the EPL was reached in *Joint Selling of the Media Rights to the FA Premier League*. This resulted in the effective end of the 15-year monopoly of broadcasting rights held by BSkyB. The EC accepted collective selling, on the condition the sale was completed through an open and transparent process and included a limit of the dura-

²⁹² Stewart, *supra* note 42, at 204.

²⁹³ *Id.*

²⁹⁴ JAMES, *supra* note 59, at 329.

²⁹⁵ Commission Decision 2003/778/EC, 2003 O.J. (L291/25) (EC).

²⁹⁶ Stewart, *supra* note 42, at 207.

²⁹⁷ *Id.*

²⁹⁸ Stewart, *supra* note 42, at 207.

²⁹⁹ *Id.* at 207–08.

³⁰⁰ *Id.*

tion of the rights being assigned.³⁰¹ The EPL then offered six packages available for tender with no single broadcaster obtaining all six.³⁰² BSkyB still managed to secure four of the six packages, with Setanta obtaining the other two.³⁰³

The commitments of the EPL to create a transparent process in the tender of rights, and the creation of various packages including a “no single buyer” clause, which limited a buyer from acquiring all rights, expired at the end of the 2012-2013 season. Since the end of this season, the commitments of the EPL have continued to be upheld.³⁰⁴

Broadcast rights for the 2016-2017 to 2018-2019 season have been agreed with BT Sport and Sky for £5.136 billion.³⁰⁵ This is in addition to the broad range of other packages already awarded, including domestic highlights to the BBC for £204 million and near live clip rights to News International.³⁰⁶

2. Exclusive Selling

The exclusive sale of broadcast rights allows the broadcaster to dominate the market for a particular sporting event. Broadcasters with exclusivity can then profit by attracting viewers and increasing subscriptions if required.³⁰⁷ Subscription channels have generated higher income from broadcasting for the seller but have made competition for free-to-air broadcasters challenging.³⁰⁸

a. EU Stance

Public access to sporting events is addressed in the AVMSD. Originally the *Television without Frontiers Directive* recognized the public interest factor in specific event broadcasts to establish fair competition.³⁰⁹ The second recital in the preamble outlines its objective:

³⁰¹ Luke Regan & Mark Balcar, *Brexit Beyond the Premier League: The Future of UK Sport*, SPORTS THINK TANK, Oct. 16, 2016), available at <http://www.sportsthinktank.com/blog/2016/10/brexit-beyond-the-premier-league—the-future-of-uk-sport>, [https://perma.cc/GH2E-K6TA].

³⁰² Stewart, *supra* note 42, at 209.

³⁰³ *Id.*

³⁰⁴ Ofcom Media Office, *supra* note 270.

³⁰⁵ Hellier, *supra* note 211.

³⁰⁶ Ofcom Media Office, *supra* note 270.

³⁰⁷ Stewart, *supra* note 42, at 210.

³⁰⁸ *Id.* at 210.

³⁰⁹ Television Without Frontiers, *supra* note 257, at 23.

Audiovisual media services provided across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Union. Certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services.³¹⁰

The focus of this directive is to ensure the “prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.”³¹¹ Under Articles 49 to 55 of the *TFEU*, which covers rights of establishment, it states the jurisdiction of the Member State where established applies in the case of dispute.³¹²

Article 2 provides that Member States shall ensure all audiovisual media service providers comply with the rules of the system of law. However, this scope is limited to the communications between Member States.³¹³ It specifically states: “This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.”³¹⁴ This is also provided for in Article 1: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.”³¹⁵

The *AVMSD* essentially ensures that any broadcaster that is established within, and conforms to an EU Member State’s national regulator, is able to freely broadcast content to the other 27 Member States.³¹⁶

“Because of the major part sport plays in the development of a broadcaster’s consumer base, exclusive sales agreements can curtail the establish-

³¹⁰ *See id.*

³¹¹ *Id.* at 24.

³¹² *AVMSD*, *supra* note 254.

³¹³ *Id.* at 38.

³¹⁴ *Id.*

³¹⁵ *Id.* at 38.

³¹⁶ CULTURE, MEDIA AND SPORT DEPARTMENT, DIGITAL SINGLE MARKET: AUDIOVISUAL MEDIA SERVICES DIRECTIVE, 2017, HC, (37812), 9479/16 + ADDs 1–4, Cm. (16) 287 (UK), available at <https://publications.parliament.uk/pa/cm201617/cm-select/cmeuleg/71-xxxi/7108.htm>, [<https://perma.cc/2667-JV48>].

ment of new broadcasters who are not parties to the exclusive rights contract.”³¹⁷ The AVMSD attempts to correct this.

b. UK Stance

The sale of broadcast rights for the EPL was first investigated by the Office of Fair Trading in 1999.³¹⁸ Their main concern with the agreement between the EPL and broadcasters was that it would stifle competition, make it too difficult for rival broadcasters to acquire the rights to show live EPL matches and force an artificially high sale price of the rights. This concern was referred to the Restrictive Practice Court, which determined that the benefits to the consumer and the clubs outweighed the anti-competitive disadvantages.³¹⁹

In an effort to provide more access for the consumer, the EPL structure has since changed, allowing for greater game coverage among multiple providers. This has resulted in more games being accessible to the public and has increased consumer choice.³²⁰

3. Post Brexit

Without EU law, when broadcasting rights are renegotiated, the EPL will have no obligation to offer packages to multiple buyers. While increased packages to offer more coverage will likely continue to exist as this is regulated through UK competition law, there is the potential for the EPL to return to a broadcast monopoly.

While options for games will be limited, fans will have full access to all content through one subscription, and the League will have an opportunity to generate increased control in the market.

IX. CONCLUSION AND RECOMMENDATIONS MOVING FORWARD

The details of Brexit are still unknown at this time. Its impacts can only be predicted. Based on primary data analysis and substantial research into secondary sources, this paper has identified a number of challenges and opportunities for the EPL, football players, and other EPL stakeholders moving forward. These are summarized below.

³¹⁷ Stewart, *supra* note 42, at 210.

³¹⁸ Office of Fair Trading v. Premier League (1999) EMLR 78 (UKCLR).

³¹⁹ JAMES, *supra* note 59, at 329.

³²⁰ Daniel Geey, *Collectivity v Exclusivity: Conflict in the Broadcasting Arena*, 11 ENT. L. REV. (2004).

A. Impact on the English Premier League

1. Challenges for the English Premier League

Overall, attaining and retaining EU talent will become difficult. Clubs can expect to face increased costs in both wages and transfer fees to obtain and retain the best talent. Clubs can expect to pay more to have EU players qualify for GBEs and subsequently UK visas. Clubs will face limitations on minor player recruitment and development as EU clubs take advantage of a two-year transfer window which will no longer be available to the EPL. This will provide EU clubs with a two-year advantage in which to obtain and develop youth talent. Subsequently, EPL teams will have a very tight timeline in which have foreign players qualify as Home Grown Players.

In addition to challenges in obtaining and developing players, a number of the top clubs in the EPL are managed by EU nationals. These individuals will likewise face visa restrictions and will no longer benefit from free movement following Brexit.

These challenges indicate the EPL will have increased costs in both wages and transfer fees to obtain the best talent. If they are unable to continue to obtain this talent, the EPL may face a subsequent deterioration in its league reputation following Brexit.

2. Opportunities for the English Premier League

While they will face challenges, the EPL will also have opportunities in the area of broadcasting following Brexit. First, the EPL should look to challenge UK citizens' use of foreign decoders to limit unauthorized viewing. This will force viewers to use UK broadcasts only for game day viewing and will protect the EPL's game day blackout period. Second, the EPL should look to recreate a broadcast monopoly. By continuing to offer multiple packages to a single broadcaster, the EPL will maintain better control of and access to the broadcast market.

B. Impact on Players

Increasingly stringent immigration requirements will apply to hundreds of EU players following Brexit. These players will need to obtain GBEs from their FA prior to the Home Office considering a permit application for a visa. With the ability to obtain a GBE tied to a player's country's FIFA rank, and with the volatility of these ranks, more players may need to go through the Exceptions Panel to obtain a GBE, secure a visa, and subse-

quently be eligible to play in the EPL. In addition, with the devaluation of the pound, these players may have the opportunity to make more by playing in a European League rather than the EPL and may choose to take their talent elsewhere.

UK players will have an advantage, with an opportunity to fill open spots on EPL rosters which would have otherwise been filled by EU players. UK players will become more valuable with no restrictions on their ability to play for UK clubs or teams. However, it may become more difficult for UK players to play in the EU following Brexit, as smaller EU clubs look to obtain equally talented EU players for less cost than they would pay for UK players.

C. Impact on Other EPL Stakeholders

Fans may face restrictions on their ability to watch EPL games live during the EPL's blackout period. For fans who attend local EPL games, there is an additional risk that teams who pay inflated wages to obtain EU players following Brexit will pass these increased costs on to fans through increased ticket prices. For fans who watch games on TV, they may also face these increased costs in the form of increased television subscription fees. For local UK leagues, outside of the EPL, the EPL's ability to enforce game day blackout periods may lead to an increase in viewership as individual consumers, no longer able to live stream during the blackout period, are encouraged to watch local games live. Local business owners who have historically obtained foreign decoders to live stream EPL games may face a decrease in revenues following Brexit.

X. APPENDIX A – LIST OF ABBREVIATED TERMS

Term	Abbreviation
<i>Audiovisual Media Services Directive</i>	AVMSD
British Exit	Brexit
Court of Arbitration for Sport	CAS
Court of Justice of the European Union	CJEU
English Premier League	EPL
European Commission	EC
European Court of Justice	ECJ
European Economic Area	EEA
European Economic Community	EEC
Fédération Internationale de Football Association	FIFA
Financial Fair Play	FFP
Football Association	FA
Governing Body Endorsement	GBE
Regulation of the Status and Transfer of Players	RSTP
<i>Treaty on the Functioning of the European Union</i>	<i>TFEU</i>
Union of European Football Associations	UEFA

XI. APPENDIX B – PLAYER NATIONALITY STATISTICS

Team	Total	UK Players	EU Players	Percentage of EU Players
Arsenal F.C.	26	9	12	46%
A.F.C. Bournemouth	27	17	5	19%
Brighton & Hove Albion F.C.	29	11	14	48%
Burnley F.C.	25	12	7	28%
Chelsea F.C.	25	3	16	64%
Crystal Palace F.C.	28	12	6	21%
Everton F.C.	30	13	8	27%
Huddersfield Town A.F.C.	26	10	9	35%
Leicester City F.C.	26	10	6	23%
Liverpool F.C.	29	18	7	24%
Manchester City F.C.	21	7	12	57%
Manchester United F.C.	25	10	12	48%
Newcastle United F.C.	26	13	9	35%
Southampton F.C.	27	13	10	37%
Stoke City F.C.	25	13	10	40%
Swansea City A.F.C.	26	12	10	38%
Tottenham Hotspur F.C.	24	8	9	38%
Watford F.C.	31	9	13	42%
West Bromwich Albion F.C.	22	17	3	14%
West Ham United F.C.	24	8	6	25%
	522	225	184	



Casino Countermeasures: Are Casinos Cheating?

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ABSTRACT

Since Nevada legalized gambling in 1931, casinos have proliferated into the vast majority of states. In 2015, commercial casinos earned over \$40 billion. This is quite an impressive growth for an activity that was once relegated to the backrooms of saloons. Indeed, American casino companies are even expanding into other countries.

Casino games have a predetermined set of rules that all players—and the casino itself—must abide by. Many jurisdictions have particularized statutes that allow for the prosecution of players that cheat at these games. Indeed, players have long been prosecuted for marking cards and sliding dice. And casino employees have long been prosecuted for cheating their employers using similar methods. But what happens when casinos cheat their players? To be sure, casinos are unlikely to engage in traditional methods of cheating for fear of losing their licenses. Instead, this cheating takes the form of perfectly suitable—at least in the casinos' eyes—game protection countermeasures. This Article argues that some of these countermeasures are analogous to traditional forms of cheating and should be treated as such by regulators and courts. In addition, many countermeasures are the product of a bygone era—and serve only to slow down games and reduce state and local tax revenues.

Part II discusses the various ways that cheating occurs in casino games. These methods include traditional cheating techniques used by players and casino employees. An emphasis will be placed on how courts have adjudicated such matters. Part III describes countermeasures that casinos take to combat cheating. Part III also argues

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that some of these countermeasures are just reimagined variations of traditional cheating techniques—and gaming regulators and courts should treat them as such, especially considering the imbalance of powers between casinos and players. Part IV demonstrates that many countermeasures are counterproductive because they slow down the game and deprive the state and municipality of tax revenue.

I. INTRODUCTION

“It’s not stacked, and any bastard who deals seconds from this new deck of years—why, we’ll crucify him head down over a privy.”²

Gaming industry insiders often describe the battle between casinos and cheaters as a “cat-and-mouse game.”³ Cheaters try hard to stay one step ahead of the casinos. Whenever a successful cheating technique is exposed, casinos are ready to implement a new countermeasure to ensure they do not fall prey to this technique again. But by then it is too late; the cheaters are already poised to take advantage of a different chink in the casinos’ armor.

And while the history of the cat-and-mouse game has largely consisted of casinos chasing cheaters, there is a parallel chase where legitimate players are constantly looking for ways to take *legal* advantage of weaknesses in casinos’ procedures. These players are called advantage players, and have proved to be an equally—if not more—effective thorn in the side of casinos.⁴

The problem is that casino security is largely reactionary—and often more so than is justified. When one cheating or advantage-play technique makes the rounds, it is common for casinos’ countermeasure to go above and beyond. Imagine a big box store that has the occasional shoplifter stealing inexpensive goods. We would not expect the store to implement a countermeasure whereby every shopper is strip-searched on his way out (put aside the legal issues and public relations nightmare for a moment). The strip-searches would grind shopping to a halt, and the revenue spent hiring unnecessary personnel would make for a highly inefficient operation. Everyone would say that the reaction of the big box store was counterproductive and wasteful. But this is what casinos do all the time. A new scam turns up in a

² JOHN STEINBECK, *EAST OF EDEN* 169 (1986).

³ Adam Goldman, *Casinos use controversial database to catch cheats*, *LAS VEGAS SUN*, (Dec. 29, 2003, 11:39 AM), <https://lasvegassun.com/news/2003/dec/29/casinos-use-controversial-database-to-catch-cheats/>, [https://perma.cc/X3E7-JX7S].

⁴ See ELIOT JACOBSON, *ADVANCED ADVANTAGE PLAY: BEATING AND SAFEGUARDING MODERN CASINO TABLE GAMES, SIDE BETS AND PROMOTIONS* 5 (2015) (“Advantage play is the act of legally exploiting procedural or structural weaknesses in some aspect of casino games or operations in a way that generates an edge over the casino.”).

few casinos, and the casino industry responds by bringing a tank to a fistfight.

The “tank” largely consists of countermeasures that are designed to stymie certain cheating and advantage-play techniques. However, they often do more harm to the casino than good. And worse, some of these countermeasures harm legitimate players who would not even know how to cheat at solitaire. In fact, these countermeasures might constitute cheating themselves. After all, the power imbalance is clear. First, consumers widely lack knowledge about casinos’ market pricing. It is very hard for players to price-shop since casinos rarely advertise their payout structures and rules outside of the casinos themselves.⁵ Second, casinos can review suspicious players via their extensive surveillance system. In contrast, players can do no such thing if they feel cheated by the casino. Lastly, casinos are often protected by their jurisdiction’s gaming regulatory body. Casinos usually get the benefit of the doubt, and complaining patrons rarely make it past an administrative hearing.⁶

This Article proceeds as follows: Part II describes various techniques—both lawful and unlawful—that players have used to win money from casinos. I will also discuss how courts have adjudicated such matters. Part III describes various countermeasures that casinos have implemented to combat the techniques described in Part II. An emphasis will be placed on why the power imbalances between players and casinos might cause us to consider some of these countermeasures to be cheating in and of themselves. Part IV will explain that many of these countermeasures harm casinos by slowing down games and depriving states and municipalities of tax revenue.

II. CHEATING IN CASINOS

People have developed methods to beat games of chance from time immemorial. Dice that were surreptitiously weighted to favor certain num-

⁵ “Rules” does not refer to the general rules of play that are common among casinos. Instead, it refers to the rule deviations that can vary dramatically from casino to casino. Take the game of blackjack for example. Some casinos allow players to “split” aces once, while others allow players to split aces three times. The more times a casino allows a player to split aces, the more favorable the game is for the player. *See* ARNOLD SNYDER, *THE BIG BOOK OF BLACKJACK* 116 (2006).

⁶ *Cf.* WALTER T. CHAMPION, JR. & I. NELSON ROSE, *GAMING LAW IN A NUTSHELL* 113–14 (2012) (explaining that Nevada courts grant the state’s gaming regulatory agency “great deference” to findings of fact and “almost never” examine legal questions decided at the administrative level).

bers date back to the Roman Empire.⁷ The myriad methods people have devised to cheat casinos run the gamut from sophisticated and invisible to clunky and heavy-handed. Today, cheating is a crime in virtually all jurisdictions that offer gambling.⁸

Nevada defines “cheating” as “alter[ing] the selection of criteria which determine: (a) The result of a game; or (b) The amount or frequency of payment in a game.”⁹ The critical element of the statute is “alter,”¹⁰ and as we will see, courts have struggled to consistently determine when a game’s criteria have been altered. Despite the confusion, the statute is considered the gold standard since most jurisdictions around the world have adopted Nevada’s framework when drafting their own casino cheating statutes.¹¹

To understand how courts evaluate various schemes, it is imperative to understand the fundamental methods themselves and the backdrop against which they operate. Cheating in casinos generally takes two forms. First, players can cheat games while giving the appearance of legitimate play.¹² This is colloquially called cheating “from the outside.” Second, casino employees—usually dealers or floor supervisors—can cheat games while giving

⁷ Robert Rath, *The Royal, Seedy, and Supernatural History of Dice*, THE ESCAPIST (Aug. 21, 2014), <http://www.escapistmagazine.com/articles/view/video-games/columns/criticalintel/12141-The-History-of-Dice-and-The-Oldest-Dice-in-the-World>, [https://perma.cc/74H7-DRJ8]. For a more contemporary account of loaded dice, see *Berman v. Riverside Casino Corp.*, 323 F.2d 977, 980 (9th Cir. 1963) (alleging that the casino introduced loaded dice to cheat players).

⁸ See, e.g., NEV. REV. STAT. § 465.083 (2017) (making it “unlawful for any person . . . to cheat at any gambling game” in Nevada); see also I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 75 (1998) (“Cheating is a felony in virtually all gambling jurisdictions.”)

⁹ NEV. REV. STAT. § 465.015 (2017).

¹⁰ BOB NERSESIAN, BEAT THE PLAYERS 173 (2006).

¹¹ STEVE FORTE, CASINO GAME PROTECTION: A COMPREHENSIVE GUIDE 39 (2004). For an example of a state statute similar to Nevada’s, see MISS. CODE ANN. § 75-76-309(2) (West 2017) (“It is unlawful to mark, alter or otherwise modify any associated equipment or gaming device in a manner that: (a) Affects the result of a wager by determining win or loss; or (b) Alters the normal criteria of random selection, which affects the operation of a game or which determines the outcome of a game.”). However, Macau, China, which is the world’s largest jurisdiction in terms of casino revenue, uses quite a different (and ambiguous) standard. It defines a cheater as one who “fraudulently runs or practices gaming or ensures the luck by means of mistake, deceit, or using any equipment” JORGE A.F. GODHINHO, THE MACAU PENAL CODE AND OTHER PENAL LAWS IN ENGLISH UNOFFICIAL TRANSLATION 32 (May 22, 2016) (draft version), <https://bit.ly/2OD4AkW>, [https://perma.cc/Q75K-MDUP].

¹² See FORTE, *supra* note 11, at 612 (defining “outside scams”).

the appearance of legitimately carrying out their job duties.¹³ This is called cheating “from the inside.” Playing from the inside can also include employees colluding with outside agents posing as legitimate players.

What follows are some of the more notorious cheating methods and how courts have construed their respective jurisdiction’s cheating statutes and regulations. Also included are methods that resemble cheating, but were ultimately held by courts to be acceptable—yet quite cunning—ways of beating casinos. These strategies are usually called “advantage plays,” because the player gains an advantage over the casino without crossing the line into cheating territory.¹⁴ Instead, players take advantage of some loophole inherent in a game’s design.¹⁵ Indeed, the most ubiquitous methods of beating casino table games largely involve legal techniques.¹⁶ Distinguishing between cheating and advantage plays will help determine which casino countermeasures should be construed as cheating and which should be valid.¹⁷

A. Methods Used to Cheat Casinos

1. Marked Cards

Marked cards are cards that have been physically altered to allow someone to identify them without looking at their faces.¹⁸

¹³ See *id.* at 609 (defining “inside scams”).

¹⁴ See FORTE, *supra* note 11, at 11. See also Anthony Cabot & Robert Hannum, *Advantage Play and Commercial Casinos*, 74 Miss. L.J. 681, 681 (2005) (“[A]dvantage play is where the player can overcome the mathematical advantage that is built into every house-banked casino game.”).

¹⁵ See FORTE, *supra* note 11, at 11.

¹⁶ See, e.g., *id.* at 105 (“[M]ore supervisors and surveillance personnel are exposed to suspected card counters than to all the other scammers revealed in this book combined!”). Card counting, as will be described in Part II.B.1, is a legal method of beating casinos at blackjack.

¹⁷ Commentators occasionally differ in their terminology. For example, Professors Cabot and Hannum classify both legal and illegal techniques into five separate categories of “advantage play.” Cabot & Hannum, *supra* note 14, at 686–88. In contrast, gaming consultant Steve Forte emphasizes that advantage plays do “not include the pure mathematical strategies like card counting” FORTE, *supra* note 11, at 11. Card counting is discussed in Part II.B.1, *infra*.

¹⁸ *United States v. Jing Bing Liang*, 362 F.3d 1200, 1201 n.2 (9th Cir. 2004) (“Certain cards can be marked for future detection These cards later can be identified without seeing their faces, which can thereby substantially increase the odds of winning a particular hand.”); GEORGE L. LEWIS JR., *CASINO SURVEILLANCE: THE EYE THAT NEVER BLINKS XI* (1996). For the science behind the sub-

In *Sheriff of Washoe County v. Martin*, a player was accused of cheating at the card game of blackjack.¹⁹ The defendant made subtle bends in the cards, allowing him to discern their identities even while the cards were facedown.²⁰ This technique is known as “card crimping.”²¹ The defendant challenged the cheating statute as unconstitutionally vague.²²

The Supreme Court of Nevada interpreted the cheating statute to proscribe “alter[ing] the identifying characteristics or attributes of a game with the intent to deprive another of money or property by affecting the otherwise established probabilities of the game’s various outcomes”²³ The court held that the conduct constituted cheating because the defendant altered “a crucial characteristic of the game.”²⁴ The values of the cards were known only to him—not to the casino or the other players.²⁵ Thus, *Martin* makes clear that players cheat when they physically alter cards to determine the cards’ identities.²⁶

In *Kelly v. First Astri Corp.*, a blackjack player lost \$120,000 and became suspicious that the cards were marked before being introduced into the game.²⁷ The tribal casino determined that numerous employees participated in the scam.²⁸ The casino manager testified that the cards were indeed marked with small red triangles that could be read before they were dealt from the blackjack shoe.²⁹ The player brought a tort action against the

stances used to mark cards, see SAMUEL RUBIN, *THE SECRET SCIENCE OF COVERT INKS* 55–68 (1987). Playing cards are not the only casino equipment that can be marked. The game of Pai Gow is played with thirty-two domino tiles that are mixed and distributed face down to the players and dealer. Domino tiles, like playing cards, can be marked. FORTE, *supra* note 11, at 387; BILL ZENDER, *PAI GOW WITHOUT TEARS* 62 (1989).

¹⁹ 662 P.2d 634, 635–36 (Nev. 1983).

²⁰ *See id.* at 636.

²¹ *Id.*; *see also* *Jing Bing Liang*, 362 F.3d at 1201 n. 2 (“Certain cards can be marked for future detection . . . by slightly folding them (‘crimping’) . . .”).

²² *Martin*, 662 P.2d at 636.

²³ *Id.* at 638.

²⁴ *Id.*

²⁵ *See id.*

²⁶ *See also* NERSISIAN, *supra* note 10, at 237 n.9 (“The one thing that is determined, nonetheless, is that daubing, bending, crimping or otherwise marking cards constitutes cheating and is a felony.”)

²⁷ 84 Cal.Rptr.2d 810 (Ct. App. 1999). For the backstory to the case, see BILL ZENDER, *HOW TO DETECT CASINO CHEATING AT BLACKJACK 2* (1999); Steve Forte, *Don’t Be a Mark for Marked Cards*, BLACKJACK FORUM (Dec. 1994), <http://www.blackjackforumonline.com/htadmin/markcard.htm>, [<https://perma.cc/AH54-BNHA>].

²⁸ *Kelly*, 84 Cal.Rptr.2d at 813.

²⁹ *See id.*

casino, but a California appellate court held that recovery was barred due to the state's longstanding policy against judicial resolution of gambling losses.³⁰

In *United States v. Vacarro*, a team of cheaters used marked cards to steal over \$500,000 while playing blackjack at a Mississippi casino.³¹ The scheme involved casino employees removing unmarked cards from the target casino, having their coconspirators mark the cards using a special dye, and replacing the cards in the casino's storage area.³² The marked cards were introduced into the game and the coconspirators bet accordingly. The defendants were convicted under the Racketeer Influenced and Corrupt Organizations Act for cheating a casino in violation of a Mississippi law that makes it "unlawful to mark, alter or otherwise modify any associated equipment or gaming device"³³

2. Glimpsing Facedown Cards

While physically altering (*i.e.*, marking) cards in order to aid identification is prohibited, the Supreme Court of Nevada has held that the state's cheating statute does not prohibit players from making decisions based on a dealer's facedown "hole card" if that card was exposed due to the dealer's error. In *Sheriff v. Einbinder*, a careless dealer exposed her otherwise-unknown hole card to a player who signaled this information to his agent who was also playing at the table.³⁴ In a pithy opinion, the court seemed to be satisfied with the defendant's conduct because he "was lawfully seated at his position at the blackjack table" and "did not use any artificial device to aid his vision."³⁵

³⁰ See *id.* at 812.

³¹ 115 F.3d 1211 (5th Cir. 1997).

³² See *id.* at 1215.

³³ *Id.* at 1220 (internal quotation marks omitted) (citing MISS. CODE ANN. § 75-76-309(2) (West 2017)); see also *United States v. Tschirgi*, 65 F.3d 177 (9th Cir. 1995) (unpublished disposition) (describing an identical scheme where a similar group cheated a tribal casino in Washington State out of \$800,000); *1 Plead Guilty in Card-Marking Scheme at Lummi Indian Casino*, SEATTLE TIMES (Feb. 3, 1995), <http://community.seattletimes.nwsourc.com/archive/?date=19950203&slug=2102984>, [https://perma.cc/2TRH-BX5B] (reporting the *Tschirgi* scam).

³⁴ 808 P.2d 22 (Nev. 1984) (unpublished table decision). For the text of the Nevada Supreme Court's order, see Arnold Snyder, *Is Spooking Legal?*, BLACKJACK FORUM (June 1987), <http://www.blackjackforumonline.com/content/spooking.htm>, [https://perma.cc/YU7C-V5SB].

³⁵ *Einbinder*, 808 P.2d at 22; see also Snyder, *supra* note 34.

In *United States v. Jing Bing Liang*, a team of cheaters used a sleight-of-hand technique to peek at the next card to be dealt from the “dealing shoe” in baccarat, a game where the hand closest to nine points wins.³⁶ Because they knew the identity of the next card, the cheaters greatly increased their advantage over the casino.³⁷ The conspirators performed this scam in casinos across the country, and eventually pleaded guilty under federal racketeering charges.³⁸ The method is nothing new, and has long been used to bilk casinos out of millions of dollars.³⁹

3. Sliding Dice

In *Skipper v. State*, the defendant was accused of cheating at the game of craps in a Nevada casino.⁴⁰ Craps involves players tossing dice down a long table and placing wagers on which numbers will appear.⁴¹ The dice are required to randomly tumble down the table.⁴² In *Skipper*, however, the defendant threw the dice in such a manner that a single die slid down the table without tumbling.⁴³ This technique is known as “dice scooting” or “dice sliding,”⁴⁴ and provides the cheater with a massive advantage over the casino.⁴⁵ To further ensure success, the defendant employed an agent—posing as another player—to obscure the dealer’s vision as the die slid down the table.⁴⁶

³⁶ 362 F.3d 1200, 1201 (9th Cir. 2004).

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See* FORTE, *supra* note 11, at 362–63 (describing one such method of peeking the top card and noting that the “scam netted cheaters about three million dollars in one evening back in the middle 1980s in Atlantic City”).

⁴⁰ 879 P.2d 732, 733 (Nev. 1994).

⁴¹ ROBERT C. HANNUM & ANTHONY N. CABOT, PRACTICAL CASINO MATH 89 (2d ed. 2005).

⁴² *Skipper*, 879 P.2d at 734.

⁴³ *Id.* at 732.

⁴⁴ FORTE, *supra* note 11, at 274. This scam has stood the test of time. For recent examples, see *State v. Young*, 95 N.E.3d 420 (Ohio Ct. App. 2018); Todd Prince, *Foreign national booked in Las Vegas on charges of cheating at craps*, LAS VEGAS REV.-J. (Nov. 29, 2017), <https://www.reviewjournal.com/crime/foreign-national-booked-in-las-vegas-on-charges-of-cheating-at-craps/>, [<https://perma.cc/CTQ7-HJFQ>]; 2 *on the run*, 1 *arrested after casino cheating scheme nets \$56,000*, WGNO (Aug. 18, 2017), <http://wgno.com/2017/08/18/2-on-the-run-1-arrested-after-casino-cheating-scheme-nets-56000/>, [<https://perma.cc/98A7-2BGH>].

⁴⁵ FORTE, *supra* note 11, at 280–81.

⁴⁶ *Skipper*, 879 P.2d at 732–33.

The Supreme Court of Nevada reached two conclusions: (1) that the defendant's play violated the rules of craps, and (2) that this violation constituted cheating. In reaching its first conclusion, the court reasoned that the conduct violated the rules of craps because dice are required to randomly tumble, and the defendant intentionally used a confederate to "blindfold[] the dealer while placing the dice on the table in a winning combination."⁴⁷ The court reached its second conclusion by explaining that the statutes apply "to those who attempt to supplant elements of chance with surreptitious conduct that alters both the nature of the game and the criteria for winning."⁴⁸ The defendant's conduct satisfied this criteria because he "surreptitiously and contrary to the rules of the game, alter[ed] the probable outcome of a throw and drastically increase[d] the chances of winning certain types of bets on the craps table."⁴⁹

4. Mechanical and Electronic Devices

Not all Nevada cheating cases revolve around the interpretation of "alter." In *Sheriff, Clark County, Nevada v. Anderson*, the defendant built a computer into his shoes to assist him in playing blackjack.⁵⁰ He cut holes in his socks and used his toes to enter the values of cards as they were dealt.⁵¹ Based on the cards that had been dealt, the computer would provide the optimal playing strategy for the remaining cards.⁵² The defendant was charged under a Nevada statute prohibiting the use of a device to assist in game strategy.⁵³ The Supreme Court of Nevada rejected the defendant's argument that the statute's use of "device" was unconstitutionally vague,

⁴⁷ *Id.* at 734.

⁴⁸ *Id.*

⁴⁹ *Id.* But see Cabot & Hannum, *supra* note 14, at 768 (arguing that the slot machines cases, discussed *infra* in Part II.B.2, cannot be reconciled with *Skipper* because the logic would suggest that the rules of slot play allow for manipulation of the reels).

⁵⁰ 746 P.2d 643, 644 (Nev. 1987).

⁵¹ See *id.*

⁵² See *id.* The astute reader will recognize this strategy as card counting, albeit with the aid of a computer instead of one's mind. See *infra* Part II.B.1 (providing more information on card counting).

⁵³ *Anderson*, 746 P.2d at 644 & n.1 (citing then-current NEV. REV. STAT. § 465.075, which has since been modified to expressly ban the assistance of computers). For other device-prohibition statutes, see N.J. ADMIN. CODE §13:69F-8.1 (2012) ("no person shall possess with the intent to use, or actually use, at any table game, either by himself or herself or in concert with others, any calculator, computer, or other electronic, electrical or mechanical device to assist in projecting an outcome at any table game or in keeping track of or analyzing the cards having been

concluding that “a hidden computer is precisely the type of conduct envisioned by the statute” and that the term “device” “certainly includes computers.”⁵⁴

5. Other Sleight-Of-Hand Methods

In *Moore v. State*, a blackjack player in Nevada used a sleight-of-hand technique that allowed him to secretly remove a card from the game and switch it with another card in order to improve his hand.⁵⁵ The technique, known as “mucking,” has long been used by cheaters around the world.⁵⁶ The defendant was convicted under a narrow cheating statute that made it unlawful to change “the outcome of a game . . . after the outcome is made sure but before it is revealed to the players.”⁵⁷

In *State v. Heffner*, a dealer in Washington surreptitiously manipulated the order of the cards, enabling him to deal hands resulting in \$5,000 bonuses to players.⁵⁸ This sleight-of-hand technique is known as “stacking the

dealt, the changing probabilities of any table game, or the playing strategies to be utilized.”); *see also* Coquille Ind. Tr. Code §198.700.

⁵⁴ *Anderson*, 746 P.2d at 644.

⁵⁵ 692 P.2d 1278, 1278 (Nev. 1984).

⁵⁶ *See* FORTE, *supra* note 11, at 366 (describing a baccarat scam where a cheater stole millions from a casino in Asia by mucking cards in and out of play); GEORGE JOSEPH, “HAND MUCKING”: THE ART OF SWITCHING CARDS IN PLAY 14 (1982) (“I was surprised to find evidence of this muck as far away as Bophuthatswana in Southern Africa . . . I was employed by Sun City Casino to demonstrate for their surveillance and casino personnel various methods of casino cheating and the procedures necessary to overcome sleight of hand stealing.”); DUSTIN D. MARKS, CHEATING AT BLACKJACK: INSIDE THE MINDSET AND METHODS OF THE GAME’S MOST SUCCESSFUL CHEATERS 174 (2016) (describing a mucking technique that “has been used by cheaters for years”); Andrew Rosenblum, *Why Baccarat, the Game of Princes and Spies, Has Become a Target for High-Tech Cheaters*, POPULAR SCIENCE (Aug. 11, 2011), <http://www.popsci.com/technology/article/2011-08/baccarat-101-why-high-rolling-game-princes-and-spies-has-become-target-high-tech-cheaters#page-5>, [https://perma.cc/3J74-TJAS] (noting how a cheater won \$1 million at Connecticut’s Foxwoods Casino using a mechanical device up his sleeve that allowed him to switch cards in baccarat).

⁵⁷ *Moore*, 692 P.2d at 1278 (quoting NEV. REV. STAT. § 465.070(1) (1981)).

⁵⁸ 110 P.3d 219, 221 (Wash. Ct. App. 2005).

deck.”⁵⁹ The dealer was convicted under a broader fraud statute, despite the existence of Washington’s cheating statute.⁶⁰

In *State v. Bethea*, an inattentive New Jersey craps dealer looked away as a player made a “winning” bet after the game’s outcome was known.⁶¹ The bet was paid and the casino’s surveillance department later discovered the late bet and alerted law enforcement.⁶² Placing winning bets after a game’s outcome is determined is called “past-posting.”⁶³ New Jersey defines cheating as winning money by “purposely or knowingly by any trick or sleight of hand performance or by fraud or fraudulent scheme, cards, dice or device.”⁶⁴ The defendant was convicted under this statute because he “waited for the

⁵⁹ STEVE FORTE, POKER PROTECTION: CHEATING . . . AND THE WORLD OF POKER 76 (2006) (defining “stacking the deck” as “position[ing] the cards during the pickup or riffle shuffle, for the purposes of dealing one or more strong hands to a dealer’s partner(s)”). Playing cards are not the only casino equipment that can be stacked. The game of pai gow is played with domino tiles that are shuffled and dealt facedown to players and the dealer. See discussion *supra* note 18. Domino tiles, like playing cards, can be stacked. FORTE, *supra* note 11, at 389.

⁶⁰ See *Heffner*, 110 P.3d at 222 (noting the existence of WASH. REV. CODE § 9.46.196 (2002)).

⁶¹ No. 13-11-3043, 2016 WL 6440654, at *1 (N.J. Super. Ct. App. Div. Nov. 1, 2016). See also Brian Ianieri, *Serial Cheater at Atlantic City Casino Games Loses Appeal*, THE PRESS OF ATLANTIC CITY (Nov. 1, 2016), http://www.pressofatlanticcity.com/business/serial-cheater-at-atlantic-city-casino-games-loses-appeal/article_e07adc5f-efa3-515f-aea4-245e868146c0.html [https://perma.cc/W4QW-V329].

⁶² See *Bethea*, 2016 WL 6440654, at *1.

⁶³ Betting on a winning number after it has already been determined is probably most prevalent in roulette. See FORTE, *supra* note 11, at 302 (“The most common approach for cheating [at roulette] is ‘past posting’, that is, betting on the winning number after the ball has landed.”); BILL FRIEDMAN, CASINO MANAGEMENT 38 (1974) (“[Past-posting] is the most common method of customer cheating In all games customers may try to switch wagers from losing to winning bets. This is particularly popular in roulette”). And as *Bethea* demonstrates, the technique can be used in craps too. See FORTE, *supra* note 11, at 284 (“Occasionally, past posting techniques similar to those used in roulette surface in craps.”). While the dealer in *Bethea* was inattentive and not part of the scam, past-posting has a greater chance of success when cheaters collude with dealers. See DARWIN ORTIZ, GAMBLING SCAMS 114 (1984) (“The most extensive past-posting conspiracy I know of occurred a few years at the San Remo Casino in Italy. About one-third of the croupiers were involved in a scam to allow agents to past post at roulette. The fraud eventually came to light when the dealers got so greedy that casino profits dropped by over 30 percent. In all, more than forty croupiers received prison terms.”).

⁶⁴ N.J. STAT. ANN. § 5:12-113(a) (West 2002).

craps dealer to become distracted and then placed his bet after the winning number was called.”⁶⁵

B. Legal Methods Used to Gain an Advantage Over Casinos

1. Card Counting

Contrary to what Hollywood would have you believe,⁶⁶ card counting does not constitute cheating.⁶⁷ Card counting is a strategy used to gain an advantage over the casino in the game of blackjack.⁶⁸ Card counters mentally keeping track of the ratio between high-valued and low-valued cards.⁶⁹ Generally speaking, players have an advantage when a sufficient number of high-valued cards remain in the deck.⁷⁰ In *Sheriff of Washoe County v. Martin*, the Supreme Court of Nevada reasoned that card counting does not implicate the state’s cheating statute because it does not alter any of the basic features of the game.⁷¹

⁶⁵ *Bethea*, 2016 WL 6440654, at *6.

⁶⁶ *See, e.g.*, 21 (Relativity Media 2008).

⁶⁷ *See, e.g.*, *Chen v. Nev. State Gaming Control Bd.*, 994 P.2d 1151, 1153 (Nev. 2000) (Maupin, J., dissenting) (“[N]either card counting nor the use of a legal subterfuge such as a disguise to gain access to [blackjack] is illegal under Nevada law.”); *Lyons v. State*, 75 P.2d 219, 221–22 (Nev. 1989) (noting that card counting is not unlawful under the state’s cheating statute because players merely “exploit what their skills and the play of the games will afford them”); *Bartolo v. Boardwalk Regency Hotel Casino, Inc.*, 449 A.2d 1339, 1342 (N.J. Super. Ctr. Law Div. 1982) (“[C]ard counting does not involve dishonesty or cheating.”); ROBERT A. NERSESIAN, *THE LAW FOR GAMBLERS* 18 & n.4 (2016) (explaining that the courts and legislatures uniformly agree that card counting does not constitute cheating, and collecting decisions from different states explaining such). Nor is card counting technically considered advantage play. FORTE, *supra* note 11, at 11. However, it is appropriate to include it in this section for two reasons. First, it is a legal strategy used to gain an advantage over the casino. Second, because of the controversy and myriad litigation over whether casinos must allow card counters to play.

⁶⁸ *See generally* BILL ZENDER, *CARD COUNTING FOR THE CASINO EXECUTIVE* (1990).

⁶⁹ *See* *Campione v. Adamar of New Jersey, Inc.*, 714 A.2d 299, 301 (N.J. 1998) (“Card counting is a method of playing blackjack that involves keeping track of the number of ‘high value’ cards.”).

⁷⁰ *Id.* (“[Card counting] allows a blackjack player to identify a favorable count, which occurs when an unusually high percentage of the cards remaining in the ‘dealing shoe’ are high value cards. At that time, the chances increase that the dealer will ‘bust,’ or deal cards that exceed 21 points, thereby permitting the card counter to win.”).

⁷¹ 662 P.2d 634, 638 (Nev. 1983).

2. Taking Advantage of Defective Equipment

The astute player can also take advantage of deficiencies in the equipment provided by casinos. As previously discussed, it is well established that players marking cards constitutes cheating.⁷² But what happens when poorly manufactured cards contain a defect that enables players to identify their values when they are facedown?

In 2012, world-famous poker player Phil Ivey won \$9.6 million while playing baccarat at New Jersey's Borgata Casino.⁷³ Casinos' playing cards are supposed to have symmetrical patterns on their backs so they cannot be distinguished when lying face down.⁷⁴ However, unbeknownst to Borgata, their cards were manufactured with tiny imperfections, and the cards could thus be distinguished if rotated 180 degrees.⁷⁵

Because Ivey wagered up to \$100,000 per hand, Borgata accommodated his unusual requests such as having his friend seated next to him and having the dealer rotate cards—under the guise of being superstitious.⁷⁶ In reality, Ivey's friend was trained to read the minute imperfections on the backs of the cards,⁷⁷ and he instructed the dealer to rotate the cards based on whether the cards' values were mathematically advantageous.⁷⁸ After all the cards were properly sorted, Ivey was effectively playing the game with the cards face-up. Ivey knew exactly when the favorable cards would fall and he bet accordingly. Borgata executives did not uncover the method until they heard a media report that London's Crockfords Casino withheld £7.3 million from Ivey.⁷⁹ At that point, Borgata determined that Ivey was using a scheme known as "edge sorting."⁸⁰

⁷² See *supra* Part I.A.1.

⁷³ *Marina Dist. Dev. Co. v. Ivey*, 216 F. Supp. 3d 426, 430 (D.N.J. 2016).

⁷⁴ See, e.g., JACOBSON, *supra* note 4, at 25 (discussing the vulnerability of games when the pattern on backs of playing cards is asymmetrical).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.* at 439 ("[Ivey's friend]'s mental acumen in distinguishing the minute differences in the patterns on the back of the playing cards is remarkable.").

⁷⁸ See *id.* at 430.

⁷⁹ See *id.* See also *Ivey v. Genting Casinos UK Ltd.* [2014] EWHC 3394 (QB).

⁸⁰ *Marina*, 216 F. Supp. 3d at 430. While edge sorting only recently gained prominence, it has been used in casinos long before *Marina*. See, e.g., JACOBSON, *supra* note 4, at 25 ("[Advantage players] have been using it to beat the house for 50 years or more."); FORTE, *supra* note 11, at 171 (referring to edge sorting by its original name, "playing the turn," and noting that it is "a very old advantage strategy once popular with many oldtimers"); STANFORD WONG, *BLACKJACK SECRETS* 137 (1993) ("I know a pro who has used [edge sorting] in a casino with good results.").

In a civil action brought by Borgata to recover Ivey's "winnings," a federal district court held that the edge-sorting scheme violated the marked-card provisions of the state's Casino Control Act.⁸¹ The court concluded that asking a dealer "to turn a card a particular way so that the pattern on the edge of the card will distinguish it from other cards" was no different from marking cards with physical substances or crimps.⁸² After New Jersey's gaming regulatory agency concluded its own investigation, the state refused to file criminal charges (and it never issued a decision as to the legality of the edge sorting scheme).⁸³

The *Marina District Development Company v. Ivey* court distinguished the impropriety of edge sorting from the propriety of card counting by reasoning that card counting uses memory and statistics, while edge sorting uses manipulation of cards.⁸⁴ This focus on "manipulation" makes it hard to reconcile with the following case, where the Supreme Court of Nevada held that a player's manipulation of a slot machine's handle was acceptable.

In *Lyons v. State*, the defendant was charged with cheating while playing slot machines in Nevada because he pulled the handle in a manner that caused the reels of the machine to stop spinning prematurely.⁸⁵ This technique is known as "handle-popping."⁸⁶ The court explained that the state's cheating statute was intended to prevent "knowing, purposeful, unlawful conduct designed to alter the criteria that determines the outcome" of a game.⁸⁷ The court acknowledged that while handle-popping indeed alters the usual criteria of the game, it does not constitute cheating because the statute is unconstitutionally vague as applied to handle-popping.⁸⁸ The court provided two justifications. First, the technique "neither damages nor mechanically alters a slot machine."⁸⁹ Instead, the player is taking advan-

⁸¹ *Marina*, 216 F. Supp. 3d at 433 (citing N.J. STAT. ANN. §§ 5:12-115(a)(2), (b) (2011)).

⁸² *Id.* at 434.

⁸³ *See id.* at 432-33 & n.5.

⁸⁴ *See id.* at 439 n.25.

⁸⁵ 775 P.2d 219, 222 n.3 (Nev. 1989).

⁸⁶ *Id.* at 220. *See also* FORTE, *supra* note 11, at 608 (defining handle-popping as "an old technique for manipulating the reels on mechanical slot machines"); Cabot & Hannum, *supra* note 14, at 768 (noting that handle-popping is now moot because of technological advancements).

⁸⁷ *Lyons*, 775 P.2d at 221.

⁸⁸ *See id.* at 222. *But see* Cabot & Hannum, *supra* note 14, at 767 (arguing that handle-popping constitutes cheating under contract theory because the player "is fraudulently attempting to alter the basic premise of the contract, i.e., to remove the random element upon which the very outcome of the contract is based").

⁸⁹ *Lyons*, 775 P.2d at 222.

tage of the slot machine's mechanical deficiencies.⁹⁰ Second, there were no rules directing players to pull a slot machine handle in a specific manner.⁹¹ The court emphasized that well-intentioned players can stumble upon various methods of handle manipulations in an attempt to change their luck.⁹²

Within one month of *Lyons*, the Nevada legislature took aim at handle-popping by amending a different cheating statute to expressly proscribe “varying the pull of the handle of a slot machine, with knowledge that the manipulation affects the outcome of the game”⁹³ Two years later, in *Childs v. State*, the defendant was charged with handle-popping under the new Nevada statute.⁹⁴

The *Childs* court reasoned that the amendment did not affect its decision in *Lyons* because a different statute already defined “cheat,” and handle-popping still did not fit that definition.⁹⁵ Put another way, even though the legislature expressly banned handle-popping, the underlying definition of “cheat” remained the same: “alter[ing] the selection of criteria which determine: (a) The result of a game; or (b) The amount or frequency of payment in a game.”⁹⁶ Moreover, because the amendment failed to describe what a “normal” pull of a slot machine handle looked like, players could not know what “varying the pull” of a handle looked like.⁹⁷

III. CASINO GAME PROTECTION COUNTERMEASURES AND POWER IMBALANCES

Casinos have implemented a wide variety of countermeasures to combat cheating, advantage play, and card counting. Indeed, many current countermeasures are the result of losses incurred through past use of these strategies.⁹⁸ On the other hand, some countermeasures are born out of an unjustified fear and do not solve any issues that threaten casinos.⁹⁹ Noted

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.* at 223.

⁹³ *Childs v. State*, 816 P.2d 1079, 1080–81 (Nev. 1991) (citing NEV. REV. STAT. § 465.070(7) (2017)).

⁹⁴ *Id.* at 1079.

⁹⁵ *Id.* at 1081 (citing NEV. REV. STAT. § 465.015 (2017)).

⁹⁶ NEV. REV. STAT. § 465.015 (2017).

⁹⁷ *Childs*, 816 P.2d at 1081.

⁹⁸ *See* LEWIS, JR., *supra* note 18, at 9.

⁹⁹ *See, e.g.,* FORTE, *supra* note 11, at 523–26 (discussing a variety of procedures that are counterproductive from the casino's perspective); ZENDER, *supra* note 27, at 134 (“With the advent of Lawrence Revere's book, *Blackjack as a Business*, and the well publicized blackjack teams formed by Ken Uston . . . , the casinos hit an all

gaming attorney Robert Nersesian suggests “casinos appear to cheat, and even cheat with the imprimatur of the State on occasion.”¹⁰⁰ This is not hyperbole.

Professors Cabot and Hannum posit that all casino regulatory systems share the common normative objectives of keeping games both fair and honest.¹⁰¹ They define “honesty” as whether a casino offers a truly random game, and “fairness” as the percentage of every dollar wagered that a casino should be allowed to keep.¹⁰² The following countermeasures arguably violate both objectives: they make games less honest because they reduce the random selections; and make games less fair because the casino keeps a higher percentage of every dollar wagered than it would otherwise keep under truly random conditions.

The imbalance of power between casinos and players is quite stark. Normatively speaking, we would expect any business catering to the general public to have superior bargaining power. But the imbalance between casinos and players is unique because of three factors: the lack public information about the market, the imbalance in ability to review questionable practices, and regulatory agencies that protect casinos’ practices.

First, there is a widespread lack in consumer knowledge about market pricing. Casinos generally do not advertise their rules and payout structures outside of their four walls. Therefore players cannot price shop casino games as easily as they can with cell phones or vegetables. And even when players do enter a casino, it is nearly impossible to determine the odds of winning and the frequency of payouts of popular games such as slot machines.¹⁰³

Second, casinos have access to an extensive surveillance system, and can review any oddities or improprieties that might arise.¹⁰⁴ Conversely, players have no such surveillance access (or expertise) if they feel aggrieved. Most of the time, casinos will review irregularities while the suspect parties are still on property. Because of this, casinos can react quickly and minimize their losses. Conversely, by the time retailers in other industries have time to review footage or use loss-prevention technology, it is too late: the thief is usually long gone. Moreover, most brick-and-mortar retailers do not have surveillance operators watching cameras in real time. To be sure, this power

time high on the paranoid-o-meter, and instituted many of the anti-counter methods used today.”).

¹⁰⁰ NERSESIAN, *supra* note 10, at 93.

¹⁰¹ HANNUM & CABOT, *supra* note 41, at 237.

¹⁰² *Id.*

¹⁰³ *See id.* at 238.

¹⁰⁴ *See infra* Part III.B.

imbalance between casinos and players is created by the state: casinos are generally required to install surveillance cameras.¹⁰⁵

Third, casinos in every jurisdiction are subject to the rules of their gaming regulatory body. But these agencies often give cover to casinos by allowing them to use methods that would normally be associated with those who cheat casinos. For example, while players are prohibited from marking cards, casinos are indeed allowed to use them.¹⁰⁶ In doing so, these gaming agencies aid casinos in making games less fair and less honest—which stands in direct contradiction to what Professors Cabot and Hannum posit are the main objectives of gaming regulators.

A. Preferential Shuffling

Preferential shuffling is a countermeasure used in blackjack where a casino will shuffle the deck whenever it wants.¹⁰⁷ Arguably the most contested of all casino countermeasures, many prominent gaming experts stand firm in their belief that it constitutes cheating.¹⁰⁸

In order to gain a worthwhile advantage using card counting, the cards need to be dealt to a sufficient depth in the shoe. Put another way, card counters will have a better gauge of their advantage as more cards are dealt. Because the odds in blackjack are dynamic, a “player’s expectation of winning will change as certain cards are played in the shoe.”¹⁰⁹ In order to combat card counting, casinos might preferentially shuffle whenever the composition of the undealt cards favors players. The effect of this preferential shuffle is threefold. First, card counters will not stay long if this coun-

¹⁰⁵ See, e.g., NEV. GAMING REG. 5.160(6) (2018) (“[E]ach licensee shall install, maintain and operate a casino surveillance system in accordance with the casino surveillance standards adopted by the chairman.”).

¹⁰⁶ See *infra* Part III.C. Another example, as noted in the previous paragraph, is that most jurisdictions mandate casinos install surveillance systems to monitor their games.

¹⁰⁷ See FORTE, *supra* note 11, at 560 (“[Preferential shuffling] occurs when a dealer shuffles early if the remaining cards favor the player, but deals down to the bottom of the deck if the remaining cards favor the house.”).

¹⁰⁸ See *id.* at 560–61 (collecting opinions from experts that believe preferential shuffling constitutes cheating); see also PETER A. GRIFFIN, THE THEORY OF BLACKJACK: THE COMPLETE CARD COUNTER’S GUIDE TO THE CASINO GAME OF 21 136 (6th ed. 1999) (“[S]ome people have suggested that the Gaming Commission should regard [preferential shuffling] as illegal.”); ZENDER, *supra* note 27, at 135 (“[Arnold] Snyder, [Edward] Thorp, Don Schlesinger and others have gone on record as stating that they believe preferential shuffling to be out and out cheating.”).

¹⁰⁹ Cabot & Hannum, *supra* note 14, at 752.

termeasure is used against them.¹¹⁰ After all, the idea of counting cards is to make big bets when the composition favors players. Here, the casino shuffles whenever that opportunity arises. This makes preferential shuffling quite effective at keeping card counters at bay *if* it is used against actual card counters (as opposed to players who are incorrectly determined to be card counters).¹¹¹ Second, it extinguishes any possible advantage card counters have because preferential shuffling has the effect of removing high-valued cards from the deck altogether—the very cards needed for players to have any chance at winning.¹¹² Indeed, the tactic adds about one-and-a-half percent to the house advantage.¹¹³ Third, it extinguishes any possible advantage that casual, unsophisticated players have. These last two effects probably push preferential shuffling into cheating territory.

Recall that cheating is generally defined as altering the elements of chance that determine the result of a game or the frequency of payment in a game.¹¹⁴ Here, preferential shuffling alters both the results of blackjack and the frequency of payments in the game.¹¹⁵ Indeed, whenever the composition of the remaining cards favors players, casinos can shuffle and destroy the expected favorable opportunities. Moreover, preferential shuffling increases the unfavorable opportunities for players.¹¹⁶ It is unlawful for casinos to remove cards from the deck, but preferential shuffling has the effect of doing so since it keeps favorable cards out of play.¹¹⁷ Indeed, mathematical simu-

¹¹⁰ See SNYDER, *supra* note 5, at 291 (“Preferential shuffling is primarily a method casinos use to get a higher advantage against non-counters who aren’t aware of it. Casinos like it because it chases the counters away from their tables in the first place, then gives the house a stronger advantage against the non-counters.”).

¹¹¹ In addition, it alienates non-card counters who get irritated when the casino shuffles in the middle of a “hot” shoe.

¹¹² See GRIFFIN, *supra* note 108, at 135–36.

¹¹³ SNYDER, *supra* note 5, at 291.

¹¹⁴ See, e.g., NEV. REV. STAT. § 465.015 (2017).

¹¹⁵ See *also* FORTE, *supra* note 11, at 560 (noting that blackjack expert Bryce Carlson thinks that preferential shuffling is “outright cheating . . . it alters the selection of criteria both with respect to the result and frequency of payment”) (citing BLACKJACK FORUM (June 1995)).

¹¹⁶ See *id.* at 561 (“[T]he preferential shuffle rids the game of favorable opportunities *and* increases unfavorable opportunities for all players.”) (emphasis in original).

¹¹⁷ SNYDER, *supra* note 5, at 291 (“It would be illegal for a casino to remove cards from a deck, but it is not illegal for them to employ a dealing style that will accomplish the same end.”). *But see* GRIFFIN, *supra* note 108, at 136 (“Since mathematically [preferential shuffling] is equivalent to shorting the deck . . . , and the latter practice is specifically prohibited by law, some people have suggested that the Gaming Commission should regard the practice as illegal. In all honesty, though, I

lations have repeatedly proven that preferential shuffling dramatically increases the house advantage against casual players and card counters alike.¹¹⁸ The injustice is magnified when one realizes that novice players will never know that casinos are forcing them to play at only the most disadvantageous times. And while players generally expect to lose in the long run, they also expect a fair shot at winning in the short run. Preferential shuffling all but eliminates this.

One former Nevada Gaming Control agent has suggested that preferential shuffling would be legal if casinos posted the rule change just like they would post any other rule change in blackjack.¹¹⁹ For example, casinos regularly advertise their blackjack rules, such as “Blackjack Pays 6-to-5” and “Dealer Hits Soft 17.”¹²⁰ This former agent suggests that casinos might one day have to post signs alerting players that “This Casino May Preferentially Shuffle At Any Time.”¹²¹ On the other hand, Professors Cabot and Hannum have argued that although casinos should “generally be permitted to set the terms and conditions of the gaming contracts that they are willing to accept, the overriding principles of gaming regulation are that the games offered are fair and honest.”¹²² And because of this basic rule of fairness, casinos should not be permitted to preferentially shuffle—even if it were an express contractual term.¹²³ To be sure, the Nevada Gaming Control Board still does not have a written policy on preferential shuffling.¹²⁴ However, a former chairman of the Nevada Gaming Control Board has stated that preferential shuffling is probably unlawful.¹²⁵

think we must recognize that player card-counting is just the obverse of preferential shuffling—what’s sauce for the goose is also for the gander.”)

¹¹⁸ See, e.g., GRIFFIN, *supra* note 107, at 136 (“[Preferential shuffling] would give the basic strategist a 1.5% disadvantage. By using a better correlated betting count to decide when to reshuffle, the house edge could probably be raised to 2%.”); ZENDER, *supra* note 26, at 135–40 (demonstrating that preferential shuffling hurts players, but concluding that “preferential shuffling works against the casino if it becomes procedure. A casino that shuffled in all positive deck situations, regardless of the number of decks, would be virtually shooting itself in the foot. The loss in total hands dealt would cost the casino more money than the additional 0.1 percent to 0.3 percent gained by shuffling on all positive counts”).

¹¹⁹ See ZENDER, *supra* note 27, at 140.

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² Cabot & Hannum, *supra* note 14, at 752.

¹²³ See *id.*

¹²⁴ See David W. Schnell-Davis, *High-Tech Casino Advantage Play: Legislative Approaches to the Threat of Predictive Devices*, 3 UNLV GAMING L.J. 299, 332 (2012).

¹²⁵ See *id.*

All casino gambling “is essentially an adhesion contract between the casino and its patrons.”¹²⁶ And the preferential shuffle exposes the overwhelmingly superior bargaining power of the sophisticated casino versus the unsophisticated amateur gambler. Casinos often determine when to preferentially shuffle through software programs. Professors Cabot and Hannum emphasize the unfairness of casinos’ use of superior technology in determining when to preferentially shuffle.¹²⁷ And while casinos’ monopoly on using software is problematic,¹²⁸ the more troubling aspect with preferential shuffling is the possibility of duping the unsuspecting casual player.

B. Surveillance Cameras

Arguably the most visible countermeasure is the vast swath of surveillance cameras monitoring every inch of the casino floor.¹²⁹ For the bigger resorts, the number of cameras can run into the thousands.¹³⁰ And while it is readily apparent that casino ceilings are peppered with these black domes,¹³¹ not much is known about the inner-workings of the surveillance department.¹³² It may seem that with so many cameras, no one could get

¹²⁶ Cabot & Hannum, *supra* note 14, at 722.

¹²⁷ *See id.*

¹²⁸ *See infra* Part III.B.

¹²⁹ But not even constant monitoring really captures every aspect of a game. *See* FORTE, *supra* note 11, at 514 (“[T]he camera lens doesn’t always provide a complete picture. Perception of depth can present problems in the most fundamental areas, such as reading bet size, which is obviously a crucial factor.”).

¹³⁰ *See* Rachel Crosby, *Aria Security is the Old-Fashioned Way—Watching People*, LAS VEGAS REVIEW JOURNAL (Aug. 23, 2014), <https://www.reviewjournal.com/business/casinos-gaming/aria-security-is-the-old-fashioned-way-watching-people/>, [https://perma.cc/J7HY-DX83] (“Nearly 4,000 cameras cover activity in 98 percent of the luxury resort. Everything that happens is monitored. Every incident is recorded; every red flag investigated.”). But more surveillance cameras do not necessarily equate to more operators actually monitoring the gaming floor. *See, e.g.*, SNYDER, *supra* note 5, at 300 (“The surveillance department is always understaffed. In most of the big casinos, there will be anywhere from one to three surveillance monitors watching the video screens.”).

¹³¹ Casino surveillance cameras are usually encased in black domes, which make it “nearly impossible for people to tell which direction they are monitoring.” Elivia, *Casino Security Cameras—Things You Are Interested In*, REOLINK (last updated Oct. 11, 2018), <https://reolink.com/casino-security-cameras/> [https://perma.cc/G9KZ-72HD].

¹³² *See* FORTE, *supra* note 11, at 514 (“Over the last few years, a number of television shows have featured rare, behind the scenes glimpses into the surveillance world. For most pit personnel, this is the only time they have ever been exposed to the inner workings of this department.”).

away with any form of deception. But the truth is that the surveillance department—like most law enforcement agencies—rarely catches cheaters red-handed. Instead, most cheaters and advantage players are usually detected by appearing on the radar through prior incidents.¹³³ Indeed, the department is more reactive than proactive.¹³⁴ In addition, the ubiquitous presence of cameras has a powerful deterrent effect.¹³⁵ And most importantly (for our purposes), gaming regulators often mandate that casinos install a surveillance system.¹³⁶ In Nevada, casinos must monitor every table game—regardless of how small the stakes are or whether there are any players gambling.¹³⁷

Casinos' use of surveillance cameras can be quite concerning. To illustrate, first consider a cheating technique used by players who work with confederates: Blackjack requires dealers to load their hole cards on the table without anyone glimpsing their identities. But some dealers become sloppy and are susceptible to a technique that enables their hole cards to be viewed from far off the gaming table. This technique is called the “express play.”¹³⁸ It involves a confederate who is positioned off the target blackjack

¹³³ See *id.* at 515; see also *id.* at 532–33 (“Historically, when we look back at the most successful scams and strategies, industry awareness came after the fact—we first had to be a victim. No gamer ever recognized the possibility of peeking up into a shuffle machine with a hidden camera until it was too late.”).

¹³⁴ See *id.* at 515 (“[W]hen faced with suspect play, in many clubs the final say is left to the surveillance director who will review the footage at a later time. What if he suspects a card bending play, but the cards are long gone? What if the play warranted different viewing angles, but it’s too late? . . . This is an important process, but after the fact analysis is often too little, too late.”).

¹³⁵ MARKS, *supra* note 56, at 30. See also NEV. GAMING REG. 5.160(2) (2018) (“The purposes of a casino surveillance system are to assist the licensee and the state in safeguarding the licensee’s assets, in deterring, detecting and prosecuting criminal acts, and in maintaining public confidence and trust that licensed gaming is conducted honestly and free of criminal elements and activity.”); FORTE, *supra* note 11, at 517 (“Outside of the obvious advantages of reviewing suspect play, the biggest benefit of surveillance is the deterrent factor. This alone will keep the majority of the players and employees honest, and keep many cheaters guessing.”).

¹³⁶ *E.g.*, NEV. GAMING REG. 5.160(6) (2018) (“[E]ach licensee shall install, maintain and operate a casino surveillance system in accordance with the casino surveillance standards adopted by the chairman.”).

¹³⁷ NEV. GAMING REG. 5, ATTACHMENT 1 (2018) (“The surveillance system of all licensees operating three (3) or more table games must possess the capability to monitor and record: (a) Each table game area, with sufficient clarity to identify patrons and dealers; and (b) Each table game surface, with sufficient coverage and clarity to simultaneously view the table bank and determine the configuration of wagers, card values and game outcome.”).

¹³⁸ FORTE, *supra* note 11, at 166.

game, such as at a nearby slot machine, bar, or even a restaurant.¹³⁹ By increasing the distance from the target blackjack game, it creates a greater angle from which to view the dealer's hole card.¹⁴⁰ The confederate then signals his agent who is playing at the target game.¹⁴¹ To be sure, it is unlawful for a player to make a bet using information that is not available to all players.¹⁴² And because the player would be making a bet using information not available to all players—namely, the identity of the dealer's hole card gleaned by the confederate positioned away from the game—the express play is cheating, not merely an advantage tactic.¹⁴³

Now consider a similar strategy employed by casinos. Here, a floor supervisor becomes suspicious of a blackjack player and calls the surveillance department to “evaluate” the player.¹⁴⁴ The floor supervisor might suspect that the player is card counting, or, as is often the case, the supervisor just wants to be thorough to avoid future liability.¹⁴⁵ A surveillance operator

¹³⁹ See *id.* at 167.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² NEV. REV. STAT. § 465.070(2) (2017) (“It is unlawful for any person: To place, increase or decrease a bet or to determine the course of play after acquiring knowledge, *not available to all players*, of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing or decreasing a bet or determining the course of play contingent upon that event or outcome.” (emphasis added)); see also *Sheriff v. Einbinder*, 808 P.2d 22 (Nev. 1984) (unpublished table decision). For the text of the Nevada Supreme Court's order, see Arnold Snyder, *Is Spooking Legal?*, Blackjack Forum (June 1987), <http://www.blackjackforumonline.com/content/spooking.htm>, [https://perma.cc/YU7C-V5SB] (emphasizing that a player and his confederate did not cheat when glimpsing the dealer's hole card because both players were seated at the same table).

¹⁴³ The film CASINO, (Universal Pictures 1995), provides a good depiction of a similar technique called “spooking.” See Universal Pictures, *Casino (1995) – Cheater's Justice HD*, YOUTUBE (Jan. 29, 2017), <https://www.youtube.com/watch?v=KGp3PrC1CKI>, [https://perma.cc/A3G4-R6LQ]. There, the confederate spots the dealer's hole card while positioned behind the dealer. See *id.* The confederate then sends electronic signals to his agent at the target blackjack table. See *id.* Unfortunately for the confederate, he winds up with a broken hand courtesy of the casino's security staff. See *id.* For more on spooking, see SNYDER, *supra* note 5, at 311.

¹⁴⁴ See SNYDER, *supra* note 5, at 300 (“[The surveillance department] basically wait[s] for phone calls from the pit, requesting that they pay attention to some specific player who may be a card counter, or just a big bettor who is unknown to the pit personnel.”).

¹⁴⁵ See *id.*

then determines whether the player is counting through a card counting software program.¹⁴⁶

If the surveillance operator determines that a player is counting cards, the floor supervisor will be notified. At this point, the casino might bar the person from playing blackjack.¹⁴⁷ Alternatively, there are many other countermeasures casinos can implement.¹⁴⁸ For example, one option is to “flat-bet” the player, which restricts him from varying his bets as the composition of the cards tips in his favor.¹⁴⁹ This erases any potential advantage gained from betting small when the deck’s composition favors the casino or betting large when the composition favors the player. Another option is preferential shuffling, which as previously discussed, occurs when the casino shuffles the cards whenever it wants.¹⁵⁰ The ability of a casino to shuffle the cards when the composition favors the player—which eliminates the player’s

¹⁴⁶ FORTE, *supra* note 11, at 518.

¹⁴⁷ However, not all jurisdictions permit casinos to bar players solely because they are engaging in card counting. *See, e.g.*, LA. STAT. ANN. 27:27.2(A)(3)(b) (2018) (prohibiting Louisiana casinos from banning players “for reasons based solely on the skill level of the person”); *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 376 (N.J. 1982) (holding that New Jersey casinos cannot ban blackjack players merely because they are counting cards). In these jurisdictions, other countermeasures are used to deter card counters, as will be discussed *infra*.

¹⁴⁸ *See Cabot & Hannum, supra* note 14, at 709 (“Some casinos do not take any measures to deal with most advantage players, such as card counters, reasoning that the harm caused does not justify the cost or consequences of taking affirmative action against the advantage players. Other casinos, however, undertake affirmative steps against advantage players where legally available, including criminal arrest, civil exclusion or changing the rules of play.”).

¹⁴⁹ *See id.* (“Other casinos, however, undertake affirmative steps against advantage players where legally available, including criminal arrest, civil exclusion or changing the rules of play.”). *See also* *Doug Grant, Inc. v. Grete Bay Casino Corp.*, 232 F.3d 173, 182–83 (3d Cir. 2000) (noting a New Jersey gaming regulation that grants “the casinos the authority to lower the betting limit whenever it identifies a card-counter so that the card-counter will not be able to bet high when the shoe becomes player-favorable,” as well as a subsequent amendment giving casinos even more discretion in accepting bets of any size); SNYDER, *supra* note 5, at 88 (describing the legal kerfuffle between card counters, Atlantic City casinos, and the New Jersey Casino Control Commission).

¹⁵⁰ *See supra* Part III.A; *see also* *Campione v. Adamar of New Jersey*, 714 A.2d 299, 306 (N.J. 1998) (noting that a New Jersey regulation permits casinos to “shuffl[e]-at-will, which allows casinos to shuffle after any round of play”). However, this technique is almost always referred to as “preferential shuffling” in casino parlance. *See, e.g.*, GRIFFIN, *supra* note 108, at 135.

opportunity to bet big at an advantageous time¹⁵¹—is one of the strongest countermeasures in the casino’s arsenal.

Regardless of which countermeasure is implemented, the casino has just benefitted from one of the fundamental requirements imposed on gamblers around the world: the prohibition of devices that aid playing strategy. The first device is the surveillance camera used to monitor the player. And as previously noted, casinos are generally required to install surveillance systems.¹⁵² The second device is the software program used to detect card counting. Recall *Sheriff, Clark County, Nevada v. Anderson*, where the Nevada Supreme Court held that it is unlawful for players to use a card-counting computer because it constitutes a “device” under the State’s anti-device law.¹⁵³ However, casinos are free to use such a device to the players’ disadvantage.¹⁵⁴ Likewise, casinos are also free to use surveillance cameras to the players’ disadvantage.¹⁵⁵ It becomes much easier to see why Robert Nerseanian believes that casinos “cheat with the imprimatur of the State.”¹⁵⁶ To be sure, a casino’s use of surveillance equipment and card counting software is not per se cheating. Instead, making use of such technology to the player’s detriment—manifested in the form of preferential shuffling or related countermeasure—is what makes the technology problematic.

Let us dig a bit deeper into this scenario. Recall that at the beginning of this section I explained that players are generally prohibited from making bets based on information that is not available to all players.¹⁵⁷ Moreover, confederates are prohibited from gathering this information in the first place—even if the confederate’s agent never makes a bet.¹⁵⁸ However, in our scenario, the casino can easily gather information that is not available to all players. Consider how blackjack is often dealt in a manner where the cards are pitched facedown and players are allowed to physically handle the cards (as opposed to the more common “shoe game,” where cards are dealt face-up and players may not touch them).¹⁵⁹ In these “pitch games,” casinos

¹⁵¹ See Cabot & Hannum, *supra* note 14, at 710 (“[A]ny advantage created through card counting, of course, is negated when the deck is shuffled.”).

¹⁵² See *supra* note 105.

¹⁵³ 746 P.2d 643, 644 (Nev. 1987); see *supra* Part II.A.4.

¹⁵⁴ See SNYDER, *supra* note 5, at 300 (noting that surveillance operators may review footage of suspected card counters and input their playing decisions into card-counting software).

¹⁵⁵ See *id.*

¹⁵⁶ NERSESIAN, *supra* note 10, at 93.

¹⁵⁷ See *supra* note 142 and accompanying text.

¹⁵⁸ Nevada only requires that the “purpose” of gathering such information is to make a bet. NEV. REV. STAT. § 465.070(2) (2017).

¹⁵⁹ See FORTE, *supra* note 11, at 612 (defining “pitch”).

might use procedures whereby some cards are never exposed to other players.¹⁶⁰ This is significant because the more cards that remain hidden, the harder it becomes for card counters to determine their advantage. But when casinos monitor games through surveillance cameras, they *can* identify these hidden cards. And when casinos identify these hidden cards, they can determine the advantage more accurately than the card counter can. This directly violates yet another fundamental law imposed on gamblers: the prohibition on the gathering and use of information that is not available to all players.

What makes the casinos' use of this information particularly egregious is the power dynamics between players and casinos. The power imbalance between the casual, unsophisticated player and the experienced, sophisticated casino should cause us to rethink what countermeasures are acceptable. The common-law doctrine of unconscionability has long held that extreme one-sided contracts in favor of the party with the superior bargaining power might be invalid.¹⁶¹ Likewise, Professors Cabot and Hannum suggest that since the overriding principle of gaming regulation is that the games are fair and honest, a casino's use of superior technology can "raise fundamental issues regarding the honesty and fairness of the games themselves sufficient to justify regulatory intervention."¹⁶² Here, a casino's use of surveillance cameras and card counting software might justify regulatory intervention because it violates a basic tenet imposed on all players: no use of information that is not available to all players.

C. Shuffle Machines and Dealing Shoes

Another ubiquitous countermeasure is the shuffle machine. First introduced in Las Vegas casinos in 1992, the inspiration for these machines came in response to the threat of card counting.¹⁶³ Shuffle machines mimic the actions of traditional shuffling by human dealers. However, these machines generally do not shuffle cards faster than humans. Nor are the machines necessarily more thorough. Instead, the machine acts as an extra pair of hands: While the dealer is attending to the game in progress, the machine

¹⁶⁰ See ZENDER, *supra* note 68, at 105 (explaining three situations when a casino can avoid exposing cards in order "to confuse the counter by not allowing him to see all the cards played").

¹⁶¹ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

¹⁶² Cabot & Hannum, *supra* note 14, at 752.

¹⁶³ *Shuffle Master Inc. History*, FundingUniverse.com (Oct. 28, 2017), <http://www.fundinguniverse.com/company-histories/shuffle-master-inc-history/>, [<https://perma.cc/UM88-S2H3>].

shuffles a different deck of cards. And when the cards that are in play have been depleted, the dealer exchanges those cards for the freshly shuffled deck. Without a shuffle machine, there would be downtime as the dealer manually shuffles the deck. This downtime can be quite costly.¹⁶⁴

The potential problem with shuffle machines arises because some machines can actually identify the values of the cards. For example, the popular MD3 shuffle machine is capable of shuffling up to eight decks at a time and “can read and verify every card being shuffled.”¹⁶⁵ This has two immediate implications. First, the casino will know the precise order of every card in the deck *before* they are dealt. This recreates a classic form of cheating that has long been considered unlawful if implemented by players: the “cold deck.”¹⁶⁶ This scam involves the player switching an entire deck (or decks) for a deck that has been set in a prearranged order.¹⁶⁷ Likewise, a shuffle machine that knows the order of every card effectively creates a cold deck on the casino’s behalf.¹⁶⁸ The power imbalance could not be starker: It would clearly be unlawful for a player to “read and verify” every card as the deck was being shuffled. But casinos are allowed to do this with impunity, and most players have no idea that this is going on. If a casino knows the order of the deck, it can easily deduce the point at which the composition of the cards favors the players in blackjack. The casino can then engage in preferential shuffling by shuffling earlier than expected and erasing any possible player advantage.¹⁶⁹ Indeed, it was this very situation that led to a legal challenge of a casino’s use of the MindPlay electronic system. The complaint alleged that the system “informed the casino that the deck or shoe had become favorable to the plaintiff and unfavorable for the [casino]”

¹⁶⁴ See BILL ZENDER, CASINO-LOGY: THE ART OF MANAGING CASINO GAMES 10–12 (2008) (demonstrating that in blackjack, the difference between a two-minute manual shuffle and a 1.25-minute manual shuffle can result in a difference in annual revenue of hundreds of thousands of dollars for the casino).

¹⁶⁵ MD3, SCIENTIFIC GAMES, <https://www.sggaming.com/Shuffle-Master/Utilities/Shufflers/Baccarat-Products/MD3>, [<https://perma.cc/CTR6-M576>].

¹⁶⁶ See FORTE, *supra* note 11, at 74 (describing the cold deck as “[t]he most infamous of all gambling scams”); see also ZENDER, *supra* note 27, at 74–75 (describing how casinos can cheat players by dealing from a deck that has already been sorted into a prearranged order).

¹⁶⁷ See FORTE, *supra* note 11, at 74.

¹⁶⁸ The order of the cards will not be materially disturbed when the player cuts the deck. Indeed, the chain of cards remains the same—only the starting point changes.

¹⁶⁹ See *supra* Part III.A (providing more information about preferential shuffling).

and then shuffled the deck whenever it was in the plaintiff's favor.¹⁷⁰ The case was eventually dismissed because the court did not believe MindPlay worked as described in the complaint.¹⁷¹ But preferential shuffling is always a possibility if a casino's shuffle machine can discern the order of the deck.

The second implication of a device that can "read and verify" the identities of the cards is that the cards themselves must be marked. For example, the Angel Eye system openly advertises that its dealing shoe reads the markings off a proprietary style of playing card.¹⁷² This mimics the traditional marked card scam that is unlawful in every jurisdiction. But yet again, casinos do not receive any scrutiny for this practice. Like the shuffle machine that can identify the order of the deck, a dealing shoe that can read marked cards can determine when players have an advantage and notify the casino to shuffle accordingly.

IV. CASINO COUNTERMEASURES AND DECREASED TAX REVENUE

Many countermeasures are the product of a bygone era—one where paranoia was rampant and often unjustified. Despite the absence of a rationale, many countermeasures survive today. As previously demonstrated, some casino countermeasures potentially cross the line into cheating territory. At the very least, these countermeasures violate fundamental duties of fairness in light of the power imbalance between players and casinos. But these countermeasures can impose additional far-reaching, unfavorable effects on other entities. Indeed, many countermeasures are counterproductive because they slow down games and deprive the state and municipality of tax revenue.¹⁷³ Eliminating these countermeasures will lead to greater revenues for casinos and the state. Moreover, players will be happier since many countermeasures do nothing but alienate and irritate them.

¹⁷⁰ *Gambler Files Lawsuit Over Card-Counting System*, LAS VEGAS SUN, (Oct. 19, 2004), <https://lasvegassun.com/news/2004/oct/19/gambler-files-lawsuit-over-card-counting-system/>, [https://perma.cc/RZ3U-VXEZ].

¹⁷¹ See Schnell-Davis, *supra* note 124, at 332.

¹⁷² *Angel Eye Electronic Security System*, ANGEL EYE PLAYING CARDS CO., LTD., http://www.angelplayingcards.com/en_casino/engineering1.php, [https://perma.cc/L72N-J8MV].

¹⁷³ A jurisdiction's gaming tax revenue is generally derived from a casino's gross gaming revenue. See, e.g., *Nevada Gaming Summary*, UNLV CENTER FOR GAMING RESEARCH (2014), http://gaming.unlv.edu/abstract/nv_main.html, [https://perma.cc/L4DF-DTKK] (noting that Nevada's gaming taxes are "approx. 7.75% effective tax rate, with a 6.75% tax on gross gaming revenues and about 1 percent of taxes in fees").

Noted casino consultant Bill Zender has demonstrated that the gain of merely a few additional blackjack hands per hour can increase annual revenue by hundreds of thousands of dollars.¹⁷⁴ Clearly, “[t]he more hands dealt, the greater revenue the casino achieves”¹⁷⁵ But when considering how to speed up games, casino managers must carefully balance game protection considerations and customer satisfaction concerns with the gain in revenue produced by a more streamlined dealing procedure.

Zender suggests that the costliest countermeasure to casinos’ bottom line is not dealing deep enough into each blackjack shoe.¹⁷⁶ Consider a typical blackjack game dealt from a shoe that holds six decks of cards. Many casinos will typically only deal around 4.5 decks.¹⁷⁷ Casinos fear that if more cards are dealt, casinos may be vulnerable to card counters (remember, card counters have a better gauge of their advantage as more cards are dealt).¹⁷⁸ However, the concern over card counters is vastly disproportionate to the revenue that casinos relinquish by not dealing deeper into the shoe.¹⁷⁹ Just as casinos avoid downtime, players do not like to sit around and wait during a shuffle.¹⁸⁰ Reducing this downtime will make all parties happier, especially considering the exaggerated threat that card counting poses to

¹⁷⁴ See ZENDER, *supra* note 164, at 4–8; see also ZENDER, *supra* note 68, at 107 (“Even in a medium size casino, if the house could gain one more round dealt per table each hour, they would win an additional \$100,000 annually.”). *But see* Richard Munchkin, *Interview—Mike Patterson VP of Table Games at Barona Casino*, RICHARD MUNCHKIN BLOG (Nov. 6, 2012), <http://www.richardmunchkin.com/2012/11/interview-mike-patterson-vp-of-table.html>, [<https://perma.cc/ND2M-CCBT>]me (“I am not a big fan of time and motion studies. . . . I tell our dealers to slow down and make the game fun. The premise that if you deal faster you will make more money only works if you have an unlimited supply of players with an unlimited bankroll.”).

¹⁷⁵ ZENDER, *supra* note 164, at 9.

¹⁷⁶ See *id.* at 15.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 20 (“The industry belief at that time was the deeper the deck penetration, the more money you would lose to card counters (and it still is today, even though there’s plenty evidence to the contrary).”).

¹⁷⁹ See *id.* at 21 (“[A]ny executive who deals less than 75% of the multiple-deck shoe is costing his operation more revenue than a busload of ‘phantom’ card counters can possibly win (85% deck penetration or greater is optimal).”); ZENDER, *supra* note 68, at 107 (“An early shuffle point may save a casino \$10,000 to \$20,000 from possible counters per year, but, it most likely will cost them \$200,000 in wasted time.”).

¹⁸⁰ See, e.g., FORTE, *supra* note 11, at 114 (“After the release of *Beat the Dealer*, it took little time for a then virgin industry to flip out, literally, to the possibility of skillful play. Drastic countermeasures could be found everywhere; shuffle after every hand, double on eleven only, no splitting aces, and multiple decks. But the

casinos. Indeed, Zender recommends moving the cutoff point to 5.5 decks to maximize revenue.¹⁸¹

Other countermeasures can likewise be harmful to a casino's revenue. Until recently, many casinos offering "pitch" blackjack games¹⁸² would use a procedure where an outgoing dealer would hand the deck to the incoming dealer if a round ended before the deck is depleted.¹⁸³ This procedure allows the game to continue without the need for an early shuffle.¹⁸⁴ However, casinos have been moving away from this procedure because of their fear that allowing dealers to temporarily touch hands would facilitate cheating.¹⁸⁵ But there is no scam that could target this procedure that would not be possible anyway.¹⁸⁶ Instead, the retreat from this productive procedure is yet another unjustified response that only serves to slow down the game.

There are many countermeasures that similarly slow down games and reduce revenue.¹⁸⁷ Why do billion-dollar properties continue to implement them? Casino consultant Steve Forte suggests that it stems from a mindset held by many executives: avoid rocking the boat.¹⁸⁸ After all, if one were to make a procedural change and the casino were to coincidentally lose money one night (it happens), it would not be unreasonable to fear that the casino's management would associate the loss with the procedural change.

Does this attitude necessitate gaming regulatory agencies to step in and mandate certain procedures? Likewise, should these agencies prohibit certain countermeasures? It would not be new for an agency to do so. Indeed, New Jersey gaming law is replete with regulations controlling every minutia of a casino's shuffle.¹⁸⁹ And there is clearly a need for casinos to eliminate their unproductive countermeasures that do nothing other than slow down games and reduce tax revenue. On the other hand, should this job be left to agencies that often employ people with little to no gaming experience? There is much debate over what countermeasures are net benefits to casinos. It is easy to imagine an agency mandating procedures that end up doing more harm than good. After all, many of these unproductive

public revolted, business dropped off significantly, and the industry was forced to soften their stand.").

¹⁸¹ See ZENDER, *supra* note 164, at 20–21.

¹⁸² See *supra* notes 159–60 and accompanying text (providing an explanation of pitch games).

¹⁸³ See FORTE, *supra* note 11, at 524.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See, e.g., ZENDER, *supra* note 164, at 9–16; FORTE, *supra* note 11, at 523–26.

¹⁸⁸ FORTE, *supra* note 11, at 526.

¹⁸⁹ See, e.g., N.J. ADMIN. CODE § 13:69F-2.5 (2012).

countermeasures have withstood the test of time—and agency capture is always a fear with any regulatory body.¹⁹⁰ Or maybe there should be something in between—perhaps a system where it is easy for casinos to request exemptions after providing some sort of reasonable showing to the agency. While the proper solution is not simple (nor clear), it is evident that many countermeasures are dragging down gaming revenues.

V. CONCLUSION

Casinos implement countermeasures for a variety of reasons. Some are thought to prevent cheating and advantage play. Others are thought to speed up games and increase revenue. Part II introduced many classical cheating techniques used by players and how courts have adjudicated them. Part III discussed various countermeasures and why they might be considered cheating in light of the power imbalance between casinos and players. Part IV considered whether casinos should streamline countermeasures, since many of them serve only to slow down games and reduce casino and tax revenues. This Article has comprehensively demonstrated that many countermeasures are unjustified and unproductive.

¹⁹⁰ See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (noting that “[t]his kind of lopsided pressure can be seen in a range of areas, from criminal justice to consumer protection”).



Hope and Faith: The Summer of Scott Boras's Discontent

Matthew J. Parlow*

ABSTRACT

The 2018 Major League Baseball (MLB) free agency period drew great attention from fans and commentators alike because of the seeming lack of lucrative contracts offered to this year's players. Theories abounded about the reasons for the slow and anomalous free agent market. Some saw it as simply a relatively weak group of free agents. Others viewed the 2018 free agent market as representing a more systemic shift in the business and operation of baseball, particularly with the rise of data analytics. Still, others pointed to the increase in the "tanking" phenomenon in MLB as the reason for the change in free agency. While each of these theories provides some explanation for what MLB experienced during the 2018 offseason, these narratives provide only an incomplete picture of the changes that MLB experienced. In particular, they overlook how the competitive balance reforms contained in the latest MLB collective bargaining agreement (CBA) contributed to these changes in the free agent market. In an attempt to create better competitive balance among teams, the MLB CBA may have created a context within which teams are incentivized to move away from established approaches to roster development and payroll. Given the unique legal status of CBAs, the players are likely stuck with this new normal in the free agent market until the current MLB CBA expires in 2021. This article explores

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the various theories regarding the 2018 free agent market within the context of the MLB CBA and the law related to professional sports leagues and their CBAs. In doing so, this article provides greater clarity to these free agent changes and forecasts what it may portend for the next round of collective bargaining between owners and players.

I. INTRODUCTION

The free agency market during Major League Baseball's ("MLB") 2018 offseason sparked a great deal of controversy. Some, including players and agents, claimed that it was an unprecedented offseason because of how few free agents were signed to new contracts. These commentators also pointed out that the free agent contracts that *were* secured were proportionately smaller—in value and length—than such contracts in past off-seasons.¹ Others, like the MLB Commissioner's Office, said that the offseason was consistent with past years and that the changes in free agency were due to teams making adjustments in the free agent marketplace.² Much ink was spilled speculating as to the causes of the slow free agent offseason, but one thing was clear: something had changed.

To be sure, MLB has surged in terms of revenue during the past decade, and teams and players alike have benefitted from the league's extraordinary growth.³ This revenue swell followed a period where MLB struggled with a competitive imbalance among its teams. At the turn of the century, success in MLB seemed tied to payroll, with small-market teams being perpetually out of contention for the playoffs because of their inability to compete with larger-market teams' player salaries.⁴ Then-Commissioner Bud Selig famously stated that "every fan has to have hope and faith. If you

¹ See Gabe Zaldivar, *MLB's Slow Offseason Hints at Larger Problems, Possible Strike*, FORBES, Jan. 29, 2018, <https://www.forbes.com/sites/gabezaldivar/2018/01/29/mlbs-slow-offseason-hints-at-larger-problems-possible-strike/#27ef2b661ca0>, [https://perma.cc/H462-7SYW] (on file with the Harvard Law School Library).

² See Tyler Kepner, *Rob Manfred Defends Changing Paces, of Free Agency and of the Game*, N.Y. TIMES, Feb. 15, 2018, available at <https://www.nytimes.com/2018/02/15/sports/baseball/rob-manfred-free-agency.html>, [https://perma.cc/KJ97-Z4T5].

³ See Maury Brown, *MLB Sets Record for Revenues in 2017, Increasing More Than \$500 Million Since 2015*, FORBES, Nov. 22, 2017, <https://www.forbes.com/sites/maurybrown/2017/11/22/mlb-sets-record-for-revenues-in-2017-increasing-more-than-500-million-since-2015/#3825c3717880>, [https://perma.cc/C9AB-AEE7] (hereinafter "Brown, *MLB Sets Record*") (on file with the Harvard Law School Library).

⁴ Gerald Schifman, *How Much Hope and Faith is in Major League Baseball?*, FANGRAPHS.COM, Jan. 23, 2017, <https://www.fangraphs.com/tht/how-much-hope-and->

remove hope and faith from the mind of a fan, you destroy the fabric of the sport.”⁵ MLB studied this disparity and implemented a variety of revenue-sharing strategies—along with other reforms aimed at competitive balance—to help ensure hope and faith for fans of most, if not all, teams every year (or in the near future).⁶ The results can be seen in MLB’s incredible revenue growth, and there was relative happiness and labor peace between the owners and players until the 2018 offseason.

However, despite these gains, the players reacted in a visceral, negative manner to what some believed to be the slowest free agent offseason in MLB’s modern history. Statistics seemed to support the players’ view in terms of the number and amounts of free agent contracts.⁷ The Major League Baseball Players Association (“MLBPA”)—the union for the players—was sufficiently concerned about this changing marketplace that they formed their own training camp during spring training to help unsigned free agents prepare for the start of the season.⁸ Moreover, the MLBPA thought something far more nefarious than a market correction was occurring: they believed that MLB teams were colluding.⁹ MLBPA Executive Director Tony Clark claimed that the lack of free agent contracts—despite record revenues and franchise valuations for MLB—“threaten[ed] the very

faith-is-in-major-league-baseball/, [https://perma.cc/KR5V-HEV7] (on file with the Harvard Law School Library).

⁵ *Id.*

⁶ Section V.B.1, *infra* notes 127-138.

⁷ See Travis Sawchik, *This is the Slowest Offseason Ever*, FANGRAPHS.COM, Feb. 6, 2018, <https://www.fangraphs.com/blogs/this-is-the-slowest-offseason-ever/>, [https://perma.cc/3XWC-AWRU], (on file with the Harvard Law School Library).

⁸ See Ben Lindbergh, *Baseball’s Economics Aren’t as Skewed as They Seem*, THERINGER.COM, Feb. 21, 2018, <https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred>, [https://perma.cc/Y97W-SJ6M] (hereinafter “Lindbergh, *Baseball’s Economics*”) (on file with the Harvard Law School Library). The creation of a special training camp for unsigned free agents happened at least once before in 1995, making this a rare—but not unprecedented—move; see Lindbergh, *Baseball’s Rumored Spring Training for Free Agents Has Happened Before*, THERINGER.COM, Jan. 30, 2018, <https://www.theringer.com/mlb/2018/1/30/16946954/baseball-spring-training-for-free-agents-homestead-1995>, [https://perma.cc/K377-4WM7], (on file with the Harvard Law School Library).

⁹ See Scott Davis, *“I Have No Idea What the Hell is Happening:” MLB’s Bizarre Free Agency Has Created a Rift in the League and Both Sides are Pointing Fingers*, BUSINESS INSIDER, Mar. 3, 2018, <http://www.businessinsider.com/mlb-free-agency-drama-rift-2018-3>, [https://perma.cc/6PNW-WJYN] (on file with the Harvard Law School Library).

integrity of our game.”¹⁰ The MLBPA even filed a grievance against four teams, claiming that the teams were violating the collective bargaining agreement (“CBA”) by not using money received through MLB revenue sharing for their respective payrolls.¹¹ MLB disagreed with the union’s view of the offseason, releasing a statement saying “what is uncommon is to have some of the best free agents sitting unsigned even though they have substantial offers, some in nine figures.”¹² Indeed, the players’ charge of collusion against MLB seems unlikely because, as one commentator noted, “the owners would have to be extremely foolish to even consider colluding against the ball players.”¹³

While collusion was the main theory proffered by the MLBPA, the vast majority of explanations for the irregular 2018 free agent offseason came from elsewhere. Some attributed the change to the rise in data analytics usage by teams’ front offices.¹⁴ Others asked more existential questions: Was the economic structure of baseball broken?¹⁵ Or were owners choosing profit maximization over win maximization when winning a championship was not feasible—thus leading to a stingier free agent market?¹⁶ And various theories about this offseason seemed to show a structural shift for baseball: for example, front offices embracing data analytics in a manner that moved away from free agent contract norms of the past. Others suggested

¹⁰ Dan Gartland, *MLB and Union Chief Tony Clark Engaged in War of Words Over Continued Free Agent Freeze*, SPORTS ILLUSTRATED, Feb. 6, 2018, available at <https://www.si.com/mlb/2018/02/06/players-union-tony-clark-president-statement-free-agency>, [https://perma.cc/H3Q4-NY8L]. Player agents agreed, with one pointing out that even for top free agents, teams only offered salaries of \$20 million or more a year or contracts for more than three years, but not both: “It’s way too uniform. . . [t]he book has been printed. It’s out there.”; see Jeff Passan, *Here’s Why Baseball’s Economic System Might Be Broken*, YAHOO SPORTS, Jan. 16, 2018, <https://sports.yahoo.com/heres-baseballs-economic-system-might-broken-224638354.html>, [https://perma.cc/297W-WLUR] (on file with the Harvard Law School Library).

¹¹ Davis, *supra* note 9.

¹² *Id.*

¹³ Wayne G. McDonnell, Jr., *MLB Free Agency is Suffering from Owners’ Flawed Strategies and an Imperfect Agreement*, FORBES, Feb. 13, 2018, <https://www.forbes.com/sites/waynemcdonnell/2018/02/13/mlb-free-agency-is-suffering-from-owners-flawed-strategies-and-an-imperfect-agreement/#84f0e74792f8>, [https://perma.cc/P63P-K8KR] (on file with the Harvard Law School Library); see also Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 875 (2016) (describing the \$280 million settlement the owners paid the players for settling various collusion claims and the ramifications for labor relations in MLB thereafter).

¹⁴ See Passan, *supra* note 10.

¹⁵ See *id.*

¹⁶ See John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 REV. INDUS. ORG. 5, 41-42 (2009).

more innocuous and less fundamental explanations: a weak free agent class in 2018; a strong upcoming free agent class in 2019; livelier baseball leading to exaggerated player statistics; teams favoring bullpen pitchers to starting pitchers; or sports agents like Scott Boras trying to push for contracts that were not justified by the market for the players.

While theories abounded, few—if any—scholars or commentators attempted to sift through them and piece together an explanation grounded in the law, business, and policy of MLB and professional sports leagues. One notable omission to popular discussion of the 2018 free agency period was how various terms of the MLB CBA may have played an important role in this more recent free agency period. In particular, the competitive balance reforms adopted over the past two decades may have inadvertently led to this anomalous offseason. Indeed, these well-intentioned changes aimed at parity among teams may have led to a structural shift in team payrolls and free agency.

This article aims to delve deeper into this controversy and provide the legal, business, and policy framework within which to analyze this past offseason and what may lie ahead for MLB. Part II provides a more in-depth analysis of the popular theories on the 2018 free agent market. Part III details the legal significance of CBAs, particularly with regard to professional sports leagues. Part IV explores the concept of competitive balance in professional sports and how various MLB CBA reforms over the past twenty years may help explain the 2018 offseason and how these reforms may have actually led to a systemic change in the business of baseball. Part V concludes with some reflections on what this potential shift in MLB's economic structure may mean for the next collective bargaining negotiations.

II. EXPLANATIONS FOR THE 2018 FREE AGENT MARKET

Commentators have offered a number of theories on the causes of the anomalous free agent market in 2018. They included a weak 2018 free agent class compared to a strong one in 2019; the rebuilding/tanking movement that has become popular in baseball; the rise of data analytics and the attendant move away from free agent contracts designed on past performance; unrealistic bargaining positions taken by player agents; and a variety of more minor explanations. While none of these theories fully explains what transpired during this free agency period, each provides a piece of the puzzle for better understanding what many viewed as a seismic shift in the economics of baseball.

A. *A Weak 2018 Free Agent Class Versus a Strong 2019 Class*

Many baseball industry observers pointed to a relatively weak free agent class in 2018 as the reason why there was a dearth of robust contracts.¹⁷ The top free agents in 2018 were J.D. Martinez, Yu Darvish, Jake Arrieta, Eric Hosmer, and Lorenzo Cain.¹⁸ As one commentator noted, “few of [those] top free agents are true game-changers, marquee guys who will sell tickets and fuel championship dreams.”¹⁹ This lack of elite free agents in 2018 may also help explain why the market as a whole seemed sluggish: studies suggest that marquee free agent players hold their contract value better than non-elite players.²⁰ It would thus follow that with a weaker top of the free agent class, the rest of the players might accordingly lag in their contract terms. Irrespective of whether this latter point is true, it seemed to many that the mediocre free agent class contributed to a lackluster offseason.

The manner in which the MLB free agent market treated this weaker free agent class may have been compounded by a particularly strong upcoming class in 2019, including Bryce Harper, Manny Machado, Charlie Blackmon, Andrew McCutchen, and others.²¹ Moreover, the already strong 2019 free agent class could include two superstar pitchers—Clayton Kershaw and David Price—if either opts out of his current contract.²² Given these upcoming free agents, many commentators posited that teams in 2018 simply decided to conserve their finite payroll resources, looking ahead to the 2019 free agent class.²³ Moreover, several high-payroll teams had planned to reset their luxury tax percentage—lowering it from 50% to 20%²⁴—by bringing their overall payroll below the \$197 million threshold for the 2018 MLB

¹⁷ See Tom Verducci, *Seven Reasons Why the Free Agent Market is so Incredibly Slow*, SPORTS ILLUSTRATED, Jan. 11, 2018, <https://www.si.com/mlb/2018/01/11/free-agent-hot-stove-slow-pace>, [https://perma.cc/X8MW-BHN3] (on file with the Harvard Law School Library).

¹⁸ See Jay Jaffe, *The Free Agent Market is Slow Partially Because It's Extremely Flawed*, SPORTS ILLUSTRATED, Jan. 19, 2018, <https://www.si.com/mlb/2018/01/19/free-agent-market-jd-martinez-eric-hosmer-jake-arrieta-yu-darvish>, [https://perma.cc/8TBZ-9TWG] (on file with the Harvard Law School Library) (hereinafter “Jaffe, *Free Agent Market*”).

¹⁹ *Id.*

²⁰ See Jay Jaffe, *Recent Results Offer Evidence that Teams Should Avoid the Free-Agent Market*, SPORTS ILLUSTRATED, May 7, 2013, <https://www.si.com/mlb/strike-zone/2013/05/07/hamilton-upton-greinke-bourn-free-agent-busts>, [https://perma.cc/9XBF-R6CH] (on file with the Harvard Law School Library).

²¹ See Verducci, *supra* note 17.

²² See *id.*

²³ See *id.*

²⁴ See *id.*

season.²⁵ In doing so, teams like the Los Angeles Dodgers and New York Yankees could thereafter increase their payroll above the luxury tax threshold and only be penalized at the 20% level rather than the elevated 50% payable by teams that exceed the luxury tax for a number of consecutive years.²⁶ The absence of these higher-revenue teams in the free agent marketplace undoubtedly created less competition and thus may have impacted agents' abilities to negotiate more lucrative contracts for their free agent clients.²⁷ In any event, while the appeal of next year's free agent class may have contributed to the results of the 2018 free agent market, the 2019 free agent market may well demonstrate whether this past offseason was an anomaly or a new normal.

B. *The Rebuilding/Tanking Trend*

During the 2018 offseason, MLB Commissioner Rob Manfred stated that while owners want to win, “[i]n Baseball, it has always been true that Clubs go through cyclical, multi-year strategies directed at winning.”²⁸ While there is truth to this statement, the number of teams rebuilding this past offseason seemed to many to be higher than historically was the case.²⁹ Specifically, MLB appeared to have more teams that had determined that they could not compete for a championship that year, so they did not spend money on free agent contracts to be more competitive. Instead, these teams oftentimes cut their payroll—by trading away higher-priced contracts—and planned for their team to compete for a championship some number of years in the future.³⁰ In paring down their payroll, these teams often also made

²⁵ *See id.*

²⁶ *See id.* Teams consistently exceeding the luxury tax also face other penalties, including a less desirable draft position in the annual amateur player draft; *see id.* Therefore, teams had other reasons for resetting their luxury tax penalties.

²⁷ *See id.*

²⁸ Dave Sheinin, *MLB's Dead Winter Has Union and Teams at Each Other's Throats as Free Agents Sit Unsigned*, WASHINGTON POST, February 6, 2018, available at https://www.washingtonpost.com/news/sports/wp/2018/02/06/mlbs-dead-winter-has-union-and-teams-at-each-others-throats-as-free-agents-sit-unsigned/?utm_term=.ed5d1deb3f5e, [<https://perma.cc/2YFM-ATWT>] (hereinafter, “MLB’s Dead Winter”).

²⁹ *See* Sam Miller, *In 2018, What is a Win? A Shift in Philosophy Has Changed MLB Forever*, ESPN, Mar. 23, 2018, available at http://www.espn.com/mlb/story/_/id/22815820/houston-astros-chicago-cubs-set-path-winning-losing, [<https://perma.cc/U22P-JPFJ>] (hereinafter “What is a Win?”).

³⁰ *See* Rachel Schaefer, *What Exactly is “Tanking?”*, DAILYCAMPUS.COM, Feb. 7, 2018, <http://dailycampus.com/stories/2018/2/7/mlb-column-what-exactly-is-tanking>, [<https://perma.cc/SZ63-GA4J>] (on file with the Harvard Law School Library).

themselves less competitive. This phenomenon in sports is known as “tanking.”³¹ While this approach oftentimes resulted in teams losing more games, they did benefit in at least two ways. First, by spending less, teams became more profitable, particularly with the robust revenue sharing that MLB has in place.³² Second, by having losing records, these teams received higher—and thus more desirable—draft picks in the annual MLB draft.³³ These draft picks turned into elite players—controllable at reasonable costs under MLB’s system of arbitration³⁴—and the teams then augmented their rosters with higher-priced free agent contracts in order to compete for a championship.

At first blush, this approach seems fraught with peril and risk. But it has worked—and not infrequently in recent years. For example, the last three World Series Champions—the Kansas City Royals (2015), Chicago Cubs (2016), and Houston Astros (2017)³⁵—all rebuilt their teams this way. In this regard, teams’ free agent spending may well be correlated with the likelihood of their competing for a championship. If a team cannot reasonably vie for the title, there are strong incentives, both financial and otherwise, to “tank”—that is, to cut costs and field a less competitive team in order to rebuild their teams and minor league farm systems with high draft picks. This trend seems to run contrary to our popular notion of sports: that teams want and try to win every game, every year. The former may be true—players compete each game wanting to win—but the latter may not. While they do not intentionally try to lose games, teams may design their rosters knowing that they will not compete for the playoffs—much less a World Series Championship—but do so with an eye to the future. In doing so, “teams [may] surrender seasons but not games.”³⁶

One might think that fans would revolt at this notion, but quite the opposite has occurred. Fan bases have seemingly embraced the notion that a

³¹ See Dave Sheinin, *No Longer Sports’ Dirty Little Secret, Tanking is on Full Display and Impossible to Contain*, WASHINGTON POST, Mar. 2, 2018, available at https://www.washingtonpost.com/sports/no-longer-sports-dirty-little-secret-tanking-is-on-full-display-and-impossible-to-contain/2018/03/02/9b436f0a-1d96-11e8-b2d9-08e748f892c0_story.html?noredirect=on&utm_term=.85e9d996a553, [https://perma.cc/9JJ2-JKFM].

³² See text accompanying *infra* notes 127-138.

³³ See Sheinin, *MLB’s Dead Winter*, *supra* note 28.

³⁴ See text accompanying *infra* notes 161-169.

³⁵ See Sheinin, *MLB’s Dead Winter*, *supra* note 28; see also Miller, *What is a Win?*, *supra* note 29 (noting *Sports Illustrated* had the Astros on the cover of their magazine in 2014—with the title “Your 2017 World Champs”—forecasting how their rebuilding plans might well pay off several years down the road, as they did).

³⁶ See Miller, *What is a Win?*, *supra* note 29.

losing season—or even two or three—is worth enduring if a potential championship lies ahead.³⁷ In fact, even studies predating the tanking/rebuilding phenomenon suggest that fans are less concerned about individual year competitiveness and look more to a three- to five-year horizon.³⁸ Fans thus view losing not as a reason for despair but as a vehicle for a more promising future for their team.³⁹ The rise of the rebuilding phenomenon has also coincided with greater parity in MLB, providing fans with even more reason to have faith in a process of losing for several years to then compete for a championship thereafter.⁴⁰ Juxtaposed with the historical trend of teams spending money to remain competitive in games but mediocre in standings—and almost certainly unlikely to make the World Series—this new rebuilding model provided hope for the future in ways that had not been the case for many teams.⁴¹

However, while fans may rejoice in the possibilities for their “tanking” team, the casualties of this new system may be free agents. If a significant number of teams are in a rebuilding mode—some estimate up to ten teams (one-third of MLB teams) in 2018⁴²—they are unlikely to spend much money during free agency as they seek to cut or contain their costs. With a significant number of teams essentially choosing to forgo signing free agents—or at least pricey ones—there is less competition for these players’ services, which may help explain some of the stagnation experienced during the 2018 offseason.

C. *Data Analytics*

Teams using data analytics also impacted the 2018 free agent market. The rise of analytics in professional sports was made famous—if not led by—the “Moneyball” approach taken by Oakland A’s general manager, Billy Beane, and his team in the early 2000s.⁴³ Today, every team has em-

³⁷ See Verducci, *supra* note 17.

³⁸ See Aaron Gordon, *The Myth of Competitive Balance*, SPORTSONEARTH.COM, Aug. 8, 2013, <http://www.sportsonearth.com/article/56193798>, [https://perma.cc/RRU8-2QVA] (on file with the Harvard Law School Library) (on file with the Harvard Law School Library).

³⁹ See Miller, *What is a Win?*, *supra* note 29.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Billy Witz, *A Reluctant Team of Free Agents Scrimmages at “Camp Jobless”*, N.Y. TIMES, Feb. 27, 2018, *available at* <https://www.nytimes.com/2018/02/27/sports/baseball/free-agent-scrimmage-camp-jobless.html>, [https://perma.cc/W57C-RRA9].

⁴³ See Jaffe, *Free Agent Market*, *supra* note 18.

braced data to inform their decision-making, so much so that it has become a norm in baseball rather than a strategy employed by some teams to gain an advantage.⁴⁴ Teams use internal metrics to project a players' offensive and defensive statistics over the course of a potential free agent contract to help them better ascertain the players' value.⁴⁵ This shift towards data analytics runs contrary to the norms that historically ruled free agency. Teams would give expensive, long-term free agent contracts to stars based on past performance, knowing that they would likely only perform to the value of the contract in the first few years.⁴⁶ Teams were thus willing to get less productivity—indeed, below contract value, statistically—for the latter years of the star player's contract because of the near-certainty of a strong performance early in the contract.⁴⁷

However, as teams have become better at quantifying player performance and understanding the effects of players aging, they have become more reticent to offer contracts for the length of time and amount of money to which free agents had become accustomed.⁴⁸ Indeed, teams' internal projections would lead their front offices to determine that the extra few wins that a star player would bring did not justify the cost—and thus lost profit—for the team.⁴⁹ Therefore, teams had likely inflated the market with the multi-year, \$100 million plus contracts for free agent players in the past.⁵⁰ Armed with this knowledge, teams shifted from paying significant yearly salaries to free agents over long-term contracts to paying younger players less money for similar—though not equal—results.⁵¹ This more cost-efficient approach also dovetailed with the payroll flexibility that teams have embraced when needing to rebuild their rosters.⁵²

⁴⁴ See Miller, *What is a Win?*, *supra* note 29.

⁴⁵ See Jaffe, *Free Agent Market*, *supra* note 18.

⁴⁶ See Emma Baccellieri, *The MLBPA is Failing Its Players*, DEADSPIN.COM, Jan. 22, 2018, <https://deadspin.com/the-mlbpa-is-failing-its-players-1822305159>, [https://perma.cc/T9ST-NW4E] (on file with the Harvard Law School Library).

⁴⁷ See *id.*

⁴⁸ See Travis Sawchik, *This is the Slowest Offseason Ever*, FANGRAPHS.COM, Feb. 6, 2018, <https://www.fangraphs.com/blogs/this-is-the-slowest-offseason-ever/>, [https://perma.cc/3XWC-AWRU] (on file with the Harvard Law School Library).

⁴⁹ See Davis, *supra* note 9.

⁵⁰ See Wayne G. McDonnell, Jr., *MLB Free Agency is Suffering from Owners' Flawed Strategies and an Imperfect Agreement*, FORBES, Feb. 13, 2018, <https://www.forbes.com/sites/waynemcdonnell/2018/02/13/mlb-free-agency-is-suffering-from-owners-flawed-strategies-and-an-imperfect-agreement/#48bed34a792f>, [https://perma.cc/P63P-K8KR] (on file with the Harvard Law School Library).

⁵¹ See Jaffe, *Free Agent Market*, *supra* note 18.

⁵² See Verducci, *supra* note 18.

There appears to be compelling evidence to support this structural shift. While elite players continue to be paid well—even if less than what had been the case in previous offseasons—most free agents do not match or exceed their production in the year before their free agency.⁵³ Teams have also learned about the negative effects of aging on players' statistics and evaluate their projected productivity accordingly.⁵⁴ Moreover, study after study has shown that the vast majority of free agents do not yield the productivity needed to justify the contract's length and amount.⁵⁵ Finally, spending more on payroll did not necessarily correlate to greater success. For example, in 2013, five MLB teams from the top fifteen payrolls made the playoffs, as did five teams from the bottom fifteen payrolls.⁵⁶ For these and other reasons, the 2018 free agency period seems to have brought about a shift in how teams value long-term contracts and teams' willingness to overpay for the latter years of such contracts.

Some commentators question whether data analytics could have led all teams to the same conclusions during the very same offseason.⁵⁷ Indeed, one agent noted that teams uniformly offered free agents contracts of \$20 million or more per year or long-term contracts exceeding three years—but not both⁵⁸—leading the MLBPA to accuse the owners of collusion.⁵⁹ On the other hand, perhaps this trend culminated this past offseason when analytics informed the teams that the weak free agent class—whose stars had shown signs of performance regression and dealt with various injuries—might not

⁵³ See Jaffe, *Free Agent Market*, *supra* note 18.

⁵⁴ See generally Sam Miller, *What Happens as Baseball Players Age?*, ESPN, July 9, 2018, available at http://www.espn.com/mlb/story/_id/23916211/major-league-baseball-aging-cycle-how-mike-trout-becomes-albert-pujols, [https://perma.cc/YCR3-HG6K]; see also Neil Weinberg, *The Beginner's Guide to Aging Curves*, FANGRAPHS.COM, Dec. 10, 2015, <https://www.fangraphs.com/library/the-beginners-guide-to-aging-curves/>, [https://perma.cc/9ZK2-YZDU] (on file with the Harvard Law School Library).

⁵⁵ See Jay Jaffe, *Recent Results Offer Evidence that Teams Should Avoid the Free-Agent Market*, SPORTS ILLUSTRATED, (May 7, 2013), <https://www.si.com/mlb/strike-zone/2013/05/07/hamilton-upton-greinke-bourn-free-agent-busts>, [https://perma.cc/9XBF-R6CH] (on file with the Harvard Law School Library).

⁵⁶ See Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS & ENT. L. 265, 310 (2014).

⁵⁷ See Baccellieri, *supra* note 46.

⁵⁸ See Passan, *supra* note 10.

⁵⁹ See Michael Hiltzik, *Are Major League Baseball's Owners Engaging in Collusion Again? Some Players and Agents Think So*, L.A. TIMES, Feb. 7, 2018, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-mlb-collusion-20180207-story.html#>, [https://perma.cc/K8E6-58BQ].

be worth lucrative, long-term contracts.⁶⁰ In all events, it is clear that the rise of data analytics has impacted the way teams evaluate free agent contracts.

D. Agents (Not) Adjusting to a Changed Marketplace and Other Explanations

One popular explanation for the relatively meager activity in the 2018 free agent market was that player agents—in particular, the most famous and successful agent, Scott Boras—did not adjust to the changing market for free agents driven, at least in part, by the rise of data analytics.⁶¹ In fact, during the height of the public rhetoric regarding the 2018 free agency period, MLB Commissioner Rob Manfred seemingly took aim at Boras in response to the MLBPA questioning teams' commitment to winning.⁶² Specifically, he pointed to multiple unsigned free agents that had significant offers pending, including some worth more than \$100 million over the term of the contract being offered.⁶³ Commissioner Manfred thus blamed agents for failing to understand, and respond to, the changing free agent market informed by data analytics.⁶⁴

Many believed that Commissioner Manfred was targeting Boras with his comments because Boras controlled most of the top free agents, both in general and in 2018.⁶⁵ Boras is famous for negotiating directly with team owners—circumventing general managers and other front office personnel—and achieving significant long-term contracts with substantial average annual salaries for his players.⁶⁶ Understandably, Boras's approach frustrated many general managers, particularly because they viewed the contracts that he secured as economically unjustifiable.⁶⁷ However, as teams embraced data analytics, more decision-making power became vested in front office personnel steeped in using statistics and projections to make more economically-efficient roster, payroll, and contracts decisions.⁶⁸ By implication, Commissioner Manfred and others posited that Boras had not adjusted his

⁶⁰ See Jaffe, *Free Agent Market*, *supra* note 18.

⁶¹ See Verducci, *supra* note 17.

⁶² See Tyler Kepner, *Rob Manfred Defends Changing Paces, of Free Agency and of the Game*, N.Y. TIMES, February 15, 2018, available at <https://www.nytimes.com/2018/02/15/sports/baseball/rob-manfred-free-agency.html>, [https://perma.cc/7YHE-PLH6].

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Verducci, *supra* note 17.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

style to these new realities and was doing his players a disservice in the process. Boras saw it differently, commenting that he achieved success with the contracts his clients ultimately secured in free agency.⁶⁹

There were also a variety of other theories—many related to data analytics—regarding the changed free agency market. For example, some hypothesized that because of the introduction of “livelier” baseballs in 2015, home runs increased by 46% from 2014 to 2017 and thus devalued the power-hitting sluggers in free agency.⁷⁰ Another data-driven trend that may have impacted the free agent market was teams shifting more to bullpen pitchers. Instead of relying on starting pitchers to go seven, eight, or nine innings as had traditionally been desired, teams instead sought to bolster their bullpens and required less from their starting pitchers.⁷¹ For example, the Los Angeles Dodgers famously made popular the trend of removing their starting pitchers after they went through the opposing team’s line-up twice because statistics showed that opposing line-ups had a dramatic spike in offensive productivity the third time seeing the same starting pitcher.⁷² Since teams rely on starting pitchers for fewer innings per game—and thus per year—it logically follows that they would also value their contributions less and not pay them as much. Indeed, relief pitchers are relatively inexpensive, so front offices were using data analytics to meet their pitching needs more cost efficiently.⁷³ Finally, many teams strategically chose to sign some of their top players during their arbitration years to long-term contracts, thus delaying their entry into the free agent market and causing fewer top free agents to be in the market each year.⁷⁴

All of these theories help explain what MLB experienced in the 2018 offseason. However, even collectively, they do not tell the whole story. To better comprehend and contextualize the changes in free agency, one must understand the role that the MLB CBA played in bringing about some of these changes. Indeed, in an attempt to create even greater competitive balance through various rules, policies, and limitations in the MLB CBA,

⁶⁹ See Bill Shaikin, *Offseason of Free-Agency Discontent Foreshadows a Possible Stormy 2021 Labor Deal*, L.A. TIMES, May 12, 2018, available at <http://www.latimes.com/sports/mlb/la-sp-mlb-shaikin-20180512-story.html>, [https://perma.cc/K8E6-58BQ].

⁷⁰ See Verducci, *supra* note 17.

⁷¹ See *id.*

⁷² See Mike Petriello, *Dodgers, Astros Redefining Starter Use—and Winning*, MLB.COM, Aug. 2, 2017), <https://www.mlb.com/news/dodgers-astros-not-pushing-starters-deep/c-245548128>, [https://perma.cc/A438-VEKA] (on file with the Harvard Law School Library).

⁷³ See Verducci, *supra* note 17.

⁷⁴ See Jaffe, *Free Agent Market*, *supra* note 18.

the owners and the MLBPA may have created various incentives for teams to make some changes in their approach to free agency that has hurt players.

III. THE CBA AND ITS UNIQUE LEGAL STATUS

Before delving into the terms of the MLB CBA, it is important to understand the special legal status afforded to CBAs negotiated in professional sports leagues. Referred to as “the supreme governing authority” regarding labor matters between professional sports teams and their players,⁷⁵ the CBA details many of the business, operational, and employment-related aspects governing the functioning of a professional sports league. A CBA is a negotiated agreement between management (all of the teams acting through the joint venture of the league⁷⁶) and its workers (the players represented by their union).⁷⁷ Consistent with the National Labor Relations Act, the leagues and their respective players’ unions negotiate a variety of matters governing the operation of their particular sport.⁷⁸ These matters include the terms and conditions of employment for players, including wages, hours, and other conditions of employment.⁷⁹ Because of their implications for player salaries, business terms among the teams—such as revenue sharing—can also be negotiated as part of the collective bargaining process and codified in a league’s CBA.⁸⁰ In short, many of the key terms governing player compensation, including team revenues, player contracts, and other related issues, are negotiated by the leagues and their players’ unions into the CBA.

⁷⁵ See Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L. REV. 167, 173 (1995).

⁷⁶ See Nadelle Grossman, *What is the NBA?*, 25 MARQ. SPORTS L. REV. 101, 103-04 (2014).

⁷⁷ See Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 183 (2017).

⁷⁸ See 29 U.S.C. § 151-69 (2012); see also *Am. League of Profl Baseball Clubs v. Ass’n of Nat’l Baseball League Umpires*, 180 NLRB 190 (1969) (establishing the National Labor Relations Board’s jurisdiction over professional sports leagues).

⁷⁹ See Cody McElroy, *Take a Knee: Speech Considerations in the NFL*, THE CIVILIAN, Oct. 5, 2016, available at <https://sites.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl/>, [https://perma.cc/F2J9-P6BC] (on file with the Harvard Law School Library).

⁸⁰ See Marc J. Coghlan, Note, *Why the NHL’s Current Expansion Criteria Will Continue to Deny Canadian Cities NHL Franchises*, 16 VA. SPORTS & ENT. L.J. 267, 284-85 (2017).

The collective bargaining process requires that the leagues and the players' unions negotiate in good faith and through arms-length negotiations.⁸¹ This legal requirement underscores the importance given to this process to ensure that the agreed-upon terms are acceptable to both sides and that the labor process was not manipulated nor disregarded.⁸² Labor law prescribes such a process because of the deference that courts give the terms of a CBA.⁸³ Indeed, the CBA's terms and conditions become somewhat sacrosanct under the law when the league and players' union negotiate, agree to, and execute a new CBA. The most significant legal protection afforded CBAs—at least for professional sports leagues like MLB—is the exemption from antitrust laws.⁸⁴ Many of the terms in a professional sports league's CBA, such as an amateur player draft, fixed salaries for drafted players, maximum salary amounts, and caps on the length of player contracts, would almost certainly violate antitrust laws as being unreasonable restraints on trade.⁸⁵ However, these CBA terms are insulated from antitrust laws because they are the product of collective bargaining between the league and its players. In this regard, both the players and the teams must abide by the terms of their CBA for the length of the negotiated contract because of the special status the law gives to these documents. These circumstances heighten the need for both sides to understand—and be relatively confident in their projections about—how the terms will play out over the length of the CBA. Otherwise, certain unintended consequences may disrupt one side's expectations, as the competitive balance reforms in the MLB CBA seemed to have done with their negative impact on players during the 2018 free agency period.

⁸¹ See *Brown v. Prof'l Football, Inc.*, 518 U.S. 231, 235–36 (1995).

⁸² See *id.*

⁸³ See Josh Mandel, Note, *Deflategate Pumped Up: Analyzing the Second Circuit's Decision and the NFL Commissioner's Authority*, 72 U. MIAMI L. REV. 827, 866 (2018).

⁸⁴ See Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

⁸⁵ See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705–06 (1977). The CBA's terms also tend to be transparent too all relevant stakeholders because of their immunity to antitrust laws; see also Evan S. Totty & Mark F. Owens, *Salary Caps and Competitive Balance in Professional Sports Leagues*, 11 J. FOR ECON. EDUC. 46, 47 (2011).

IV. COMPETITIVE BALANCE, MLB REFORMS, AND THE IMPACT ON FREE AGENTS

Over the course of the past two decades, MLB—similar to other professional sports leagues—has made a concerted effort to create greater competitive balance among its teams.⁸⁶ Specifically, MLB has adopted a number of reforms—codified in the MLB CBA—to help facilitate this goal of parity within the league. To better analyze these competitive balance reforms, one must first explore the meaning of competitive balance and its special place in professional sports. This context helps explain why MLB and other leagues have adopted similar reforms aimed at this goal. Moreover, it provides an opportunity to assess the efficacy of these reforms and, in all events, how the particular policies adopted by MLB negatively impacted free agents in the 2018 offseason.

A. *Defining Competitive Balance and Its Unique Role in Professional Sports*

Professional sports league commissioners view competitive balance among their teams as a “core responsibility” of their job.⁸⁷ But while there appears to be agreement in the conceptual goal of parity within a league, a universal definition of “competitive balance” remains elusive. One view is that competitive balance means that there is not much of a gap between a league’s strongest and weakest teams.⁸⁸ A league with competitive balance would be one where the teams were relatively equal in ability, creating unpredictability regarding the outcome of any given game.⁸⁹ A league lacking parity would be one where a small number of teams dominated the league each year and most teams were uncompetitive—leading to more predictable outcomes of seasons, if not individual games.⁹⁰ Others have identified different criteria to judge whether a league has achieved parity: These factors

⁸⁶ See Martin B. Schmidt & David J. Berri, *Competitive Balance and Market Size in Major League Baseball: A Response to Baseball’s Blue Ribbon Panel*, 21 REV. INDUS. ORG. 41, 52 (2002).

⁸⁷ John Urschel, *The Parity Ideal*, THE PLAYERS’ TRIBUNE, Jan. 4, 2016, <https://www.theplayertribune.com/en-us/articles/john-urschel-ravens-parity-ideal>, [<https://perma.cc/N9S9-RDYJ>] (on file with the Harvard Law School Library).

⁸⁸ See Matt D. Pautler, *The Relationship Between Competitive Balance and Revenue in America’s Two Largest Sports Leagues*, CMC SENIOR THESES, PAPER 86 (2010), (unpublished dissertation, Claremont McKenna College) http://scholarship.claremont.edu/cmcc_theses/86/, [<https://perma.cc/H75E-4ZUB>] (on file with the Harvard Law School Library).

⁸⁹ See *id.*

⁹⁰ See *id.*

include the number of different teams that won a championship within a certain time period; the number of teams to reach the playoffs; the number of teams that failed to make the post-season for an extended period of time; whether there were teams that had long droughts of seasons with losing records; and how compressed the league's teams are around the .500 mark.⁹¹ Indeed, MLB's Blue Ribbon Panel that studied competitive balance in the early 2000s seemed to embrace this analysis by defining competitive balance as when teams that are effectively operated have a "regularly recurring hope of reaching postseason play."⁹²

Others focus more heavily on the uncertainty of the outcome of games and seasons. This concept relates to how easy it is to predict the winner of a game, the teams that will make the playoffs, and the team that will ultimately win the league championship.⁹³ If most teams are more evenly matched, it will be more difficult to predict which teams will win a game, make the playoffs, or win the championship.⁹⁴ Moreover, league parity does not require every team to be competitive each year. Rather, optimal competitive balance within a league provides an environment where a team may not be competitive every year, but there is a strong likelihood that it will be competitive in the near future.⁹⁵ As courts have noted, "[c]ompetitive balance means in essence that all of the league's teams are of sufficiently compatible playing strength that . . . fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching games, thus supporting the teams' television and gate revenues."⁹⁶ This uncertainty of outcome within a competitively balanced league should, in theory, increase fan interest.⁹⁷

⁹¹ See *Competitive Balance in Pro Sports Leagues: How Does the NBA Look?*, 82GAMES.COM, Jul. 11, 2018, <http://www.82games.com/balance.htm>, [https://perma.cc/B4AW-NLAN] (on file with the Harvard Law School Library).

⁹² Olugbenga Ajilore & Joshua Hendrickson, Unpublished Paper, *The Impact of the Luxury Tax on Competitive Balance in Major League Baseball*, 3 (2011) (unpublished paper), <https://works.bepress.com/gajilore/11/>, [https://perma.cc/F2EQ-3CWS] (on file with the Harvard Law School Library).

⁹³ See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 Marq. Sports L. Rev. 517, 521 (2011).

⁹⁴ See *id.* at 522.

⁹⁵ See *id.* at 526.

⁹⁶ *Smith v. Pro-Football*, 420 F. SUPP. 738, 745 (D.C. Cir. 1976).

⁹⁷ See Michael Lopez, *Exploring Consistency in Professional Sports: How the NFL's Parity is Somewhat of a Hoax*, SLOANSPORTSCONFERENCE.COM, Jul. 11, 2018, http://www.sloansportsconference.com/mit_news/exploring-consistency-in-professional-sports-how-the-nfls-parity-is-somewhat-of-a-hoax/, [https://perma.cc/KSU7-KHL7] (on file with the Harvard Law School Library).

Indeed, the “uncertainty of outcome hypothesis” posits that greater parity among a league’s teams—and thus greater uncertainty among the outcomes of games and seasons—will lead to a corresponding increase in attendance, viewership, and overall interest.⁹⁸

This interconnectedness between the parity among teams and the overall economic health of the league has fueled various competitive balance reforms in professional sports leagues over the past two decades. However, the roots of the competitive balance debate date back further than that. As professional sports leagues grew and matured over the course of the twentieth century, they began to realize how important parity was for their long-term strength. MLB experienced this in the 1920s when it had significant attendance problems because of the New York Yankees’ dominance—who made the World Series six times within the decade, winning three of them.⁹⁹ The lack of balance among teams during that era lessened fan appeal because lack of parity led to predictable outcomes (namely, the Yankees winning).¹⁰⁰ MLB realized that it had to address such imbalance. In particular, it identified the need to create parity between larger-market and smaller-market teams.

In a true free market in professional sports, those teams with the most financial resources—usually those in the largest metropolitan areas—would be able to sign the best players and dominate their respective leagues.¹⁰¹ To temper this phenomenon, professional sports leagues over time adopted various policies and rules—like amateur drafts, restrictions to free agency, revenue sharing, and the like—to help level the playing field among their teams spread throughout different sized-markets and regions of the country. In-

⁹⁸ See P. Dorian Owen & Nicholas King, *Competitive Balance Measures in Sports Leagues: The Effects of Variation in Season Length*, 53 *ECON. INQUIRY* 731, 731 (2015); but see Kurt Badenhausen, *Does Competitive Balance Drive Interest in Sports?*, *FORBES*, Aug. 25, 2015, <https://www.forbes.com/sites/kurtbadenhausen/2015/08/25/does-competitive-balance-drive-interest-in-sports/#4975dc134f25>, [https://perma.cc/3GK7-5MX2] (on file with the Harvard Law School Library) (noting that some scholars have found that star players and new stadiums—as opposed to the uncertainty of outcome—drive fan attendance).

⁹⁹ See Daniel A. Rascher, *Competitive Balance: On the Field and in the Courts*, *THESPORTSADVISORYGROUP.COM*, <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/competitive-balance-on-the-field-and-in-the-courts/>, [https://perma.cc/KE7V-QXJV] (on file with the Harvard Law School Library).

¹⁰⁰ See *id.*

¹⁰¹ See *id.* Some have argued that the teams playing in the western United States also have an advantage because of warmer weather, but studies have shown this factor to only have a marginal effect; see also J.P.F., *Continental Divide*, *ECONOMIST.COM*, Dec. 16, 2013, available at <https://www.economist.com/game-theory/2013/12/16/continental-divide>, [https://perma.cc/AC5D-4D9D].

deed, with regard to MLB, there was good reason to do so. Economists and other social scientists studied issues related to parity, and some of the results were concerning. For example, since 1985, the amount of a team's payroll and its winning percentage were positively correlated.¹⁰² If there is a perception that larger-market, better-resourced teams have a competitive advantage over other teams in the league, it undermines the unpredictability of outcome that attracts fans to sports and thus poses a threat to a league's growth and sustainability.¹⁰³ Again, that is not to say that fans demand that every team be competitive every year. Indeed, as discussed above, one study suggested that fans look at their own team's competitiveness on a three- to five-year horizon.¹⁰⁴ So as long as fans think that their team will be in playoff contention (or better) within that timeframe, they are comfortable supporting their team and waiting for it to get better.¹⁰⁵

For these reasons, it has become well-accepted that a competitive balance is critical for the development, growth, and longevity of a professional sports league.¹⁰⁶ This is a special problem that is unique to sports leagues in attempting to create competitive balance among its teams to attract and retain fans.¹⁰⁷ Traditionally, economists have espoused the virtues of competition between individual businesses—which seek less or no competition—but professional sports may be the exception.¹⁰⁸ While competitor businesses seek to eliminate their competition for their own economic advantage, professional sports is such that competition is essential to the business.¹⁰⁹ Competition—that is, two teams playing against each other—is necessary for the functioning of a professional sports league.¹¹⁰ This need for competition similarly drives a need for cooperation and collaboration

¹⁰² See Evan Zepfel, *Have MLB's Efforts to Preserve Competitive Balance Done Enough?*, HARV. SPORTS ANALYSIS COLLECTIVE, Feb. 13, 2015, <http://harvardsportsanalysis.org/2015/02/have-mlbs-efforts-to-preserve-competitive-balance-done-enough/>, [https://perma.cc/ZXF2-58KR] (on file with the Harvard Law School Library).

¹⁰³ See Owen & King, *supra* note 100, at 731.

¹⁰⁴ See Gordon, *supra* note 38.

¹⁰⁵ See *id.*

¹⁰⁶ See Yong-zhen Cao, *Competitive Balance of Professional Sports Leagues—A Case Study on NBA* 1, 1 (2010), <https://ieeexplore.ieee.org/document/5660323/> (on file with the Harvard Law School Library), [https://perma.cc/3GN8-4427].

¹⁰⁷ See Rodney Fort & James Quirk, *Cross-Subsidization, Incentives, and Outcomes in Professional Sports Leagues*, 33 J. ECON. LIT. 1265, 1265 (1995).

¹⁰⁸ See Schmidt & Berri, *supra* note 86, at 41.

¹⁰⁹ See Rascher, *supra* note 99.

¹¹⁰ See *id.* Moreover, a large-market, high revenue team like the Los Angeles Dodgers benefits when a smaller-market team, like the Oakland Athletics, is competitive.

among the teams. In this regard, professional sports leagues are joint ventures where individual, team owners cooperate to co-produce their product of a competitive game.¹¹¹ So while teams compete with each other on the field or court, they work together to create the rules, structure, and other elements of their league to create a desired level of competitive balance that appeals to their fans and consumers.¹¹² In doing so, leagues optimize not just fan attendance, but also revenue from sponsorships, merchandise, television and radio broadcasting rights, trademark licensing, and other sources.¹¹³

Given this unique structure of professional sports leagues, many have argued that these entities need to be treated differently by antitrust laws.¹¹⁴ Teams, they contend, need to be able to cooperate to create the product of a professional sports game and ensure competitive balance with various rules, policies, and other measures to maintain the economic health and strength of the league.¹¹⁵ Courts have agreed and treated professional sports leagues differently under antitrust laws. Courts have allowed restrictive labor practices, which would otherwise violate antitrust laws—such as amateur drafts, salary caps, contract length limits, revenue sharing, and the like—in furtherance of this goal of competitive balance.¹¹⁶ In fact, the United States Supreme Court noted in *American Needle* that competitive balance is “unquestionably an interest that may well justify a variety of collective decisions made by the teams.”¹¹⁷ In this regard, courts have carved out preferential antitrust treatment of teams working collectively to achieve the competitive balance needed to sustain the league.

B. MLB's Competitive Balance Reforms

Professional sports leagues have thus used their CBAs to address a number of issues regarding the business and operation of their particular sport, including competitive balance. MLB did just that when it experienced its crisis with parity within the league in 2000.¹¹⁸ The New York Yankees had won four out of the five World Series spanning from 1996-

¹¹¹ See Cao, *supra* note 106, at 1.

¹¹² See McKeown, *supra* note 93, at 523.

¹¹³ See *id.*, at 524.

¹¹⁴ See Salil K. Mehra & T. Joel Zuercher, *Striking Out “Competitive Balance” in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1500 (2016).

¹¹⁵ See generally *id.*

¹¹⁶ See generally *id.*

¹¹⁷ *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010).

¹¹⁸ See Schifman, *supra* note 4.

2000.¹¹⁹ Studies showed that the financial disparity between larger and smaller market teams was leading to a stark lack of parity where a significant number of teams were perpetually uncompetitive.¹²⁰ In response, then-MLB Commissioner Bud Selig formed a committee—MLB’s Blue Ribbon Panel led by Senator George Mitchell—to study the causes of revenue disparity, analyze their impact on the goal of competitive balance, and make recommendations for possible reforms that could be adopted to address these issues.¹²¹ Commissioner Selig believed that by creating greater parity in the league, MLB would experience higher attendance, more popularity, and greater revenues.¹²² The Blue Ribbon Panel concluded that the competitive imbalance in MLB was hurting the game and business of professional baseball.¹²³ The committee also made a number of recommendations, including more robust revenue sharing, a luxury tax, and changes to MLB’s drafting of players, aimed at creating greater parity within the league.¹²⁴ These recommendations were consistent with competitive balance reforms pursued by other professional sports leagues as well.

1. Revenue Sharing

To improve parity in their leagues, the National Basketball Association (“NBA”), National Football League (“NFL”), National Hockey League (“NHL”), and MLB have all implemented revenue sharing among their teams.¹²⁵ Revenue sharing is defined as an “allocation of certain revenue among all teams so as to shorten the gap between affluent and less affluent teams and fortify the stability of [the] league.”¹²⁶ Leagues pool and then

¹¹⁹ See Ajilore & Hendrickson, *supra* note 94, at 1.

¹²⁰ See Pautler, *supra* note 88, at 8; see also Gordon, *supra* note 38 (noting MLB’s Blue Ribbon Panel’s findings that from 1995-99 no teams from the lower two quartiles of payroll won a divisional or league championship series game and that no team from the lower three quartiles of payroll won a World Series game).

¹²¹ See Pautler, *supra* note 88, at 15.

¹²² See Schiffman, *supra* note 4.

¹²³ See Richard C. Levin, George J. Mitchell, Paul A. Volcker, & George F. Will, The Report of the Independent Members of the Commissioner’s Blue Ribbon Panel on Baseball Economics 1, 1-5 (2000), available at http://www.mlb.com/mlb/downloads/blue_ribbon.pdf, [<https://perma.cc/MJ6Z-NE9Z>].

¹²⁴ See *id.* at 8-10.

¹²⁵ See Lopez, *supra* note 97. However, while each league engages in this redistributive practice, the extent of the revenue sharing and the policies designed to effect it vary from league to league; see also Urschel, *supra* note 87. In some leagues, teams that perform particularly well in terms of revenue pay a higher percentage of their local money to the league for revenue sharing; see also Zepfel, *supra* note 102.

¹²⁶ See Cao, *supra* note 106.

redistribute some or all money from a variety of revenue categories such as national broadcasting contracts, intellectual property rights, box-office revenue, and the like.¹²⁷ Generally, teams share equally national broadcasting revenues, pooled intellectual property rights, and league-wide sponsorship agreements, while retaining most of their locally-generated revenue (ticket sales, local television and radio revenue, and sponsorships).¹²⁸

In MLB, the league distributes hundreds of millions of dollars among its teams each year.¹²⁹ The two main sources of revenue sharing derive from the central fund and locally-generated money.¹³⁰ Central fund revenues include national broadcasting deals and the pooled intellectual property rights licensed centrally through the league.¹³¹ Local revenue includes ticket sales, regional television and radio deals, and other revenues generated by a team related to baseball.¹³² MLB teams share evenly in the revenue from the central fund, so while markets like Los Angeles and New York bring greater value to national television deals and their intellectual property rights are exponentially more valuable than some smaller-market teams, all teams receive the same amount from this source.¹³³ All teams also contribute 34% of their locally-generated money to the league for revenue sharing.¹³⁴ Therefore, while the Los Angeles Dodgers' local television deal—\$140 million per

¹²⁷ See Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, ENT. & SPORTS LAW 12, 12-16 (2017). See also Cao, *supra* note 106.

¹²⁸ See Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTINGNEWS.COM, Sept. 5, 2014, <http://www.sportingnews.com/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu875oeaq6>, [<https://perma.cc/QN8J-5SF7>] (on file with the Harvard Law School Library).

¹²⁹ See Andy Dolich, *MLB Revenue Sharing a Problem for A's, Raiders*, NBCSPORTS.COM, Feb. 29, 2016, <https://www.nbcsports.com/bayarea/athletics/mlb-revenue-sharing-problem-raiders>, [<https://perma.cc/Y86Z-FD8U>] (on file with the Harvard Law School Library) (noting that each MLB team got \$30 million in 2009).

¹³⁰ See Maury Brown, *Revenue Sharing is Making an Impact*, BASEBALLAMERICA.COM, Mar. 2, 2010, <https://www.baseballamerica.com/stories/revenue-sharing-is-making-an-impact/>, [<https://perma.cc/W35P-4ERB>] (on file with the Harvard Law School Library).

¹³¹ See *id.*

¹³² See *id.*

¹³³ See Evans, *supra* note 127, at 15.

¹³⁴ See Bloom, *supra* note 128; see also Maury Brown, *Breaking Down MLB's New 2017-21 Collective Bargaining Agreement*, FORBES, Nov. 30, 2016, <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#5ce4724311b9>, [<https://perma.cc/S5SR-8A34>] (on file with the Harvard Law School Library) (noting that the percentage of industry revenue allocated to revenue sharing remained the same as the previous collective bargaining agreement, which was also 34%).

year—generates far more money than the San Diego Padres’ local television deal—\$50 million per year—the Dodgers pay a greater amount into the local revenue fund than the Padres.¹³⁵ Moreover, as described further below in section IV.C.2, luxury taxes paid by teams with high payrolls also are redistributed through a revenue-sharing plan to help keep lower-payroll teams competitive.¹³⁶ In redistributing such monies, MLB aims to create greater financial balance among teams and thus greater parity within the league.

2. Salary Caps

Some professional sports leagues have implemented a salary cap to help achieve competitive balance. In some ways, this should come as no surprise because player salaries are the greatest cost for a team, and if there is a limit on what a team can spend on their payroll, the more likely there will be parity in the league.¹³⁷ A salary cap is collectively bargained by the league and its players’ association and the amount of the cap is based off of league revenues.¹³⁸ In this regard, the amount of the salary cap and how the league intends to enforce it—including harsh penalties¹³⁹—is determined before a season begins.¹⁴⁰ The parity-driven theory behind the salary cap is that by creating a salary ceiling—a hard cap or a soft cap—professional sports leagues create a more level playing field for all teams, whether large-market or small-market, to compete for player talent.¹⁴¹ Accordingly, a salary cap prevents teams with higher revenues from securing a disproportionate amount of player talent and thus create competitive imbalance among the league’s teams.¹⁴² By spending a relatively similar amount on their respec-

¹³⁵ See Evans, *supra* note 127, at 15.

¹³⁶ See *id.*

¹³⁷ See Totty & Owens, *supra* note 85, at 46.

¹³⁸ See Michael Schottey, *How the NFL Became the Most Competitive League in All of Sports*, BLEACHER REPORT, Mar. 20, 2013, <https://bleacherreport.com/articles/1574285-how-the-nfl-became-the-most-competitive-league-in-all-of-sports>, [https://perma.cc/988X-PPZA] (on file with the Harvard Law School Library).

¹³⁹ See *id.*

¹⁴⁰ See Totty & Owens, *supra* note 85, at 46–47.

¹⁴¹ See Totty & Owens, *supra* note 85, at 48.

¹⁴² See *id.* Moreover, if larger-market, higher-revenue teams are not disproportionately more talented than other teams, they may experience a decrease in revenue while smaller-market, lower-revenue teams may increase their revenue if they are more competitive than would be the case without the salary cap; see Rascher, *supra* note 99. This potential consequence of the salary cap thus improves the revenue disparity in professional sports leagues, which also can lead to competitive imbalance.

tive payrolls, teams should more evenly distribute talent and thus improve the likelihood for parity within the league.¹⁴³ In fact, courts have recognized the important policy impact of a salary cap in professional sports in holding that salary caps do not violate federal antitrust law, despite being anticompetitive in decreasing competition for players.¹⁴⁴

Each league differs on how it approaches its salary cap. The NFL and NHL have “hard caps” which forbid their teams’ payrolls from exceeding this designated threshold for any reason.¹⁴⁵ Teams exceeding the cap can lose draft picks, receive hefty fines, and even have contracts cancelled.¹⁴⁶ The NBA has a “soft cap” which, by contrast to the “hard cap,” creates a payroll threshold for teams that they can exceed only under certain limited exceptions and conditions.¹⁴⁷ MLB does not have a salary cap. In fact, during the latest collective bargaining negotiations, the MLBPA was adamant that they would never agree to a salary cap, thinking that a lack of a cap

¹⁴³ See Rascher, *supra* note 99. Others have also argued that along with a salary cap, professional sports leagues must also adopt a salary floor or minimum payroll threshold to ensure that teams spend closer to the salary cap level and thus spread player salaries—and thus talent—around in a more balanced fashion; see Maury Brown, *As Free Agents Languish, Major League Baseball Faces a Nasty Problem That's Hard to Fix*, FORBES, Mar. 2, 2018, <https://www.forbes.com/sites/maurybrown/2018/03/02/major-league-baseballs-nasty-problem-thats-hard-to-fix/#315497b95359>, [<https://perma.cc/8YSE-9QRJ>] (on file with the Harvard Law School Library) (hereinafter Brown, *As Free Agents Languish*). MLB super-agent Scott Boras proposed a salary floor during the 2018 free agent market debate; see Shaikin, *supra* note 69. A minimum payroll threshold also ensures that team owners do not merely keep as profit much of the money they receive through revenue sharing as well; see Schottery, *supra* note 138. The NBA and the NFL have both adopted salary floors, though MLB has not. See *id.*

¹⁴⁴ See *National Basketball Ass'n v. Williams*, 857 F.Supp. 1069, 1079 (S.D.N.Y. 1994). There appears to be good reason for this protected legal status, as some studies suggest that salary caps are effective tools for achieving greater competitive balance; see, e.g., Andrew Larsen, Aju J. Fenn, & Erin Leanne Spenner, *The Impact of Free Agency and the Salary Cap on Competitive Balance in the National Football League*, 7 J. SPORTS ECON. 474 (2006); but see Totty & Owens, *supra* note 85, at 47 (explaining that their research could not find evidence that supported the arguments advanced by advocates for salary caps). In fact, their research suggested that a salary cap may actually decrease competitiveness among teams; see *id.* One scholar even suggested that salary caps actually create competitive imbalance in professional sports leagues; see Vrooman, *supra* note 16, at 38.

¹⁴⁵ See Totty & Owens, *supra* note 85, at 47.

¹⁴⁶ See *id.*

¹⁴⁷ See Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, Jul. 13, 2018, <http://www.cbafaq.com/salarycap.htm#Q2>, [<https://perma.cc/L9D8-WGQ3>] (on file with the Harvard Law School Library).

would lead to more payroll spending by teams.¹⁴⁸ However, the principles underlying the imposition of a salary cap undergird the animating motivations for creating a luxury tax, as MLB and other professional sports leagues have done.

3. Luxury Tax

Often in conjunction with a salary cap, professional sports leagues have implemented a luxury tax as another tool for pursuing competitive balance. The luxury tax is a penalty tax assessed on a team's payroll on amounts above the designated threshold.¹⁴⁹ The penalty increases at set amounts above this threshold, and there are progressive taxes for those teams that exceed it year after year.¹⁵⁰ This design seeks to limit the ability for high-revenue, larger-market teams to outspend other teams in the league.¹⁵¹ The result of the luxury tax is that it becomes prohibitively expensive to employ a number of highly-paid stars (or to otherwise have disproportionately excessive payroll amounts vis-à-vis the rest of the league).¹⁵² MLB's luxury tax, referred to as the competitive balance tax ("CBT"), sets thresholds for each season above which teams are taxed for payroll amounts that exceed it.¹⁵³ There are also progressive penalties for teams whose payroll exceed the CBT threshold for consecutive years and/or for designated amounts in excess of the threshold. The first time a team exceeds the CBT threshold, the team must pay a twenty percent tax on the overage.¹⁵⁴ The second consecutive

¹⁴⁸ See Shaikin, *supra* note 69.

¹⁴⁹ See Richard A. Kaplan, Note, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1615 (2002). A team's payroll is calculated as the amount of money that a team pays its players in that season, with multi-year contracts and signing bonuses been evenly apportioned for each year of the contract; see Kristi Dosh, *Can Money Still Buy the Postseason in Major League Baseball?* DEN. U. SPORTS & ENT. L.J. 1, 20 (2007).

¹⁵⁰ See Ajilore & Hendrickson, *supra* note 92, at 3.

¹⁵¹ See Dan Messeloff, Note, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 562, (2000).

¹⁵² See Matt Mullarkey, *For the Love of the Game: A Historical Analysis and Defense of Final Offer of Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234, 241-42 (2010).

¹⁵³ See *Competitive Balance Tax*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/transactions/competitive-balance-tax>, [https://perma.cc/6ZLL-8CUG] (on file with the Harvard Law School Library). The amounts are \$195 million for 2017; \$197 million for 2018; \$206 million for 2019; \$208 million for 2020; and \$210 million for 2021.

¹⁵⁴ *Id.*

year a team exceeds the threshold, it must pay a thirty percent tax on such overages, and fifty percent for every consecutive year thereafter.¹⁵⁵ However, a team can reset their penalty by dropping below the CBT threshold in a season.¹⁵⁶ In addition, the league assesses a twelve percent surtax if a team exceeds the CBT threshold by between \$20 million to \$40 million.¹⁵⁷ If a team exceeds the CBT threshold by more than \$40 million, MLB assesses a surtax of 42.5% for the first year it does so and by forty-five percent if it does so again the next year.¹⁵⁸

4. The Draft

Professional sports leagues also use their respective player drafts to promote competitive balance. To help distribute new player talent among their teams, leagues hold a draft for all players—amateur and/or international—seeking to enter the league.¹⁵⁹ In hopes of achieving competitive balance, leagues provide the best draft picks to those teams that were the least competitive the year before (i.e., had the worst records).¹⁶⁰ New players joining a professional sports league through the draft are inexpensive because of the rookie salaries and contracts that leagues prescribe.¹⁶¹ Therefore, those teams at the top of the draft have a better chance to obtain elite players with the built-in cost-control measures through each league's draft. The draft thus provides an avenue for a league's worst teams to improve more quickly—without needing to spend substantially to do so. It further promotes competitive balance because smaller-market teams cannot be outbid—financially or otherwise—by a large-market team for a player that they draft.¹⁶²

MLB has long held a draft for amateur players seeking to enter the league, and it has structured the draft in reverse order based on team's

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* There are also consequences related to a team's draft picks and status for exceeding the CBT threshold by \$40 million or more.

¹⁵⁹ See Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205, 205-06 (1996).

¹⁶⁰ See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 573-74 (1997).

¹⁶¹ See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 119-20 (2004).

¹⁶² See Yavner, *supra* note 56, at 307.

records the previous year.¹⁶³ In 2012, MLB also adopted “competitive balance draft picks” to further support both the teams from the smallest markets and/or those with the lowest revenues.¹⁶⁴ Eligible teams get to select an additional player in one of the special rounds held between the first and second rounds or the second and third rounds.¹⁶⁵ These teams also get additional international bonus pool money with which they can use to sign international players.¹⁶⁶ Finally, MLB provides for compensatory draft picks to teams that lose free agents to another team.¹⁶⁷ Not only does this approach provide disincentives to high-revenue teams to spend aggressively for free agents, it provides those teams losing elite free agents—perhaps because they cannot afford them—to gain back a draft pick that could well yield a very talented, cost-effective player.¹⁶⁸ Indeed, as data analytics have promoted cost-effectiveness within the league, teams now value these various draft picks highly—perhaps even more than free agents.¹⁶⁹ Through these various draft strategies, MLB seeks to promote competitive balance for its teams.

C. *Efficacy of MLB’s Competitive Balance Reforms*

In some ways, it is impossible to definitively say whether MLB’s competitive balance reforms were successful because it is an imperfect science to attempt to quantify fans’ feelings about the level of competition within a professional sports league. Moreover, any number of factors beyond those reforms adopted by MLB—and other professional sports leagues—can influence competitive balance in a way that makes it difficult to attribute success to particular policies. For example, technology, performance enhancing elements, field conditions, and rules of the game can impact competitiveness among teams.¹⁷⁰ Exceptional coaching, ownership, and front-office manage-

¹⁶³ See Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the First-Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J. 427, 438 (2012).

¹⁶⁴ See *Competitive Balance Draft Picks*, MLB.COM, <http://m.mlb.com/glossary/transactions/competitive-balance-draft-picks>, [https://perma.cc/4426-M5ZB] (on file with the Harvard Law School Library).

¹⁶⁵ See *id.* Moreover, the competitive balance draft picks—unlike the traditional draft picks in the amateur draft—can be traded by the teams that have them.

¹⁶⁶ See *id.*

¹⁶⁷ See Schottey, *supra* note 138.

¹⁶⁸ See *id.*

¹⁶⁹ See Davis, *supra* note 9.

¹⁷⁰ See Andrew S. Zimbalist, *Competitive Balance in Sports Leagues*, 3 J. SPORTS ECON. 111, 119 (2002).

ment can also positively influence a team's ability to win.¹⁷¹ In short, these various relevant factors and the difficulty in clearly defining the term "competitive balance" creates challenges for assessing the efficacy of the reforms aimed at achieving parity in MLB.

However, there are a number of data points which suggest that these reforms achieved the goals that then-Commissioner Selig set forth. For example, in the fifteen years following the Blue Ribbon Panel's report, all thirty MLB teams made the playoffs.¹⁷² This statistic is significant because fewer teams make the MLB playoffs each year—10 out of 30—than the other professional sports leagues (16 out of 30, 12 out of 32, and 16 out of the 30 make the playoffs in the NBA, NFL, and NHL, respectively).¹⁷³ In fact, since 2010, only four MLB teams have not made the playoffs.¹⁷⁴ Moreover, since the Blue Ribbon Panel's report, there have been twelve different World Series Champions and twenty different teams that were either National League or American League Champions.¹⁷⁵ Other evidence also suggests that the competitive balance reforms were successful. For example, in 2013, the teams in the top half of payrolls did not do any better than those in the bottom half.¹⁷⁶ Moreover, five playoff teams that year came from the former group, while the other five playoff teams came from the latter group.¹⁷⁷

On the other hand, some critics question whether these competitive balance reforms were as successful as some claim. For example, from 2004–2011, each World Series winner had a payroll in the top 10 in MLB.¹⁷⁸ Moreover, from 2004–2014, two teams—the Boston Red Sox and the San Francisco Giants—each won three World Series titles.¹⁷⁹ Indeed,

¹⁷¹ See *Competitive Balance in Pro Sports Leagues: How Does the NBA Look?*, *supra* note 91. For example, the "Moneyball" data analytics approach made popular by the Oakland A's demonstrated that a small-market team can find market inefficiencies and outperform competitors.

¹⁷² See Matt Snyder, *The NFL is a League of Parity, But So is Major League Baseball*, CBSSPORTS.COM, Jan. 23, 2016, <https://www.cbssports.com/mlb/news/the-nfl-is-a-league-of-parity-but-so-is-major-league-baseball/>, [https://perma.cc/EX4W-NC7D] (on file with the Harvard Law School Library).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*

¹⁷⁶ Yavner, *supra* note 56, at 310.

¹⁷⁷ *Id.*

¹⁷⁸ Reeves Wiedeman, *Is Parity Worth It?*, NEW YORKER, Sept. 28, 2012, <https://www.newyorker.com/news/sporting-scene/is-parity-worth-it>, [https://perma.cc/HR9E-EZ24] (on file with the Harvard Law School Library).

¹⁷⁹ Badenhausen, *supra* note 98.

one scholar noted that in his research, he did not find that any of the traditional measures to promote competitive balance—such as a salary cap or luxury tax—“had any statistically significant impact on balance in any of these [professional sports] leagues.”¹⁸⁰

D. *The Impact on Free Agents*

Irrespective of whether MLB’s competitive balance reforms achieved their desired goals, these policies seemed to have had a negative impact on the 2018 free agent market. Indeed, the effect of two of these reforms—revenue sharing and the CBT—provide insight into the anomalous 2018 free agent market. Revenue sharing was intended to provide more money to smaller-market teams with lower revenues so that they might expand their respective payrolls to compete with higher-revenue teams. MLB seems to imply this by stating in the MLB CBA, “[e]ach Club shall use its revenue-sharing receipts (including any distributions from the Commissioner’s Discretionary Fund) in an effort to improve its performance on the field.”¹⁸¹ In fact, the MLB CBA forbids using revenue sharing on a variety of team expenses, including servicing debt and tax obligations.¹⁸² If a team runs afoul of these restrictions, the MLB Commissioner can fine teams that improperly use these monies.¹⁸³ At the same time, the language quoted from the MLB CBA does not explicitly require teams to spend revenue-sharing money on their payroll to become more competitive.¹⁸⁴ This issue is the basis of the MLBPA’s grievance claiming that four teams were violating the MLB CBA by not spending the money gained through revenue sharing on enhancing

¹⁸⁰ See Gordon, *supra* note 38 (quoting Professor Dave Berri regarding his research on competitive balance); see also Mehra & Zuercher, *supra* note 114, at 1534-35 (citing several studies that did not find a relationship between competitive balance reforms and increased attendance); see also Vrooman, *supra* note 16, at 18 (arguing that the length of the MLB schedule—162 games, 81 of which are at home—“introduces considerable variance in attendance and high demand elasticity with respect to team quality”).

¹⁸¹ Sheryl Ring, *What the MLBPA’s Grievance Means*, FANGRAPHS.COM Feb. 28, 2018, <https://www.fangraphs.com/blogs/what-the-mlbpas-grievance-means/>, [https://perma.cc/RX8H-XZJ7] (on file with the Harvard Law School Library).

¹⁸² See *id.*

¹⁸³ *Players’ Union Raise Concerns with MLB on Pirates’ Use of Revenue-Sharing Income but MLB Sees No Wrongdoing*, PITTSBURGH POST-GAZETTE, Jan. 26, 2018, <http://www.post-gazette.com/sports/pirates/2018/01/26/MLB-players-union-mlbpa-investigation-revenue-sharing-income-Andrew-McCutchen-Gerrit-Cole/stories/201801260119>, [https://perma.cc/Q33R-MGAE] (on file with the Harvard Law School Library).

¹⁸⁴ See *id.*

their rosters.¹⁸⁵ In all events, without an express requirement to dedicate revenue-sharing money to payroll, teams receiving such monies seem to have prioritized profitability over spending more on free agents to make their teams more competitive.

This result may be due, in part, to how revenue sharing may influence teams in valuing players in the free agent marketplace. Some economists argue that redistributing revenue lessens the value of non-elite players, providing an incentive for owners to keep more of the shared money as profit rather than spend it on free agent players.¹⁸⁶ One study projected that revenue sharing reduced players' salaries by more than twenty percent.¹⁸⁷ This analysis comports with Professor Rodney Fort's theory that revenue sharing causes winning to become less valuable to teams, thus making players less valuable.¹⁸⁸ With winning becoming less valuable, it is unsurprising, then, that teams would not use money obtained through revenue sharing to increase their respective payrolls. Indeed, as one commentator noted, "[t]here has never been a time in baseball history when a team. . .got more money just for existing than it does today. The whole risk-reward scale has been skewed because of [revenue sharing]. . .Revenue sharing has hurt competitive balance by guaranteeing profitability irrespective of on-field success."¹⁸⁹

MLB's CBT has had a similar impact on team spending and thus the lack of a robust free agent market. While MLB revenues have continued to rise at an impressive rate, the CBT threshold has not followed proportionally.¹⁹⁰ For example, at \$197 million, the 2018 CBT threshold is just four percent more than it was four years ago.¹⁹¹ In fact, in the last ten years, the CBT threshold has increased by less than half (32%) of the growth in league revenues (67%).¹⁹² This phenomenon slows the growth of team payroll—lagging behind the league's overall economic growth—because of the CBT penalties imposed on teams exceeding that threshold. In this regard, the harsh CBT penalties have begun to create somewhat of a ceiling effect with regard to the luxury tax threshold.¹⁹³ Teams have a strong disincentive to

¹⁸⁵ See Ring, *supra* note 181.

¹⁸⁶ See Rodney Fort, *Competitive Balance in the NFL*, THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE 1, 216-17 (Kevin G. Quinn, ed. 2012).

¹⁸⁷ See Gordon, *supra* note 38 (citing to a study by John Solow and Anthony Krautmann).

¹⁸⁸ See *id.* (citing to a study by Rodney Fort).

¹⁸⁹ See Jaffe, *supra* note 18 (quoting Sports Illustrated writer Joe Sheehan).

¹⁹⁰ See *id.*; see also *Competitive Balance Tax*, *supra* note 153.

¹⁹¹ See *id.* (finding that penalties for offenders has increased during this same time); see also Verducci, *supra* note 17.

¹⁹² See Verducci, *supra* note 17.

¹⁹³ See *id.*

spend above this amount—either in a particular year and certainly any number of years in a row—thus depressing the market for free agents. Moreover, the significant penalties for repeat offenders have driven teams with high payrolls to reset their CBT penalties.¹⁹⁴ These penalties have thus helped create more salary compression among teams—at least over a period of a few years—which may also help explain some of the changes in free agency experienced in 2018.

The CBT threshold serving as a payroll ceiling dovetails with the revenue sharing phenomenon described above in a manner that impinges on the free agent market. If owners are profit maximizers, a luxury tax like the CBT will not primarily drive competitive balance but rather reduce team expenditures and increase profits.¹⁹⁵ In effectively limiting the amount a team can spend on its payroll, the CBT minimizes salary competition for players across the league, as the threshold keeps down costs driven by market and competitive inflation.¹⁹⁶ In this regard, if team owners prioritize profit maximization over winning—or only prioritize winning once profitable—the CBT and revenue sharing may well not lead to the competitive balance that it seeks to achieve.¹⁹⁷ This analysis seems consistent with one theory regarding these competitive balance reforms: they may be aimed more at controlling owners' payroll costs than at league parity.¹⁹⁸ One critic referred to the competitive balance narrative as a myth and stated that the term is “just a PR argument to try and hold down labor costs.”¹⁹⁹ Another commentator noted that one never hears the competitive balance argument applied to the National Collegiate Athletic Association because the costs for players is negligible (scholarships to cover tuition and some modest sti-

¹⁹⁴ See *id.* When these teams—like the Los Angeles Dodgers and the New York Yankees—cut their payroll to reset their CBT penalties, they also almost always take themselves out of the free agent market for that year, which could also explain, in part, why the 2018 free agent market was not more robust; see Brown, *As Free Agents Languish*, *supra* note 143.

¹⁹⁵ See Totty & Owens, *supra* note 85, at 47-48.

¹⁹⁶ See *id.*, at 48.

¹⁹⁷ See *id.*, at 47.

¹⁹⁸ See David Berri, *Major League Baseball is Less Competitive Than We Think*, TIME.COM, Oct. 7, 2014, <http://time.com/3479205/major-league-baseball-bud-selig-competitive-balance/>, [<https://perma.cc/BTC5-E9RP>] (on file with the Harvard Law School Library); see also Gordon, *supra* note 38 (noting that one scholar's work found that revenue sharing would create a scenario where winning was less valuable and thus labor costs would become less valuable for teams as well).

¹⁹⁹ See Gordon, *supra* note 38 (quoting sports economist J.C. Bradbury). A similar argument regarding the need for competitive balance was made to defend the reserve clause in MLB—which many also saw as a means to controlling labor costs; see *id.*

pend).²⁰⁰ Indeed, this theory may not be far-fetched: the MLB Blue Ribbon Panel linked the league's lack of competitiveness to the need to control team's payrolls.²⁰¹ Regardless, whether intended or not, the competitive balance reforms have seemed to negatively impact free agent contracts sufficiently so that they loom large for the next MLB collective bargaining negotiations.

V. CONCLUSION

MLB totaled more than \$10 billion in revenue last year,²⁰² and players are receiving roughly fifty percent of the league's revenue.²⁰³ So why was there such a meager free agent market in 2018? As this article shows, the answer is not as straightforward as some commentators think. A weak free agent class—with a strong free agent class looming a year later—probably played a role. After all, teams will not necessarily overpay for player productivity just because stronger players are not available in the market. Moreover, given the potential CBT penalties—and consistent with general budget planning—teams will plan their roster and payroll over a several-year horizon. The rise of data analytics no doubt played a role in this past offseason as well. Teams have become much more sophisticated in valuing player productivity and projecting future performance and its worth. Gone are the days of teams overpaying star players with long-term, nine-figure contracts that reward the player for past performance. Such contracts are widely disfavored today because of too many examples of them being budgetary albatrosses in the middle of the contract. Teams have become more cost-effective at finding the balance of productivity and cost. It is hard to argue that this analytics movement in MLB has not caused a structural shift in how teams approach long-term contracts—particularly lucrative ones—and, in particular, free agents.

This factor also has coincided with another rising trend: the tanking phenomenon. The number of teams that may be tanking this season is not a robust enough sample size to definitively say that tanking influenced the 2018 free agency period. But the strategy of rebuilding a team by shedding payroll and building back up through high draft picks is undeniably in vogue in MLB. Given that the last three World Series Champions followed

²⁰⁰ See Gordon, *supra* note 38.

²⁰¹ See Mehra & Zuercher, *supra* note 114, at 1513.

²⁰² See Schiffman, *supra* note 4. Team owners have seen additional gains as well with franchise values having increased from \$18.1 billion to \$46.1 billion since 2013; see Passan, *supra* note 10.

²⁰³ See Lindbergh, *Baseball's Economics*, *supra* note 8.

this strategy, it is hard to begrudge teams that follow their examples. However, as more teams rebuild, fewer teams are likely to be active in free agency. One might think that a team losing—and badly, for a while—would negatively impact fan interest, attendance, and revenue. But that has largely not been the case. In fact, with dreams of a championship, fans seem more than willing to continue to support their teams treating “competitiveness as an option, not a priority.”²⁰⁴ Perhaps such fan loyalty has exacerbated the historical tension for team owners between prioritizing winning versus profitability. If a team is not in a position to compete for a championship, one can see how a team owner may decide to cut payroll and become more profitable during that rebuilding period—particularly if the fan base will support it.

But there is more to understanding the changes in MLB that led to the 2018 free agent market. The competitive balance reforms that the MLBPA and the team owners negotiated into the MLB CBA also likely contributed to this shift. Over the past fifteen years, MLB has made significant strides in revenue sharing through the MLB CBA. MLB teams share more revenue now than ever before in the league’s history. It would be understandable for the MLBPA to believe that with more robust revenue sharing, more teams would spend actively in free agency. That did not occur in the 2018 off-season. Data analytics, the tanking phenomenon, and team owners prioritizing greater profits when they were not competing for a championship led to the revenue sharing money improving team’s profitability instead. Another unintended consequence, at least from the players’ perspective, was that the CBT threshold and penalties may have chilled the 2018 free agent market. With the CBT threshold growing at a slower rate than overall revenue, and with the severe penalties for teams exceeding the CBT threshold—particularly for multiple years in a row—the CBT threshold has become close to a hard salary cap. Teams have thus been careful in managing their payroll and more conservative in their spending to avoid those penalties. The consequence, at least in part, may be less spending in free agency as seen in 2018.

The challenge in both of these circumstances is that the MLBPA collectively bargained—and agreed to—these MLB CBA terms.²⁰⁵ There are

²⁰⁴ Passan, *supra* note 10.

²⁰⁵ The MLBPA has been criticized for focusing more on leisure and quality of life matters for its players rather than on economic and compensation issues; *see* Verducci, *supra* note 17. For example, the MLBPA pushed for—and got the owners to agree to—clubhouse chefs, team sports psychologists, and added seats on buses used in spring training; *see also* Brown, *Breaking Down*, *supra* note 134. While these player perks are valuable and probably even needed, they pale in comparison to the real monetary concessions that the MLBPA made to the owners—such as a slow-

limited legal options for the MLPBA given this fact. For example, there is no unintended consequences provision that allows the MLBPA to renegotiate those terms. The team owners may have sought these provisions as a means of keeping their labor costs down—as opposed to, or at least in addition to, for purposes of competitive balance—but the reality remains the same: these free-agent-market-depressing terms of the MLB CBA will be in place through 2021. If the 2019 free agent market mirrors this past off-season, the MLBPA may face a lot of discontent from its player members. Indeed, players may well be so unhappy with baseball's seemingly changed economic structure that they might strike when the 2021 MLB CBA expires. Such a labor disruption would end what will then be a more than twenty-five-year period of labor peace, which many point to as the reason for the unprecedented economic growth that MLB has experienced during that time. The next few free agent markets will be telling in terms of whether 2018 was an anomaly or it represents a new normal for baseball.

growth CBT threshold coupled with punitive luxury tax penalties—even if they were made with competitive balance in mind. The MLBPA may have mistakenly assumed team free agent spending would continue based on the historical—but outdated—model that seems to no longer reflect how the league functions.

Terminating the Struggle Over Termination Rights

Kike Aluko

I. INTRODUCTION

Copyright termination rights, also known as copyright reversion rights, are an important yet confusing set of rights reserved to authors of copyrighted works. As applied to musicians and performers, these rights represent an opportunity to reclaim ownership in musical works and sound recordings after decades. These rights are additionally increasingly relevant, as more artists are becoming eligible to exercise them as years pass. Indeed, the first musicians that were eligible to exercise these rights could do so in 2013. These rights are increasingly important for musicians to exercise as soon as possible; the window for the first eligible musicians to exercise their rights already closed in 2016, and future windows will also quickly lapse as more years pass.

While termination rights are extremely important for musicians, the process that allows them to exercise these rights is far from straightforward. As the windows of eligibility have begun to open, it has been difficult for artists to successfully exercise this right. This paper will explore why it is so difficult for music artists to exercise copyright termination rights as focused on the sound recording copyright in the United States. It will offer a brief history to provide background context on the various issues involved, and will then consider what steps may be taken to help music artists better exercise their copyright termination rights, by incorporating potential approaches from the legal lens, the business lens, and the policy lens.

II. BACKGROUND ISSUES

At the heart of the issue surrounding copyright termination rights as they pertain to sound recordings is whether sound recordings can be classified as works made for hire under the law. As the overview of relevant statutory provisions below will show, copyright termination rights do not apply to works made for hire. Thus, if sound recordings can be considered works made for hire, then music artists will not be eligible to exercise copyright termination rights in order to re-obtain the rights to their sound recordings. Alternatively, if sound recordings cannot be considered a work made for hire, then music artists will have the ability to exercise these copyright termination rights in order to re-obtain the rights to their sound recordings.

A. Overview of Relevant Statutory Provisions

Copyright termination rights are contained in § 203¹ and § 304² of the U.S. Copyright Act of 1976. The relevant provisions in § 203 of the statute set forth that “[i]n 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, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . .”³ Termination of works transferred (or assigned) after January 1, 1978 may be exercised during a five-year window that starts 35 years after the date of assignment under certain conditions.⁴ Among those conditions include the requirement that the author provide notice to the grantee of an intent to exercise this termination right between two and ten years before the intended effective date of the termination.⁵ On the effective date of termination, all rights previously transferred from the author to the grantee revert back to the author.⁶ This means that the first available window to exercise copyright termination rights opened in 2013 and closed on January 1, 2018. Further, the most recent available window for authors to provide notice to grantees of an intent to exercise this termination right already closed in 2016.

The relevant provisions in § 304 of the statute set forth that “. . . other than a 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, exe-

¹ 17 U.S.C. § 203 (termination of transfers and licenses granted by the author).

² 17 U.S.C. § 304 (duration of copyright: subsisting copyrights).

³ 17 U.S.C. § 203(a) (conditions for termination).

⁴ 17 U.S.C. § 203(a)(3).

⁵ 17 U.S.C. § 203(a)(4)(A).

⁶ 17 U.S.C. § 203(b).

cuted before January 1, 1978, by any of the persons designated by subsection 304 (a)(1)(C) of this section, otherwise than by will, is subject to termination . . .”⁷ Termination of works transferred (or assigned) before January 1, 1978 may be exercised during a five-year window that starts at the later date of 56 years after the date of original copyright publication, or January 1, 1978, under certain conditions.⁸ Among those conditions include the requirement for the author to provide notice to the grantee of an intent to exercise this termination right between two and ten years before the intended effective date of the termination.⁹ On the effective date of termination, all rights previously transferred from the author to the grantee revert back to the author.¹⁰ For works transferred (or assigned) before January 1, 1978, this copyright termination right may also be exercised during an additional five-year window that starts 75 years after the date of original copyright publication.¹¹

As previously mentioned, it is important to restate that these copyright termination rights do not apply to works made for hire under the statute. Works made for hire (or works for hire) are also defined in the U.S. Copyright Act of 1976, in § 101. The relevant provisions in § 101 of the statute set forth that

“A ‘work made for hire’ 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 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.”¹²

This means that a work can only be considered a work for hire if it was created within an author’s scope of employment or if it was a commissioned work created by an independent contractor in one of the nine specifically enumerated categories in the statute.

Notably, sound recordings are not included among one of these nine specifically enumerated categories. However, the statute also includes an important reference to a “Technical Amendment” that was added and then

⁷ 17 U.S.C. § 304(c) (termination of transfers and licenses covering extended renewal term).

⁸ 17 U.S.C. § 304(c)(3).

⁹ 17 U.S.C. § 304(c)(4)(A).

¹⁰ 17 U.S.C. § 304(c)(6).

¹¹ 17 U.S.C. § 304(d)(2).

¹² 17 U.S.C. § 10.

subsequently removed to an unrelated statute in 1999.¹³ This Technical Amendment to the Intellectual Property and Communications Omnibus Reform Act of 1999 added sound recordings to the list of specifically enumerated categories of works for hire in § 101 of the U.S. Copyright Act of 1976.¹⁴ The record industry, led by the Recording Industry Association of America (RIAA), lobbied for the insertion of this Technical Amendment in an effort to specifically enumerate sound recordings as works for hire in the copyright statute.¹⁵ However, music artists, led by a group called the Artists' Coalition,¹⁶ worked to repeal the Amendment, which was successfully repealed in 2000.¹⁷ Thus, as it currently stands, sound recordings are not explicitly considered works for hire in § 101 of the copyright statute, and works for hire are not considered transfers or assignments of copyright subject to copyright termination in § 203 and § 304 of the statute.

B. Overview of Relevant Contract Provisions

In the context of the recording industry, musicians and performers are considered authors and record companies are considered grantees within the context of the aforementioned relevant provisions in the copyright statute. Traditionally, recording agreements between these parties contain a grant of rights provision that specifies that the musician's sound recordings are considered works for hire and that if those sound recordings are determined not to be works for hire, then the contract serves as a transfer or assignment of the musician's copyrights to the record company. For example:

Solely for the purposes of any applicable Copyright Law, you and all others rendering services in connection with the recordings of Master Recordings made hereunder and/or the creation of any Subject Materials shall be Company's employees for hire and each item of such Subject Materials under this Agreement or during its Term . . . shall be deemed 'works made for hire.' Company shall be deemed the author of such Subject Materials but if

¹³ William Fisher, *CopyrightX: Lecture 5.3, Authorship: Works for Hire*, YouTube (Feb. 2, 2015), <https://www.youtube.com/watch?v=4-2qLmmDBnE&feature=youtu.be>, [https://perma.cc/G2GE-GCSP].

¹⁴ Intellectual Property and Communications Omnibus Reform Act of 1999, S. 1948, 106th Cong. § 1011(d) (1999).

¹⁵ Eric Boehlert, *Four little words*, SALON.COM, Aug. 28, 2000, https://www.salon.com/2000/08/28/work_for_hire/, (on file with the Harvard Law School Library), [https://perma.cc/434R-UR6B].

¹⁶ *Id.*

¹⁷ Barry Willis, *Clinton Signs Repeal of "Works for Hire" Law*, STEREOPHILE.COM, Oct. 29, 2000, <https://www.stereophile.com/news/10880/> (on file with the Harvard Law School Library), [https://perma.cc/2QZC-8W92].

for any reason any such Subject Materials shall not be a work made for hire, then you hereby assign to Company all Territory-wide right and title to copyrights and all other rights in and to each element of such Subject Materials and all records and reproductions made therefrom for the full term of such copyright and all renewals and extensions of same.

C. *Artist Interests*

From a musician's perspective, these contract provisions can be extremely restrictive. However, while this "belt and suspenders" clause appears in most recording contracts, musicians can still find recourse in their copyright termination rights, which are inalienable and cannot be transferred or waived.¹⁸ In order to find this recourse, they need the grant of rights provisions to be interpreted as transfers or assignments of their copyrights, so that such grants may be terminated subject to § 203 and/or § 304 of the copyright statute. It is important for artists not to have their sound recordings classified as works for hire under the law in these agreements.

Artists who are eligible to exercise their copyright termination rights have a few options. They can either renegotiate for better recording agreements with higher royalty rates during the termination window, or they can attempt to exercise their termination rights, thereby reverting ownership of their sound recordings from the record company back to themselves. While it historically may have been difficult for artists to exploit these sound recordings on their own, it is now more than ever easier for them to do so in this new digital distribution environment. While there are now countless musicians who are eligible to exercise these copyright termination rights, only a small proportion of them have actually taken steps to do so. Examples include Prince, Billy Joel, Pat Benatar, and Joni Mitchell.¹⁹

D. *Record Company Interests*

From a record company's perspective, these contract provisions are an attempt to retain control over the musician's sound recordings for as long as

¹⁸ Bob Donnelly, *Everything You Need to Know About Copyright Reversions*, LOMMEN.COM, 2012, <http://www.lommen.com/wp-content/uploads/2016/03/Everything-You-Need-to-Know-About-Copyright-Reversions-5-12-version.pdf> (on file with the Harvard Law School Library), [https://perma.cc/EGU4-JYGP].

¹⁹ Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD.COM, Sep. 28, 2017: <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law> (on file with the Harvard Law School Library), [https://perma.cc/AEK8-HACY].

possible. For this reason, and to prevent musicians from exercising their copyright termination rights, record companies want sound recordings to be classified as works for hire in order to retain indefinite ownership under the copyright statute. Otherwise, if sound recordings cannot be classified as works for hire, it is in the record companies' best interests to renegotiate with artists to retain ownership over their catalog of sound recordings. Given the new opportunities to exploit longtail catalogs in the digital distribution environment, it is important for record companies to retain ownership over these copyrights in order to do so.

III. APPROACHES AND STRATEGIES

While the copyright statute does provide musicians with an opportunity to reverse the grant of their sound recording copyrights to record companies, the window to take advantage of this opportunity only lasts for five years. It is therefore very important for musicians who are approaching this window to have a specific plan to overcome the obstacles that record companies will often put in place to exercise these rights. In considering their strategies to exercise their copyright termination rights, artists may consider a range of approaches including the legal angle, the business angle, and the policy angle.

A. *Legal*

Even if musicians properly meet the requirements to exercise their copyright termination rights by serving the correct notice within the applicable window of eligibility, that is unfortunately not a guarantee for them to recapture their sound recording copyrights. One reason for this is that record companies often ask artists to waive their termination rights (which are not waivable), or ignore the artists' attempts to exercise those rights altogether.²⁰ In such cases, musicians may need to seek legal recourse in the courts in order to exercise these termination rights.

The courts must resolve several questions to determine how effective the copyright statute can be in helping musicians to exercise their termination rights. As previously stated, these questions revolve around defining if sound recordings made during record contracts can be considered works for hire under the copyright statute. First, can sound recordings made during record contracts be considered works for hire under the employment prong of § 101 of the copyright statute? Can musicians under a record contract be

²⁰ *See id.*

considered employees of record companies, thus making the record companies the legal author of the sound recordings produced during the recording agreement? Second, can sound recordings made during record contracts be considered works for hire under the independent contractor prong of § 101 of the copyright statute? Can music albums be considered “compilations” or “collective works” thus qualifying them as works for hire under this prong? In order to prevail on the legal front, musicians will need to convince courts that the answer to all of these questions is no.

In addressing the employment prong, the primary Supreme Court case that defines what types of relationships generally qualify as employment relationships is *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In that case, the Court laid out several factors to consider in determining whether a hired party is an employee under the common law. These factors include the hiring party’s right to control the product, the skill required, the source of the tools, the location of the labor, the duration of the relationship, the right of the hiring party to assign additional projects, the hiring party’s control over the hours of work, the method of payment, the hiring party’s right to hire assistants, the business of the hiring party, employee benefits, and the tax treatment of the hired party.²¹ Using these factors, musicians should generally be able to convince a court that the location of the labor, the method of payment, employee benefits, and tax treatment are not such that would qualify their relationship with record companies as employer-employee relationships under recording contracts. However, because none of these factors are determinative, it is unclear how courts might rule. Unfortunately, there are not many cases that address the specific question of employment relationships as they relate to musicians and record companies.

There is one unreported case that is helpful for musicians. In *Eliscu v. T.B. Harms Corp.*, 151 U.S.P.Q. 603 (N.Y. Sup. Ct. 1966), the New York Supreme Court noted that the use of the phrase “we engage and employ you” found in written instruments is not enough to make an artist an employee.²² While this case concerned musical compositions instead of sound recordings, the logic should still be helpful to support musicians’ sound recording copyrights. On the other hand, in a more recently unpublished case, *Fifty-Six Hope Road Music v. UMG Recordings, Inc.*, No. 08 Civ. 6143(DLC), 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010), the Southern

²¹ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

²² Ryan Ashley Rafoth, *Limitations of the 1999 Work-For-Hire Amendment*, 53 VAND. L. REV., 1030 (2000), <http://rafothlaw.com/VLR%20Note.pdf>, [https://perma.cc/RMT4-Z4SR] (citing *Eliscu v. T.B. Harms Corp.*, 151 U.S.P.Q. 603, 603-04 (N.Y. Sup. Ct. 1966)).

District Court of New York applied the 2nd Circuit “instance and expense” test to determine that Bob Marley’s pre-1978 sound recordings did qualify as work for hire.²³ Given this unclear case law, musicians may need to consider courts in the 9th Circuit in an effort to resolve the employment prong in their favor.

In addressing the independent contractor prong, the copyright statute already establishes that sound recordings cannot categorically be considered works for hire because they are excluded from one of the nine enumerated categories that are automatically considered works for hire. However, among other arguments, record companies may attempt to convince courts that albums of sound recordings should be considered “compilations” or “collective works” under the copyright statute. The case law concerning these specific questions is similarly scarce. In *Ballas v. Tedesco*, 41 F. Supp. 2d 531 (D.N.J. 1999), the District Court of New Jersey held that the sound recordings under consideration did not qualify as works for hire because they do not fit into one of the nine enumerated categories and there was no written agreement to consider them as works for hire.²⁴ However, unlike most recording arrangements today, there was no signed agreement in that case explicitly claiming that the sound recordings were considered works for hire.²⁵ In *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999), the District Court of Washington, D.C. further confirmed that a sound recording does not fall within one of the nine enumerated categories in § 101 of the copyright statute.²⁶ In this case, there was a written contract between the parties, but the agreement did not specify which party owned the sound recording’s copyright.²⁷ Thus, while *Ballas* and *Staggers* reiterate that sound recordings cannot categorically be considered works for hire because they do not fit into one of the nine enumerated categories in the copyright statute, they do not consider the question in light of an explicit written agreement to the contrary. They additionally do not consider the specific question of whether music albums can be considered “compilations” or “collective works” under the copyright statute.²⁸

²³ See *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 Civ. 6143(DLC), 2010 WL 3564258, at *7–8 (S.D.N.Y. Sept. 10, 2010).

²⁴ See *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

²⁵ See *id.*

²⁶ See *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

²⁷ See *id.*

²⁸ Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. Cal. L. Rev. 375, 382 (2001), available at <http://www-bcf.usc.edu/~usclrev/pdf/075202.pdf>, [<https://perma.cc/Y6CW-VLLQ>].

While the case law is quite scarce concerning whether recorded albums of sound recordings can be considered “compilations” as they relate to works for hire, there is more case law concerning whether recorded albums of sound recordings can be considered “compilations” as they relate to statutory damages. In these cases, record companies ironically argue against the consideration of recorded albums of sound recordings as “compilations” in an attempt to maximize potential statutory damages available to them for infringement under § 504 of the copyright statute.²⁹ For example, “in *UMG Recordings, Inc. v. MP3.com, Inc.*, the plaintiff record label argued that each individual track on a CD should constitute a separate work for the purpose of determining statutory damages [. . .] The [Southern District Court of New York] rejected that argument, holding that a music CD is a ‘compilation,’ and thus constitutes a single work for purposes of § 504(c). *UMG Recordings, Inc.*, 109 F. Supp. 2d at 225. [(S.D.N.Y. 2000)]”³⁰ In *Bryant v. Media Right Productions*, 603 F.3d 135, the 2nd Circuit Court of Appeals followed the District Court’s decision to treat albums of sound recordings as “compilations” for the purpose of calculating statutory damages.³¹ However, in a later unreported case in *Arista Records LLC v. Lime Group LLC*, the Southern District Court of New York distinguished *Bryant* by noting that unlike in *Bryant*, the plaintiffs in this case had issued individual sound recordings and compilation albums, holding that “[n]othing in the Copyright Act bars a plaintiff from recovering a statutory damage award for a sound recording issued as an individual track, simply because that plaintiff, at some point in time, also included that sound recording as part of an album or other compilation.”³² It therefore seems like it is possible for recorded albums to be considered “compilations” under the copyright statute in the 2nd Circuit. Musicians may again need to consider courts in the 9th Circuit in an effort to gain clarity and to resolve the independent contractor prong in their favor.

Given that the first window for musicians to exercise copyright termination rights only opened in 2013, case law regarding termination-specific disputes is similarly still rare. Many musicians settle these disputes outside of court, making it difficult to understand the legal landscape for these disputes. Indeed, while most of the cases that have gone to court do not deal with sound recordings but rather musical compositions, they may be instructive to musicians considering the court system to resolve termination

²⁹ See 17 U.S.C. § 504(c)(1).

³⁰ LaFrance, *supra* note 28, at 382.

³¹ See *Bryant v. Media Right Productions*, 603 F.3d 135, 142 (2nd Cir. 2010).

³² See *Arista Records LLC v. Lime Group LLC*, 2011 WL 1311771, *3 (S.D.N.Y. 2011).

disputes in the sound recording context. In 2012, the Southern District Court of California affirmed the right for Victor Willis, a songwriter and lead singer of The Village People, to terminate his copyright assignment to his publishing companies and regain control of his share of that copyright.³³ In this case, the publishing companies tried to argue that Willis was an employee and thus that his musical compositions were works for hire, but they then withdrew that argument.³⁴ In 2015, the 9th Circuit Court of Appeals confirmed that the Ray Charles Foundation has standing to challenge copyright termination notices filed by Ray Charles' heirs.³⁵ In 2017, Paul McCartney filed a lawsuit in the Southern District Court of New York against Sony/ATV Music Publishing to exercise his copyright termination rights to his musical compositions, but that case was then settled outside of court.³⁶

It is unfortunate that case law specific to the exercise of sound recording copyright termination rights is so rare. Given the expense and potential risk associated with litigating such cases, musicians may consider initiating a class action suit against record labels who ignore or refuse their copyright termination claims. In this way, a bigger group of musicians can bear the risk of litigation costs. This strategy also provides a larger opportunity than individual cases to set a wide-ranging precedent for the music industry moving forward.

B. Business

As mentioned above, musicians who have reached the window of eligibility to exercise their copyright termination rights may consider renegotiating for better recording agreements with higher royalty rates with their record labels. Assuming the record companies are willing to enter into a negotiation with them instead of refusing or ignoring their claims, this option may be ideal for musicians who would like to stay in a relationship with their record labels and who would like those labels to continue to manage

³³ *Village People Frontman Wins Court Battle to Reclaim Song Rights*, Rolling Stone, May 8, 2012, available at <https://www.rollingstone.com/music/news/village-people-frontman-wins-court-battle-to-reclaim-song-rights-20120508>, [https://perma.cc/Z59E-GGHJ].

³⁴ *The New York Times*, "A Copyright Victory, 35 Years Later," September 10, 2013: <https://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html>, [https://perma.cc/7XYD-T95M].

³⁵ See *Ray Charles Foundation v. Robinson*, 795 F.3d 1109, 1111 (9th Cir. 2015).

³⁶ See Don Gorder, *A Paul McCartney / Sony-ATV Brief*, BERKLEE C. OF MUSIC MUSIC BUS. J., Aug. 2017, at <http://www.thembj.org/2017/08/a-paul-mccartney-sony-atv-brief/>, [https://perma.cc/43TW-TJH2].

and exploit the musicians' sound recordings on their behalf. In order to minimize their risk of lawsuits, record companies may additionally be more willing to negotiate with musicians: "[f]or whatever reason, some suggest the labels are hesitant to risk a losing court fight, and would rather negotiate with artists to settle the rights upcoming for reversion."³⁷ The record labels can additionally offer some attractive benefits to musicians who are willing to renegotiate: "[w]e can offer a higher royalty rate for the expiring copyright, and we can sweeten the pot by offering to pay a higher royalty rate for albums that have not yet hit the 35-year point, and we can offer a higher royalty rate on records outside the U.S.' And don't forget big advances, too."³⁸ One major artist for whom this strategy has worked is Prince, who was able to reclaim ownership over his sound recordings after renegotiating his record deal with Warner Bros. Records in 2014.³⁹

While renegotiating with record companies on an individual basis may be an ideal solution for individual musicians, one drawback for the artist community as a whole is that this approach encourages record companies to fight, on a case-by-case basis, to retain the copyrights to sound recordings. Additionally, individual negotiations with record companies give those companies more leverage to require musicians to sign Non-Disclosure Agreements (NDAs) in order to keep the results of those negotiations secret.⁴⁰ This secrecy will serve to keep the power in the record labels' hands and thwart the copyright statute's attempt to "safeguard authors against unremunerative transfers" and "address the unequal bargaining position of authors."⁴¹ Thus, one-on-one negotiations with record labels, while a potential individual solution, does not seem to be an ideal industry-wide solution.

³⁷ Ed Christman, *Reversion Rights: Will 2013 Be A Game-Changer?*, Dec. 27, 2012, <https://www.billboard.com/biz/articles/news/1483926/reversion-rights-will-2013-be-a-game-changer>, [<https://perma.cc/DN9E-9JF5>].

³⁸ *Id.*

³⁹ See Ed Christman, *Prince Gets Masters Back, Which Labels Say 'Scares Us Silly'*, BILLBOARD, Apr. 25, 2014, <https://www.billboard.com/biz/articles/news/legal-and-management/6069987/prince-gets-masters-back-which-labels-say-scares-us>, [<https://perma.cc/Q7FX-MYPW>].

⁴⁰ See Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD, Sep. 28, 2017, <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law>, [<https://perma.cc/GFY7-U6YD>].

⁴¹ Rolling Stone, *supra* note 33.

C. Policy

Another approach that musicians can take in order to more easily and effectively exercise their copyright termination rights is to seek a policy solution by lobbying Congress to get clearer statutory language in favor of artists. Potential policy remedies could include eliminating the termination window such that once musicians become eligible to exercise copyright termination rights, the window is open indefinitely. This change would allow artists more freedom, flexibility, and an opportunity to exercise these rights outside of a restrictive five-year window.

A more difficult and controversial remedy could be asking Congress to make clear in the copyright statute that musicians cannot be considered employees of record companies under recording agreements, or that sound recordings are categorically and definitively not works for hire. This collective approach, similar to the class action litigation approach, is likely to have a much more favorable impact than individual negotiations with record companies. There are several groups that will resist this policy action by Congress. Of course, the RIAA has already demonstrated its willingness to pressure Congress to act in the record industry's interests, as demonstrated by the 1999 Technical Amendment.⁴² The record industry also spends significant amounts of money on PACs and other Congressional contributions.⁴³ In addition to the record industry, other groups like ASCAP, BMI, and the National Music Publishers' Association (NMPA) are also likely to oppose these types of policy efforts in Congress.

In order to make any meaningful change on the policy front, it is thus imperative for artists to have a coordinated approach in Congress to counter the efforts of the record and publishing industry organizations. The Recording Academy is one organizational candidate that already participates in lots of activity in Congress that could act on musicians' behalf in the policy arena. Indeed, the Recording Artists Coalition, the group responsible for the repeal of the Technical Amendment in 2000, is now a part of The Recording Academy and could be reignited as a powerful force for artists' copyright termination rights.⁴⁴ The Recording Academy has also housed a Termina-

⁴² See Eric Boehlert, *Four little words*, SALON.COM, Aug. 28, 2000, https://www.salon.com/2000/08/28/work_for_hire/

⁴³ See *id.*

⁴⁴ See Jay Cooper, *With High Stakes Music Reforms Looming, Is It Time For a Recording Artists Coalition 2.0?*, BILLBOARD, Feb. 7, 2018, available at <https://www.billboard.com/articles/business/8098394/recording-artists-coalition-music-reform-jay-cooper>, [<https://perma.cc/QH25-XRBT>].

tion Rights Working Group in the past, which could be revived to assist with this lobbying purpose.⁴⁵

In addition to The Recording Academy, technology companies like Spotify, Google, Apple, Amazon, and Pandora may also be supportive partners for artists in lobbying Congress. Not only would lobbying in support of artists for a policy remedy help them strengthen historically tenuous relationships with the artist community, it would also be in these companies' best interests to remove record labels from the equation as much as possible. Record labels charge high content costs for these services to license their content, so if musicians are able to recapture their sound recording copyrights, these technology companies are less likely to be required to pay such premiums for their content. At the same time, because they could pay directly to artists instead of through record labels, artists could stand to capture a bigger portion of royalty rates on these re-captured copyrights without the label first taking its portion.

IV. CONCLUSION

While it will likely be a difficult battle, musicians have several options to more effectively exercise their copyright termination rights in the future. While it may be tempting to negotiate with record companies on an individual basis, any coordinated and collective action from a legal or policy approach is likely to have a better impact. Collective action is also likely to come with an additional advantage in media coverage. The media arguably played a crucial role in the repeal of the Technical Amendment in 2000,⁴⁶ and the artist community would certainly be a more sympathetic subject than record companies in this dispute. This paper has by no means considered all possible courses of action, and the subject of copyright termination rights is still much more complicated (for example, joint authorship adds another level of complexity to copyright termination rights).⁴⁷ Additionally, record labels may still be able to use sound recordings even after musicians have exercised their copyright termination rights under the derivative works

⁴⁵ See Larry Rohther, *Record Industry Braces for Artists' Battles Over Song Rights*, NEW YORK TIMES, Aug. 15, 2011, available at <https://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>, [https://perma.cc/7D45-U9KG].

⁴⁶ See Boehlert, *supra* note 15.

⁴⁷ See Bobby Rosenblum, *A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry*, 17 Ent. & Sports Law 3, 3-5 (1999).

argument.⁴⁸ Ultimately however, musicians are more likely to achieve an optimal solution with a proactive and coordinated strategy to ensure they can exercise their copyright termination rights in a way that works best for them.

⁴⁸ See Aaron Samuel Fischer, *Avoiding Termination: How the Music Industry Should Deal With the Imminent Battle Over Copyright termination Rights*, May 1, 2013, available at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1343&context=student_scholarship, [<https://perma.cc/9W2C-RXAW>].



Blurring the Lines: The Impact of *Williams v. Gaye* on Music Composition

John Quagliariello

I. INTRODUCTION[†]

Copyright law has long held an important influence on musical compositions. Stemming back to the Statute of Anne, the first public copyright statute, musical compositions have been afforded some level of copyright protection.¹ At first, this protection was limited to sheet music, but was later expanded to all traditional notions of musical compositions, including sound recordings.² Under the current copyright statutory scheme, a musical work is afforded two types of copyright: one for the underlying composition, and one for the digital sound recording.³

Even with these expansions, however, music copyright law has long been subjected to criticisms by musicians and the musical community. The primary complaint is that the law is too disjointed.⁴ Due to inconsistencies

[†] The recent passage of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551 115th Cong. (2018) will not directly impact any of the arguments made or conclusions drawn in this paper. Moving forward, this law should address a majority of the inconsistencies in the federal statutory framework discussed herein and may provide a definitive solution to the legal ambiguities surrounding federal copyright law.

¹ See Jonathan Little, *History of Copyright: a chronology in relation to music* (last visited Apr. 22, 2018), <http://eprints.chi.ac.uk/2350/1/Little%2C%20J.%20D.%2C%20History%20of%20Copyright%20-%20%20%20A%20Chronology.pdf>, [<https://perma.cc/PY5P-RHRY>].

² See *id.*

³ See *id.*

⁴ *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, COPYRIGHT.GOV (last visited Apr. 22, 2018), <https://www.copyright.gov/docs/sound/>, [<https://perma.cc/4NFQ-SD6Y>].

in the federal statutory framework, musical copyrights receive different lengths of protection, which are determined by the type of copyright (composition or sound recording) and when the work was first published. For musical compositions, the determining date is January 1, 1978.⁵ Works created before this date are subject to a different and much more complex statutory scheme, whereas those created after this date have a much more streamlined framework. Similarly, February 15, 1972 serves as the key date regarding the copyright of sound recordings.⁶ Like musical compositions, sound recordings created before this date are subject to more statutory complexities.⁷

The complexity of the musical copyright statutory scheme has led to a multitude of lawsuits in which courts are forced to apply a rather disjointed framework to the facts of each case.⁸ Over the years, this reality has spurred several high-profile cases, whereby a musical artist has been sued for infringing on the copyright of another artist. The most recent of these cases was *Williams v. Gaye*, a case decided by the 9th Circuit on March 18, 2018.⁹ Commonly referred to as the “Blurred Lines” case, the case involved an alleged infringement by musical artists Pharrell Williams, Robin Thicke, and Clifford Harris (known professionally as T.I.) on a previous work of artist Marvin Gaye.

Aptly named, the “Blurred Lines” case is now blurring the lines of rather well-settled copyright doctrine and is sending shockwaves through the musical community. While it is unclear what the ultimate impact of *Williams* will be on the music industry, it has, at the very minimum, put artists and publishers on notice as to how they should approach musical composition to avoid legal issues. Section II of this paper will discuss the contextual background of *Williams*. Next, Section III will examine the initial lawsuit, and preliminary reactions to the decision. Section IV will review the 9th Circuit’s decision. Finally, Section V will discuss some of the potential impacts of this case on the music industry.

⁵ Sandra Enimil, *Copyright duration for musical compositions and sound recordings*, THE OHIO STATE UNIVERSITY LIBRARIES (May 15, 2013), <https://library.osu.edu/blogs/copyright/2013/05/15/198/>, [https://perma.cc/SDP3-JSTX].

⁶ *Id.*

⁷ *See id.*

⁸ *See id.*

⁹ *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018)

II. CONTEXTUAL BACKGROUND OF CASE

A. *Got to Give It Up*

Marvin Gaye first released the song, “Got to Give It Up,” in 1977 as a single from the album, *Live At London Palladium*.¹⁰ Inspired by artists Johnnie Taylor’s highly popular “Disco Lady,” Gaye wrote “Got to Give It Up” as a parody to the disco craze that was sweeping the music industry.¹¹ The song contained some unique musical elements, including background conversations, the banging on a grapefruit bottle, and the use of a “hotel sheet” (a piece of polystyrene that would make a wobbly sound when shaken)¹² The song became an instant hit, topping the *Billboard* Hot 100, the R&B Singles Charts, and various other disco charts.¹³ “Got to Give It Up” was later covered and sampled by a variety of artists, with the most prominent cover being performed by Aaliyah feat. Slick Rick in 1996 and sample being “Shake Your Body (Down to the Ground)” by the Jacksons in 1978.¹⁴ In addition, the song remains heavily featured in music and television, and can be heard in films such as *Boogie Nights* (1998), *Charlie’s Angles* (2000), *Barbershop* (2002) and *Eat Pray Love* (2010). Notable television uses include *The Wire* (2002), *Scrubs* (2003, 2010), and *True Blood* (2014).¹⁵

B. *Blurred Lines*

“Blurred Lines” was a song released by Pharrell Williams, Robin Thicke, and T.I. in 2013 as a single on the Robin Thicke album of the same name.¹⁶ Primarily produced by Williams through his record company Star

¹⁰ *Got to Give It Up*, ALLMUSIC (last visited Apr. 30, 2018), <https://www.allmusic.com/song/got-to-give-it-up-mt0030492705/variations>, [https://perma.cc/RD4W-6KCH].

¹¹ *Got to Give It Up*, SONGFACTS (last visited Apr. 30, 2018), <http://www.songfacts.com/detail.php?id=6368>, [https://perma.cc/4ZMJ-ZQMH].

¹² *Id.*

¹³ Joel Whitburn, *Top R&B/Hip-Hop Singles: 1942–2004* 108, 225 (2004).

¹⁴ *Got to Give It Up by Marvin Gaye – Samples, Covers and Remixes*, WHOSAMPLED (last visited Apr. 30, 2018), <https://www.whosampled.com/Marvin-Gaye/Got-to-Give-It-Up/>, [https://perma.cc/QFP9-TXXV].

¹⁵ *Marvin Gaye*, IMDB (last visited Apr. 18, 2018), <https://www.imdb.com/name/nm0310848/#soundtrack>, [https://perma.cc/QVT8-UY9H].

¹⁶ *Blurred Lines*, ALLMUSIC (last visited Apr. 30, 2018), <https://www.discogs.com/label/19189-Star-Trak-Entertainment>, [https://perma.cc/76CK-TTJY].

Trak Entertainment,¹⁷ the song was heavily influenced by “Got to Give It Up”. This influence can primarily be heard in the song’s percussions, which were designed to invoke a similar feel to the unique musical effects that Gaye first created thirty-six years prior.¹⁸ According to Thicke, the entire song only took a few hours to produce.¹⁹ Coupled with the release of the song was a highly controversial music video, which featured scantily clad models dancing around Williams, Thicke, and T.I. as they performed the song. The video became a viral hit on video streaming websites,²⁰ and both the song and music video instantly became a source of controversy, as many advocacy groups sought to ban the song due to the provocative video and sexually suggestive lyrics.²¹ This controversy, however, only enabled the song to grow in popularity. “Blurred Lines” soon became a commercial success, topping the *Billboard* Top 100 in June²² for 12 consecutive weeks.²³ “Blurred Lines” later went on to become one of the best-selling singles ever, with over 14.8 million dollars in sales by the end of 2014.²⁴

III. THE INITIAL LAWSUIT

On August 13, 2015, a preliminary complaint was filed in the Central District of California by Williams, Thicke, and Harris.²⁵ The complaint was filed against the heirs of Marvin Gaye (the Gaye family)²⁶ with the purpose

¹⁷ *Star Trak Entertainment*, DISCOGS, <https://www.discogs.com/label/19189-Star-Trak-Entertainment> (last visited Apr. 30, 2018), (on file with the Harvard Law School Library), [<https://perma.cc/CUK5-RPY3>].

¹⁸ See Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 6, 2013), available at <https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy>, [<https://perma.cc/H949-BVA9>].

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See id.*

²² Gary Trust, *Robin Thicke’s ‘Blurred Lines’ Hits No. 1 on Hot 100*, BILLBOARD, Jun. 12, 2013, available at <https://www.billboard.com/articles/news/1566519/robin-thickes-blurred-lines-hits-no-1-on-hot-100>, [<https://perma.cc/A98D-MBWW>].

²³ *Id.*

²⁴ *IFPI Digital Music Report 2014*, Int’l Fed’n of the Phonographic Indus. (2014), <http://ifpi.org/downloads/Digital-Music-Report-2014.pdf>, [<https://perma.cc/E36R-M4SF>].

²⁵ Complaint for Declaratory Relief, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), ECF No. 1.

²⁶ *See id.* at 6. The claim was also brought against Bridgeport Music Inc., an organization that holds the rights to the song catalog of George Clinton. In this case, the complaint was specifically for a declaratory judgement that *Blurred Lines*

of obtaining a declaratory judgement from the court that stated “Blurred Lines” did not infringe on “Got to Give it Up.”²⁷ The motivation behind seeking a declaratory judgement, according to one music industry attorney, was to preserve the reputation of Pharrell Williams as an artist and producer.²⁸ Essentially, Williams was aware that he might be sued by the Gaye family, and wanted to control the narrative of the lawsuit to the best of his ability.²⁹ By filing the lawsuit in the Central District of California, the hub of the music industry, Williams could also establish precedent that would enable future artists to preemptively halt frivolous infringement claims.³⁰

The Gaye family filed a counter-claim against the trio of artists for copyright infringement. The court denied summary judgment, primarily because the two parties provided conflicting expert reports.³¹ These experts, primarily musicologists, provided different opinions on whether “Blurred Lines” had infringed “Got to Give It Up.”³² As such, the court reasoned that a genuine issue of material fact existed and determined that granting summary judgement would be the inappropriate outcome.³³

At trial, the jury was instructed to determine whether infringement on the underlying musical composition of “Got to Give It Up” had occurred. They were to make their analysis based only on the sheet music Gaye had recorded with the Copyright Office in 1977.³⁴ No actual sound recordings of the songs were to be used or relied upon by the jury, as the judge had ruled them inadmissible as evidence.³⁵ This inadmissibility was due to the inconsistencies in federal copyright law.³⁶ “Got to Give it Up,” which was published before 1978, was subjected to the Copyright Act of 1909, and not

did not infringe on the copyright of the Clinton song *Sexy Ways*. The specifics of this song and the decision of the court are not the focus of this article, and will thus not be discussed.

²⁷ *See id.*

²⁸ See Ed Christman, “Blurred Lines” Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous, *BILLBOARD*, Mar. 13, 2015, available at <http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and>, [https://perma.cc/APL4-NVCC].

²⁹ *See id.*

³⁰ *Id.*

³¹ *See Williams v. Bridgeport Music, Inc.*, No. LACV1306004JAK (AGR), 2015 WL 4479500, at 1 (C.D. Cal. July 14, 2015), *aff’d sub nom. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

³² *See id.* at 5.

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See Section I supra.*

the Copyright Act of 1976.³⁷ Under this older statutory framework, the creation of a sound recording did not constitute an adequate form of publication for copyright protection purposes. Instead, a musician had to deposit the sheet music with the Copyright Office in order to receive copyright protection and had to follow different procedural processes to receive protection on the recording.³⁸ The Gaye family failed to offer evidence that proved the sound recording was entitled to copyright protection. Accordingly, the judge ruled that the sound recordings would not be at issue on trial, nor could they be admitted as evidence by either party.³⁹

When the jury returned its verdict, it found by a preponderance of the evidence that Williams and Thicke had infringed on Gaye's copyright.⁴⁰ As a result of this finding, the jury awarded the Gaye family \$4 million in damages and \$3.37 million in profits.⁴¹ The judge later reduced both of these amounts, but both sides nonetheless appealed the decision.⁴²

Many artists, reporters, and other music industry insiders felt that the jury had erred when it issued its decision. Never before had a copyright infringement been determined simply because the "groove" of two songs sounded similar.⁴³ Such a finding was simply beyond the scope of ordinary

³⁷ Megan Coane and Maximillian Verrelli, *Blurring Lines? The Practical Implications of Williams v. Bridgeport Music*, AMERICANBAR.ORG, Feb. 2 2016, https://www.americanbar.org/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music.html#14, (on file with the Harvard Law School Library), [https://perma.cc/7A8J-2RNZ].

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *See Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRX), 2015 WL 4479500, at 1 (C.D. Cal. July 14, 2015), *aff'd sub nom. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

⁴¹ *See id.*

⁴² The court also overturned the jury verdict regarding Harris' lack of culpability in the case, but this issue is outside the scope of this paper, and will not be addressed further. Harris was later found to be not liable by the Ninth Circuit, who found that the court acted improperly by overturning the jury verdict. *See Williams v. Gaye*, 885 F.3d 1150, 1175 (9th Cir. 2018).

⁴³ Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, NEWYORKER (Mar. 12, 2015), <https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out>, [https://perma.cc/DBF2-WBPF].

9th Circuit jurisprudence⁴⁴ or any preceding copyright litigation cases in other circuits.⁴⁵

Experts predicted that the results of the “Blurred Lines” case would be overturned on appeal. The primary consensus was that many errors had occurred during the preliminary trial. First, they felt the issue should have never gone to trial, and the judge should have ruled on the case during the motion for summary judgement.⁴⁶ These industry experts felt that Williams’ lawyers had erred by not appealing the denial of summary judgement before the case fully to trial, due to the unpredictability of jury verdicts.⁴⁷ Juries are especially unpredictable in music copyright cases, where musical experts on both sides often barrage unsophisticated juries with musical technicalities and analogies that make it hard to discern the issues actually being litigated.⁴⁸ Furthermore, some experts felt the jury instructions were improper, as the judge may have mistakenly failed to distinguish what is permissible and impermissible use of copyrighted works.⁴⁹ Lastly, others felt the jury may have reached beyond the scope of the evidence available to them by subconsciously incorporating the sound recordings of the two songs in their decision making.⁵⁰ In doing so, the jury, according to some, reached a verdict that was not supported by the weight of the evidence.

IV. THE APPELLATE DECISION

A. *Majority Decision*

On appeal, the majority rejected Williams’s argument that the district judge had acted improperly by failing to issue a summary judgment and subsequently not granting a new trial.⁵¹ Once the trial began, Williams lost his right to appeal the issue unless “the district court made an error of law that, if not made, would have required the district court to grant the mo-

⁴⁴ Megan Coane and Maximillian Verrelli, *Blurring Lines? The Practical Implications of Williams v. Bridgeport Music*, AMERICANBAR.ORG (Feb. 2016), https://www.americanbar.org/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music.html#14, [https://perma.cc/5S7Z-ER2N].

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Williams v. Gaye*, 885 F.3d 1150, 1166 (9th Cir. 2018)

tion.”⁵² The court also found that the denial of a new trial was appropriate because the jury instructions were proper, the court properly admitted evidence, and the verdict was supported by the weight of the facts.⁵³ Great deference was given to both the decisions and findings of the judge and jury during the trial.⁵⁴ Further, the court reaffirmed the notion that musical compositions are not confined to a narrow range of expression and that a party need only find substantial similarity—not virtual identity—to substantiate a copyright infringement claim.⁵⁵

Overall, the 9th Circuit opinion primarily focused on various procedural elements of the district court trial. As a result, the opinion offered little to no substantive precedent for future musical copyright infringement claims aside from reaffirming the fact that music is subjected to a broader range of copyright protection that will ultimately be decided at the discretion of the factfinder. The court did not resolve the question of whether sound recordings can be used as evidence in cases involving songs subjected to the 1909 Copyright Act. Rather, it stated that ambiguity made the trial judge’s decision to bar the evidence a proper decision, but elected not to address the question because the case was not going to be remanded for a new trial.⁵⁶

B. Dissent

Unlike the majority opinion, Judge Jacqueline Nguyen’s dissent focused much more on the musical elements of the two songs, and criticized the majority for essentially bucking the actual issue at hand by deciding the case on procedural grounds. Nguyen chastised the majority for its analysis of the musical elements of the song, claiming that the majority failed to dictate what particular elements of the song should have received copyright protection.⁵⁷ Judge Nguyen then went further, claiming that even if all of the individual musical elements at issue were afforded copyright protection, the aggregation of those elements would not make “Blurred Lines” substantially similar to “Got to Give It Up.”⁵⁸ As such, the case should have been resolved by the district court as a matter of law and the trial should not have

⁵² *Id.*

⁵³ *Id.* at 1167–74.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1164–65.

⁵⁶ *See id.* at 1166.

⁵⁷ *See id.* at 1186.

⁵⁸ *Id.* at 1191.

reached a jury verdict.⁵⁹ According to Nguyen, The case should have been dismissed in favor of Williams and Thicke before it even went to trial.⁶⁰

Judge Nguyen offered some powerful words to the majority, and by extension to the musical community, by stating “the majority establishe[d] a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.”⁶¹ In her view, she felt the majority allowed a musical style, or “groove” to be copyrighted. “Groove,” according to Nguyen, is an unprotectable idea, and yet the majority made it so that all future artists “find a diminished store of ideas on which to build their works.”⁶² Further, Nguyen speculated that while the opinion may be seen as a “win” for the Gaye family, their victory will be short lived, as the Marvin Gaye catalog is now exposed to similar copyright infringement cases.⁶³

V. FUTURE IMPACT OF CASE

The impact of the “Blurred Lines” case on the music industry is unclear, and experts are divided as to whether it will stifle musical creativity moving forward. Some agree with Judge Nguyen’s dissent that a chilling effect will occur due to a potential increase in frivolous infringement claims by “copyright trolls.”⁶⁴ These “copyright trolls” would acquire the copyrights of older music, and then sue artists for infringement with the hopes of forcing a settlement. Many artists would agree to these settlements, as they often are less expensive than the costs of litigating the issue in court.⁶⁵ Further, the threat of litigation may incline new musical artists to obtain unnecessary licenses and other permissions that they feel will protect them from these lawsuits. Given the costs associated with these licenses and other permissions, and the legal liability they may nonetheless face, many artists may simply elect to forgo entering the music industry entirely.⁶⁶

⁵⁹ *Id.* at 1194

⁶⁰ *See id.* at 1196.

⁶¹ *Id.* at 1183.

⁶² *Id.* at 1186.

⁶³ *Id.* at 1196.

⁶⁴ *See* Scott Graham, *Ninth Circuit Upholds \$5M ‘Blurred Lines’ Verdict Against Thicke, Pharrell*, LAW.COM, Mar. 21, 2018, available at <https://www.law.com/therecorder/2018/03/21/ninth-circuit-upholds-5m-blurred-lines-verdict-against-thicke-pharrell/>, [https://perma.cc/R4D7-JWDU].

⁶⁵ *See id.*

⁶⁶ *See* Adrienne Gibbs, *Marvin Gaye’s Family Wins ‘Blurred Lines’ Appeal; Pharrell, Robin Thicke Must Pay*, FORBES, Mar. 21, 2018, available at <https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#4be7b4bf689b>, [https://perma.cc/DKB2-ZDGH].

Meanwhile, other industry experts are not too worried about the actual outcome of the case, but were nonetheless disappointed with the 9th Circuit's decision to base a majority of its opinion on procedural postures. As noted previously, the decision of *Williams v. Gaye* offers little to no precedent moving forward, much to the chagrin of music copyright lawyers.⁶⁷ As one commentator put it, the 9th Circuit essentially skirted the real issue at stake by "not resolv[ing] the question of whether the scope of Gaye's copyrights was limited to the sheet music. . . ."⁶⁸ This issue is becoming especially important as the 9th Circuit is beginning to see an uptick of copyright cases in its dockets, and lawyers want to prepare their legal strategies accordingly.⁶⁹

While musical copyright cases have always frequented the 9th Circuit due to the music and entertainment industry's presence in Los Angeles, the recent increase in cases can be partially attributed to the Supreme Court ruling *Petrella v. MGM*.⁷⁰ *Petrella* held that laches cannot be used as an equitable defense for instances of copyright infringement and that the three-year statute of limitations of a copyright infringement claim resets after each instance of infringement.⁷¹ For musical works, this would include each commercial use of a song that has potentially infringed on another musical work. As a result of this ruling, artists are now afforded the opportunity to litigate claims that may have otherwise expired, and this holds especially true to songs that still remain popular decades after their initial releases.

In addition to *Petrella*, developments in music and digital media technology have made it increasingly easier for artists to access previously unheralded or unknown works of music. When artists write and record new music, they are no longer isolated in a studio. Millions of unique songs, rhythms, and beats are now simply a few clicks away thanks in part to musical databases such as Spotify, Apple Music, Spotify, Pandora, and other digital web players.⁷² This results in recording studios no longer being an

⁶⁷ See Scott Graham, *Skilled in the Art: Blurred Lines — Iancu Revealed — Tinder v. Bumble*, LAW.COM, Mar. 23, 2018, available at <https://www.law.com/2018/03/23/skilled-in-the-art-blurred-lines-iancu-revealed-tinder-v-bumble/>, [https://perma.cc/F64C-V43Z].

⁶⁸ Colin Stutz, *The 'Blurred Lines' Appeal Failed — Now What?*, BILLBOARD, Mar. 22 2018, <https://www.billboard.com/articles/news/8257580/blurred-lines-appeal-pharrell-robin-thicke-marvin-gaye-legal-analysis>.

⁶⁹ See Graham, *supra* note 64.

⁷⁰ *Petrella v. MGM*, 134 S. Ct. 1962, 1964 (2014).

⁷¹ See *id.* at 1969.

⁷² See Randall Roberts, *How the 'Blurred Lines' case could have chilling effect on creativity*, LATIMES, Mar. 6, 2015, available at <http://www.latimes.com/entertainment/>

“artistic bunker . . . but porous to all copyrighted work available.”⁷³ In turn, artists regularly search previous compositions, often subjected to copyright protection, for inspiration during the creative song writing process. While such a process has always been utilized by artists, these new technological developments are causing artists to be more open and honest about their sources of inspiration.⁷⁴

As a result of *Petrella*, the improvement in music media technology, and openness from artists, older songs that would have ordinarily been subject to laches are now finding themselves being litigated in federal courts. The most notable of these cases is currently being litigated in the 9th Circuit. The band Led Zeppelin is being accused of copyright infringement in its writing of their hit song, “Stairway to Heaven.”⁷⁵ While this case remains unsettled, industry experts expect that the 9th Circuit opinion on this case will provide much needed clarity on the admissibility of sound recordings for jury trials involving songs released before 1978.⁷⁶ As one of the lawyers for the Gaye family put it, arguing the “Blurred Lines” case, “was like trying the case blindfolded and handcuffed.”⁷⁷ Therefore, the judges of the 9th Circuit may wish to stray away from such difficulties moving forward, and may adopt a judicial standard that would allow for such evidence to be admitted in their court rooms. Until the 9th Circuit affirmatively rules in one direction or the other, however, the issue remains ultimately unresolved and up to the individual discretions of trial judges.

Lastly, the “Blurred Lines” case may be seen by future courts as merely being a factual outlier; a “perfect storm” of facts that led to its conclusion. Unlike most music infringement cases that go to trial, *Williams v. Gaye* involved two high-profile artists and two highly popular songs. Further, the Gaye family was relatively strapped for cash, as most of the money their father’s estate generated was forced to go to unpaid creditors as per the terms of a previous settlement agreement.⁷⁸ The profits generated by

music/la-et-ms-blurred-lines-notebook-pharrell-williams-robin-thicke-marvin-gaye-20150306-column.html, [https://perma.cc/57UK-DQWU].

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *See* Kory Grow, *Led Zeppelin Win in ‘Stairway to Heaven’ Trial*, ROLLINGSTONE, June 23, 2016, available at <https://www.rollingstone.com/music/news/led-zeppelin-prevail-in-stairway-to-heaven-lawsuit-20160623>, [https://perma.cc/V4BT-9ZHK].

⁷⁶ *See* Graham, *supra* note 64.

⁷⁷ *Id.*

⁷⁸ *See* William Keeler, Jr., *The Victorious Estate of Marvin Gaye*, GARVEY SCHUBERT BARER (Mar. 17, 2015), <http://www.gsblaw.com/west-coast-trusts-estates-litigation/the-victorious-estate-of-marvin-gaye>

“Blurred Lines” offered the Gaye family a financial opportunity to reap some of the benefits of their deceased father’s intellectual property.

The fact that Williams, Thicke, and Harris brought a preemptive lawsuit against the Gaye estate may have additionally forced the issue to go to trial. Some legal experts speculate that, had the Gaye family initiated the lawsuit, the case would have ultimately resulted in a settlement and more favorable outcome for the “Blurred Lines” artists.⁷⁹ Once the case was on trial, Robin Thicke made multiple ill-advised references to “Got to Give It Up” when doing promotional interviews for “Blurred Lines” upon its release.⁸⁰ Thicke subsequently walked back those statements in later interviews and at trial stating he had little to no hand in writing the song.⁸¹ This back and forth, combined with his admissions of consistent lying, infidelity, and drug abuse, painted the artist in an extremely negative light.⁸² The controversial nature of the lyrics and music video only served to strengthen the spotlight on Thicke. While the jury is theoretically supposed to remain unbiased in its decision-making, it may have subconsciously created unfavorable biases towards Thicke, and in extension, his fellow musicians.

When combined with the aforementioned questionable jury instructions and failure of Williams’ and Thicke’s attorneys to appeal the district court’s denial of summary judgement, the facts of this case created a situation that essentially guaranteed an unfavorable outcome. As a result, the multitude of these factors creates a feasible argument that the 9th Circuit should only be seen as a judicial anomaly moving forward. Only time will tell on whether this argument holds any merit, and once again the 9th Circuit’s opinion in the “Stairway to Heaven” case may provide some much-needed clarity on the issue.

Moving forward, the “Blurred Lines” case can still provide valuable insight to musicians and their attorneys as they engage in the creative process of song writing. Musicians will need to be less open about their sources of information, and may need to be more proactive in obtaining proper samples and other licenses in the creation of their songs. Attorneys, meanwhile, will need to be more aware of musicians’ sources of influence and provide legal advice accordingly. This advice will include limiting a client’s statements to the media regarding the creative writing process, as such statements can only harm the client should litigation ensue. When preparing for

⁷⁹ See Christman, *supra* note 28.

⁸⁰ See Roberts, *supra* note 72.

⁸¹ See *id.*

⁸² See Jeff Nelson, *Paula Patton Accuses Robin Thicke of Abuse, Addiction and Infidelity in Explosive Court Documents*, PEOPLE, Jan. 26, 2017, available at <http://people.com/music/paula-patton-accuses-robin-thicke-of-abuse-addiction-infidelity/>.

court, attorneys will need to formulate two different sets of litigation strategies that account for both the use and absence of sound recordings as evidence. They will also need to have musical experts willing to testify on their client's behalf, and be aware of all procedural postures that may enable them to win a case before a full jury trial. If a motion for summary judgement is denied, attorneys must immediately appeal the decision or risk subjecting their client to the inconsistent opinions of a jury.

The "Blurred Lines" case certainly made headlines as it progressed through the 9th Circuit. While the impact may not be as severe as some legal experts once believed, it remains to be seen what the ultimate legacy will be. What is apparent, however, is that 9th Circuit has, at least at the moment, "blurred the lines" of previously established music copyright law precedent.

