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## Preface to Volume 14, Issue 1

In preparation for Volume 14, Issue 1 of the *Harvard Journal of Sports and Entertainment Law*, we wanted pieces that were timely and that would provide insights into the future of the ever-changing landscape of sports and entertainment law. Perhaps more importantly, we wanted to work with authors who were passionate about the issues they wrote about. The authors we have selected and the pieces they wrote fulfilled all those goals and more. Each author's excitement about the issues discussed in their piece shines through in their writing and we are grateful to be able to share that with you.

First is an essay by Professor Robert Jarvis detailing the life of Robert Gibson, the only professional baseball player to later be named a federal judge. The detail with which Professor Jarvis writes illuminates Gibson's life as a baseball player, a judge, and a man.

We then have an article by Professor Zachary Catanzaro analyzing the legal and economic implications of NFT-tethered sound recordings and the emerging NFT marketplace for sound recordings. Professor Catanzaro's careful analysis outlines the current landscape and makes predictions about the future of NFT tethering.

Professor Michael LeRoy wrote our next piece, and he provides a new perspective and approach to considering college athletes as employees under the FLSA. Professor LeRoy submitted an amicus brief to the Third Circuit in the case *Johnson v. NCAA*, and part of his piece for us details some of the same considerations from his amicus brief. Here, he is also able to provide greater details and more in-depth comparisons to the college athlete's plight.

Finally, we worked with Seth Corwin on a phenomenal student note for this Issue. Seth wrote about medical autonomy for professional athletes, specifically in the NHL. He breaks down the potential labor and antitrust issues that surround the NHL's policy that provides teams the final say in the type of treatment a player gets.

We are so grateful to our authors and to each of you for supporting the Journal. We look forward to continuing to learn from and with each of you.

Connor Oniki  
Editor-in-Chief, Volume 14  
*Harvard Journal of Sports and Entertainment Law*





## From the Ballfield to the Courthouse: The Life and Times of Judge Robert M. Gibson, Sr.

Robert M. Jarvis\*

### ABSTRACT

*In 1922, President Warren G. Harding selected Pittsburgh's Robert M. Gibson, Sr. to fill an open seat on the U.S. District Court for the Western District of Pennsylvania. Although many major league baseball players also have been lawyers, to date Gibson is the only one to ever become a federal judge. This essay provides the first detailed look at Gibson's remarkable life.*

### I INTRODUCTION

This year (2022) marks the 100th anniversary of the investiture of Robert M. Gibson, Sr. as a U.S. District Judge for the Western District of Pennsylvania.<sup>1</sup> For most observers, this is a minor event. For baseball fans,

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<sup>1</sup> See *infra* notes 34-36 and accompanying text. A full-length biography of Gibson does not exist. A truncated one can be found at the website of the U.S. District Court for the Western District of Pennsylvania. See *infra* note 8.

Just why Gibson, who served on the court for 27 years and was its first chief judge, see *infra* notes 64-66 and accompanying text, has been overlooked is hard to explain. Gibson does have a Wikipedia page, see *Robert Murray Gibson*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [https://en.wikipedia.org/wiki/Robert\\_Murray\\_Gibson](https://en.wikipedia.org/wiki/Robert_Murray_Gibson) [<https://perma.cc/EJ48-T344>], and is included in the Federal Judicial Center's *Biographical Directory of Federal Judges. Gibson, Robert Murray*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/node/1381201> [<https://perma.cc/Y7EL-C9T5>]. He also has a short entry on the website *Baseball-Reference*. See *Robert Gibson*, BASEBALL-REFERENCE.COM, [https://www.baseball-reference.com/bullpen/Robert\\_Gibson](https://www.baseball-reference.com/bullpen/Robert_Gibson)

however, it is a banner occasion. In the sport's long history,<sup>2</sup> there have been many major league players who also have been lawyers.<sup>3</sup> But to date, only one — Gibson — has served as a federal judge.<sup>4</sup>

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[<https://perma.cc/5LAY-L4WR>]. The Society for American Baseball Research has requested a volunteer to write a profile of Gibson but to date has found no takers. *Robert Gibson*, SABR BIOGRAPHY PROJECT, <https://sabr.org/bioproj/person/robert-gibson/> [<https://perma.cc/BS5R-Q8SZ>].

<sup>2</sup> When and how baseball was invented remains a subject of much debate — most sources, however, agree that it evolved from British folk games (one, called “stoolball,” has been traced back to the 11th century). See DAVID BLOCK, *BASEBALL BEFORE WE KNEW IT: A SEARCH FOR THE ROOTS OF THE GAME* (2005). The earliest known reference to baseball appears in John Newberry's *A Little Pretty Pocket-Book*, printed in London in 1744. The earliest American reference is a 1778 diary entry penned by George Ewing, a Revolutionary War soldier stationed at Valley Forge. See JOHN THORN, *BASEBALL IN THE GARDEN OF EDEN: THE SECRET HISTORY OF THE EARLY GAME* (2011).

<sup>3</sup> Unfortunately, a complete list of such players does not exist. Various partial lists, however, can be located. See, e.g., JONATHAN FRASER LIGHT, *THE CULTURAL ENCYCLOPEDIA OF BASEBALL* 54-55 (2d ed. 2005) (under “Attorneys”); *Post-Playing Careers*, SABR RESEARCH JOURNALS ARCHIVES, <http://research.sabr.org/journals/post-playing-careers> [<https://perma.cc/3JYF-YPAK>].

Other professional leagues have their own legal fraternity members. Infielder John G. Shackelford, for example, played for various teams in the Eastern Colored League and the Negro National League between 1924 and 1930 (Birmingham Black Barons, Chicago American Giants, Cleveland Browns, and Harrisburg Giants) and then earned a law degree from the University of Michigan (1931). See Caleb Hardwick, *John Shackelford*, ARKANSAS BASEBALL ENCYCLOPEDIA, <http://arkbaseball.com/tiki-index.php?page=John+Shackelford> [<https://perma.cc/EQ5H-84G6>]. Similarly, after her playing days in the All-American Girls Professional Baseball League ended, pitcher Patricia I. Brown (Chicago Colleens, 1950; Battle Creek Belles, 1951) earned a law degree at Suffolk University (1965). See KAT D. WILLIAMS, *THE ALL-AMERICAN GIRLS AFTER THE AAGPBL: HOW PLAYING PRO BALL SHAPED THEIR LIVES* 112 (2017).

Additionally, as has been explained elsewhere, many of the original players on the Cincinnati Reds, baseball's first professional team, were “Cincinnati-area attorneys.” ED EDMONDS & FRANK G. HOUEK, *BASEBALL MEETS THE LAW: A CHRONOLOGY OF DECISIONS, STATUTES AND OTHER LEGAL EVENTS* 19 (2017).

<sup>4</sup> Gibson does have a counterpart at the state level: Harry L. Taylor (1866-1955). Primarily a first baseman, but used at all positions except pitcher, Taylor played in the American Association and the National League for the Louisville Colonels (1890-92) and the Baltimore Orioles (1893). See *Harry Taylor*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/players/t/tayloha01.shtml> (last visited Oct. 16, 2022). In 1893, with his playing days behind him, Taylor earned a law degree from Cornell University. After graduating, Taylor established a law practice in Buffalo, New York. In 1906, Taylor was elevated to the New York Supreme Court, where he first spent 18 years in the trial division and then 12 years in the appellate division. See *Harry L. Taylor*, HISTORICAL SOCIETY OF THE NEW

## II EARLY LIFE

Robert Murray Gibson, Sr. was born on August 20, 1869, in Duncanville, Blair County, Pennsylvania (just outside Altoona), the oldest child of Elizabeth M. (née Murray) (1837-1900) and the Reverend William J. Gibson, D.D. (1807-83).<sup>5</sup> The pair had wed in 1867, two years after William, a Presbyterian minister, lost his first wife (Cassandra O. Jameson, 1795-1865).<sup>6</sup> Although William already had fathered six children — Horatio G.J. (1834-35); Katherine R. (1834-1928); Mary Jane (1836-36); Cassandra J. (1838-79); Dr. Robert L. (1839-65); and William J. (1840-70) — he and Elizabeth had three children of their own: Robert (hereinafter “Gibson”) (1869-1949); Murray (1871-71); and William J. (1875-1958).<sup>7</sup>

After attending the Blair County public schools, Gibson briefly enrolled in Pennsylvania State College (now Pennsylvania State University) but then transferred to Washington & Jefferson College in Washington, Pennsylvania (just outside Pittsburgh), where he earned an A.B. degree in 1889.<sup>8</sup>

In 1890, Gibson, who by now stood 6’3” and weighed 185 pounds, joined the Wheeling (West Virginia) Nailers.<sup>9</sup> The Nailers were one of eight teams in the unclassified Tri-State League (so named because its clubs

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YORK COURTS, <https://history.nycourts.gov/biography/harry-l-taylor/> (last visited Oct. 16, 2022). For a detailed biography of Taylor, see Charlie Bevis, *Harry Taylor*, SOC’Y FOR AM. BASEBALL RESEARCH, <https://sabr.org/bioproj/person/harry-taylor-3/> [https://perma.cc/6FNE-JENZ].

<sup>5</sup> See Corezfam, *Robert Murray Gibson Sr.*, ANCESTRY.COM, <https://www.ancestry.com/family-tree/person/tree/36479335/person/19487650796/facts> (last visited Oct. 16, 2022) [hereinafter *Gibson Family Tree*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See U.S. District Court — Western District of Pennsylvania, *Robert Murray Gibson*, <https://www.pawd.uscourts.gov/robert-murray-gibson> [https://perma.cc/X374-8ZRW] [hereinafter *Gibson Court Biography*]. This source includes a photograph of Gibson. Gibson’s graduation from Washington and Jefferson is confirmed by the school’s alumni directory. See BIOGRAPHICAL AND HISTORICAL CATALOGUE OF WASHINGTON AND JEFFERSON COLLEGE, 1802-1902, at 507 (1902) (listing Gibson as an 1889 graduate).

<sup>9</sup> See *1890 Wheeling National Citys/Nailers*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/register/team.cgi?id=A6d0fad2> (last visited Oct. 16, 2022) (listing Gibson as a member of the Nailers and giving his height and weight). For the history of the various team names cited throughout this essay, see RICHARD WORTH, *BASEBALL TEAM NAMES: A WORLDWIDE DICTIONARY*, 1869-2011 (2013).

played in various cities in Michigan, Ohio, and West Virginia).<sup>10</sup> Due to a lack of records, it is not known how either Gibson or the Nailers performed.

On June 4, 1890, Gibson got his chance to break into the major leagues when the visiting Chicago Colts (now Cubs) found themselves in need of a pitcher for a game against the Pittsburgh Alleghenys (now Pirates) at Recreation Park.<sup>11</sup> In a sparkling debut, Gibson led the Colts to a 5-1 victory over the Alleghenys. The next day, the *Pittsburgh Dispatch* wrote:

A young pitcher named Gibson, from the Washington and Jefferson College, was tried by the Chicagos, and he proved a veritable puzzle for the local men, only six hits being secured, and they so scattered that they did no good. The young man is very modest, and, although he has been defeating everything that comes his way, doesn't much fancy trying professional ball. [Pittsburgh baseball executive] Al Pratt at last convinced him that he would be all right and [Colts manager Cap] Anson took him up.<sup>12</sup>

Despite Gibson's impressive performance, the Colts did not keep him.<sup>13</sup> In August 1890, Gibson signed with the Alleghenys and got into three contests (on August 1, 4, and 7). None went well.

After Gibson's first game, a 20-1 loss to the Brooklyn Bridegrooms (now Dodgers), the *Dispatch* reported:

Gibson [was] in the box [to start the game], but one inning was sufficient to cause his retirement. . . In the first inning the Brooklyns scored 11 runs, two earned. Fifteen men went to the bat; five hits were made, including a couple of two-baggers, but then Gibson gave three men bases on balls, had three wild pitches, and with the dropped flies and fumbles the spectators evidently experienced a great relief when the inning closed.<sup>14</sup>

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<sup>10</sup> 1890 *Tri-State League*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/register/league.cgi?id=C16b027f> (last visited Oct. 16, 2022).

<sup>11</sup> Recreation Park (originally called Union Park) served as the Alleghenys' home field from 1883 to 1890. In 1891, the team moved to Exposition Park. See DAN ROONEY & CAROL PETERSON, ALLEGHENY CITY: A HISTORY OF PITTSBURGH'S NORTH SIDE 163-64 (2013).

<sup>12</sup> *A College Pitcher — Anson Gets a Washington-Jefferson Man to Defeat the Pittsburghs — But Six Scattering Hits — A Young Fellow Who Will Develop into a Good Ball Player — Baker's Good Work in the Box — Not a Run was Earned by Either Team in Yesterday's Game at Recreation (Park)*, PITT. DISPATCH, June 5, 1890, at 6.

<sup>13</sup> As there is no public reporting on the Colts' decision, it is not known why the team did not keep Gibson.

<sup>14</sup> See *Two Defeats East — The Brooklyns Bunched Their Hits and Fielded Finely, Winning Both Games Against the Pittsburgh League Team*, PITT. DISPATCH, Aug. 2, 1890, at 6 (explaining that the Pirates lost the first game of the doubleheader by the more respectable score of 7-3).

After Gibson's second game, a 16-6 loss to the Bridegrooms, the *Dispatch* observed:

Manager [Guy] Hecker, of the Pittsburgh (N.L.) Club, gave Gibson another chance in the box today in the game played with the Brooklyns. He was hit quite freely, [and] his wild delivery was responsible for five runs, four being charged to bases on balls and one to a wild pitch[, in the first inning alone].<sup>15</sup>

After Gibson's third game, a 23-17 loss to the Cincinnati Reds, the *Pittsburgh Post* exclaimed: "It would be too tedious to rehearse the history of the 40 runs made. Gibson went in to pitch for the Alleghenys [at the beginning of the game], but retired in the fourth, [by which time Cincinnati had scored 11 runs]."<sup>16</sup>

In these three outings, Gibson had gone a combined 0-3 with a 17.25 earned run average.<sup>17</sup> At the plate, he had gone 3-for-13, with three singles and one run batted in, for a .231 batting average.<sup>18</sup> Having seen enough, the Alleghenys released Gibson, marking the end of his major league career.<sup>19</sup>

Reflecting on Gibson's time in the majors, noted baseball commentator David Nemeč has asked: "Was Gibson simply inordinately lucky in his inaugural game? Was he hurt afterwards? Was the Pittsburgh NL team really so dreadful in 1890 that a pitcher could compile a 0.00 ERA against them and a 17.25 ERA when they performed in his behalf?"<sup>20</sup> While the answers to Nemeč's first two questions are unknowable, one can give an unequivocal "yes" to the third one. In 1890, the Alleghenys finished in last place in the eight team National League. Their 23-113-2 record (a .169 winning percentage) put them 66½ games behind the first-place Bridegrooms.<sup>21</sup> Historically, only the 1899 Cleveland Spiders (20-134, .130 winning percentage,

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<sup>15</sup> *A Want of Support — Gibson Could Pitch Better if He was Supported by the Team — His Wildness Gave the Brooklyns Five Runs*, PITT. DISPATCH, Aug. 5, 1890, at 6.

<sup>16</sup> *Slugging at Cincinnati — Runs are Piled Up Steeple High — The Alleghenys Too Weary to Win the Game — They Hit the Ball and Field Well, but Lose All the Same*, PITT. POST, Aug. 8, 1890, at 6.

<sup>17</sup> See *Robert Gibson*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/players/g/gibso01.shtml> (last visited Oct. 16, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> There is no public reporting on the Alleghenys' decision to release Gibson.

<sup>20</sup> DAVID NEMEČ, *THE RANK AND FILE OF 19TH CENTURY MAJOR LEAGUE BASEBALL: BIOGRAPHIES OF 1,084 PLAYERS, OWNERS, MANAGERS AND UMPIRES* 38 (2012).

<sup>21</sup> See *1890 National League Team Statistics*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/leagues/NL/1890.shtml> (last visited Oct. 16, 2022).

84½ games behind the first-place Brooklyn Superbas, later Dodgers) own a worse season record based on 100 or more games played.<sup>22</sup>

### III AT THE BAR

Having failed to make it as a major leaguer,<sup>23</sup> Gibson read law under various local attorneys and in 1894 was admitted to the Pennsylvania bar.<sup>24</sup> In 1897, he married Lorena G. Core (1872-1928), a resident of Washington, Pennsylvania.<sup>25</sup> Like Gibson, Lorena had grown up in a religious household — her parents were Sarah K. (née Heiner) (1848-1930) and the Reverend Jesse F. Core, Jr., D.D. (1846-98), the presiding elder of the Washington, Pennsylvania, district of the Methodist Episcopal Church.<sup>26</sup> Together, Gibson and Lorena had seven children: four sons (William H., 1900-64; Daniel H., 1901-70; Robert M., Jr., 1903-76; and John M., 1911-

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<sup>22</sup> See 1899 *National League Team Statistics*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/leagues/NL/1899.shtml> (last visited Oct. 16, 2022). See DAVID L. FLEITZ, *ROWDY PATSY TEBEAU AND THE CLEVELAND SPIDERS: FIGHTING TO THE BOTTOM OF BASEBALL, 1887-1899* (2017).

<sup>23</sup> Despite his less than stellar statistics, Gibson later insisted he could have had a career in baseball: “I had to choose between playing ball and studying law—and I took law.” Chester Potter, *Federal Judge Ending 27-Year Service: Move to Drive Him from Bench Led Gibson to Delay Retirement*, PITT. PRESS, Jan. 16, 1949, at 1.

<sup>24</sup> See *Gibson Court Biography*, *supra* note 8. Until the early 20th century, “reading law” (also known as the apprentice system) was the method used by most Americans to become lawyers. See Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 801 (2004) (“As of 1900, more than half of American lawyers had not attended law school or even college.”). Had he been born just a few years later, Gibson likely would have attended the University of Pittsburgh’s law school, which was founded in 1895. See W. EDWARD SELL, *THE LAW DOWN: A CENTURY REMEMBERED — A 100 YEAR HISTORY OF THE UNIVERSITY OF PITTSBURGH SCHOOL OF LAW* (1995).

While reading law, Gibson played minor league baseball, going 2-7 for the Jamestown Champions of the unclassified New York-Pennsylvania League (1891) and 0-1 for the Memphis Giants of the Class B Southern Association (1892). See *Robert Gibson*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/register/player.fcgi?id=Gibson006rob> (last visited Oct. 16, 2022).

<sup>25</sup> See *Wedding at Washington*, DAILY REPUBLICAN (Monongahela, PA), Oct. 1, 1897, at 4. This article describes Lorena as “an accomplished young lady, well and favorably known in Washington, where her abilities as a soprano singer are recognized. Mr. Gibson is a young attorney at the Washington bar, also well and favorably known.” *Id.*

<sup>26</sup> *Id.*; See also *Gibson Family Tree*, *supra* note 5.

87) and three daughters (Ruth C., 1898-1968; Mary L., 1905-87; and Sarah E., 1907-88).<sup>27</sup>

From 1894 to 1902, Gibson had his own law practice in Washington, Pennsylvania. In 1902, he moved to Pittsburgh, where he continued his practice.<sup>28</sup> Two years later, he became an assistant U.S. attorney for the Western District of Pennsylvania.<sup>29</sup> In 1912, Gibson served as a special assistant to the U.S. Attorney General and spent much of the year in Valdez, Alaska, where he helped prosecute the officers of the failed Washington-Alaska Bank of Fairbanks.<sup>30</sup>

In 1914, Gibson resigned from the U.S. Attorney's Office and became Allegheny County's second assistant district attorney.<sup>31</sup> In 1918, upon Harry H. Rowand's election as district attorney, Gibson was promoted to first assistant district attorney.<sup>32</sup> In this position, Gibson oversaw the office's trials and extradition proceedings.<sup>33</sup>

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<sup>27</sup> *Gibson Family Tree*, *supra* note 5.

<sup>28</sup> See *Turning Out Lawyers Fast — Thirty New Applications for Admission to the Local Bar — Now Ready for Examination — Growth of Allegheny Bar Keeping Up — Gossip of the Courthouse*, PITT. PRESS, Mar. 9, 1902, at 8 (reporting that Gibson, although already “a member of the Bar of Washington County, Pa.,” had to “go before the [Allegheny County] board [of bar examiners] before gaining admission”).

<sup>29</sup> See *Langham Leaves; Promotions Made*, PITT. PRESS, Feb. 1, 1904, at 2 (“Robert M. Gibson, who has been clerk to the district attorney, and who has assisted greatly in the preparation of some important cases, has been promoted by District Attorney James S. Young, to the place vacated by [Assistant U.S. Attorney Jonathan N.] Langham.”). Oddly, Gibson's only reported case while at the U.S. Attorney's Office involved the attempted robbery of a grave. See *Franklin v. United States*, 193 F. 334 (3d Cir. 1912).

<sup>30</sup> See *Alaska Bankers' Trial Begins at Valdez Today*, SACRAMENTO DAILY UNION, Dec. 2, 1912, at 2. See also *Gibson Back from Alaska: Assistant United States Attorney Ends Work on Banking Cases*, PITT. GAZETTE TIMES, Jan. 28, 1913, at 3 (“[Gibson was] sent to Alaska by Attorney General George W. Wickersham because of his knowledge of banking laws and his long experience in trying cases.”).

<sup>31</sup> See *Mackrell May Get Civil Service Job — R.M. Gibson Named Second Assistant District Attorney*, PITT. POST, Jan. 1, 1914, at 17.

<sup>32</sup> See *Gibson Selected as Rowand's Chief Aide*, PITT. PRESS, Jan. 4, 1918, at 1.

<sup>33</sup> See Robert M. Ginter, *Gibson Selected for U.S. Judge in this District — Recommendation of Pepper and Reed Acceptable to Attorney General — Member of Local Bar*, PITT. GAZETTE TIMES, July 15, 1922, at 1. See also *Man Accused in Fatal Crash to be Extradited*, PITT. PRESS, Oct. 2, 1921, at 1 (“International extradition proceedings have been instituted by Assistant District Attorney Robert M. Gibson to secure the return to this country of Arthur L. Campbell, who was convicted April 4, 1921, of involuntary manslaughter, and, free on bail, failed to appear when called for sentence. Campbell has been arrested at Kingston, Jamaica, British West Indies, the district attorney's office has been informed.”).

## IV ON THE BENCH

On July 18, 1922, Gibson, a Republican, was nominated by President Warren G. Harding to a seat on the U.S. District Court for the Western District of Pennsylvania.<sup>34</sup> On July 24, 1922, the U.S. Senate confirmed Gibson by a voice vote.<sup>35</sup> Five days later, Gibson was sworn in.<sup>36</sup> Years later, Gibson explained how he got the job:

Senator David A. Reed called me in and told me I was one of those under consideration. He told me to go see [Circuit] Judge Joseph Buffington and [District] Judge W.H. Seward Thomson and see if I would be acceptable to them. I would never have gone unless I had been sent. . . .<sup>37</sup>

During his time on the bench, Gibson authored 364 published opinions,<sup>38</sup> many of which dealt with bankruptcy law. Near the end of his life, when asked which case had interested him the most, “Judge Gibson said he couldn’t recall any particular case which was of the greatest interest to him during his long judicial career. ‘But the kind that cost me the most blood

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<sup>34</sup> See *Gibson Nominated for Federal Bench*, PITT. PRESS, July 19, 1922, at 11. The seat had become vacant due to the death of Judge Charles P. Orr. See *Judge C.P. Orr of U.S. District Court Here Dies — Senior Member of Federal Bench Succumbs to Heart Trouble — Born in Pittsburgh — Twice Vice President of State Bar Association — Prominent Club Man — Appointed by Taft in 1909*, PITT. GAZETTE TIMES, May 17, 1922, at 1. Given his Republican ties and prior federal service, Gibson was an easy choice to take Orr’s place. See *Bench Nominee May Be Gibson — Washington Hears Rowand’s Assistant is to be U.S. Judge Here*, PITT. GAZETTE TIMES, July 13, 1922, at 1 (“The attorney selected is known in Department of Justice circles, having been connected with the department as an assistant United States attorney at Pittsburgh during a Republican administration previous to the regime of President Woodrow Wilson.”).

<sup>35</sup> See *Gibson Confirmed as U.S. Judge Here — Tentative Plans Made to Induct Judge Orr’s Successor into Office*, PITT. GAZETTE TIMES, July 25, 1922, at 1.

<sup>36</sup> See *Gibson Takes Seat on Bench — Former Assistant District Attorney Sworn in as Federal Court Judge — Friends Attend*, PITT. GAZETTE TIMES, July 30, 1922, at 7.

<sup>37</sup> Potter, *supra* note 23, at 1. In 1922, the Western District of Pennsylvania had two seats, one created in 1818, Act of Apr. 20, 1818, ch. 108, 3 Stat. 462, and the other created in 1909, Act of Feb. 26, 1909, ch. 215. See 35 Stat. 656. Judge Buffington had been appointed to the 1818 seat in 1892. When he was elevated to the Third Circuit in 1906, he was succeeded first by Nathaniel Ewing (appointed 1906, died in office 1908); then by James S. Young (appointed 1908, died in office 1914); and then by Thomson (appointed 1914). Judge Orr was the first holder of the 1909 seat; thus, Gibson was seeking to become the seat’s second holder. Today, the district has 10 seats. See 28 U.S.C. § 133(a).

<sup>38</sup> An official tally of Gibson’s opinions does not exist. This figure is based on a Westlaw search conducted by the author on Aug. 1, 2022.



and tears — and which I liked — were the [bankruptcy] reorganization cases.’”<sup>39</sup>

On May 14, 1937, Gibson issued his best-known ruling, a preliminary injunction prohibiting the federal government from proceeding with its plan to bring an antitrust action in New York against Pittsburgh’s Aluminum Company of America (“ALCOA”).<sup>40</sup> The Third Circuit, sitting as a three-judge district court under the Expediting Act,<sup>41</sup> quickly vacated Gibson’s decision,<sup>42</sup> one of the few times Gibson was reversed.<sup>43</sup>

In 1941, Gibson decided *Metcalf v. Pittsburgh Athletic Company*,<sup>44</sup> the first of his two baseball-related opinions. William Metcalf, Jr.<sup>45</sup> and a friend went to a game at Forbes Field on August 13, 1938,<sup>46</sup> and saw the visiting Chicago Cubs beat the Pittsburgh Pirates 11-5.<sup>47</sup> Shortly before the game

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<sup>39</sup> Potter, *supra* note 23, at 6.

<sup>40</sup> See *United States v. Aluminum Co. of Am.*, 19 F. Supp. 374 (W.D. Pa.), *vacated*, 20 F. Supp. 608 (W.D. Pa.), *probable juris. noted*, 58 S. Ct. 40, *aff’d*, 302 U.S. 230 (1937).

<sup>41</sup> Expediting Act, 15 U.S.C. §§ 28-29 (1903) (authorizing the convening of a three-judge district court to hear antitrust actions brought by the government). The Act was triggered by the U.S. attorney general filing a certificate with the district court stating that the case was one of “general public importance” that required expeditious treatment. Under the Act, appeals went directly to the U.S. Supreme Court. Section 28 was repealed in 1984; section 29 was amended in 1974 to require appeals to be heard by the circuit courts.

<sup>42</sup> *Aluminum Co. of Am.*, 20 F. Supp. 608.

<sup>43</sup> The vacating of Gibson’s injunction allowed the government to proceed with its plan. In 1945, Judge Learned Hand decided that ALCOA was a monopolist. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). On remand, however, the district court decided not to take any action against ALCOA after finding that the end of the war, and the demobilization of the nation’s defense plants, had created sufficient competition in the aluminum market to protect the public. *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333 (S.D.N.Y. 1950).

<sup>44</sup> 39 F. Supp. 115 (W.D. Pa.), *aff’d*, 120 F.2d 328 (3d Cir. 1941).

<sup>45</sup> Metcalf (1870-1956) was a 1901 graduate of Cornell University’s law school. After practicing law in Pittsburgh for nearly a decade (1901-08), he became a steel company executive. See *Wm. Metcalf Dies, Retired Steel Official — Industrialist Dies at 86 in Sewickley*, PITT. PRESS, Aug. 31, 1956, at 28.

<sup>46</sup> In the *Federal Supplement*, the date of the game is incorrectly given as August 13, 1939. See *Metcalf*, 39 F. Supp. at 115. Forbes Field served as the Pirates’ home throughout Gibson’s time on the bench. *FORBES FIELD: ESSAYS AND MEMORIES OF THE PIRATES’ HISTORIC BALLPARK, 1909-1971* (David Cicotello & Angelo J. Louisa eds., 2007).

<sup>47</sup> See Lester Biederman, *Cubs Win Second Straight from Bucs, 11-5 — Bruins Pound Four Hurlers for 17 Hits; Diz Fails to Finish — Blanton Routed in First Inning; Swift, Bowman Also Chased — Page Relieves Dean in Seventh*, PITT. PRESS, Aug. 14, 1938, at 1 (Sports).

ended, Metcalf and his friend decided to leave. While walking down a ramp, the 68-year-old Metcalf tripped and fractured his left knee. Claiming the ramp was unreasonably slippery, Metcalf sued the Pirates for \$20,000<sup>48</sup> — the equivalent today of \$398,860.43<sup>49</sup> — and was awarded \$4,013.70 by a jury.<sup>50</sup> Subsequently, the Pirates filed two post-trial motions, the first seeking a judgment notwithstanding the verdict and the second asking for a new trial. In denying both motions, Gibson wrote:

In connection with the plaintiff's testimony, several photographs were offered in evidence to show the ramp in question. At the same time the photographs were taken, a rubber mold was made of certain parts of the ramp, and later reproduced in plaster to show the condition of the surface. Objection was made to these when offered in evidence, on the ground that the surface of the ramp was not the same when the molds were made as at the time of the accident. . .

These casts were later used in connection with the testimony of several witnesses called by plaintiff. These witnesses were experienced in the construction of ramps, and were called to establish as a fact that the maintenance of a 15% concrete ramp in such a smooth condition as that alleged by plaintiff was hazardous. [While] testifying these witnesses had their attention called to parts of the casts which showed unroughened parts of the ramp, and applied their testimony to those parts. They testified that a 15% grade concrete ramp was in common use and within legal limits, but to render them safe they should not be allowed to become smooth. None of these witnesses saw the ramp prior to the re-roughening.

The court, after some doubt it must be confessed, is of [the] opinion that the case was one for submission to the jury, and that no vital error was made in the admission of testimony. It will therefore deny both defendant's motion for judgment upon the reserved point, and its motion for a new trial.<sup>51</sup>

On appeal, Gibson was affirmed in a one sentence *per curiam* opinion.<sup>52</sup>

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<sup>48</sup> See *Club Fights \$20,000 Suit — Fall at Forbes Field is Patron's Fault, Claim(s Club)*, PITT. POST-GAZETTE, Apr. 19, 1940, at 7. It is not clear how this routine slip-and-fall case ended up in federal court. The Pirates defended by arguing “that a man leaving the field has his choice of exits, and . . . the club is not responsible if he falls in the opening he picks.” *Id.*

<sup>49</sup> See Morgan Friedman, *The Inflation Calculator*, <https://westegg.com/inflation/> [<https://perma.cc/ZEN2-AKQE>] (converting 1938 dollars into 2021 dollars).

<sup>50</sup> See *Pittsburgh Ball Club Loses \$4,013 Decision*, SCRANTON TRIB., May 9, 1940, at 17.

<sup>51</sup> See *Metcalf*, 39 F. Supp. at 115-16 (paragraphing inserted to improve readability). See *\$4,013 Verdict Upheld*, PITT. POST-GAZETTE, Jan. 17, 1941, at 7.

<sup>52</sup> *Metcalf v. Pittsburgh Athletic Co.*, 120 F.2d 328 (3d Cir. 1941).

Gibson's willingness to admit the evidence and send the case to the jury is quite telling. As an experienced trial lawyer, Gibson had been in front of many juries. Thus, it would have been easy for him to decide that Metcalf had failed to make out a *prima facie* case. That he chose instead to leave matters up to the jury suggests he took a cautious view of his role as a judge. Perhaps this is why he preferred bankruptcy reorganization cases,<sup>53</sup> which allowed him greater freedom to act.

In 1943, Gibson authored his only other baseball-related opinion: *Poydock v. Adams Transfer & Storage Co.*<sup>54</sup> On October 18, 1941, Richard J. Poydock, a 21-year-old pitcher with the Charlotte Hornets, a Piedmont League Class B affiliate of the Washington Senators, was killed when the car his brother Henry was driving crashed first into a truck and then into a trolley.<sup>55</sup> When his parents sued Adams, the truck's owner, it impleaded both Henry and the trolley company. A jury found Adams solely liable and awarded the Poydocks \$20,000<sup>56</sup>—the equivalent today of \$324,765.85.<sup>57</sup> Deeming this amount excessive, Gibson vacated the judgment and ordered a new trial:

Plaintiffs, in addition to their direct expenses, claimed expected contributions had the life of the deceased continued. It will be noted that these contributions were 'expected,' and not required or certain. The parents were not dependent upon their son, and the deceased had reached the age

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<sup>53</sup> See *supra* text accompanying note 39.

<sup>54</sup> 51 F. Supp. 373 (W.D. Pa. 1943); 51 F. Supp. 374 (W.D. Pa. 1943). Three separate cases — designated, respectively, Civil Actions “2100,” “2101,” and “2197” — were brought using this caption (although tried together, they were not consolidated). In 2100, Joseph and Mary Poydock sued the trucking company (Adams Transfer & Storage) they claimed was responsible for the death of their son Richard. In 2101, Henry Poydock, Richard's brother, filed his own suit against Adams. In 2197, Joseph, as the administrator of Richard's estate, filed yet another lawsuit against Adams. The 2100 lawsuit led to the decision reported at 51 F. Supp. 373. The 2101 lawsuit did not result in a published decision. The 2197 lawsuit led to the decision reported at 51 F. Supp. 374.

<sup>55</sup> See *Youth Killed, Nine Injured in Collision: Auto, En Route to Tech Football Game, Strikes Truck and Trolley*, PITT. POST-GAZETTE, Oct. 20, 1941, at 13 [hereinafter *Youth Killed*]. For Poydock's career statistics (compiled between 1937 and 1941 while playing in the Appalachian, Eastern, Piedmont, and South Atlantic Leagues), see *Richard Poydock*, BASEBALL-REFERENCE.COM, <https://www.baseball-reference.com/register/player.fcgi?id=Poydoc001ric> (last visited Oct. 16, 2022). As these records indicate, Poydock also played first base.

<sup>56</sup> See *Large Award for Death of Son*, BROCKWAY REC. (PA), Dec. 4, 1942, at 2.

<sup>57</sup> See Morgan Friedman, *The Inflation Calculator*, <https://westegg.com/inflation/> [https://perma.cc/B7FS-JJKU]. (converting 1943 dollars into 2021 dollars).

of twenty-one years. Under these circumstances no court . . . would require payments to the parents.

The basis of the claim of expectation of contributions was largely in imagination. The deceased had been a ball player in a small minor baseball league and, according to the not too satisfactory testimony of his family, had earned about \$140 per month for the five-month season, of which amount he had sent one-third home; but during the seven months interval between seasons he had lived with his parents at their expense without performance of any particular duties.

During two of the three seasons he had been a minor but [he] had reached his majority before the last season. With such an intangible foundation the contributions to be expected would amount to little or nothing. Deceased might have been taken from his parents' home by marriage, or by still more probable induction into the military service; but even if contributions were to be assumed for the natural duration of the parents' lives, about fifteen years, the amounts received would be far from the \$20,000 awarded.<sup>58</sup>

Gibson's statement that Poydock had been "a ball player in a small minor baseball league" is interesting, given that Gibson himself had spent time in three different minor leagues.<sup>59</sup> Based on these experiences, one would have expected Gibson to be more sympathetic to Poydock's parents, who undoubtedly were underwriting their son's effort to become a major leaguer.

## V LATER YEARS

On May 20, 1943, when he was 73, Gibson suffered a heart attack.<sup>60</sup> Although he recovered, his increasing absences from the bench soon became

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<sup>58</sup> *Poydock*, 51 F. Supp. at 374 (paragraphing inserted to improve readability). Gibson's statement that "Deceased might have been taken from his parents' home by marriage, or by still more probable induction into the military service," *id.*, makes it clear that Gibson was unaware that "Young [Richard] Poydock, of Adrian, Pa., was en route to the Carnegie Tech-Notre Dame football game [at the time of his death], and in 10 days would have been inducted for military service." *Youth Killed*, *supra* note 55.

<sup>59</sup> See *1890 Wheeling National Citys/Nailers*, *supra* note 9 and accompanying text; Robert Gibson, *supra* note 24 and accompanying text.

<sup>60</sup> See *Judge Gibson Rests After Heart Attack*, PITT. SUN-TEL., May 21, 1943, at 1; *Judge Gibson Improves Slowly*, PITT. SUN-TEL., May 22, 1943, at 1; *Judge Gibson Gains*, PITT. SUN-TEL., May 25, 1943, at 4.

the talk of the town, with many observers calling for his retirement.<sup>61</sup> Gibson, however, held on,<sup>62</sup> and when the position of chief judge of the Western District of Pennsylvania was created in June 1948,<sup>63</sup> Gibson, the court's most senior member, became its first occupant.<sup>64</sup>

In November 1948, President Harry S. Truman, a Democrat, shockingly beat his Republican challenger, New York Governor Thomas E. Dewey.<sup>65</sup> As a result, on January 1, 1949, Gibson finally announced his

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<sup>61</sup> *OPA Denies Blame for Court Backlog: Attorney Say It's U.S. Judges' Fault*, PITT. PRESS, Aug. 5, 1946, at 1, 6 ("Judges Gibson and Nelson McVicar are past 70 and 'in poor health.' The two have been absent frequently from the bench in recent years because of illness but refuse to retire on a \$15,000-a-year pension.")

<sup>62</sup> Gibson later insisted he had remained not because of politics but because of the whispering campaign against him:

Judge Robert M. Gibson will step down from the Federal bench on Jan. 31 after 27 years of service.

He's going to relax by reading Gibbon's "Decline and Fall of the Roman Empire."

He would have discarded the law books for that classic several years ago "if some people hadn't tried to drive me from the bench. . . I was going to retire some time ago," the tall, spare, white-mustached jurist said, "because I didn't want anyone saying that I had lost my grasp on things but was hanging on. But some people started the story that I wasn't doing my share of the work and couldn't. They didn't bother to check the records and get the facts. So I just stayed on to show them they couldn't drive me off the bench. I have enough Irish in me for that."

Potter, *supra* note 23, at 1. In fact, Gibson *did* have trouble keeping up during his final years on the bench. In a lengthy report prepared in 1960 for the Administrative Office of the United States Courts, a prominent court reform expert wrote: "Between 1945 and 1955, the work of this court [the Western District of Pennsylvania] was considerably hampered because of the advanced age of two of its three members . . . Judge Robert M. Gibson, appointed 1922, died 1949, [and] Judge Nelson McVicar, appointed 1928, retired February 1, 1951." FANNIE J. KLEIN, SURVEY OF THE U.S. DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA 60 (1960).

<sup>63</sup> See Act of June 25, 1948, ch. 646, 62 Stat. 897 (now codified as 28 U.S.C. § 136) (creating, in all district courts, the position of "chief judge").

<sup>64</sup> See *Gibson Court Biography*, *supra* note 8.

<sup>65</sup> See Kermit McFarland, *Truman is Elected! — GOP Loses Control of Congress — Pennsylvania Votes for New Yorker, GOP Wins 2 State Posts*, PITT. PRESS, Nov. 3, 1948, at 1. As is well known, Truman was expected to lose the election in a landslide. Indeed, the *Chicago Daily Tribune* was so sure of the outcome that it printed advance copies with the headline "Dewey Defeats Truman," which Truman later gleefully held up in a famous photograph. See Ben Cosgrove, *Behind the Picture: 'Dewey Defeats Truman,'* LIFE, <https://www.life.com/history/dewey-defeats-truman-the-story-be>

retirement (effective January 31, 1949) after 27 years.<sup>66</sup> This news quickly set off a vigorous lobbying effort by Pittsburgh Democrats for his seat.<sup>67</sup> On June 26, 1950, Westmoreland County (just outside Pittsburgh) assistant district attorney Rabe F. Marsh, Jr. was sworn in as Gibson's successor.<sup>68</sup>

On December 19, 1949, Gibson died of cancer at the age of 80 at his home in Pittsburgh.<sup>69</sup> In its reporting, the *Pittsburgh Post-Gazette* described Gibson as “an institution in this area’s judicial life”<sup>70</sup> and noted that he had been an avid boxing fan, an excellent chess player, and a skilled golfer.<sup>71</sup> Two days later, Gibson was buried at Pittsburgh’s Homewood Cemetery<sup>72</sup> next to his wife Lorena.<sup>73</sup> A few steps away is the gravesite of Hall of Famer

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hind-a-classic-political-photo/ [https://perma.cc/57RW-HTHN]. For a further discussion, see GARY A. DONALDSON, *TRUMAN DEFEATS DEWEY* (1999).

<sup>66</sup> See William Doak, *Gibson to Resign on Jan. 31*, PITT. SUN-TEL., Jan. 2, 1949, at 1.

<sup>67</sup> *Scramble for His Job Gives Gibson Big Kick: Federal Judge Sets January 31 as Definite Date for Retirement*, PITT. POST-GAZETTE, Jan. 3, 1949, at 15.

<sup>68</sup> See *Marsh Inducted Here as 4th Federal Judge*, PITT. POST-GAZETTE, June 27, 1950, at 13. Marsh was Truman’s second choice to replace Gibson. His first choice — U.S. Representative Herman P. Eberharter (D-PA) — withdrew in January 1950 after the American Bar Association opposed his nomination due to his drinking. *Eberharter Gives Up Bid for Judgeship — President Agrees to Withdraw Nomination at Request of Pittsburgh Congressman*, PITT. POST-GAZETTE, Jan. 13, 1950, at 1.

<sup>69</sup> See *Robert Murray Gibson in the Pennsylvania, U.S., Death Certificates, 1906-1968*, ANCESTRY.COM, [https://www.ancestry.com/imageviewer/collections/5164/images/42410\\_2421406271\\_0997-01565?treeid=&personid=](https://www.ancestry.com/imageviewer/collections/5164/images/42410_2421406271_0997-01565?treeid=&personid=) (last visited Oct. 16, 2022).

<sup>70</sup> See *Judge R.M. Gibson*, PITT. POST-GAZETTE, Dec. 20, 1949, at 8 (editorial).

<sup>71</sup> See *Veteran Jurist Taken by Death — Judge Gibson Dies, Aged 80, in His Home — U.S. Jurist Ill Since Retirement from Bench in January*, PITT. POST-GAZETTE, Dec. 20, 1949, at 5.

<sup>72</sup> See *Honf.} Robert Murray Gibson*, FIND A GRAVE, <https://www.findagrave.com/memorial/90910484/robert-murray-gibson> [https://perma.cc/NUA8-X5PQ]; *Court Services Laud Judge Gibson — Lawyers and Jurists Pay Final Tributes*, PITT. PRESS, Dec. 21, 1949, at 39 (describing Gibson’s funeral and memorial services — Gibson’s eulogists included Third Circuit Chief Judge John Biggs, Jr.; Common Pleas Court President Judge Harry H. Rowand (Gibson’s former boss); Criminal Court Judge William H. McNaugher; and Pittsburgh attorneys William H. Eckert and Con F. McGregor).

<sup>73</sup> See *Lorena Gwendolyn Core Gibson*, FIND A GRAVE, <https://www.findagrave.com/memorial/90910476/lorena-gwendolyn-gibson> [https://perma.cc/U5DH-YL2X]. For Lorena’s obituary, see *Lorena Core Gibson Dies in Pittsburgh — Daughter of Late Rev. Core of Washington*, DAILY NOTES (Canonsburg, PA), Mar. 14, 1928, at 1 (reporting that Lorena “died of heart’s disease in her home”). Despite being only 58, Gibson did not remarry after Lorena’s death.

Pie Traynor, the Pirates' legendary third baseman.<sup>74</sup>

## VI CONCLUSION

Baseball and the law have a long connection.<sup>75</sup> As such, it is not surprising that many major league players have had law degrees. But for a player to have become a federal judge is quite extraordinary — a unique feat that deserves both notice and praise.

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<sup>74</sup> See *Pie Traynor*, FIND A GRAVE, <https://www.findagrave.com/memorial/3695/pie-traynor> [<https://perma.cc/2NYQ-YKB9>]. Harold J. Traynor played for the Pirates from 1920 to 1937; in 1948, he was inducted into the Baseball Hall of Fame. He died in 1972. For a look at Traynor's career, see JAMES FORR & DAVID PROCTOR, *PIE TRAYNOR: A BASEBALL BIOGRAPHY* (2010). As this source explains, "Pie Traynor was the face of Pittsburgh baseball during the twenties and thirties, when the Pirates were a perennial pennant contender." *Id.* at back cover. Given the overlap of their careers, it is likely that Gibson, while sitting on the bench, carefully followed Traynor's exploits on the field.

<sup>75</sup> See, e.g., Robert M. Jarvis & Phyllis G. Coleman, *Early Baseball Law*, 45 AM. J. LEGAL HIST. 117 (2001) (describing the relationship between baseball and the legal system in the 19th century). For more modern connections between the two subjects, see EDMONDS & HOUDEK, *supra* note 3; PATRICK K. THORNTON, *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* (2012); JOHN H. MINAN & KEVIN COLE, *THE LITTLE WHITE BOOK OF BASEBALL LAW* (2009).





## NFT-tethered Sound Recordings and Digital Resale

Zachary L. Catanzaro<sup>1</sup>

### ABSTRACT

If consumers are buying ownership interests in Non-Fungible Token (“NFT”)-tethered sound recordings, can they lawfully resell those interests under the Copyright Act? What exactly is the consumer buying—a digital sound recording, or a phonorecord? I argue that NFT consumers are purchasing fractionalized interests in a phonorecord from the copyright owner in addition to any interests they may acquire in the digital sound recording.

NFTs are not art and do not create copyrights. Rather, NFT sound recordings are a decentralized Digital Rights Management (“DRM”) technology that tethers a unique phonorecord to a unique digital sound recording. NFTs have captured the attention of artists and public alike, with many musicians, like Calvin Cordozar Broadus Jr. (known professionally as “Snoop Dogg”), paying serious attention. Sales of Snoop’s NFT-tethered album, *Bacc on Death Row* (“B.O.D.R.”), totaled \$44.3 million in five days, and the industry predicts that the NFT marketplace for sound recordings will become a multibillion-dollar one as early as 2025.

I explore this emerging marketplace and the economic implications of NFTs as a decentralized distribution channel. Distribution of copyrighted works invites potential copyright misuse, raising unresolved issues under the venerable first sale doctrine. Congressional resistance to codification of digi-

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tal first sale protections has resulted in increasing copyright misuse, made more apparent with this nascent technology. I weigh the advantages and disadvantages of three responses: (1) relying on Section 115’s compulsory license scheme to check ongoing copyright misuse; (2) calling on Congress to extend Section 109’s first sale protections to digital sound recordings; and (3) recognizing the NFT purchaser’s acquired ownership interest to include both the digital sound recording and a fractionalized interest in the hard drive to which the NFT is tethered. Under the third response, Section 109’s first sale doctrine covers the existing resale marketplace.

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## I. INTRODUCTION

NFTs are not art.<sup>2</sup> Nor do NFTs create property rights.<sup>3</sup> NFTs record, track, and enforce ownership and provenance of physical or digital assets,

<sup>2</sup> See Daniel J. Barsky, *Non-Fungible Tokens and Intellectual Property Law: Key Considerations*, HOLLAND & KNIGHT, <https://www.hklaw.com/-/media/files/insights/publications/2021/07/nonfungibletokensandintellectualpropertylaw.pdf?la=ES> (last visited July 4, 2022) (discussing how NFTs are not “[t]he underlying asset itself”).

<sup>3</sup> See Joshua A.T. Fairfield, *Law of Non-Fungible Tokens*, 97 IND. L. J. 1261, 1263 (2022) (explaining how purchasing an NFT does not equate to acquiring property rights and owning the underlying data outright “because the intellectual property

like art, by tethering<sup>4</sup> an asset to a digital tokenized representation of ownership of that asset.<sup>5</sup> These tokens use smart contract technology to append these records to blockchain ledgers, most commonly using the Ethereum ledger. NFTs are most often used to track provenance in and facilitate the distribution of digital art, with early NFT offerings like Yuga Lab’s Bored Apes Yacht Club (“BAYC”) reaching \$2 billion in secondary market activity.<sup>6</sup>

Notably, NFTs do not create copyrights; the Copyright Act does. Technology can decentralize a distribution channel; it cannot decentralize a statutory monopoly. Whether art appended to an NFT is copyrightable is a consideration collateral to the underlying technical functionality of the material object in which the copyrighted work is fixed. Ownership of the material object storing the tethered work should not be conflated with ownership of the copyright *per se*.<sup>7</sup>

By tethering a copy of a copyrighted work to a token, NFTs allow consumers to exchange ownership of a tokenized interest rather than the digital file.<sup>8</sup> The goal of this article is to define that interest, as whether one can “own” a digital file is a problem as old as computing technologies.<sup>9</sup> NFTs tethered to art, such as sound recordings, serve three purposes, acting

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regime that currently governs the internet is hostile to digital personal property ownership, imposing the contract-and-licensing regime”).

<sup>4</sup> See Vallabhaneni, *infra* note 31.

<sup>5</sup> See Kimberly A. Houser et al., *Navigating the Non-Fungible Token*, UTAH L. REV. (forthcoming 2022) (“Tokenization is the conversion of a digital or physical asset into a digital unit of data to serve as a record of ownership or identity.” Adding how a token, which is found on the blockchain, is a certificate of provenance or ownership); see also Henry Wager, *The Andy Warhol of Cryptocurrency: Legal Pursuit of Non-Fungible Tokens*, COLUM. UNDERGRADUATE L. REV. (Jan. 19, 2022) (noting how “[r]epresenting the rights or authority to something by ownership of another item [through] ‘tethering’ is a common occurrence”).

<sup>6</sup> Raphael Minter, *Bored Ape Yacht Club Surpasses \$2 Billion in All-Time Sales*, BE IN CRYPTO (May 5, 2022), <https://beincrypto.com/bored-ape-yacht-club-2-billion-sales/> (detailing sales volume of NFT collections by market capitalization).

<sup>7</sup> 17 U.S.C. § 202 (1976).

<sup>8</sup> See Chris Odinet, *The Property Law of Tokens*, UNIV. IOWA PUB. POL’Y CTR., Nov. 2021, [https://ppc.uiowa.edu/sites/default/files/property\\_law\\_of\\_tokens\\_policy\\_brief.pdf](https://ppc.uiowa.edu/sites/default/files/property_law_of_tokens_policy_brief.pdf) (explaining how there is no “connection between owning the NFT and owning the underlying thing. The only property right to protect is in the token itself, not the underlying asset”).

<sup>9</sup> See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that Peak customers cannot be considered “owner[s]” of the software and as a result are not afforded protection under 17 U.S.C. § 117 (1988)); see also Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents Of Copy Ownership*, 42 WM & MARY L. REV. 1245, 1257–58 (2001) (“The MAI court concluded. . .that the

as (1) DRM systems that provide access and rights control to lawfully fixed, copyrighted works; (2) digital distribution channels that connect copyright owners and purchasers of media in a manner that lowers search costs; and (3) material objects under Section 101 of the Copyright Act, in some use cases.<sup>10</sup> The interplay of these three modalities defines the boundaries of the copyright owner's statutory interest in the tethered asset, as Congress defines it. I question whether consumers are buying a digital copy of the work, rather than an interest in the unique phonorecord in which the digital copy is stored.

Congress has long-standing concerns with encouraging a digital resale marketplace. Before the advent of digital computers in the 1960s, Congress believed that the start-up costs to engage in unlawful commercial reproductions of a sound recording were a sufficient economic safeguard against a copyright owner's right to distribute their own copies of a phonorecord.<sup>11</sup> Mass production of physical phonorecords was an industrial affair, requiring aggregation of large capital expenditures and physical inputs.<sup>12</sup> Additionally, Congress thought that the degradation inherent to copying a secondary of a master would stop the dissemination of unlawful copies from competing and displacing the sale of lawful ones.<sup>13</sup> Such secondary market activity was perceived as a threat to the economic incentives grounding copyright theory.

In the 1960s, Congress foresaw the advent of distributed file sharing and predicted that computers would lower the transaction costs of reproduction and distribution of sound recordings to zero.<sup>14</sup> With the economic barriers to engage in mass commercial piracy eliminated, and the creation of perfect nonrivalrous copies of digital works, Congress took the position that there was no public benefit to extending the first sale protections to the resale of digital files.<sup>15</sup> Congress affirmed this public policy determination when it adopted the Copyright Registrar's 2001 Report on the Digital Mil-

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statutory privilege was not available because the user in the case was not an 'owner' of the program, but merely a licensee").

<sup>10</sup> See *infra*, Section III.

<sup>11</sup> DMCA § 104 Report 97 (2001) ("Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost").

<sup>12</sup> DMCA § 104 Report 82 (2001) ("The need to transport physical copies of works . . . no longer exists in the realm of digital transmissions").

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See also *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908) (holding judicial first sale doctrine prohibits a copyright owner from qualifying lawful first purchaser's title, right to resell, or alienate lawfully made copies of works); 17 U.S.C. 109 (1976) (codifying the judicial first sale doctrine).

lennium Copyright Act (“DMCA”). However, neither Congress, the DMCA Report, nor the caselaw in this area contemplated a digital distribution platform that facilitated the resale of specific material objects fixed in specifically identifiable digital works – the NFT.

NFTs provide technological solutions to two of Congress’ greatest concerns: the incidental destruction of economic safeguards against commercial piracy through the enablement of digital distribution of lawfully created digital sound recordings *without an act of reproduction* necessary to facilitate the transmission of the work digitally;<sup>16</sup> and the market displacement of nonrivalrous digital works.

This Article demonstrates how NFTs address those concerns. Section II starts with a short discussion on the technical and economic function of NFT technologies.<sup>17</sup> An examination of NFT-tethered sound recordings under the Copyright Act follows in Section III, focusing on how Sections 106 and 117 enable lawful NFT use, the interplay of the reproduction and distribution rights under Sections 106(1) and 106(3), and the implications of NFTs on the policy goals of Section 109.<sup>18</sup> Section IV explores three possible paths forward: (1) application of the compulsory license scheme found in Section 115, (2) legislative extension of the first sale doctrine under Section 109 to digital files, and (3) judicial application of Section 109 to the

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<sup>16</sup> See *London-Sire Recs., Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166 (D. Mass. 2008) (explaining that an individual violates the distribution right under Section 106(3) when his/her actions “do more than ‘authorize’ a distribution; they must actually ‘do’ it”); see also *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that “[i]nfringement of [the distribution right] requires the actual dissemination of either copies or phonorecords”); see also Enrico Bonadio et al., *NFTs and Copyright: Some Burning Issues*, KLUWER COPYRIGHT BLOG (July 21, 2022), <http://copyrightblog.kluweriplaw.com/2022/07/21/nfts-and-copyright-some-burning-issues/> (putting forth two arguments surrounding NFTs and Section 106’s reproduction right: (1) NFTs do not violate the reproduction right because “NFTs do not include a copy of the work, but rather only include the associated ‘hash’ or URL” (emphasis added) (2) NFTs may violate the reproduction right because “the process of creation of a ‘hash’ is deterministic. . .the ‘hash’ constitutes a translation of the underlying artistic work” covered by Section 106 (emphasis added)); see also Peter Mezei et al., *The Rise of Non-Fungible Tokens (NFTs) and the Role of Copyright Law – Part II*, KLUWER COPYRIGHT BLOG (Apr. 22, 2021), <http://copyrightblog.kluweriplaw.com/2021/04/22/the-rise-of-non-fungible-tokens-nfts-and-the-role-of-copyright-law-part-ii/> (explaining that because the underlying data is tokenized and sold as an NFT, an “NFTs [is just] metadata pointing to a . . . work,” making them non-violative of a copyright owners distribution and reproduction right).

<sup>17</sup> See *infra*, Section II.

<sup>18</sup> See *infra*, Section III

underlying phonorecords, to which the NFT has been tethered.<sup>19</sup> I conclude by endorsing the third approach.

## II. NFTs

### A. *What are NFTs?*

NFTs are digital tokens appended to blockchain ledgers using one or more smart contracts. A smart contract is an autonomous computer algorithm that merges language of obligation and performance within a single digital instrument upon the occurrence of one or more conditions.<sup>20</sup> The term “smart contract” is a misnomer, as smart contracts are neither “smart” in an intelligence context nor legally enforceable contracts *per se*.<sup>21</sup> Rather,

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<sup>19</sup> See *infra*, Section IV.

<sup>20</sup> See Michelle Adams, *In with the New, But Out with the Old?*, UNIV. OF MIA. L. REV. (2021), <https://lawreview.law.miami.edu/blockchain-smart-contracts/> (explaining how smart contracts function by using conditional statements coded in the blockchain and elaborating on how the conditions coded into the blockchain “must be met in order for the said actions to be executed”); see also James Grimmelmann, *All Smart Contracts Are Ambiguous*, 2 J. OF L. & INNOVATION 1 (2019) (explaining how smart contracts “are executed by hardware and software” and how “[t]he program updates as th[e] [parties] perform their obligations”).

<sup>21</sup> While the enforceability of individual NFTs is beyond the scope of this paper, many early NFT offerings are unenforceable. Examples include those that contain illusory terms, fail to comply with Section 204’s signed writing requirement, or are void as a matter of public policy for violating Federal and State gambling laws regulating ‘lootboxes’ or ‘stashboxes.’ The fact that the algorithm permits autonomous execution of code does not make code law. See Scott A. Burroughs, *NFTs And Copyright: What You See Is Not What You Get*, ABOVE THE LAW (Feb. 18, 2022), <https://abovethelaw.com/2022/02/nfts-and-copyright-what-you-see-is-not-what-you-get/> (noting how the blockchain “receipt” does not comply with Section 204(a)’s requirements and adding that “[w]hen an NFT associated with a work of art is sold, it is almost never the case that the author signs anything transferring any rights in the work”); see also Stuart D. Levi et al., *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2018), (adding how “[c]ourts. . . may be hesitant to enforce a smart contract where the consumer [did not receive sufficient notice of the terms of the agreement]”); Diane Flannery et al., *Blockchain, Cryptocurrency and Non-fungible Token Litigation Primer: A Look at McKimmy v. OpenSea*, MCGUIREWOODS (Feb. 28, 2022), <https://www.mcguirewoods.com/client-resources/Alerts/2022/2/blockchain-cryptocurrency-non-fungible-token-litigation-primer> (noting the elements of an express or implied contract—offer, acceptance, consideration, mutual assent, capacity, and legality—and stating how “[i]n the analog world, contract language is bound by the four corners of the contract, and so long as contracts ‘are clear and unambiguous, parole or extrinsic evidence antecedent or contemporaneous to the contract is inad-

an NFT smart contract automates outputs based on autonomous inputs gathered by the computer program in or associated with the NFT.

While there is no consensus as to what a blockchain ledger is, most, including Ethereum, are encrypted, substantially immutable, redundant, and consensus-based distributed ledgers hosted on a peer-to-peer computer network.<sup>22</sup> Foundationally, a blockchain ledger stores groups of data into blocks using encryption, with individual blocks linked together in chains of transactions that form a blockchain—a chain of records—like the title records maintained in a county recording office.<sup>23</sup> Rather than rely on intermediaries, these systems dis-intermediate trust in the authenticity of provenance records through encrypted proof-of-work or proof-of-stake incentive models.<sup>24</sup>

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missible to vary, contradict, or add terms to the contract’”) (citing *Sterling, Winchester & Long, LLC v. United States*, 83 Fed. Cl. 179, 184 (Fed. Cl. 2008)). While concluding on how: (1) “[t]here has been practically no analysis on smart contracts under settled legal principles at this time[;]” (2) a majority of states have not passed legislation with respect to smart contracts; and (3) the court in the case of *McKimmy v. OpenSea*, 22-cv-00545 (S.D. Tex. Feb. 18, 2022) “will provide context for how courts will analyze blockchain, NFTs, smart contracts under current analog laws.” Ultimately, discussing the subject of the enforceability of smart contracts, who can enforce them, and whether UCC § 3-203 (b) will apply to NFT transfers allowing grantees to be sheltered from other claims from a bona fide purchaser).

<sup>22</sup> See Zachary L. Catanzaro & Robert Kain, *Patients as Peers: Blockchain Based EHR and Medical Information Commons Models for HITECH Act Compliance*, 44 NOVA L. REV. 289 (2020); see also James Grimmelmann et al., *Blockchains as Infrastructure and Semicommons*, WILLIAM & MARY L. REV. (forthcoming 2023), (“Blockchains are ledgers, and as such they are infrastructure . . . [A] blockchain can be used not just to record information about property rights in already-existing off-chain assets, but to create and enforce property rights in new on-chain assets”).

<sup>23</sup> See Eric D. Chason, *How Bitcoin Functions As Property Law*, 49 SETON HALL L. REV. 129 (2019) (analogizing a blockchain to a public records office, adding that blockchain “replicates the recording of deeds, a process by which formally valid transactions between two parties become essentially a public record”).

<sup>24</sup> See Primavera De Filippi et al., *Blockchain as a confidence machine: The problem of trust & challenges of governance*, 62 TECH. IN SOC’Y AN INT’L J. 1, 7 (2020) (stating hot blockchain-based networks—Proof of Work or Proof of Stake—aims “to distribute trust . . . [and] reduc[e] risk of individual opportunism”); see also Kurt Yaeger et al., *Emerging Blockchain Technology Solutions for Modern Healthcare Infrastructure*, J. SCI. INNOVATION IN MED. 1, 2 (2019) (differentiating existing payment models that require a third-party intermediary from blockchain and explaining that “[w]ithin a traditional transaction, the presence of centralized institution . . . introduces the possibility of bias . . . [and] dishonesty” but a “‘blockchain’ is a decentralized, distributed ledger of digital transactions that allows a trustless exchange of money or data”).

NFTs use a standard Application Programming Interface (“API”), such as the Ethereum-based ERC-721 API, to “track distinguishable asset [ ] ownership individually and atomically.”<sup>25</sup> ERC-721, for example, requires “[e]very NFT [to be] identified by a unique uint256.”<sup>26</sup> ERC-721 contains standard transfer mechanisms for denoting a change in ownership.<sup>27</sup> An ERC-721 NFT may include other restrictions on alienation, such as identification of prior art or blacklisted hash identifiers.<sup>28</sup> ERC-721: (1) automates the payment of transaction costs on the ledger, “gas fees”; (2) contains provisions for the creation or deletion of tokens (“minting” and “burning,” respectively); (3) creates downstream royalty conditions; and (4) automates the transfer of ownership records for digital assets appended to the Ethereum blockchain ledger upon a consummate transaction.<sup>29</sup> Together, these smart contract provisions tether the ownership of identifiable digital assets on blockchain ledgers to a token.<sup>30</sup>

Tethering is an abstraction of technological access controls.<sup>31</sup> For digital files, tethering creates a link between the NFT and the digital asset file

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<sup>25</sup> See William Entriken et al., *EIP-721: Non-Fungible Token Standard*, ETHEREUM IMPROVEMENT PROPOSALS (Jan. 24, 2021), <https://eips.ethereum.org/EIPS/eip-721> (listing “LAND in Decentraland, the eponymous punks in CryptoPunks” as examples of NFTs that use a standard API and propounding the idea that using a standardized interface that permits for “cross-functional asset management and sales platforms” will strengthen the NFT space).

<sup>26</sup> See Develop, *Integers*, DEVELOP, <https://docs.soliditylang.org/en/develop/types.html#integers> (last visited Oct. 16, 2022) (a “Uint256” is an unsigned integer of up to 256 bits which serves as a hash identifier); see also Investopia.com, *What is a Hash?*, M <https://www.investopedia.com/terms/h/hash.asp> (Jan. 13, 2022) (Hashes serve two important functions: 1) each block header contains the hash of the block header, linking them into a blockchain; and 2) proof-of-work mining uses hashing as part of the mathematical burden imposed on miners, to make it difficult for a bad actor to overcome the blockchain ledger); see also *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Pratin Vallabhaneni, *The Rise of NFTs—Opportunities and Legal Issues*, WHITE & CASE (Apr. 20, 2021), <https://www.whitecase.com/insight-alert/rise-nfts-opportunities-and-legal-issues> (illustrating how “this technology lays the foundation for creators to have more control over the value and the conditions of the sale of their digital creative works and create new distribution channels of art, performance access, or other valuable property”); see also Jacob Kastrenakes, *Your million-dollar NFT can break tomorrow if you’re not careful*, THE VERGE (Mar. 25, 2021), <https://www.theverge.com/2021/3/25/22349242/nft-metadata-explained-art-crypto-urls-links-ipfs> (explaining that tethering occurs when “NFTs use *links* to direct you to somewhere else where the art and any details about it are being stored”).



itself.<sup>32</sup> Whether the file is saved on-chain or off-chain is generally immaterial, however most sound recording NFTs are stored off-chain for reasons of cost.<sup>33</sup> An access control, as the name suggests, prevents unauthorized access to the underlying file. This does not, however, mean that the NFT bars public access to the digital asset as a *per se* rule, as often the purchaser of an NFT has acquired an assignment of a public performance or display right from the copyright owner.<sup>34</sup>

Thus, NFTs also serve as a rights-control mechanism.<sup>35</sup> Many existing NFTs purport to transfer or license one or more of the Section 106 rights to the direct or secondary purchasers of the NFT.<sup>36</sup> These transfers require a signed writing under Section 204 of the Copyright Act and need to comport with contract law principles for enforceability, but such issues are outside the scope of this Article.<sup>37</sup> For present purposes, it is enough to note that nearly all current NFT use cases result in an express or implied license to the sold work, rather than the true alienation of the digital file in fee simple.<sup>38</sup>

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<sup>32</sup> See Vallabhaneni, *supra* note 31 (explaining how an NFT and digital asset are connected via a link).

<sup>33</sup> See Kristen E. Busch, *Non-Fungible Tokens (NFTs)*, CONG. RSCH. SERV., R47189 (July 20, 2022), <https://crsreports.congress.gov/product/pdf/R/R47189> (noting that storing on-chain is expensive and inefficient because blockchains have limited storage space and high network traffic. Thus, a majority of underlying NFT assets, including sound recordings, are stored off-chain).

<sup>34</sup> See Daniel Anthony, *Commercializing NFTs – generating value from digital assets and intellectual property rights*, JDSUPRA (Mar. 2, 2022), <https://www.jdsupra.com/legalnews/commercializing-nfts-generating-value-1110648/> (explaining a purchaser of an NFT obtains a limited right, such as the right to display the underlying asset of an NFT).

<sup>35</sup> Steve Kaczynski et al., *How NFTs Create Value*, HARV. BUS. REV. (Nov. 10, 2021), <https://hbr.org/2021/11/how-nfts-create-value> (“[i]t’s not an accident that so many of the early NFT projects are built around digital rights management, since that’s one of the most direct applications of the technology.”).

<sup>36</sup> See Anthony, *supra* note 34 (“NFT License has been adopted by several prominent NFT projects such as CryptoPunks and Meebits.”).

<sup>37</sup> See Flannery, *supra* note 21 (raising the issue of whether UCC § 3-203 (b) will apply to NFT transfers allowing grantees to be sheltered from other claims from a bona fide purchaser).

<sup>38</sup> Of course, one could easily construe most NFT smart contracts as purporting to assign an interest in fee determinable rather than under an implied license, as has been customary in digital file marketplaces for the last quarter century. Such interpretation issues are beyond the scope of this paper.

### B. *The Economics of NFT-tethered Sound Recordings*

NFTs offer several major advantages over existing DRM technologies, which have incentivized rapid marketplace adoption. First, by creating technologically controlled provenance, stakeholders in a blockchain ledger are disincentivized from committing fraud against the ledger's ownership records.<sup>39</sup> Second, by providing access and copy controls of digital works of authorship in a manner that does not require an act of reproduction, NFTs facilitate the lawful distribution and resale of digital works of authorship.<sup>40</sup> Third, artists can use technological rights terms within smart contracts to ensure downstream royalty payments.<sup>41</sup> Finally, by connecting artists directly with consumers on digital secondary marketplaces, NFTs reduce the need for investing in capital intensive marketing and distribution associated with traditional content distribution models.<sup>42</sup> This arguably lowers ex-

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<sup>39</sup> See Ross Mauri, *Three features of blockchain that help prevent fraud*, IBM SUPPLY CHAIN AND BLOCKCHAIN BLOG (Sept. 19, 2017), <https://www.ibm.com/blogs/blockchain/2017/09/three-features-of-blockchain-that-help-prevent-fraud/>; see generally Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG, <https://bitcoin.org/bitcoin.pdf> (Aug. 29, 2022) (outlining the mechanisms inherent in a distributed ledger system such as a blockchain ledger in mitigating the potential for fraud).

<sup>40</sup> See Enrico Bonadio, *NFTs and Copyright: Some Burning Issues*, KLUWER COPYRIGHT BLOG (July 21, 2022), <http://copyrightblog.kluweriplaw.com/2022/07/21/nfts-and-copyright-some-burning-issues/> ("In the context of NFTs, since the underlying work is created digitally, tokenizing and selling it as an NFT would not violate the distribution right[.]"); see also Kimberly Adams & Sasha Fernandez, *How Does Copyright Law Affect The Sale and Distribution of NFTs?*, MARKETPLACE TECH, at 2:36 (Feb. 7, 2022), <https://www.marketplace.org/shows/marketplace-tech/how-does-copyright-law-affect-the-sale-and-distribution-of-nfts/> (explaining that because an NFT acts like a URL, "there's not really a copyright element that comes into play because the original art is not being adapted or distributed or copied in a meaningful way.").

<sup>41</sup> See Pratin Vallabhaneni & Adam Chernichaw, *How Do NFT Royalties Work*, TALKSONLAW (June 18, 2021), <https://www.talksonlaw.com/briefs/how-do-nft-royalties-work>; see also King & Spalding, *Not Your Standard Orange Grove: Non-Fungible Tokens & Securities Laws*, KING&SPALDING (June 16, 2021), <https://www.kslaw.com/news-and-insights/not-your-standard-orange-grove-non-fungible-tokens-securities-laws> ("One key characteristic of NFTs is provable control. [ ] NFTs can [ ] be accompanied by 'smart contracts,' which allow the seller to place conditions on the token-holder's rights, such as royalty payments to the original NFT creator. The conditions of an NFT's underlying smart contract are designed to be automatically enforced by the NFT's code on the blockchain.").

<sup>42</sup> See Reto Hofstetter et al., *Crypto-marketing: how non-fungible tokens (NFTs) challenge traditional marketing*, SPRINGER (July 29, 2022), <https://link.springer.com/article/10.1007/s11002-022-09639-2>.

isting barriers to entry for new authorship, creating consumer surplus through lowered search and acquisition costs for buyers and sellers of works of creative art.

NFTs achieve these goals through asset tokenization. Tokenization is a legal abstraction that has existed in the common law for centuries.<sup>43</sup> Tokens allow parties to transfer legal rights in an underlying asset through exchange of a unit representing proof of ownership rather than transferring physical possession of the underlying asset.<sup>44</sup> The use of tokens lowers transaction costs as parties no longer need to physically exchange possession and control over an asset to transfer ownership in the tokenized physical or digital asset.<sup>45</sup> These in turn facilitate more efficient distribution markets for assets that would otherwise be difficult to alienate, making those assets more (or less) saleable within a particular marketplace.<sup>46</sup>

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<sup>43</sup> See Rahul Dev, Legal Requirements Before Launching Cryptocurrency Token, RAHUL DEV, <https://patentbusinesslawyer.com/legal-requirements-before-launching-cryptocurrency-token/> (last visited Nov. 1, 2022); see also Juliet M. Moringiello & Christopher K. Odinet, *The Property Law of Tokens*, FLA. L. REV. 615 (forthcoming 2022) (“While not always called this by name, doctrinal tokenization has happened for many centuries—specifically, legal concepts have developed to recognize that a single thing can indeed be configured so as to actually represent rights—including property rights—in something else.”). See generally Elev8, *What Is Tokenization? — A Guide to Putting Assets on a Blockchain*, ELEV8 (Sept. 24, 2019), <https://www.elev8con.com/what-is-tokenization-a-guide-to-putting-assets-on-a-blockchain/> (“Tokenization is the process of converting physical (and non-physical) assets into digital tokens on a blockchain.”).

<sup>44</sup> *Id.* at 615-616

<sup>45</sup> See Steve Kaczynski & Scott D. Kominers, *How NFTs Create Value*, HARV. BUS. REV. (Nov. 10, 2021), <https://hbr.org/2021/11/how-nfts-create-value> (noting how “NFTs have fundamentally changed the market for digital assets. Historically there was no way to separate the “owner” of a digital artwork from someone who just saved a copy to their desktop. Markets can’t operate without clear property rights: Before someone can buy a good, it has to be clear who has the right to sell it, and once someone does buy, you need to be able to transfer ownership from the seller to the buyer.” Further explaining that the use of tokens—such as NFTs—lower transaction costs “by giving parties something they can agree represents ownership.” In doing so, they make it possible to build markets around new types of transactions—buying and selling products that could never be sold before, or enabling transactions to happen in innovative ways that are more efficient and valuable.”).

<sup>46</sup> See Kurt Yaeger et al., *Emerging Blockchain Technology Solutions for Modern Healthcare Infrastructure*, J. SCI. INNOVATION IN MED. 1, 24 (2019).

Assets can be either economically fungible or non-fungible.<sup>47</sup> A fungible asset is freely exchangeable with another unit of that asset.<sup>48</sup> Fungible assets are not unique as to one another.<sup>49</sup> Assets are non-fungible when they cannot be freely exchanged with another unit of the same asset.<sup>50</sup> Works of art can be fungible or non-fungible, depending on how reproducible the material object in which the work of authorship has been fixed is. Despite their legal status in the public domain, the original *Mona Lisa*, *Venus de Milo*, and *Wedding Feast at Cana* displayed in the Louvre remain economically non-fungible—*unique en son genre*. Each of these masterpieces is uniquely tied to the provenance of its creation. The prints, reproductions, and photographs sold downstairs in the Louvre’s gift shop, however, are fungible, with any one reproduction being freely exchangeable with another. As the works belong to the public domain, anyone is free to make their own copies of the originals.<sup>51</sup> Copyright law draws similar distinctions between material object and copyright.<sup>52</sup> In the *Mona Lisa*’s case, the material object, *i.e.*, the combination of the specific canvas and paint through the acts of Leonardo da Vinci’s labor, is non-fungible; the paper and ink used to make the mechanical reproductions are fungible. The same is true for sound recordings, with the master phonograph (or set of masters) being a non-fungible material object, and the copies being fungible.

A digital reproduction of a digital file is a (near) perfect reproduction of the original, resulting in no diminution of the value of the original copy upon an act of reproduction.<sup>53</sup> The copy does not interfere with the first owner’s interest in the first file, nor does it suffer degradation in value. The fact that a reproduction of a digital sound recording results in a “perfect

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<sup>47</sup> See Cambridge Univ. Press 2022, *Fungible*, CAMBRIDGE UNIV. PRESS 2022, <https://dictionary.cambridge.org/us/dictionary/english/fungible> (last visited Aug. 29, 2022) (defining “fungible” as “easy to exchange or trade for something else of the same type and value”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> The fungibility of a public domain copy would be contingent on the craftsmanship and quality of the reproduction. The law, however, would deem the passing of a copy off as an original an act of fraud, preserving the non-fungibility of the original despite its lapse into the public domain under the French copyright regime.

<sup>52</sup> 17 U.S.C. § 202 (1976) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

<sup>53</sup> See U.S. Copyright Office’s Digital Millennium Copyright Act, § 104 Report at xix (Aug. 29, 2001) (“Physical copies degrade with time and use; digital information does not.”).

copy” has been the key factor in Congress’ continued refusal to extend the codification of the common law first sale doctrine in Section 109 of the Copyright Act to digital resale.<sup>54</sup>

The commercial availability of digital recordings in the 1980s lowered the economic barriers preventing wide-spread music piracy.<sup>55</sup> Older analog technologies could not create a perfect copy of a phonorecord, leading to sound degradation in any copy of the work. Further, because the technology was primitive, the start-up costs necessary to engage in large scale economic piracy were an added disincentive against piracy. Digital copying techniques, however, result in mostly lossless copies of the original file, “allow[ing] thousands of perfect or near perfect copies (and copies of copies) to be made from a single original recording.”<sup>56</sup>

Thus, a digital copy of a sound recording is intrinsically fungible without the application of a DRM system. NFTs are novel as a DRM system because they transform fungible digital copies of works of authorship that could be fixed in any hard drive into nonfungible works fixed in a specifically identifiable material object. In tethering the digital object to an NFT, the tokenization process creates non-fungibility. This non-fungibility may create artificial scarcity in the digital asset if the NFT limits further tokenization of the digital asset.<sup>57</sup> Artificial scarcity, in turn, influences consumer behavior within a given marketplace.<sup>58</sup>

Artificial scarcity defines the early NFT sound recording marketplace. Borrowing from economic concepts created and refined in the video game and collectible trading card industry, NFTs have implemented randomization of these nonfungible tokens to influence consumer demand on an

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<sup>54</sup> *Id.* (“Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost.”).

<sup>55</sup> See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1073 (9th Cir. 1999).

<sup>56</sup> *Id.*

<sup>57</sup> Shipra Gupta, *The Psychological Effects of Perceived Scarcity on Consumers’ Buying Behavior*, DIGITALCOMMONS@UNIVERSITY OF NEBRASKA - LINCOLN (June 17, 2013), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1045&context=businessdiss> (arguing that scarcity, whether exogenous or endogenous, real or artificial, enhances consumer perceptions of value).

<sup>58</sup> See Rebecca Carroll, *NFTs: The Latest Technology Challenging Copyright Law’s Relevance Within a Decentralized System*, 32 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 979, 990-991 (2022) (explaining the economic incentives to NFT artists and consumers).

emerging speculative asset class.<sup>59</sup> In February of 2022, Snoop Dogg released NFTs of his new album, *B.O.D.R.*, in a limited release of 25,000 “stashboxes.”<sup>60</sup> Each stashbox randomly contains one of the seventeen album tracks at an initial sale price of \$5,000.00. Snoop’s *B.O.D.R.* NFTs sold \$44 million in five days, partly on speculative hype generated through operant conditioning.<sup>61</sup>

Other artists have mixed services into their NFT offerings. The Kings of Leon’s March 2022 release of *When You See Yourself* was the band’s first foray into the NFT marketplace, arising from their frustration with the low royalty rates offered by digital streaming.<sup>62</sup> Launching on both traditional streaming platforms and digital music stores, a purchase of a \$50.00 limited release NFT version of the album came with enhanced features, including a digital visual album cover, a physical vinyl copy, and a chance at winning a “golden ticket” at auction.<sup>63</sup> Minting just eighteen golden tickets, the band released six of them to the public, with the purchaser of the ticket getting free lifetime tickets to the band’s shows, special merchandise, and VIP treatment at concerts.<sup>64</sup>

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<sup>59</sup> Whether NFTs are or should be deemed securities or commodities is outside the scope of this Article. Whether lootboxes or stashboxes should be regulated as gambling is also outside the scope of this Article.

<sup>60</sup> Murray Stassen, *Snoop Dogg Sells Over \$44M Worth of ‘Stash Box’ NFTs in Just Five Days*, MUSIC BUSINESS WORLDWIDE (Feb. 15, 2022), <https://www.musicbusinessworldwide.com/snoop-dogg-sells-over-44m-worth-of-stash-box-nfts-in-just-five-days123/>.

<sup>61</sup> Whether “loot boxes” are or should be regulated as gambling is beyond the scope of this article. See generally J. E. R. Staddon and D. T. Cerutti, *Operant Conditioning*, 54 ANN. REV. PSYCHOL. 115–144 (2003) (defining operant conditioning as the study of reversible behavior maintained by reinforcement schedules); Daniel Vu, *An Analysis of Operant Conditioning and its Relationship with Video Game Addiction*, ART 108: INTRODUCTION TO GAMES STUDIES. 2 (2017) (“[O]perant conditioning’s main claim is that the correlation between the numbers of times an action is executed is dependent on if that action is rewarded or punished.”); Kevin Liu, *A Global Analysis into Loot Boxes: Is It “Virtually” Gambling?*, 28 WASH. INT’L LAW REV. 3, 773 (2019) (citing Kendra Cherry, *Variable-Ratio Schedules Characteristics*, VERYWELL MIND (Mar. 2, 2018), <https://www.verywellmind.com/what-is-a-variable-ratio-schedule-2796012> (“Variable rate reinforcement is a psychological practice where a response is reinforced after fluctuating intermittent outcomes.”)).

<sup>62</sup> See Samantha Hissong, *Kings of Leon Will Be the First Band to Release an Album as an NFT*, ROLLING STONE (Mar. 3, 2021), <https://www.rollingstone.com/pro/news/kings-of-leon-when-you-see-yourself-album-nft-crypto-1135192/> (“[S]treaming’s subscription-based pro rata model irreparably hurts artists, and NFTs will make modern fans want to own music again[.]”).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

The marketplace for digital sound recordings has rapidly embraced this nascent DRM technology. The technology addresses long standing Congressional concerns about digital file sharing technologies destroying disincentives to commercial music piracy. But what exactly is the consumer actually purchasing from the copyright owner?

### III. NFT-TETHERED SOUND RECORDINGS AND THE COPYRIGHT ACT

Section 102(a)(7) of the Copyright Act extends copyright protection to: “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . . includ[ing] . . . sound recordings.”<sup>65</sup> Traditional 102 analysis applies to any digital sound recording tethered to an NFT.<sup>66</sup> If the sound recording satisfies Section 102, then copyright vests in the work with the authorship of the sound recording—not upon minting of the NFT and regardless of whether an NFT is even utilized, as NFTs do not create copyrights.<sup>67</sup>

Subject to the limitations of Sections 107 through 122 of the Copyright Act, a copyright owner enjoys six statutory rights under Section 106.<sup>68</sup> While Section 106(1) grants the Copyright owner the exclusive right to make reproductions of the work, not all downstream reproductions infringe upon that right. These lawful reproductions include: (1) those reproductions necessary for lawful public or private performance; (2) those reproductions necessary for lawful digital distribution; and (3) the technical functionality of NFT tethering as contemplated under the Copyright Act.

#### A. *Lawful Enablement: Reproductions for Use*

At a minimum, use of an NFT-tethered sound recording on a local device requires a consumer to either download an ephemeral local copy of the work or stream a digital transmission of the work, with the first act

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<sup>65</sup> Whether an NFT is original under Section 102 is beyond the scope of this Article. See 17 U.S.C. § 102 (1990).

<sup>66</sup> *Id.*

<sup>67</sup> See 17 U.S.C. § 201 (1978); see also Jeremy Goldman, *A Primer on NFTs and Intellectual Property*, LEXOLOGY (Mar. 11, 2021), <https://www.lexology.com/library/detail.aspx?g=D96ed012-8789-4e87-bc1d-70ba76569c0f> (explaining that the author initially owns the copyright in the underlying asset unless they transfer the ownership of their copyright to another individual).

<sup>68</sup> 17 U.S.C. § 106 (2002).

covered under Section 106(1) and the latter covered under Section 106(6), if performed publicly.<sup>69</sup> These reproductions are ancillary and unrelated to acts of reproduction necessary to exploit the distribution right under Section 106(3).

There is, of course, nothing that technologically limits an NFT to service as a general form of DRM. A copyright owner could sell an NFT of a sound recording conditioned on use in the owner's music software program. An encrypted digital file could be loaded to the user's device and require a check-in with the NFT ledger to confirm ongoing ownership of the file before authorizing performance of the work.

For the vast majority of NFT-tethered sound recordings, the copyright owner links the NFT to a digital file stored on a third-party's hard drive.<sup>70</sup> Stored on the copyright owner's hard drive, on a cloud service, or on-chain, the NFT serves as an access and copy prevention control to the specifically identifiable work, allowing the NFT owner to call and stream the file ephemerally to a local computer on an authorized basis.<sup>71</sup> Without this technological enablement, there will be no way to lawfully use the sound recording.<sup>72</sup> Any copying necessary to facilitate the use of the lawfully acquired sound recording is excusable, as these activities further the immediate market objectives of the copyright owner in a manner that does not compete with or diminish the value of the first sale of the copyright owner's other offerings.<sup>73</sup>

Section 117 provides additional safeguards for authorized use by consumers. Section 117(1) states that it is not copyright infringement for the "owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program" if that copy or adap-

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<sup>69</sup> See generally, 2 Nimmer on Copyright § 8.13[A].

<sup>70</sup> Whichever hard drive is used is ultimately immaterial, as all would be treated as a phonorecord under Section 101 of the Act. See 17 U.S.C. 101 (2010).

<sup>71</sup> While generally not seen in practice, a properly licensed NFT *could* permit access to the sound recording through a post on a public social media platform or website, allowing the NFT owner to authorize others to publicly perform the work without the NFT owner engaging in a literal transmission of the work.

<sup>72</sup> See 2 Nimmer on Copyright § 8.13 n. 26 ("Although it is certainly the case that the first sale doctrine does not privilege reproduction of copyrighted works, the instant question is whether the technology actually *distributes* the affected copy rather than reproducing it.").

<sup>73</sup> See *Capitol Recs., LLC v. ReDigi Inc.*, 910 F.3d at 649, 658 (2d Cir. 2018) (stating that "[t]he production of innocuous, unauthorized reproductions through the unavoidable function of a computer, when done for purposes that do not involve competing with the rights holder in its exclusive market, is outside the scope of this dispute.").



tation is essential to using or executing the computer program.<sup>74</sup> For the sound recording to function as a sound recording, at least a localized copy of the work must be temporarily created on the purchaser's device.<sup>75</sup> Additionally, many NFTs license a right to engage in public performances or displays of the work.<sup>76</sup> Enabled by Section 117, many NFTs provide technological access and rights control measures sufficient to afford the consumer a way to engage in lawful public displays or performances of the work under Sections 106(4) and (5).

### B. Lawful Enablement: Reproductions for Distribution

Together, Sections 106(1) and (3) create the exclusive rights for the copyright owner “to reproduce the copyrighted work in copies or phonorecords” and “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>77</sup> During the years leading up to the enactment of the 1976 Act, Congress modified the proposed language in the then pending 1976 omnibus revision, relabeling the previous “publication” right as “distribution,” expanding the scope of the original Act.<sup>78</sup> From 1971 to 1976, after the enactment of the Sound Recording Act, the “right to distribute” applied solely to sound recordings.<sup>79</sup> In 1976, the current form of Section 106(3) was enacted. While the Copyright Act does not define distribution, the Supreme Court has interpreted the distribution right in the 1976 Act as

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<sup>74</sup> 17 U.S.C. § 117 (1998).

<sup>75</sup> If Congress had not rejected CONTU's proposal for amending the placeholder version of Section 117 and left in “possessor” rather than “owner,” NFTs would fail to function as a DRM system, as the owner of an NFT based on non-localized access controls is not in possession of the underlying digital file. In the common use cases, the possessor of the tethered file is the owner of the hard drive serving as the phonorecord. The NFT owner merely has a right to execute a performance of the NFT contingent on the licensing terms of the NFT but no way to make lawful reproductions unless separately granted on a limited basis from the copyright owner.

<sup>76</sup> See Richard Lawler, *Twitter brings NFTs to the timeline as hexagon-shaped profile pictures*, THE VERGE (Jan. 21, 2022), <https://www.theverge.com/2022/1/20/22893502/nft-twitter-profile-picture-crypto-wallet-opensea-coinbase-right-click> (explaining the launch of Twitter's NFT-tethered profile pictures).

<sup>77</sup> 17 U.S.C. § 106 (1), (3) (2002).

<sup>78</sup> 2 Nimmer § 8.11[A] (The drafters of the current Act wished to avoid the tremendous accumulation of common law interpretation that had thus arisen over how to define “publication.”).

<sup>79</sup> 2 Nimmer § 8.11[B][3] (citing 17 U.S.C. § 1(f) (1909), as added by Act of Oct. 15, 1971, 85 Stat. 391).

analogous to the older publication right, requiring consideration of the evolving frameworks of the 1790, 1909, and 1976 Acts.<sup>80</sup>

### 1. Early Cases

While copyright has been called the daughter of the printing press,<sup>81</sup> the grandchildren of this reproduction technology have required expansions in the scope of copyright protection.<sup>82</sup> This expansion is inseparable from the invention and commercial adoption of new reproduction and distribution technologies, particularly in the case of sound recordings.<sup>83</sup> As new modes of technological reproduction are introduced, the barriers to entering the marketplace for reproductions are lowered, creating greater economic incentives to engage in piracy. The development of sound recording technologies evidences these economic pressures, in that lower transaction costs led to growing distributions of pirated works.

Originally, music compositions were protected as “books” under the 1790 version of the Act.<sup>84</sup> Sound recordings would not be invented for another century. In 1877, Thomas Edison’s mechanical phonograph cylinder brought a new mode of reproduction and distribution of sound to the public.<sup>85</sup> Gradual improvements enhanced the durability and performance of the devices. Edison’s early devices used tin foil spread over cardboard to record sound waves.<sup>86</sup> Alexander Graham Bell’s improvements—the use of wax and the change to flat discs—enabled Emile Berliner’s 1887 invention of the

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<sup>80</sup> See Harper & Row, *Publrs v. Nation Enters*, 471 U.S. 539, 552 (1985).

<sup>81</sup> 1 Nimmer on Copyright § 2A.02 (quoting Bernard Lang, *Orphan Works and the Google Book Search Settlement: An International Perspective*, 55 N.Y.L. SCH. L. REV. 111, 154 (2011)).

<sup>82</sup> See House Report No. 94-1476.

<sup>83</sup> *Id.*

<sup>84</sup> 1 Nimmer on Copyright § 2.05[A][1][a]; see 1 Stat. 124, 1 (protecting “any map, chart, book or books”); Musical compositions were expressly added in a 1831 amendment to the 1790 Act; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

<sup>85</sup> See Library of Congress, *Inventing Entertainment: The Early Motion Pictures and Sound Recordings of the Edison Companies*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-sound-recordings/history-of-the-cylinder-phonograph/> (last visited Aug. 29, 2022).

<sup>86</sup> See *Id.*; see also ThoughtCo., *Edison’s Invention of the Phonograph*, THOUGHTCO., <https://www.thoughtco.com/invention-of-the-phonograph-4156528> (last visited Nov. 1, 2022) (explaining how Edison’s early cylinders only could store “about two minutes of music. But as the technology was improved, a great variety of selections could be recorded.”).

gramophone.<sup>87</sup> Mass production of phonorecords came in 1895, and record players dominated commercial markets until the invention of the cassette player in the early 1980s.<sup>88</sup>

An automated performance device, the piano-roll player, entered the market in the early 1890s, leading to the Supreme Court's decision in *White-Smith Music Publishing Co. v. Apollo Co.*<sup>89</sup> In *White-Smith*, the alleged infringer was accused of copying sheet music compositions and imprinting them onto perforated paper piano rolls.<sup>90</sup> The rolls would allow a specially designed piano to autonomously perform the music composition without a human performer.<sup>91</sup> The music rolls were made of perforated sheets that used pneumatics to sound the notes on the piano.<sup>92</sup> The rolls were constructed in one of three ways, by: (1) transcribing the music compositions directly to the roll, (2) copying existing rolls, or (3) using an automatized recording device to capture a live performance.<sup>93</sup> In a technological sense, these early piano rolls, as a type of punch card technology, were a rudimentary computer software—a set of instructions for a machine to interpret and perform or display to a user.

In *White-Smith*, however, the Court held that the piano transcriptions were not an infringement of the underlying music compositions—they were not a “copy” of the original work—as the Copyright Act at the time required the infringing work to be readable by “those skilled in the art . . . by reading, in playing or singing, definite impressions of the melody.”<sup>94</sup> The Court read the writing requirement to mean “a written or printed record of it in intelligible notation[,]” foreclosing protection to works that required the use of a machine or device to interpret the copy, thereby barring musical compositions (and, through *dictum*, any other works) that were not *visually* perceptible without the aid of a machine.<sup>95</sup> This interpretation, in turn, meant that a music performer could not produce two copies of a sound re-

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 13 (explaining how “[c]onveying no meaning, then, to the eye of even an expert musician and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared waxed cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope”).

<sup>92</sup> *Id.* at 10.

<sup>93</sup> *Id.*

<sup>94</sup> *White-Smith*, 209 U.S. at 18 (citing § 4952 (U.S. Comp. Stat. Supp. 1907, p. 1021)).

<sup>95</sup> *Id.* at 17.

ording of a music composition for deposit with the Copyright Office, as “mechanical reproductions were not. . . ‘copies’” under the Act.<sup>96</sup>

Congress responded to *White-Smith* with the Copyright Act of 1909, which eased the human perception requirement to “fixation in a tangible medium . . . that is perceptible either directly or with the aid of a machine or device” and the creation of the compulsory music licensing scheme.<sup>97</sup> Thus, the 1909 House Report recognized that the distinction between sound recordings and musical compositions was no longer a theoretical question.<sup>98</sup> Congress did not, however, add sound recordings as a protectable category of works at the time, and the legislative history shows congressional attention was focused solely on amending section 1(e) to overturn *White-Smith’s* visual perception requirement.<sup>99</sup> The 1976 Act later added that this medium may be one “now known or later developed” to avoid the artificial medium distinctions drawn from cases like *White-Smith*.<sup>100</sup>

The majority’s dictum and Judge Learned Hand’s dissent in the 1955 decision *Capitol Records v. Mercury Records Corp.* were the first judicial suggestions that sound recordings, though not visually perceptible, nor literally a “writing,” were separate constitutional ‘writings’ from musical compositions under the Progress Clause.<sup>101</sup> In *Mercury Records*, the Court reviewed a German company’s grant of a limited license to make and vend phonographic records in Czechoslovakia.<sup>102</sup> The defendant made and vended the same records in the United States. Relying on *White-Smith*, the Court in *Mercury Records* held that, while Congress had the power under the Progress Clause to extend protection to sound recordings, it had not done so under the 1909 amendment to the Copyright Act.<sup>103</sup> The Court went on to note that “[n]othing in the Act indicates an intention that the record shall be the

<sup>96</sup> *Capitol Recs. v. Mercury Recs. Corp.*, 221 F.2d 657, 660 (2d Cir. 1955).

<sup>97</sup> 17 U.S.C. § 5 (1909).

<sup>98</sup> See Rep., No. 2222, 60th Cong., 2d Sess. 10

<sup>99</sup> See *Mercury Recs. Corp.*, 221 F.2d at 654 (J. Hand, dissenting) (arguing that Congress did not intend the 1909 Act to include sound recordings) (quoting H.R. Rep., No. 2222, 60th Cong., 2d Sess. 10).

<sup>100</sup> 8 Nimmer on Copyright [51] Section 102 (2022).

<sup>101</sup> 1 Nimmer on Copyright § 1.08[B][2].

<sup>102</sup> See generally, *Mercury Recs. Corp.*, 221 F.2d at 647.

<sup>103</sup> *Id.* at 659. Notably, Judge Learned Hand broadly construed the scope of an author’s writings under the 1909 Act in the earlier 1921 District Court decision. See *Reiss v. National Quotation Bureau*, 276 F. 717, 719 (S.D.N.Y. 1921) (holding the Progress Clause includes the known and unknown); see also The House Report 1 on the Copyright Act of 1909 (citing *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53 (“Congress and the courts have always given a liberal construction to the word ‘writings.’”)).

‘copyrighted work.’” As a result, Congress did not include sound recordings in the 1909 Act, rejecting it in favor of a compulsory license.<sup>104</sup>

## 2. Digital Distribution

By the 1960s, inexpensive, easy-to-transport tape-recording equipment became commercially available, creating piracy concerns for copyright owners. With the new ease of private reproduction, the music industry began pressuring Congress to revise the Copyright Act to deal with increased music piracy.<sup>105</sup> In 1961, the Register of Copyrights first recommended that sound recordings “be protected against unauthorized duplication under copyright principles.”<sup>106</sup> Yet, the Copyright Act remained unchanged until 1971, when Congress enacted the Sound Recording Act, adding sound recordings as a protectable class of works under the 1909 version of the Copyright Act.<sup>107</sup> While the House Report to the Sound Recording Act of 1971 concluded that “sound recordings are clearly within the scope of the ‘writings of an author’ capable of protection under the Constitution,”<sup>108</sup> the distinction between copies and phonorecords remains preserved under both the 1971 amendments and the present version of Section § 101.<sup>109</sup>

Parallel to rapid changes in the music industry, rapid advances in computing technologies in the 1960s led to similar concerns in the digital space. The first deposit of a computer program with the Copyright Office occurred on November 30, 1961.<sup>110</sup> By 1967, as Congress was considering updating the 1909 Act in response to sound recording reproduction technologies, “it was apparent that the copyright problems raised by computer uses had not been dealt with directly in the bills then before the House of Representa-

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<sup>104</sup> See John E. Mason, Jr. *Sound Recordings Protection*, 59 CAL. L. REV. 549 (1971).

<sup>105</sup> Patry, *Copyright Law and Practice*, 74 (2000) <http://digital-law-online.info/patry/patry7.html#sec6.21>.

<sup>106</sup> *Copyright law Revision Part 1: Report of the Register of Copyrights on the General Revision of the U.S. copyright law*, Before the H. Comm. on the Judiciary. 87th Cong., 18 (Comm. Print, 1961).

<sup>107</sup> See 1 Nimmer on Copyright § 1.08[B]2.

<sup>108</sup> H. R., p. 56. See H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 5 (1971); S. Rep. No. 92-72, 92d Cong., 1st Sess. 4 (1971).

<sup>109</sup> See 17 U.S.C. § 101 (2010).

<sup>110</sup> See Lee A. Hollaar, *Chapter 2: Copyright of Computer Programs*, LEGAL PROTECTION OF DIGITAL INFORMATION, <http://digital-law-online.info/lpdi1.0/treatise17.html> (last visited Aug. 29, 2022) (noting the first deposit of a computer registration in the section entitled “I.B. The First Software Copyrights.”).

tives and the Senate.”<sup>111</sup> However, Congress was concerned that an adequate study of computers and copyright law would delay the enactment of other urgently needed revisions, including the Sound Recording Act.<sup>112</sup> On December 31, 1974, Congress established the national Commission on New Technological Uses of Copyrighted Works (“CONTU”) with the enactment of Public Law 93-573.<sup>113</sup> CONTU met between 1975 and 1978 to “assist the President and Congress in developing a national policy for both protecting the rights of copyright owners and ensuring public access to copyrighted works when they are used in computer and machine duplication systems[.]”<sup>114</sup> While CONTU prepared its report, Congress modernized several sections of the 1976 Act to include computers, including the definition of computer programs and the inclusion of several computer related storage devices within the definition of “literary works” under Section 101 of the Act.<sup>115</sup> Congress also put a placeholder into Section 117 pending CONTU’s final report.<sup>116</sup>

CONTU’s report came on July 31, 1978 and noted that “placement of any copyright work into a computer is the preparation of a copy and, therefore, a potential infringement of copyright.”<sup>117</sup> However, unlike the modern approach, CONTU did not view the loading of a lawfully possessed program into a computer as impacting the reproduction right, but rather, the right to create a derivative under Section 106 (2), analogizing the conversion of the program as a “translation, transformation, and adaptation of the work.”<sup>118</sup> CONTU recommended that Section 117 be amended to cover possessors of copyrighted computer programs making copies necessary to execute the program.<sup>119</sup> Congress adopted CONTU’s recommendations, changing only the word “possessor” to “owner” in Section 117 without comment.

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<sup>111</sup> See CONTU at 3 Report citing 90th Cong., 1st sess., 1967 H.R. 2512; 90th Cong., 1st sess., 1967 S. 597.

<sup>112</sup> See CONTU at 3.

<sup>113</sup> Public Law 93-573 (1974).

<sup>114</sup> CONTU at 3. The Commission also studied photocopying technologies at this time.

<sup>115</sup> See 17 U.S.C. § 101 (2010). One could argue that, without the material objects savings clause, some advanced storage devices, like solid state drives or quantum computers, would fall outside the definition of “film, tapes, disks, or cards.” The House Report does include “computer databases” despite omitting it from Section 101 as enacted. See H.R. Rep. No. 94-1476 at 54 (1976).

<sup>116</sup> See Hollaar, *supra* note 110 (explaining that the Copyright Act of 1976 clearly reflected Congressional intent to add computer software to the scope of the Act).

<sup>117</sup> CONTU at 12.

<sup>118</sup> *Id.*

<sup>119</sup> See Hollaar, *supra* note 110.

This change to Section 117 has unintended consequences for NFT technologies. If Congress had left “possessor,” rather than “owner,” in Section 117, someone who had stolen the credentials to an NFT could have taken shelter in Section 117 for the making of unlawful copies.<sup>120</sup> While ownership presumes lawful acquisition, possession does not.<sup>121</sup> The high-profile NFT theft involving Seth Green’s Bored Ape and his plans to make derivative works under Section 106(2) demonstrates this difference. If CONTU’s version of Section 117 had been enacted, Section 117 would have been in immediate conflict with the writing requirement for transference of a copyright owner’s rights under Section 204 of the Act.<sup>122</sup>

Regardless, the 1965 Supplemental Report statement of legislative purpose to the then-pending 1976 omnibus revision was, as Nimmer calls it, “remarkable.”<sup>123</sup> The drafters of the 1976 Act were keenly aware that “no one can foresee accurately and in detail the evolving patterns in the ways [an] author’s work will reach the public 10, 20 or 70 years from now.”<sup>124</sup> To Congress, it was “becoming increasingly apparent that the transmission of works by . . . linked computers, and other new media of communication may soon be among the most important means of disseminating them[.]”<sup>125</sup> Looking toward a future of linked computer network file sharing, Congress foresaw non-profit distribution of works coming into direct conflict with the incentive theory grounding the whole of American copyright law.<sup>126</sup> Fifty years later, non-profit distribution of sound recordings caught the public’s attention in the high-profile music file sharing cases.

### 3. The Peer-to-Peer File Sharing Cases

In the seminal *Napster* file-sharing case, the Ninth Circuit held that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights[.]” deciding that “making available” a file was a sufficient act of distribution to violate Section 106(3), prior to any

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<sup>120</sup> See 17 U.S.C. § 117 (1998).

<sup>121</sup> *Id.*

<sup>122</sup> See Lorenzo Franceschi-Bicchierai, *Seth Green NFT Theft Part of Multimillion-Dollar Scam Campaign, Investigator Says*, VICE (July 12, 2022), <https://www.vice.com/en/article/jgp8kd/seth-green-nft-theft-part-of-multi-million-dollar-scam-campaign-investigator-says> [https://perma.cc/QH69-67P5].

<sup>123</sup> 2 Melville Nimmer, *Nimmer on Copyright* § 8.11 at 17 (1978).

<sup>124</sup> *Id.* at 16 (quoting Reg. Supp. Rep., p. 13).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 17.

act of unlawful reproduction.<sup>127</sup> Napster's platform hosted a peer-to-peer network architecture that allowed users to share files with one another.<sup>128</sup> Each uploaded file would have a name and some associated metadata indexed in the Napster search engine.<sup>129</sup> Napster did not make direct reproductions nor make the reproductions available; Napster facilitated distribution of the user's reproductions by making them available to users through its centrally stored file indexing program.<sup>130</sup>

In further proceedings in the district court, the Northern District of California looked to the Supreme Court's previous decision in *Harper & Row* for further guidance on the plaintiff's distribution claims.<sup>131</sup> The Court observed that while Section 101 lacked an express definition of "distribution[,]," the Supreme Court had interpreted Congress' equation of the distribution right with the publication right. Publication is defined, in pertinent part, as:

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The *offering* to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication[.]<sup>132</sup>

The first clause requires actual distribution, the second contemplates an offer of distribution.<sup>133</sup>

In the aftermath of *Napster*, a number of companies shifted to a decentralized index for their peer-to-peer file sharing network, hoping to find safe harbor under the *Sony* staple articles doctrine, a defense ultimately rejected by the Supreme Court in the *Grokster* case.<sup>134</sup> The next decade and a half saw two changes in file sharing litigation: the rejection by some courts of the

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<sup>127</sup> A&M Inc. v. Napster Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

<sup>128</sup> *Id.* at 1011.

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

<sup>132</sup> 17 U.S.C. § 101 (2010) (emphasis added).

<sup>133</sup> 2 Melville Nimmer, *Nimmer on Copyright* § 8.11 (1978). In the later *Perfect 10 v. Google Inc.*, the Ninth Circuit confusingly stated that "the distribution right required an actual distribution of a copy. . ." but "merely making images available" where an owner of the work has already made the available copies of the work already." *Id.*

<sup>134</sup> *See* MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1040 (C.D. Ca. 2003) (explaining the spokes-and-hub Grokster and "true" decentralized Gnutella file sharing networks); *id.* at 1036 (holding *Sony* defense not available where putative defendant has actual knowledge of infringement).



“making available” reading of the distribution right, and the music industry’s campaign against individual file sharing.<sup>135</sup> The courts remain divided on this issue.<sup>136</sup> *London-Sire Records, Inc. v. Doe 1*, for example, rejects the “making available” doctrine found in *Napster*.<sup>137</sup> Nimmer notes that the distinction has more academic than practical import, at least inasmuch as tethering technologies remained in an unsophisticated state until around 2018.<sup>138</sup>

In *London-Sire*, the Massachusetts District Court did not view the materiality of a phonorecord in a literal sense, unlike the courts adopting the “making available” doctrine.<sup>139</sup> Instead, the Court broadly construed “fixation” and “phonorecord,” holding that the reproduction of a sound recording in a digital file resulted in the creation of a new material object.<sup>140</sup> As the Court noted, “[w]hat matters in the marketplace is not whether a material object ‘changes hands,’ but whether, when the transaction is completed, the distributee has a material object.”<sup>141</sup> This reading of the Copyright Act presupposes the state of reproduction and DRM technology as it existed in the early to mid-part of the 2000s.

One company sought to create a lawful digital resale marketplace through application of the first sale doctrine and a (then) novel DRM system. In 2009, ReDigi, Inc. launched its digital sound recording resale marketplace, where consumers could buy and resell lawfully purchased music files from iTunes.<sup>142</sup> ReDigi was founded “with the goal of creating enabling technology and providing a marketplace for the lawful resale of law-

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<sup>135</sup> 2 Melville Nimmer, *Nimmer on Copyright* § 8.11 (1978). Individual user litigation is outside the scope of this article.

<sup>136</sup> Compare *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (holding that making copyrighted material available is sufficient to constitute a distribution), and *Arista Records LLC v. Greubel*, 453 F.Supp. 2d 961, 969-70 (N.D. Tex. 2006) (citing and following *Hotaling*), and *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 U.S. Dist. LEXIS 65765, 2006 WL 2844415, at \*3-\*4 (W.D. Tex. July 17, 2006) (same), with *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802-05 (N.D. Cal. 2005) (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and “inconsistent with the text and legislative history of the Copyright Act of 1976”), and *Nat’l Car Rental Sys., Inc.*, 991 F.2d at 434, (8th Cir. 1993) (stating that infringement of the distribution right requires the *actual* dissemination of copies or phonorecords).

<sup>137</sup> See 542 F. Supp. 2d at 166–67.

<sup>138</sup> 2 Melville Nimmer, *Nimmer on Copyright* § 8.11 at 46 (1978).

<sup>139</sup> See 542 F. Supp. 2d at 170.

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* at 174.

<sup>142</sup> *ReDigi Inc.*, 910 F.3d at 649.

fully purchased digital music files from the iTunes store.”<sup>143</sup> ReDigi required its users to download a DRM program called the “Music Manager.”<sup>144</sup> Once downloaded, the Music Manager would identify lawfully purchased iTunes music and check for modification.<sup>145</sup> If eligible, the program would mark it available for resale on ReDigi’s resale platform.<sup>146</sup>

The ReDigi user then had the option to migrate that file to ReDigi’s remote “Cloud Locker.”<sup>147</sup> The Cloud Locker was a hard drive owned, controlled, and operated by ReDigi.<sup>148</sup> Normally, transferring a digital file creates a perfect reproduction of the file on the receiving hard drive.<sup>149</sup> ReDigi’s Music Manager purported to delete the origin file from the user’s hard drive in the process of transferring it to the Cloud Locker.<sup>150</sup> To send a digital file, a user’s computer would break that file into smaller “packets” for transmission over the internet.<sup>151</sup> ReDigi’s program would delete each of those packets as they were transmitted to the Cloud Locker.<sup>152</sup> Users could continue streaming files loaded into the Cloud Locker until resold on the ReDigi marketplace.<sup>153</sup>

The ReDigi marketplace allowed users to search for previously uploaded sound recordings.<sup>154</sup> Upon resale, a purchaser could choose to leave the file in the Cloud Locker, or to download the file to their own computer.<sup>155</sup> If a purchaser downloaded the file to a personal computer, it would be deleted from the Cloud Locker.<sup>156</sup> Acting in good faith, ReDigi tried to use the DRM functionality of its Music Manager and Cloud Locker system to police against unlawful reproductions of the lawfully acquired sound recording.<sup>157</sup> By preventing users from retaining a copy of an uploaded file, and by deleting the sound recording file upon resale and download to a

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<sup>143</sup> *Id.* at 652.

<sup>144</sup> *Id.* at 652-53.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 653.

<sup>147</sup> *ReDigi Inc.*, 910 F.3d at 653.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 662 (stating how “[t]he digital files resold by ReDigi, although used, do not deteriorate the way printed books and physical records deteriorate.”).

<sup>150</sup> *Id.* at 653-54.

<sup>151</sup> *Id.*

<sup>152</sup> *ReDigi Inc.*, 910 F.3d at 654.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *ReDigi Inc.*, 910 F.3d at 654. Notably, ReDigi’s 1.0 system did not stop users from retaining duplicates on other devices that the Music Manager was not installed on.

purchaser's computer, ReDigi believed it had created a lawful resale marketplace in a manner that advanced the policy goals of copyright law.<sup>158</sup> But the Second Circuit ultimately ruled that ReDigi's actions violated Section 106(1), rejecting ReDigi's first sale defense as inapplicable to violations of a copyright owner's reproduction right.<sup>159</sup>

ReDigi raised two arguments in support of its first sale defense. First, ReDigi argued that the Music Manager system resulted in the distribution of a *particular* digital file.<sup>160</sup> Likening a particularly identifiable digital sound recording to a material object, ReDigi argued that the digital music files qualified as phonorecords under Section 101.<sup>161</sup> ReDigi believed that if the digital file were a phonorecord, then Section 109 would apply and provide a defense to Capitol Records' infringement claims. Recognizing that "[the Court's] understanding of the technology was limited," the Second Circuit ruled narrowly, holding that the system still created an unlawful reproduction of the file, even if the digital file itself constituted a phonorecord.<sup>162</sup>

Second, ReDigi argued that its DRM system did not result in a reproduction as it "'causes [packets] to be removed from the file . . . remaining in the consumer's computer' as those packets are copied into the computer buffer and then transferred to the ReDigi server."<sup>163</sup> The Second Circuit held that this did not "rebut or nullify the fact that the eventual receipt and storage of that file in ReDigi's server, as well as in the new purchaser's device . . . does involve the making of new phonorecords."<sup>164</sup> So, "[u]nless the creation of those new phonorecords is justified by the doctrine of fair use

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<sup>158</sup> *Id.* at 652 n.3 ("[ReDigi] invented a system designed in good faith to achieve a goal generally favored by the law of copyright, reasonably hoping the system would secure court approval as conforming to the demands of the Copyright Act.").

<sup>159</sup> *Id.* at 656 ("[I]n the course of ReDigi's transfer, the phonorecord has been reproduced in a manner that violates the Plaintiffs' exclusive control of reproduction under § 106(1)." (emphasis omitted)).

<sup>160</sup> *Id.* ("ReDigi emphasizes that its system simultaneously 'causes [packets] to be removed from the . . . file remaining in the consumer's computer' as those packets are copied into the computer buffer and then transferred to the ReDigi server, Appellants Br. 24, so that the complete file never exists in more than one place at the same time.").

<sup>161</sup> *Id.* The Second Circuit declined to rule on this argument, as the system still resulted in an unlawful reproduction regardless of whether the digital file was a material object. *But see* London-Sire Recs., Inc., 542 F. Supp. 2d at 170 (stating that "[i]t makes no difference that the distribution occurs electronically, or that the items are electronic sequences of data rather than physical objects.").

<sup>162</sup> *ReDigi Inc.*, 910 F.3d at 656 n.10.

<sup>163</sup> *Id.* at 656.

<sup>164</sup> *Id.* at 657.

. . . the creation of such new phonorecords involves unauthorized reproduction.”<sup>165</sup>

The Second Circuit’s narrow focus on the reproduction right, rather than the distribution right, avoided application of the “making available” doctrine in the distribution context. It also did not address the 1995 amendments to Section 115 to encompass the distribution of nondramatic musical compositions.<sup>166</sup> NFTs, being the first sophisticated tethering technology, bring practical import to this narrow issue of statutory interpretation.<sup>167</sup>

### C. DRM Tethering

Section 202 makes clear that ownership of the material object in which a lawful copy is fixed is distinct from ownership of the copyright.<sup>168</sup> Section 109 provides the most important limitation on the copyright owner’s distribution right, stating that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>169</sup> As a result, a consumer does not commit copyright infringement when they resell an iPhone or other electronic device onto which they have downloaded music without first erasing the downloaded songs.<sup>170</sup> The first sale doctrine exhausts the copyright owner’s rights to control the resale of a phonorecord once they have made the initial sale of the fixed work.<sup>171</sup> For a time, it was

<sup>165</sup> *Id.*

<sup>166</sup> 4 Patry on Copyright § 13:23 at 2.

<sup>167</sup> *See infra*, Section IV.

<sup>168</sup> 4 Patry on Copyright § 13:15 at 3 (permitting video store to rent or sell lawfully purchased copies of audiovisual works (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984))); *Sturgis v. Target Corp.*, 630 F.Supp.2d 776, 778-779 (E.D. Mich. 2009).

<sup>169</sup> 17 U.S.C. § 109 (2008).

<sup>170</sup> Characterizing the resale of a device fixed with a sound recording purchased on iTunes as *per se* lawful resale is misleading. Such conduct is not copyright infringement, but it violates the iTunes terms of use. *See* Apple, *Apple Media Services Terms and Conditions*, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Aug. 26, 2022) (noting the scope of license in § G (a), by specifically stating, “[y]ou may not transfer, redistribute or sublicense the Licensed Application except as expressly permitted in this Agreement and, if you sell your Apple Device to a third party, you must remove the Licensed Application from the Apple Device before doing so.”).

<sup>171</sup> Robert Rotstein, *The First Sale Doctrine in the Digital Age*, INTELL. PROP. & TECH. L. J. (Mar. 2010), <https://www.msk.com/newsroom-publications-1114> (ex-

unsettled whether the codification of the first sale doctrine in Section 109 should extend to digital files.

In 2001, the Copyright Office issued its Digital Millennium Copyright Act Section 104 report (“the Report”).<sup>172</sup> Largely on economic grounds, the Report opposed enlargement of the first sale doctrine to encompass digital resale.<sup>173</sup> Noting the physical degradation of physical objects, the Report found that the nonrivalrousness of digital files made them perfect substitutes for the digital works originally distributed by a putative copyright owner.<sup>174</sup> These transmissions affect the marketability for original digital files in such a way that it undermines the public policy goal of promoting the creation of works of expression.<sup>175</sup>

Further, the Report evaluated DRM technologies that existed in that particular time period.<sup>176</sup> The Report found that “unless a “forward-and-delete” technology is employed to automatically delete the sender’s copy, the deletion of a work requires an additional affirmative act on the part of the sender subsequent to the transmission.” Due to evidentiary concerns, it would be impossible to know for certain whether a consumer had in fact actually deleted the purchased original file without making additional reproductions of the work, lawful or unlawful.<sup>177</sup> It was impossible to say for sure, in 2001, that the market would ever develop or embrace a DRM technology that solved this evidentiary concern.<sup>178</sup>

ReDigi tried to lawfully solve this identified market failure with a technological measure.<sup>179</sup> But regardless of intent, the ReDigi system effectuated an unlawful transmission of the digital sound recordings through the unique Media Manager DRM system in a manner that created unlawful reproductions.<sup>180</sup> Conversely, a sufficiently sophisticated DRM system that fa-

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plaining how the first sale doctrine “rest[s] on the principle that [a] copyright is entitled to realize the full value of each copy or phonorecord upon its disposition.”)

<sup>172</sup> See Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act xviii-xxi, 19-40, 78-105 (August 2001) (“the DMCA Report”).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> The DMCA Report at 19-40; 78-105.

<sup>179</sup> *ReDigi Inc.*, 910 F.3d at 654 n.3. Notably, the district court found that ReDigi’s public policy defenses were selfishly motivated. See *Capitol Records, LLC v. ReDigi, Inc.*, 934 F.Supp.2d 640 (S.D.N.Y. 2013), *aff’d*, 910 FL2d 649 (2d Cir. 2018).

<sup>180</sup> *ReDigi Inc.*, 910 F.3d at 664.

cilitates transfer of ownership of the sound recording by tokenizing the consumer's interest in either the phonorecord *or* the digital file would permit lawful transmission of the work *without* an act of reproduction, and would neither create an unlawful reproduction of the work, nor violate the distribution right.<sup>181</sup> And if the digital file was originally created lawfully—either through the direct authorization of the copyright owner, fair use under Section 107, or if excused under Section 1008—then the distribution right would not be infringed through such a DRM system.<sup>182</sup> Stated differently, a DRM system that permits the transfer of ownership of a lawfully created copyrighted digital file (or its material object) *without* a concomitant act of reproduction does not violate the copyright owner's reproduction or distribution right.

Unlike ReDigi's system, which required an act of reproduction to facilitate transmission of the centrally saved sound recording, an NFT-tethered sound recording tethers a nonfungible token appended on a blockchain ledger to a uniquely identifiable digital file saved on a uniquely identifiable phonorecord.<sup>183</sup> The NFT owner does not need to make a copy available or transmit files directly to a purchaser to facilitate resale.<sup>184</sup> The copyright owner's minting of the NFT authorizes and creates a uniquely identifiable copy of that work in an identifiable material object.<sup>185</sup> The tethering aspects of NFTs facilitate a secondary market in which the purchasers of the lawfully created sound recording do not need to engage in any act of reproduction.<sup>186</sup> Rather, resale is consummated through the exchange of ownership of

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<sup>181</sup> See The DMCA Report at xix; see also *id.* at 81–91.

<sup>182</sup> See 17 U.S.C. §§ 107, 1008 (1992).

<sup>183</sup> See *supra*, Section II.

<sup>184</sup> See 2 Nimmer § 8.11 (“It is clear that merely transmitting a sound recording to the public on the airwaves does not constitute a ‘distribution’; otherwise, sound recording copyright owners would have the performance rights expressly denied to them under the statute. For this reason, distribution is generally thought to require transmission of a ‘material object’ in which the sound recording is fixed: a work that is of ‘more than transitory duration.’”); see also 2 Nimmer § 8.11[C] (distribution right is right to “publicly to sell, give away, rent or lend any material embodiment of copyrighted work” (emphasis omitted)); see generally, 17 U.S.C. § 101 (2010) (defining “copy”).

<sup>185</sup> See Harsch Khandelwal, *Minting, distributing and selling NFTs must involve copyright law*, COINTELEGRAPH (Aug. 22, 2021), <https://cointelegraph.com/news/minting-distributing-and-selling-nfts-must-involve-copyright-law> (explaining the process of NFT minting, specifically how a copyright owner— “[a] minter—stores a copy of the digital file on a server and then created a blockchain token that contains a link to that file.”).

<sup>186</sup> See Laura-Michelle Horgan, *Not For the Taking: NFTs and Intellectual Property Rights*, BARTON (Mar. 23, 2022), <https://www.bartonesq.com/news-article/not-for->

a tokenized interest in the sound recording or phonorecord (*i.e.* the hard drive).<sup>187</sup> Instead of reproduction as a condition of digital transmission, the parties exchange possession of the access controls tethered to the copyright owner's original fixation of the work in a material object.<sup>188</sup>

Twenty-one years after the DMCA Report, tethering technology has become sophisticated enough to address the original Congressional concerns about file sharing technologies. Now what?

#### IV. THE FUTURE OF NFT TETHERING

In the Copyright Office's 2001 DMCA Report, the Registrar of Copyrights recognized that "if the practice of tethering were to become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers of such a development remains unclear."<sup>189</sup> The Registrar's predictions about the state of future tethering DRM technologies was off the mark in that it failed to see the potential utility of linking decentralized networking with access and rights management controls, a technological solution that NFTs facilitate.<sup>190</sup> The DMCA Report predicted a technology in which the tethering of the sound recording to the hard drive would prohibit further disposition or alienation of the work, rather than a technology in which the decentralized nature of the network created technological immutability in the phonorecord itself.<sup>191</sup>

An NFT is a tethering DRM system that allows the lawful resale of the storage device without any reproduction of the stored file.<sup>192</sup> Stated differently, the parties to a secondary market transaction exchange the password

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the-taking-nfts-and-intellectual-property-rights/ (using the popular NFT collection—Bored Ape Yacht Club—to illustrate how NFT purchasers do not need to engage in reproduction as an NFTs are tokens that "link to or and point to digital files.").

<sup>187</sup> *Id.*

<sup>188</sup> See Desiree Moshayedi, *Does the First Sale Doctrine Apply to NFTs?*, COLUMBIA L. SCH.: THE CLS BLUE SKY BLOG (Jan. 5, 2022), <https://clsbluesky.law.columbia.edu/2022/01/05/does-the-first-sale-doctrine-apply-to-nfts/> (noting how most NFT agreements allow for buyers to have the right to resell).

<sup>189</sup> U.S. Copyright Office's Digital Millennium Copyright Act, § 104 Report at 76 (Aug. 29, 2001).

<sup>190</sup> *Id.*

<sup>191</sup> See *id.* at 75 ("The only way of accessing the content on another device would be to circumvent the tethering technology, which would violate section 1201.").

<sup>192</sup> See James Grimmelman, Yan Ji & Tyler Kell, *Copyright Vulnerabilities in NFTs*, IC3, <https://medium.com/initc3org/copyright-vulnerabilities-in-nfts-317e02d8ae26> (Mar. 21, 2022).

to access the stored file, resulting in a change of ownership, but not possession, of the hard drive containing the stored digital file.<sup>193</sup> This exchange of ownership of a hard drive, rather than a digital file, aligns itself with the views taken in the *London-Sire Records* and *ReDigi* cases.<sup>194</sup> As the DMCA Registrar noted in the 2001 DMCA Report, this new technology has serious implications on the first sale doctrine for consumers. There are three ways to resolve this problem.

#### A. *Do Nothing and Apply Section 115*

If Congress resists further extension of the scope of Section 109, prohibiting application of Section 109's first sale doctrine into digital resale, Section 115 *already* covers the resale of lawfully created NFT-tethered sound recordings for private performances.<sup>195</sup> Because the copyright owner authorized the minting of the NFT, Section 115 can control and impute a compulsory license to downstream transactions.<sup>196</sup> Thus, an NFT-tethered sound recording satisfies Section 115(a)(1)(A)(i) as a "musical work. . . previously distributed to the public in the United States under the authority of the copyright owner."<sup>197</sup> Section 115(a)(1)(A)(i) also covers the NFTs function as a means of digital phonorecord delivery.<sup>198</sup> Further, Section 115(a)(1)(A)(i) excludes real time streaming from the scope of the compulsory license, which an NFT, by function of its technology, is not engaged in.<sup>199</sup>

For these reasons, Congress can simply treat the downstream imposition of royalty fees as the equivalent of a mechanical license without having

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<sup>193</sup> *Id.*

<sup>194</sup> *See supra* notes 139–53.

<sup>195</sup> *See Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 267 (2d Cir. 1959) ("Once a copyright owner makes his musical work available to any record manufacturer it becomes subject to the compulsory licensing provisions of the Copyright Act and may be copied by others simply upon their giving notice of intention and thereafter paying the royalty fixed by the statute.").

<sup>196</sup> 17 U.S.C. § 115(a)(1)(A) (1972) ("A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery").

<sup>197</sup> *Id.* § 115(a)(1)(A)(i) (1972).

<sup>198</sup> *Id.* (covering individual delivery of phonorecords by digital transmissions of a sound recording, where such delivery results in a specifically identifiable reproduction).

<sup>199</sup> *See supra* Section II.



to resolve the first sale implications of NFTs, should it so choose.<sup>200</sup> Of course, this does not resolve the more difficult digital first sale problem. Notably, Section 115 was amended in 1995 on the theory that digital distributions of musical compositions were equivalent to hard copy distributions.<sup>201</sup> Simply falling back to Section 115 would continue to reward the rent-seeking behavior of the music industry, who “should not be heard to take a contrary view when consumers wish to avail themselves of their section 109 privileges.”<sup>202</sup>

Thus, relying on Section 115’s mechanical license is a poor prophylactic. Congressional inaction leaves intact an NFT marketplace dominated by unclear rights allocation and disparate bargaining power between the parties. Once a copyright owner mints an NFT, the terms of service almost always include downstream royalty provisions despite the NFT minter and the subsequent purchasers lacking any privity between one another. Absent the protections of first sale doctrine, the marketplace of digital “ownership” that has emerged is both defined and constrained by its technological endorsement of restraints on alienation and algorithmic distraintment.

Several prominent and popular NFTs highlight this problem. Yuga Labs Inc.’s Bored Apes NFT launched in April 2021. Bored Apes are marketed as “[a] limited NFT collection where the token itself doubles as your membership to a swamp club for apes.”<sup>203</sup> Each Bored Ape is “unique and programmatically generated from over 170 possible traits, including expression, headwear, clothing, and more.”<sup>204</sup> Many have sold on secondary resale markets, like Open Sea, for seven figure sums.<sup>205</sup> Assuming that Bored Ape

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<sup>200</sup> If Congress wishes to extend the compulsory license to other works tethered to NFTs, beyond sound recordings, it must say so, and amend Section 115 accordingly.

<sup>201</sup> Patry on Copyright § 13:23 at 2.

<sup>202</sup> *Id.*

<sup>203</sup> Yuga Labs Inc., *BAYC*, <https://boredapeyachtclub.com/#/> [<https://perma.cc/2H9T-UA7B>] (last visited Oct. 25, 2022).

<sup>204</sup> Watcher.Guru, *What is Bored Ape Yacht Club NFT?*, WATCHER NEWS (Aug. 25, 2021), <https://watcher.guru/news/what-is-bored-ape-yacht-club-nft> [<https://perma.cc/G3H9-HSVX>] (“Owning a Bored Ape amounts to much more than owning a provably unique piece of art. You also get the rights for commercial usage of the image.”); *see id.*

<sup>205</sup> Renuka Tahelyani, *Top 11 Most Expensive Bored Ape Yacht Club NFTs*, THE CRYPTO TIMES, <https://www.cryptotimes.io/most-expensive-bored-ape-yacht-club-nfts/> [<https://perma.cc/KXX7-6TWS>] (last updated Sept. 21, 2022).

NFTs are copyrightable, is the promise of ownership in an unrecognized property right a legally enforceable one?<sup>206</sup>

The Bored Ape NFT terms of use, like those of many other NFTs, grant conflicting rights to purchasers.<sup>207</sup> Despite using the word “own” and “ownership” and promising to never revoke a purchaser’s ownership in a Bored Ape NFT, the terms of use restrain future alienation subject to the purchaser’s compliance with the terms of use, and limits permissible exercises of the public display right and reproduction or resale of the NFT to platforms that satisfy certain resale conditions.<sup>208</sup> Furthermore, the lack of privity between the downstream purchaser of a Bored Ape and Yuga Labs raises other issues, as the high-profile theft of Seth Green’s Bored Ape highlights.<sup>209</sup> Transference of ownership of an NFT does not, under the Copyright Act, transfer any of a copyright owner’s exclusive rights without a signed writing transferring those rights.<sup>210</sup>

The NBA’s popular Top Shot NFT is another prominent NFT offering, consisting of a collection of video clips of basketball games.<sup>211</sup> Like BAYC, the NBA offers purchasers ownership of these “moments” as NFTs from “lootboxes” available through the NBA’s official Top Shot application.<sup>212</sup> The Top Shot application serves as both an access and a rights portal for the moments and provides a direct secondary marketplace to the consumers of

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<sup>206</sup> See Katya Fisher, *Once Upon a Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine*, 37 CARDOZO ARTS & ENT. L. J. 629, 632 (2019) (supporting the same concern regarding conflicting rights between NFT creators and NFT purchasers). Whether “ownership” of an NFT equates to ownership in fee simple or fee determinable is beyond the scope of this Article. It is worth noting, however, that to the extent an NFT creates a property interest, rather than a contractual one, a fee determinable interest created through an NFT smart contract raises concerns under property law of dead hand control and under copyright law by extending the copyright term beyond the statutory boundaries found in Section 302 of the Copyright Act.

<sup>207</sup> Watcher.Guru, *supra* note 204.

<sup>208</sup> *Id.*

<sup>209</sup> See Lorenzo Franceschi-Bicchierai, *Seth Green NFT Theft Part of Multimillion-Dollar Scam Campaign, Investigator Says*, VICE (July 12, 2022, 2:07 PM), <https://www.vice.com/en/article/jgp8kd/seth-green-nft-theft-part-of-multi-million-dollar-scam-campaign-investigator-says> [<https://perma.cc/P87M-WMDG>] (detailing high-profile hack of Seth Green’s private NFT collection, and potential legal consequences).

<sup>210</sup> See 17 U.S.C. § 204(a) (1976).

<sup>211</sup> NBA TOP SHOT, <https://nbatopshot.com> [<https://perma.cc/7YDB-WGCU>] (last visited Oct. 25, 2022).

<sup>212</sup> See NBA Top Shot, *Terms of Use*, NBA TOP SHOT (Aug. 12, 2022), <https://nbatopshot.com/terms> [<https://perma.cc/Z4KD-SD5V>].

the Top Shot NFT.<sup>213</sup> Despite promising “ownership,” the Top Shot terms are more egregious regarding the restraint of alienation and do not provide any of the Section 106 rights, except a limited right to resale of the moments under certain terms.<sup>214</sup>

While Top Shot’s terms of use expressly permit resale outside of the NBA’s platform, the related Shot Code of Conduct allows the NBA to unilaterally and without notice remove moments from accounts that are “overpriced” or “artificially inflated.”<sup>215</sup> The NBA reserves the right to “seize, freeze, or otherwise modify the ownership of any Moment” for violations of the terms of service, including “Category “B” Prohibited Activities,” which are left undefined in the terms of use.<sup>216</sup> The terms also give the NBA a number of extra-judicial remedies, raising some procedural due process concerns that are beyond the scope of this paper.

In 2022, Snoop Dogg released *B.O.D.R.* on the Gala Games blockchain platform.<sup>217</sup> Similar to Bored Apes and Top Shot, the Gala Games terms of service offer users ownership rights.<sup>218</sup> Gala disclaims any ability to control NFTs sold on its platform, while simultaneously reserving the right to charge downstream gas fees without notice on future resales.<sup>219</sup> Gala also disclaims any warranties in the sale of NFTs on its platform and reserves the

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<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> *NBA Top Shot Code of Conduct*, NBA TOP SHOT (Jan. 31, 2021, 11:06 AM), <https://blog.nbatopshot.com/posts/trade-code-conduct> [<https://perma.cc/3VWJ-4Q6G>]; see *id.*

<sup>216</sup> See NBA Top Shot, *supra* note 212.

<sup>217</sup> Vismaya V., *Snoop Dogg’s B.O.D.R. NFT Album Released in Collaboration with Gala Games*, THE CRYPTO TIMES, <https://www.cryptotimes.io/snoop-doggs-b-o-d-r-nft-album-released-in-collaboration-with-gala-games/> [<https://perma.cc/AY22-JNHY>] (last updated Feb. 21, 2022).

<sup>218</sup> While *B.O.D.R.* is also available for purchase on the NFT platform OpenSea, OpenSea does not make any promises or warranties about what property rights, if any, are being conveyed in a transaction. See *Snoop Dogg - B.O.D.R.*, OPENSEA, <https://opensea.io/collection/snoopdoggbodr> [<https://perma.cc/DK9W-4Q4C>] (last visited Oct. 25, 2022); see also *Terms of Service*, OPENSEA, <https://opensea.io/tos/> [<https://perma.cc/LG8E-6ESB>] (last updated Aug. 2, 2022); see also *Gala Games, Terms and Conditions*, GALA GAMES, <https://app.gala.games/terms-and-conditions> [<https://perma.cc/6RMV-VKP5>] (last visited Oct. 25, 2022).

<sup>219</sup> See *id.* (stating in the Ownership Restrictions section that “[t]he User *owns* the underlying NFT completely for as long as the User owns the Platform Asset, subject to the terms and restrictions of this Agreement and any accompanying license restrictions for the Platform Asset. Ownership of the NFT is mediated entirely by the smart contract and Ethereum Network (or any other applicable network); at no point may GALA seize, freeze, or otherwise modify the ownership of the Platform Asset.”) (emphasis added).

right to lock users out of the purchases and claw back sales if its licensing terms are violated.<sup>220</sup>

There are two ways to treat these conflicting promises to the consumer.<sup>221</sup> The first is to view the promise of “ownership” as puffery, and to imply a forced license between the consumer and the seller of the NFT.<sup>222</sup> Under this approach, Section 115 implies a compulsory license to downstream resale for sound recordings as a limitation on obvious copyright misuse. Adopting an implied licensing model would mean that NFTs have created an environment where consumers are promised that they “own” an artificially scarce digital work without actual ownership.<sup>223</sup> Yet, the potential for resale (and speculation field through artificial scarcity) is what creates the market demand for ownership of this new type of sound recording in the first place.<sup>224</sup> This is different from the garden variety licensing cases in which the consumer is fully on notice that they are not acquiring the full rights to the work they are licensing.<sup>225</sup> Here, consumers are being promised the ability to resell, and, sometimes, to exploit the underlying work of authorship.<sup>226</sup> But the word “ownership” is a term of art with a distinct meaning in law.<sup>227</sup> To own a thing is to take it with all the property rights inherent to that thing. True ownership of an NFT would match the promises (but not the implementation) seen in the Bored Apes NFT: the right to possess it, control it, exclude others from it, exploit it, and dispose

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<sup>220</sup> *Id.*

<sup>221</sup> NBA Top Shot, *supra* note 212.

<sup>222</sup> *C.f.* Orit Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA HIGH TECH. LAW J. 2, 282 (“Under the implied license doctrine, the purchaser of a tangible asset reflecting intellectual property rights has a right to use the asset in a normal and natural manner that may be deduced from the nature of the asset.”).

<sup>223</sup> See James Grimmelmann et al., *The Tangled Truth About NFTs and Copyright*, THE VERGE (June 8, 2022, 8:30 AM), <https://www.theverge.com/23139793/nft-crypto-copyright-ownership-primer-cornell-ic3> [https://perma.cc/5XWE-RH2E] (noting how NFT minters “need to give serious thought to how they structure their terms”).

<sup>224</sup> See *id.*

<sup>225</sup> See *AccuZip, Inc. v. Director, Div. of Taxation*, 25 N.J. Tax 158, 176 (N.J. Tax Ct. 2009) (noting how the agreement placed customers on notice that “AccuZIP and Quark are not selling *ownership* of its intellectual property. Rather, the buyer receives ownership of the physical property containing the intellectual property for its own use.”) (emphasis added).

<sup>226</sup> See Grimmelmann, *supra* note 223.

<sup>227</sup> See Arti K. Rai et al., *University Software Ownership and Litigation: A First Examination*, 87 N.C. L. REV. 1519–1570 (2009).

of it.<sup>228</sup> So, if Congress acquiesces to this market behavior without further action, then it should encourage regulatory agencies, like the FTC, to better police and enforce laws concerning false advertising and consumer fraud to reign in obvious cases of copyright misuse.

### B. *Extend Section 109 to the Tethered Sound Recordings*

Alternatively, Congress could adopt the view that NFT-tethered sound recordings do not properly facilitate distribution without a digital first sale doctrine.<sup>229</sup> If, for example, a second-party purchaser legally acquires an NFT from a secondary marketplace, a digital first sale doctrine would protect the third party purchaser from attempts to restrain further alienation or impose downstream royalties under Section 106(3).<sup>230</sup> This approach would align with that of the *London-Sire Recs., Inc.* Court’s holding that the sound recording can serve as the material object, rejecting the materiality interpretation of the Section 101 phonorecords definition.<sup>231</sup>

The downside to this approach is that it would require concerted congressional action. After sixty years of rejecting calls to extend the first sale doctrine to digital works, it seems rather unlikely that Congress will revisit this issue without pressure from the music industry. Given that NFTs are marketed as a disruptive technology, it remains to be seen whether the music industry would call for such a change. Whether extension of the first sale doctrine to digital works would further the public policy goals of the American copyright regime is beyond the scope of this work.<sup>232</sup>

### C. *Apply Section 109 to the Phonorecord*

Finally, if we were to treat the sale of an NFT as a transfer of a fractionalized interest in ownership of the phonorecord, rather than a transfer of ownership of the digital file, Section 109 would apply without further con-

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<sup>228</sup> *Id.*

<sup>229</sup> See 2 Nimmer § 8.13[A], *supra* note 72.

<sup>230</sup> *Id.*

<sup>231</sup> See *London-Sire Recs., Inc.*, 542 F. Supp. 2d at 170–71 (“The Copyright Act . . . refers to materiality as a medium in which a copyrighted work can be “fixed.”).

<sup>232</sup> See generally Kimberly A. Condoulis, *Let Me Sell My Song! The Need for a Digital First Sale Doctrine Amendment to the Copyright Act*, 22 B.U. J. SCI. & TECH. L. 121 (2016) (contending that a healthy resale market for digital copies of copyrighted works is necessary in order not to “stifle[ ] the Copyright Act’s goal of increasing access to copyrighted works,” and that technological advances that could not have been foreseen during drafting of the Copyright Act of 1976, now require legislators to update the Act for a digital first sale doctrine).

gressional action. “Physical copies of works in a digital format, such as CDs or DVDs, are subject to section 109 in the same way as physical copies of works in analog form.”<sup>233</sup> Just as the downloading of a lawfully purchased music file onto a flash drive or iPod would not prohibit the owner of that material object from reselling their device,<sup>234</sup> Section 109 provides blanket immunity against claims of infringement to a consumer who buys and resells a minted NFT tethered to a lawfully created sound recording.

Because an NFT is an access token that points to a hard drive where a sound recording has been fixed in a digital music file, the sale of the NFT updates the ownership records on a blockchain ledger and possession of the access token is transferred from one party to the other without requiring an act of reproduction.<sup>235</sup> This results in a transfer of possession in a fractionalized interest in the portion of a hard drive—*i.e.*, the material object—storing the digital sound recording.<sup>236</sup>

Under this final approach, the parties are not solely buying and selling sound recordings, but *nonfungible* sound recordings fixed in unique material objects (*i.e.*, the unique hard drive acting as the phonorecord). By identifying a unique phonorecord, we can apply the traditional materialist interpretations of the first sale doctrine under Section 109 to the resale of NFTs without Congress acting to extend first sale protections to digital works.<sup>237</sup>

## V. CONCLUSION

Over the past sixty years, Congress, under the guidance of the Copyright Office, has declined to recognize a digital first sale doctrine under

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<sup>233</sup> See *ReDigi Inc.*, 910 F.3d at 659 (quoting Patry on Copyright § 13:23 which also observed that § 109 permits the sale of an iPod that contains lawfully made digital music files).

<sup>234</sup> *Id.*

<sup>235</sup> See 2 Nimmer on Copyright § 8.11 fn 32. (citing H.R. Rep. No. 2237, 89th Cong., 2d Sess. 134 (1966) (“This definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form or dissemination in which a material object does not change hands—performance or displays on television, for example—is not a publication no matter how many people are exposed to the work.”); H.R. Rep. No. 83, 90th Cong., 1st Sess. 105 (1967) (same). Apart from replacing the initial word (“The” instead of “This”), the identical language appears in the final 1975 and 1976 Senate and House Reports for the final version of the current Act).

<sup>236</sup> Whether the file is stored on-chain or off-chain is immaterial to application of Section 109.

<sup>237</sup> At the time of the DMCA Report, several commentators suggested that Section 109 already applied to digital transmissions. See 2 Nimmer on Copyright § 8.13 fn 10.

Section 109 of the Copyright Act. By treating the sale of NFT-tethered sound recordings as a sale of a fractionalized interest in a phonorecord, rather than as a sale of the tethered digital file, Congress need not immediately act to remediate ongoing copyright misuse in the industry, nor risk stifling innovation in a rapidly evolving marketplace. If the parties are engaged in the lawful resale of particularly identifiable portions of hard drives, Section 109 already covers the downstream resale of these digital works. While there are strong arguments as to why Congress should or should not recognize a digital first sale doctrine, NFT-tethered sound recordings resolve the issue without requiring further Congressional action.





## Are College Athletes Employees under the Fair Labor Standards Act?

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### ABSTRACT

My amicus brief, submitted to the Third Circuit Court of Appeals in *Johnson v. NCAA*, 2022 WL 2828262, draws from the research in this Article. In *Johnson*, college athletes are seeking wages under the Fair Labor Standards Act. The NCAA argues that college athletes are amateurs, not employees, under their rules. Two appellate courts have been persuaded by the NCAA's argument in similar FLSA cases: *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016), and *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

My research analyzes shortcomings in the appellate briefs for college athletes in *Berger* and *Dawson* and offers a better way to conceptualize the employment relationship between college athletes and schools. The *Johnson* court should apply the Supreme Court's interpretation of "work" in *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

By delving into numerous NCAA rules that meticulously cover the hours and activities of college players, I demonstrate that these are work rules, not amateur rules—and, therefore, that the work performed by college athletes for the benefit of their schools is compensable as employment.

More generally, I show that NCAA athletes are misclassified—the term that some courts use in gig-work cases—except that these athletes are classified not as independent contractors but with a fungible term called “student athletes.”

To support this view, I compare the work of dancers to the work of college athletes. Both groups are comprised of adult performers who are valued for their physical attributes; they also work under take-it-or-leave-it contracts. The NCAA and adult clubs financially penalize dancers and athletes for breaking their rules. Using a Third Circuit case, *Verma v. 3001 Castor, Inc.*, 937 F.3d 221 (3d Cir. 2019), that resulted in a \$4.5 million judgment against an adult club that misclassified its dancers under the FLSA as independent contractors, I argue for a similar analysis and result in *Johnson v. NCAA*.

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## I. INTRODUCTION

### A. Framing Collegiate Athletic Labor

At first glance, college athletics compares more to professional sports than to adult entertainment clubs.<sup>1</sup> But once the NCAA's amateurism model for athletic labor comes into focus,<sup>2</sup> the work of dancers in adult

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<sup>1</sup> For this Article, I eschew the terms “strip club,” “exotic dancer,” and “stripper” because they may convey to some readers a derogatory meaning. In their place, I use more neutral terms: “adult entertainment club,” “adult club,” “adult club dancer,” and “club dancer.” This terminology is accurate while differentiating this type of performing from other forms of dancing for pay, as I describe in *infra* note 59.

While courts use different terminology for clubs and dancers in cases under the Fair Labor Standards Act, many have settled on “adult entertainment” or “adult entertainer” as descriptors. Recent examples include *Verma v. 3001 Castor Club, Inc.*, 937 F.3d 221, 224 (3d Cir. 2019) (“adult entertainment”); *Johnson v. Houston KP, LLC*, 2022 WL 605802, at \*6 (S.D. Tex. 2022) (“adult entertainment”); *Tassy v. Lindsay Entertainment Enterprises, Inc.*, 2022 WL 801279, at \*7 (W.D. Ky. 2022) (“adult entertainment”); *Mays v. Rubiano, Inc.*, 560 F.Supp.3d 1230, 1233 (N.D. Ind. 2021) (“adult entertainment” and “adult entertainer”); *Duren v. International Follies, Inc.*, 2021 WL 9274495, at \*1 (N.D. Ga. 2021) (“adult entertainment” and “adult entertainer”); *Kellogg v. Fannie’s Inc.*, 467 F.Supp.3d 1296, 1313 (N.D. Ga. 2020) (“adult entertainers’ dancing”); *Betras v. Oli-Car Inc.*, 2021 WL 5239938, at \*4 (W.D. Pa. 2021) (“adult entertainment clubs”); *Clay v. Showntail the Legend LLC*, 2020 WL 10727983, at \*2 (N.D. Fla. 2020) (“adult entertainer”); *Becton v. WBY, Inc.*, 2020 WL 3402865, at \*1 (N.D. Ga. 2020) (“adult entertainers”); *Hurst v. Yoangelson*, 354 F.Supp.3d 1362, 1368 (N.D. Ga. 2019) (“adult entertainer”); *Mantooth v. Bavaria Inn Restaurant, Inc.*, 360 F.Supp.3d 1164, 1167 (D. Colo. 2019) (“adult entertainment”); *Embry v. 4745 Second Ave., Ltd.*, 2019 WL 8376264, at \*2 (S.D. Iowa 2019) (“adult entertainer”); *Dean v. Billings*, 2017 WL 2063001, at \*1 (W.D. Okla. 2017) (“adult entertainers”); and *Dean v. 1715 Northside Drive, Inc.*, 224 F.Supp.3d 1302, 1308 (N.D. Ga. 2016) (“adult entertainment”).

<sup>2</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21, NCAA DIV. I MANUAL, art. 1, 1.3.1 (Basic Purpose), stating: “A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” To make amateur competition an explicit requirement, the NCAA has promulgated these rules:

Art. 2.9 The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

clubs<sup>3</sup> offers a closer comparison for courts to rule that college athletes are employees under the Fair Labor Standards Act (FLSA).<sup>4</sup> My research offers a blueprint to persuade courts to see college athletes as employees under the FLSA.

This introduction relates to *Johnson v. NCAA*, a lawsuit that seeks unpaid wages for college athletes.<sup>5</sup> In this Article, I explain the evidence and reasoning in my amicus brief to the Third Circuit Court of Appeals, filed on behalf of college athletes.<sup>6</sup> My Article makes this research available to a wider audience, including lawyers, academic researchers, law students, and college athletes.

Federal appeals courts failed to rule in favor of student athlete pay in similar lawsuits in *Berger v. NCAA*<sup>7</sup> and *Dawson v. NCAA*,<sup>8</sup> ruling that college athletes are not employees under the FLSA. But the *Johnson* litigation has already gone further in allowing athletes to pursue an FLSA action: a federal district court denied the NCAA's motion to dismiss the case,<sup>9</sup> and the matter is now on appeal.<sup>10</sup>

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...  
 2.13 The Principle Governing Financial Aid. A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.

<sup>3</sup> For a succinct and frank discussion of the work of adult club dancers, see *Clincy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1329 (N.D.Ga. 2011) (“Plaintiffs refer to Onyx as a strip club, Defendants refer to it as a nightclub, regardless of this distinction in nomenclature, Onyx is a club in Atlanta, Georgia that features ‘nude, female exotic dancers.’”).

<sup>4</sup> Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-219 (2021) (also called FLSA).

<sup>5</sup> *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021) (*Johnson I*). Johnson’s complaint seeks wages under the FLSA and state wage law for his uncompensated time playing football for Villanova University.

<sup>6</sup> By the rules of the Third Circuit Court of Appeals, an amicus brief cannot exceed 6,500 words. U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT / REQUIREMENTS FOR BRIEFS. <https://www.ca3.uscourts.gov/sites/ca3/files/chart%20of%20requirements%20for%20briefs.pdf> [https://perma.cc/8RJS-36EP].

<sup>7</sup> 843 F.3d 285 (7th Cir. 2016).

<sup>8</sup> 932 F.3d 905 (9th Cir. 2019).

<sup>9</sup> *Johnson I*, 556 F.Supp.3d 491 at 512.

In its opening brief, the NCAA worshiped the false god of collegiate amateurism. Quoting from *NCAA v. Bd. of Regents of Univ. of Oklahoma*,<sup>11</sup> the NCAA said that college athletics must continue to operate on its “revered tradition of amateurism.”<sup>12</sup> *Berger* was persuaded by this nostalgic argument,<sup>13</sup> while *Dawson* avoided discussion of this outdated tribute.<sup>14</sup>

My Article provides a more realistic legal context for the Third Circuit and future courts. I do not suggest that the adult entertainment dance industry and college athletics are similar businesses. Adult entertainment dancers (also called club dancers in this Article) are frequently misclassified as independent contractors by their clubs, and they often prevail in FLSA lawsuits for minimum wages and overtime.<sup>15</sup> I contend that college athletes are similarly misclassified when the NCAA regulates their labor, only the terminology differs: they are called amateurs, not independent contractors. Also, I avoid comparing college athletes to college interns, a mistake made in the appellate briefs filed on behalf of athletes.<sup>16</sup> The better comparison is to college students who are employed by their universities as campus tour guides and cafeteria workers —jobs on campus during the school year that

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<sup>10</sup> *Johnson v. NCAA*, 2021 WL 6125453 (E.D. Pa. 2021) (*Johnson II*), granting motion by NCAA and defendant-schools to certify appeal.

<sup>11</sup> 468 U.S. 85, 120 (1984).

<sup>12</sup> Motion of Attended School Defendants to Dismiss First Amended Complaint at 6, *Johnson II* (2020) (No. 2:19-cv-05230-JP, document 25-1)

<sup>13</sup> *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016) (“As the Supreme Court has noted, there exists ‘a revered tradition of amateurism in college sports’”) (citation omitted).

<sup>14</sup> See *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019) (“in the context of our preceding analysis, the revenue generated by college sports does not unilaterally convert the relationship between student-athletes and the NCAA into an employment relationship”). More generally, *Dawson* examined the functional aspects of an employment relationship, and found them lacking: “The NCAA Bylaws pervasively regulate college athletics. The complaint, however, does not allege that the NCAA/PAC-12 ‘hire and fire,’ or exercise any other analogous control, over student-athletes.” *Id.* at 910. While this improves on *Berger*’s reliance on a revered amateurism model, this functional approach has no direct relationship to the FLSA’s Section 203(g), which defines “employ” as “suffer or permit to work.” See *infra* note 163. If putative employers could avoid FLSA liabilities by simply not hiring or firing people who work for them, the law would be rendered pointless.

<sup>15</sup> My arguments in this article draw from earlier research in Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 256, 264 (2017).

<sup>16</sup> See Plaintiff App. Brief, *Berger v. NCAA*, 2016 WL 3659034 (7th Cir. Dec. 5, 2016).

fall under the FLSA. In short, the amateur label is a subterfuge to avoid an employment relationship.<sup>17</sup>

### B. *Contextualizing the History of Paying College Athletes*

The NCAA and its predecessor have never admitted to the fact that stealthy methods are used to pay college athletes to play for schools. Speaking to the Intercollegiate Athletic Association of the United States in 1907, Captain Palmer E. Pierce of the Military Academy at West Point summarized newspaper stories that exposed sham amateurism in college athletics:

It was related in detail under what disguise money returns were given. For instance, one prominent player was said to have derived hundreds of dollars from the privilege of furnishing programs at games; another received the profit from a special brand of cigarettes named after him; a third was the ostensible head of an eating club, while others were in the employ of rich college graduates.<sup>18</sup>

Instead of allowing pay for athletes, the 1907 convention enacted seven rules for player eligibility that collectively anchored their status as amateurs.<sup>19</sup> These principles have largely survived. Currently, in Points 3(a) and 3(b) of the NCAA's "Athletic Financial Aid Agreement," the NCAA stipulates that financial aid will be reduced or cancelled for an athlete who "[s]igns a professional sports contract for this sport," or "[a]ccepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant."<sup>20</sup>

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<sup>17</sup> See *infra* note 285.

<sup>18</sup> PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 27 (Dec. 28, 1907), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=39&q1=professional> [<https://perma.cc/V8XC-KLJL>].

<sup>19</sup> *Id.* at 78–79. Rule 1 required a student to take a full schedule of courses. Rule 2 required a student who serves as a trainer or instructor had not been previously paid for athletic competition. Rule 3 required a student who played in an athletic contest had not been previously paid for this activity. Rule 4 prohibited a student from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics. Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions.

<sup>20</sup> NCAA, *Athletic Financial Aid Agreement (Sample)*, [https://ncaaorg.s3.amazonaws.com/about/d2/ed\\_res/D2Ed\\_SampFinAidAgreement.pdf](https://ncaaorg.s3.amazonaws.com/about/d2/ed_res/D2Ed_SampFinAidAgreement.pdf) [<https://perma.cc/34DN-WT8B>].

Three recent legal developments have eroded the NCAA's amateur model. First, in *O'Bannon v. NCAA*,<sup>21</sup> a former UCLA basketball player prevailed in a landmark antitrust lawsuit involving the NCAA's exclusive exploitation of his name, image, and likeness (also called "NIL").<sup>22</sup> Second, in the 2021 case *NCAA v. Alston*, the Supreme Court unanimously ruled that the NCAA violated the Sherman Act by unreasonably restricting educational benefits for college athletes.<sup>23</sup> Finally, by July 1, 2021, twenty-five states had adopted laws that granted NCAA athletes NIL rights to receive compensation.<sup>24</sup> The NCAA eventually yielded to this changing landscape by adopting a general policy allowing athletes to earn NIL income.<sup>25</sup> Now that athletes are permitted to earn NIL money,<sup>26</sup> why should the NCAA prevent schools from paying wages to their athletes?

### C. Organizing My Analysis

I demonstrate that the NCAA and schools misclassify college athletes as amateurs, rather than employees. In addition to comparing NCAA athletic labor rules to independent contractor agreements for club dancers,<sup>27</sup> I contend that the NCAA's misclassification of athletes is part of a broader trend of wage theft by employers.<sup>28</sup>

<sup>21</sup> 802 F.3d 1049 (9th Cir. 2015) (Hereinafter referred to as "*O'Bannon II*").

<sup>22</sup> *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 963 (N.D. Cal. 2014).

<sup>23</sup> *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>24</sup> See Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. (forthcoming) (survey of state law NIL restrictions on athlete pay).

<sup>25</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness (NIL) Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/7HWV-6BA5>].

<sup>26</sup> Collectives are loosely structured business groups that provide NIL deals for players at schools, functioning somewhat like a booster club. William Lawrence, *The NCAA's New Guidance Regarding NIL Collectives — Will the Guidance Shut Down NIL Collectives or Affect Their Abilities to Pay College Athletes?* JDSUPRA (May 12, 2022), <https://www.jdsupra.com/legalnews/the-ncaa-s-new-guidance-regarding-nil-4436573/> [<https://perma.cc/ZY9S-MV9V>], explaining:

Following the NCAA's adoption of the Interim NIL Policy a mere 10 months ago, so-called NIL collectives have meteorically begun emerging. In less than one year, NIL collectives have fundamentally reshaped college athletics by becoming a critical component of athletic success using novel techniques to compensate college athletes for their NIL.

<sup>27</sup> My arguments in this article draw from earlier research in LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, *supra* note 15.

<sup>28</sup> My arguments also draw from earlier research in Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment*

I build on these foundations in the following arguments. In Part II, I show that NCAA athletes and club dancers are controlled by similarly restrictive contracts and rules imposed by their putative employers.<sup>29</sup> Part II.A explains how these dancers and athletes work in exploitative labor markets.<sup>30</sup> Part II.B shows how rules and work conditions provide them false autonomy.<sup>31</sup> Part II.C shows how their earnings are limited by work rules.<sup>32</sup> Part II.D demonstrates how clubs and the NCAA use financial penalties to enforce work rules.<sup>33</sup>

Part III traces the legal history of laws and rulings that treat college athletes as employees.<sup>34</sup> Part III.A shows how college athletes were once treated by courts as employees but later excluded by a California law and court rulings.<sup>35</sup> Part III.B focuses on recent appellate rulings in FLSA cases,<sup>36</sup> and critically explains how appellate briefs failed to convince the *Berger* and *Dawson* courts to find that college athletes are employees.<sup>37</sup>

Part IV is a blueprint for an appellate brief to explain why college athletes are employees.<sup>38</sup> Part IV.A presents evidence that college athletes perform work for their schools.<sup>39</sup> In Part IV.B, I show that college athletes meet all tests for employees under the FLSA's six-factor analysis.<sup>40</sup> Part IV.C examines how consolidation of conferences should influence courts to rule that NCAA athletes are employees.<sup>41</sup>

Part V concludes my analysis.<sup>42</sup> My generalized presentations of adult entertainment and athletic labor culminate with *Verma v. 3001 Castor, Inc.*,<sup>43</sup> a Third Circuit opinion upholding a \$4.5 million judgment for club dancers who were misclassified under the FLSA. I explain how this case from 2019

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*Relationship*, 2017 U. CHI. LEGAL F. 327, 337 (2017) (Fact Finding 1, employers have misclassified workers as independent contractors in 20 of the 22 major occupation categories defined by the U.S. Department of Labor).

<sup>29</sup> *Infra* notes 47–89.

<sup>30</sup> *Infra* notes 56–61.

<sup>31</sup> *Infra* notes 62–67.

<sup>32</sup> *Infra* notes 68–75.

<sup>33</sup> *Infra* notes 76–89.

<sup>34</sup> *Infra* notes 90–160.

<sup>35</sup> *Infra* notes 101–130.

<sup>36</sup> *Infra* notes 139–145; 151–160.

<sup>37</sup> *Infra* notes 131–138; 146–150.

<sup>38</sup> *Infra* notes 161–244.

<sup>39</sup> *Infra* notes 173–181.

<sup>40</sup> *Infra* notes 190–234.

<sup>41</sup> *Infra* notes 235–244.

<sup>42</sup> *Infra* notes 245–286.

<sup>43</sup> *Infra* notes 251–252.



applies to NCAA athletes and their schools.<sup>44</sup> I also explain how *Johnson's* litigation history is shaping up to resemble FLSA cases and *Alston*,<sup>45</sup> and how my analysis tracks closely to Justice Kavanaugh's approach in *Alston*.<sup>46</sup> Regardless of the outcome in *Johnson*, legal developments point to a time when college athletes will be paid for their athletic labor.

## II. NCAA ATHLETES AND ADULT CLUB DANCERS: REGULATION OF THEIR WORK

My research adds a new perspective to an expansive research stream on the NCAA's (1) outdated amateurism model,<sup>47</sup> (2) antitrust problems,<sup>48</sup> (3) de facto employment of college athletes,<sup>49</sup> (4) creation of wealth for schools,<sup>50</sup> and (5) exploitation of college athletes.<sup>51</sup>

<sup>44</sup> *Infra* notes 253–277.

<sup>45</sup> *Infra* notes 278–279.

<sup>46</sup> *Infra* notes 280–286.

<sup>47</sup> See, e.g., Nicolas A. Novy, “*The Emperor Has No Clothes*”: *The NCAA's Last Chance as the Middleman in College Athletics*, 21 SPORTS L.J. 227 (2014); Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329 (2007); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24 (2000); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 234 (1990) (“[I]t is disingenuous for the NCAA to rely on the Olympic ideal to justify restrictions on payments to athletes.”); and Sharon Elizabeth Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 587 (1989) (“[I]t would be naive to suppose that simply the pretense of maintaining the amateur ideal is essential to continuing the current system.”).

<sup>48</sup> See, e.g., Sarah M. Kinsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1602 (2003) (comparing NCAA transfer rules which deter the free movement of student-athletes among schools to restrictions on employees who could be competitive threat if left unrestricted); Note, *Sherman Act Invalidates the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1313 (1992) (the limited compensation rule is contradicted by the fact that thirty out of thirty-three national championship basketball teams from 1952–85 violated the no-pay rule); and Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 659 n.22 (1978) (financial aid is a quid pro quo for a student's exchange of athletic skills for a package of goods and services).

<sup>49</sup> See, e.g., Michael H. LeRoy, *Courts and the Future of “Athletic Labor” in College Sports*, 57 ARIZ. L. REV. 475 (2015).

<sup>50</sup> See Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports*, NAT'L BUREAU ECON. RSCH. (Working Paper 27734, Aug. 2020), <http://www.nber.org/papers/w27734> [<https://perma.cc/SFD8-W8DR>]; Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010).

I suggest that FLSA misclassification extends to college athletes in a way that compares to adult club dancers: the NCAA distorts economic realities by labeling athletes as amateurs, and clubs misapply the independent contractor title to their dancers. These forms of misclassification deprive athletes and club dancers, respectively, of minimum wages under the FLSA. The NCAA's financial aid contract is at the heart of this comparison.<sup>52</sup> It binds an athlete to a strict amateurism model.<sup>53</sup> Similarly, adult clubs

<sup>51</sup> See e.g., BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* (2013); Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. FOR SOCIO. SPORT 550 (2012); Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L. J. 265 (2011); Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17 (2010); Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010); Krystal K. Beamon, *Used Goods: Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 J. NEGRO EDUC. 352 (2008); Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student Athletes*, 43 SOC. SCI. J. 393 (2006); Patrick James Rishe, *A Reexamination of How Athletic Success Impacts Graduation Rates*, 62 AM. J. ECON. & SOC. 407, 415 (2003) (football graduation rate at Division I schools was 52.46%); Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes' Stories of Schooling*, 71 J. HIGHER ED. 223 (2000); and Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 COLL. BD. REV. 8 (1984) (stating "[b]ut Black student-athletes are burdened also with the insidiously racist implications of the myth of 'innate Black athletic superiority,' and the more blatantly racist stereotype of the 'dumb Negro' condemned by racial heritage to intellectual inferiority.").

<sup>52</sup> NCAA, *Athletic Financial Aid Agreement*, *supra* note 20.

<sup>53</sup> *Id.* stating:

3. This aid will also be reduced or canceled if the recipient:
  - a. Signs a professional sports contract for this sport.
  - b. Accepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant.
  - c. Agrees to be represented by an agent and accepts money that causes him/her to exceed the cost of a full grant.
  - d. Receives other aid that causes him/her to exceed his/her individual limit.

See also NCAA DIV. I MANUAL, *supra* note 2, art. 8.4.2.1 (Agreement to Provide Benefit or Privilege), stating:

Agreement to Provide Benefit or Privilege.

Any agreement between an institution (or any organization that promotes, assists or augments in any way the athletics interests of the member institution, including those identified per Bylaw 8.4.1) and an individual who, for any consideration, is or may be entitled under the terms of the agreement to

require their dancers to sign an independent contractor agreement.<sup>54</sup>

I suggest this comparison as an argument in *Johnson v. NCAA*, because my recent empirical study found that adult club dancers won 93% of misclassification rulings.<sup>55</sup> This success rate suggests that lawyers should consider the factual and legal comparisons between college athletes and these dancers. In the remainder of Part II, I develop the dancer-to-athlete comparison.

### A. Exploitative Labor Markets

College athletes and club dancers work in labor markets that take advantage of them. Empirical measures of these labor markets are elusive. This paucity of statistical information signifies that the exploitation of these performers is overlooked. The lack of data also suggests that the labels of amateur and independent contractor have reinforced the idea in the public's mind that student-athletes and club dancers are not employees—indeed, if there is no employment data for these workers, this reinforces the legal tautology that clubs and the NCAA advance in defending FLSA lawsuits.

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any benefit or privilege relating to the institution's athletics program, shall contain a specific clause providing that any such benefit or privilege may be withheld if the individual has engaged in conduct that is determined to be a violation of NCAA legislation (emphasis added).

Art. 8.4.2.1 states: "The clause shall provide for the withholding of the benefit or privilege from a party to the agreement and any other person who may be entitled to a benefit or privilege under the terms of the agreement." *Id.*

<sup>54</sup> *E.g.*, *Wagoner v. N.Y.N.Y., Inc.*, No. 1:14-cv-480, 2015 WL 1468526, at \*1–2 (S.D. Ohio Mar. 30, 2015) (dancers signed an independent contractor agreement stating that "the Entertainers . . . expressly disavow the existence, the intention and the desire to enter into an employment relationship, and expressly recognize that they will provide services directly to patrons in exchange for compensation by patrons."). *See also* different versions of independent contracting in *D'Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 314 (D. Conn. 2011) (dancer signed "Entertainment Lease" when she began to work for the club), and *Robinson v. Taboo Gentlemen's Club, LLC*, No. 3:14-CV-123, 2015 WL 3868531, at \*4 (N.D.W. Va. June 23, 2015) (referencing the club's licensing agreement). *Clinicy*, *supra* note 3, at 1329 (N.D.Ga. 2011) shows that the club presented new dancers with a packet of forms, policies, and independent contractor agreement.

<sup>55</sup> *LeRoy*, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, *supra* note 15, at 260. Twenty-eight of the seventy-five cases in my database ruled that dancers were misclassified as independent contractors, rather than employees. *Id.* Compare *Becton*, 2020 WL 3402865 at \*1, where a lawyer for an adult entertainment club told his client "that Follies had a five percent chance of winning a misclassification case and the best way to avoid FLSA liability would be to change its business model."

There are fragmentary ways to imply labor market value of elite college players. A recent study compared pay for elite high school-age players in the NBA's G League and another league, Overtime Elite, to extrapolate a payroll of nearly \$5 million for a college basketball team.<sup>56</sup> The emerging NIL market that provides third-party pay to college athletes offers another implied but imprecise valuation.<sup>57</sup> Perhaps the safest conclusion from these observations is that the NCAA's amateurism rules artificially limit the earning power of college athletes for their on-field performance, though the extent of that market interference cannot yet be accurately gauged.

The various labor markets for dancers have better empirical measures. The U.S. Department of Labor reports employment data for these occupations. This includes a general census code for "exotic dancers," a label that applies alike to "ballerina," "ballet dancer," "go-go dancer," "burlesque dancer," "tap dancer," and others.<sup>58</sup> There is an industry report on employment of dancers, but without a specific category for nude dancing.<sup>59</sup> It is possible that the Bureau of Labor Statistics' dancer data for "drinking places (alcoholic beverages)" is that agency's way of describing an adult entertainment club.<sup>60</sup> In May 2021, the average pay for dancers in these establishments was \$13.78 per hour, far below pay for other dancers.<sup>61</sup>

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<sup>56</sup> Michael H. LeRoy, *The Professional Labor Market for Teenage Basketball Players: Disruptive Competition to the NCAA's Amateur Model*, 11 BERKELEY J. ENT. & SPORTS L. 1, 2 (2022) (salary data from elite, non-collegiate basketball leagues implies that a college would spend \$4,985,540 to employ a roster of seven elite players out of high school for the 2021–2022 season).

<sup>57</sup> Des Bieler & Scott Allen, *Nick Saban and Jimbo Fisher Spar as NIL Drama Overtakes the SEC*, WASH. POST (May 19, 2022) (25 members of Alabama's football team earned a total of \$3 million in 2021).

<sup>58</sup> U.S. BUREAU OF LABOR STATISTICS ON BEHALF OF THE OFFICE OF MANAGEMENT AND BUDGET (OMB) AND THE STANDARD OCCUPATIONAL CLASSIFICATION POLICY COMMITTEE (SOCPC) 33 (Nov. 2017, updated Apr. 15, 2020), available in [https://www.bls.gov/soc/2018/soc\\_2018\\_direct\\_match\\_title\\_file.pdf](https://www.bls.gov/soc/2018/soc_2018_direct_match_title_file.pdf) [<https://perma.cc/E7SH-DQVA>].

<sup>59</sup> U.S. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2021*, 27-2031 Dancers, <https://www.bls.gov/oes/current/oes272031.htm#nat> [<https://perma.cc/H4LR-JRTK>].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (reporting pay for Performing Arts Companies (\$26.57), Drinking Places (Alcoholic Beverages) (\$13.78), Spectator Sports (\$18.25), Other Schools and Instruction (\$ 29.41), and Independent Artists, Writers, and Performers (\$26.88)).

### B. False Autonomy

NCAA athletes lack bargaining power because a price-fixing monopoly controls their labor market. This was true in 1995, when the NCAA's former executive director published a polemic that equated the collegiate amateur model to an "economic camouflage for monopoly practice. . . that operat[es] an air-tight racket of supplying cheap athletic labor."<sup>62</sup> Recently, Justice Kavanaugh accused NCAA schools of similarly rapacious behavior at the expense of powerless athletes.<sup>63</sup>

Similarly, adult clubs disingenuously serve as market intermediaries who bring fee-paying customers together with their dancers.<sup>64</sup> Clubs invert the employment relationship, making dancers responsible for paying co-workers.<sup>65</sup> These upside-down working conditions "may actually reflect 'a framework of false autonomy' that gives performers 'a coercive choice' between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity."<sup>66</sup> False autonomy occurs when a club imposes an in-

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<sup>62</sup> See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 376, 388 (1995), where the NCAA's executive director from 1951-1988 characterized the NCAA as an "economic camouflage for monopoly practice . . . that operat[es] an air-tight racket of supplying cheap athletic labor."

<sup>63</sup> See *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring):

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

<sup>64</sup> *E.g.*, *Johnson v. VCG Holding Corp.*, 845 F. Supp. 2d 353 (D. Me. 2012), where male emcees sued for FLSA violations, claiming that their pay was based on tips from dancers. VCG leased space to dance for patrons. *Id.* at 355–56. VCG also treated dancers as independent contractors. *Id.* at 361, 365. In a striking distortion of reality, "VCG sees it differently. It insists that the emcees receive their tips from customers, but that the customers are the entertainers." *Id.* at 377.

<sup>65</sup> See *Collins v. Barney's Barn, Inc.*, No. 4:12CV000685 SWW, 2013 WL 1668984, at \*4 (E.D. Ark. 2013) (stating that a dancer paid \$25 to \$50 to the house every night and was told to pay "tip-outs" to disc jockeys and bouncers).

<sup>66</sup> *Terry v. Sapphire Gentlemen's*, 336 P.3d 951, 959 (Nev. 2014), quoting Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 347 (2013).

dependent contractor agreement on club dancers while exerting extreme control over their conditions of work.<sup>67</sup>

### C. Limits on Earnings

The NCAA extensively regulates how much money an athlete can receive from a school. Athletes can only receive “financial aid” in the form of “funds provided to student-athletes from various sources to pay or assist in paying their cost of education at the institution.”<sup>68</sup> Permissible sources in-

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<sup>67</sup> *E.g.*, *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 864-65 (Nev. 2021), enumerated a comprehensive list of club rules for dancers:

Myriad written and posted limitations on the Doe Dancers’ costumes and performances met them inside the club — setting a minimum heel height of two-inches, grip strips, mandatory; prohibiting “clog type” shoes, “street clothes,” “cotton material,” “tears in your stockings or outfits,” glitter and body oil; requiring graceful stage exits; and defining appropriate body placement during performances and while interacting with customers. And, the posted rules carried on, addressing dancer manners (“Keep feet off the furniture”) and etiquette (“Working together is very important.” “PLEASE GIVE [other dancers] THE SAME RESPECT THAT YOU WOULD LIKE THEM TO GIVE YOU.”); social interactions (“[D]o not walk up to a customer and just ask him for a dance, talk to them, get to know him a little . . . leave a great and lasting impression. Sit at least one song with them first.”); personal hygiene (“A MUST”); wound care (“ALL CUTS TO BE COVERED WITH . . . BAND-AIDS.”); transportation (“CABS AND YOUR RIDE WILL PICK YOU UP AT THE DRESSING ROOM DOOR ONLY.” “Anyone giving you a ride . . . is not allowed in the dub during your shift.”); and parking (“ALL NIGHT TIME ENTERTAINERS—AFTER 7PM WILL VALET PARK OR HAND KEYS OVER TO HOUSE MOM.”) . . .

and ultimately singular and seemingly intrusive limitations (“LET MANAGER KNOW OF [YOUR PRESCRIPTION] MEDICATIONS” . . . “No boyfriends, husbands, or lovers allowed in the club while you are [w]orking.” “You MUST NOT refuse a drink or shooter from a customer.” “You MUST change costumes at least three times during a shift.”).

The club imposed “‘a framework of false autonomy’” by setting prices the house fee and dances; requiring dancers to be in stage dances together unless they paid a fee to stay off-stage and demanding “a cut from any earned ‘funny money. . . .’” *Id.* at 869 (citations to quotes omitted).

<sup>68</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 16.01.1.1 (Restitution for Receipt of Impermissible Benefits), providing that:

[A] Unless otherwise noted, for violations of Bylaw 16 in which the value of the benefit is \$200 or less, the eligibility of the student-athlete shall not be affected conditioned upon the student-athlete repaying the value of the benefit to a charity of the student-athlete’s choice. The student-athlete,

clude institutional funds for athletics,<sup>69</sup> a separate category of institutional financial aid,<sup>70</sup> another category that narrowly defines aid from outside an institution,<sup>71</sup> and other sources for incidental assistance.<sup>72</sup>

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however, shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the student-athlete repays the benefit.

<sup>69</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.1 (Athletically Related Financial Aid), defined as “financial aid that is awarded on any basis that is related to athletics ability, participation or achievement.”

<sup>70</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.2 (Institutional Financial Aid), which includes but is not limited to “(1) Scholarships; (2) Grants; (3) Tuition waivers; (4) Employee dependent tuition benefits, unless the employee has been employed as a full-time faculty/staff member for a minimum of five years; and (5) Loans.”

<sup>71</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.3 (Other Permissible Financial Aid):

- (a) Financial aid received from anyone upon whom the student-athlete is naturally or legally dependent;
- (b) Financial aid awarded solely on bases having no relationship to athletics ability;
- (c) Financial aid awarded through an established and continuing outside program as outlined in Bylaw 15.2.6.4; and
- (d) Educational expenses awarded by the U.S. Olympic and Paralympic Committee, which count against an institution’s sport-by-sport financial aid limitations and against the individual’s maximum limit on financial aid.

<sup>72</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 16.11.1.6 (Miscellaneous Benefits), allowing an institution to “provide or arrange for the following benefits for a student athlete,” including:

- (a) The use of a return ticket at any time after the conclusion of a foreign tour;
- (b) Receipt of frequent flier points and/or miles earned while traveling to and from intercollegiate practice and/or competition;
- (c) Participation in receptions and festivities associated with championships, conference tournaments or all-star events hosted by and conducted on the institution’s campus;
- (d) Occasional meals to team members provided by a student-athlete’s family member at any location;
- (e) Telephone calls in emergency situations as approved by the director of athletics (or designee);
- (f) Reasonable tokens of support and transportation, housing and meal expenses in the event of injury, illness, or death of a family member or another student-athlete;
- (g) Fundraisers for student-athletes (or their family members) under the following extreme circumstances:

Similarly, dancers are financially dependent on the clubs rather than being in business for themselves.<sup>73</sup> Clubs extensively control dancers by requiring them to adhere to price lists.<sup>74</sup> For example, clubs regulate prices for lap dances in a VIP room.<sup>75</sup>

#### D. Financial Penalties

The NCAA and adult entertainment clubs not only limit the earnings of athletes and dancers: they impose rules to take back these earnings. NCAA rules allow a school to impose financial penalties on athletes who violate amateurism rules.<sup>76</sup> The NCAA's standard financial agreement specifies numerous grounds for terminating aid to an athlete. These grounds include four activities that are an ordinary part of an employment relationship:

This aid will also be reduced or canceled if the recipient:

- a. Signs a professional sports contract for this sport.
- b. Accepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant.
- c. Agrees to be represented by an agent and accepts money that causes him/her to exceed the cost of a full grant.

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(1) Extreme circumstances should be extraordinary in the result of events beyond the student-athlete's control (e.g., life-threatening illness, natural disaster);

(2) The proceeds must be designated for a specific purpose (e.g., payment of medical bills, purchase of medical equipment, replacement of items lost in a fire, etc.);

(3) The proceeds may be given directly to the beneficiaries, with receipt kept on file by the institution, which must include the amount of expenses incurred and the total amount received; and

(4) The excess proceeds must be given to a not-for-profit organization with the receipt kept on file by the institution.

(h) The payment of admission costs or a meal for any student-athlete being honored at a nonathletics awards ceremony.

The rule's most remarkable features are its specificity and petty value of certain allowable transactions (e.g., emergency telephone calls).

<sup>73</sup> See *Butler v. PP&G, Inc.*, No. WMN-13-430, 2012 WL 5964476, at \*4 (D. Md. Nov. 7, 2013) (finding that dancers were "entirely dependent on the [club] to provide [them] with customers.")

<sup>74</sup> *Clincy*, 808 F.Supp.2d at 1333 (noting that house dances were priced at \$10, VIP room dances at \$20).

<sup>75</sup> *Id.*

<sup>76</sup> See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5 (Financial Aid), which "includes all institutional financial aid and other permissible financial aid as set forth below."



- d. Receives other aid that causes him/her to exceed his/her individual limit.<sup>77</sup>

The NCAA Financial Agreement states reasons for withdrawing aid that are defensible on grounds that all students are likely subject to similar school sanctions.<sup>78</sup> However, these grounds expand to include situations where a coach might induce a breach of rules. For example, some coaches pressure athletes to leave a program because they want to create a roster space for a better player.<sup>79</sup>

More specifically, two grounds for withdrawing aid are problematic because they are vague and can be abused. These can occur, for instance, when athletes transfer in response to coaching harassment or mistreatment. One ground for withdrawing aid from an athlete—seemingly innocuous—

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<sup>77</sup> NCAA, *Financial Aid Agreement*, *supra* note 20, Point 3.

<sup>78</sup> *Id.* at Point 2:

...

- b. Fraudulently misrepresents any information on his/her application for scholarship, application for admission, historical report, or letter of intent.

...

- d. Engages in serious misconduct warranting substantial disciplinary penalty. Violations of the following constitute serious misconduct or manifest disobedience:

...

- e. Fails to attend classes, squad or individual meetings, study hall, assemblies, tutoring of study group sessions and participate in athletic practice sessions and scheduled contests, as specified by the sport coach.

- f. Does not comply with expected personal conduct, appearance and dress, both on and off the University campus, and accepted uniform for athletic contests, when such violations bring discredit to the athletic program.

...

- h. Engages in gambling activities on intercollegiate activities prohibited by NCAA legislation.

- i. Engages in the use, possession, or traffic of an illegal drug substance, or refuses to take a drug test when requested to do so by NCAA, campus, community or departmental authority.

<sup>79</sup> See PETER G. LAND ET AL., FRANCZEK RADELET, INVESTIGATIVE REPORT: INJURY MANAGEMENT AND SCHOLARSHIP RENEWAL IN THE UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN DIVISION OF INTERCOLLEGIATE ATHLETICS FOOTBALL PROGRAM 3, reporting:

A total of four students relinquished their scholarships. We determined that, because of direction from football coaches, those four players agreed in early December 2014 to leave school and give up their scholarship for the spring 2015 semester against their stated wishes and without anyone telling them they had a right to a scholarship for the entire 2014-2015 academic year.

states: “Fails to adhere to training rules and regulations.”<sup>80</sup> In reality, some athletes are pressured to train when they are injured or medically restricted.<sup>81</sup>

In addition, the NCAA Financial Agreement fails to specify a process for withdrawing an athlete’s aid. This gray area can be abused, as shown by an episode involving the Rutgers University women’s softball team. Players were “in constant fear that they would lose their scholarships if they complained about the abuse despite NCAA rules to protect them from such retribution.”<sup>82</sup> Apart from possible retaliation for reporting abuse or harassment, the second ground that can be exploited states: “Voluntar[y] with-

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<sup>80</sup> NCAA, *Financial Aid Agreement*, *supra* note 20, at 2(g).

<sup>81</sup> See PETER G. LAND ET AL., *supra* note 79, at 26, reporting: “Demeaning Criticism for Seeking Treatment. Coach (Tim) Beckman told us that, during practice, he called players ‘pussy,’ ‘sissy,’ or ‘soft’ when they left practice to seek assistance from an athletic trainer. See *also id.* at 4-5, with quotes from an athlete who was part of the investigation:

@coachbeckman and staff systematically removed our voices by holding scholarships over our head. . . .

I’m not the only horror story of abuse and misuse of power by @coachbeckman.

My knee had a tear in the meniscus. Takes 6 months to heal if repaired. Ask @drose Instead I was told it was no big deal. Back in two weeks. 8 months later I found out my meniscus is almost completely gone.

No MRI’s no surgery pictures for 8months (sic).

We don’t talk about how we’re mistreated because we’re then “not a team player” or “soft” but no one pays the bill when we’re gone.

. . .

This is @coachbeckman’s strategy, conform, or you’ll really hate it. I quit football because the pressure to get back on the field was too much from @coachbeckman and his staff. I was too injured to continue.

I didn’t want to come into work after my “boss” told me wasn’t given an option to have my knee repaired. my pain is in my head.

I know my body so don’t tell me your opinion when I know the truth.

. . .

The @NCAA lol doesn’t care, the @BigTenNetwork doesn’t care, and the @Illinois\_Alma doesn’t care #followthemoney

WHEN @coachbeckman is fired you’ll hear plenty more stories but right now he’s dangling scholarships like a carrot.

<sup>82</sup> Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETIC BUS. (Oct. 2019), <https://www.athleticbusiness.com/civil-actions/rutgers-softball-players-allege-abuse-by-coach.html> [https://perma.cc/K4TH-UNSN] (Rutgers softball head coach, Coach Kristen Butler, who allegedly engaged in abusive treatment of at least seven players, attempted to revoke the scholarship of two players who eventually transferred).

draw[al]s from a sport for his/her own personal reasons.”<sup>83</sup> However, coaches can induce an athlete’s “voluntariness”<sup>84</sup> to gain a scholarship for a new athlete.

Likewise, adult clubs exercise control over dancers by threatening to fine them for breaking rules.<sup>85</sup> Clubs can fine dancers for being late to work or tardy in appearing on stage.<sup>86</sup> They can also charge a variety of work-related fees including a fee to appear on stage,<sup>87</sup> and require dancers to pay tips to “house moms,” disc jockeys, poker announcers, doormen, and bartenders.<sup>88</sup>

### III. COURT RULINGS FOR COLLEGE ATHLETES: ALTERNATING BETWEEN EMPLOYEES AND AMATEURS

College athletes should be considered employees under the FLSA. To support that conclusion, I trace the long history on this issue. In Part III.A,<sup>89</sup> I begin with the earliest legal treatment of college athletes, two worker’s compensation cases from nearly 70 years ago ruling that student athletes were employees.<sup>90</sup> The impact of these decisions was blunted—first, by a revision in California’s labor code to exclude college athletes,<sup>91</sup> then by tort cases,<sup>92</sup> and more recently by two federal appeals courts decisions that ruled on FLSA cases (*Berger v. NCAA*,<sup>93</sup> and *Dawson v. NCAA*<sup>94</sup>).

<sup>83</sup> NCAA, *Financial Aid Agreement*, *supra* note 20, at 2(c).

<sup>84</sup> Kate Hairopoulos, *SMU’s Brown Trims 4 Players from Roster*, DALLAS MORNING NEWS (Apr. 22, 2012), at 2012 WLNR 9165434 (newly hired basketball coach forced out four scholarship players, saying that they would never play for him).

<sup>85</sup> *E.g.*, *Doe v. New Ritz, Inc.*, No. WDQ-14-2367, 2015 WL 4389699, at \*1 (D. Md. 2015).

<sup>86</sup> *Id.*; *see also* *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343, 1350 (M.D. Fla. 1997); *Hart v. Rick’s Cabaret Intern., Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013); and *Thompson v. Linda A., Inc.*, 779 F. Supp. 2d 139, 148 (D.D.C. 2011).

<sup>87</sup> *E.g.*, *Smith v. Tyad, Inc.*, 209 P. 3d 228, 234 (Mont. 2009) (club-imposed stage fee for dancer is subject to the reimbursement provisions under Montana’s wage laws and is enforceable with a statutory penalty).

<sup>88</sup> *E.g.*, *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-002510-TMB, 2012 WL 2175753, at \*4 (D. Ala. 2012).

<sup>89</sup> *Infra* notes 101-130.

<sup>90</sup> *Infra* notes 101-102.

<sup>91</sup> *Infra* note 103.

<sup>92</sup> *Infra* note 104.

<sup>93</sup> *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

<sup>94</sup> *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

My attention shifts in Part III.B to appellate briefs filed on behalf of college athletes in *Berger* and *Dawson*.<sup>95</sup> I demonstrate how these briefs failed to persuade the courts. My analysis condenses these briefs,<sup>96</sup> and demonstrates how court opinions rejected,<sup>97</sup> or ignored,<sup>98</sup> the athletes' arguments. I suggest that there are lessons to be learned in briefing the FLSA cases before the Third Circuit in *Johnson*.<sup>99</sup>

#### A. College Athletes: How They Were Excluded by Law as Employees

Long before college sports mushroomed into a heavily commercialized business, courts began to recognize NCAA athletes as employees. The Colorado Supreme Court, in *Univ. of Denver v. Nemeth*, ruled that a college athlete who hurt his back during the team's football practice qualified for worker's compensation benefits because he "engage[d] in football games under penalty of losing the job and meals" and therefore "playing football was an incident of his employment by the University."<sup>100</sup> In the 1963 case *Van Horn v. Indus. Accident Comm'n*, a California appeals court ruled the widow and minor children of a college athlete, who was killed in a plane crash while returning from a game, were entitled to death benefits under the California Workmen's Compensation Act because his athletic scholarship was "consideration . . . paid for services."<sup>101</sup>

California lawmakers nullified *Van Horn*.<sup>102</sup> Subsequent cases then reflected the NCAA's view that athletes are amateurs.<sup>103</sup> *Rensing v. Indiana*

<sup>95</sup> *Infra* notes 131-160.

<sup>96</sup> *Infra* notes 131-138; 146-150.

<sup>97</sup> *Infra* notes 139-142; 152-160.

<sup>98</sup> *Infra* note 151.

<sup>99</sup> *Infra* notes 161-244.

<sup>100</sup> 257 P.2d 423, 428 (Colo. 1953).

<sup>101</sup> 33 Cal. Rptr. 169, 170-74 (Cal. Ct. App. 1963), superseded by statute, CAL. LAB. CODE § 3352(a)(11)(West 2018). *See also* State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288 (Colo. 1957) (holding that a widow of an athlete who was fatally injured on the opening play of a college football game was not entitled to a beneficiary death benefit under the Colorado Workmen's Compensation Act).

<sup>102</sup> California Labor Code Section 3352 was amended in 1965 to exclude athletic participants as employees. *Townsend v. State of California*, 191 Cal.App.3d 1530, 1537 (1987), described the intent of this change: "[The] amendment evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution for any purpose which could result in financial liability on the part of the university."

<sup>103</sup> *Shephard v. Loyola Marymount Univ.*, 102 Cal. Rptr. 2d 829, 832-33 (Cal. Ct. App. 2002); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. 1983); and *Korellas v. Ohio St. Univ.*, 779 N.E.2d 1112 (Ohio 2002).

*State Univ. Bd. of Trustees* highlighted this deferential posture.<sup>104</sup> An Indiana State University football player, Fred W. Rensing, who signed a scholarship contract with the university, was paralyzed while covering a punt in spring practice.<sup>105</sup> His injury left him 95%-100% disabled.<sup>106</sup> An appeals court found that Rensing was an employee under the state's worker's compensation law,<sup>107</sup> but the Indiana Supreme Court reversed this ruling.<sup>108</sup> Its reasoning centered on Rensing's contract with his school, and NCAA rules that defined his status as an amateur.<sup>109</sup>

Nearly forty years later, two federal appeals courts in FLSA lawsuits by college athletes mimicked the Indiana Supreme Court's deference to the NCAA. In *Berger v. NCAA*,<sup>110</sup> a female track and field athlete from the University of Pennsylvania sought payment of a minimum wage for rendering athletic labor. The Seventh Circuit Court of Appeals ruled that she lacked standing to sue the NCAA, because her connection to the association was tenuous.<sup>111</sup> Paradoxically, the court also said that NCAA rules regulated

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<sup>104</sup> 444 N.E.2d 1170 (Ind. 1983) (*Rensing II*).

<sup>105</sup> *Rensing v. Ind. St. Univ. Bd. Trs.*, 437 N.E.2d 78, 82 (Ind. 1982) (*Rensing I*).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 89.

<sup>108</sup> *Rensing II*, 444 N.E.2d at 1175.

<sup>109</sup> *Id.* at 1174, reasoning that:

While there was an agreement between Rensing and the Trustees which established certain obligations for both parties, the agreement was not a contract of employment. Since at least three important factors indicative of an employee-employer relationship are absent in this case, we find it is not necessary to consider other factors which may or may not be present.

The court also noted:

We find that the evidence here shows that Rensing enrolled at Indiana State University as a fulltime student seeking advanced educational opportunities. He was not considered to be a professional athlete who was being paid for his athletic ability. In fact, the benefits Rensing received were subject to strict regulations by the NCAA which were designed to protect his amateur status. Rensing held no other job with the University and therefore cannot be considered an "employee" of the University within the meaning of the Workmen's Compensation Act.

*Id.* at 1175.

<sup>110</sup> *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

<sup>111</sup> *Id.* at 289, concluding that the plaintiffs' "connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship," and that they "have not plausibly alleged any injury traceable to, or redressable by, any defendant other than Penn."

her athletic competitions.<sup>112</sup>

In addition, although the court acknowledged that the FLSA defines compensable work “expansively,”<sup>113</sup> it relied instead on legislation that authorizes states to employ prisoners for less than a minimum wage even though these work arrangements could compete against private sector wage-earners.<sup>114</sup> The court explained that “Congress has already struck the balance by precluding a wide range of inmate-labor competition while permitting governments to use the fruits of such labor.”<sup>115</sup> Prison labor is not comparable to college athletics because unpaid college athletes do not put downward wage competition on any group of workers. Moreover, there is the absurd implication that if a state can enjoy “the fruits” of prison labor, its public universities can enjoy the fruits of college athletic labor without paying a minimum wage. This reasoning ironically supports the critical view that the NCAA’s amateur model exploits athletes more than it advances an educational mission.<sup>116</sup>

And while the court recognized that FLSA claims are usually judged by a multi-factor test,<sup>117</sup> it concluded with cursory reasoning that Berger’s complaint did not qualify for this type of analysis.<sup>118</sup> More specifically, Berger contended that her status as a student employee was governed by a multi-factor test for college interns set forth in *Glatt v. Fox Searchlight Pic-*

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<sup>112</sup> Curiously, the court acknowledged that “Penn’s women’s track and field team is regulated by the NCAA” (emphasis added) — essentially, how employers control an employee’s time and activities. *Id.*

<sup>113</sup> *Id.* at 290.

<sup>114</sup> *Id.* citing *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992) without a convincing justification for how a prison labor case compares to college athletics.

<sup>115</sup> See *Vanskike*, 974 F.2d at 811:

Congress has already struck the balance by precluding a wide range of inmate-labor competition while permitting governments to use the fruits of such labor. That Congress drew the line where it did suggests that it considered a certain range of prison labor for the benefit of government outside the boundaries of the targeted evil.

<sup>116</sup> See *HAWKINS*, *supra* note 51; *Van Rheenen*, *supra* note 51; *Beamon*, *supra* note 51; *Edwards*, *supra* note 51 (“But Black student-athletes are burdened also with the insidiously racist implications of the myth of ‘innate Black athletic superiority,’ and the more blatantly racist stereotype of the ‘dumb Negro’ condemned by racial heritage to intellectual inferiority.”).

<sup>117</sup> *Berger v. NCAA*, 843 F.3d 285, 290 (7th Cir. 2016).

<sup>118</sup> *Id.* at 291 (“The multifactor test proposed by Appellants here simply does not take into account this tradition of amateurism or the reality of the student-athlete experience.”).

*tures, Inc.*, but the court gave this argument short shrift.<sup>119</sup> Thus, the Court held that Berger failed to state a claim under the FLSA.<sup>120</sup>

In a concurring opinion, Judge Hamilton indicated that an FLSA claim put forward by athletes who participate in “revenue sports” like Division I football and basketball would merit closer scrutiny, because in those sports, “the economic reality and the tradition of amateurism may not point in the same direction.”<sup>121</sup> Judge Hamilton’s focus on revenue-generating sports also suggests that NCAA sports linked to the Olympics should be examined for their progress in modifying outdated definitions of amateur competition.<sup>122</sup>

*Dawson v. NCAA* was decided along similar lines by the Ninth Circuit Court of Appeals.<sup>123</sup> Lamar Dawson, a football player at the University of Southern California (USC), alleged that the PAC-12 Conference and the NCAA were employers under the FLSA and California labor law.<sup>124</sup> Dawson also alleged that the NCAA and the PAC-12 acted as an employer by “pre-scripting the terms and conditions under which student-athletes perform services.”<sup>125</sup>

Affirming the district court’s dismissal of Dawson’s complaint, the Ninth Circuit rejected his argument that the conference and NCAA are joint employers of college athletes.<sup>126</sup> The court engaged in a tautology

<sup>119</sup> *Id.* at 290, citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015).

<sup>120</sup> *Id.* at 294.

<sup>121</sup> *Id.* setting forth this reasoning:

I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.

<sup>122</sup> Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV. 118, 214, reporting on the “well-documented demise of amateurism as a major theme for the Olympics,” and proposing a “new tradition— one that takes advantages of the lessons learned by the Olympics and which recognizes the reality of college sports as big business. . . .”

<sup>123</sup> *Dawson*, 932 F.3d 905.

<sup>124</sup> *Id.* at 908.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 908, 913.

when it reasoned that, because NCAA amateurism rules prohibit any payment for athletic skill, college athletes cannot be employees.<sup>127</sup>

*Dawson* also mirrored *Berger's* acknowledgment that the FLSA broadly defines employment to mean “permit to work,” but noted, however, that the FLSA has “its limits.”<sup>128</sup> Because the NCAA has no rules for hiring or firing athletes, the “economic reality of the relationship between the NCAA/PAC-12 and student-athletes does not reflect an employment relationship.”<sup>129</sup> Not only is this tautological reasoning, but it also ignores the fact that employment relationships are often at-will without the formalities that the court said define an employment relationship.<sup>130</sup> In addition, the court recounted the state of California’s history of excluding college athletes from employment laws.<sup>131</sup> The *Dawson* court, like the *Berger* court, briefly referred to a prison labor case to conclude that some types of institutionalized work fall outside the FLSA.<sup>132</sup>

#### B. Appellate Briefs Failed to Convince Courts in *Berger* and *Dawson*

In this section, I condense the legal arguments made in the athletes’ briefs in *Berger* and *Dawson*. My goal is to match arguments in the briefs with outcomes in these appellate decisions to learn how these arguments failed to persuade the courts.

<sup>127</sup> *Id.* at 908, citing NCAA art. 12.1.4 (financial aid is “not considered to be pay or the promise of pay for athletics skill” and art. 12.1.2 (prohibiting any payment to a student-athlete for athletic services).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 909, observing that NCAA rules “pervasively regulate college athletics” but say nothing about “hire and fire” or similar control over college athletes.

<sup>130</sup> *E.g.*, *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1386 (1st Dist. 1999) (“[I]n the absence of any evidence of the duration or term of employment under a written or oral agreement, there is a statutory presumption that employment is terminable at will, and a contract of employment may be ended at any time at the option of either party.”); and *Tenerelli v. Rite Aid Corp.*, 2019 WL 1755497, \*4 (E.D. Cal. 2019). The fact that employers have largely unfettered power to end the employment relationship has been a concern to legal commentators for decades. *See* Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207 (1983) (proposing a state-by-state adoption of statutes that guarantee protection from unjust discharge); and Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (discussing obstacles faced by employees in the employment at will context).

<sup>131</sup> *Dawson*, 932 F.3d at 912–913.

<sup>132</sup> *Id.* at 910, citing *Hale v. State of Ariz.*, 993 F.2d 1387 (9th Cir. 1993). Curiously, the court did not elaborate its reason for mentioning *Hale*.



The athletes in *Berger* argued that an employer's labeling of the work relationship does not determine a legal inference of independent contracting.<sup>133</sup> Just as an agricultural employer cannot not evade wage and hour laws by labeling workers as migrant laborers,<sup>134</sup> the NCAA should not be permitted to evade FLSA obligations by analogizing athletes to non-employee interns.<sup>135</sup> The brief centered on the multi-factor test for employment of college interns under the FLSA.<sup>136</sup> By this reasoning, college athletes are unlawfully excluded from FLSA coverage due to their misclassification as non-employee interns, referring to *Glatt v. Fox Searchlight Pictures, Inc.*<sup>137</sup> Under *Glatt*, whether college interns are classified as employees or volunteers depends on a flexible approach that weighs the “economic reality of the nature of the working relationship.”<sup>138</sup> This approach aimed to encourage the Court to focus on whether a student's work is performed primarily for the benefit of the putative employer.<sup>139</sup> The brief concluded that the NCAA's labeling of a student worker as an intern should have no bearing on a determination of a college athlete's employment relationship because the FLSA does not define an “intern.”<sup>140</sup>

The Seventh Circuit found no merit in these arguments,<sup>141</sup> persuaded instead by the NCAA's mythical depiction of college athletes.<sup>142</sup> Without any authority, the court editorialized:

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<sup>133</sup> Plaintiff App. Brief, *supra* note 16, at \*5–9.

<sup>134</sup> *Id.* at \*5–6, citing *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987), affirming district court ruling that that farm-field workers are “employees” under the FLSA.

<sup>135</sup> *Id.* at \*8 (“The relevant point is that there is no more any ‘intern’ test under the FLSA than there is any ‘migrant laborer’ test. There are only employee tests.”).

<sup>136</sup> *Berger et al.*, *supra* note 133.

<sup>137</sup> *Id.* at \*6–9, \*12, citing 791 F.3d 376 (2d Cir. 2015), modified, 811 F.3d 528 (2d Cir. 2016).

<sup>138</sup> *Id.* at \*6 (quoting *Lauritzen*, 835 F.2d at 1534, and *Glatt*, 791 F.3d at 384 (2d Cir. 2015)). The *Berger* brief—filed on June 16, 2016—mistakenly relied on the *Glatt* ruling in 2015, which was vacated on January 25, 2016, and remanded in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d. Cir 2016).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at \*7.

<sup>141</sup> *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016).

<sup>142</sup> *Id.* at 291, noting: “As the Supreme Court has noted, there exists ‘a revered tradition of amateurism in college sports,’” (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)). The *Berger* court continued: “That long-standing tradition defines the economic reality of the relationship between student athletes and their schools. To maintain this tradition of amateurism, the NCAA and its member universities and colleges have created an elaborate system of eligibility rules.” *Id.*

Moreover, the long tradition of amateurism in college sports, *by definition*, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—without any real expectation of earning an income (emphasis added).<sup>143</sup>

The italicized portion shows that the court accepted the NCAA’s circular reasoning: college athletes are not employees because the NCAA says so.

The court also found limits to the FLSA’s expansive definition of employment, citing a prison labor case which denied the law’s coverage to incarcerated workers.<sup>144</sup> In reaching this conclusion, the court stated that the prison labor case was more relevant than the *Glatt* case.<sup>145</sup> The court also relied on case law that rejected college athlete claims for employment status,<sup>146</sup> and a Department of Labor Field Operations Handbook—no longer in effect—that provided interpretive guidance on classifying student interns.<sup>147</sup>

The brief for college athletes in *Dawson* advanced similar arguments.<sup>148</sup> Broadly, the brief argued that the FLSA and California labor laws require that people are paid in exchange for working.<sup>149</sup> However, in a significant departure from the *Berger* brief, the *Dawson* brief explained that *O’Bannon* identified an exchange of athletic labor for educational benefits.<sup>150</sup> The brief concluded that the “exchange the Court described as ‘quintessentially commercial’ in *O’Bannon*—labor on the sports field for in-kind compensation—

<sup>143</sup> *Id.* at 293.

<sup>144</sup> *Id.* at 290, citing *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 292, citing *Shephard* 102 Cal.App.4th at 837.

<sup>147</sup> *Berger*, 843 F.3d at 293. (“Because NCAA-regulated sports are ‘extracurricular,’ ‘interscholastic athletic’ activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH’s interpretation of the student-athlete experience to be persuasive.”).

<sup>148</sup> *Dawson et al., Plaintiff Appellants v. National Collegiate Athletic Association, et al.*, 2017 WL 4318972 (Appellate Brief), United States Court of Appeals, Ninth Circuit.

<sup>149</sup> *Id.* at \*2, \*4.

<sup>150</sup> *Id.* at \*19, contending: “Indeed, in *O’Bannon*, under identical circumstances, in deciding that the NCAA’s compensation rules were not exempt from the anti-trust laws, the Court recently held that ‘the exchange they regulate — *labor for in-kind compensation* — *is a quintessentially commercial transaction*,’” quoting *O’Bannon*, 802 F.3d at 1066 (emphasis in original). The brief also quoted this passage from *O’Bannon* at \*2, \*13.

is exactly the same exchange at issue here,”<sup>151</sup> adding: “There simply is no principled basis on which to conclude that, under this Court’s decision in *O’Bannon*, the relationship between Division I FBS football players and Defendants is anything other than quintessentially commercial.”<sup>152</sup>

In a remarkable omission, the *Dawson* opinion did not cite *O’Bannon*—a complete rejection of the athletes’ effort to call attention to a significant erosion of the NCAA’s amateur model. By ignoring *O’Bannon* entirely, the court avoided its own description of how college athletes engage in a commercial exchange of labor for the benefit of their schools.<sup>153</sup>

Adding to this disconnect in reasoning, *Dawson* determined that the NCAA was nothing more than a “regulator” who set rules for how schools utilize college athletes.<sup>154</sup> The NCAA did not “hire and fire” as an employer would,<sup>155</sup> nor “exercise any other analogous control over student-athletes.”<sup>156</sup> *Dawson* added that “the record does not demonstrate that the NCAA and PAC-12 choose the players on any Division I football team, nor that they engage in the actual supervision of the players’ performance.”<sup>157</sup> The court referred to “student-athletes” who “allegedly render services,” not college athletes who actually render labor.<sup>158</sup>

Moreover, the *Dawson* brief demonstrated how California wage law applies a four-factor test to determine an employee in *Bonnette v. California Health and Welfare Agency*.<sup>159</sup> The *Dawson* opinion, however, rejected this argument.<sup>160</sup> The court instead focused on a California statute,<sup>161</sup> and case law that determined that college athletes are not employees.<sup>162</sup>

<sup>151</sup> *Id.* at \*19.

<sup>152</sup> *Id.* at \*2, \*13, \*19, \*29.

<sup>153</sup> *O’Bannon*, 802 F.3d at 1066.

<sup>154</sup> *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 909, 910.

<sup>157</sup> *Id.* at 910.

<sup>158</sup> *Id.*

<sup>159</sup> *Dawson* (Appellate Brief), *supra* note 148, at \*17, citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (factors include the power to hire and fire the employees, supervision and control of employee schedules and conditions of work, rate and method of payment, and employment records).

<sup>160</sup> *Dawson*, 932 F.3d at 911 (“Under the *Bonnette* test, however, the NCAA and PAC-12 are clearly not *Dawson*’s employers.”).

<sup>161</sup> *Id.* at 912 (citing the exclusion of student-athletes from the Workmen’s Compensation Act at Section 3352(k) of the Labor Code).

<sup>162</sup> *Id.* at 911, stating:

Under the *Bonnette* test, however, the NCAA and PAC-12 are clearly not *Dawson*’s employers. They do not admit him to the school or pick him for the team; they cannot remove him from the team; they do not supervise

Overall, given the rulings in these cases, it appears that the briefs filed on behalf of college athletes were unpersuasive. In developing and communicating arguments, what went wrong? And what can be learned from the strategy pursued in these cases?

First, lessons emerge from the arguments that failed to persuade the courts. Neither the Seventh Circuit nor the Ninth Circuit appear to have given serious thought to the idea that college athletes are employees. Nor did the courts seriously consider that the NCAA is a joint employer who sets terms and conditions of employment under which schools and their athletes hold games and other athletic competitions. The attempt to compare college athletes to student interns who work for the benefit of a putative employer also had no traction. Similarly, the courts found that, under both the FLSA and applicable state law, no factor indicated employment for the athletes. Relatedly, the courts fully accepted the NCAA's argument that college athletes are simply students who happen to compete in athletics.

Second, though less obvious, lessons can be inferred from points the briefs failed to advance or made only superficially. The briefs could have emphasized a textual argument by narrowing the issue to the FLSA Section 203(g)'s definition of "employ."<sup>163</sup> In a related argument, the athletes' lawyers also could have further scrutinized the FLSA's definition of "work" in Section 203(g). Additionally, the briefs could have explored NCAA rules in more depth to demonstrate that they regulate work, not amateurism. Finally, the briefs missed an opportunity to discuss the extensive time that athletes lose in traveling to and from games and competitions. The concept of "compensable time" under the FLSA for traveling—when an employee reports to an employer's designated station where travel is an indispensable part of the primary work activity—could have been emphasized because college athletes render this form of labor.

I incorporated these lessons into my brief to the Third Circuit in *Johnson*. In Part IV, I reproduce portions of that brief, along with elaboration that goes beyond the court's 6,500-word limit.

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his schedules or activities in practices or games; they do not maintain his scholastic records; and, although they put caps on what he may receive as a scholarship, they do not determine whether he gets a scholarship or in what amount.

<sup>163</sup> Fair Labor Standards Act, Pub. L. No. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §203(g) (2021), stating: "'Employ' includes to suffer or permit to work."

#### IV. BLUEPRINT FOR AN APPELLATE BRIEF: COLLEGE ATHLETES ARE EMPLOYEES

An appellate brief should provide judges a persuasive rationale to rule in favor of an appellant or appellee.<sup>164</sup> In framing my amicus brief in *Johnson*, I used a more textual argument than the briefs in *Berger* and *Dawson*,<sup>165</sup> emphasizing the central importance of Section 203(g)'s definition of “employ” to mean “to suffer or permit to work.”<sup>166</sup> Noting that the Supreme Court broadly defined “work,”<sup>167</sup> my brief extensively quoted the word “work” as it is used in the NCAA’s Division I Manual.<sup>168</sup> My point is simple: the NCAA’s rules constitute work rules, not amateur rules.<sup>169</sup>

I relate this analysis to a common tool that courts use to determine if work qualifies as “employ” under Section 203(g). The Third Circuit has had a long-running, stable body of precedent that originates in early Supreme Court efforts to flesh out the contours of employment covered by the FLSA.<sup>170</sup> There are two simple elements to my argument. First, I frame the NCAA’s use of the amateur model as just another version of an FLSA misclassification case,<sup>171</sup> like cases involving gig workers, including adult club

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<sup>164</sup> The Writing Center, Georgetown University Law Center, *Writing the Statement of the Case in an Appellate Brief* 1 (2020), [https://www.law.georgetown.edu/wp-content/uploads/2021/04/Handout\\_4-Writing\\_the\\_Statement\\_of\\_the\\_Case\\_in\\_an\\_Appellate\\_Brief.pdf](https://www.law.georgetown.edu/wp-content/uploads/2021/04/Handout_4-Writing_the_Statement_of_the_Case_in_an_Appellate_Brief.pdf) [https://perma.cc/7A7R-B6RU] (“Every component of an appellate brief is an opportunity to persuade the reader. . .”). Also, the guide states: “An appellate brief should provide the judges with everything they need to write an opinion in your client’s favor. Therefore, striking the right balance between persuasive advocacy and credibility is crucial.” *Id.* Brooke Rowland (2014) prepared the original handout, which was revised in 2020 by John Donnelly & Perry Cao. *Id.* at n.2.

<sup>165</sup> See Brief for Prof. Michael H. LeRoy as Amicus Curiae Supporting Plaintiff Appellees, *Johnson et al., Plaintiff Appellees v. National Collegiate Athletic Association, et al., Defendant-Appellants*, 2022 WL 2828262 (Third Circuit) [hereinafter *LeRoy Amicus Brief*].

<sup>166</sup> *Id.* at \*8.

<sup>167</sup> *Id.* at \*5, citing *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) (“work” does not necessarily require an employee to engage in “exertion”).

<sup>168</sup> *Id.* at \*7–9, and \*12–13.

<sup>169</sup> *Id.* at \*4 (“NCAA’s rules that meticulously cover the time and activities of college players are clearly work rules—not amateur rules—and therefore, college athletes ‘work’ in the course of ‘employment’ under the FLSA.”).

<sup>170</sup> *Id.* at \*8, \*31.

<sup>171</sup> *Id.* at \*2–4 (“To begin with, the NCAA, its various conferences, and its approximately 1,100 university and colleges, misclassify college athletes as amateurs.”), and at \*3–4, stating:

dancers.<sup>172</sup> Second, and more specifically, I apply the six-factor test under the Third Circuit’s leading precedent, *Donovan v. DialAmerica Marketing, Inc.*<sup>173</sup> Again, I use the NCAA’s Division I Manual to demonstrate how these rules implicate control of the work of athletes for the financial benefit of schools.<sup>174</sup> Finally, I avoid comparing college athletes to the unpaid college interns in *Glatt*. Simply put, this comparison is wrong. The better comparison is to students who are employed by their universities in common jobs that are subject to federal and state minimum wage laws.<sup>175</sup>

#### A. College Athletes Perform “Work” for Their Schools

The FLSA requires employers to pay a minimum wage to their employees, and overtime for workweeks beyond 40 hours.<sup>176</sup> However, the FLSA does not define “work” nor “workweek.”<sup>177</sup> In view of the remedial purposes of the FLSA,<sup>178</sup> the Supreme Court has broadly defined these terms.<sup>179</sup>

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Wage-theft has become widespread: employers have misclassified workers as independent contractors in 20 of the 22 major occupation categories defined by the U.S. Department of Labor. Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationship*, 2017 UNIV. OF CHI. LEGAL FORUM 327, 337 (2017) (Fact Finding 1).

<sup>172</sup> *Id.* at \*3:

Strip clubs use this heavy-handed approach by requiring dancers to sign independent contractor agreements authorizing pay deductions for violating non-negotiable work regulations. Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. OF WOMEN AND THE LAW 249, 256, 264 (2017).

<sup>173</sup> *Id.* at \*10–22.

<sup>174</sup> *Id.* at \*11–15.

<sup>175</sup> *Id.* at \*31 (“NCAA athletes are employees just like classmates are employees who earn a minimum wage as resident advisors, campus tour guides, teaching assistants, and cafeteria cashiers in jobs that are properly classified under the FLSA.”).

<sup>176</sup> 29 U.S.C.A. § 207(a)(1).

<sup>177</sup> *IBP Inc. v. Alvarez*, 546 U.S. 21, 25 (2005).

<sup>178</sup> *Id.*

<sup>179</sup> *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) (travel time to remote work area is compensable); *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) (“work” does not necessarily require an employee to engage in “exertion”); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–691 (1946) (“the statutory workweek” includes “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”); *Steiner v. Mitchell*, 350 U.S. 247, 248–249 (1956) (postliminary compensable time includes safety-related showering on premises); and *IBP, Inc.*, 546 U.S. at 35 (“donning and doffing of protective gear are compensable activities”).

Federal appellate courts have consistently applied these precedents with respect to the FLSA's coverage.<sup>180</sup>

NCAA rules use language that overlaps with terminology from the FLSA and case law. For example, one rule defines how a weight coach directs an athlete's exertion.<sup>181</sup> This verbiage combines elements of work, including words for "exertion" in *Armour & Co.*,<sup>182</sup> and preliminary activities that are indispensably related to a principal activity in *IBP*.<sup>183</sup>

The NCAA Manual allows for "workout apparel" in connection with a "conditioning program" (emphasis added).<sup>184</sup> This language literally uses the root word "work" in a way that arguably conveys the essence of FLSA coverage in *Armour & Co.*<sup>185</sup> Similarly, NCAA Manual contains FLSA's terminology related to "work."<sup>186</sup> This includes a rule for voluntary overtime, performed under an employer's supervision. The first part of the regulation recognizes that a portion of a college player's activities involve "required

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<sup>180</sup> Third Circuit decisions include *Sec'y of U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 425 (3d Cir. 2017) (FLSA requires compensation for rest periods of short duration); *Tyger v. Precision Drilling Corp.*, 832 Fed.Appx. 108, 113 (3d Cir. 2020) (donning and doffing for basic personal protective equipment is compensable under the FLSA, provided it is an integral and indispensable aspect of primary work); and *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) ("donning and doffing activity in this case constitutes 'work' as a matter of law" under the FLSA).

<sup>181</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5, art. 11.7.4.1.1 (Weight or Strength Coach. [FBS])

A weight (strength and conditioning) coach may conduct flexibility, warm-up and physical conditioning activities prior to any game and prior to or during any practice or other organized activities without being included in the limitations on number of coaches (emphasis added)."

<sup>182</sup> *Armour & Co.*, 323 U.S. at 132.

<sup>183</sup> *IBP, Inc.*, 546 U.S. at 35.

<sup>184</sup> NCAA DIV. I MANUAL, *supra* note 2, at 189, in Fig. 14.1 ("Initial Eligibility: How NCAA Legislation (Bylaw 14.3) Affects Student-Athletes During Their Initial Year of College Attendance").

<sup>185</sup> *Armour & Co.*, 323 U.S. at 132.

<sup>186</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.02.15 ("Student-Athlete Discretionary Time. [FBS/FCS]"):

Student-athlete discretionary time is time during which a student-athlete may only participate in athletics activities at the student-athlete's discretion. There shall be no required workouts and institutions are not permitted to recommend that student-athletes engage in weight-training or conditioning activities; however, if the student-athlete opts to work out, the strength and conditioning coach may monitor the facility in use for health and safety purposes.

*workouts*” (emphasis added),<sup>187</sup> while the second part relates to an athlete’s discretionary time “to *work* out.”<sup>188</sup> The plain text of this regulation is consistent with case law that defines “work” performed under the FLSA.<sup>189</sup> A pertinent rule specifically applies to the FCS football team on which Trey Johnson played at Villanova University.<sup>190</sup> This rule’s labeling of coaches as certified strength and conditioning professionals shows that college athletes engage in “exertion” for the benefit of their schools,<sup>191</sup> consistent with *Tennessee Coal, Iron & R. Co. v. Mascoda Local No. 123*.<sup>192</sup>

In sum, the only obstacle to finding that college athletes “work” and engage in “exertion” under the FLSA is the NCAA’s definitional wizardry in mischaracterizing collegiate athletic labor as amateurism.

### B. College Athletes Are Employees under the FLSA’s Six-Factor Test

Appellate courts use a six-factor test to determine whether work should be classified as employment under the Fair Labor Standards Act.<sup>193</sup>

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Fair Labor Standards Act, Pub. L. No. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §203(g) (2021).

<sup>190</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.2.1.1 (“Exception—Championship Subdivision Football. [FCS]”) specifically relates to Trey Johnson’s participation: “In championship subdivision football, countable coaches who are certified strength and conditioning coaches may design and conduct specific workout programs for student-athletes, provided such workouts are voluntary and conducted at the request of the student-athlete.” FCS is the NCAA’s classification of university and college football programs in fourteen conferences: the Big Sky, Big South, CAA, Independent, Ivy, MEAC, Missouri Valley, Northeast, Ohio Valley, Patriot, Pioneer, Southern, Southland and SWAC conferences. See NCSA College Recruiting, *Full List of Division 1 Football Teams: Find the Right Fit for Your Goals*, <https://www.ncsasports.org/football/division-1-colleges#:~:text=FCS%2C%20or%20the%20Football%20Championship,Southern%2C%20Southland%20and%20SWAC%20conferences> [https://perma.cc/W63P-XT3P].

<sup>191</sup> *Id.*

<sup>192</sup> 321 U. S. 590 (1944).

<sup>193</sup> *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985).

- (1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer’s business.



As one Third Circuit opinion noted, the “fundamental point here is that courts must look to the economic realities, not the structure, of the relationship between the workers and the businesses.”<sup>194</sup> Courts do not necessarily keep score with these factors—“neither the presence nor absence of any particular factor is dispositive and. . . courts should examine the ‘circumstances of the whole activity.’”<sup>195</sup>

My analysis turns to specific rules in the NCAA Division I Manual that provide direct evidence that schools are employers under this six-factor test.<sup>196</sup>

**1. Degree of Control:** NCAA rules expressly limit activities and countable hours for college athletes to be under the control and direction of coaches and trainers. A school can control college athletes up to these maximums.

To begin with, Article 17 (“Playing and Practice Seasons”) indicates periods for controlling the practice and competition activities of athletes.<sup>197</sup> More specifically, Article 17.02.1 (“Countable Athletically Related Activities”) shows the essential feature of work performed by athletes under the supervision of coaches and managers:<sup>198</sup>

“Countable athletically related activities include any required activity with an athletics purpose involving student-athletes and *at the direction of, or supervised by, one or more of an institution’s coaching staff* (including strength and conditioning coaches) and must be counted within the *weekly and daily limitations* under Bylaws 17.1.7.1 and 17.1.7.2 (emphasis added).”<sup>199</sup>

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The Third Circuit has consistently applied the six-factor FLSA test. *See e.g.*, *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142 (3d Cir. 2020); *Sec’y U.S. Dep’t. of Labor v. Am. Future Systems, Inc.*, 873 F.3d 420, 426, (3d Cir. 2017); *Moon v. Breathless Inc.*, 868 F.3d 209, 218 (3d Cir. 2017); *Safarian v. Am. DG Energy Inc.*, 622 Fed.Appx. 149, 152 (3d Cir. 2015); *In re Enterprise Rent-A-Car*, 683 F.3d 462, 467 (3d Cir. 2012); *Messmer v. Colors In Bloom, Inc.*, 67 Fed.Appx. 719, 722 (3d Cir. 2003); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987); *DialAmerica Marketing, Inc.*, 757 F.2d at 1382; *E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32, 36 (3d Cir. 1983); and *Zygowski v. Erie Morning Telegram, Inc.*, 298 F.2d 639, 641 (3d Cir. 1962).

<sup>194</sup> *Safarian*, 622 Fed.Appx. at 152.

<sup>195</sup> *DialAmerica Marketing, Inc.*, 757 F.2d at 1383 (quoting *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981)).

<sup>196</sup> *Safarian*, 622 Fed.Appx. at 152.

<sup>197</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.

<sup>198</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.02.1.

<sup>199</sup> *Id.*

Article 17.1.7.1 (“Daily and Weekly Hour Limitations—Playing Season”) provides specific evidence of an institution’s control of athletes, stating: “A student-athlete’s participation in countable athletically related activities (see Bylaw 17.02.1) shall be limited to a maximum of four hours per day and 20 hours per week.”<sup>200</sup> This rule indicates a half-time job relative to a full-time job for 40 hours per week. Rules regulate off-season hours, too:

Article 17.1.7.2(a) “Weekly Hour Limitations— Outside of the Playing Season (Sports Other Than Football).”

Outside of the playing season. . . , only a student-athlete’s participation in required weight training, conditioning and skill-related instruction (including film review and team meetings related to technical and tactical instruction) shall be permitted. A student-athlete’s participation in such activities per Bylaw 17.02.1 shall be limited to a maximum of eight hours per week with not more than four hours per week spent on skill-related workouts.<sup>201</sup>

Article 17.2.6.2 suggests the possibility that college athletes are employed for most of the calendar year by their universities or colleges.<sup>202</sup> The rule is shrewdly phrased by triggering a coach’s supervision when the athlete requests this help, as if coaches do not plant this idea.<sup>203</sup>

Another NCAA rule closely regulates an athlete’s use of sports equipment with the same detail that appears in *IBP, Inc. v. Alvarez*,<sup>204</sup> ruling that an employee’s time in a locker room while donning and doffing safety equipment is compensable under the FLSA.<sup>205</sup> While this rule relates to a school’s commercial exploitation of its trademarks and logos as displayed by their athletes, its enumeration of equipment shows that in some sports—for example, football, hockey, lacrosse, and skiing—athletes don and doff gear in locker rooms much like meatpacking employees in *IBP* don and doff safety gear in compensable preliminary and postliminary work.<sup>206</sup>

<sup>200</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.1.

<sup>201</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.2(a).

<sup>202</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 17.2.6.2 (Vacation-Period and Summer Workout Exception) (“A coach may participate in individual workout sessions with student-athletes from the coach’s team during any institutional vacation period and/or the summer, *provided the request for the assistance is initiated by the student-athlete* (emphasis added).”).

<sup>203</sup> *Id.*

<sup>204</sup> *IBP, Inc.*, 546 U.S. at 24.

<sup>205</sup> *Id.* at 37.

<sup>206</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 12.5.4 states, in pertinent part.

Considered as a whole, these rules show that college athletes are under the continuous supervision and control of coaches, trainers, and managers for most weeks during the academic year. *Razak v. Uber Technologies, Inc.* illustrates the legal relevance of this fact: “Actual control of the manner of work is not essential; rather, it is the right to control which is determinative.”<sup>207</sup> In sum, NCAA rules show enough control over athletes to create an employment relationship.

**2. Skill and Initiative:** While college athletes are talented, their athletic skills do not remove them from FLSA coverage as employees. This is because “(r)outine work which requires industry and efficiency is not indicative of independence and nonemployee status.”<sup>208</sup>

NCAA rules regulate an institution’s employment and use of coaches, beginning with Art. 11.01.2 (“Coach, Head or Assistant”), defining this person as a “head or assistant coach. . . who is designated by the institution’s athletics department to perform coaching duties and who serves in that capacity on a volunteer or paid basis.”<sup>209</sup> These rules regulate the number and type of coaches by sport. For example, Article 11.7.4 (“Bowl Subdivision Football”) provides: “There shall be a limit of one head coach, 10 assistant coaches and four graduate assistant coaches who may be employed by an institution in bowl subdivision football.”<sup>210</sup> These rules clearly indicate the importance of providing instruction and direction to college athletes, thereby minimizing an athlete’s independent reliance on his or her skill and initiative to excel in NCAA competitions.

A skilled therapist in *Jimenez v. Best Behavioral Healthcare, Inc.* sued a mental health provider under the FLSA and Pennsylvania Wage Payment

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A student-athlete may use athletics equipment or wear athletics apparel that bears the trademark or logo of an athletics equipment or apparel manufacturer or distributor in athletics competition and pre- and postgame activities (e.g., celebrations on the court, pre- or postgame press conferences), provided the following criteria are met.

. . .

Athletics equipment (e.g., shoes, helmets, baseball bats and gloves, batting or golf gloves, hockey and lacrosse sticks, goggles and skis) shall bear only the manufacturer’s normal label or trademark, as it is used on all such items for sale to the general public. . . .

<sup>207</sup> 951 F.3d at 145.

<sup>208</sup> *Cherichetti v. PJ Endicott Co.*, 906 F.Supp.2d 312, 317 (D. Del. 2012), quoting *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1295 (3d Cir. 1991).

<sup>209</sup> NCAA, 2021-2022 NCAA Division I Manual at 46. NCAA DIV. I MANUAL, *supra* note 2, art. 11.01.2.

<sup>210</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 11.7.4.

Collection Law,<sup>211</sup> alleging that he was never paid for the specific time he provided services.<sup>212</sup> The court denied a motion to dismiss.<sup>213</sup> Like talented college athletes, psychotherapists have a special skill. However, the court reasoned that “an employee’s training carries less weight where. . . the company ‘controlled the terms and conditions of the employment relationship.’”<sup>214</sup>

In short, because coaches and trainers intensively direct and supervise college athletes, these athletes do not have the skill or initiative to fall outside the employment relationship.

**3. Opportunities for Profit and Loss Depending on Managerial Skill:** College athletes have not been able to profit from their athletic labor until the recent enactment of state NIL laws. New Jersey<sup>215</sup> and Pennsylvania<sup>216</sup> are two such examples of states, and both are in the Third Circuit. While these laws grant economic rights for college athletes, they defer to the NCAA’s amateur athletics model by prohibiting NIL deals that pay for athletic performance.

For example, the New Jersey Fair Play Act limits a college athlete’s ability to profit only from his or her NIL. Section 4(c) allows an athlete to use “the athlete’s name, image, or likeness for a commercial purpose *when the athlete is not engaged in official team activities* (emphasis added).”<sup>217</sup> Section 4(d) provides that an “institutional team contract shall allow the institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics to use the athlete’s name, image, or likeness for advertising and marketing purposes without additional compensation paid to the student-athlete.”<sup>218</sup>

Similarly, Pennsylvania’s NIL law in Section 2006-k(B) forbids college athletes “to use the name, trademarks, servicemarks, logos, symbols” and

<sup>211</sup> See 391 F.Supp.3d at 380, 384 (E.D. Pa. 2019)

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 395.

<sup>214</sup> *Id.* at 390. The court reasoned that “the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way.” *Id.* The court concluded: “Because BBH controlled the terms of Mr. Jimenez’s employment, including its complete control over compensation, the impact of Mr. Jimenez’s skill on the Court’s analysis is therefore minimal.” *Id.* at 390-391.

<sup>215</sup> See New Jersey Fair Play Act, S.B. 971, 2021 Reg. Sess. (N.J. 2021), available at <https://legiscan.com/NJ/text/S971/id/2209738>. [<https://perma.cc/M2A6-FT9K>].

<sup>216</sup> See S.B. 381, 2021 Reg. Sess. (Penn. 2021), available at <https://legiscan.com/PA/text/SB381/id/2420743> [<https://perma.cc/QR66-WMSY>].

<sup>217</sup> S.B. 971, 2021 Reg. Sess. (N.J. 2021).

<sup>218</sup> *Id.*

other institutional intellectual property of schools “in furtherance of the college student athlete’s opportunities to earn compensation”<sup>219</sup> for his or her name, image, and likeness.

In short, these laws afford college athletes new economic rights; however, they disassociate opportunities for profit or loss from athletic accomplishments and team achievements.

The astounding success of St. Peter’s men’s basketball team in the 2022 NCAA’s March Madness tournament shows how NCAA schools continue to profit from team success. In March 2021, the New Jersey school received 149 gifts totaling \$475,000; a year later, the school’s Cinderella run in the tournament coincided with 414 gifts in the same period, yielding \$2.3 million.<sup>220</sup> St. Peter’s financial windfall demonstrates that NCAA rules for amateur athletics, in combination with New Jersey’s NIL, limit a college athlete’s opportunity to profit from their own managerial skill. NIL deals can only be a side-job for athletes,<sup>221</sup> akin to the pay arrangement in *Martin v. Selker Bros., Inc.*<sup>222</sup> In sum, the NCAA severely limits athletes’ opportunities for profit and loss, thereby pointing to an employment relationship.

**4. Investment in Equipment and Facilities:** To demarcate employment more precisely, courts consider whether a putative employer pays for equipment, tools, and facilities. When an organization provides this physical capital to enable or facilitate work, it signifies employment. NCAA schools pay for player equipment and uniforms. The Penn State University 2021 NCAA Financial Report reveals how much a major sports program pays for these essential items—here, \$3,247,919.<sup>223</sup> Football equipment, uniforms, and supplies alone cost the Penn State football team \$523,724 in 2021.<sup>224</sup>

<sup>219</sup> S.B. 381, 2021 Reg. Sess. (Penn. 2021).

<sup>220</sup> See Dave Caldwell, ‘People Just Sent Money In’: What Happened After St Peter’s Basketball Fairytale? THE GUARDIAN (Apr. 26, 2022), <https://www.theguardian.com/sport/2022/apr/26/people-just-sent-money-in-what-happened-after-st-peters-basketball-fairytale> [<https://perma.cc/PUZ4-C6XH>].

<sup>221</sup> See N.J. S.B. 971.

<sup>222</sup> See 949 F.2d 1286, 1294 (3d Cir. 1991) (holding commissioned service station operators, working as independent contractors, were employees under FLSA because “the potential for profit from these side activities does not undermine the finding . . . that the predominant money-making activity of the stations was the sale of gasoline”).

<sup>223</sup> See Penn State University NCAA Membership Financial Reporting System, *Sports Equipment, Uniforms and Supplies* 55, [https://s3.amazonaws.com/gopsusports.com/documents/2022/2/7/2020\\_21\\_NCAA\\_Report\\_Final.pdf](https://s3.amazonaws.com/gopsusports.com/documents/2022/2/7/2020_21_NCAA_Report_Final.pdf). [<https://perma.cc/T95H-ECH6>].

<sup>224</sup> *Id.*

NCAA rules also demonstrate that institutions furnish facilities for college athletes. To illustrate, Article 13.02.3 (“Competition Site”), defines a “competition site” as “the facility in which athletics competition is actually conducted, including any dressing room or meeting facility used in conjunction with the competition.”<sup>225</sup>

At Trey Johnson’s university, Villanova recently announced that its athletic director, Mark Jackson, raised \$18 million for the Andrew J. Talley Athletic Center and \$65 million for the Finneran Pavilion renovation.<sup>226</sup> Even small colleges are investing in modern athletic facilities, including St. Vincent’s College in Latrobe, Pennsylvania.<sup>227</sup> These examples of facilities investments are concrete evidence in support of classifying athletes as employees.<sup>228</sup>

**5. Permanency of Relationship:** The permanency test for employment is met even where a work arrangement is short-term or part-time. In misclassification cases, putative employers who rely on an FLSA exclusion for independent contractors frequently contend that flexible, short-term work assignments differ from permanent jobs, and therefore are excluded from the statute.<sup>229</sup> The test for this employment factor asks whether a person “transfer[s] their services from place to place, as do independent contractors.”<sup>230</sup>

In this vein, the NCAA’s amateurism model reflects a continuing relationship between athletes and their schools of sufficient duration and sub-

<sup>225</sup> NCAA DIV. I MANUAL, *supra* note 2, art. 13.02.3.

<sup>226</sup> See *Villanova University Names Director of Athletics Mark Jackson to Position of Vice President*, VILLANOVA UNIV. (Jan. 13, 2020), <https://villanova.com/news/2020/1/13/general-villanova-university-names-director-of-athletics-mark-jackson-to-position-of-vice-president.aspx> [https://perma.cc/5Q6U-VEU3].

<sup>227</sup> See *Saint Vincent College Announces Plans to Build New Athletic and Recreation Center by Public Relations*, SAINT VINCENT COLL.COLLEGE (Feb. 14, 2022), <https://www.stvincent.edu/news/2022/svc-announces-plans-for-new-athletic-recreation-center.html> [https://perma.cc/6KMW-K6V8].

<sup>228</sup> See *Zippo*, 713 F.2d at 36 (3d Cir. 1983), tracing the origins of this factor to *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (“courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.”).

<sup>229</sup> See *Terry*, 336 P.3d at 960, noting that while the club contended that “[d]ancers are itinerant because they have the freedom to ply their dancing trade at a multitude of gentlemen’s clubs,” the germane point was that “the performers were like “countless workers in other areas of endeavor who are undeniably employees . . . for example, waiters, ushers, and bartenders (citations and quotes omitted).”

<sup>230</sup> *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985).

stance to lead to high graduation rates for athletes.<sup>231</sup> Recently, the NCAA reported that the graduation rate for Division I athletes increased from 74 percent in 2002 to 90 percent in 2021.<sup>232</sup> These graduation rates imply that athletes meet the permanency test by providing athletic labor over a four- to five-year period.

Universities have employment contracts for similar years, even when they hire a sought-after coach. When Seton Hall University hired Shaheen Holloway—St. Peter’s head coach—to be its men’s basketball coach, the school agreed to a six-year contract.<sup>233</sup>

A college athlete’s years spent pursuing a degree while playing an NCAA sport is evidence in support of an employment relationship. Unlike independent contractors who have transient relationships with entities who use their labor, college athletes do not frequently transfer schools.<sup>234</sup> Their stable relationships with schools imply the type of continuity that is found in employment.

#### **6. The Service Rendered Is an Integral Part of the Alleged Employer’s Business:**

In determining whether an employment relationship exists under the FLSA, a court inquires into the “the primary work of the defendant.”<sup>235</sup> Education seems to be the primary work of NCAA institutions, which appears to tilt this factor away from a finding of employment for college athletes. Nonetheless, that is not how these schools justify their NCAA athletic

<sup>231</sup> NCAA, *Graduation Rates* (Nov. 19, 2013), <https://www.ncaa.org/sports/2013/11/19/graduation-rates.aspx> [https://perma.cc/RXH2-NEKN] (stating that the “ultimate goal of the college experience is graduation,” and to this end it “has devoted attention to researching student-athlete graduation rates for more than two decades.”).

<sup>232</sup> NCAA, *Crossing the Line*, (Dec. 2, 2021), <https://www.ncaa.org/news/2021/12/2/general-college-athletes-continue-to-graduate-at-record-highs.aspx> [https://perma.cc/PR7H-TTDA].

<sup>233</sup> Mike McDaniel, *Seton Hall Hires Saint Peter’s Coach Shaheen Holloway*, SPORTS ILLUSTRATED (Mar. 30, 2022), <https://www.si.com/college/2022/03/30/seton-hall-hires-saint-peters-coach-shaheen-holloway> [https://perma.cc/5PZA-UBJ5].

<sup>234</sup> For 2021, the NCAA reported that 6,475 Division I athletes entered the transfer portal, counting all sports. See NCAA, *Transfer Portal Data: Division I Student-Athlete Transfer Trends*, at <https://www.ncaa.org/sports/2022/4/25/transfer-portal-data-division-i-student-athlete-transfer-trends.aspx>. This compares to a population of approximately 187,000 D-I athletes for 2021. See NCAA, *Our Division I Members*, at <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx#:~:text=With%20350%20member%20schools%2C%20including,in%20NCAA%20sports%20each%20year>. This means that about 3.4% of athletes attempted to transfer in 2021.

<sup>235</sup> *DialAmerica*, 757 F.2d at 1385.

programs. Even at the smaller institutions named as defendants in *Johnson*, athletics play an integral role in a school's identity. For example, Lafayette College's main website advertises its football rivalry week.<sup>236</sup> This announcement shows a football bleacher packed with people against a backdrop of a handsome, three-story press box.<sup>237</sup> Cornell University prominently displays its football marching band.<sup>238</sup> At Fordham University, the athletic depart-

<sup>236</sup> See Lafayette College, *Traditions—Life on Campus*, <https://campus-life.lafayette.edu/traditions> [<https://perma.cc/LR94-EBZY>]:

RIVALRY WEEK

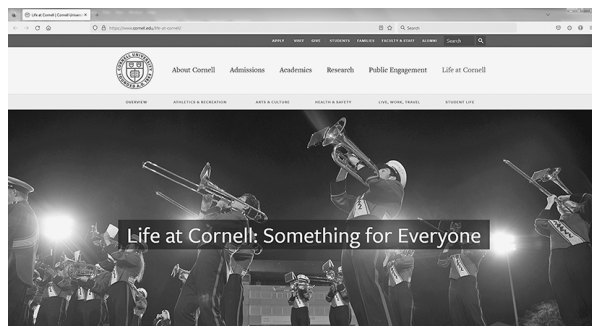
No football game is more anticipated than the one against Lehigh, the most-played football rivalry in the nation. The game always sells out months in advance and has inspired a book and a documentary narrated by the late Harry Kalas. Activities often include a pep rally, class spirit competitions, concerts, and the Midnight Breakfast.

<sup>237</sup> See *id.* *The Leopard Leads the Crowd*:



Lafayette College is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.

<sup>238</sup> *Life at Cornell: Something for Everyone*, CORNELL UNIVERSITY, <https://www.cornell.edu/life-at-cornell/> [<https://perma.cc/9ND7-7KWS>]. Cornell University is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.





ment's mission statement explicitly states that its mission "is to *integrate* academic and athletic experiences successfully in the Jesuit tradition" (emphasis added).<sup>239</sup> If schools believe that NCAA sports are integral to their broader educational mission, courts in FLSA cases should be inclined to count the "integral to the business" factor as one that weighs in favor of employment for athletes.

The economic realities of highly commercialized NCAA sports drives home this point. Dreams of a "Cinderella" March Madness run fuel NCAA schools with hope to market themselves on a larger stage. As a result of St. Peter's nationally televised wins in the March Madness tournament over Kentucky, Murray State, and Purdue, and its loss to North Carolina, the school reaped a bonanza of "free media" valued at \$125–150 million.<sup>240</sup>

These examples demonstrate that college athletics are integral to the business of NCAA schools. This adds to evidence of an employment relationship that athletes have with their schools.

### C. FLSA Implications of Conference Consolidation

In late June 2022, the Big Ten announced the addition of USC and UCLA to the conference in 2024.<sup>241</sup> This conference expansion will, in turn, directly affect two schools in the Third Circuit that are in the Big Ten, Penn State and Rutgers, by requiring their athletes to travel to Los Angeles and back.

The Big Ten's transcontinental conference exposes the hypocrisy surrounding the NCAA's amateur athletics model. College athletes already report that coaches and advisors limit their choice of majors.<sup>242</sup> This coast-to-coast business model is wholly unsuited for educating college students who

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<sup>239</sup> *Athletic Department's Mission, Philosophy, and Objectives*, FORDHAM SPORTS, <https://fordhamsports.com/> [<https://perma.cc/993G-3WS4>] ("The ultimate objective of Fordham University's Department of Intercollegiate Athletics is to integrate academic and athletic experiences successfully in the Jesuit tradition. Student-athletes are expected to benefit from the educational, professional, and cultural advantages of a university located in New York City."). Fordham University is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.

<sup>240</sup> Caldwell, *supra* note 220.

<sup>241</sup> Chuck Culpepper and Glynn A. Hill, *USC and UCLA Will Join the Big Ten in 2024*, WASH. POST (June 30, 2022).

<sup>242</sup> Michael Burke, *Report: In NCAA-Mandated Interviews, Syracuse Athletes Voiced Academic Advising Concerns, Dissatisfaction with Facilities*, THE DAILY ORANGE (Sept. 7, 2017) (reports indicate that athletes were being "forced into majors they did not want").

are pursuing a baccalaureate degree. This seems likely to increase hardships for students in science majors<sup>243</sup>—majors that require intensive lab work, field work, clinical, or intern experience—as well as for students in education, psychology, speech and hearing, and fine arts such as dance, music, and theater. Going forward, Big Ten athletes may be forced to reconsider their intellectual interests with a view of gravitating to portable degree programs that can accommodate the long travels required by their sports.

Moreover, Big Ten athletes are far from alone in being road warriors. Villanova—a named defendant in this matter—subjected its men’s basketball team to a fatiguing road schedule in the 2021-2022 season with long-distance games at UCLA (2,713 miles), Baylor (1,563 miles), Creighton (1,213 miles), Marquette (849 miles), DePaul (763 miles), Purdue (709 miles), Butler (643 miles), Tennessee (625 miles), Xavier (569 miles)—and then NCAA tournament trips to Pittsburgh (305 miles), San Antonio (1,741 miles), and New Orleans (1,225 miles).<sup>244</sup> These college athletes traveled a staggering 12,918 miles (one way), and 25,836 miles (roundtrip). Even smaller schools impose fatiguing schedules on their athletes. For example, Bucknell University, located in rural Pennsylvania, is a defendant in *Johnson*.<sup>245</sup> Bucknell athletes compete against smaller schools that are scattered across Pennsylvania, New York, and surrounding states,<sup>246</sup> suggesting

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<sup>243</sup> Raleigh Harbin, *Student-Athletes Pursue Variety of Majors, Still Some Trends within Teams*, RED & BLACK (Mar. 3, 2014) (Prof. Billy Hawkins’ survey led him to conclude that “certain majors require internships, labs or other responsibilities during the time in which sports practices are held, so the athletes are often guided towards less time-consuming majors”). In a related vein, an internal research report for the NCAA revealed that a “strong majority of student-athletes and administrators support pausing a student-athletes’ eligibility clock to allow for a study abroad or internship experience,” but this idea “garnered support from just over a third of head coaches.” NCAA, DIV. I RESEARCH, TIME DEMANDS STUDY SUMMARY OF FINDINGS 4 (Apr. 1, 2016), [https://ncaaorg.s3.amazonaws.com/research/d1/2016/D1RES\\_TimeDemandsSummary.pdf?fbclid=IWAR3VA\\_t\\_ATzuVSzLMDw8IPJjqHLC\\_VQv2Oqz9MBUkn5R3ukbRUrJL1xFY4r8](https://ncaaorg.s3.amazonaws.com/research/d1/2016/D1RES_TimeDemandsSummary.pdf?fbclid=IWAR3VA_t_ATzuVSzLMDw8IPJjqHLC_VQv2Oqz9MBUkn5R3ukbRUrJL1xFY4r8) [https://perma.cc/EW7B-EEZ6].

<sup>244</sup> *Villanova Wildcats— Schedule*, CBS SPORTS, <https://www.cbssports.com/college-basketball/teams/NOVA/villanova-wildcats/schedule/regular/> [https://perma.cc/X39S-NEUZ]. Distances were calculated using Google’s Map and entering distances for Philadelphia and the cities where Villanova traveled for games.

<sup>245</sup> See *Johnson v. NCAA*, 556 F.Supp.3d 491,494 (E.D. Pa. 2021), Docket 2:19-CV-05230.

<sup>246</sup> See *Women’s Soccer 2022 Schedule*, BUCKNELL BISON, <https://bucknellbison.com/sports/womens-soccer/schedule/2022> [https://perma.cc/PAA9-AYQA] (showing trips to eight states and the District of Columbia with Air Force, Colorado College, Binghamton, Youngstown State, Towson, West Virginia, Navy, American, Colgate, Princeton, Holy Cross, Lafayette, Loyola, Boston University, Army, and Lehigh).

time-consuming travel in buses. To pretend that these sorts of exhausting travel schedules are part-and-parcel of a student's educational experience ignores reality.

The NCAA's research shows that college athletes want more time away from their sport. In a self-study involving athletes, coaches, and administrators across Division I schools, athletes said they spend too much time traveling to and from competitions. This survey, conducted in 2016, included responses from 44,058 Division I student-athletes. The study reported:

*Travel During a Day Off*

A majority of student-athletes *do not feel* that the current rule permitting travel on a day off to be appropriate, while a large majority of coaches *are comfortable* with the current rule (emphasis added).

Student-athletes indicated a preference that *an off-day not involve any form of travel, even if travel spans a two-day period (arriving after midnight)* (emphasis added).

...  
*A quarter to a third of student-athletes would prefer to allow the institution to count the latter day as a day off provided that student-athletes have 24 consecutive hours of time off, and administrators strongly prefer this approach as well. However, a majority of coaches would prefer to maintain the current rule allowing return travel to count as a day off* (emphasis added).<sup>247</sup>

The dichotomy in responses from athletes and coaches recalls the reason that Congress and President Franklin D. Roosevelt enacted the FLSA: Workers wanted time off, managers wanted to maximize productivity, and Congress wanted to penalize employers who scheduled employees beyond 40 hours a week by requiring payment of a minimum wage at a time-and-a-half rate.<sup>248</sup> Decades later, the Supreme Court recognized that the FLSA protects workers "from the evil of 'overwork' as well as 'underpay.'"<sup>249</sup>

The FLSA's remedial purpose comes into sharp focus for college athletes who spend long hours traveling to away games and waiting for a game or competition to start. The Supreme Court addressed this type of situation when it ruled that an employee who is "engaged to wait" must be compensated.<sup>250</sup> The "engaged to wait" doctrine is codified.<sup>251</sup> NCAA athletes who

<sup>247</sup> DIV. I TIME DEMANDS STUDY, *supra* note 243.

<sup>248</sup> See Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTH. LAB. REV. 32, 36 (Dec. 2000).

<sup>249</sup> *Barrentine v. Ark. Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

<sup>250</sup> *Armour & Co.*, 323 U.S. at 133 ("Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity.").

<sup>251</sup> See 29 C.F.R. §§ 785.14–785.17.

travel long distances and wait for games should be considered to be “on the clock” for compensable time, much like truck drivers: “A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period.”<sup>252</sup>

Whether schools have major athletic programs that can support air travel or smaller programs with modest budgets centered around ground travel, their athletes are physically unavailable for many kinds of laboratory-based and experiential classes. NCAA athletes experience travel-related fatigue and stress that are atypical for other college students and conflict with pursuing a degree. These economic realities point away from an amateur role and toward an employment relationship.

## V. CONCLUSIONS

As recently as 2019, the NCAA persuaded an appellate court that its rules have nothing to do with employment but merely “establish academic eligibility requirements, provide guidelines and restrictions for recruitment, impose limits on the number and size of athletic scholarships, and regulate the scheduling and conditions of practice and games.”<sup>253</sup> This ignores evidence in NCAA rules that demonstrates an employment relationship.

So far, courts have not considered FLSA complaints by college athletes as a misclassification problem. My research demonstrates how the adult entertainment industry compares to college athletics. College athletes and club dancers operate in industries that shirk legal duties as employers by using contracts that pervasively define working conditions which fall explicitly outside an employment relationship. Powerless, exploitable performers are put in a take-it-or-leave-it position. In other industries, courts do not accept at face value an organization’s self-serving definitions of independent contracting, finding aspects of an employment relationship in FLSA lawsuits for

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<sup>252</sup> 29 C.F.R. § 785.16(b).

<sup>253</sup> *Dawson v. NCAA*, 932 F.3d 905, 907–08 (9th Cir. 2019).

ride-sharing drivers,<sup>254</sup> cable installers,<sup>255</sup> janitors,<sup>256</sup> maids,<sup>257</sup> health care workers<sup>258</sup> and others.

How do the work conditions of NCAA athletes compare to club dancers? *Verma v. 3001 Castor, Inc.*,<sup>259</sup> a recent FLSA case in the Third Circuit that involves these dancers, is a model for answering this question. The decision, which upheld a \$4.5 million jury verdict against the Penthouse Club in Philadelphia,<sup>260</sup> provides the Third Circuit factual and legal parallels to NCAA athletes in *Jobnson*.

1) **Factual Parallels to NCAA Schools:** To begin with, college coaches and the Penthouse Club's management evaluate talent for physical attributes. They recruit performers by their potential to win over fans and customers. This adult club held auditions for dancers, evaluating them on appearance and "fluid" movement.<sup>261</sup>

NCAA schools and the Penthouse Club use their disproportionate bargaining power to set conditions for powerless performers to render labor for them. NCAA athletes are required to sign a contract that authorizes termination of their financial assistance.<sup>262</sup> The club used its superior bargaining power to require their dancers to sign an independent contractor agreement.<sup>263</sup>

Both NCAA schools and the Penthouse Club also intensively regulate their workers' bodies. College athletes are often subject to specific targets for weight and strength.<sup>264</sup> Female athletes report that schools fail to accommodate their health concerns related to menstruation,<sup>265</sup> while in other in-

<sup>254</sup> *E.g.*, *O'Connor v. Uber Techs., Inc.*, 58 F.Supp.3d 989 (N.D. Cal. 2015).

<sup>255</sup> *E.g.*, *Doucette v. DIRECTV, Inc.*, No. 2:14-cv-02800-STA-tmp, 2015 WL 2373271 (W.D. Tenn. May 18, 2015).

<sup>256</sup> *E.g.*, *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149 (N.D. Ill. July 11, 2013).

<sup>257</sup> *E.g.*, *Quinteros v. Sparkle Cleaning, Inc.*, No. AW-07-0628, 2010 WL 3000865 (D. Md. July 26, 2010).

<sup>258</sup> *E.g.*, *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008); and *LeMaster v. Alternative Healthcare Sols., Inc.*, 726 F. Supp. 2d 854 (M.D. Tenn. 2010).

<sup>259</sup> 937 F.3d 221 (3d Cir. 2019) (*Verma II*).

<sup>260</sup> *Id.* at 224.

<sup>261</sup> *Id.* at 231.

<sup>262</sup> NCAA, *Financial Aid Agreement*, *supra* note 20.

<sup>263</sup> *Id.* at 229-230.

<sup>264</sup> *E.g.*, Peter G. Land, *supra* note 79, describing several Illinois football players who reported how their coaches created stress for them over weight management issues.

<sup>265</sup> Hawa Camara, Erica Jackson, & Rachel Priest, '*Shameful*' Stigma Surrounding Athletes, *Their Periods: How Taboo Surrounding Periods Affects CisGendered Female Ath-*

stances coaches engage in period-shaming.<sup>266</sup> The club exerts control over a dancer's body, including her hairstyle and makeup.<sup>267</sup> The club's facility includes a salon to prepare dancers for their work.<sup>268</sup>

Moreover, NCAA schools and the Penthouse Club rigidly regulate schedules for their workers. The club exerts great control over a dancer's work shifts and appearance times.<sup>269</sup> These performers face fines for leaving the stage or club early.<sup>270</sup> The NCAA similarly regulates how coaches and trainers control their athletes' time.<sup>271</sup> These pervading regulations cover weekend work: the Penthouse Club requires dancers to work at least two weekends a month,<sup>272</sup> like the scheduling of football games and other competitions for weekends.

Finally, NCAA schools and the Penthouse Club use financial penalties to enforce their rules.<sup>273</sup> The club micromanages a dancer's work to the point of designating entrances and exits apart from those used by patrons and prohibiting dancers from being seen in street clothes by patrons.<sup>274</sup> The club selects a dancer's music.<sup>275</sup> NCAA rules provide penalties for athletes who fail to conform to their numerous restrictions on compensation.<sup>276</sup>

2) **Legal Parallels to NCAA Schools:** In *Verma*, the Third Circuit applied the same six factor test as in *DialAmerica*.<sup>277</sup> The club contended that its adult dancers were independent contractors because they were permitted to select their shifts. However, this was insufficient to overcome evidence of the club's "overwhelming control over the performance of their

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*letes*, GRADY NEWSOURCE (Jun. 8, 2020), <https://gradynewsourc.uga.edu/shameful-stigma-surrounding-athletes-their-periods/> [https://perma.cc/8NA5-72S7] (athletes report discomfort and communication barriers in discussing health risks and other concerns related to athletic competition and their menstrual cycle).

<sup>266</sup> Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETICBUSINESS (Oct. 31, 2019) (coach told women players that their bus smelled like "period blood").

<sup>267</sup> *Verma v. 3001 Castor, Inc.*, 2014 WL 2957453 (E.D. Pa 2014) (*Verma I*), at \*2. The case began on May 31, 2013, when the case was docketed. *Id.* Filings, Docket 2:13cv03034.

<sup>268</sup> *Verma I*, WL 2957453 at \*2.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at \*3.

<sup>271</sup> *E.g.*, NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.1.

<sup>272</sup> *Verma I*, WL 2957453 at \*2.

<sup>273</sup> NCAA, *Financial Aid Agreement*, *supra* note 20; *Verma I*, WL 2957453 at \*3 (club fines imposed on dancers).

<sup>274</sup> *Verma I*, WL 2957453 at \*6.

<sup>275</sup> *Id.* at \*8.

<sup>276</sup> NCAA, *Financial Aid Agreement*, *supra* note 20, Point 3.

<sup>277</sup> *Verma II*, 937 F.3d at 229.

work.”<sup>278</sup> While the club argued that dancers were independent contractors because they could control their profits and losses by soliciting business on social media,<sup>279</sup> the court rejected the idea that dancers exercised managerial skill.<sup>280</sup> On the factor of employee investment in equipment or materials required for the task, the court found that a dancer’s rental of stage time was less significant than the club’s investment in its facility and costs related to running its business.<sup>281</sup> The court also rejected the club’s argument that dancers provided a service that required a special skill.<sup>282</sup> The fifth factor—permanence of the relationship—was the only one where the court found evidence of an independent contractor relationship.<sup>283</sup> However, the court found that dancers’ topless performances were integral to the business.<sup>284</sup> Based on a “holistic assessment” of the factors, the court concluded that the dancers were employees of the Penthouse Club and affirmed the trial court’s judgment.<sup>285</sup>

What do these parallels mean for *Johnson*? The Third Circuit could use *Verma* as a precedent to return the case to the district court for more specific evidence that college athletes are employees.

Even if the district court finds that college athletes have stated a valid FLSA claim, large questions would remain, including these: is a class or collective certification appropriate beyond the current plaintiffs? Does the FLSA apply alike to both large athletic programs, such as Penn State and small Division III schools? Would backpay be appropriate if there is a finding of liability, and if so, how would liability be apportioned between the NCAA and its approximately 1,100 member schools? Would front-pay be appropriate? These matters need to be explored through discovery.

In sum, *Johnson* is shaping up like other large misclassification cases under the FLSA.<sup>286</sup> It also resembles the class action lawsuit in *Alston*,<sup>287</sup>

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<sup>278</sup> *Id.* at 230.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 231.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* (“We refuse to recognize these as ‘special skills’ that weigh in favor of independent-contractor status. . . . (W)e do not believe ‘appearance,’ ‘social skills,’ and ‘hygiene’ qualify.”).

<sup>283</sup> *Id.* at 231-32.

<sup>284</sup> *Id.* at 232 (club’s “primary offering to customers is topless female dancers who dance on stage and give lap dances in private rooms”).

<sup>285</sup> *Id.* The court concluded: “But the case before us is not a hard one. Here the dancers’ relationship to the Club falls well on the ‘employee’ side of the line. Five of the six factors weigh in favor of concluding the dancers are Castor’s ‘employees.’”

<sup>286</sup> *Id.* at 231; see *e.g.*, *Verma I* and *Verma II*, decided respectively in 2014 and 2019.

where the Supreme Court was deeply skeptical of the NCAA's amateurism model.

How would this Article be relevant if the Third Circuit rules in favor of athletes? To begin with, my analysis could be useful in guiding plaintiffs' depositions of NCAA and conference officials, athletic directors, coaches and trainers, and college athletes. Questions could flesh out the intersections between NCAA rules, the transmission of that information to conference and school compliance efforts, and the daily experiences of college athletes while they train, practice, and compete for their schools. Depositions and documents might disclose that college athletes spend more time—or less time—directed by coaches and trainers than NCAA rules allow.

Would the arguments put forth in this article be pointless if the Third Circuit ultimately rules against athletes in *Johnson*? No. My research perspective would offer insight into recasting Trey Johnson's rejected FLSA complaint into the type of antitrust lawsuit that Justice Kavanaugh alluded to in his condemnation of the NCAA's amateur rules. His antitrust critique and my FLSA arguments significantly overlap. Indeed, Justice Kavanaugh states: "The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny."<sup>288</sup> Similarly, my amicus brief frames the NCAA's amateur rules as work rules: "NCAA's rules that meticulously cover the time and activities of college players are clearly work rules—not amateur rules—and therefore, college athletes 'work' in the course of 'employment' under the FLSA."<sup>289</sup>

Justice Kavanaugh further writes that "[t]he NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules."<sup>290</sup> Along the same lines, my brief frames the same conditions as misclassifying the labor of college athletes as non-compensable amateurism:

The NCAA's antiquated principle of amateurism cannot overcome the economic reality that NCAA institutions "employ" athletes under 29 U.S.C. § 203(g) of the FLSA when these universities and colleges "suffer or per-

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<sup>287</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2163 (2021) remarking, "while the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time (citations omitted)."

<sup>288</sup> *Id.* at 2166 (Kavanaugh, J., concurring).

<sup>289</sup> Leroy Amicus Brief at \*4.

<sup>290</sup> *Alston*, 141 S. Ct. at 2167.



mit” these athletes “to work.” NCAA athletes are employees just like classmates are employees who earn a minimum wage as resident advisors, campus tour guides, teaching assistants, and cafeteria cashiers in jobs that are properly classified under the FLSA.<sup>291</sup>

Justice Kavanaugh’s analysis parallels my approach when he writes:

Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels.<sup>292</sup>

My brief makes the same point in the context of an FLSA complaint, stating that “the only obstacle to finding that college athletes ‘work’ and engage in ‘exertion’ under the FLSA is the NCAA’s definitional wizardry in mischaracterizing collegiate athletic labor as amateur.”<sup>293</sup>

Finally, Justice Kavanaugh compares the NCAA’s price-fixing of labor to other jobs when he states: “All of the restaurants in a region cannot come together to cut cooks’ wages on the theory that ‘customers prefer’ to eat food from low-paid cooks.”<sup>294</sup>

In short, the NCAA has spent more than a century peddling a myth that the skilled labor it promotes in college games and competitions stems from a revered tradition of blending academics and athletics. Whether this organized form of wage theft ends with an FLSA lawsuit that finds that college athletes are employees, or ends with an antitrust lawsuit that proves that the NCAA’s amateur model is a price-fixing labor conspiracy in a Sherman Act lawsuit, or ends with federal or state legislation that creates employment rights for college athletes, the day draws near when college athletes will be paid for their athletic labor.

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<sup>291</sup> Leroy Amicus Brief at \*31.

<sup>292</sup> *Alston*, 141 S. Ct. at 2167.

<sup>293</sup> Leroy Amicus Brief at \*10.

<sup>294</sup> *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).



## Offsides: A Labor and Antitrust Analysis of How the Nonstatutory Labor Exemption Subverts Players’ Medical Autonomy

Seth M. Corwin<sup>1</sup>

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## INTRODUCTION

In 1914, while sitting on the New York Court of Appeals, Judge Cardozo opined, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .”<sup>2</sup> 108 years ago, Cardozo’s pronouncement presaged the contemporary definition of “medical autonomy”, defined as “[a patient’s] right to make his or her own choices concerning healthcare.”<sup>3</sup> Despite the deep roots of this concept, Jack Eichel, a star National Hockey League (“NHL”) player for the Buffalo Sabres, had his right to medical autonomy subverted by terms in the NHL collective bargaining agreement (“CBA”).<sup>4</sup> The CBA’s terms provide that teams and their doctors have final authority regarding *any* medical treatment of their players under the NHL contract.<sup>5</sup> Moreover, the CBA is legally shielded by antitrust law and the nonstatutory labor exemption.<sup>6</sup> This left Eichel with no viable avenue for recourse but to be traded to another team that would allow his preferred form of medical treatment.<sup>7</sup> How can our antitrust laws legally protect the subversion of a human being’s right to medical autonomy and informed consent? Will this become a more prevalent issue in sports, as more forms of medical treatment attractive to players are developed?

This Note asserts that players’ rights to medical autonomy should be enforceable outside the scope of any labor agreement as a matter of legality and public policy. Furthermore, it argues that labor agreements that allow for the subversion of players’ medical autonomy should be deemed deficient and are anti-competitive under antitrust law. Part I will examine the factual background of the Eichel situation in greater detail. Part II will lay out the

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<sup>2</sup> *Schloendorff v. Soc’y of N.Y. Hospital*, 105 N.E. 92, 93 (N.Y. 1914).

<sup>3</sup> 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, 36 (2017).

<sup>4</sup> Wajih AlBaroudi, *Jack Eichel, Sabres Saga Explained: How a Medical Disagreement Led to the Star’s Trade to Vegas*, CBS SPORTS (Nov. 4, 2021, 10:46 PM), <https://www.cbssports.com/nhl/news/jack-eichel-sabres-saga-explained-how-a-medical-disagreement-led-to-the-stars-trade-to-vegas/> [https://perma.cc/S82S-655F].

<sup>5</sup> *Id.*

<sup>6</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-37 (1996) (discussing and reinforcing the reasoning and policy as to why CBAs are given immunity under antitrust law).

<sup>7</sup> Ryan Thomas, Comment, *How the NHL CBA Left Player with No Other Choice but to Request a Trade*, VILL. U. JEFFREY S. MOORAD CTR. FOR STUDY SPORTS L. J. 2022 JOURNAL BLOGS (Jan. 7, 2022), [https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj\\_blog/2022/HowtheNHLCBALeftPlayer.html](https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2022/HowtheNHLCBALeftPlayer.html) [https://perma.cc/7CTC-8NJF].

antitrust and nonstatutory labor exemption framework employed by the courts, the unavailability of arbitration and other remedial deficiencies within this framework, and the uncomfortable situation it creates for teams and the NHL as a whole. Part III will explore the impropriety of the current framework as applied to issues such as medical autonomy and informed consent, looking to cases analogous to Eichel's while noting some differences between them. Part IV will provide recommendations as to how courts, the NHL, and the National Hockey League Players Association ("NHLPA") might resolve these issues in the future.

### I. JACK EICHEL HANDCUFFED BY THE NHL CBA

When Jack Eichel was drafted second overall by the Buffalo Sabres in 2015, both sides were excited to begin to move in the right direction.<sup>8</sup> Eichel, who was only eighteen years old, indicated that he thought "Buffalo as a city and the Sabres as a team [were] headed in [a] good direction," that he "want[ed] to be a piece of the puzzle" in Buffalo, and that he knew "Buffalo want[ed] success and they want[ed] success soon[.]"<sup>9</sup> The Sabres as an organization felt the same way about Eichel, with then Sabres head coach Dan Bylsma stating that "[t]o be able to add [Jack's skills] to our team is pretty exciting."<sup>10</sup> In 2017, after netting 113 points in his first two seasons, the Sabres signed Eichel to an eight-year, \$80 million contract extension.<sup>11</sup> But by the end of the 2020-21 season, some described the relationship as "a marriage gone bad."<sup>12</sup> How did a healthy relationship between a star franchise player and a rebuilding organization go so wrong? This section will detail the events prior to Eichel's injury, the injury itself, the timeline of events following his injury, the structure of the governing NHL CBA, and the ultimate resolution of the issues.

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<sup>8</sup> Mike G. Morreale, *Jack Eichel Drafted No. 2 by Buffalo Sabres*, NHL: NEWS HEADLINES (June 26, 2015), <https://www.nhl.com/news/jack-eichel-drafted-no-2-by-buffalo-sabres/c-772406> [<https://perma.cc/W9KV-6G7W>].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Kristen Shilton, *Timeline of Jack Eichel's Hockey Career Prior to His Vegas Golden Knights Debut*, ESPN (Feb. 16, 2022), [https://www.espn.com/nhl/story/\\_id/33290616/line-jack-eichel-hockey-career-prior-vegas-golden-knights-debut](https://www.espn.com/nhl/story/_id/33290616/line-jack-eichel-hockey-career-prior-vegas-golden-knights-debut) [<https://perma.cc/S8WV-2TKZ>].

<sup>12</sup> 32 Thoughts: The Podcast, *The Eich-Stravaganza*, SPORTSNET, at 11:01 (Nov. 5, 2021), <https://podcast.sportsnet.ca/32-thoughts/the-eich-travaganza/> [hereinafter *Eich-Stravaganza*].

A. *Losing Culture and A Bad Disk*

Prior to Eichel's injury, the Sabres had been in a seemingly perpetual rebuild for several years dating back to when Eichel was drafted.<sup>13</sup> At the end of the 2019-20 season, the Sabres had missed the playoffs for the ninth year in a row and Eichel was "fed up with losing," stating that it had "been a tough five years[.]"<sup>14</sup> Eichel further stated that he was "a competitor" who wanted to win every time he got on the ice and "want[ed] to win the Stanley Cup" every season.<sup>15</sup> Eichel played for three different coaches<sup>16</sup> and three different general managers<sup>17</sup> in only six years with the organization, which likely made it difficult to develop stable institutional relationships.<sup>18</sup> Eichel was so frustrated with the state of affairs in Buffalo that he requested a trade at the end of the 2019-20 season.<sup>19</sup> Eichel later stated that he felt like that had impacted his relationship with the team's ownership.<sup>20</sup>

The situation surrounding Eichel's injury did not occur until March 7 of the 2020-21 season, when Eichel suffered a herniated disk in his neck in a game against the New York Islanders.<sup>21</sup> Sabres doctors believed Eichel would only be out seven to ten days—a prognosis that likely instilled little faith in Eichel regarding the ability of the Sabres medical staff to properly diagnose him, given how unrealistic that timeline proved to be.<sup>22</sup> Around

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<sup>13</sup> Adam Gretz, *Sabres' Rebuild is Still Going Nowhere*, NBC SPORTS: PRO HOCKEY TALK (Mar. 11, 2019, 5:37 PM), <https://nhl.nbcports.com/2019/03/11/sabres-rebuild-is-still-going-nowhere/> [<https://perma.cc/VGV5-CF4N>].

<sup>14</sup> Sam Jarden, *Sabres Star Jack Eichel Admits He's Frustrated with Losing Seasons*, THE SPORTING NEWS (May 28, 2020), <https://www.sportingnews.com/us/nhl/news/sabres-jack-eichel-frustrated-losing-seasons/1u9572cypvbv17cfhjfcii0bz> [<https://perma.cc/F3R8-JF5V>].

<sup>15</sup> *Id.*

<sup>16</sup> Buffalo Sabres Coaches, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/BUF/coaches.html> [<https://perma.cc/59NN-BQDJ>].

<sup>17</sup> Staff, *Adams is Fourth General Manager of Sabres in Pegulas' Time as Owners*, THE BUFFALO NEWS (July 14, 2020), [https://buffalonews.com/sports/sabres/adams-is-fourth-general-manager-of-sabres-in-pegulas-time-as-owners/article\\_c39f1844-6290-5a90-8563-a49ed2082d69.html](https://buffalonews.com/sports/sabres/adams-is-fourth-general-manager-of-sabres-in-pegulas-time-as-owners/article_c39f1844-6290-5a90-8563-a49ed2082d69.html) [<https://perma.cc/VY57-RXRM>].

<sup>18</sup> Jack Eichel, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/e/eicheja01.html> [<https://perma.cc/JD8H-AGTJ>] (last visited Dec. 20, 2022) [hereinafter Eichel Stats].

<sup>19</sup> Elliotte Friedman, *Jack Eichel Discusses Trade Request, Desire for Disk Replacement Surgery*, SPORTSNET (Nov. 4, 2021, 6:04 PM), <https://www.sportsnet.ca/nhl/article/jack-eichel-diskusses-trade-request-desire-disk-replacement-surgery/> [<https://perma.cc/YEP3-W5V3>] [hereinafter *Eichel Discussion*]; Jarden, *supra* note 14.

<sup>20</sup> *Eich-Stravaganza*, *supra* note 12.

<sup>21</sup> AlBaroudi, *supra* note 4.

<sup>22</sup> *Id.*

March 11, Eichel traveled to an independent specialist to determine the severity of his injury.<sup>23</sup> The specialist suggested that he needed a surgical procedure called cervical artificial disk replacement (“artificial disk replacement”), which no NHL player had undergone before.<sup>24</sup> By March 13, Sabres head coach Ralph Kruger announced that Eichel would be out for the foreseeable future before announcing on April 14 that the Sabres had ruled Eichel out for the rest of the season.<sup>25</sup> The next day, Buffalo Sabres general manager Kevyn Adams noted that Eichel would rehabilitate the injury until a May reevaluation, hopefully avoiding surgery.<sup>26</sup> At the reevaluation on May 10, both sides determined that Eichel would require surgery on his neck, but disagreed on the type of surgery that Eichel should receive.<sup>27</sup> The Sabres were in favor of an anterior cervical discectomy and fusion (“fusion”), while Eichel favored the artificial disk replacement.<sup>28</sup> According to Eichel, this is when the relationship between him and the Sabres began to splinter, stating “[t]here’s been a bit of a disconnect between myself and the organization.”<sup>29</sup>

Understanding the differences in the surgical procedures (fusion and artificial disk replacement) and their long-term effects is the key to understanding why both sides remained entrenched in their positions. Fusion is meant to mimic the healing process of a broken bone and involves a surgeon placing bone, bonelike material, metal plates, screws, or rods within the space between two spinal vertebrae so that they can heal into one solid unit.<sup>30</sup> Artificial disk replacement involves removing the damaged disk and placing an artificial disk in its place, similar to receiving an artificial hip or knee.<sup>31</sup> Both procedures have high success rates: around 90%.<sup>32</sup> However, fusion presents a greater risk of complications from degenerative disks as time passes, due to the pressure the procedure gradually places on adjacent

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Mayo Clinic Staff, *Spinal Fusion*, MAYO CLINIC: PATIENT CARE & HEALTH INFORMATION, TESTS AND PROCEDURES (Nov. 14, 2020), <https://www.mayo.clinic.org/tests-procedures/spinal-fusion/about/pac-20384523> [https://perma.cc/DP5S-XRDD].

<sup>31</sup> 32 Thoughts: The Podcast, *Why Eichel Wants a Disk Replacement*, SPORTSNET, at 06:56 (July 31, 2021), <https://podcast.sportsnet.ca/32-thoughts/why-eichel-wants-a-disk-replacement/> [hereinafter *Why Eichel Wants a Disk Replacement*].

<sup>32</sup> *Id.* at 7:30.

disks.<sup>33</sup> This occurs in about 25% of patients, ultimately requiring another fusion within ten years.<sup>34</sup> For artificial disk replacement, the chance of requiring additional surgery within ten years is only 4.5% to 5%.<sup>35</sup> Moreover, after only two years, a patient is two times more likely to have a degenerative disk finding in the disks above and below the initially affected disk with fusion than with an artificial disk replacement.<sup>36</sup> Additionally, a fusion can take three months to recover from, while recovery from an artificial disk replacement can take as few as six weeks, further supporting Eichel's desire to get an artificial disk replacement over fusion.<sup>37</sup>

Eichel's doctor, Chad Prusmack, described these long term impacts as a "very key component in Jack's case" because of Eichel's young age.<sup>38</sup> For instance, he noted that with fusion, there was a potential that by the time Eichel reached sixty years old, he may have "difficulties swallowing" and other adverse side effects.<sup>39</sup> However, the Sabres were worried about the unprecedented novelty of the artificial disk replacement procedure in the NHL.<sup>40</sup> According to Prusmack, fusion was great for the Sabres "from a risk management standpoint," but from a "young adult standpoint, [was] not optimal" for Eichel.<sup>41</sup> Yet, Prusmack pointed out that artificial disk replacement was being used to treat rugby players, UFC fighters, and younger hockey players with tremendous success rates.<sup>42</sup> He further felt that Eichel could perform even better than the athletes in those cases, given the types of contact NHL players take, where their head can "move more freely [and] take less impact."<sup>43</sup>

#### B. *The NHL CBA and Its Terms that Forced a Trade*

Heading into the summer, the two sides had not reached an agreement as to which procedure Eichel should receive, but it was certain that he would have no control over the selection of a course of treatment. Under the NHL CBA, the team maintains final say over *all* medical and treatment decisions

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 32:03.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 26:08.

<sup>40</sup> *Id.* at 13:07.

<sup>41</sup> *Id.* at 14:50.

<sup>42</sup> *Id.* at 18:35.

<sup>43</sup> *Id.* at 21:05.



of a player under contract.<sup>44</sup> All that is required of the teams under the NHL CBA is “due consideration” of the medical opinion of the player’s physician and—if the player’s physician deems it necessary to send the player to a third-party physician due to disagreement between the team’s doctor and the player’s physician—of that third-party physician.<sup>45</sup> The NHL CBA does not provide players with the option of resolving disputes of this kind through third-party arbitration.<sup>46</sup> Nevertheless, both the league and the players association can file a grievance for arbitration.<sup>47</sup> Here, the NHLPA did not want to file any grievances with the NHL because they were fearful of setting a precedent affirming the CBA language at issue.<sup>48</sup> In other words, Eichel had only two options: appease the Sabres and get the fusion surgery against his will, or sit out and wait while his injury continued to go untreated in hopes that the Sabres would change their mind or trade him.<sup>49</sup>

As the summer progressed, the stalemate between the two sides continued, with talks heating up about a potential trade.<sup>50</sup> But other teams were, for a number of reasons, reluctant to trade for Eichel. The first issue was with the Sabres’ high asking price, which was “at least four pieces that would be equivalent [to] first-rounders. . . .”<sup>51</sup> Teams were also concerned about the uncertainty surrounding Eichel’s recovery from a procedure that

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<sup>44</sup> 2012-2022 NHL-NHLPA Collective Bargaining Agreement, Art. 34.4(e) (Feb. 5, 2013), [https://cdn.nhlpa.com/img/assets/file/NHL\\_NHLPA\\_2013\\_CBA.pdf](https://cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf) [hereinafter NHL CBA]. The CBA was extended through 2026 because of the COVID-19 pandemic in a Memorandum of Understanding. *See generally* NHL-NHLPA 2020 Memo. Of Understanding (July 10, 2020), *available at* [https://cdn.nhlpa.com/img/assets/file/NHLPA\\_NHL\\_MOU.pdf](https://cdn.nhlpa.com/img/assets/file/NHLPA_NHL_MOU.pdf).

<sup>45</sup> NHL CBA, *supra* note 44 at Art. 34.4(d).

<sup>46</sup> John Wawrow, *All Eyes on Eichel and Ongoing Stalemate with Sabres*, ASSOCIATED PRESS (Oct. 8, 2021), <https://apnews.com/article/nhl-sports-gary-bettman-jack-eichel-buffalo-sabres-900dae4a4c2f42176166717405fec970> [<https://perma.cc/LG2G-DH68>].

<sup>47</sup> NHL CBA, *supra* note 44 at Art. 17.

<sup>48</sup> Wawrow, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> Elliott Friedman, *31 Thoughts: What Caused the ‘Disconnect’ Between Eichel, Sabres*, SPORTSNET (May 11, 2021, 12:14 PM), <https://www.sportsnet.ca/nhl/article/31-thoughts-caused-disconnect-eichel-sabres/> [<https://perma.cc/VD6P-UNWM>].

<sup>51</sup> Larry Brooks, *Rangers Look Into Jack Eichel’s Condition in Preliminary Sabres Talks*, N.Y. POST (June 28, 2021, 1:40 PM), [https://nypost.com/2021/06/28/rangers-interested-in-jack-eichels-condition-in-early-talks/?utm\\_source=&twitter-site-buttons&utm\\_medium=site%20buttons&utm\\_campaign=site%20buttons](https://nypost.com/2021/06/28/rangers-interested-in-jack-eichels-condition-in-early-talks/?utm_source=&twitter-site-buttons&utm_medium=site%20buttons&utm_campaign=site%20buttons) [<https://perma.cc/8QUF-ZFRJ>].

had never been performed on an NHL player before.<sup>52</sup> Further, they worried about whether Eichel would be able to return from his injury in time for the start of the NHL season at all.<sup>53</sup> Finally, the Sabres were reportedly withholding Eichel's medical records from interested teams, which likely further compounded hesitation.<sup>54</sup>

Eichel's agents, Peter Fish and Peter Donatelli, had hoped to secure a trade by the beginning of the NHL free agency period on July 28, due in part to the likely unwillingness of many teams to risk waiting on a trade for Eichel and missing key players in free agency.<sup>55</sup> This did not occur. On July 30, Eichel's agents released a statement about Eichel's situation, hoping to put pressure on the Sabres.<sup>56</sup> In the statement, Eichel's agents stated that "[t]he process is not working[,]" and that they "fully anticipate[d] a trade by the start of the NHL free agency period."<sup>57</sup> Eichel's agents concluded the statement by proclaiming that "[the] process is stopping Jack from playing in the NHL. . . ."<sup>58</sup> The Sabres however, were in no rush to move Eichel, with Sabres general manager Kevyn Adams stating that they were "in control of this process[,]" and that they had "a player under contract [and didn't] feel any pressure."<sup>59</sup> Eichel ultimately decided to switch agents in late August, perhaps hoping that a change could accelerate a trade.<sup>60</sup> While Eichel was under contract and the Sabres had every right to get the best deal

<sup>52</sup> 32 Thoughts: The Podcast, *Back to Florida*, SPORTSNET, at 20:16 (July 6, 2021), <https://podcast.sportsnet.ca/32-thoughts/back-to-florida/>.

<sup>53</sup> *Id.*

<sup>54</sup> See Brooks, *supra* note 51.

<sup>55</sup> 32 Thoughts: The Podcast, *The Good and Bad of Draft Weekend*, SPORTSNET, at 30:30 (July 25, 2021), <https://podcast.sportsnet.ca/32-thoughts/the-good-and-bad-of-draft-weekend/>; @LLysowski, TWITTER (July 30, 2021, 9:45 PM), [https://perma.cc/SV92-YA2Q](https://twitter.com/LLysowski/status/1421285967265030148?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1421285967265030148%7Ctwgr%5E%7Ctwcon%5E1_&ref_url=https%3A%2F%2Fwww.cbssports.com%2Fnhl%2Fnews%2Fjack-eichel-sabres-saga-explained-how-a-medical-disagreement-led-to-the-stars-trade-to-vegas%2F); Nick Goss, *NHL Free Agents 2021: Ranking Top 25 Players Available*, NBC SPORTS BOSTON (July 9, 2021), <https://www.nbcsports.com/boston/b Bruins/nhl-free-agents-2021-ranking-top-25-players-available?cid=yahoo&partner=ya4nbcs> [<https://perma.cc/9HYR-Y8PW>].

<sup>56</sup> See AlBaroudi, *supra* note 4.

<sup>57</sup> @LLysowski, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> AlBaroudi, *supra* note 4.

<sup>60</sup> See John Wawrow, *AP Sources: Eichel Switching Agents Amid Dispute with Sabres*, ASSOCIATED PRESS (Aug. 27, 2021), <https://apnews.com/article/sports-nhl-buffalo-sabres-hockey-854be9032e92c009a1d16c838b7472f0> [<https://perma.cc/NQ3X-7RBP>].

they could for Eichel, the delay was likely due in part to the Sabres owners' feelings of betrayal regarding Eichel's prior trade request.<sup>61</sup>

As training camp approached, the Sabres announced on September 23 that Eichel had failed his physical examination and would be placed on long-term injured reserve because he would "not accept [the] Sabres' desire for fusion surgery."<sup>62</sup> Moreover, the Sabres declared that Eichel was no longer the captain of the Sabres, with Kevyn Adams stating, "I feel the captain is the heartbeat of your team," and "I felt we needed to address that."<sup>63</sup> As trade talks grew quiet around October 21, Eichel gathered several medical opinions to make "one last attempt to convince Sabres management to allow him to get his preferred surgery. . ."<sup>64</sup> Despite this last-ditch effort, the team still refused to budge.<sup>65</sup> About two more weeks passed before the Sabres finally traded Eichel to the Vegas Golden Knights on November 4 for slightly less than the Sabres' original asking price (three first-round equivalents and a third-round draft pick).<sup>66</sup> Importantly, the Golden Knights noted they would allow Eichel to get the artificial disk replacement surgery that he desired. In total, the entire saga between both sides lasted an astonishing eight months, keeping Eichel off the ice for almost an entire year.<sup>67</sup>

## II. THE ANTITRUST & LABOR FRAMEWORK

The situation was unacceptable from a public relations and a business standpoint for all sides, and it could have been avoided with a better anti-trust and labor framework under the nonstatutory labor exemption. This section will detail the current framework employed by courts and arbitrators when examining whether CBA terms are valid, how the framework would have applied in this case, and where the framework positioned all parties involved.

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<sup>61</sup> *Eich-Stavaganza*, *supra* note 12.

<sup>62</sup> AlBaroudi, *supra* note 4.

<sup>63</sup> *Id.*

<sup>64</sup> Emily Kaplan, *Sources: Jack Eichel's Camp to Meet With Buffalo Sabres, Make Final Case for Disk Replacement Surgery*, ESPN (Oct. 21, 2021), [https://www.espn.com/nhl/story/\\_/id/32448880/jack-eichel-meet-buffalo-sabres-make-final-case-disk-replacement-surgery](https://www.espn.com/nhl/story/_/id/32448880/jack-eichel-meet-buffalo-sabres-make-final-case-disk-replacement-surgery) [<https://perma.cc/8SYL-FTNS>].

<sup>65</sup> AlBaroudi, *supra* note 4.

<sup>66</sup> *Id.*

<sup>67</sup> Chris Bengel, *Why Jack Eichel's Return Can Vault the Golden Knights to Their First Stanley Cup Victory*, CBS SPORTS (Feb. 18, 2022, 1:01 PM), <https://www.cbssports.com/nhl/news/why-jack-eichels-return-can-vault-the-golden-knights-to-their-first-stanley-cup-victory/> [<https://perma.cc/T4WQ-HKFS>].

A. *The Current Framework and Its Application*

Under Section 1 of the Sherman Antitrust Act, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”<sup>68</sup> The Sherman Act was passed “in order to prevent or suppress devices or practices that . . . restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade.”<sup>69</sup> The Supreme Court made clear in *American Needle v. National Football League* that some agreements amongst a professional sports league’s teams can be subject to scrutiny under Section 1 of the Sherman Act, despite the unique need for teams in a league to agree on certain issues, such as the rules of the sport, in unilateral concert.<sup>70</sup> Notably, while labor organizations would also be subject to scrutiny under Section 1 of the Sherman Act, Congress ensured in the Clayton Act that antitrust laws would not be “construed to forbid the existence and operation of labor . . . organizations. . . .”<sup>71</sup> Additionally, the Norris LaGuardia Act prevents federal courts from issuing injunctions in labor disputes, and the National Labor Relations Act (“NLRA”) grants workers the right to collectively bargain with employers.<sup>72</sup>

Oddly, neither the Clayton Act, the Norris LaGuardia Act, nor the NLRA immunized CBAs between unions and employers from antitrust scrutiny, leading the Supreme Court to create a “nonstatutory labor exemption” to protect CBAs from antitrust scrutiny in *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea Co.*<sup>73</sup> The Court later provided a gloss on the nonstatutory labor exemption, recognizing that “a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”<sup>74</sup> In other words, courts recognize that the nonstatutory labor exemption gives effect to federal labor laws and allows for collective

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<sup>68</sup> Sherman Antitrust Act, 15 U.S.C.A. § 1 (West).

<sup>69</sup> John J. Dvorske, Annotation, *Construction and Application of Sherman Act*, 15 U.S.C.A. §§ 1 et seq.—*Supreme Court Cases*, 35 A.L.R. Fed. 2d 1 § 2 (2009).

<sup>70</sup> *American Needle v. Nat’l Football League*, 560 U.S. 183, 200-03 (2010).

<sup>71</sup> Clayton Antitrust Act, 15 U.S.C.A. § 17 (West).

<sup>72</sup> Norris LaGuardia Act, 29 U.S.C.A. § 104 (West); National Labor Relations Act, 29 U.S.C.A. § 151 (West).

<sup>73</sup> See generally, 381 U.S. 676 (1965).

<sup>74</sup> *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975).

bargaining, even though it may restrain competition.<sup>75</sup> The main purpose of the exemption is to give effect to the Congressional intent to prevent the “judicial use of antitrust law to resolve labor disputes.”<sup>76</sup> Subsequently, many courts have held that the nonstatutory labor exemption grants near-immunity to terms created through or incorporated in CBAs between professional sports leagues and player unions.<sup>77</sup>

The Second Circuit has stated that the nonstatutory labor exemption applies if subjecting the challenged provisions of the CBA to antitrust scrutiny would “subvert fundamental principles of . . . federal labor policy.”<sup>78</sup> The court made clear in *Clarett v. National Football League* that placing mandatory (and, potentially, permissive) subjects of bargaining under antitrust attack would subvert fundamental principles of federal labor policy.<sup>79</sup> The Eighth Circuit developed a three factor test for determining when the exemption applies, known as the “Mackey Test,” which includes: (1) whether the terms of the agreement primarily impacted only the parties to the collective bargaining relationship, (2) whether the terms were mandatory subjects of bargaining, and (3) whether the agreement is the result of bona fide arm’s-length bargaining.<sup>80</sup> The Third Circuit’s approach is closer to the Second Circuit’s, but does provide that an antitrust plaintiff “can establish a prima facie case under Section 4 of the Clayton Act by showing that he had been injured in in his business or property by ‘a collective bargaining agreement, or conduct taken pursuant to it, [which] has been shown to be illegal under federal labor law.’”<sup>81</sup> All of these standards share a common feature: it is extremely difficult for a player to succeed on an antitrust claim when there is a CBA in place.

This difficulty is further exacerbated by CBAs containing arbitration or grievance provisions. When a CBA contains such a provision and a plaintiff has not used the procedures outlined in said provision, state and federal courts will usually dismiss the case to arbitration in light of the Federal Arbitration Act, which deems arbitration provisions in contracts to be

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<sup>75</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

<sup>76</sup> *Id.* at 236.

<sup>77</sup> See *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 963 (2d Cir. 1987); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 474-75 (6th Cir. 2005); *Clarett v. Nat’l Football League*, 369 F.3d 124, 142-43 (2d Cir. 2004).

<sup>78</sup> *Wood*, 809 F.2d at 959.

<sup>79</sup> See *National Labor Relations Act*, 29 U.S.C.A. § 158 (West); 369 F.3d at 139-40 n. 17.

<sup>80</sup> *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

<sup>81</sup> *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 (3d Cir. 1983) (citing to *Consol. Express, Inc. v. N.Y. Shipping Ass’n*, 641 F.2d 90 (3d Cir. 1981)).

“valid, irrevocable, and enforceable. . .”<sup>82</sup> Further, even when plaintiffs bring claims after arbitration, courts are unwilling to vacate the arbitration award as long as “the award draws its essence from the collective bargaining agreement and is not merely the arbitrator’s own brand of industrial justice. . .”<sup>83</sup>

### *B. Applying the Framework to the Eichel Situation*

Applying the current framework to Eichel’s situation shows that he was left with no proper recourse. Since the NHL has a grievance procedure outlined in Article 17 of the NHL CBA, Eichel would have been required to go through arbitration before bringing a lawsuit, as any claim brought in court would have been dismissed to arbitration.<sup>84</sup> Article 17 of the NHL CBA does not specify whether the arbitrator will apply state or federal law in grievance proceedings.<sup>85</sup> The only guidance in respect of applicable law or interpretation thereof appears in Article 17.13, which provides that “the Impartial Arbitrator has the authority to interpret, apply, and determine compliance with any provision of this Agreement. . .”<sup>86</sup> This provision was likely left vague and open-ended to promote flexibility. To the extent that the primary focus is on the arbitrator’s determination of compliance, it seems clear that Eichel would have been found to be out of compliance with the CBA, which plainly gives teams the right to make medical decisions for the player.

Eichel could have subsequently brought a proceeding in federal court (given that both parties are in the State of New York), where federal law tends to govern labor disputes regarding CBAs. However, since Eichel would have been in the Second Circuit, it is likely that circuit precedent would have bound a court to uphold the arbitration award to the extent that a court would likely determine that the arbitrator had acted within the powers of the CBA instead of imposing their own brand of industrial justice.<sup>87</sup> Alternatively, Eichel might have argued that the Articles 34.4(d) and (e) were anti-competitive under antitrust law and thus not protected by the

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<sup>82</sup> See 9 U.S.C.A. § 2; *Preston v. Ferrer*, 552 U.S. 346, 349, 352-53 (2008); Federal Arbitration Act, 9 U.S.C.A. § 2 (West).

<sup>83</sup> *Nat’l Football League Mgmt. Council v. Nat’l Football Players Ass’n*, 820 F.3d 527, 537 (2d Cir. 2016).

<sup>84</sup> See *Preston*, 552 U.S. at 349, 352-53; Federal Arbitration Act, 9 U.S.C.A. § 2 (West); NHL CBA, *supra* note 45 at Art. 17.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at Art. 17.13.

<sup>87</sup> See *Nat’l Football League Mgmt. Council*, 820 F.3d at 537.

nonstatutory labor exemption.<sup>88</sup> Yet, Second Circuit precedent likely would have cut against his claim, since holding Articles 34.4(d) and (e) as anti-competitive would likely “subvert fundamental principles of . . . federal labor policy.” This might be the case because topics like medical treatment of a player appear likely to be viewed as conditions of employment and thus mandatory subjects of bargaining.<sup>89</sup>

Since both arbitration and antitrust claims would have likely failed, Eichel was effectively left at the whim of the system. All he could do was give in to the Sabres’ desires or sit out and wait as the clock on his career ticked away. Alternatively, Eichel might have gone ahead and had the artificial disk replacement procedure done behind the organization’s back, but this would have put him in breach of his contract, allowing the Sabres to have “fined him, suspended him without pay until he was healthy[,] [or] based on the CBA, . . . terminated his contract [thus] voiding the final \$50 million of his contract.”<sup>90</sup> Meanwhile all Eichel wanted to do was exercise medical autonomy over his own body.

Not every player will have the good fortune of a platform from which to refuse an undesired medical procedure until traded. Indeed, though the details on what occurred between the two sides are scarce, New Jersey Devils goaltender, Mackenzie Blackwood, encountered a similar medical treatment dispute with the Devils during the 2021-22 NHL season.<sup>91</sup> While the Devils did not release Blackwood, they did trade for Washington Capitals goaltender, Vitek Vanecsek, who they then signed to a three year contract, signaling that the Devils may not have appreciated Blackwood’s hard-headedness regarding his medical treatment.<sup>92</sup> Where players like Eichel and Blackwood face resistance over their preferred forms of medical treatment, it is not hard to see that the current NHL CBA terms put many bubble and fringe players in poor positions. These players may only get one shot to play in the NHL and do not have the same platform or voice as Eichel or Blackwood to stand up to the teams’ decisions on their medical

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<sup>88</sup> See *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975).

<sup>89</sup> See National Labor Relations Act, 29 U.S.C.A. § 158 (West); see also *Clarett v. Nat’l Football League*, 369 F.3d 124, 142-43 (2d Cir. 2004).

<sup>90</sup> Thomas, *supra* note 7 (citing to Tim Graham, *Will the Bills, Sabres Stay in Buffalo for the Long Term? The Satchel Addresses the Angst on Both*, THE ATHLETIC (Aug. 18, 2021), <https://theathletic.com/2776616/2021/08/18/will-the-bills-sabres-stay-in-buffalo-for-the-long-term-the-satchel-addresses-the-angst-on-both/> [https://perma.cc/69CM-2AN3]).

<sup>91</sup> 32 Thoughts: The Podcast, *Willing Combatants*, SPORTSNET, at 45:00 (Apr. 4, 2022), <https://podcast.sportsnet.ca/32-thoughts/willing-combatants/>.

<sup>92</sup> *Id.*

treatment. They may well fear that they might be labelled as “difficult” and buried in the minors for speaking up.

The current CBA puts teams in a difficult position as well. While the Sabres certainly had a right to enforce the CBA terms as they were written, the saga was damaging from a public relations perspective.<sup>93</sup> Sports attorney Dan Lust stated that “[the Sabres were] trying to force this down the player’s throat,” and noted that he did not “think there [was] much of a win from a [public relations] perspective with the Sabres.”<sup>94</sup> To spectators, it looked like Sabres ownership was retaliating in response to Eichel’s earlier trade request.<sup>95</sup> Notably, however, while the Sabres were certainly worried about damaging Eichel as an asset, they were also genuinely concerned about him from a health perspective, with general manager Kevyn Adams stating, “I care about Jack Eichel as a person,” and “I wish him nothing but the best for him. I want nothing more than for Jack to get healthy. I also told him nothing in this was personal.”<sup>96</sup> Yet, outsiders and fans will struggle to fully credit Adams’ comments. Moreover, players have already told NHL insiders that they are hesitant about playing for the Sabres in light of this situation because it left them wondering, “what if that’s me?”<sup>97</sup>

From the league’s perspective, this situation was a worst case scenario. Whether the NHL anticipated this when they made the medical decision provision of the CBA is unknown, though some believe the league never imagined it would be an issue.<sup>98</sup> Previously, teams had routinely allowed their star players to get preferred medical treatment, even when those forms of treatment were unconventional.<sup>99</sup> When Sidney Crosby was going through his concussion and neck problems, he used unusual treatments like chiropractic neurology with the full support of the Pittsburgh Penguins.<sup>100</sup> The Edmonton Oilers allowed their star player, Connor McDavid, to get

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<sup>93</sup> See Wawrow, *supra* note 47 (discussing how Attorney Dan Lust thought the whole situation was a really bad look for the league).

<sup>94</sup> *Id.*

<sup>95</sup> See *Eich-Stravaganza*, *supra* note 12.

<sup>96</sup> Sean Leahy, *Jack Eichel Saga Ends as Sabres Deal Forward to Golden Knights*, NBC SPORTS (Nov. 4, 2021, 8:11 AM), <https://nhl.nbcsports.com/2021/11/04/jack-eichel-saga-ends-as-sabres-deal-forward-to-golden-knights/> [<https://perma.cc/LNJ6-Z5QA>].

<sup>97</sup> *Eich-Stravaganza*, *supra* note 12 at 44:01.

<sup>98</sup> *Eich-Stravaganza*, *supra* note 12 at 42:35; See also Deubert, *supra* note 3 at 60 (noting how at the time the article was written there had not been any documented instances where an NHL team tried to perform treatment against a player’s wishes, likely signaling that the NHL had not anticipated this issue to arise).

<sup>99</sup> See *Eich-Stravaganza*.

<sup>100</sup> *Id.*



unorthodox rehabilitation treatments for a PCL knee injury he suffered a few years ago, despite not being entirely keen on the course of treatment.<sup>101</sup> However, the plain language of the CBA creates an uncomfortable situation for the NHL, where it must split support for its teams and owners with the obvious desire to have star players back on the ice quickly.<sup>102</sup>

The current legal framework played a substantial role in creating a difficult situation for all parties involved and makes clear how deference to CBAs is not always the best course of action.

### III. WHY THE CURRENT FRAMEWORK DOES NOT WORK FOR THESE TYPES OF ISSUES

The current framework does not work for issues like a player's medical autonomy, and there need to be appropriate changes in the law. This is especially so considering that this is not just an issue that is exclusive to the NHL, but also a potential issue in the National Basketball Association ("NBA"), whose CBA contains a similar provision to the one at issue in the NHL CBA regarding player medical autonomy.<sup>103</sup> This section will detail how this framework promoted illegal tort-like behavior and poor public policy and how these terms in the CBA can be anti-competitive.

#### A. *Illegality & Public Policy*

The medical decision provision in CBAs can tempt team physicians to breach their duty to adhere to the informed consent doctrine under state tort law. Under tort law, physicians have a duty to disclose material information about the patient's physical condition and to obtain informed consent to the

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<sup>101</sup> See *id.*

<sup>102</sup> See Brandon Maron, *Bettman: Both Sides of Eichel Stalemate Have 'The Best Intentions'*, THE SCORE (Oct. 4, 2021), <https://www.thescore.com/nhl/news/2200797> [<https://perma.cc/3QWN-K9P9>].

<sup>103</sup> See 2017 NBA-NBPA Collective Bargaining Agreement, Art. XXII § 10 (g) (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (stating how the team is only required to *consider* the player's second medical opinion, suggesting that the ultimate decision lies with the team); Chris Deubert, *Jack Eichel's Dispute with Sabres Reveals NHL-NHLPA CBA in Conflict with Bioethical Principles*, LINKEDIN (Oct. 6, 2021) <https://www.linkedin.com/pulse/jack-eichels-dispute-sabres-reveals-nhl-nhlpa-cba-conflict-deubert/> [<https://perma.cc/M3BF-DRE5>].

recommended medical treatment from the patient.<sup>104</sup> To obtain informed consent, the physician must relay “sufficient medical information to a patient relevant to the proposed treatment, allowing [the patient] to make an intelligent decision as to whether he should begin or continue medical treatment.”<sup>105</sup> Should the physician consciously choose not to reveal important information to the patient, then the physician is engaging in fraudulent concealment, which can be imputed to the team under a theory of vicarious liability.<sup>106</sup> When the player lacks the necessary information to provide informed consent, it can have disastrous repercussions for the athlete because “professional athletes are expected to perform at the highest level attainable” and “the physician’s failure to disclose [important information] could potentially cost the athlete his career through continued or subsequent injury.”<sup>107</sup> Allowing physicians to have total control over the player’s medical decisions thus endorses a physician to breach their duty under the informed consent doctrine. In other words, the CBA is endorsing the team physician and medical personnel to violate the doctrine of informed consent and the patient’s right to choose.

Team physicians have several potential conflicts of interest and may be improperly pressured or feel compelled by a team’s management to make a decision that is not in the best interests of the player.<sup>108</sup> A prime example of how physicians can be pressured into not revealing information to the player is the case of Charlie Krueger, a former defensive lineman for the San Francisco 49ers. Krueger had a reputation for playing hurt and accepting team medical care without question.<sup>109</sup> Five years after Krueger retired, he was suffering from chronic pain and a doctor discovered that he was missing a ligament in his knee.<sup>110</sup> It was at this point that Krueger realized that 49ers medical staff had concealed the severity of his injuries and let him keep playing on the field, while prescribing him excessive pain-killing medications.<sup>111</sup> Krueger had received surgery on this knee fifteen years prior to his discovery of the missing ligament and was told by team doctors that his knee was in “good repair,” although one of them noted in his surgical re-

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<sup>104</sup> Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORTS L. 196, 204 (1999); Deubert, *supra* note 103.

<sup>105</sup> *Id.*

<sup>106</sup> WALTER T. CHAPMAN, JR., FUNDAMENTALS OF SPORTS L. § 4:2 (2D ED. 2022), WESTLAW (DATABASE UPDATED JAN. 2022).

<sup>107</sup> Keim, *supra* note 104, n. 58.

<sup>108</sup> *Id.* at 212-13.

<sup>109</sup> *Id.* at 205.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

view that a ligament appeared to be absent from Krueger's knee.<sup>112</sup> This information was especially important because the medical community knew that lacking this ligament would be "debilitating" for said person.<sup>113</sup> Ultimately, a court found the 49ers and their medical staff guilty of fraudulent concealment.<sup>114</sup>

Like Krueger, many ice hockey players play through serious injuries and accept team medical care without full knowledge, due to the sport's culture of playing through pain.<sup>115</sup> Some notable injuries that hockey players have played through include torn ACLs and MCLs, broken feet, broken fingers, acute compartment syndrome, broken ribs, collapsed lungs, and more.<sup>116</sup> This culture leads to players, like former first-round NHL draft pick Ryan Kesler, having serious health issues after playing.<sup>117</sup> Kesler discussed his post-NHL life and how he has "holes in [his] colon and ulcers, and basically [his] whole intestines went into spasm."<sup>118</sup> He also suffered from Chron's Disease, having to go the bathroom thirty to forty times a day, and many other health issues because he "wasn't made aware of what [toradol] could potentially do to [him]."<sup>119</sup> His stated reason for continuing to take the painkiller without asking questions was that he "never wanted to hurt the team. . . ."<sup>120</sup> While it is true that many NHL players likely do not fully understand the severity of their injuries,<sup>121</sup> there are real possibilities that team physicians are being pressured into not revealing the repercussions

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 206.

<sup>115</sup> Sarah Hall, *Hockey's 'Ice Warrior' Culture Feeds Injuries & Dangerous Habits*, SB NATION: NHL EDITORIALS (Jun. 1, 2017, 11:00 AM), <https://www.fiveforhowling.com/2017/6/1/15717694/nhl-injuries-erik-karlsson-sidney-crosby-and-hockey-culture> [https://perma.cc/MYQ9-4KSK].

<sup>116</sup> *See id.*

<sup>117</sup> Greg Wyshynski, *Former Player Ryan Kelsey Says There's Lack of Education Across NHL in Risks of Pain Medications*, ESPN: NHL (Sep. 22, 2020), [https://www.espn.com/nhl/story/\\_/id/29946533/former-player-ryan-kesler-says-there-lack-education-nhl-risks-pain-medications](https://www.espn.com/nhl/story/_/id/29946533/former-player-ryan-kesler-says-there-lack-education-nhl-risks-pain-medications) [https://perma.cc/Y245-DS5U].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* Toradol is a nonsteroidal anti-inflammatory drug (painkiller) that is not approved for long-term use. *Id.* Many players, like Kesler used it long-term in order to keep playing and were not made aware of the risks of doing so. *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See* Hall, *supra* note 116 (suggesting that hockey culture asks players to blindly play through injuries, perhaps not realizing the severity of those injuries).

of certain medical treatment because the teams likely know that players are not asking questions when getting treatment and are blindly accepting.<sup>122</sup>

What is most striking about the Krueger case are the parallels that it draws to hockey players and Eichel's situation. Krueger, like many hockey players, chose to play through pain and injuries and willingly accepted team medical care without asking any questions, thus remaining totally unaware of any of the risks involved with such medical treatment. Eichel took an approach different from many other hockey players and Krueger, and instead considered what his options were and the treatment that would be best for him.<sup>123</sup> In spite of this, Sabres' doctors tried to push a procedure onto Eichel that had much higher likelihoods of needing further surgery and affecting his quality of life after his NHL career.<sup>124</sup> What if Eichel had done what Krueger and Kesler had done and just accepted what the Sabres' doctors had to say? What about hockey players who are on the cusp of making it to the NHL and have no choice but to accept medical treatment for fear of being labeled difficult, selfish, or weak? What happened to Krueger, Kesler, and countless other players underpins these questions and why team physicians are allowed to—or being forced to—not disclose injuries and repercussions of treatments to players.

Moreover, the medical decision provision places players in a position where they either need to get the team's prescribed medical treatment or risk breaching their contract by holding out or getting their preferred medical treatment against the wishes of the team's doctors and in violation of the CBA. In essence, the NHL CBA is telling players to either get the team's preferred treatment or risk forfeiting their livelihood and earnings. Leagues and teams are trying to prevent player holdouts because it causes instability in leagues.<sup>125</sup> Additionally, one of the main pillars of contract law is promoting parties to faithfully fulfill their obligations and to protect the expectancy interests of each party.<sup>126</sup> The medical decision provision cuts against these two important interests and makes the player resort to breaching a contract if they want to receive their preferred medical treatment.

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<sup>122</sup> See Wyshynski, *supra* note 118 (stating that Kesler took painkillers because he knew he had to in order to play, which implies that other players likely do the same and that NHL teams seemingly know this).

<sup>123</sup> See *Eichel Discussion*, *supra* note 20.

<sup>124</sup> See *Why Eichel Wants a Disk Replacement*, *supra* note 31 at 08:23.

<sup>125</sup> Basil M. Loeb, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done*, 11 MARQ. SPORTS L. REV. 275, 275 (2001).

<sup>126</sup> See *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (W.I. 1998)

This medical decision provision is furthermore abysmal public policy because it promotes players concealing their injuries or playing through said injuries when they know it is wrong for fear of losing current or future earnings or their place on the team. These issues affect even the National Football League (“NFL”), where the players hypothetically have control over their medical decisions.<sup>127</sup> A prime example is the case of Antonio Brown with the Tampa Bay Buccaneers in the 2021 season. Certainly, Antonio Brown has had a troubled history in the NFL.<sup>128</sup> However, Brown alleged in January of 2022 that he was pressured by his coach to continue to play with an injured ankle and receive injections of dangerous painkillers.<sup>129</sup> When Brown determined that he could no longer play, he told Buccaneers head coach, Bruce Arians, and alleged that Arians told him he was done and no longer a member of the team.<sup>130</sup> What truly happened between Arians and Brown is unknown. However, it highlights the fact that players who do not have the leverage that someone like Jack Eichel has are left seriously vulnerable to undue influence to play through an injury or not reveal the injury to team medical staff in the first place.

In sum, the current framework is not fit for the NHL CBA’s medical decision provision because it allows illegal behavior in the form of physicians failing to disclose injuries and treatment side effects to players, violations of the informed consent doctrine, and even fraudulent concealment—all of which can put teams at risk for vicarious liability and angers fans, who are mad at the teams and league for allowing their favorite players to suffer. They enable poor public policy in making players choose between getting a treatment they do not want or holding out and risk breaching their contracts, thus forfeiting earnings and their livelihoods. Finally, they encourage players to conceal injuries, despite it not being in the player’s best interest to do so.

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<sup>127</sup> See 2020 National Football League Collective Bargaining Agreement, Art. 39, § 6 [https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA\\_CBA\\_March\\_5\\_2020.pdf](https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf) [hereinafter NFL CBA].

<sup>128</sup> See Billy Heyen, *Antonio Brown’s Timeline of Trouble: From Steelers Benching to Suspensions and Buccaneers Release*, THE SPORTING NEWS (Jan. 01, 2022), <https://www.sportingnews.com/us/nfl/news/antonio-brown-suspension-lawsuit-steelers/14i8a1dpzxlrl1u0x9kqhybd3c> [<https://perma.cc/WNL9-6WLS>].

<sup>129</sup> Ian Rapoport, @RapSheet, TWITTER (Jan. 5, 2022, 8:58 PM), <https://twitter.com/RapSheet/status/1478908690627506176> [<https://perma.cc/XD5G-4MPT>].

<sup>130</sup> See *id.*

*B. Anti-competitiveness*

The medical decision provision in CBAs is anti-competitive and should not receive protection under the nonstatutory labor exemption because it risks collusion among teams, keeps players off the playing surface, and creates bad public relations for the team and league.

The current framework creates risks of collusion by teams in the league to prevent a player from getting their preferred medical treatment and to not allow a player to play unless they give in to the medical treatment all of the teams want. A semi-analogous situation can be seen in Major League Baseball (“MLB”), where MLB teams colluded in the free-agency market against players by agreeing to not pursue players on other teams, agreeing to not pursue a player until other teams showed disinterest in the player, and agreeing to create an “information bank” for all teams with detailed information about every contract offer made to a player in free agency.<sup>131</sup> Quite conceivably, NHL teams could have chosen to engage in collusion and agreed not to trade for Eichel until he got the fusion procedure. The current framework seriously risks collusion that is clearly anti-competitive and should not be protected by the nonstatutory labor exemption.

The current framework also inhibits the player’s ability to compete freely and effectively to the best of his ability. In *Flood v. Kuhn*, Kurt Flood, a talented MLB player, sued the Commissioner of Baseball, arguing that baseball’s reserve clause violated antitrust law and the Thirteenth Amendment.<sup>132</sup> The Supreme Court ultimately rejected his claims, largely on *stare decisis* grounds because the Court had already granted the MLB an antitrust exemption fifty years earlier.<sup>133</sup> However, Justice Marshall notably pointed out in his dissent that the antitrust laws guarantee “the right to compete freely and effectively to the best of one’s ability.”<sup>134</sup> While a Thirteenth Amendment claim would be preposterous and not apply to Eichel’s situation, like Flood, Eichel did have his right to compete freely and effectively to the best of his ability hindered because he felt that he needed the artificial disk replacement to perform to the best of his ability. Thus, an argument can be made that the Sabres denying Eichel his procedure is anti-competitive under antitrust laws as an unreasonable restraint on trade.

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<sup>131</sup> See Connor Mulry, *Is Baseball Shrouded in Collusion Once More? Assessing the Likelihood that the Current State of the Free Agent Market Will Lead to Antitrust Liability for Major League Baseball’s Owners*, 25 *FORDHAM J. CORP. FIN. L.* 273, 286-88 (2019).

<sup>132</sup> *Flood v. Kuhn*, 407 U.S. 258, 265-66 (1972).

<sup>133</sup> *Id.* at 285.

<sup>134</sup> *Id.* at 292-93.

Finally, the medical decision provision harms teams' and leagues' brand image and reputation in that it has economic impacts on viewership and ticket sales, making it anti-competitive. Studies have shown that a team's reputation, brand image, and fan loyalty are directly impacted by a star player's presence on the team.<sup>135</sup> By having star players sidelined because of a dispute over medical treatment, ticket sales and viewership will inevitably go down and harm the team's economic interests. Moreover, when teams trade their star players to resolve situations like this (consider, for instance, Eddy Curry of the NBA)<sup>136</sup>, there are further economic impacts to the team through reduced viewership, brand reputation and image, and fan loyalty. All these considerations could lead to smaller broadcast rights deals and directly impact the potential earnings of the league, teams, and players. These economic interests can point to an argument that the medical procedure provision is anti-competitive under antitrust law.

#### IV. RECOMMENDATIONS

In the future, situations like this can be prevented by several parties involved. This section will discuss recommendations for preventing situations like this from occurring again through courts and player unions, teams, and leagues.

One way to prevent these situations in the future is for courts to make changes to the nonstatutory labor exemption. Where the nonstatutory labor exemption was crafted by courts to begin with, they have more flexibility to adjust it as needed. The best way for courts to do this is to make determinations that a player's right to medical autonomy cannot be extinguished by any CBA. Such an idea is not new for courts, as they have held that CBAs cannot extinguish certain rights in the past. For example, Roy Tarpley sued the National Basketball Association ("NBA") claiming that the NBA CBA's reinstatement policy violated the Americans with Disabilities Act ("ADA") and that his rights under the ADA trumped the CBA.<sup>137</sup> While

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<sup>135</sup> NATHAN DAVID PIFER, AN EXAMINATION OF STAR PLAYERS' EFFECTS ON THE BRANDING PROCESS OF PROFESSIONAL SPORTS TEAMS 49 (Marshall U., Jan. 1, 2012).

<sup>136</sup> Eddy Curry played for the Chicago Bulls and the team wanted him to undergo a DNA test to determine the extent of potential heart problems Curry may have had. Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. Pa. J. Lab. & Emp. L. 819, 819-20 (2006). Curry refused and he was ultimately traded to the New York Knickerbockers who did not require him to get a DNA test. *Id.*

<sup>137</sup> Robin L. Muir, *Drunk or Disabled? The Legal and Social Consequences of Roy Tarpley's Discrimination Claim Against the NBA*, 15 VILL. SPORTS & ENT. L.J. 333, 334 (2008).

Tarpley's case was ultimately settled before reaching a substantive ruling,<sup>138</sup> other courts have ruled on the issue and found that in some situations, a CBA does not reign supreme when reasonable accommodations under the ADA are possible.<sup>139</sup> Courts could take this approach and adopt similar holdings, stating that a player's right to medical autonomy trumps any CBA that tries to infringe on this right. Moreover, taking this approach would allow courts to remain relatively uninvolved in CBAs and leave the nonstatutory labor exemption with plenty of bite.

In addition to holding that rights under the ADA trump provisions in CBAs, courts have also held some issues to fall outside of the CBA entirely. One example of this was *Tynes v. Buccaneers Limited Partnership*, a case where the Tampa Bay Buccaneers' kicker, Lawrence Tynes, suffered an MRSA infection in his toe because the Buccaneers did not properly sterilize their facilities.<sup>140</sup> Tynes sued the Buccaneers, under a theory of state premises liability and negligent misrepresentation.<sup>141</sup> The Buccaneers argued that any lawsuit was barred by the CBA's medical treatment provisions.<sup>142</sup> The court determined that Tynes's claims fell outside of the CBA where the CBA had no disclaimers that narrowed the scope of a team's common law duty.<sup>143</sup> Such an approach could be taken to players' rights to medical autonomy, as courts could determine under state tort law that a CBA provision like the NHL's does not narrow the scope of a team's common law duty to provide the player with pertinent medical information to properly consent under the doctrine of informed consent. As with the ADA example, such a solution would avoid touching the nonstatutory labor exemption and leave CBAs intact.

Whether courts get involved or not, the NHLPA will need to make this issue a focal point when the CBA expires in 2026. The NHLPA has generally done a good job in CBA negotiations on behalf of its players, but it fell short on this particular CBA term, leaving Eichel, like many other players, in a rough situation. Tom Brady's Deflategate case against the NFL shows a good example of what can happen when the players' union does not

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<sup>138</sup> See Associated Press, *Tarpley Settles Lawsuit Against Mavericks, NBA*, TORONTO STAR (Mar. 17, 2009), [https://www.thestar.com/sports/basketball/2009/03/17/tarpley\\_settles\\_lawsuit\\_against\\_mavericks\\_nba.html](https://www.thestar.com/sports/basketball/2009/03/17/tarpley_settles_lawsuit_against_mavericks_nba.html) [<https://perma.cc/D8BE-M9HK>].

<sup>139</sup> See GARY PHELAN ET AL., DISABILITY DISCRIMINATION IN THE WORKPLACE § 15:5, Westlaw DISDW.

<sup>140</sup> *Tynes v. Buccaneers Ltd. P'Ship*, 134 F.Supp.3d 1351, 1353-54 (M.D. Fla. 2015).

<sup>141</sup> *Id.* at 1356.

<sup>142</sup> *Id.* at 1357.

<sup>143</sup> *Id.* at 1358.



consider the ramifications of a certain provision and it ultimately has seriously negative effects on the player. In Brady's case, the National Football League Players' Association agreed to a provision that gave NFL Commissioner Roger Goodell unchecked power to be the arbitrator to any appeals that a player made regarding suspensions.<sup>144</sup> Goodell was ultimately able to use this power to change the grounds of Brady's suspension, despite it violating notions of fundamental fairness.<sup>145</sup> As a recommendation, the NHLPA should do everything in its power during the next CBA negotiations to have this provision changed so that players have the ability to make these medical decisions, while also ensuring that the players are getting the proper information to make such decisions.

One way of achieving this could be to allow the NHL to have limited games on Christmas Eve or Christmas Day in exchange for the players being given the right to medical autonomy. Currently, the NHL CBA does not allow the NHL to schedule games on Christmas Eve or Christmas.<sup>146</sup> However, both the NBA and the NFL play games on these days.<sup>147</sup> Certainly, the number of games played on either of these days should not be an ordinary schedule, but the NHLPA could agree to have two or three games being played on these days or over the course of these two days. Additionally, they could argue for teams that play one year to be cycled out for a certain number of years before they can be required to play on the holiday again. This would make it so most players would not have to play yearly on these holidays, while also allowing the NHL to take advantage of an opportunity to earn revenues in broadcast rights over the holidays. This is just one possible area of many that the NHLPA could bargain on in attempting to secure its players' right to medical autonomy.

Turning the focus to what the NHL and its teams can do, they should be more willing to let the players determine their own medical treatment despite what the CBA says. Generally, the NHL and its teams have done a superb job of promoting healthy relationships and avoiding issues between its teams and players, while also ensuring stability within the sport. However, by not allowing the players to get their preferred forms of medical treatment, the NHL and its teams are creating instability that is unneces-

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<sup>144</sup> National Football League Mgmt. Council v. National Football League Players Ass'n, 820 F.3d 527, 534-35 (2d Cir. 2016).

<sup>145</sup> *Id.* at 535-36.

<sup>146</sup> NHL CBA, *supra* n. 45 at Art. 16.5(b).

<sup>147</sup> See generally NFL CBA, *supra* n. 127; see also 2017 NBA-NBPA Collective Bargaining Agreement, Art. XX § 5(a), (c)-(d) (Jan. 19, 2017). <https://cosmics3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

sary. Teams have seen others already engaging in this more permissive practice, such as when the Penguins let Sidney Crosby get his preferred form of treatment for his concussions and neck and when the Oilers let Connor McDavid get his preferred form of treatment for his knee.<sup>148</sup> Both players had successful recoveries and came back still playing at their best levels. While it is certainly important for teams to have a say in the treatment of a player, they need to be in an advisory and support role for the player's treatment, not a decision-making role. Doing so will allow for better relationships with players, as well as more trust between both sides (something NHL Commissioner Gary Bettman has worked extremely hard to try and achieve). Moreover, it will prevent bad public relations situations from popping up for both the team and the NHL. Additionally, with the rapid growth of non-fungible tokens ("NFTs") and the legalization of sports gambling, the NHL will certainly want the players' approval on some of these topics in CBA negotiations, and providing the players with the right to medical autonomy would be a strong avenue to do this.

While these solutions are ideal, CBA negotiations can be contentious, and less ideal compromises are often needed to get a deal done. Should the NHL and NHLPA be unable to reach an agreement that gives players the right to medical autonomy, both sides could alter Article 34.4(e) to mimic the procedures that are outlined in Article 17.7 of the NHL CBA. Article 17.7 details the procedures for determining a player's fitness to play, or more specifically, "whether a Player is disabled and unable to perform his duties as a hockey Player. . . ."<sup>149</sup> The procedures outlined in these provisions generally provide that a team's physician will determine the player's fitness to play, that the player can get a second medical opinion regarding this determination, and that if both physicians disagree on the diagnosis, they can jointly select an independent third physician to examine the player.<sup>150</sup> In the event the team physician and player physician cannot agree on an independent third physician, then a medical designee appointed by the NHL and a medical designee appointed by the NHLPA will jointly decide who the third physician will be.<sup>151</sup> Most importantly though, this third physician's decision is "conclusive, final and binding upon the [Team] and the Player. . . ."<sup>152</sup> These provisions could easily be "copied-and-pasted" into the provisions of Article 34 in the CBA and make it so that a third physician, who would essentially be acting as an arbitrator, would determine

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<sup>148</sup> *Eich-Stravaganza*, *supra* note 12 at 42:35.

<sup>149</sup> NHL CBA *supra* note 45 at Art. 17.7(a).

<sup>150</sup> *Id.* at Art. 17.7(a)-(d).

<sup>151</sup> *Id.* at Art. 17.7(d)(iv).

<sup>152</sup> *Id.* at Art. 17.7(f).

the player's course of treatment, and not solely the team physician. While the other solutions are preferable to this one, this solution would be a step in the right direction. It is likely the most feasible of the solutions outlined here and would provide players with some protection against having undesirable treatments forced upon them.

#### CONCLUSION

This problem will likely only get worse in the future as new forms of medical treatment come about that players want to get because it will be better for them, and teams, like the Sabres, will likely fall into similar situations where they are worried about the unknowns surrounding a new type of procedure the player wants. Ultimately though, players need to be allowed to make these medical decisions for themselves with team insight on what they believe is best. We should not allow our laws to protect provisions in labor agreements that push medical treatments onto players who are against those treatments, especially regarding treatment for critical medical issues that have the potential to impact the players' health during and long after their career.

