

ARIZONA STATE  
SPORTS AND ENTERTAINMENT  
LAW JOURNAL

VOLUME 5

SPRING 2016

ISSUE 2



SANDRA DAY O'CONNOR COLLEGE OF LAW  
ARIZONA STATE UNIVERSITY  
111 EAST TAYLOR STREET  
PHOENIX, ARIZONA 85004

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**WEBSITE:** [www.asuselj.org](http://www.asuselj.org).

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**CITATION:** ARIZ. ST. SPORTS & ENT. L.J.

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CAN ANTITRUST LAW AND UNDERSTANDING  
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PERMIT WAGERING ON SPORTS GAMES?**

JOHN A. FORTUNATO, PH.D.\*

**ABSTRACT**

*The Professional and Amateur Sports Protection Act (PASPA) directs the current federal sports gambling policy; PASPA prohibits states from allowing wagering on sports games and regulates the Unlawful Internet Gambling Enforcement Act (UIGEA), which differentiates most forms of gambling from fantasy sports by defining the latter as a game of skill. Allowing gambling through fantasy sports participation, but not allowing wagering on sports games, represents a legal inconsistency. The most prominent challenge to PASPA was initiated by the state of New Jersey. Sports leagues have contested New Jersey's claim by arguing that sports wagering would harm the integrity of their games. Although it can be argued that permitting gambling could indeed cause harm, it can also be argued that leagues are, in fact, complicit in gambling behavior and are capitalizing on sponsorships with gambling organizations, including lucrative partnerships with daily fantasy sports companies. New Jersey may be able to highlight this conflict in framing a legal argument.*

*This article contends that the leagues' contradictory positions may be most vulnerable to antitrust scrutiny. If the gambling marketplace is defined as all of the gambling dollars available, competition to daily fantasy sports companies would be greater if people have the option to wager on games at a local racetrack or casino. The enactments of the PASPA and UIGEA drastically altered the gambling environment. A subsequent change in sports gambling law that permits all forms of gambling would*

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\* Professor, Fordham University School of Business, Area of Communication & Media Management.

*create a competitive marketplace compatible with the philosophical intent of antitrust laws and also provide needed legal consistency.*

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#### INTRODUCTION

According to the American Gaming Association, an estimated \$3.6 billion is bet legally every year, compared approximately to the annual \$140 billion bet illegally.<sup>1</sup> The increase in sports wagering through innovative games, led by daily fantasy sports, and the technological ease with which people can participate in these games through digital and mobile capabilities have altered the gambling landscape and have brought a heightened legal focus to this issue.

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<sup>1</sup> Sean Gregory, *The Case for Sports Gambling in America*, TIME, Mar. 23, 2015, at 40; David Purdum, “I’m Not Pro Sports Gambling. I’m Just a Realist”: When NBA Commissioner Adam Silver Declared His Support for Legalized Sports Betting in November, He Changed the Game for the Other Leagues. But Will it be Enough to Move the Line?, ESPN THE MAGAZINE, Feb. 16, 2015, at 55.

Current federal sports gambling policy is directed by the Professional and Amateur Sports Protection Act (PASPA),<sup>2</sup> which prohibits states from offering wagering on sports games, and the Unlawful Internet Gambling Enforcement Act (UIGEA),<sup>3</sup> which provides a special exemption for fantasy sports games and differentiates these games from other forms of gambling by defining them as a game of skill. Designed to complement each other and to provide comprehensive regulation of the sports gambling industry, the coexistence of the UIGEA, which allows gambling through daily fantasy participation, and the PASPA, which prohibits wagering on actual sports games, is inconsistent and problematic. Legal complications and challenges have arisen regarding both the PASPA and UIGEA.

In the most prominent legal challenge to PASPA, the state of New Jersey initiated legislation that allowed wagering on sports games at its racetracks and in Atlantic City casinos.<sup>4</sup> In legal proceedings, New Jersey's arguments focused on the 10<sup>th</sup> Amendment as the justification, claiming that sports gambling policy should be determined at the state level.<sup>5</sup> New Jersey also pointed out that gambling on sports is already occurring both legally (increasingly through fantasy sports) and illegally.<sup>6</sup>

Other states, including Massachusetts, Illinois, Nevada, and New York, are questioning the UIGEA's definition of

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<sup>2</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (1992).

<sup>3</sup> Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).

<sup>4</sup> The New Jersey challenge to PASPA has been a prominent topic of legal scholarship. See generally: Matthew T. Mierswa, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HALL LEGIS. J. 447 (2014); Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 VILL. SPORTS & ENT. L.J. 149, (2015).; Joshua Winneker, Ira Sprotzer, & Lindsay Demery, *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, (2013).

<sup>5</sup> Matthew T. Mierswa, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HALL LEGIS. J. 447, 452 (2014).

<sup>6</sup> Peles, *supra* note 4, at 177.

fantasy sports as a game of skill. These states seek to ban fantasy sports participation by defining it as gambling.<sup>7</sup> Upon the issuance of a cease-and-desist order shutting down daily fantasy sports companies from operating in the state, New York Attorney General Eric Schneiderman declared that fantasy sports are a form of gambling because participants are “placing bets on events outside of their control or influence.”<sup>8</sup>

Professional sports leagues and the NCAA are in a precarious position on the issue of sports gambling. On the one hand, the leagues vociferously contest New Jersey’s efforts to permit wagering on sports games and claim that the integrity of the games will be questioned. Yet, the leagues also generate revenue through gambling organizations’ sponsorships and lucrative partnerships with daily fantasy sports companies. The sports leagues also benefit from gambling in general; fantasy sports participation in particular has led to higher television viewership of their games.<sup>9</sup> In analyzing the impact of fantasy sports, Professors Bernhard and Eade of the University of Nevada state, “as is the case with more conventional forms of sports wagering, many claim to find the game more interesting when money is risked and awarded to the winners.”<sup>10</sup> This increased viewership is incredibly beneficial to sports leagues as television broadcast rights are a significant revenue source.<sup>11</sup>

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<sup>7</sup> Josh Gordon, James Johnston, Joseph Lewczak, *The Specter of Gambling Threatens an Industry*, DAVIS AND GILBERT LLC (Oct. 27, 2015), <http://www.dglaw.com/press-alert-details.cfm?id=556#.VsitAFMrKuU>.

<sup>8</sup> See Sharon Terlep, *Fantasy-Sports Sites Told to Close in N.Y.*, Wall St. J., Nov. 11, 2015 at A1, A16, available at <http://www.wsj.com/articles/n-y-attorney-general-tells-daily-fantasy-sports-companies-to-cess-operations-in-the-state-1447197512?mod=ST1>.

<sup>9</sup> See Darren Heitner, *The Hyper Growth of Faily Fantasy Sports is Going to Change our Culture and our Laws*, Forbes (Sept. 16, 2015), <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#1df4cfe5f254>.

<sup>10</sup> Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RESEARCH & REV. J. 29, 36 (2005).

<sup>11</sup> John A. Fortunato, *Television Broadcast Rights: Still the Golden Goose*, In ROUTLEDGE HANDBOOK OF SPORT CONSUMPTION 188 (Paul M. Pederson ed., 2013).



Rodenberg and Wertheim summarize the contradictory stance of the leagues, stating, “professional leagues and the NCAA want nothing more than to tap into the easy revenue generated by sports gambling; then they contend that the ills associated with gambling undermine honest competition and threaten the entire sports enterprise.”<sup>12</sup>

States should use the current inconsistency in federal law and the leagues’ contradictory position to frame a legal argument. Specifically, in challenging PASPA, a state like New Jersey should point out the inconsistent behavior of the leagues. Although leagues argue against wagering on sports games when they allege that a change in the law would cause them harm, many continue to acquire sponsorship money from gambling organizations and have equity stakes in daily fantasy companies.

The purpose of this article is to describe the partnership between professional sports leagues and gambling organizations—specifically in the form of sponsorship—and to debate whether these partnerships could influence a court’s perspective. A question arises: does a league’s relationship with a gambling organization and a league’s acceptance of money through sponsorship undermine a league’s legal argument against legalized wagering on sports games?

Antitrust laws provide the legal framework to highlight the leagues’ vulnerability of their contradictory position. Antitrust laws are designed to maintain the competitiveness of a marketplace. The definition of a marketplace becomes the key determination. The money that people have to gamble is limited.<sup>13</sup> If the gambling marketplace is defined as the totality of gambling dollars available, and if people have other gambling options, they might not gamble through daily fantasy games. In addition to the integrity of their games, in bringing the antitrust debate to the issue of gambling, the economic motivation of sports leagues raises competitive marketplace concerns. It is arguable whether the leagues’ motivation to prohibit states from

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<sup>12</sup> Ryan Rodenberg & L. Jon Wertheim, *Hedging Their Bets*, SPORTS ILLUSTRATED 52 (May 12, 2014).

<sup>13</sup> Brad Humphreys, Yang S. Lee, & Brian P. Soebbing, *Modeling Consumers Participation in Gambling Markets and Frequency of Gambling*, 5 THE J. OF GAMBLING AND ECON. 1 (2011); Pamela Wicker & Brian Soebbing, *Examining Participation in Sports Betting in Germany*, 6 THE J. OF GAMBLING AND ECON. 17 (2012).

allowing gambling is merely to protect the leagues' sponsorship partners and their lucrative revenue source by limiting the gambling marketplace.

Future change in the law governing sports gambling is certain. Since the PASPA and UIGEA were enacted, the gambling environment has drastically changed. States are looking for new sources of tax revenue and realize the popularity of fantasy sports and the immense profit opportunity. The federal regulatory status quo that permits one form of sports gambling, but not others, is no longer plausible, and either Congress or the courts will need to act. NBA Commissioner Adam Silver has repeatedly expressed the need for the United States Congress to take the lead and provide federal oversight in legalizing sports gambling. However, the states have initiated so many legal challenges that a patchwork of laws across the country have resulted. Which branch of government will provide the leadership to reconcile the legal questions and create the needed consistency in the sports gambling industry?

To build an efficient regulatory system, it is necessary to understand all of the entities that are involved and the economic relationships that exist in the sports gambling industry. The sponsorship contracts between sports leagues and gambling organizations are of particular interest. In an analysis of sponsorship and its implications, Nicholas Cameron explains that a sponsorship is a three-way relationship between the sponsor (gambling organizations), the property (sports leagues), and the consumer.<sup>14</sup> Prior to examining the specific legal questions, Part I of this article provides an overview of audience motivations for watching sports, as well as the characteristics of sports gamblers and fantasy sports participants. Studying audience motivation is important because they form the same group who engages in sports betting behavior. The financial profiles of the two prominent daily fantasy companies, DraftKings and FanDuel, is thus provided.

Part II of this article examines the fundamentals of the practice of sponsorship, focusing on professional sports leagues' sponsorships with gambling organizations and daily fantasy partnerships. Part III discusses the PASPA and UIGEA laws.

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<sup>14</sup> NICHOLAS CAMERON, *Understanding Sponsorship and its Measurement Implications*, 2 J. SPONSORSHIP MAP 2 (2009), <http://www.sponsormap.com/wp-content/uploads/2008/10/Understanding-sponsorship.pdf>.

Part IV proceeds to analyze antitrust law in the context of sponsorship and its application to the sports gambling industry. Part V discusses future regulatory options and the possible repercussions if PASPA or UIEGA are rescinded or amended. In addition, Part V explains how states can challenge PASPA by citing antitrust law and pointing out leagues' economic interest in restricting the gambling marketplace. Finally, the article concludes with a recommendation for legal consistency with respect to sports gambling.

## I. AUDIENCE MOTIVATIONS

### A. THE SPORTS AUDIENCE

The study of sports audience behavior “seeks to understand consumer attitudes toward teams and sporting events in order to enable sport managers to effectively package and deliver the sport product.”<sup>15</sup> The sports audience is unique in comparison to consumers in other industries, largely due to audience's motivation to experience games and events.<sup>16</sup> Sports games provide an emotional experience that leads to positive stress and arousal.<sup>17</sup> The sports audience is described as loyal, and whose behavior is consistent and enduring in the form of game attendance, watching games on television, and participation in other media forms.<sup>18</sup> All of these audience behaviors are key revenue generators for leagues.<sup>19</sup>

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<sup>15</sup> Daniel C. Funk & Jeffrey James, *Consumer Loyalty: The Meaning of Attachment in the Development of Sport Team Allegiance*, 20 J. SPORT MANAGEMENT. 189 (2006).

<sup>16</sup> *Id.* at 198.

<sup>17</sup> Daniel L. Wann, *Preliminary Validation of the Sport Fan Motivation Scale*, 19 J. SPORT & SOCIAL ISS. 377 (1995).

<sup>18</sup> Funk & James, *supra* note 9; BERNIE MULLIN, STEPHEN HARDY, & WILLIAM SUTTON, *SPORT MARKETING 3RD* (2007); Daniel L. Wann, Michael P. Schrader, & Anthony M. Wilson, *Sport Fan Motivation: Questionnaire, Validation, Comparisons by Sport and Relationship to Athletic Motivation*, 22 J. SPORT BEHAVIOR, 114 (1999).

<sup>19</sup> JOHN A. FORTUNATO, *THE ULTIMATE ASSIST: THE RELATIONSHIP AND BROADCAST STRATEGIES OF THE NBA AND TELEVISION NETWORKS 202-03* (2001).

The audience's emotional motivation is largely driven by the unknown outcome of the game.<sup>20</sup> Perhaps the strongest motivation for watching sports on television is due to the uncertainty and the resolution of ambiguity.<sup>21</sup> For example, outcome uncertainty, which is measured by the score of the game at halftime, has a significant impact on audience viewership for the second half of a game.<sup>22</sup> Fan interest positively correlates with outcome uncertainty.<sup>23</sup>

Researchers have determined that emotions and behaviors of sports fans are modified by their levels of team identification, with motivations heightened when one's favorite team is playing in the game.<sup>24</sup> Wenner and Gantz state,

[C]oncerns with seeing 'who wins' and how one's 'favorite does' are among the strongest individual motivations for sports viewing. These tend to combine with the enjoyment that comes with experiencing the 'drama and tension' and the excitement of 'rooting' for a player or team to win. Indeed, seeking these experiences, along with looking forward to 'feeling good' when wins occur, round out the strongest motives for sports on television.<sup>25</sup>

The unknown outcome factor and the emotional connection that is present when a favorite team is playing, is similar to cheering for a particular side when one places a wager on a game. As discussed *supra*, such behavior is—because one has a financial stake in the outcome—a key revenue generator. Gambling can lead to increased viewership.<sup>26</sup> NBA Commissioner Adam Silver commented in an appearance on

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<sup>20</sup> Lawrence A. Wenner & Walter Gantz, *Watching Sports on Television: Audience Experience, Gender, Fanship, and Marriage*, in *MEDIASPORT*, 233, 235 (Lawrence A. Wenner ed., 1998).

<sup>21</sup> *See id.* at 236.

<sup>22</sup> Rodney P. Paul & Andrew Weinbach, *The Role of Uncertainty of Outcome and Scoring in the Determination of Fan Satisfaction in the NFL*, 12 *J. SPORT ECON.* 213, 214 (2011).

<sup>23</sup> Jason Berkowitz, Craig A. Depken & Dennis P. Wilson, *When Going in Circles is Going Backward: Outcome Uncertainty in NASCAR*, 12 *J. SPORT ECON.* 253, 276 (2011).

<sup>24</sup> Wann, *supra* note 17.

<sup>25</sup> Wenner & Gantz, *supra* note 20, at 236.

<sup>26</sup> *See, e.g.*, Steven Salaga & Scott Tainsky, *Betting Lines and College Football Television Ratings*, 132 *ECON. LETTERS*, 112 (2015).

WFAN New York's *Boomer & Carton* radio show, that sports wagering is "good for business," adding that "it creates more engagement."<sup>27</sup> Joe Asher, CEO of British bookmaker Will Hill, stated, "nobody being intellectually honest can debate that the popularity of the NFL is greater with gambling."<sup>28</sup> A study of NASCAR also showed that fantasy sports helped convert previously identified non-fans into involved fans.<sup>29</sup>

#### B. THE SPORTS GAMBLING AUDIENCE

The sports audience in general and sports gamblers in particular share a similar demographic profile.<sup>30</sup> This similarity is particularly appealing to professional sports leagues, its television partners, and its sponsors.<sup>31</sup> Sports gambling motivations and behaviors correlate with a few distinct variables.<sup>32</sup> Some researchers focus on general demographic variables, finding that age, gender, and nationality are predictors of gambling participation.<sup>33</sup>

Other researchers focus on individual characteristics, and explain sports betting as a behavioral function of economic, socio-demographic, and lifestyle factors.<sup>34</sup> The motivation and

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<sup>27</sup> James Herbert, *Gambling Good for Business*, CBSSPORTS.COM,

<http://www.cbssports.com/nba/eye-on-basketball/25155791/adam-silver-on-gambling-its-good-for-business-i-don't-want-to-hide-from-that>. (April 20, 2015, 9:58 AM).

<sup>28</sup> Rodenberg & Wertheim, *supra* note 12.

<sup>29</sup> See Andrew L. Goldsmith & Matthew Walker, *The NASCAR Experience: Examining the Influence of Fantasy Sport Participation on 'Non-Fans.'* 18 SPORT MGMT. REV. 231, 241 (2015).

<sup>30</sup> See generally Joseph E. Mahan III, Joris Drayer & Emily Sparvero, *Gambling and Fantasy: An Examination of the Influence of Money on Fan Attitudes and Behaviors*, 21 SPORT MARKETING. Q. 159 (2012); Toben Nelson, Richard A. LaBrie, Debi A. LaPlante, Michael Stanton, Howard J. Shaffer & Henry Wechsler, *Sports Betting and Other Gambling in Athletes, Fans, and Other College Students*, 78 RES. Q. EXERCISE & SPORT 271 (2007).

<sup>31</sup> See Mahan et al. *supra* note 30, at 160.

<sup>32</sup> See generally *id.* at 167-169; Nelson et al., *supra* note 30, at 278-81.

<sup>33</sup> Humphreys, Lee, & Soebbing, *supra* note 14; Wicker & Soebbing, *supra* note 14.

<sup>34</sup> Wicker & Soebbing, *supra* note 13.

ability for individuals to bet are constrained by the money and the time needed to engage in this behavior. Wicker and Soebbing found that an increase in an individual's income increases the likelihood that he or she placed a bet on a sports event.<sup>35</sup> An interest in sports can also lead to an increase in sports gambling behavior. Nelson, LaBrie, LaPlante, Stanton, Shaffer, and Wechsler reported that college students with higher levels of interest in sports were more likely to wager on college sports events.<sup>36</sup> Overall, gambling behavior is produced by an availability of time and money, combined with an interest in sports and wagering.

Further, gambling's popularity increase may be due to technology: not only does the Internet make it easy for people to place bets online, the Internet promotes new and innovative gambling games, most notably daily fantasy sports.<sup>37</sup>

### C. FANTASY SPORTS

Academic research on fantasy sports has primarily focused on participant motivations<sup>38</sup> and fantasy sport participant media use.<sup>39</sup> Fantasy sports participation is

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<sup>35</sup> Wicker & Soebbing, *supra* note 13.

<sup>36</sup> See Nelson et al., *supra* note 30, at 278-9.

<sup>37</sup> Bernhard & Eade, *supra* note 10 at 36; Brody J. Ruihley & Robin L. Hardin, *Focus on Fantasy: An Overview of Fantasy Sport Consumption*, In ROUTLEDGE HANDBOOK OF SPORT COMM. 269 (Paul M. Pedersen ed., Routledge, 2013).

<sup>38</sup> Bernhard & Eade, *supra* note 10; Nickolas W. Davis & Margaret C. Duncan, *Sports Knowledge is Power: Reinforcing Masculine Privilege Through Fantasy Sport League Participation*, 30 J. SPORT & SOC. ISSUES. 244 (2006); Lee Farquhar & Robert Meeds, *Types of Fantasy Sports Users and Their Motivations*, 12 J. COMPUTER-MEDIATED COMM. 1208 (2007); Donald P. Roy & Benjamin D. Goss, *A Conceptual Framework of Influences of Fantasy Sports Consumption*, 17 MARKETING MGMT.. J. 96 (2007). Ruihley & Hardin, *supra* note 37.

<sup>39</sup> See generally John P. McGuire, Greg G. Armfield & Jeff Boone, *Show Me the Numbers!: Media Dependency and Fantasy Game Participants*, in SPORTS FANS, IDENTITY, AND SOCIALIZATION: EXPLORING THE FANDEMONIUM 275 (Adam C. Earnhardt, Paul W. Haridakis, & Barbara S. Hugenberg eds., 2012); Ruihley & Hardin, *supra* note 37; Joris Drayer, Stephen L. Shapiro, Brendan Dwyer, Alan L. Morse & Joel White, *The Effects of Fantasy Football Participation on NFL Consumption: A Qualitative Analysis*, 13 SPORT MGMT. REV.

motivated by both external social variables and internal psychological variables. Motivations to satisfy external social variables include the value of building and maintaining relationships.<sup>40</sup> Technology plays a role in fostering the socialization aspect of playing fantasy sports by facilitating communication interactions between participants.<sup>41</sup> Researchers Roy and Goss applied marketing principles of product, price, and promotion in their analysis of fantasy sports.<sup>42</sup> They determined that participating in fantasy sports is made easy through the Internet, and its free or low cost participation fee contributes to the vast number of fantasy players.<sup>43</sup> Without technology and the current state of communication outlets, “fantasy sport could not exist at its present scale.”<sup>44</sup>

In terms of internal psychological variables, fantasy sports competition largely drives audience motivation and participation.<sup>45</sup> The attractive competition aspect of fantasy sports is due to the participant involvement in extensive decision-making, which may determine the outcome of the competition.<sup>46</sup> For example, “instead of passively following

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129 (2010); Brendan Dwyer & Joris Drayer, *Fantasy Sport Consumer Segmentation: An Investigation into the Differing Consumption Modes of Fantasy Football Participants*, 19 *SPORT MARKETING Q.* 207 (2010); Brendan Dwyer & Yongjae Kim, *For Love or Money: Developing and Validating a Motivational Scale for Fantasy Football Participation*, 25 *J. SPORT MGMT.* 70 (2011); John A. Fortunato, *The Influence of Fantasy Football on NFL Television Ratings*, 3 *J. SPORT ADMIN. & SUPERVISION* 74 (2011); Adam Karg & Heath McDonald, *Fantasy Football Participation as a Complement to Traditional Sport Consumption*, 14 *SPORT MGMT. REV.* 327 (2011); Mahan et al., *supra* note 30; Todd M. Nesbit & Kerry A. King, *The Impact of Fantasy Sports on Television Viewership*, 23 *J. MEDIA ECON.* 24 (2010).

<sup>40</sup> Bernhard & Eade, *supra* note 10 at 33-4.; Davis & Duncan, *supra* note 38 at 255-56.; Roy & Goss, *supra* note 38 at 101; Ruihley & Hardin, *supra* note 37 at 272.

<sup>41</sup> Bernhard & Eade, *supra* note 10; Roy & Goss, *supra* note ; Ruihley & Hardin, *supra* note 37.

<sup>42</sup> Roy & Goss, *supra* note 38 at 99, 102.

<sup>43</sup> Roy & Goss, *supra* note 38 at 103.

<sup>44</sup> Ruihley & Hardin, *supra* note 37 at 275.

<sup>45</sup> Ruihley & Hardin, *supra* note 37.

<sup>46</sup> Roy & Goss, *supra* note 38 at 99-100; Ruihley & Hardin, *supra* note 37.

one's favorite team, a fantasy participant is given the opportunity to actively engage in operations similar to those that occur in a professional team's front office."<sup>47</sup> Researchers have determined that the ability to demonstrate one's knowledge while drafting players, and the desire for victory, motivates a participant to join a fantasy league.<sup>48</sup>

Competition and the ability to make decisions about the team lead to intense information gathering on the part of the fantasy player.<sup>49</sup> Sports analyst Rich Luker contends that

playing fantasy sports is the pinnacle fan experience. To consistently succeed requires the player to not only master the game and the strategies, but also to understand how those strategies are used by every team, coach and player in the league, and how those strategies vary by matchup between two particular teams.<sup>50</sup>

This information gathering behavior lends credence to the idea that fantasy sports is a game of skill, differentiating itself from other forms of gambling that are games of pure chance. Those that contend fantasy sports are a game of skill, state, "through research, intelligence and skill, the participants can control the outcome of the contests."<sup>51</sup> Fantasy participation can also be compared to other forms of gambling, and some compare it to participation in the stock market.<sup>52</sup> There is even a question of whether or not sports bettors are better characterized as fans or investors.<sup>53</sup> Others, however, argue that even if considered a game of skill, fantasy sports should be thought of as gambling simply because of the opportunity to win or lose

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<sup>47</sup> Dwyer & Kim, *supra* note 39 at 71.

<sup>48</sup> Davis & Duncan, *supra* note 40; Farquhar & Meeds, *supra* note 38.

<sup>49</sup> Farquhar & Meeds, *supra* note 38; Rauhley & Hardin, *supra* note 37.

<sup>50</sup> Rich Luker, *Reality of Fantasy Sports: Engagement has Limits*, STREET & SMITH'S SPORTS BUS. J. (April 20-26, 2015) at 15.

<sup>51</sup> M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?* 8 N.C. J. LAW & TECH. 59, 79 (2006).

<sup>52</sup> Bernhard & Eade, *supra* note 10 at 35.

<sup>53</sup> Rodney P. Paul, Yoav Wachsman & Andrew Weinbach, *Measuring and Forecasting Fan Interest in NFL Football Games*, 6 J.GAMBLING BUS. & ECON. 34, 35 (2012).



money.<sup>54</sup> The emotions fostered through competition are amplified when winning or losing money is involved.<sup>55</sup> Researchers claim that gambling serves as an important motivation for fantasy sports participation.<sup>56</sup>

The motivations of fantasy sports participants lead to purposeful, active, and consistent media consumption behavior.<sup>57</sup> Researchers Davis and Duncan provide accounts from fantasy players, who cite the reason for watching a game may depend on whether they had a player on their fantasy team participating in the real game.<sup>58</sup> Fantasy sports participation has led to an increase in the number of games watched on television, for both Major League Baseball<sup>59</sup> and the NFL.<sup>60</sup> Games with more NFL players starting in a high percentage of fans' fantasy football leagues correlate with that game's television rating.<sup>61</sup> The motivation to win a fantasy football league drives media behavior, and a study has shown that participants had a greater interest in their fantasy team winning rather than their favorite NFL team.<sup>62</sup>

Prior to the increase in fantasy football participation, researchers claimed that fans watched sports because of the unknown outcome of the game and to support their favorite

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<sup>54</sup> Woo-Young Lee et al., *Effects of Personality and Gender on Fantasy Sports Game Participation: The Moderating Role of Perceived Knowledge*, 27 J. GAMBLING ST. 427, 428 (2011).

<sup>55</sup> See Yin Wu, Eric van Dijk & Luke Clark, *Near-wins and Near-losses in Gambling: A Behavioral and Facial EMG Study*, 52 PSYCHOPHYSIOLOGY 359 (2015), for a discussion on the psychological affects on individuals for near-wins and near-losses while gambling.

<sup>56</sup> Bernhard & Eade, *supra* note 10; Dwyer & Kim, *supra* note 39 at 73.

<sup>57</sup> See McGuire, Armfield, & Boone, *supra* note 39, at 284-5; Rauhley & Hardin, *supra* note 37, at 273-4; Drayer et. al, *supra* note 39, at 135-9; Dwyer & Drayer, *supra* note 39, at 208; Dwyer & Kim, *supra* note 39, at 71-2; Karg & McDonald, *supra* note 39, at 329, 331; Mahan, Drayer, & Sparvero, *supra* note 30, at 161-2.

<sup>58</sup> Davis & Duncan, *supra* note 38, at 252.

<sup>59</sup> See Nesbit & King, *supra* note 39, at 39-40.

<sup>60</sup> See Fortunato, *supra* note 39, at 88-9.

<sup>61</sup> See Fortunato, *supra* note 39, 83-5.

<sup>62</sup> McGuire, Armfield, & Boone, *supra* note 39, at 287.

team.<sup>63</sup> Now, fans may watch because of the unknown outcome of the fantasy competition and to watch the NFL players who will help their fantasy team win. Dwyer claims that fantasy participation is a benefit for the league and its broadcast partners, because it expands fan interest beyond one singular team to players across the league who are on his or her fantasy team.<sup>64</sup> He states, “involvement with fantasy football will provide the NFL with sustained consumption through both short-term and long-term usage.”<sup>65</sup>

Overall, fantasy sports are another way for fans to invest emotionally and financially in sports.<sup>66</sup> Fantasy players are often already sports fans, and participation in fantasy games merely enhances their enjoyment of the game.<sup>67</sup> This additional emotional and financial investment then translates into more media consumption and more consumption of tickets and merchandise.<sup>68</sup>

#### D. DAILY FANTASY SPORTS

Daily fantasy sports games create another opportunity for sports wagering. The demographic of daily fantasy sports players are typically male, younger than traditional fantasy players, technologically advanced (often using their mobile phone to play), college-educated, and have more disposable income.<sup>69</sup> According to the Fantasy Sports Trade Association,

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<sup>63</sup> See Brendan Dwyer, *Divided Loyalty? An Analysis of Fantasy Football Involvement and Fan Loyalty to Individual National Football League (NFL) Teams*, 25 J. Sport Mgmt. 445, 446 (2011).

<sup>64</sup> Brendan Dwyer, *Divided Loyalty? An Analysis of Fantasy Football Involvement and Fan Loyalty to Individual National Football League (NFL) Teams*, 25 J. SPORT MGMT. 445, 453 (2011).

<sup>65</sup> *Id.*

<sup>66</sup> Mahan et al., *supra* note 30, at 168.

<sup>67</sup> See Nelson et al., *supra* note 30, at 278-9; Mahan et al., *supra* note 30, at 166.

<sup>68</sup> See McGuire, Armfield, & Boone, *supra* note 39, at 284-5; Ruihley & Hardin, *supra* note 37, at 273-4; Drayer et. al, *supra* note 39, at 135-9; Dwyer & Drayer, *supra* note 39, at 208; Dwyer & Kim, *supra* note 39, at 71-2; Karg & McDonald, *supra* note 39, at 329, 331; Mahan, Drayer, & Sparvero, *supra* note 30, at 161-2.

<sup>69</sup> Albert Chen, *Every Sunday is Super Bowl Sunday*, SPORTS ILLUSTRATED. (Feb. 2, 2015), available at <http://www.si.com/vault/2015/02/02/106715259/every-sunday-is-super-bowl-sunday>.

an estimated 41 million people participate in fantasy sports, but daily fantasy sports only accounts for approximately five percent of those participants.<sup>70</sup> More importantly, fifteen percent of daily fantasy players have never played fantasy sports of any other kind,<sup>71</sup> meaning that daily fantasy brings a new type of person to the sports gambling realm and a new fan with increased interest in professional sports games.

The most significant difference between daily fantasy sports games and seasonal fantasy sports games is that daily fantasy games offer cash prizes.<sup>72</sup> In daily fantasy sports, every professional player is assigned a salary for that day's game.<sup>73</sup> Fantasy players must construct their lineup using these assigned professional player salaries within a predetermined salary cap limit.<sup>74</sup> Daily fantasy sports games have an entrance fee ranging from \$.25 to \$1000 and paid games can range from \$1 to \$5000.<sup>75</sup> There are also many highly priced tournaments.<sup>76</sup>

Two companies dominate market share for daily fantasy sports: FanDuel, launched in 2008, and DraftKings, started in 2011.<sup>77</sup> The companies combined occupy an estimated 96 percent of the daily fantasy sports marketplace.<sup>78</sup> In addition to entrance fees, daily fantasy sports companies take a commission of approximately ten percent on each game.<sup>79</sup> In 2014, FanDuel

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<sup>70</sup> Eric Fisher, *Daily Fantasy Pushes to Continue Growth*, 17 STREET & SMITH'S SPORTS BUS. J. 1, 40-41 (2015).

<sup>71</sup> Chen, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N. Y. TIMES (Oct. 5, 2015) at A1.

<sup>76</sup> Chen, *supra* note 69.

<sup>77</sup> Brian Lambert, *The economics of fantasy football – or why you can't watch TV anymore without seeing an ad for Fanduel*, MINNPOST (Oct. 1, 2015), <https://www.minnpost.com/media/2015/10/economics-fantasy-football-or-why-you-cant-watch-tv-anymore-without-seeing-ad-fanduel>.

<sup>78</sup> Fisher, *supra* note 70.

<sup>79</sup> Lora Kolodny, *Big Media Catch Daily-Fantasy-Sports Bug*, THE WALL STREET JOURNAL (July 26, 2015), <http://www.wsj.com/articles/big-media-catch-daily-fantasy-sports-bug>.

earned more than \$57.3 million in revenue;<sup>80</sup> and estimated earning projections for 2015 were close to \$200 million.<sup>81</sup> DraftKings earned an estimated \$30 million in 2014; and their 2015 revenue was projected to grow to \$150 million,<sup>82</sup> compared to only \$4 million in 2013.<sup>83</sup> FanDuel paid out more than \$564 million in prizes in 2014.<sup>84</sup> That same year, DraftKings gave away \$300 million in prize money;<sup>85</sup> the company expects to triple its prize money in 2015, awarding participants more than \$1 billion.<sup>86</sup>

The continued growth potential for daily fantasy sports participation is widely reported. One 2015 estimate predicts daily fantasy sports entry fees will surpass the amount bet legally on sports in Las Vegas.<sup>87</sup> Another estimate predicts that by 2020, daily fantasy sports will produce \$2.5 billion in annual revenue in the United States alone.<sup>88</sup> Investors have responded to this growth potential.<sup>89</sup> In 2014, FanDuel and Draft Kings combined for \$111 million in capital investment (\$70 million for the former and \$41 million for latter).<sup>90</sup> In 2015, both companies continued to raise capital,<sup>91</sup> and in July, 2015, DraftKings raised approximately \$300 million while Fan Duel

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<sup>80</sup> Chen, *supra* note 69; Fisher, *supra* note 70.

<sup>81</sup> Fisher, *supra* note 70.

<sup>82</sup> *Id.*

<sup>83</sup> Eric Fisher, *DraftKings Closes on \$300M Funding Round*, SPORTS BUS. J. (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Finance/DraftKings.aspx>.

<sup>84</sup> Fisher, *supra* note 70.

<sup>85</sup> Kolodny, *supra* note 79.

<sup>86</sup> Fisher, *supra* note 83.

<sup>87</sup> Terry Lefton, *For Paid Fantasy Gaming, the Question is How High Can it Go?*, 17 STREET & SMITH'S SPORTS BUS. J. 10 (2015) [hereinafter *How High Can it Go?*].

<sup>88</sup> Kolodny, *supra* note 79.

<sup>89</sup> Darren Heitner, *The Hyper Growth of Daily Fantasy Sports is Going to Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015), <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#1af90df45f25>.

<sup>90</sup> Fisher, *supra* note 70.

<sup>91</sup> *Id.*

raised an estimated \$275 million; both companies now are valued at more than \$1 billion.<sup>92</sup>

The nature of daily fantasy participation and the benefit of cash prizes leads to greater fan engagement with sports. DraftKings chief executive and co-founder Jason Robins explained, “we’re not only changing how fantasy is played, but more fundamentally, how fans engage with sports.”<sup>93</sup> Fan engagement manifests itself in greater television viewing of games and also viewing for longer periods at a time. FanDuel CEO and co-founder Nigel Eccles stated, “we can drive a lot of viewership and, anecdotally, we’re seeing a positive impact on the purchase of out-of-market TV packages by our players.”<sup>94</sup> FanDuel contends that once fans start playing paid daily fantasy games, their weekly sports consumption on television and other media increases from 17 hours to 24 hours.<sup>95</sup> Tom Griffiths, FanDuel’s chief product officer, explained that the reason why people play daily fantasy sports is “simple: they play because it makes watching games more exciting.”<sup>96</sup> More importantly, the audience watches sports games during the live telecast, not at a later time or another day using a DVR device. An estimated 95 percent of televised sports is watched live.<sup>97</sup> Watching live makes sports programming extremely attractive to advertisers because their promotional communication messages will be seen at their desired time.<sup>98</sup> Viewing games live due to daily fantasy participation is a significant and positive behavior outcome for sports leagues; television broadcast rights are one of their greatest revenue sources. Combined, the NFL, NHL, NBA, and Major League Baseball earn more than \$17 billion annually in national television contracts.<sup>99</sup>

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<sup>92</sup> Fisher, *supra* note 83; Kolodny, *supra* note 79.

<sup>93</sup> Fisher, *supra* note 70 at 40.

<sup>94</sup> *How High Can it Go?*, *supra* note 87.

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

<sup>96</sup> Chen, *supra* note 69.

<sup>97</sup> John Ourand, *Switch to C7 Ad Rating Unlikely to Have Big Impact on Sports*, STREET & SMITH’S SPORTS BUS. J. (June 16-22, 2015), at 11.

<sup>98</sup> John A. Fortunato, *Sports Sponsorship: Principles & Practices*, 45-56 (2013) [Hereinafter *Sponsorship*].

<sup>99</sup> John Ourand, *With Major Media Deals Done, How Will*

Media companies and sports leagues have become investors in daily fantasy sports companies.<sup>100</sup> One of the primary investors of DraftKings is Fox Sports.<sup>101</sup> In July, 2015, Fox invested \$300 million and received 11% equity in DraftKings.<sup>102</sup> The deal includes a \$250 million marketing commitment for DraftKings on Fox media platforms over a three-year period, allowing Fox to obtain an equity position while any costs incurred are almost completely offset by DraftKings advertising spending.<sup>103</sup> DraftKings chief executive and co-founder Jason Robins explained, “there are a ton of synergies between us and Fox. They share our vision, their rights portfolio aligns strongly with our partnership roster, and they understand very well the impact that daily fantasy has upon viewership.”<sup>104</sup> Fox Sports president and chief operating officer Eric Shanks commented, “we don’t see this as a short-term investment. We’re not looking to get in and get out. There already has been exponential growth in this category, and we certainly believe there is a lot more to come.”<sup>105</sup> The Fox Sports agreement with DraftKings is not exclusive, allowing the network to accept advertising from FanDuel or other daily fantasy sports companies.<sup>106</sup> In April 2015, DraftKings also reached a three-year exclusive advertising commitment with ESPN.<sup>107</sup> In this agreement, DraftKings will spend more than

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*Nets Grow Revenue*, STREET & SMITH’S SPORTS BUS. J., (June 16-22, 2015), at 1.

<sup>100</sup> Eric Fisher, *DraftKings Closes on \$300M Funding Round*, STREET & SMITH’S SPORTS BUS. J. (July 27-Aug 2, 2015), at 3.

<sup>101</sup> Fisher, *supra* note 83; Kolodny, *supra* note 79.

<sup>102</sup> Matthew Futterman & Sharon Terlep, *The Deals That Made Daily Fantasy Take Off*, THE WALL STREET JOURNAL (Oct. 16, 2015), <http://www.wsj.com/articles/the-deals-that-made-daily-fantasy-take-off-1445043328>.

<sup>103</sup> Fisher, *supra* note 83; Futterman & Terlep, *supra* note 102.

<sup>104</sup> Fisher, *supra* note 83, at 3.

<sup>105</sup> Fisher, *supra* note 83, at 7.

<sup>106</sup> Fisher, *supra* note 83.

<sup>107</sup> Terry Lefton & John Ourand, *ESPN Agrees to Buy Stake in DraftKings*, STREET & SMITH’S SPORTS BUS. J. (Apr. 3, 2015), <http://www.sportsbusinessdaily.com/SB-Blogs/On-The-Ground/2015/04/0403-ESPN-DraftKings.aspx>.

\$200 million across the company's platforms, including fantasy analyst Matthew Berry's columns and podcasts.<sup>108</sup>

Other investors of DraftKings include: Major League Baseball, NHL, Major League Soccer, Madison Square Garden, Legends Hospitality, (which has partnerships with the Dallas Cowboys and the New York Yankees), and the Kraft Group (headed by New England Patriots owner, Robert Kraft).<sup>109</sup> Investors of FanDuel include: Time Warner Investment, Turner Sports, NBC Sports Ventures, Comcast Ventures, and the NBA.<sup>110</sup>

Because daily fantasy sports participation promotes television viewership of games, it encourages sports leagues and media companies to invest in a daily fantasy company. For example, with the NBA and Time Warner both investing in FanDuel, there is symmetry in integrating the FanDuel brand through the broadcasting of NBA games on TNT.<sup>111</sup>

Meanwhile, daily fantasy sports companies need the sponsorship of professional sports leagues and teams to promote the fantasy sports brand in order to acquire new customers. Beyond television commercials, daily fantasy companies have obtained sponsorship partnerships with professional sports leagues and teams.<sup>112</sup> Danson states,

[T]he people most likely to bet on sports events are sports fans, so sponsorship of a sports team or competition is an obvious way to reach the betting operator's target demographic<sup>113</sup> . . . it is a widely held belief that betting operators increase the

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<sup>108</sup> *Id.*

<sup>109</sup> Eric Fisher, *DraftKings Closes on \$300M Funding Round*, STREET & SMITH'S SPORTS BUS. J., (July 27-Aug 2, 2015), at 3.

<sup>110</sup> Fisher, *supra* note 83.

<sup>111</sup> Kolodny, *supra* note 79.

<sup>112</sup> Brent Schrottenboer, *FanDuel Signs Deals with 15 NFL Teams, Escalating Daily Fantasy Integration*, USA TODAY SPORTS (Apr. 21, 2015, 10:42 PM), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

<sup>113</sup> Andrew Danson, *Sponsorship by Gambling Companies in the UK and Europe: The Opportunities and Challenges*, 3 J. OF SPONSORSHIP 194, 195 (2009).

exposure of, and interest in, the sports on which they offer bets.<sup>114</sup>

Certainly, there are similar audience characteristics that make the gambling sponsorship product category appealing. Day states, “due to the close synergy between sports and betting, many gambling companies have used sponsorship as one of the core ways to promote themselves to the general public.”<sup>115</sup>

## II. THE SPONSORSHIP PRACTICE

While a sponsorship agreement provides another major revenue stream to the sports property, these agreements also offer a series of benefits to the sponsor. Benefits include greater opportunities to obtain brand exposure, increased brand recall, improved brand association with a property and its consumers, and improved consumer engagement with the brand and improved brand image.<sup>116</sup> Thus, sponsorship can be viewed as “an investment, of cash or in kind, in an activity, in return for access to the exploitable commercial potential associated with that activity.”<sup>117</sup>

One of the greatest advantages of sponsorship as a form of promotional communication is that all of the parameters of the agreement between a sponsor and a property are meticulously negotiated. Through the negotiation of a sponsorship agreement anything is possible—it is merely a matter of what the sponsor and the property decide. Decisions on sponsorship are “thick with negotiation, barter, and deal making.”<sup>118</sup> No two sponsorship agreements are alike, and the negotiated details are what help make the sponsorship flexible and customizable so as to satisfy the sponsor’s specific brand goals.<sup>119</sup> For example,

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<sup>114</sup> *Id.*

<sup>115</sup> Helen Day, *Is Gambling Sponsorship a Risk Worth Taking?* 4 J. OF SPONSORSHIP 205, 206 (2011).

<sup>116</sup> *Sponsorship*, *supra* note 98; Kevin Gwinner, *A Model of Image Creation and Image Transfer in Event Sponsorship*, 14 INT. MARK. REV. 145 (1997); Norm O’Reilly & Judith Madill, *The Development of a Process for Evaluating Marketing Sponsorships*, 29 CAN. J. ADMIN. SCI. 50 (2012).

<sup>117</sup> Tony Meenaghan, *The Role of Sponsorship in the Marketing Communications Mix*, 10 INT. J. ADVER. 35 (1991).

<sup>118</sup> T. Bettina Cornwell, *State of the Art and Science in Sponsorship-Linked Marketing*, 37 J. ADVER. 41, 46 (2008).

<sup>119</sup> *Id.*



stadium naming rights or signage might be the ideal sponsorship strategy if the goal is brand exposure.

Brand exposure is often the most vital element to the success of a sponsorship agreement and is the initial objective.<sup>120</sup> Other sponsorship objectives might not be achieved if the brand is not noticed in that particular location. Furthermore, “sponsorship awareness is crucial for any assessment of sponsorship effectiveness.”<sup>121</sup> If the brand goes unnoticed, any audience reaction or behavior toward the brand is due to some other reason rather than that specific sponsorship. Sports property sponsorship is desirable for companies because of the opportunity to receive brand exposure during the actual game or event when the audience is apt to be watching—not only during commercials.<sup>122</sup> Brand names are woven through the broadcast through sponsored scoreboards, highlight segments, or pre-game and halftime shows.<sup>123</sup>

Brand exposure helps achieve the important objective of brand recall. It is not enough that consumers are aware of the product category (e.g., insurance); they also need to be aware of and have the ability to recall the specific brand name (e.g., State Farm) when the purchase decision is made.<sup>124</sup> Recall is especially important in product categories where there are several competing brands or when making a purchase for the first time in a product category. The more time spent viewing an event leads to greater brand recall.<sup>125</sup>

To assist with brand recall, sponsors negotiate for exclusivity within a product category. Exclusivity eliminates any competition that one company might receive from a rival within that product category at the sponsored event or location or with the sponsored league or team.<sup>126</sup> The result of product category

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<sup>120</sup> Elise Neils, *Ballpark Figures: Assessing Brand Value and the Benefits of Stadium Naming Rights*, WORLD TRADEMARK REVIEW, (Dec. 2011), at 51, 51.

<sup>121</sup> M. Walraven, Tammo Bijmolt, & Ruud H. Koning, *Dynamic Effects of Sponsoring: How Sponsorship Awareness Develops Over Time*, 43 J. ADVER. 142, 143 (2014).

<sup>122</sup> *Id.* at 144.

<sup>123</sup> *Id.*

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

<sup>125</sup> Walraven, Bijmolt, & Koning, *supra* note 121, at 142.

<sup>126</sup> *Sponsorship*, *supra* note 98 at 51.

exclusivity could be a distinct competitive advantage for the sponsor. Additionally, the "ability to be an exclusive sponsor in one's product category presumably aids in avoiding the competitive interference that typically is experienced in other media contexts."<sup>127</sup> Exclusivity acts as a barrier to competitors who might have tried to acquire that same sponsorship or at least diffuses the promotional attempts of competitors during the time that the company is sponsoring the property.<sup>128</sup>

Another enhancement of brand recall through sponsorship is the ability to develop and communicate a brand association between the sponsor and the property.<sup>129</sup> On this topic, Dwayne Dean says that "for the payment of a fee (or other value) to the sponsee, the sponsor receives the right to associate itself with the sponsee or event."<sup>130</sup> In addition, authors Grohs and Reisinger point out that, "the aim is to evoke positive feelings and attitudes toward the sponsor, by closely linking the sponsor to an event the recipient values highly."<sup>131</sup> The sponsorship goals assume that the target audience will transfer their loyalty from the sponsored property or event to the sponsor itself.<sup>132</sup>

To help achieve this transfer, the sponsor is allowed to communicate its association to a league or team by placing a

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<sup>127</sup> Anthony D. Miyazaki & Angela G. Morgan, *Assessing Market Value of Event Sponsorship: Corporate Olympic Sponsorships*, 41 J. ADVER. RES. 9, 10 (2001).

<sup>128</sup> Demitra Papadimitriou & Artembia Apostolopoulou, *Olympic Sponsorship Activation and the Creation of Competitive Advantage*, 15 J. PROMO. MGMT. 90, 108-09 (2009).

<sup>129</sup> Dwane H. Dean, *Associating the Corporation with a Charitable Event Through Sponsorship: Measuring the Effects on Corporate Community Relations*, 31 J. ADVER. 77, 79 (2002); Kevin P. Gwinner & John Eaton, *Building Brand Image Through Event Sponsorship: The Role of Image Transfer*, 28 J. ADVER. 47, 47 (1999); Erik L. Olson & Hans M. Thjomoe, *Explaining and Articulating the Fit Construct in Sponsorship*, 40 J. ADVER. 57, 60 (2011).

<sup>130</sup> Dean, *supra* note 129, at 78.

<sup>131</sup> Reinhard Grohs & Heribert Reisinger, *Image Transfer in Sports Sponsorships: An Assessment of Moderating Effects*, 7 INT'L J. SPORTS MKTG. & SPONS. 42, 44 (2005).

<sup>132</sup> Andre M. Louw, *AMBUSH MARKETING & THE MEGA-EVENT MONOPOLY* 76 (Springer ed. 2012).

logo on product packaging and in advertisements.<sup>133</sup> For example, a Coca-Cola case or even an individual can or bottle can feature the logo of a team that it sponsors. The ideal outcome for the sponsor is that the popularity and the positive image and reputation of the team can precipitate a similar favorable feeling by fans and consumers toward their brand. Fans might simply think favorably about Coca-Cola because that company supports their team.

The sponsorship progression is the idea that brand exposure and increased recall—through strategies such as product category exclusivity and brand association—can help achieve the desired consumer behavior.<sup>134</sup> Several researchers indicate that achieving sales through sponsorship is an attainable objective.<sup>135</sup> Harvey found that “sponsorship changes the consumer’s perception of a specific sponsor—which can rub off positively on brands that sponsor in terms of willingness to purchase those brands.”<sup>136</sup>

#### A. PROFESSIONAL SPORTS LEAGUE GAMBLING SPONSORSHIPS

Sports leagues determine the product categories that they will open to sponsors.<sup>137</sup> There is some concern about hurting the brand image of the leagues by having sponsorship partnerships with risk industries, such as tobacco, alcohol, and unhealthy foods.<sup>138</sup> The idea of a potentially negative brand association is countered by the quest for sports leagues and

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Dean, *supra* note 129; Larry Degaris, Corrie West, & Mark Dodds, *Leveraging and Activating NASCAR Sponsorships with NASCAR-Linked Sales Promotions*, 3 J. SPONSORSHIP 88 (2009); Bill Harvey, *Measuring the Effects of Sponsorship*, 41 J. ADV. RES. 59, 64 (2001); Madrigal, *supra* note 129; Miyazaki & Morgan, *supra* note 127, at 13.

<sup>136</sup> Harvey, *supra* note 135, at 64.

<sup>137</sup> Terry Lefton & John Lombardo, *Bacardi, NBA Strike Unique Deal*, S. FLA. BUS. J., (Apr 5, 2010), <http://www.bizjournals.com/southflorida/stories/2010/04/05/daily4.html>.

<sup>138</sup> Cornwell, *supra* note 118; Rebecca Harris, *When Giving Means Taking: Public Relations, Sponsorship, and Morally Marginal Donors*, 31 PUB. REL. REV. 486, 488 (2005).

teams to maximize revenue by having exclusive sponsors in various product categories. For example, in 2010, the NBA became the first major sports league to sell a league-wide sponsorship to a liquor company when it signed a three-year contract with Bacardi.<sup>139</sup> Prior to 2009, liquor companies were allowed to have agreements with individual NBA teams, which allowed for the sponsorship of clubs and suites in arenas, so long as the brand names were not visible by television cameras.<sup>140</sup> In March 2009, the NBA lifted the television camera restriction, allowing liquor companies to have sponsorship agreements with courtside signage.<sup>141</sup> By the end of the year, 26 NBA teams reached or extended sponsorships with liquor companies.<sup>142</sup>

Negative brand associations could extend to sponsorships from gambling organizations. From a league perspective, the integrity of the games could be threatened. Leagues may be concerned that gambling sponsors will use their position to try and fix matches, or at least try to acquire inside information about the games.<sup>143</sup> Day, however, argues,

[A]ny regulated gambling sponsor of a sport is one of the least likely companies to get involved in any integrity issues. The whole purpose of their sponsorship is to be in a partnership concerned with mutual benefit and the promotion of positive image in relation to the sponsored party, so their key aim is to ensure that nothing happens to affect this.<sup>144</sup>

There are also concerns regarding the addictive qualities of gambling. Understandably, the concern is that through these sponsorships, gambling is portrayed as an acceptable activity in general, and specifically depicted as a normative activity to the youth population<sup>145</sup> and to those most vulnerable to gambling

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<sup>139</sup> *Sports Sponsorship*, *supra* note 131, at 50.

<sup>140</sup> *Id.*

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

<sup>142</sup> Ken Belson, *Knicks Add Tequila to Roster of Sponsors*, N. Y. TIMES (Oct. 26, 2010), at B16.

<sup>143</sup> Day, *supra* note 115.

<sup>144</sup> Day, *supra* note 115, at 206.

<sup>145</sup> Cathryn L. Claussen & Lori K. Miller, *The Gambling Industry and Sports Gambling: A Stake in the Game?* 15 J. SPORT MAN. 350 (2001); Jennifer Felsher, Jeffrey Derevensky, & Rina Gupta, *Lottery Playing Amongst Youth: Implications for Prevention and Social Policy*, 20 J. GAMBLING ST. 127 (2004); Sally Monaghan, Jeffrey Derevensky, & Alyssa Sklar, *Impact of Gambling*

problems.<sup>146</sup> Day encourages gambling sponsors to engage in educational campaigns to raise awareness of responsible gambling behavior.<sup>147</sup> However, others contend “gambling has shed its image as a corrupting vice and has been reconstructed as a socially acceptable activity.”<sup>148</sup> Some argue that government policies to restrict gambling marketing may be necessary to reduce the risk of promoting gambling to vulnerable groups (including youths and individuals with gambling problems), and to counter the marketing that minimizes the risk of gambling.<sup>149</sup>

In 2012, the NFL permitted its teams to sell sponsorships and advertising to casinos.<sup>150</sup> The NFL was the last of the four major sports leagues in the United States to accept casino sponsorships and advertising.<sup>151</sup> The NFL placed the following restrictions on how the casinos could advertise: stadium signage was only permitted in the upper bowl or concourse of the stadium, restricting television exposure; advertisements were only permitted on the radio or in print—not television or digital; the casinos that secured the sponsorships could not allow sports gambling; players or coaches could not appear in the advertisements; the advertisements could not depict people gambling or include language that implies that gamblers can win big; and lastly, the casino was required to donate five percent of

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*Advertisements and Marketing on Children and Adolescents: Policy Recommendations to Minimize Harm*, 22 J. GAMBLING ISS. 252 (2008).

<sup>146</sup> Alex Blaszczyński, Robert Ladouceur, & Howard Shaffer, *A Science-Based Framework for Responsible Gambling: The Reno Model*, 20 J. GAMBLING ST. 301 (2004); Matthew Lamont, Nericee Hing, & Sally Gainsbury, *Gambling on Sport Sponsorship: A Conceptual Framework for Research and Regulatory Review*, 14 SPORT MAN. REV. 246 (2011); Stephen McKelvey, *The Growth in Marketing Alliances Between US Professional Sport and Legalized Gambling Entities: Are We Putting Consumers at Risk?* 7 SPORT MAN. REV. 193 (2004).

<sup>147</sup> Day, *supra* note 115.

<sup>148</sup> Claussen & Miller, *supra* note 145, at 353.

<sup>149</sup> Lamont, Hing, & Gainsbury, *supra* note 146.

<sup>150</sup> Daniel Kaplan, *NFL Gives OK for Teams to Accept Casino Advertising*, STREET & SMITH'S SPORTS BUS. J. (April 16-22, 2012), at 3.

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

the total sponsorship and advertising dollar value to the NFL's anti-gambling program.<sup>152</sup> An NFL memo issued to the teams explained, "these policy modifications are designed to ensure that all permitted gambling advertising by NFL clubs is executed in accordance with industry best practices."<sup>153</sup> The memo adds that the policy restrictions are designed to "minimize any potential negative impact on the NFL brand."<sup>154</sup>

In 2014, the NFL eased some of its restrictions on what a casino sponsorship could entail, making the sponsorship more valuable.<sup>155</sup> Casino sponsorships were permitted to include lower bowl signage, naming rights to stadium club areas, and print, radio, and digital advertising.<sup>156</sup> Using team and casino logos together remains prohibited.<sup>157</sup> Teams are also not permitted to produce a television or radio show that originates from a casino.<sup>158</sup> Finally, teams are still prohibited from forming relationships with casinos that have sports betting.<sup>159</sup>

Some team sponsorships with casinos have been traditional brand exposure agreements.<sup>160</sup> For example, the WNBA's Connecticut Sun play home games at the Mohegan Sun casino.<sup>161</sup> Likewise, the Arizona Coyotes of the NHL has its arena named after the local Gila River Casino in a nine-year deal worth more than \$3 million per year.<sup>162</sup>

Other casino sponsorships have been more creative and fostered greater fan involvement with the brand. For example,

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<sup>152</sup> *Id.*

<sup>153</sup> Terry Lefton, *NFL Expands Sponsor Inventory That Teams May Sell to Casinos*, STREET & SMITH'S SPORTS BUS. J. (Mar. 17-23, 2014), at 13.

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

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

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

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

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

<sup>159</sup> *Id.*

<sup>160</sup> Pat Eaton-Robb, *Sun Only Profitable Team in WNBA*, ASSOCIATED PRESS (June 5, 2011), <http://connecticut.cbslocal.com/2011/06/05/43369/>.

<sup>161</sup> *Id.*

<sup>162</sup> *Coyotes Ink Naming-Rights Deal With Gila River*, STREET & SMITH'S SPORTS BUS. DAILY (Aug. 14, 2014), <http://www.sportsbusinessdaily.com/Daily/Issues/2014/08/14/Facilities/Coyotes.aspx?hl=Arizona%20Coyotes&sc=0>.

season-ticket holders for the WNBA's Tulsa Shock received \$5 to \$10 vouchers to spend at the Osage Casino when they received their tickets.<sup>163</sup> The Osage Casino is also the primary jersey sponsor for the Shock.<sup>164</sup> In its agreement with the NHL's Columbus Blue Jackets, the Hollywood Casino Columbus created a promotion where fans signed up to receive keywords through text messaging.<sup>165</sup> The fans would then have to go to the casino to enter the keywords.<sup>166</sup> Four keywords were sent at different times, meaning fans had to go to the casino on four different occasions.<sup>167</sup> The fans who successfully entered all four keywords could play in a poker tournament at the casino with Blue Jackets players.<sup>168</sup> A.J. Poole, Blue Jackets vice president of corporate development, explained the brand goal for the casino, stating the "primary focus was driving residents of Central Ohio to their facility—just getting people in there to see what it was all about, and hopefully eat at one of their restaurants or play games, but get them in the door."<sup>169</sup>

The Philadelphia 76ers and New Jersey Devils, owned by Josh Harris and David Blitzer, became the first teams to reach a sponsorship agreement with an online gambling web site, [nj.partypoker.com](http://nj.partypoker.com),<sup>170</sup> owned by British company Bwin Party Digital Entertainment.<sup>171</sup> The [nj.party.poker.com](http://nj.party.poker.com) web site was approved by the New Jersey Division of Gaming

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<sup>163</sup> Adam Silver, *Marketers Bet on Growth in Gaming Deals*, STREET & SMITH'S SPORTS BUS. J., (Feb. 10, 2014), at 18 [hereinafter *Marketers Bet on Growth*].

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

<sup>165</sup> *Blue Jackets, Hollywood Casino Columbus Announce Partnership*, COLUMBUS BLUE JACKETS (Oct. 4, 2013, 10:03 AM), <http://bluejackets.nhl.com/club/news.htm?id=685390>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Marketers Bet on Growth*, *supra* note 163.

<sup>170</sup> Craig Wolff, *Devils, 76ers Strike Sponsorship Deal With Gaming Website Partypoker.com*, NEWARK STAR-LEDGER (Jan. 8, 2014, 11:05 PM), [http://www.nj.com/devils/index.ssf/2014/01/devils\\_76ers\\_strike\\_sponsorship\\_deal\\_with\\_gaming\\_website\\_partypokercom.html](http://www.nj.com/devils/index.ssf/2014/01/devils_76ers_strike_sponsorship_deal_with_gaming_website_partypokercom.html) [hereinafter *Devils, 76ers Strike Sponsorship Deal*].

<sup>171</sup> *Id.*

Enforcement.<sup>172</sup> Poker players on the web site must sign in from New Jersey.<sup>173</sup> The sponsorship makes nj.party.poker.com an official gaming partner of the 76ers and Devils, and includes television and radio advertising, signage at the teams' arenas, hospitality opportunities, and luxury seating.<sup>174</sup> Booths are also set up in the team arenas where fans can learn how to play poker online.<sup>175</sup> Among the prizes that fans can win are unique 76ers and Devils experiences.<sup>176</sup> Mark Tatum, NBA deputy commissioner and chief operating officer, commented, "as long as the gambling site doesn't include sports gambling or sports betting, it's now allowed within our rules."<sup>177</sup>

#### B. PROFESSIONAL SPORTS LEAGUE DAILY FANTASY SPONSORSHIPS

Daily fantasy sports produce another gambling-related sponsorship product category. This sponsorship product category is especially beneficial because of audience demographic, fan engagement, and viewership behaviors.<sup>178</sup> FanDuel CEO and co-founder Nigel Eccles stated, "we're not a new automotive, insurance, or beer category for them. We're

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<sup>172</sup> Steve Ruddock, *New Jersey Online Gambling Licenses: 12 Partnerships Form*, NJ.COM (Nov. 4, 2013, 2:24 PM), [http://www.nj.com/onlinegamblingnj/index.ssf/2013/09/new\\_jersey\\_online\\_gambling\\_lic.html](http://www.nj.com/onlinegamblingnj/index.ssf/2013/09/new_jersey_online_gambling_lic.html).

<sup>173</sup> *Devils, 76ers Strike Sponsorship Deal*, *supra* note 170.

<sup>174</sup> Craig Wolff, *Devils, 76ers Strike Landmark Sponsorship Deal with Gambling Website, PartyPoker.com*, NEWARK STAR-LEDGER (Jan. 9, 2014), [http://www.nj.com/devils/index.ssf/2014/01/devils\\_76ers\\_strike\\_sponsorship\\_deal\\_with\\_gaming\\_website\\_partypokercom.html](http://www.nj.com/devils/index.ssf/2014/01/devils_76ers_strike_sponsorship_deal_with_gaming_website_partypokercom.html).

<sup>175</sup> John George, *PartyPoker Sponsorship with 76ers, Devils Raises Stakes in Gaming Category*, STREET & SMITH'S SPORTS BUS. J., (Feb. 10-16, 2014) at 18, 23. <http://www.sportsbusinessdaily.com/Journal/Issues/2014/02/10/In-Depth/PartyPoker.aspx>.

<sup>176</sup> George, *supra* note 175.

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

<sup>178</sup> Robert Tuchman, *The Knew King of Sponsorship Deals: Fantasy Sports*, FORBES (Dec. 3, 2014, 5:45 PM), <http://www.forbes.com/sites/roberttuchman/2014/12/03/the-new-king-of-sponsorship-deals-fantasy-sports/#b745f488bbda>.



something that can drive value back to them [sports leagues] because we are driving ticket sales and TV viewership.”<sup>179</sup>

Major League Baseball was the first sports league to create a relationship with a daily fantasy company when it partnered with DraftKings.<sup>180</sup> The initial three-year agreement featured one day fantasy games to be played on mlb.com.<sup>181</sup> In 2015, Major League Baseball reached a five-year extension with DraftKings, raising its equity stake to an undisclosed single-digit percentage.<sup>182</sup> Major League Baseball did not pay to obtain its equity position.<sup>183</sup> Instead, DraftKings offered cash and stock to become the official daily fantasy game sponsor of Major League Baseball.<sup>184</sup> Major League Baseball official trademarks can now appear on DraftKings pay-based games.<sup>185</sup> Jason Robins, DraftKings chief executive and co-founder, commented, “it is such a monumental move to have their official marks behind the pay games.”<sup>186</sup>

Other elements of the agreement include DraftKings’ integration on mlb.com, Major League Baseball Advanced Media’s mobile products, and on the MLB Network.<sup>187</sup> The

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<sup>179</sup> Terry Lefton, *For Paid Fantasy Gaming, the Question is How High Can it Go?*, STREET & SMITH’S SPORTS BUS. J. (Mar. 9, 2015).

<sup>180</sup> Darren Heitner, *DraftKings and Major League Baseball Extend Exclusive Partnership*, FORBES (April 2, 2015), <http://www.forbes.com/sites/darrenheitner/2015/04/02/draftkings-and-major-league-baseball-extend-exclusive-partnership/#2e3f15074588>.

<sup>181</sup> Ian Thomas & Eric Fisher, *Daily Fantasy Goes Big: NHL Signs DraftKings; NBA in Talks With Pair*, STREET & SMITH’S SPORTS BUS. J. (Nov. 10-16, 2014), at 1, 26.

<sup>182</sup> Eric Fisher, *A Look into DraftKings’ MLB Deal*, STREET & SMITH’S SPORTS BUS. J., (Apr. 20-26, 2015), at 6 [hereinafter *A Look at DraftKings*].

<sup>183</sup> Futterman, *supra* note 102.

<sup>184</sup> Futterman, *supra* note 102.

<sup>185</sup> See Darren Heitner, *DraftKings and Major League Baseball Extend Exclusive Partnership*, FORBES (Apr. 2, 2015, 12:55 PM), <http://www.forbes.com/sites/darrenheitner/2015/04/02/draftkings-and-major-league-baseball-extend-exclusive-partnership/#32f3ee2a4588>.

<sup>186</sup> *A Look at DraftKings*, *supra* note 182.

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

MLB Network integration includes hosts and analysts of programs, such as *MLB Central* and *High Heat with Christopher Russo*, making selections of players who will perform well in that day's games based on their assigned DraftKings dollar value.<sup>188</sup> The final promotional element of the sponsorship agreement is the creation of baseball experiences as prizes for DraftKings game winners.<sup>189</sup> Major League Baseball players are not be permitted to play in daily fantasy baseball games for money, but are permitted to play in free games, and players can sign their own endorsement deals with daily fantasy game companies.<sup>190</sup> Bob Bowman, Major League Baseball President of Business and Media, defined the relationship with DraftKings "as important philosophically as it is economically. Daily fantasy skews very young and drives great awareness for the game. And don't forget, we are the daily game. We play every day. If there's any sport that applies itself perfectly to daily fantasy, it's baseball."<sup>191</sup>

In 2014, DraftKings reached a two-year agreement to become the official daily fantasy game of the NHL.<sup>192</sup> DraftKings receives brand exposure on nhl.com (including the slot as presenting sponsor of daily previews for regular season games), brand exposure on the NHL mobile application, the presenting sponsor slot for fantasy segments on the NHL Network's *NHL Live* program, and signage on the boards around the ice during major NHL games, such as the Winter Classic.<sup>193</sup> The NHL offers free daily fantasy games with the prizes being fan experiences, not paid games for cash payouts.<sup>194</sup> Keith Wachtel, NHL executive vice president of global partnerships, explained, "fantasy sports are such an important fabric of all sports, especially for passionate fans. This daily category is obviously a growing one, and from a category standpoint, we wanted to find a partner that would not only embrace the league's fan base, but also look at the league as a great

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

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

<sup>191</sup> *Id.*

<sup>192</sup> Thomas & Fisher, *supra* note 181.

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

<sup>194</sup> *Id.*

marketing and branding platform.”<sup>195</sup> Christopher Golier, NHL vice president of mobile marketing and strategy, added, “we noticed that the average fan that played daily fantasy games was spending five to ten minutes more watching games than those that didn’t play. These sorts of games obviously appeal to the avid fans, but we also see an opportunity to reach more casual fans as well.”<sup>196</sup>

In November, 2014, the NBA reached a four-year agreement with FanDuel, which included the league having an equity position in the company.<sup>197</sup> Free, one-day basketball games are available on both [fanduel.com](http://fanduel.com) and [nba.com](http://nba.com), with prizes including game tickets, NBA experiences, and merchandise.<sup>198</sup> FanDuel also receives brand exposure on the league’s mobile applications.<sup>199</sup>

In the fall of 2014, the NBA opened the daily fantasy product category to its teams, with sixteen teams reaching sponsorship agreements by the time that the All-Star game began in February, 2015.<sup>200</sup> Amy Brooks, NBA executive vice president of team marketing and business operations, called daily fantasy sports “one of our top sponsorship categories.”<sup>201</sup> It is important to note that teams do not have to contract with the league’s sponsor, FanDuel.<sup>202</sup> Several teams, including the Boston Celtics, Golden State Warriors, Houston Rockets, and

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> John Lombardo & Terry Lefton, *Gambling a Key Topic at All-Star: NBA Keeps Issue Front and Center*, STREET & SMITH’S SPORTS BUS. J. (Feb. 23-Mar. 1, 2015), at 1, 36-37.

<sup>198</sup> FanDuel, <https://www.fanduel.com> (last visited Feb. 11, 2016); NBA, [www.nba.com](http://www.nba.com) (last visited Feb. 11, 2016).

<sup>199</sup> Thomas Barrabi, *NBA, FanDuel Reach Daily Fantasy Basketball Partnership: League Will Invest, Feature Gameon Website*, INT’L BUS. TIMES (Nov. 12, 2014) 1:59 PM), <http://www.ibtimes.com/nba-fanduel-reach-daily-fantasy-basketball-partnership-league-will-invest-feature-1722619>.

<sup>200</sup> Eric Fisher, *Daily Fantasy Pushes to Continue Growth Streak*, STREET & SMITH’S SPORTS BUS. DAILY (March 16, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/16/Marketing-and-Sponsorship.aspx>.

<sup>201</sup> Lombardo & Lefton, *supra* note 197 at 1.

<sup>202</sup> Press Release, FANDUEL (Nov. 12, 2014).

Los Angeles Clippers, have sponsorship agreements with DraftKings.<sup>203</sup>

The NFL does not have a league-wide daily fantasy sponsor, even with the estimate that the product category could earn the league more than \$50 million annually.<sup>204</sup> The NFL does have an agreement with DraftKings for it to be a league partner in presenting its International Series in Britain, where in 2015, the NFL played three regular season games.<sup>205</sup> Gambling on sports games is legal in Britain.<sup>206</sup>

In September 2014, the NFL provided its teams with a set of rules under which they could pursue sponsors in the daily fantasy product category.<sup>207</sup> Under the rules, daily fantasy companies could not use team logos in their advertising, teams could not sell naming rights to a stadium or practice facility, and stadium signage for daily fantasy companies could not be visible on television.<sup>208</sup> Teams could sell to daily fantasy companies advertising on team-controlled media and hospitality suites, so long as those suites were not used as prizes.<sup>209</sup> As of September 2015, sixteen NFL teams had sponsorship agreements with FanDuel and five teams had agreements with DraftKings.<sup>210</sup>

Similar to casinos, daily fantasy companies receive general brand exposure through their team sponsorships. For example, FanDuel has its web site address on the court in front of the team benches for the Orlando Magic, a deal estimated at \$2 million annually.<sup>211</sup> Some teams have been more creative in providing brand exposure. The St. Louis Rams made every first

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<sup>203</sup> See *DFS Partnership/ Sponsorship Tracker*, <http://www.legalsportsreport.com/dfs-sponsorship-tracker/>.

<sup>204</sup> Terry Lefton, *Will NFL Make Move to Daily Fantasy? That's a \$50M Question*, STREET & SMITH'S SPORTS BUS. J. (Apr. 13-19, 2015), at 11.

<sup>205</sup> Drape & Williams, *supra* note 75.

<sup>206</sup> *Id.*

<sup>207</sup> Thomas & Fisher, *supra* note 181.

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

<sup>209</sup> Thomas & Fisher, *supra* note 181.

<sup>210</sup> John Ourand & Terry Lefton, *Daily Fantasy Ad Buys Make NFL a Big Winner*, STREET & SMITH'S SPORTS BUS. J. (Sept. 14, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/09/14/Marketing-and-Sponsorship/Fantasy-sports-NFL.aspx>.

<sup>211</sup> Thomas & Fisher, *supra* note 181.

down at home in 2015 a “FanDuel First Down,” indicated with signage on the stadium’s 360-degree LED system.<sup>212</sup> The New York Jets allow FanDuel to have fantasy updates at the stadium, receive brand exposure across Jets media, including mobile and preseason radio and television, and hospitality for FanDuel customers.<sup>213</sup> FanDuel CEO and co-founder Nigel Eccles commented on the team sponsorships, “we view these as a brand recognition and association exercise. If you see an ad for us and you know the Jets are our partner, we think there’s a benefit. All of these [sponsorships] fit within our mission of connecting to the live sports experience.”<sup>214</sup>

Beyond mere brand exposure, team sponsorship agreements often involve games where fans can win tickets, merchandise, or fan experiences.<sup>215</sup> Paul Charchian, the Fantasy Sports Trade Association president, stated, “daily has completely changed the visibility of the industry and through all the team and league partnerships they’ve done, it’s legitimized fantasy in a lot of ways.”<sup>216</sup>

Finally, daily fantasy companies spend considerable amounts of money on advertising during sports events. In 2015, DraftKings spent \$80 million in advertising from August 1 through mid-September, while FanDuel spent \$20 million.<sup>217</sup> The daily fantasy companies spent more than \$200 million in advertising during the 2015 NFL season, helping give the leagues broadcast partners a high single-digit percentage increase in advertising sales for the season.<sup>218</sup> DraftKings alone spent more than \$32.5 million on one single creative advertisement, the most spent on any single creative

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<sup>212</sup> Terry Lefton, *Ravens, Rams Sign With FanDuel Ahead of Owners Discussion*, STREET & SMITH’S SPORTS BUS. J. (Mar. 23-29, 2015) at 10.

<sup>213</sup> Terry Lefton, *Jets, FanDuel Deal Starts at Super Bowl*, STREET & SMITH’S SPORTS BUS. J. (Jan. 26, 2015).

<sup>214</sup> Terry Lefton, *supra* note 153 at 4.

<sup>215</sup> John George, *PartyPoker Sponsorship with 76ers, Devils Raises Stakes in Gaming Category*, STREET & SMITH’S SPORTS BUS. J. (Feb. 10, 2014).

<sup>216</sup> Fisher, *supra* note 70 at 40.

<sup>217</sup> Futterman & Terlep, *supra* note 102.

<sup>218</sup> Lefton & Ourand, *supra* note 107.

advertisement on national television in 2015.<sup>219</sup> The advertisement began with a voice-over that stated, “this is what it looks like when real people win \$1 million playing fantasy football.”<sup>220</sup> DraftKings replaced this specific advertisement in late September with an advertisement that focused more on the skill element of fantasy sports.<sup>221</sup> The advertisement’s voice-over stated, “The sleeper pick. The guy only you believe in.”<sup>222</sup> The NCAA soon after announced, in October 2015, that it would not permit fantasy television advertisements during its championship events.<sup>223</sup>

### III. SPORTS GAMBLING AND GOVERNMENT

In addition to sports leagues providing a level of acceptability for gambling, several researchers have identified the government as another validating agent for sports gambling.<sup>224</sup> Government and sports organizations can be construed as supporting such activities by having a relationship with gambling.<sup>225</sup> Some discuss the interplay between gambling organizations as sponsors of sports leagues, government regulation, and the effect on society.<sup>226</sup> Regarding gambling as a health-related issue, “regulators, sponsors and sports organizations should be mindful of the likely ethical and public health implications of promoting potentially harmful products through sport sponsorship.”<sup>227</sup>

Any concern over the potential problems stemming from an increase in gambling availability is confounded by governments recognizing the revenues from sports wagering as

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<sup>219</sup> John Ourand, *Industry Keeps Eye on Daily Fantasy Ad Spend*, STREET & SMITH’S SPORTS BUS. J., Oct. 26-Nov. 1, 2015, at 12 [Hereinafter *Ad Spend*].

<sup>220</sup> *Ad Spend*, *supra* note 219.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Opinion, *Fantasy Moneyball ‘Scandal’*, WALL STREET J. (Oct. 23, 2015, 6:29 PM), <http://www.wsj.com/articles/fantasy-moneyball-scandal-1445639340> [hereinafter *Fantasy Moneyball ‘Scandal’*].

<sup>224</sup> Claussen & Miller, *supra* note 145 at 352; Lamont, et al., *supra* note 145 at 252-53.

<sup>225</sup> McKelvey, *supra* note 145.

<sup>226</sup> *Id.*

<sup>227</sup> Lamont, Hing, & Gainsbury, *supra* note 145 at 247.

an essential source of funding.<sup>228</sup> States are even using the popularity of their sports teams to generate gambling revenue.<sup>229</sup> Several teams are now part of their state lottery scratch-off ticket offerings.<sup>230</sup> These lottery tickets have team branding, and although the teams do not receive revenue from the sale of the lottery tickets, they do receive a licensing fee.<sup>231</sup> The New England Patriots branded lottery ticket included the chance to win season tickets for life.<sup>232</sup>

#### A. THE CURRENT STATE OF SPORTS GAMBLING LAW: PASPA

On October 28, 1992, then-President George H. W. Bush signed into law the Professional and Amateur Sports Protection Act (PASPA), except in the four states where wagering on sports games in some form of sports betting was allowed.<sup>233</sup> Specifically, PASPA prohibits:

[A] person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>234</sup>

#### B. THE PASPA LEGAL CHALLENGE: NEW JERSEY

Because New Jersey had an established gambling industry, it was given one year to be included in the PASPA

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<sup>228</sup> Claussen & Miller, *supra* note 155; Day, *supra* note 88; Humphreys, Lee, & Soebbing, *supra* note 14; Wicker & Soebbing, *supra* note 14.

<sup>229</sup> See Claussen & Miller, *supra* note 145.

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

<sup>231</sup> *Id.*

<sup>232</sup> David Broughton, *Lotteries Still a Scratch and Win for Sports?* STREET & SMITH'S SPORTS BUS. J. (Feb. 10-16) at 22.

<sup>233</sup> Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. § 3701-04); S. REP. 102-248, at 11 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3562.

<sup>234</sup> 28 U.S.C. § 3702 (2012).

exemption in 1992.<sup>235</sup> At the time, the state's politicians were unable to pass legislation to allow sports wagering.<sup>236</sup> Two decades later, New Jersey launched an initiative that challenged the PASPA law.<sup>237</sup> In 2011, New Jersey voters supported a ballot referendum to legalize sports wagering.<sup>238</sup> Two months later, New Jersey Governor Chris Christie signed the Sports Wagering Act, permitting sports betting at the state's racetracks and Atlantic City casinos.<sup>239</sup> From the state's perspective, the incentive to establish sports gambling is primarily based on the potential tax windfall.<sup>240</sup> One estimate concluded that legalized gambling would raise more than \$30 million in tax revenue for the state.<sup>241</sup>

New Jersey contended that PASPA was unconstitutional under the 10<sup>th</sup> Amendment, and that it "impermissibly trenches on the states' authority to regulate their own citizens, and it does so in a manner that discriminates among the states."<sup>242</sup> The argument also highlighted the fact that professional leagues and the NCAA host games where sports wagering is legal, within the United States and internationally. For instance, state sponsored sports gambling is allowed in Delaware, Montana, Nevada, and Oregon, and the NFL and NBA play games in London.<sup>243</sup> New Jersey also argued that the new laws do not prevent illegal gambling.<sup>244</sup>

All four major professional sports leagues (the NBA, NHL, NFL, and MLB) and the NCAA filed a lawsuit in August,

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<sup>235</sup> David Purdum, *Arguments Set for Gambling Suit*, STREET & SMITH'S SPORTS BUS. J., (Feb. 4–10, 2013), at 8, <http://www.sportsbusinessdaily.com/Journal/Issues/2013/02/04/Law-and-Politics/NJ-gambling.aspx>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Purdum, *supra* note 235.

<sup>242</sup> Ryan Hutchins, *Chris Christie Appeals Sports Betting Case to U.S. Supreme Court*, STAR-LEDGER (Feb. 18, 2014, 8:37 PM), [http://www.nj.com/politics/index.ssf/2014/02/chris\\_christie\\_appeals\\_sports\\_betting\\_case\\_to\\_us\\_supreme\\_court.html](http://www.nj.com/politics/index.ssf/2014/02/chris_christie_appeals_sports_betting_case_to_us_supreme_court.html).

<sup>243</sup> Ryan Rodenberg & L. Jon Wertheim, *supra* note 12.

<sup>244</sup> *Id.*



2012, to stop New Jersey.<sup>245</sup> One of the leagues' key positions was the fear of the integrity of the games being questioned.<sup>246</sup> In a declaration filed with the court, NCAA president Mark Emmert stated that

[A]n increase in state-promoted sports betting would wrongly and unfairly engender suspicion and cynicism toward every NCAA event that affects the betting line. When gambling is freely permitted on sporting events, normal incidents of any athletic competition inevitably will fuel speculation, distrust, and accusations of point-shaving or game fixing.<sup>247</sup>

In testimony regarding whether or not the leagues' lawsuit could proceed, NFL Commissioner Roger Goodell stated that "the spread of sports betting, including the introduction of sports betting as proposed by the state of New Jersey, threatens to damage irreparably the integrity of, and the public confidence in, NFL football."<sup>248</sup> In December 2012, the United States District Court for the District of New Jersey Judge Michael Shipp ruled that the leagues' lawsuit could proceed.<sup>249</sup> In January 2013, the United States Justice Department intervened in the case on the side of the sports leagues.<sup>250</sup>

In March 2013, Judge Shipp ruled in favor of the sports leagues, reasoning that New Jersey's efforts were in violation of PASPA.<sup>251</sup> The decision was upheld in September 2013, by the United States Third Circuit Court of Appeals.<sup>252</sup> The Circuit Court of Appeals indicated that there was nothing in its ruling that prevented New Jersey from repealing its own laws prohibiting sports wagering.<sup>253</sup> New Jersey Governor Chris

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<sup>245</sup> *Id.* at 52.

<sup>246</sup> *Id.*

<sup>247</sup> Rodenberg & Wertheim, *supra* note 12 at 53.

<sup>248</sup> Purdum, *supra* note 235.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> David Hudson Jr., *NJ Suffers a setback in its Bid for a Sports Gambling Law*, A.B.A. J. (Nov. 01, 2014, 3:30 AM), [http://www.abajournal.com/magazine/article/losing\\_to\\_the\\_spread\\_new\\_jersey\\_suffers\\_a\\_setback\\_in\\_its\\_bid\\_for\\_a\\_sports\\_g](http://www.abajournal.com/magazine/article/losing_to_the_spread_new_jersey_suffers_a_setback_in_its_bid_for_a_sports_g).

<sup>252</sup> *Id.*

<sup>253</sup> Christopher Baxter, *Sports Betting at N.J. Casinos, Racetracks Will Not Be Prosecuted, Acting AG Says*, STAR-LEDGER

Christie then petitioned the United States Supreme Court to take the case, only to have that request denied in June 2014.<sup>254</sup> In August 2014, Christie vetoed a bill passed by the New Jersey legislature to approve sports wagering, stating, “ignoring federal law, rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with the constitutional values I have sworn to defend and protect.”<sup>255</sup>

In September 2014, New Jersey tried another strategy and had the State Attorney General John Hoffman issue a directive that the racetracks and casinos would not be prosecuted by state law enforcement agencies if they were to take wagers on sports games.<sup>256</sup> The sports leagues filed a motion to block that directive.<sup>257</sup> The fear of prosecution for violating federal law, and the fact that New Jersey still had not passed a law that permitted sports wagering, caused none of the casinos or racetracks to accept bets.<sup>258</sup>

The New Jersey legislature once again passed a bill that would amend the state’s sports gambling laws.<sup>259</sup> The position of New Jersey was that the federal ban only prevents states from having regulated sports wagering, and thereby allows private companies to accept bets without being regulated or licensed by the state.<sup>260</sup> On October 17, 2014, Governor Christie signed

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(Sept. 9, 2014, 6:31 AM),

[http://www.nj.com/politics/index.ssf/2014/09/nj\\_casinos\\_racetracks\\_will\\_not\\_be\\_held\\_liable\\_for\\_sports\\_betting.html](http://www.nj.com/politics/index.ssf/2014/09/nj_casinos_racetracks_will_not_be_held_liable_for_sports_betting.html)

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Claude Brodesser-Akner, *Pro Leagues Sue over Christie’s Sports Betting Plan; Lesniak Readies Repeal of State Ban*, NEWARK STAR-LEDGER (Sept. 29, 2014),

[http://www.nj.com/politics/index.ssf/2014/09/pro\\_sports\\_leagues\\_sue\\_over\\_christies\\_sports\\_betting\\_plan\\_lesniak\\_announces\\_repeal\\_of\\_state\\_ban.html](http://www.nj.com/politics/index.ssf/2014/09/pro_sports_leagues_sue_over_christies_sports_betting_plan_lesniak_announces_repeal_of_state_ban.html).

<sup>258</sup> Baxter, *supra* note 253.

<sup>259</sup> *Id.*

<sup>260</sup> Brent Johnson, *Sports Leagues Seek to Stop Sports Betting from Beginning in N.J.*, NEWARK STAR-LEDGER (Oct. 20, 2014), [http://www.nj.com/politics/index.ssf/2014/10/sports\\_leagues\\_seek\\_to\\_stop\\_sports\\_betting\\_from\\_beginning\\_in\\_nj.html](http://www.nj.com/politics/index.ssf/2014/10/sports_leagues_seek_to_stop_sports_betting_from_beginning_in_nj.html); Brent Johnson, *Christie Signs Law Allowing Sports Betting in N.J.*, NEWARK STAR-LEDGER (Oct. 17, 2014), [http://www.nj.com/politics/index.ssf/2014/10/chris\\_christie\\_signs\\_law](http://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law)

legislation that eliminated the state law provisions that banned sports wagering.<sup>261</sup> He stated, “I am a strong proponent of legalized sports wagering in New Jersey. But given earlier decisions by federal courts, it was critical that we follow a correct and appropriate path to curtail new court challenges and expensive litigation. I believe we have found that path in this bipartisan legislation.”<sup>262</sup> Monmouth Park racetrack announced that it would begin taking bets on October 26.<sup>263</sup>

On Monday, October 20, the sports leagues filed an immediate injunction to stop legalized sports wagering in New Jersey.<sup>264</sup> The motion claimed the New Jersey law is “in clear and flagrant violation of federal law.”<sup>265</sup> On Friday, October 25, Judge Michael Shipp ruled in favor of the sports leagues by issuing a temporary restraining order that prevented Monmouth Park from accepting bets.<sup>266</sup> Ruling in favor of the leagues, Shipp stated, “betting could result in a negative effect on the perception of their games and their relationship to their fans. This is a very real harm.”<sup>267</sup> On November 21, 2014, Shipp issued a more permanent ruling in favor of the sports leagues, stating that New Jersey was not permitted to legalize sports wagering.<sup>268</sup>

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[\\_allowing\\_for\\_sports\\_betting\\_in\\_nj.html](#).

<sup>261</sup> *Id.*

<sup>262</sup> Johnson, *supra* note 260.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Brent Johnson, *Judge Halts N.J. Sports Betting from Beginning at Monmouth Park on Sunday*, NEWARK STAR-LEDGER (Oct. 24, 2014), [http://www.nj.com/politics/index.ssf/2014/10/nj\\_sports\\_betting\\_federal\\_judge\\_rules\\_on\\_monmouth\\_park\\_taking\\_bets\\_sunday.html](http://www.nj.com/politics/index.ssf/2014/10/nj_sports_betting_federal_judge_rules_on_monmouth_park_taking_bets_sunday.html).

<sup>268</sup> Brent Johnson, *N.J. Politics Roundup: Judge Blocks Sports Betting; Obama's Immigration Order Sparks Debate*, NEWARK STAR-LEDGER (Nov. 24, 2014), [http://www.nj.com/politics/index.ssf/2014/11/nj\\_politics\\_roundup\\_judge\\_blocks\\_sports\\_betting Ebola\\_quarantine\\_leads\\_to\\_overtime\\_pay.html](http://www.nj.com/politics/index.ssf/2014/11/nj_politics_roundup_judge_blocks_sports_betting Ebola_quarantine_leads_to_overtime_pay.html).

New Jersey continued to appeal the ruling.<sup>269</sup> On August 25, 2015, a three-judge U.S. Circuit Court of Appeals panel in Philadelphia again ruled in a two to one vote in favor of the sports leagues.<sup>270</sup> However, after another appeal by New Jersey, on October 14, 2015, the full Third Circuit Court of Appeals granted the state's request to rehear the case.<sup>271</sup>

### C. THE CURRENT STATUS OF SPORTS GAMBLING LAW: UIGEA

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) is the second major law currently governing sports gambling.<sup>272</sup> In this law, the terms “bet” or “wager” are defined as

the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.<sup>273</sup>

The law features an exemption that permits participation in fantasy sports games. This exemption is granted through a rationale of three main points:

- 1) Fantasy sports is a game of skill. The law states, “all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.”<sup>274</sup>
- 2) The outcome of fantasy games is not based on a single team or any single athlete. The law states, “no winning outcome is

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<sup>269</sup> Brent Johnson, *N.J. Sports Betting Case Will Go Before U.S. Appeals Court Again*, NEWARK STAR-LEDGER (Oct. 14, 2015), [http://www.nj.com/politics/index.ssf/2015/10/us\\_appeals\\_court\\_to\\_rehear\\_nj\\_sports\\_betting\\_case.html](http://www.nj.com/politics/index.ssf/2015/10/us_appeals_court_to_rehear_nj_sports_betting_case.html).

<sup>270</sup> Brent Johnson, *Federal Appeals Court Rejects N.J.'s Latest Bid for Legal Sports Betting*, NEWARK STAR-LEDGER (Aug. 25, 2015), [http://www.nj.com/politics/index.ssf/2015/08/federal\\_appeals\\_court\\_rejects\\_njs\\_latest\\_bid\\_for\\_1.html](http://www.nj.com/politics/index.ssf/2015/08/federal_appeals_court_rejects_njs_latest_bid_for_1.html).

<sup>271</sup> Johnson, *supra* note 269.

<sup>272</sup> See Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (codified at 31 U.S.C. § 5361–67); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701–04 (2012).

<sup>273</sup> 31 U.S.C. § 5362(1)(A) (2012).

<sup>274</sup> *Id.* at § 5362(1)(E)(ix)(II).

based (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.”<sup>275</sup>

- 3) The potential winnings from fantasy games are clearly communicated. The law states, “all prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.”<sup>276</sup>

The definition of fantasy sports as a game of skill is the defining characteristic. Because of this skill element, daily or weekly fantasy games are more similar to betting on sports games, rather than traditional season-long fantasy leagues.<sup>277</sup>

Peter Schoenke, head of the Fantasy Sports Trade Association lobbying committee, commented that “we’ve continued to focus on making sure fantasy, all forms of it, is fully recognized as a game of skill.”<sup>278</sup> This law and its definition as a game of skill was used by Major League Baseball commissioner Rob Manfred as justification for Major League Baseball’s agreement with DraftKings.<sup>279</sup> Manfred drew the distinction between daily fantasy sports and other forms of gambling, stating, “DraftKings is fantasy—it’s not gambling. I think there is a clear legal line, and quite frankly, we’ve spent some considerable effort and money to make sure we knew where DraftKings was in relation to that line. We’re very comfortable with the idea that it’s fantasy.”<sup>280</sup>

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<sup>275</sup> *Id.* at § 5362(1)(E)(ix)(III).

<sup>276</sup> *Id.* at § 5362(1)(E)(ix)(I).

<sup>277</sup> Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 University of Nevada Las Vegas GAMING L. J. 201 (2014).

<sup>278</sup> Fisher, *supra* note 70 at 40 (March 16-22).

<sup>279</sup> Mark Feinsand, *MLB Commissioner Rob Manfred Defends Draft Kings Partnership, Says Fantasy Sports ‘Not Gambling’*, N.Y. DAILY NEWS (Oct. 26, 2015), <http://www.nydailynews.com/sports/baseball/fantasy-sports-not-gambling-mlb-commissioner-manfred-article-1.2412347>.

<sup>280</sup> Eric Fisher, *Comments Highlight Misgivings on Gambling*, 18 STREET & SMITH’S SPORTS BUS. J. 26 (2015).

In one reflection of daily fantasy sports as a game of skill, FanDuel hosts the FanDuel Fantasy Football Championship in Las Vegas where players have to qualify to participate.<sup>281</sup> The players submit one lineup for a chance at the \$10 million purse, which has the winner receive \$2 million.<sup>282</sup> However, Miller and Singer do caution that if the skill element causes skilled players to be excessively successful, then recreational players could potentially be dissuaded from playing.<sup>283</sup> They point out that in the first half of the 2015 Major League Baseball season, only 1.3 percent of people won 91 percent of daily fantasy league profits.<sup>284</sup> Miller and Singer contend that daily fantasy sports “needs to be the right balance of skill versus luck.”<sup>285</sup> FanDuel limits the number of entries per day, per player to prevent the highly skilled players from entering every single contest.<sup>286</sup>

#### D. DAILY FANTASY SCRUTINY

The daily fantasy sports industry came under scrutiny in October 2015, when DraftKings employee Ethan Haskell prematurely released data that listed NFL players and their ownership percentage by fantasy players for that week’s NFL games.<sup>287</sup> This incident fueled speculation that he and other employees had information before it was made public.<sup>288</sup> DraftKings contended that Haskell simply made a mistake in releasing that data.<sup>289</sup> Complicating the issue was that Haskell won \$350,000 playing in fantasy games on rival FanDuel’s web

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<sup>281</sup> *World Fantasy Football Championship*, FANDUEL, <https://www.fanduel.com/wffc> (last visited Feb. 28, 2016).

<sup>282</sup> Chen, *supra* note 69.

<sup>283</sup> Ed Miller & Daniel Singer, *For Daily Fantasy Sports Operators, the Curse of too Much Skill*, STREET & SMITH’S SPORTS BUS. J. (July 27-Aug. 2, 2015), at 15.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Larry Brown, *Ethan Haskell: Draft Kings employee won \$350,000 on Fanduel*, LARRYBROWNSPORTS.COM (Oct. 5, 2015), <http://larrybrownsports.com/fantasy/ethan-haskell-draft-kings-fanduel-profile/276741>.

<sup>288</sup> Drape & Williams, *supra* note 75.

<sup>289</sup> *Id.*

site that same week.<sup>290</sup> Any fear that daily fantasy games are not honest competition, with some individuals having access to advanced, non-public data, would certainly hinder confidence in the fantasy games integrity and curtail participation.<sup>291</sup> Both DraftKings and FanDuel quickly banned their employees from participating in games, both on their own company web site and from competitors' daily fantasy web sites.<sup>292</sup> DraftKings and FanDuel issued a joint statement, insisting that the integrity of the games is the most important aspect of their business.<sup>293</sup> They stated,

[B]oth companies have strong policies in place to ensure that employees do not misuse any information at their disposal and strictly limit access to company data to only those employees who require it to do their jobs.<sup>294</sup> Employees with access to this data are rigorously monitored by internal fraud control teams, and we have no evidence that anyone has misused it.<sup>295</sup>

After this incident, scrutiny came from many legal avenues.<sup>296</sup> On the federal level, the United States Justice Department and the FBI quickly launched investigations, questioning whether any of the daily fantasy companies' business practices violated federal law.<sup>297</sup> After the Haskell incident, New Jersey Congressman Frank Pallone and Senator Robert Menendez requested that the Federal Trade Commission investigate the daily fantasy sports game practices "to explore and implement safeguards to ensure a fair playing field."<sup>298</sup> In

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

<sup>291</sup> *Id.*

<sup>292</sup> Drape & Williams, *supra* note 75; Sarah Needleman & Sharon Terlep, *FanDuel, DraftKings Ban Employees from Playing*, WALL ST. J. (Oct. 8, 2015) at B3.

<sup>293</sup> Chuck Schilken, *DraftKings and FanDuel Defend Integrity of Fantasy Sports Industry*, LOS ANGELES TIMES (Oct. 6, 2015, 10:18 AM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-draftkings-fanduel-scandal-20151006-story.html>.

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

<sup>295</sup> Drape & Williams, *supra* note 75 at A1.

<sup>296</sup> *Fantasy Moneyball 'Scandal'*, *supra* note 223.

<sup>297</sup> Futterman & Terlep, *supra* note 102.

<sup>298</sup> *Fantasy Moneyball 'Scandal'*, *supra* note 223.

September 2015, Congressman Pallone called for hearings to examine the relationship between fantasy sports, sports leagues, and gambling.<sup>299</sup> In a letter to the leadership of the House Committee on Energy and Commerce, Congressman Pallone wrote that “professional sports deep involvement with daily fantasy sports leaves many questioning whether fantasy sports are distinguishable from sports betting and other forms of gambling.”<sup>300</sup>

Prior to the Haskell incident, only five states (Arizona, Iowa, Louisiana, Montana, and Washington) did not allow paid fantasy games.<sup>301</sup> Free daily fantasy games were available in those states.<sup>302</sup> After the Haskell story, the New York Attorney General and the Massachusetts Attorney General opened inquiries into the daily fantasy companies’ business practices.<sup>303</sup> In October 2015, the state of Nevada ordered daily fantasy operations to cease until they acquired a gaming license from the state.<sup>304</sup> On Thursday, November 19, 2015, Massachusetts attorney general Maura Healey announced the state would pursue imposing regulations on the daily fantasy industry, such as prohibiting anyone younger than 21 from participating.<sup>305</sup>

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<sup>299</sup> Adam Kilgore, *DraftKings, FanDuel Could Face First Significant Legal Challenge After Hearing Request*, THE WASH. POST (Sept. 14, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/09/14/draftkings-fanduel-could-face-first-significant-legal-challenge-after-hearing-request/>.

<sup>300</sup> Paul Mulshine, *Place Your Bets, Just Don’t Call Them That*, NEWARK STAR-LEDGER (Sept. 17, 2015) at 8.

<sup>301</sup> Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS LAWYERS J. 95 (2015).

<sup>302</sup> *Id.*

<sup>303</sup> Needleman & Terlep, *supra* note 292. *See generally* Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS LAWYERS J. 79 (2015) (Arguing that daily fantasy sports should withstand the state challenges).

<sup>304</sup> Futterman & Terlep, *supra* note 102; Christian Red, *End Zone: DraftKings and FanDuel Investigation Could be Just Tip of Iceberg as Reality Catches Up with Fantasy*, NY DAILY NEWS (Oct. 17, 2015, 9:19 PM), <http://www.nydailynews.com/sports/football/fanduel-draftkings-investigations-tip-iceberg-article-1.2401513>.

<sup>305</sup> Sharon Terlep, *Massachusetts Moves to Restrict Daily Fantasy Games to Players 21 and Older; State also proposes*



The greatest challenge to UIGEA came from the state of New York. On Tuesday, November 10, 2015, New York Attorney General Eric Schneiderman, issued a cease-and-desist order shutting down daily fantasy operations in the state.<sup>306</sup> Claiming daily fantasy games to be illegal, Schneiderman stated, “daily fantasy sports is neither victimless nor harmless.”<sup>307</sup> He added, “it is clear that DraftKings and FanDuel are the leaders of a massive, multibillion-dollar scheme intended to evade the law and fleece sports fans across the country.”<sup>308</sup> Schneiderman also pointed to the difference between daily fantasy sports and season-long fantasy games, and that the advertising for daily fantasy sports has been misleading.<sup>309</sup> He stated that daily fantasy sports “is designed for instant gratification, stressing easy game play and no long-term strategy.”<sup>310</sup> Both FanDuel and DraftKings issued statements in response. FanDuel argued “this is a politician telling hundreds of thousands of New Yorkers they are not allowed to play a game they love.”<sup>311</sup> DraftKings declared Schneiderman’s decision to be “an unfortunate example of a state government stifling innovation, technology, and entrepreneurship and acting without full and fair consideration of the interests of consumers.”<sup>312</sup> After New York State Supreme Court Judge Manuel Mendez ordered DraftKings and FanDuel to halt operations, appellate Judge Paul Feinman issued an emergency stay to allow New York residents to continue playing daily fantasy games until January 4, when a five-judge panel would hear arguments.<sup>313</sup>

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*prohibiting anyone connected to professional sports from participating in paid contests involving their sports*, WALL ST. J. (Nov. 20, 2015), available at ProQuest ID No. 1734486360.

<sup>306</sup> Terlep, Sharon, *New York Orders Daily Fantasy-Sports Companies FanDuel, DraftKings to Cease Operations; Attorney General Eric Schneiderman says daily fantasy sports constitutes illegal gambling*, WALL ST. J. (Nov. 11, 2014), available at ProQuest ID No. 1732169944 [hereinafter Terlep, *New York Orders*].

<sup>307</sup> Terlep, *New York Orders*, *supra* note 306.

<sup>308</sup> Terlep, *supra* note 8.

<sup>309</sup> *See id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *See id.*

<sup>313</sup> Sharon Terlep, *Appeals Court Lets DraftKings, FanDuel*

Several states have initiated legislation to regulate daily fantasy sports.<sup>314</sup> Announcing that he would introduce a new bill, New Jersey state senator Jim Whelan stated that he didn't believe the government, "should impede one's enjoyment of fantasy sports, however we have an obligation to ensure that fantasy sports competition is fair, impartial and transparent to everyone."<sup>315</sup> In hearings before the New Jersey State Assembly's Gaming and Tourism Committee, Jeremy Kudon, a representative for DraftKings, FanDuel, and the Fantasy Sports Trade Association, testified that daily fantasy is "a form of entertainment, not gambling."<sup>316</sup> He contended the outcome of fantasy contests "depends almost entirely on the amount of time, research and talent—otherwise known as skill. Chance is not a material effect in the contest."<sup>317</sup> Class-action lawsuits were also launched in Ohio, New York,<sup>318</sup> and Florida.<sup>319</sup>

#### IV. ANTITRUST LAW

The definition of gambling becomes the linchpin to legally permitting daily fantasy sports. Allowing gambling through daily fantasy games, but not allowing states to offer wagering on sports games represents a legal inconsistency. The states may be able to highlight this inconsistency in framing a legal argument. The leagues' contradictory position of having exclusive sponsorships with daily fantasy companies, yet

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*Continue in New York; Court says daily fantasy sites can operate while case is awaiting trial*, WALL ST. J. (Dec. 11, 2015), available at ProQuest ID No. 1747613288.

<sup>314</sup> Johnson, *supra* note 315.

<sup>315</sup> Brent Johnson, *N.J. Lawmaker Wants to Regulate Fantasy Sports*, NEWARK STAR-LEDGER (Nov. 2, 2015), [http://www.nj.com/politics/index.ssf/2015/11/nj\\_lawmaker\\_wants\\_to\\_regulate\\_fantasy\\_sports.html](http://www.nj.com/politics/index.ssf/2015/11/nj_lawmaker_wants_to_regulate_fantasy_sports.html).

<sup>316</sup> Brent Johnson, *N.J. Lawmakers, Fantasy Sports Companies Debate Whether Contests should be Regulated*, NEWARK STAR-LEDGER (Nov. 9, 2015), [http://www.nj.com/politics/index.ssf/2015/11/nj\\_lawmakers\\_fantasy\\_sports\\_companies\\_debate\\_regulation.html](http://www.nj.com/politics/index.ssf/2015/11/nj_lawmakers_fantasy_sports_companies_debate_regulation.html).

<sup>317</sup> *Id.*

<sup>318</sup> *Fantasy Moneyball 'Scandal'*, *supra* note 223.

<sup>319</sup> Michael McCann, *NBA, Sports Investment Groups Among Those Sued Over DFS*, SPORTS ILL., (Nov. 21, 2015) <http://www.si.com/fantasy/2015/11/21/daily-fantasy-sports-lawsuit-nba-draft-kings-fan-duel>.

vociferously contesting states' ability to legalize wagering on sports games may be most vulnerable to antitrust scrutiny.

On July 2, 1890, the United States Congress passed the Sherman Antitrust Act<sup>320</sup> with the primary purpose of preventing trusts and other arrangements that had the potential to unfairly restrain trade. The goal of the Sherman Act is to foster competition within the marketplace between various industries.<sup>321</sup> The antitrust laws of the United States are designed to protect and promote the economic competitiveness of a marketplace.<sup>322</sup> Lacy and Vermeer suggest that in an economic market, "at the most basic level, competition exists when one or more potential buyers consider two or more products to be acceptable substitutes for each other."<sup>323</sup> There essentially must be an environment where there is an availability of options.<sup>324</sup> Antitrust issues remain a regulatory challenge with recent mergers within the beer, pharmaceutical, chemical, appliance, and wireless communication industries, and are among those receiving government scrutiny.<sup>325</sup>

Section One of the Sherman Act prohibits combinations and conspiracies that are in restraint of trade.<sup>326</sup> Section Two

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<sup>320</sup> Act of July 2, 1890, ch. 647, 26 Stat. 209, codified at 15 U.S.C. § 1, et seq.

<sup>321</sup> *Spectrum Sports v. Shirley McQuillan*, 506 U.S. 447 (1993).

<sup>322</sup> EARL W. KINTNER, *AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN* 15 (2d ed. 1973).

<sup>323</sup> Stephen Lacy & Jan P. Vermeer, *Theoretical and Practical Considerations in Operationalizing Newspaper and Television Competition*, 8 J. OF MEDIA ECON. 49, 50 (1995).

<sup>324</sup> *Id.*

<sup>325</sup> Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL ST. J., (Oct. 18, 2015); Jonathan D. Rockoff & Dana Mattioli, *Pfizer, Allergan Agree on Historic Merger Deal*, WALL ST. J., (Nov. 22, 2015); Jacob Bunge & Brent Kendall, *Merger of Dow, DuPont Likely to Get Close to Antitrust Security*, WALL ST. J., (Dec. 9, 2015); Brent Kendall, Drew Fitzgerald, & Ted Mann, *Antitrust Cops Put Brakes on Staples, GE Deals*, WALL ST. J., (Dec. 7, 2015).

<sup>326</sup> See ROSS D. PETTY, *THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY* 131-132 (1992).

declares firms to be an illegal monopoly if: (1) they have monopoly power and (2) there has been a willful acquisition or maintenance of that power through predatory or exclusionary conduct.<sup>327</sup> In an analysis of law on business and public policy, Ross Petty explains that the antitrust laws concern themselves with a lack of competition by means of collusion or exclusion.<sup>328</sup> He defines “collusion” as referring to competitors agreeing with each other in order to restrict competition in the market, and “exclusion” as a single company purposefully acting to drive or keep others from capturing a part of its particular market.<sup>329</sup>

The language of the Sherman Act is, however, plainly broad and ambiguous. Viewed most broadly, one could interpret it to declare almost every type of agreement between two or more businesses illegal. The Supreme Court has held that only those agreements that operate as an “unreasonable” restraint of trade are in violation of the law.<sup>330</sup> This has come to be known as “The Rule of Reason.”<sup>331</sup> Under the Rule of Reason standard, “courts balance all the competitive harms and benefits of a particular business arrangement before labeling it an unreasonable restraint of trade.”<sup>332</sup>

In an analysis of sports sponsorship and antitrust law, Fortunato and Richards examined the practice of sponsorship in relation to the philosophical intent of antitrust policy, debating whether product category exclusivity creates the opposite effect of protecting and promoting the economic competitiveness of a marketplace.<sup>333</sup> They point out that product category exclusivity

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<sup>327</sup> *See id.*

<sup>328</sup> *See id.*

<sup>329</sup> *See id.*

<sup>330</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

<sup>331</sup> Nicole LaBletta, *If Per Se is Dying, Why Not in TV Tying? A Case for Adopting the Rule of Reason Standard in Television Block-Booking Arrangements*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 194, 197 (2001).

<sup>332</sup> *Id.*

*Standard in Television Block-Booking Arrangements*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 197 (2001). Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 129–31 (2002).

<sup>333</sup> John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEX. REV. ENT. & SPORTS L. 33, 38 (2007).

limits competition with leagues or teams and their sponsorship partners, and in some instances create environments that restrict brand purchase options, such as a stadium only offering certain brands. The outcome of these exclusive sponsorship agreements result in restricted purchase options, counter to antitrust ideals. In their analyses, Fortunato and Richards raised the question in a sponsorship context of how a marketplace should be defined. The definition of a marketplace is also pertinent to the sports gambling industry regulatory analysis.

Applying the antitrust debate to the issue of gambling raises competitive marketplace concerns. It can be argued that the leagues' motivation to prohibit states from allowing gambling is because leagues are merely trying to protect their sponsorship partners and their lucrative revenue source by limiting the gambling marketplace. This antitrust argument is based on two principles: 1) the gambling marketplace consists of all the gambling dollars available, and 2) there is a limited amount of gambling dollars available—the money that people have to gamble is limited.<sup>334</sup> The competition for sports gambling dollars would certainly be greater if people had other gambling options. If people have the ability to bet on a sports game at a local racetrack or casino, they might prefer that type of gambling and would then have less money to spend on daily fantasy sports games. If widespread legalized sports wagering would hurt the daily fantasy market, these companies might not have the same level of revenue to pay the leagues and teams for sponsorships.<sup>335</sup>

Another antitrust argument can be made regarding the exclusivity of a sponsorship product category, which may be seen as a limiting choice, by having certain types of prizes for daily fantasy games exclusively available through one particular company. For example, Major League Baseball prizes for winning a daily fantasy game are exclusively available through DraftKings.<sup>336</sup> In a team example, prizes with a New York Jets

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<sup>334</sup> Humphreys, Lee, & Soebbing, *supra* note 13; Wicker & Soebbing, *supra* note 13.

<sup>335</sup> Lefton, *supra* note 87; Lombardo & Lefton, *supra* note 977.

<sup>336</sup> DraftKings, Inc., *DraftKings Becomes the Official Daily Fantasy Game of Major League Baseball*, ENTERTAINMENT NEWSWEEKLY, (Apr. 2015), at 93.

theme are only offered through FanDuel.<sup>337</sup> Fans of Major League Baseball or the Jets can only obtain these potential benefits through interacting with one company.<sup>338</sup>

## V. POSSIBLE SPORTS GAMBLING REGULATIONS

### A. THE STATUS QUO

There are a few future legal options available for the sports gambling community, legislatures, and courts. First, we may rely on the current status quo, and not subvert Congress while deferring to current PASPA and UIGEA laws. Wagering on sports games would continue to be prohibited by the states, yet fantasy sports participation would continue to be allowed due to the exemption in UIGEA.<sup>339</sup> The legal reasoning for maintaining PASPA would be due to the benefit of having a unified national standard and the leagues' claim that their sports would suffer harm. The legal reasoning for maintaining UIGEA would continue to rely on the defining interpretative characteristic that fantasy sports is a game of skill, not a form of gambling. The status quo result would seemingly please the leagues, which prefer to prevent states from wagering on sports games, and prefer to allow people to have the unfettered ability to play daily fantasy sports games, thereby driving up interest and viewership for their games. The status quo result, where the sports gambling industry continues to be governed by the PASPA and UIGEA, would represent a disappointing outcome for the states that are trying to legalize wagering on sports games. States would not be able to capitalize on any tax revenue potential. Conversely, the states that have tried to get fantasy sports defined as gambling would also be disappointed, and would be required to comply with the federal interpretation.

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<sup>337</sup> Brent Schrotenboer, *FanDuel Signs Deals with 15 NFL Teams, Escalating Daily Fantasy Integration*, USA TODAY (Apr. 21, 2015), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

<sup>338</sup> *See, e.g., id.*

<sup>339</sup> Mark Hichar, *Fantasy Sports – Will Regulators Throw a Yellow Flag?*, PUBLIC GAMING INT'L, (Sept.-Oct. 2015), at 32; This assumes the UIGEA federal law withstands state challenges. Should states have the ability to prevent daily fantasy companies from operating, the New Jersey argument of sports gambling being a states-rights issue could be bolstered.

Maintenance of the status quo is problematic because it will continue to perpetuate an inconsistent standard by permitting daily fantasy sports participation, but not allowing states to offer wagering on sports games. Finally, continuing with the PASPA and UIGEA in its current form would result in the failure to recognize a dramatic change in the sports gambling environment, the technological ease to participate in new and innovative games, and would ignore the issues of illegal sports betting.

#### B. AMEND OR RESCIND THE PASPA

Second, we may amend or rescind PASPA, either through the legislative process that provides federal regulation and oversight, or by allowing all states to regulate sports gambling as they desire.<sup>340</sup> NBA commissioner Adam Silver would like federal regulation implemented.<sup>341</sup> In an effort to develop “a different approach” to the professional sports gambling environment, Silver wrote an op-ed in the November 14, 2014, *New York Times* and encouraged the United States Congress to legalize wagering on sports games.<sup>342</sup> Silver argued,

Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”<sup>343</sup> He concluded, “any approach must ensure the integrity of the game. One of my most important responsibilities as commissioner of the NBA is to protect the integrity of professional basketball and preserve public

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<sup>340</sup> Federal regulation would provide a unified national standard. Making all gambling on sports a states issue could also result in some states prohibiting daily fantasy participation and allowing no wagering on sports games of any kind.

<sup>341</sup> David Purdum, *Explaining Silver’s Betting Stance*, ESPN (Nov. 18, 2014), [http://espn.go.com/chalk/story/\\_/id/11896833/gambling-explaining-nba-commissioner-adam-silver-stance-sports-betting](http://espn.go.com/chalk/story/_/id/11896833/gambling-explaining-nba-commissioner-adam-silver-stance-sports-betting).

<sup>342</sup> Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

<sup>343</sup> *Id.*

confidence in the league and our sport. I oppose any course of action that would compromise these objectives. But I believe that sports betting should be brought out of the underground and into the sunlight where it can be properly monitored and regulated.<sup>344</sup>

Silver explained in the *New York Times* op-ed, “outside of the United States, sports betting and other forms of gambling are popular, widely legal and subject to regulation.”<sup>345</sup> He later stated in *Time Magazine* that “it’s part of the culture in Europe to bet on sporting events. Of course, it’s legal and regulated. It’s part of the culture in the United States to bet on sporting events. It just happens to be illegal.”<sup>346</sup>

Silver offered clarification of his position in an interview in *ESPN the Magazine*. He stated,

[O]ne of my concerns is that I will be portrayed as pro sports betting, but I view myself more as pro transparency. And someone who’s a realist in the business. The best way for the league to monitor our integrity is for that betting action to move toward legal betting organizations, where it can be tracked. That’s the pragmatic approach.<sup>347</sup>

Silver has consistently argued that the sports gambling issue should be regulated on a federal level.<sup>348</sup> His stance against New Jersey passing its own law is that the rules governing sports wagering would be different in every state.<sup>349</sup> He argued that there would be “a hodgepodge of regulations controlling sports betting that will vary from state to state, jurisdiction to jurisdiction, and will make it increasingly difficult to monitor betting on our very own sport.”<sup>350</sup>

Regarding the opportunity for Congress to pass legislation, vice president of Caesars Interactive Entertainment in Las Vegas and former NFL marketing director Ty Stewart stated,

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<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> Gregory, *supra* note 1 at 42.

<sup>347</sup> Purdum, *supra* note 1 at 56.

<sup>348</sup> DUSTIN GOUKER, *What the NFL, NBA and MLB Have to Say About Daily Fantasy Sports and Sports Betting*, LEGAL SPORTS REPORT (Nov. 4, 2015, 8:21 PM), <http://www.legalsportsreport.com/5798/nfl-nba-mlb-on-dfs-and-sports-betting/>.

<sup>349</sup> Purdum, *supra* note 1, at 57.

<sup>350</sup> *Id.* at 57.



[I]f the sports leagues got behind this as a united industry along with us in the gaming industry, there's a real chance to introduce legislation to make this activity a reality within a few years<sup>351</sup> . . . you need to look no further than our sports books in Nevada or the regulated European markets to see that effective regulations and legislation can lead to a multi-billion dollar opportunity for all constituencies. The United States is the number one market in the world for unlicensed, unregulated and untaxed sports betting.<sup>352</sup>

Short of Congressional action, the states will need to have the issue adjudicated in their favor by the courts. However, the leagues will continue to fight against such a ruling. The most prominent legal challenge to PASPA is that of the state of New Jersey. Although New Jersey has used a 10<sup>th</sup> Amendment argument in legal proceedings, it is being proffered here that the sponsorship partnerships between sports leagues and gambling organizations offer an angle for legal scrutiny. It could be argued that the sports leagues—the group alleging to be harmed if gambling is permitted at the state level—are in fact complicit in gambling behavior through their sponsorship relationships with gambling organizations, most notably with daily fantasy sports companies.

The core of this legal justification centers on antitrust laws. By fighting those states that are permitted to offer sports wagering, sports leagues are protecting their lucrative sponsorship revenue source by restricting available gambling options. Due to the limited dollars available for gambling, having the ability to bet on a sports game at a local racetrack or casino could mean less money spent gambling on daily fantasy sports. In an antitrust analysis, the key determination to be made by a court is how to define the sports gambling marketplace.<sup>353</sup>

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<sup>351</sup> JOHN LOMBARDO & TERRY LEFTON, *Silver's Column an Effort to Clarify NBA Stance*, SPORTS BUSINESS DAILY (Nov 24, 2014), <http://m.sportsbusinessdaily.com/Journal/Issues/2014/11/24/Leagues-and-Governing-Bodies/NBA-Silver-gambling-oped.aspx>.

<sup>352</sup> John Lombardo & Terry Lefton, *Silver's Column an Effort to Clarify NBA Stance*, STREET & SMITH'S SPORTS BUS. J. (Nov. 24-30, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/11/24/Leagues-and-Governing-Bodies/NBA-Silver-gambling-oped.aspx>.

<sup>353</sup> See generally Peter Davis & Eliana Garces, QUANTITATIVE

A court may consider the gambling marketplace to be all of the gambling dollars available. In this interpretation, a court could alter PASPA in a way that legalizes all sports gambling, to create a competitive marketplace consistent with the philosophical intent of antitrust law. Through this outcome, there could still be regulation and oversight, but the options to bet on an actual game and participate in a daily fantasy sports game will all be available.

### C. AMEND OR RESCIND THE UIGEA

Third, we may amend or rescind the UIGEA by altering the definition of fantasy sports from a game of skill, to a definition similar to other forms of gambling. The fall-out from altering UIGEA would depend on whether or not PASPA remained intact. If PASPA is rescinded or amended, thereby allowing states to offer legalized wagering, then altering UIGEA would not necessarily mean the end of daily fantasy sports games even if it was defined as gambling. These games would instead become permissible, subject to the regulation developed through a new gambling law that supersedes PASPA, one that provides either a federal standard or has states regulate sports gambling through their own respective legislative processes. It would appear that a competitive marketplace, one that permits all forms of sports wagering, could be created.

If PASPA is not rescinded or amended, then states would not be permitted to offer wagering on sports games. As a result, defining fantasy sports similar to other forms of gambling would appear to place fantasy sports under the PASPA regulation. In this case, fantasy sports games that offer monetary prizes would not be permissible at the state level, perhaps except in the four states where there is already sports wagering. This result would be the most controversial, and would quickly be challenged by both daily fantasy companies and sports leagues because neither would view this outcome favorably.

Questions must be raised as to why the definition of fantasy sports cannot be simultaneously defined as a game of skill *and* gambling. Gambling skill and luck do not have to be considered mutually exclusive. Daily fantasy can maintain its definition as a game of skill and still be thought of as gambling because there is an opportunity for economic gain or loss.

First, to participate in daily fantasy games on DraftKings or FanDuel, the participant must pay the entrance fee to have the opportunity to win any monetary prizes; thus, there is a level of risk. In the definition of terms provided in the UIGEA, a bet or wager is defined as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”<sup>354</sup>

Second, although the lottery can be thought of as a game of pure luck, other forms of gambling undoubtedly have both luck and strategic elements. There are strategies for choosing when to draw or decline a card at blackjack, and some people are more skilled than others at playing poker or handicapping horse races. Even if there is a sophisticated level of skill necessary to succeed in daily fantasy sports games, there are still certainly elements of luck in determining the outcome. For example, good fortune in fantasy football can be at the whims of a coach’s decision. If a team is at the one-yard line, it could give the ball to the running back, or call for a pass, which could get both the quarterback and the receiver fantasy points.

#### CONCLUSION

The sports gambling environment has been drastically altered since the enactment of PASPA and UIGEA. Innovative games and technological ease have increased participation and brought a heightened legal focus to sports gambling. States may allow daily fantasy sports to operate because of the exemption in the UIGEA, which has defined fantasy sports as a game of skill. Nevertheless, states cannot offer wagering on sports games because of the restrictions in the PASPA. Continuing with this inconsistency that permits certain forms of sports gambling, but not others, no longer seems plausible.

The state of New Jersey has been at the forefront of challenging PASPA. On the other side of the spectrum, sports leagues have vociferously argued against states being able to permit wagering on games. The leagues claim that betting on games would harm the integrity of the games. These leagues, however, are in seemingly contradictory positions. Leagues generate revenue through their sponsorship partnerships with

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<sup>354</sup> Public Law 109-347, *supra* note 272.

gambling organizations, including lucrative partnerships with daily fantasy sports companies. It is also widely acknowledged that gambling on sports games, especially fantasy sports participation, leads to higher television viewership, a significant outcome because television broadcast rights are a major source of revenue for sports leagues.

States should use the current inconsistent legal standard, and the leagues' contradictory position, to frame a legal argument. In particular, New Jersey and other states could use antitrust laws to frame an argument. How the gambling marketplace is defined becomes a key determination. Because there is a limited amount of money available to gamble, and if the gambling marketplace is defined as all of the gambling dollars available, then there would be greater competition to daily fantasy sports companies if people have the option to wager on other sports games, such as at a local racetrack or casino. This outcome could negatively impact daily fantasy companies' revenues and the value of their sponsorships with the sports leagues, but it would create a competitive environment consistent with the philosophical intent of antitrust law.

Ultimately, Congress or the courts will have to act to provide legal consistency. There are only two ways to create legal consistency: (1) deny participation in daily fantasy sports, or (2) allow participation in wagering on sports games. If individual states are successful in defining fantasy sports as gambling, thereby superseding UIGEA, it would seem that New Jersey would be able to advance their states' rights argument; if some states rulings can supersede UIGEA, why can't other states rulings supersede PASPA? Given daily fantasy sports' popularity, it would be surprising if citizens are denied participating in this activity. Therefore, permission to wager on sports games for all citizens in all states, even if regulated by the federal government, might be the eventual solution to create a competitive marketplace and provide the legal consistency needed in the sports gambling industry.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

COMMENT:

**DAILY FANTASY SPORTS IN FLUX: BETTING ON THE  
FUTURE OF THE LEGALITY OF THE LEAGUES**

DEXTON NYE\*

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**INTRODUCTION**

As fantasy sports leagues have increased in prominence and popularity, the ever pressing question as to the legality of pay-for-play is now under the microscope. For now, daily fantasy sports leagues seem to slip past federal law—mainly the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>1</sup> To do so, institutions: (1) do not base winnings on a singular outcome of a game or performance of a player; (2) announce the available winnings beforehand, and leave them unattached from fees or participant numbers; and (3) assure the reflection of “skill,” “talent,” and “expertise” by the winners.<sup>2</sup>

At the state level, gambling is highly regulated in order to both minimize its negative societal effects and to safeguard the gambling industry.<sup>3</sup> However, the majority of states have not yet decided whether or not fantasy sports fall under existing

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\* J.D. Candidate 2017, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> Ryan B. Frazier & Kirton McConkie, *Don’t Bet on It: Allowing a Fantasy Sports League May Be Gambling with Legal Trouble*, 28 WESTLAW J. ENTMT’T IND. 2, 2 (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 3.

state gambling laws.<sup>4</sup> Currently, many fantasy sports operations bypass state gambling laws because, in most cases, state laws do not specifically mention fantasy sports as a form of gambling activity.<sup>5</sup> Furthermore, many states have not challenged fantasy sports gambling, thus making the already unstable foundation of fantasy sports even more unpredictable.<sup>6</sup>

States deal with this issue in their own ways. Some states are moving towards legalizing fantasy sports betting and are regulating it by identifying fantasy sports as games of skill.<sup>7</sup> These states accomplish this by mirroring federal law.<sup>8</sup> However, fantasy sports leagues are vulnerable in states that have yet to settle the issue.<sup>9</sup> In these states, a pertinent state official may issue a decree announcing the illegality of fantasy sports operations at any time.<sup>10</sup> For example, New York Attorney General Eric Sneiderman recently classified daily fantasy sports as “illegal gambling.”<sup>11</sup> Many other states have taken similar steps, but this issue is constantly in flux.<sup>12</sup>

### I. FANTASY SPORTS AS A STIMULUS

Fantasy sports have made recent economic strides in large part due to technological developments.<sup>13</sup> Modern technology like the Internet has transformed fantasy sports from a modest industry into an ever growing economic market boom.<sup>14</sup> Fans, many of whom turn to fantasy sports as a stress reliever, enter the action through this technology.<sup>15</sup> By providing fans the opportunity to act as both managers and coaches to decide whom to draft, trade, and play, participants are able to

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> Anthony Vecchione, *Fantasy Sports – Has Recent Anti-Gambling Legislation ‘Dropped the Ball’*, 61 SMU L. REV. 1697 (2009).

<sup>15</sup> Frazier & McConkie, *supra* note 1, at 1.

have the ultimate fan experience.<sup>16</sup> Much like March Madness brackets, some employers also implement fantasy sports in the workplace to increase morale.<sup>17</sup>

Moreover, fantasy sports benefit both sports leagues and the sport industry more generally by adding new consumers to the market.<sup>18</sup> These consumers not only play, but they also watch the sports live, increasing viewership.<sup>19</sup> Consumers care about following their fantasy players' performances more than the actual team outcomes of televised games; and as a result, consumers watch games in their entirety—even when the game is a blowout.<sup>20</sup> Many predict that the trend in increased viewership will continue to improve.<sup>21</sup>

Other positive economic factors include media outlets receiving revenues as advertisements increase, a rise in media planner and buyer growth potential, and marketers being able to reach consumers in new ways.<sup>22</sup> Even successful advice sites are piggy backing off of these new markets, creating an innovative and in-demand service.<sup>23</sup>

## II. THE SOCIAL ILLS OF FANTASY SPORTS

Although there are some economic benefits to fantasy sports, existing laws are hypocritical and inconsistent.<sup>24</sup> Thus

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<sup>16</sup> *Id.*

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

<sup>18</sup> Brent Schrottenboer, *Leagues See Real Benefits in Daily Fantasy Sports*, USA TODAY (Jan. 1, 2015), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

<sup>19</sup> *Id.*

<sup>20</sup> Nelson Rose, *Law, Politics, and Daily Fantasy Sports*, ORANGE COUNTY LAWYER 38 (2016).

<sup>21</sup> Schrottenboer, *supra* note 18.

<sup>22</sup> James L. Johnston & Josh J. Gordon, *Rise of Daily Fantasy Sports Presents Opportunities and Risks to Companies*, 27 NO. 1 INTELLECTUAL PROP. & TECH. L. J. 19, 20 (2015).

<sup>23</sup> Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS L. J. 80 (2015).

<sup>24</sup> Neil Irwin, *Daily Fantasy Sports and the Hidden Cost of America's Weird Gambling Laws*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2015/09/27/upshot/daily-fantasy-sports-and-the-hidden-cost-of-americas-weird-gambling-laws.html>.

far, the law has not kept up with the fantasy sports market explosion.<sup>25</sup> For example, the rules surrounding the activity do not favor passive or casual play.<sup>26</sup> Many associate gambling with social ills, including “indebtedness,” “credit card theft,” and “divorce rates,” among others.<sup>27</sup> Pro-fantasy sports advocates attempt to distinguish fantasy sports from traditional gambling by acknowledging typical fantasy players as “normal and well adjusted,” and provide that fantasy sports do not affect their lives.<sup>28</sup> However, these advocates make these claims with no support.<sup>29</sup> Studies have already established that fantasy players are experiencing addictive behaviors, such as hourly obsession and waking up in the middle of the night to check statistics.<sup>30</sup> It is even affecting marriages; spouses have cited fantasy sports as the reason for their divorces.<sup>31</sup> Former ESPN Vice President of Games Raphael Poplock said that while he was on his honeymoon, he “had an itch the whole time,” and felt “withdrawal” from fantasy sports.<sup>32</sup>

In this sense, fantasy sports seem to foster addiction. The World Health Organization states that “pathological gambling as a disorder consist[s] of ‘frequent, repeated episodes of gambling that dominate the patient’s life to the detriment of social, occupational, material, and family values and commitments.’”<sup>33</sup> Internet gambling is a concern largely due to the fact that it is easily accessible and readily available—a perfect storm for many young people who are likely incapable of bridling the rush.<sup>34</sup>

Fantasy sports lack some of the safeguards that traditional gambling has, sometimes resulting in young men’s loss of relatively large quantities of money and the stunting of personal growth during their vulnerable years.<sup>35</sup> FanDuel CEO

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<sup>25</sup> Ehrman, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> Vecchione, *supra* note 14, at 1704.

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

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

<sup>30</sup> *Id.* at 1704-05.

<sup>31</sup> *Id.* at 1705.

<sup>32</sup> *Id.* at 1706.

<sup>33</sup> *Id.* at 1707.

<sup>34</sup> Aaron Levy, *A Risky Bet: The Future of Pay-To-Play Online Fantasy Sports*, 39 CONN. L. REV. 343 (2006).

<sup>35</sup> *Id.* at 343.



Nigel Eccles remarked that daily fantasy sports are for “the A.D.D. generation.”<sup>36</sup> He admitted that the “daily” function is deliberately targeting the younger generation to isolate their accustomed perspective for instant gratification.<sup>37</sup> Additionally, leagues barrage sports fans with marketing ploys to attract viewers to play, ever increasing the likelihood of reaching vulnerable young males.<sup>38</sup>

Yet, some businesses hope that by creating an inter-office fantasy sports league, there will be an increase in office morale. However, instead of having a positive effect, office fantasy sports leagues often lead to league-related disputes between coworkers, thus frustrating togetherness and morale.<sup>39</sup> Moreover, employees spend hours wasting time on the clock, putting job efficiency at stake.<sup>40</sup> One study estimates that this inefficiency affects business profits in the billions.<sup>41</sup>

### III. THE QUESTION OF SKILL AND THE ROLE OF CHANCE

Fantasy sports participants receive points based on real athlete performances.<sup>42</sup> For example, in fantasy football, the player who scores a touchdown wins points for that player’s team; similarly, whoever has that player on their fantasy team also receives those points. Points from real-sports transfer to fantasy-sports points by converting the total yards achieved to points, and so on.

Generally speaking, daily fantasy leagues change the dynamic of season-long fantasy leagues. Specifically, if the choice of who to draft boils down to the simple factor of which player will rush for more, guesses, not skill, are involved.<sup>43</sup>

States should base their gambling laws on a cost-benefit analysis, even though many governmental decisions are based on where the big money is going.<sup>44</sup> New York Attorney General

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<sup>36</sup> Ehrman, *supra* note 23, at 81.

<sup>37</sup> *Id.*

<sup>38</sup> Frazier & McConkie, *supra* note 1, at 1.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> Vecchione *supra* note 14, at 1697.

<sup>42</sup> Johnston & Gordon, *supra* note 22, at 19.

<sup>43</sup> *Id.* at 19-20.

<sup>44</sup> Rose, *supra* note 20, at 40.

Eric Schneiderman declared “it is clear that DraftKings and FanDuel are the leaders of a massive, multibillion-dollar scheme intended to evade the law and fleece sports fans across the country. Today, we have sent a clear message: not in New York, and not on my watch.”<sup>45</sup> Schneiderman interpreted fantasy sports as a societal ill, deemed it a gambling, and thus, with one statement, he made it illegal.<sup>46</sup> However, many argue that fantasy sports require skill because assembling a team is active and not passive.<sup>47</sup> In their opinions, because knowledge and engagement are required, fantasy sports require skill.<sup>48</sup>

If fantasy sports are ever considered as gambling, and not a skill as Schneiderman unilaterally decided, then fantasy sports would be illegal in most states.<sup>49</sup> Andy Frankenger, a two time World Series Poker Champion went as far as to say, “it’s a joke that between online poker and daily fantasy, poker is the one that’s widely prohibited in this country.”<sup>50</sup> Fantasy sports require less skill because player prices are set efficiently, much like how lines are set in sports betting, creating a less complicated decision making process.<sup>51</sup> Professional daily fantasy players only have a slight edge over amateurs in entry match-ups, but professionals submit many more entries, thereby making it more likely that they will win.<sup>52</sup> Additionally, overlays are the only real reason professionals currently enter more than amateurs, and once that advantage is gone, statistics will show that professionals and amateurs are closer in actual winnings.<sup>53</sup>

The daily fantasy sports proponents’ arguments do not seem to add up. Ed Miller, an independent games consultant, found that the biggest daily fantasy sharks have a minute 7% return, while smaller sharks had higher returns with fewer actual

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<sup>45</sup> Eric Chemi & Nicholas Wells, *So is Daily Fantasy Gambling or Not?*, CNBC (Nov. 10, 2015), <http://www.cnbc.com/2015/11/10/so-is-daily-fantasy-gambling-or-not.html>.

<sup>46</sup> *Id.*

<sup>47</sup> Frazier & McConkie, *supra* note 1, at 2.

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

<sup>49</sup> Chemi & Wells, *supra* note 45.

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

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

dollars bet.<sup>54</sup> Even FanDuel and DraftKings admit that professionals make more as a result of their higher volume of bets; this means the average person can do the same.<sup>55</sup> This makes it more difficult to support the argument that daily fantasy sports activity is a skill.<sup>56</sup>

There are too many uncertainties with players when injuries and life events are taken into account.<sup>57</sup> Even draft day preparation can lead to endless hours of study without an effect on the likelihood of knowing the results.<sup>58</sup> For example, not all fantasy players play the same way.<sup>59</sup> Some fantasy sports participants are heavily involved in draft days while others let automatic drafts select their team rosters.<sup>60</sup> Each institution differs from the next in gambling application; for example, free leagues involve no consideration or rewards, and automatic drafts require almost no application of skill.<sup>61</sup>

It is worthy to note that policy arguments run counter to automatic drafts; the draft is automatically completed for the participant, thus almost eliminating a possibility for social ills resulting from the fantasy sports draft. Automatic drafts do not necessitate any use of skill, thereby weakening the pro-fantasy sports argument.

To properly measure chance, most states suggest that consideration be construed liberally, and they apply either a “predominant purpose test” or an “any chance test.”<sup>62</sup> The predominant purpose test requires that skill be a greater portion of the game than chance. The any chance test considers an activity to be “gambling” when any chance is associated with the activity.<sup>63</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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

<sup>57</sup> Vecchione, *supra* note 14.

<sup>58</sup> Levy, *supra* note 34, at 242.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

<sup>62</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 30 (2012).

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

### CONCLUSION

Whether daily fantasy sports play is a skill or gambling is really of no avail. The issue should be decided on the merits of the cost-benefit analysis to society, in the same way that the New York Attorney General Schneiderman concluded. On the surface, it seems that the definitions of skill and gambling are what wedges the issue. However, underneath it all, the avoidance of social ills has traditionally been the driving force behind these regulations. With these considerations in mind, only state legislatures or state courts can establish the foundation of law for fantasy sports, thereby solidifying the future of the industry for better or for worse.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

**ROMAN POLANSKI AND THE “ARTISTS’ MINISTER”:  
AMERICAN CRIMINAL LAW V. FRENCH CULTURAL  
DIPLOMACY**

JULIEN MAILLAND\*

**ABSTRACT**

*In 1977, famed Hollywood director Roman Polanski was convicted by a California court of unlawful sexual intercourse with a 13-year old he had drugged. The night before the sentencing hearing, he fled to France where, as a French citizen, he was immune from deportation and would spend the next thirty years as a fugitive. In 2009, Polanski was arrested in Switzerland at the bequest of the United States.*

*The arrest triggered a violent reaction from the French executive branch and intellectual elites, and caused a still-ongoing disagreement between France and the U.S. This case study of the international imbroglio reveals a profound misunderstanding. While French elites fail to understand the importance of the rule of law in American society, U.S. jurists and international political scholars fail to understand the significance of French operational code—a set of political beliefs originating from the cultural matrix of a society.*

*This case study occurs within the general comparative-law methodological framework of immersion. Immersion calls for the practice of legal hermeneutics and requires the study of politics, economics, and ethnography as integral to the understanding of any given legal system. Within this framework, I contribute foreign policy analysis and international communication theory in order to reveal the cultural meaning hidden behind the hermetic legal case and to further mutual understanding between*

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\*Assistant Professor, The Media School, Indiana University. Ph.D., 2013, University of Southern California; LL.M., 2000, New York University School of Law; M.C.L., 1999, LL.B., 1997, University of Paris II School of Law (Panthéon-Assas). Many thanks to Marc Chomel, Steven Lamy, Philip Spencer, and Matt Ward.

*American and French jurists and international political scholars.*

*Specifically, I argue that the French executive branch and intellectual elites perceived American international criminal procedure efforts to arrest Polanski in Switzerland as an assault by Hollywood against French culture. In addition, the attempt by the U.S. to seize Polanski was perceived as an attack against France on the international scene—in particular, as an attempt to hinder France’s civilizing mission and the projection of its universalist mode through culture and cinema.*

*This case study also highlights a fundamental irony in France’s position: the fact that the self-crowned spearhead against U.S. hegemony in the international legal order only relies on Gramscian arguments to better ground and justify its own civilizing mission, that is, cultural imperialism. In the end, the comparative legal analysis shows that for America, this is a criminal case of *California v. Polanski*, but for France, this is an international law and politics case of *U.S. v. France* taking place in the realm of the arts.*

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### INTRODUCTION

On March 10, 1977, famed 44-year old Hollywood director Roman Polanski performed cunnilingus on, and vaginally and anally-sodomized, a 13-year old girl, Samantha Galley, whom he had drugged, at actor Jack Nicholson's residence in Los Angeles.<sup>1</sup> Charged with the criminal acts of furnishing Quaaludes to a minor, child molesting, unlawful sexual intercourse, rape by use of drugs, oral copulation, and sodomy, Polanski struck a deal with the Los Angeles County District Attorney, pleaded guilty, and was convicted of unlawful sexual intercourse, having had sexual relations with a female not yet 14 years old, a crime subject to a maximum sentence of one to twenty years in state prison or an alternative probation sentence without jail time.<sup>2</sup> The night before the sentencing hearing, Polanski fled to France. Polanski, a French citizen,<sup>3</sup> was immune from deportation under a French international criminal procedure provision that states that France shall not deport its own citizens.<sup>4</sup> Back in France, the famed movie director was welcomed, protected, and celebrated as a "genius."<sup>5</sup> He would go on to produce many international blockbusters, receive an Academy Award from the American Academy of Motion Picture Arts and Sciences for Best Director,<sup>6</sup> and live a Hollywood-like socialite life in Europe for the next thirty years. On September 26, 2009, amid tensions between the United

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<sup>1</sup> *See generally* Transcript of Grand Jury Proceedings, State v. Polanski, No. A-334139 (Cal. Super. Ct. 1977); Polanski v. Super. Ct. of Los Angeles County, 180 Cal. App. 4th 507, 102 Cal. Rptr. 3d 696 (Cal. Super. Ct. 1977); Probation Officer's Report, State v. Polanski, (Cal. Super. Ct. 2007) (No. A-334139), 2010 WL 239234.

<sup>2</sup> People's Opposition to Defendant Roman Polanski's Motion to Dismiss at 7, People v. Polanski, No. A-334139 (Cal. Super. Ct. 2009).

<sup>3</sup> *Roman Polanski*, IMDB, <http://www.imdb.com/name/nm0000591/> (last visited Apr. 2, 2016).

<sup>4</sup> CODE DE PROCÉDURE PÉNALE [C.PÉN.] art. 696-4 (Fr.).

<sup>5</sup> *Arrestation de Polanski: des Voix Discordantes Troublent le Concert de Soutiens*, LE PARISIEN, (Sept. 29, 2009), <http://www.leparisien.fr/flash-actualite-culture/arrestation-de-polanski-des-voix-discordantes-troublent-le-concert-de-soutiens-29-09-2009-656448.php> (Fr.).

<sup>6</sup> *See Roman Polanski*, *supra* note 3.

States and Switzerland stemming from accusations that Swiss banks—and by extension the Swiss state—had been helping U.S. citizens defraud U.S. tax authorities, Switzerland arrested Polanski at the Zürich airport at the request of the United States, and held him pending deportation hearings.<sup>7</sup>

The arrest caused an outrage in the French artistic milieu, and in the executive branch of government.<sup>8</sup> French artists and intellectual socialites compared the U.S. judicial system to the Nazi Gestapo,<sup>9</sup> and the French executive branch unleashed a frontal media campaign against the United States. The French Foreign Affairs Minister, Bernard Kouchner, wrote to his U.S. counterpart, Secretary of State Hillary Clinton, demanding Polanski's immediate release.<sup>10</sup> The French Minister of Culture, Frédéric Mitterrand,<sup>11</sup> dubbed the arrest "repulsive" and declared, in a somber tone: "[w]e know the circumstances in which this took place. While there is a generous America which we love, there also is a certain America that frightens, and it is this America that just showed its face to us."<sup>12</sup> French President Nicolas Sarkozy himself took an active part in the behind-the-scenes act by putting pressure on Switzerland to release Polanski.<sup>13</sup>

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<sup>7</sup> *Polanski Arrêté en Suisse: son Avocat Surpris, la France et la Pologne se Mobilisent*, LE PARISIEN (Sept. 27, 2009), <http://www.leparisien.fr/flash-actualite-culture/polanski-arrete-en-suisse-son-avocat-surpris-la-france-et-la-pologne-se-mobilisent-27-09-2009-655039.php> (Fr.).

<sup>8</sup> *Id.*

<sup>9</sup> *Le Cinéma le Soutient Toujours*, LE PARISIEN, (Oct. 8, 2009), <http://www.leparisien.fr/une/le-cinema-le-soutient-toujours-08-10-2009-666412.php> (Fr.).

<sup>10</sup> *Polanski: Kouchner a Écrit à Clinton avec Son Homologue Polonais*, LE PARISIEN (Sept. 28, 2009), <http://www.leparisien.fr/flash-actualite-politique/polanski-kouchner-a-ecrit-a-clinton-avec-son-homologue-polonais-28-09-2009-655158.php> (Fr.).

<sup>11</sup> Frédéric Mitterrand is not to be confused with his uncle, former French President François Mitterrand.

<sup>12</sup> *Frédéric Mitterrand Juge "Épouvantable" L'arrestation de Roman Polanski*, LA DÉPÊCHE (Sept. 29, 2009), <http://www.ladepeche.fr/article/2009/09/28/682266-frederic-mitterrand-juge-epouvantable-l-arrestation-de-roman-polanski.html> (Fr.).

<sup>13</sup> *Sarkozy S'enquiert avec Son Homologue Suisse du Sort de Polanski*, LE PARISIEN (May 15, 2010), <http://www.leparisien.fr/flash->



On the American side, the French government's actions were met with disbelief and incomprehension. A comment by Los Angeles County Deputy District Attorney Marc Chomel perhaps best summed up American disbelief in this context: "[i]t's not U.S. v. France, it's California v. Polanski. Nobody even knows that he's French!"<sup>14</sup> So, why would the highest levels of the executive branch of the French government actively create such a brutal clash against the United States, over a very sad and all-too-common criminal case involving the sexual molestation of a 13-year old girl who had been drugged? I submit that the answer neither lies in substantive criminal law nor in international criminal procedure rules. The misunderstanding exists because the position of the United States, voluntarily or not, is at odds with a crucial part of France's *operational code*, that is, "a set of political beliefs or more broadly . . . a set of beliefs embedded in the personality of a leader or originating from the cultural matrix of a society."<sup>15</sup> Analyzing the French reaction strictly in the context of criminal law and procedure leads one to miss what leading semiotician Roland Barthes,<sup>16</sup> building on Ferdinand de Saussure's work,<sup>17</sup> called the *signified*, that is, the meaning hidden behind the

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actualite-politique/sarkozy-s-enquiert-avec-son-homologue-suisse-du-sort-de-polanski-15-05-2010-923193.php (Fr.).

<sup>14</sup> Personal interview with Marc Chomel, Los Angeles County Deputy District Attorney (September 30, 2009). Chomel noted that he was not directly involved with the case and that his opinion did not purport to be that of the Office of the Los Angeles District Attorney.

<sup>15</sup> S.G Walker et al., *Profiling the Operational Codes of Political Leaders*, in *THE PSYCHOLOGICAL ASSESSMENT OF POLITICAL LEADERS: WITH PROFILES OF SADDAM HUSSEIN AND BILL CLINTON* 216 (2005). It is not to say that the State is unitary, but that the study of political science, law, sociology, geography, international relations, and policy, to name a few, placed in historical context, reveals certain constants in the behavior and rationale of state actors that are so entrenched that they do become part of what Schafer and Young call the "cultural matrix of a society." *Id.*

<sup>16</sup> *See generally* ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers trans., 1957).

<sup>17</sup> *See generally* FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1916).

*signifier*, itself a symbolic element.<sup>18</sup> In this case, the signifier, the international criminal case spanning 38 years and still ongoing, hides a signified: French cultural policy, both domestic and in the international political and legal order.

Comparative legal theory helps explain the French executive branch's reaction to the international criminal proceedings. The French executive branch likely viewed the proceedings as a violation of French sovereignty domestically and of French public diplomacy efforts in the international political and legal order: if you attack Roman Polanski, you are attacking France. In addition, the public intellectuals saw it as an attack on a system which, through subsidies, feeds them in ways that defy capitalist logic. Specifically, I place the present analysis within the framework of *immersion*, a comparative law method theorized in particular by Pierre Legrand<sup>19</sup> and Vivian Curran,<sup>20</sup> the foundations of which are shared by scholars such as James Whitman<sup>21</sup> and Robert Gordon.<sup>22</sup> This approach "calls for the practice of legal hermeneutics that would require the study of politics, economics, and ethnography as integral to the understanding of any given legal system."<sup>23</sup> We can add foreign policy analysis, from a historical context, to the list of scholarly fields drawn by Legrand, in the vein of international relations scholars Neustadt and May, who lamented about sensing around them "a host of people who did not know any history to speak of and were unaware of suffering any lack, who thought the world was new and all its problems fresh."<sup>24</sup>

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<sup>18</sup> See BARTHES, *supra* note 16.

<sup>19</sup> Pierre Legrand, *Comparer*, 48 REVUE INT'L DE DROIT COMPARE 279 (1996).

<sup>20</sup> Vivian G. Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 79 (1998).

<sup>21</sup> See generally James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J 1279 (2000).

<sup>22</sup> See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

<sup>23</sup> Julien Mailland, *The Blues Brothers and the American Constitutional Protection of Hate Speech: Teaching the Meaning of the First Amendment to Foreign Audiences*, 21 MICH. ST. INT'L LAW REV. 443, 446 (2013), (translating Legrand, *supra* note 19 at 279).

<sup>24</sup> R. NEUSTADT & E. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS*, xi (1986).

In both international relations and the comparative law literature, analysis is performed through case studies. Examples of cultural meanings hidden behind hermetic symbols but revealed by comparative legal scholars in a Franco-American context include: Zoller shedding light on the importance of the rule of law principle in American society through an analysis of the Bill Clinton impeachment proceedings, otherwise perceived by the French public as a simple and clear representation of American puritanism;<sup>25</sup> Whitman suggesting that the French criminalization of hate speech is not an indication that France “is a more ‘mature’ or ‘civilized’ place than the United States,”<sup>26</sup> neither is it simply “an expression of the ‘high ideals of tolerance that have grown up since the Holocaust,’”<sup>27</sup> but is rather “only one aspect of a more complex cultural pattern,”<sup>28</sup> which in this case reveals a French cultural tradition of civility, which the author traces back to the 18<sup>th</sup> century tradition of “revolutionary redistribution of honor” that was previously reserved to aristocracy;<sup>29</sup> Mailland arguing through a case study of the *Blues Brothers* movie that the U.S. constitutional protection of hate speech, which the French generally consider as an insane American oddity, the sign of a “postadolescent civilization,”<sup>30</sup> in fact reflects a commitment toward the deeper cultural and political principle of popular sovereignty;<sup>31</sup> Legrand, opposing the “monumental symmetry of the perspective”<sup>32</sup> that characterizes the French gardens, to the English gardens and bouquets of flowers which are organized only as the result of impulse, in order to reveal the difference between the common law, marked by pragmatism, and the civil law, dominated by

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<sup>25</sup> ELISABETH ZOLLER, *DE NIXON A CLINTON : MALENTENDUS JURIDIQUES TRANSATLANTIQUES* (1999).

<sup>26</sup> See Whitman, *supra* note 21, at 1281.

<sup>27</sup> *Id.* at 1395.

<sup>28</sup> See Whitman, *supra* note 21, at 1282.

<sup>29</sup> *Id.* at 1395-96, 1398.

<sup>30</sup> See Mailland, *supra* note 23, at n.48 (quoting Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 1, 9 n.4 (1998) (describing France, in contrast to the “regressed” United States, as a “postadolescent civilization.”)).

<sup>31</sup> See Mailland, *supra* note 23, at 447.

<sup>32</sup> See Legrand, *supra* note 19, at 292.

systems and rules that reflect the French quest for order and harmony;<sup>33</sup> and Legrand again, building on the methodological precept that iconography is not just “finery” but “a great purveyor of lessons,”<sup>34</sup> deconstructing a portrait of French Emperor Napoléon<sup>35</sup> to contrast the civil law with the common law system and hermeneutically uncover the fact that French law is not framed from the ground up, as in the common law tradition, but from top down, as, symbolized, in the portrait, by the Emperor drafting the Code.<sup>36</sup>

The abject nature of the criminal acts at stake in the Polanski case are rivaled only by the abject nature of the anti-U.S. comments made 32 years later by French public intellectual-socialites and high ranking government Ministers, as will be discussed in Part II. The French position shows a misunderstanding of the importance of the rule of law principle in American society, which has already been uncovered for a French audience by Elisabeth Zoller.<sup>37</sup> The international incident and subsequent tension reveals the importance of French cultural policy in French operational code, in domestic and international politics and law. The purpose of this article is to foster a better understanding of the French’s position.

Part I presents the substantive facts of the 1977 U.S. case, as recorded in the Reporter’s Transcript of Grand Jury Proceedings,<sup>38</sup> the Proceedings of the Superior Court of the State of California for the County of Los Angeles,<sup>39</sup> and the Probation Officer’s Report.<sup>40</sup> The minute details provided show the level of heinousness of the acts in question. This in turn sets the stage for Part II, in which I explain the magnitude of the cultural misunderstanding embodied in the French reaction to the 2009

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<sup>33</sup> See Mailland, *supra* note 23, at 447 (discussing Legrand *supra* note 19 at 289.).

<sup>34</sup> See Legrand *supra* note 19 at 289.

<sup>35</sup> *The Emperor Napoleon in His Study at the Tuileries*, NAT’L GALLERY OF ART, [http://www.nga.gov/fcgi-bin/tinfo\\_f?object=46114&detail=note](http://www.nga.gov/fcgi-bin/tinfo_f?object=46114&detail=note) (last visited Mar. 30, 2016).

<sup>36</sup> See Mailland, *supra* note 23 at 449 (discussing Legrand *supra* note 19).

<sup>37</sup> See ZOLLER, *supra* note 25.

<sup>38</sup> See Transcript of Grand Jury Proceedings, *supra* note 1.

<sup>39</sup> See *Polanski v. Super. Ct. of Los Angeles County*, 180 Cal. App. 4th 507, 102 Cal. Rptr. 3d. 696 (Cal. Super. Ct. 1977).

<sup>40</sup> See Probation Officer’s Report, *supra* note 1.

U.S. and Swiss international criminal proceedings. The comparative analysis is Part III. Part III.A. provides a historical and political background of French cultural policy in international relations and law. Part III.B. reveals the domestic implications of the Polanski case for French operational code. Part III.C. explains the otherwise hermetic reaction of the French executive branch and public intellectuals with reference to French cultural policy in international relations and law. I also suggest that the case sheds light on the uneasy relationship between France and the United States in the field of cinematic production and trade regulation. The Polanski case reminds us that while during the Cold War, the West and the East waged a physical war on international battlefields, cinema was, and remains, one of the battlegrounds where France and the U.S., otherwise strong allies, wage a battle for imposing their respective, distinct, and therefore inherently conflictual, universalist vision of the world.<sup>41</sup> The case also highlights a fundamental irony in France's position in the international legal order: the fact that the self-crowned spearhead against U.S. hegemony only relies on Gramscian arguments to better ground and justify its own civilizing mission, that is, cultural imperialism.<sup>42</sup>

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<sup>41</sup> The U.S. and France, respectively, have inherently incompatible – claims to the universality of their social model by the US and France. See generally Pierre Bourdieu, *Deux Impérialismes de l'Universel*, in CHRISTINE FAURÉ & TOM BISHOP (EDS.), *L'AMÉRIQUE DES FRANÇAIS* 149 (1992); Stanley Hoffman, *Deux Universalismes en Conflit*, 21(1) *THE TOCQUEVILLE REVIEW* 65 (2000); Michèle Lamont & Laurent Thévenot, *Introduction: Toward a Renewed Comparative Cultural Sociology*, in MICHÈLE LAMONT & LAURENT THÉVENOT (EDS.), *RETHINKING COMPARATIVE CULTURAL SOCIOLOGY: REPERTOIRES OF EVALUATION IN FRANCE AND THE UNITED STATES* 3 (2000).

<sup>42</sup> See Herbert Schiller, *Communication and Cultural Domination*, *Int'l J. of Politics* 4 (1976) (defining cultural imperialism as “the sum of the processes by which a society is brought into the modern world system and how its dominating stratum is attracted, pressured, forced, and sometimes bribed into shaping social institutions to correspond to, or even promote, the values and structures of the dominating center of the system.”).

### I. CASE FACTS

On March 10, 1977, famed 44-year old Hollywood director Roman Polanski performed cunnilingus on, and vaginally and anally-sodomized a 13-year old girl, Samantha Galley, whom he had drugged with quaaludes and champagne, at actor Jack Nicholson's residence in Los Angeles.<sup>43</sup>

Polanski had met Galley through a friend when looking for a model to pose for pictures he had been commissioned to take for French *Vogue*.<sup>44</sup> On February 13, 1977, after showing Galley and her mother pictures Polanski had published in French *Vogue*, the mother, who disclosed Galley's age to Polanski, agreed to the photoshoot on behalf of her daughter.<sup>45</sup> On February 20, 1977, Polanski and Galley found themselves alone in the hills behind Galley's house, for a photoshoot.<sup>46</sup> According to Galley's testimony to the Los Angeles County Grand Jury on March 24, 1977, Galley took her top and bra off at Polanski's request, while he shot two rolls of photographs.<sup>47</sup> On March 10, 1977, Polanski returned to Galley's house for another photoshoot.<sup>48</sup> He took Galley to another residence, where, in the presence of another five individuals, he shot pictures of her wearing a white blouse and a pair of jeans.<sup>49</sup> When the light became too dim to shoot, he drove her to Jack Nicholson's residence on Mulholland Drive, where a woman with black hair and two dogs, Melena Kalliniaotes, welcomed them inside.<sup>50</sup> Kalliniaotes, who served as a caretaker for both Nicholson's and nearby Marlon Brando's residence, allowed Polanski to open a bottle of Nicholson's champagne, which he poured in three glasses and shared with the woman and the teenage girl.<sup>51</sup> As the woman left and the residence became empty except for the 44-year old director and the 13-year old model, Polanski began

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<sup>43</sup> Luchina Fischer, *Roman Polanski, What Did He Do?*, ABC NEWS (Sept. 30, 2009), <http://abcnews.go.com/Entertainment/roman-polanski/story?id=8705958>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Transcript of Grand Jury Proceedings, *supra* note 1, at 68.

<sup>48</sup> *Id.* at 68-69.

<sup>49</sup> *Id.* at 70-71.

<sup>50</sup> *See id.* at 74.

<sup>51</sup> *See id.* at 71.

taking pictures of Galley by the pool.<sup>52</sup> Polanski then took the girl inside the patio, where, according to her Grand Jury testimony, he requested that she take off her shirt, and took a series of topless pictures of her holding a glass of champagne.<sup>53</sup> He subsequently took another series of pictures of Galley wearing a blue dress in the residence's kitchen.<sup>54</sup> After making a quick call to Galley's mother, during which Galley indicated she did not wish to be picked up and Polanski warned that he would bring Galley home "kind of late because it had already gotten dark out," Polanski ingested a "Rorer 714" quaalude and offered part of another one to the girl.<sup>55</sup> Galley, who, to her own admission, had kept drinking during the photo shoots, accepted and took it with a swallow of champagne.<sup>56</sup> After Galley took off her blue dress, the two proceeded to the jacuzzi.<sup>57</sup> According to the Galley's Grand Jury testimony, Polanski stated, "take off your underwear," an instruction the girl complied with before getting into the jacuzzi.<sup>58</sup> Polanski then took a series of pictures of a naked Galley holding the glass of champagne in the jacuzzi.<sup>59</sup> The teenager reported that Polanski briefly went back inside the house, returned naked, sat in the jacuzzi, and, to the tone of repeated "come down here" and "doesn't it feel better down here," briefly enticed Galley to be held by him.<sup>60</sup> At that point, the girl, who according to her testimony started to fear Polanski, left the jacuzzi and put on her underwear and a towel.<sup>61</sup>

What followed were a series of exchanges where Galley requested several times that Polanski take her back home, where he stalled, alternatively promising to take her home soon, trying to kiss her, being rejected, and stalling some more.<sup>62</sup> The two ended up on the couch, where, she said, "he went down and he

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<sup>52</sup> *Id.* at 77.

<sup>53</sup> *Id.* at 78.

<sup>54</sup> *Id.* at 79.

<sup>55</sup> *Id.* at 80-84.

<sup>56</sup> *Id.* at 84.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 85.

<sup>59</sup> *Id.* at 85-86.

<sup>60</sup> *Id.* at 86-87.

<sup>61</sup> *Id.* 89-91.

<sup>62</sup> *Id.* at 91.

started performing cuddliness," meaning "placing [his] mouth on [her] vagina."<sup>63</sup> After a few minutes of cunnilingus, during which the 13-year old, who, under the influence of a quaalude and alcohol felt dizzy, had blurred vision, and "was having trouble with [her] coordination," asked him to stop several times, Polanski "placed his penis in [her] vagina."<sup>64</sup> She described asking him, again, to stop, but not "fighting really, because . . ., you know, there was no one else there and [she] had no place to go."<sup>65</sup> At some point, she recalled, Polanski grew concerned and asked the girl if she was on the pill, and, as the answer was no, when she had had her last period.<sup>66</sup> Left in the expectative when the girl could not conclusively and precisely answer, the 44-year old allegedly asked, "would you want me to go in through your back?"<sup>67</sup> Despite her negative response, the girl recalls "he put his penis in my butt."<sup>68</sup> We know that Polanski eventually climaxed, because forensic tests confirmed her testimony in this regard.<sup>69</sup> I knew, she said, "because I could kind of feel it and it was in my underwear. It was in my underwear. It was on my butt and stuff . . . I felt it on the back of my behind and in my underwear when I put them on."<sup>70</sup> Polanski eventually drove Galley home, after allegedly instructing her to tell neither her mother nor her boyfriend. "This is our secret," she recalled him saying.<sup>71</sup> That same night, she told her boyfriend, then her mother.<sup>72</sup> Polanski was arrested the next evening at the Beverly Wilshire hotel in Beverly Hills, and charged with the criminal acts of furnishing quaaludes to a minor, child molesting, unlawful sexual intercourse, rape by use of drugs, oral copulation, and sodomy.<sup>73</sup>

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

<sup>64</sup> *Id.* at 93.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 94.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 95.

<sup>69</sup> *See id.* at 96-97; *see also* Probation Officer's Report, *supra* note 1, at 9.

<sup>70</sup> Transcript of Grand Jury Proceedings, *supra* note 1, at 96-97.

<sup>71</sup> *Id.* at 99-100.

<sup>72</sup> *Id.* at 102.

<sup>73</sup> People's Opposition to Defendant Roman Polanski's Motion



Polanski acknowledged most of the facts of the case, though he also shed a different light on them.<sup>74</sup> Regarding the topless photographs, he stated: "[t]opless photograph is acceptable in Europe. I didn't realize it was objectionable here."<sup>75</sup> He acknowledged giving her champagne, though he estimated the quantity she drank at two glasses, and he suggested that while she took a quaalude, "there was no actual offer by [him]."<sup>76</sup> In fact, the girl acknowledged having both gotten drunk and taken quaaludes prior to that day, as well as previously having had sex.<sup>77</sup> While Polanski did not discuss the allegations of either oral or anal intercourse, he acknowledged "[withdrawing] before [climax]."<sup>78</sup> But, he stated, "she never objected to intercourse," a statement that seemed corroborated by the caretaker, Kalliniotes, who "stated that Mr. Polanski and the girl acted as if they were lovers," and by Hollywood star Angelica Houston, who walked in the house as the intercourse was taking place, and, seeing the girl leave the room, thought that "she didn't appear to be distressed."<sup>79</sup>

## II. U.S. AND SWISS CRIMINAL PROCEEDINGS

Galley's attorney requested a closed grand jury hearing and pressed the district attorney to agree to a plea bargain with Polanski, in order to "avoid a circus-like atmosphere and allow the case to be presented with appropriate dignity and concern for the witness," and in the view that "a trial may cause such serious damage" to the girl.<sup>80</sup> In the end, the District Attorney and Polanski struck a plea bargain, where the director pleaded guilty and was convicted of "unlawful sexual intercourse, having had sexual relations with a female not yet 14 years old," a crime

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to Dismiss, *supra* note 1, at 7.

<sup>74</sup> Michael Cieply, *How Polanski's Probation Officer Saw His Crime*, New York Times, (Oct. 2, 2009), [http://artsbeat.blogs.nytimes.com/2009/10/02/how-polanskis-probation-officer-saw-his-crime/?\\_r=0](http://artsbeat.blogs.nytimes.com/2009/10/02/how-polanskis-probation-officer-saw-his-crime/?_r=0).

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

<sup>76</sup> *Id.*

<sup>77</sup> See Probation Officer's Report, *supra* note 1, at 10.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.* at 14.

subject to a maximum sentence of one to twenty years in state prison, or to an alternative probation sentence without jail time.<sup>81</sup>

As part of the conviction, mentally-disordered sex-offender proceedings were initiated prior to sentencing,<sup>82</sup> under which Polanski was ordered to undergo a 90-day psychiatric evaluation at Chino State Prison. After Polanski was held for 42 of the 90 days, psychiatrist Alvin E. Davis concluded that Polanski was “not mentally ill or disordered,” nor was he a “sexual deviate.”<sup>83</sup> Davis also said that the offense was an “isolated instance” in which Polanski exercised “transient poor judgment” and that Polanski was “most unlikely to reoffend.”<sup>84</sup> He further concluded that incarceration would serve no useful purpose,<sup>85</sup> referring in part to Polanski’s traumatic childhood as a Jewish child interned in the Polish Krakow ghetto, from which he escaped on the night prior to the final evacuation of the ghetto population to Auschwitz.<sup>86</sup> Following Davis’ evaluation and report, and after careful consideration of the circumstances of the case and the personality of Roman Polanski, the probation officer, noting that the defendant had “been thoroughly impressed by court and probation proceedings” and had “demonstrated genuine remorse at having committed” the offense, recommended probation, rather than jail, to the

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<sup>81</sup> *Id.* at 25-28.

<sup>82</sup> *Polanski v. Super. Ct. of Los Angeles County*, 180 Cal. App. 4th 507, 102 Cal. Rptr. 3d. 696 (Cal. Ct. App. 2009). Under US law, a criminal trial where a defendant is found to be guilty is constituted of two phases. First, the conviction, and second the sentencing. This is a different process than in France, where the conviction and sentencing phases are merged. In this case, Polanski was convicted of a crime but never sentenced. Because Polanski fled before the sentencing hearing, and because in France both hearings are merged, the French public opinion, misled by Polanski supporters, tends to be under the impression that he was never convicted. He was, however, indeed convicted of "unlawful sexual intercourse, having had sexual relations with a female not yet 14 years old." Karen Bandt, *Polanski: What's on Trial*, THE HUFFINGTON POST, (Mar. 18, 2009) [http://www.huffingtonpost.com/karin-badt/polanski-whats-on-trial\\_b\\_335049.html](http://www.huffingtonpost.com/karin-badt/polanski-whats-on-trial_b_335049.html).

<sup>83</sup> See Probation Officer’s Report, *supra* note 1, at 23.

<sup>84</sup> *Id.* at 23-24.

<sup>85</sup> *Id.* at 24.

<sup>86</sup> *Id.* at 25.

sentencing judge.<sup>87</sup> But this was not the end of a case that would rock Franco-American, Swiss-American, and Franco-Swiss relations thirty years later; it is still ongoing. On February 1, 1978, hours before his sentencing hearing, Polanski, who was fearful the judge would sentence him to jail despite the probation officer's recommendation for a simple probation sentence, fled the country.<sup>88</sup> He relocated to Paris, where, as a French citizen, he was immune from deportation, because France, by law, does not deport its own citizens to foreign countries.<sup>89</sup>

#### A. LIVING THE HIGH LIFE IN THE *MILKY WAY*

For the next thirty years, Polanski would live a Hollywood-like life outside of Hollywood, maintaining Paris as his home base.<sup>90</sup> While the United States had filed an international arrest warrant, and while an INTERPOL notice for his arrest was outstanding,<sup>91</sup> Polanski frequently travelled outside of France for leisure and to received many movie awards.<sup>92</sup> He was always careful to choose countries he thought would not arrest and deport him to the United States.<sup>93</sup> This included Switzerland, where he maintained a lavish chalet, the *Milky Way*, in the star-riddled resort of Gstaad.<sup>94</sup>

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<sup>87</sup> *Id.* at 27.

<sup>88</sup> Peter Allen, *French Government Drops Support for Director Roman Polanski as He Faces Extradition to the U.S. over Child Sex Charge*, DAILYMAIL.COM (Oct. 1 2009), <http://www.dailymail.co.uk/news/article-1217378/French-government-drops-support-director-Roman-Polanski-faces-extradition-U-S.html>.

<sup>89</sup> CODE DE PROCÉDURE PÉNALE [C.PÉN.] art. 696-4 (Fr.).

<sup>90</sup> Allen, *supra* note 88.

<sup>91</sup> According to an INTERPOL 2009 press release, “[g]iven Mr Polanski’s history of international travel while defying a judicial order, a 4.5-million-dollar bail and an electronic bracelet does not mean that law enforcement lets its global guard down . . . Mr Polanski has given us more than 30 years of proof that he does not feel bound to respect any court decision with which he does not agree.” *INTERPOL Red Notice for Roman Polanski Remains Valid*, INTERPOL (Nov. 26, 2009), <http://www.interpol.int/en/News-and-media/News/2009/PR112/>.

<sup>92</sup> *See Roman Polanski Biography*, IMDB, [http://www.imdb.com/name/nm0000591/bio?ref\\_=nm\\_ov\\_bio\\_sm](http://www.imdb.com/name/nm0000591/bio?ref_=nm_ov_bio_sm) (last visited Apr. 13, 2016).

<sup>93</sup> *See id.*

<sup>94</sup> *Le Cinéaste Roman Polanski Arrêté en Suisse où il se*

Polanski, who was already world famous prior to the events for movies such as *Rosemary's Baby*<sup>95</sup> and *Chinatown*,<sup>96</sup> and whose wife Sharon Tate's brutal murder by the Manson Family in 1969 made him even more visible,<sup>97</sup> would go on to direct such internationally-acclaimed blockbusters as *Tess*,<sup>98</sup> *Pirates*,<sup>99</sup> *Frantic*,<sup>100</sup> and *The Ghost Writer*.<sup>101</sup> In 2003, the American Academy of Motion Picture Arts and Sciences awarded him the Best Director Oscar for *The Pianist*,<sup>102</sup> an award the Academy accepted on his behalf while the audience gave a standing ovation.<sup>103</sup> Polanski, a socialite, who split his time between Paris and his Swiss *Milky Way* chalet, would further travel the world to receive a total of 53 awards.<sup>104</sup>

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*Rendait Fréquentement*, LE PARISIEN (Sept. 27, 2009), <http://www.leparisien.fr/flash-actualite-culture/le-cineaste-roman-polanski-arrete-en-suisse-ou-il-se-rendait-frequeument-27-09-2009-654842.php> (Fr.); *La Justice Américaine va Demander l'Extradition de Polanski*, LE PARISIEN, (Sept. 27, 2009), <http://www.leparisien.fr/faits-divers/la-justice-americaine-va-demander-l-extradition-de-polanski-27-09-2009-653813.php> (Fr.).

<sup>95</sup> *Roman Polanski Filmography*, IMDB, [http://www.imdb.com/name/nm0000591/?mode=desktop&ref\\_=m\\_ft\\_dsk#filmography](http://www.imdb.com/name/nm0000591/?mode=desktop&ref_=m_ft_dsk#filmography) (last visited Mar. 30, 2016).

<sup>96</sup> *Id.*

<sup>97</sup> See Probation Officer's Report, *supra* note 1.

<sup>98</sup> *Roman Polanski Filmography*, *supra* note 95.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Polanski Finally Gets Oscar*, BBC NEWS (Sept. 8, 2003), <http://news.bbc.co.uk/2/hi/entertainment/3089108.stm>. Polanski finally received the Oscar from the hands of Harrison Ford at the Deauville Film Festival in France. *Id.*

<sup>104</sup> Kate Connolly, *Roman Polanski Freed From House Arrest*, THE GUARDIAN (July 16, 2010), <http://www.theguardian.com/film/2010/jul/12/romanpolanski-switzerland>; Esther Addley & Kate Connolly, *Roman Polanski Arrested In Switzerland 31 Years After Fleeing Trial*, THE GUARDIAN (Sept. 27, 2009), <http://www.theguardian.com/film/2009/sep/27/roman-polanski-arrest-switzerland-custody>; *Roman Polanski Awards*, <http://www.imdb.com/name/nm0000591/awards> (last visited on Mar. 30, 2016).

## B. THE UNION BANK OF SWITZERLAND AFFAIR

On February 18, 2009, The Union Bank of Switzerland (UBS), the largest Swiss bank, entered into a deferred prosecution agreement with the United States Internal Revenue Service (IRS) on charges of conspiring to defraud the United States by impeding the IRS.<sup>105</sup> Based on an order by the Swiss Financial Markets Supervisory Authority, UBS agreed to divulge ownership information for about 250 accounts suspected to belong to American citizens, and to pay the U.S. government USD 780 million in fines.<sup>106</sup> The next day, the U.S. government further sued UBS in a Miami court, seeking disclosure of the identities of 52,000 suspected American customers of UBS.<sup>107</sup>

The U.S. government, who suspected that about USD 20 billion were held in Switzerland by U.S. citizens, was in effect attacking one of the cornerstones of Swiss society and its business model, absolute banking secrecy.<sup>108</sup> U.S. Democratic Senator and Chairman of the Subcommittee on Investigations, Carl Levin, denounced the "tax havens . . . engaged in economic warfare against the United States,"<sup>109</sup> while on the Republican

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<sup>105</sup> Deferred Prosecution Agreement, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla.); *see also UBS Enters into Deferred Prosecution Agreement*, U.S. DEP'T OF JUSTICE (Feb. 18, 2009), <http://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>.

<sup>106</sup> Deferred Prosecution Agreement, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla.); *see also UBS Enters into Deferred Prosecution Agreement*, U.S. DEP'T OF JUSTICE (Feb. 18, 2009), <http://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>.

<sup>107</sup> *United States v. UBS AG*, Civil No. 09-20423 (S.D. Fla.); *see also* David Voreacos & Carlyn Kolker, *U.S. Sues UBS Seeking Swiss Account Customer Names*, BLOOMBERG (Feb. 19, 2009), <http://www.bloomberg.com/news/articles/2009-02-19/us-sues-ubs-seeking-swiss-account-customer-names-update4>.

<sup>108</sup> Janet Novack, *UBS Cheats Can Still Come Clean*, FORBES (July 9, 2008), [http://www.forbes.com/2008/07/08/irs-ubs-taxes-biz-beltway-cz\\_jn\\_0709beltway.html](http://www.forbes.com/2008/07/08/irs-ubs-taxes-biz-beltway-cz_jn_0709beltway.html).

<sup>109</sup> Bradley S. Klapper, *Tax Havens Cost U.S. \$100 Billion a Year*, THE WASH. POST, (July 17, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071603035.html>.

side, Senator Norm Coleman lashed out at the individuals "using offshore tax havens and secrecy jurisdictions to shelter trillions of dollars from taxation, forcing families to shoulder the burden," suggesting Swiss banks were acting as "Al Capone safe houses for evading taxes."<sup>110</sup> On July 9, 2009, amid significant tensions between the U.S. and Swiss governments, the latter threatened to seize the names of the suspected 52,000 American owners of UBS accounts from UBS, in order to shield the bank from having to comply with a potential U.S. court order forcing disclosure. In a filing with the Miami court, the Swiss government declared, "Switzerland will use its legal authority to ensure that the bank cannot be pressured to transmit the information illegally, including if necessary by issuing an order taking effective control of the data at UBS."<sup>111</sup> On August 19, 2009, further to negotiations between American and Swiss diplomats, the Swiss government agreed to the disclosure of select 4,450 UBS client account information to the U.S. government.<sup>112</sup>

### C. ZÜRICH ARREST

On September 26, 2009, Roman Polanski flew from Paris to Zürich, where he was to receive a career accomplishment award.<sup>113</sup> As he de-boarded the plane, Swiss police arrested him pursuant to the 31-year old Interpol arrest warrant and jailed him at the Winterthur prison.<sup>114</sup>

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<sup>110</sup> Nick Mathiason, *Billionaire tycoon accused of tax evasion*, THE GUARDIAN (July 17, 2008), <http://www.theguardian.com/business/2008/jul/17/taxevasionprobe.franklowy>.

<sup>111</sup> *Swiss to stop UBS Handing Over Data in U.S. Tax Row*, REUTERS, (July 8, 2009), <http://www.reuters.com/article/us-ubs-sb-idUSTRE5672DM20090708>.

<sup>112</sup> Agreement Between the United States of America and the Swiss Confederation on the Request for Information From the Internal Revenue Service of the United States of America Regarding UBS AG, A Corporation Established Under the Laws of the Swiss Confederation (U.S.-Switz.), IRS, (Aug. 19, 2009), [https://www.irs.gov/pub/irs-drop/us-swiss\\_government\\_agreement.pdf](https://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf).

<sup>113</sup> Esther Addley & Kate Connolly, *Roman Polanski Arrested in Switzerland 31 Years After Fleeing Trial*, THE GUARDIAN (Sept. 27, 2009), <http://www.theguardian.com/film/2009/sep/27/roman-polanski-arrest-switzerland-custody>.

<sup>114</sup> *Polanski Arrêté en Suisse*, *supra* note 7.

The next day, the French foreign affairs Minister, Bernard Kouchner, demanded his release.<sup>115</sup> The Swiss justice Minister, however, explained that under the rule of law, Switzerland had no choice but to arrest him based on the INTERPOL arrest warrant.<sup>116</sup> Amid rumors that the arrest was motivated by a desire to appease the U.S. government in the context of the very tense UBS case, Wildmer-Schultz denied the rumors and pointed out that while Polanski had traveled to Switzerland many times before to reside in his Gstaad *Milky Way* chalet, the authorities had never been notified in advance of those trips.<sup>117</sup> This time, however, the Los Angeles County District Attorney's office had heard of the planned trip to Zürich and coordinated the arrest with the Swiss government.<sup>118</sup> Questioned about the rumors that the arrest was linked to the UBS case, Marc Chomel, a Los Angeles County Deputy District Attorney, commented, "if [Polanski] had made himself a little more available, we would have arrested him a long time ago!"<sup>119</sup> The American authorities immediately prepared a request for deportation, which Polanski's lawyer contested in Swiss courts.<sup>120</sup>

#### D. FRENCH REACTIONS

Under the limelight, a very loud group of French actors, directors, producers, and other filmmakers, joined by several international stars, denounced the "police trap" and demanded Polanski's immediate release.<sup>121</sup> Signatories included Woody

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<sup>115</sup> *Id.*

<sup>116</sup> *Le Cinéaste Roman Polanski Arrêté*, *supra* note 94.

<sup>117</sup> *Id.*

<sup>118</sup> *La Justice Américaine va Demander*, *supra* note 94.

<sup>119</sup> Personal Interview with Marc Chomel, Los Angeles County Deputy District Attorney (Sept. 30, 2009) (on file with author); *See also Les Coulisses de l'Arrestation de Roman Polanski*, LE PARISIEN (Sept. 29, 2009), <http://www.leparisien.fr/faits-divers/les-coulisses-de-l-arrestation-de-roman-polanski-29-09-2009-655397.php> (Fr.).

<sup>120</sup> *Roman Polanski a Demandé sa Mise en Liberté*, LE PARISIEN (Sept. 29, 2009), <http://www.leparisien.fr/flash-actualite-culture/roman-polanski-a-demande-sa-mise-en-liberte-29-09-2009-656372.php> (Fr.).

<sup>121</sup> *Une Pétition de Cinéastes et d'Artistes Pour la Libération*

Allen, John Landis, Pedro Almodovar, Terry Gilliam, Costa-Gavras, Wong Kar-Wai, Fanny Ardant, Ettore Scola, Marco Bellocchio, Giuseppe Tornatore, Jeanne Moreau, Martin Scorsese, Monica Bellucci, Abderrahmane Sissako, Wim Wenders, Tony Gatlif, Pierre Jolivet, Jean-Jacques Beineix, Paolo Sorrentino, Michele Placido, Barbet Schroeder, Gilles Jacob, and Bertrand Tavernier.<sup>122</sup> The French movie industry lobby and representative institutions, including the *Cinémaèque Française*, the Cannes film festival, the SACD (*Société des auteurs compositeurs dramatiques*), the ARP (*Auteurs, réalisateurs et producteurs*) and the *Groupe 25 Images*, joined the protest.<sup>123</sup> They considered it inadmissible "that an international cultural event, paying homage to one of the greatest contemporary filmmakers, is used by the police to apprehend him."<sup>124</sup> "By their extraterritorial nature," they wrote, film festivals the world over have always permitted works to be shown and for filmmakers to present them freely and safely, even when certain States opposed this.<sup>125</sup> The arrest of Roman Polanski in a neutral country, where he assumed he could travel without hindrance, undermines this tradition: it opens the way for actions of which no-one can know the effects.<sup>126</sup>

And to conclude:

Roman Polanski is a French citizen, a renowned and international artist now facing extradition. This extradition, if it takes place, will be heavy in consequences and will take away his freedom. Filmmakers, actors, producers and technicians—everyone involved in international filmmaking—want him to know that he has their support and friendship.<sup>127</sup>

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*de Polanski*, LE PARISIEN (Sept. 29, 2009), <http://www.leparisien.fr/flash-actualite-culture/une-petition-de-cineastes-et-d-artistes-pour-la-liberation-de-polanski-27-09-2009-654031.php> (Fr.).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

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

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

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

<sup>127</sup> *Id.*



Artists were not the only ones engineering loud and visible protests. On September 26, 2009, Jack Lang declared that the arrest seemed "unimaginable and disproportionate," "and called for active acts of solidarity" to take place, in order to ensure that Polanski, the "great European creator" be freed.<sup>128</sup> The iconic Jack Lang had previously served as President Mitterrand's Minister of Culture from 1981 to 1986 and from 1988 to 1992.<sup>129</sup> As such, he became notorious for creating the cultural phenomenon that is *Fête de la Musique*,<sup>130</sup> a free music festival taking place throughout France on the day of the summer solstice, and for being a prominent opponent to the Americanization of culture. The same day, the acting Minister of Culture, Frederic Mitterrand, himself a famous film critic and proponent of the protection of French culture against Americanization (also dubbed in recent years "omnigooglization"), made a solemn statement.<sup>131</sup> He dubbed the arrest "repulsive" and "deprived of sense."<sup>132</sup> "Choking with emotion," as he himself described his state of mind, the Minister, acting on behalf of the French executive branch, fustigated the "trap" against a "French citizen and internationally famous artist."<sup>133</sup> And he concluded, in a dramatic, yet soft and somber tone: "[w]e know the circumstances in which this took place. While there is a generous America which we love, there also is a certain America that frightens, and it is this America that just showed its face to us."<sup>134</sup> Asked about French President Nicolas Sarkozy's position on the case, Mitterrand answered: "I think he

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<sup>128</sup> *Stars et Politiques se Mobilisent Pour Libérer Polanski*, LE PARISIEN, (Sept. 29, 2009), <http://www.leparisien.fr/actualite-people-medias/stars-et-politiques-se-mobilisent-pour-liberer-polanski-27-09-2009-654019.php> (Fr.).

<sup>129</sup> *Id.*

<sup>130</sup> *La Fête de la Musique: Une Fête Nationale Devenue un Grand Événement Musical Mondial*, FÊTE DE LA MUSIQUE (May 18, 2015), <http://fetedelamusique.culturecommunication.gouv.fr/La-Fete-de-la-Musique/Presentation-de-la->, (Fr.).

<sup>131</sup> *Frédéric Mitterrand Juge*, *supra* note 12.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

is in the same emotional state of mind as myself and all the French."<sup>135</sup>

This later statement was not quite accurate, however. If comments posted online by Internet readers of French newspapers are any indication, there was a clear disconnect between the defenders of Polanski (and through him, of "French culture"), including artists, socialites, and executive branch representatives, and the people, who remembered that Polanski was simply being subject to criminal proceedings for having had sexual relations with a 13-year old girl he drugged, and who generally was indignant at the attitude of the French film industry and of French officials.<sup>136</sup> Echoing public opinion, a few opposition members of parliament and several reputable regional newspapers, voiced their concern: *Le Télégramme* pointed out that while being a "likeable genius," Polanski was not above the law; *La Charente Libre* reminded its readers of the crime that had been committed by the "genius;" and *La République du Centre* expressed concern at the attitude of "intellectuals" trying to institute notoriety as a defense, comments which national daily *Aujourd'hui en France* remarked were a warning against an increasing gap between "Parisian intellectual elites and public opinion."<sup>137</sup>

#### E. LEGAL ARGUMENTS

Implicitly posing as an expert of the U.S. legal system, Hervé Temine, Polanski's French lawyer, advanced several legal arguments in the media, in which he argued that Polanski should be freed.<sup>138</sup> First, he argued the statute of limitations should have run its course.<sup>139</sup> Second, he argued that the victim had for many years requested that the Los Angeles District Attorney refrain from prosecuting Polanski.<sup>140</sup> Third, he argued that

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<sup>135</sup> *Id.*

<sup>136</sup> *Arrestation de Polanski, supra* note 5.

<sup>137</sup> *Id.*; see also *Polanski: Mitterrand et Kouchner Épinglés par des Députés UMP*, LE PARISIEN (Sept. 29, 2009), <http://www.leparisien.fr/flash-actualite-politique/polanski-mitterrand-et-kouchner-epingles-par-des-deputes-ump-29-09-2009-656459.php> (Fr.).

<sup>138</sup> *Polanski Arrêté en Suisse, supra* note 7.

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

<sup>140</sup> *Id.* It is worth noting, however, that such request only came after a civil settlement with Polanski for an amount for USD

Polanski had never been arrested in the 31 years that followed his escape, even though he openly spent much time in his Gstaad chalet.<sup>141</sup> Fourth, he argued that Polanski was only prosecuted because he was famous, an argument echoed in the virulent anti-American diatribe of Paris intellectual socialite and self-proclaimed philosopher, Bernard Henry-Lévy, who cried his "anger at the methods used by the California justice system."<sup>142</sup>

Marc Chomel, Los Angeles County Deputy District Attorney, responded to the arguments advanced by Polanski's French lawyers.<sup>143</sup> Regarding the statute of limitations issue, Chomel explained that Polanski had been convicted of a crime before fleeing.<sup>144</sup>

There is no statute of limitations issue here . . . the statute of limitations runs from the time of the offense to the time of filing. In Polanski's case, the statute was fulfilled by his arrest and the filing within the three-year period; there is no statute after the defendant is convicted and fails to show up for sentencing. Warrants in those cases can take twenty years to execute, without penalty to the state as it is the defendant's own doing that places him beyond the jurisdiction of the court. Other discretionary due process considerations come into play, as they did

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500,000.

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

<sup>142</sup> *Les Soutiens de Polanski Se Félicitent de sa Libération Annoncée*, LE PARISIEN (Nov. 26, 2009), <http://www.leparisien.fr/affaire-polanski/les-soutiens-de-polanski-se-felicitent-de-sa-liberation-annoncee-26-11-2009-725489.php> (Fr.); *Nouveau Rebondissement Dans L'affaire Polanski, en Plein Festival de Cannes*, LA DÉPÊCHE, (May 14, 2010), <http://www.ladepeche.fr/article/2010/05/14/836135-nouveau-rebondissement-affaire-polanski-plein-festival-cannes.html> (Fr.); *Nouvelle Attaque Contre Polanski: BHL ne Désarme Pas*, LE PARISIEN (May 15, 2010), <http://www.leparisien.fr/affaire-polanski/nouvelle-attaque-contre-polanski-bhl-ne-desarme-pas-15-05-2010-923177.php> (Fr.).

<sup>143</sup> Interview with Marc Chomel, Los Angeles County Deputy District Attorney (Sept. 30, 2009) (on file with author). Chomel noted that he was not directly involved with the case and that his opinion did not purport to be that of the Office of the Los Angeles District Attorney.

<sup>144</sup> *Id.*

here, but typically they don't really amount to much; the state has no obligation to find the defendant once he is convicted.<sup>145</sup>

Regarding the fact that the victim, who had received a monetary settlement from Polanski, requested that the prosecution be halted, Chomel said, "we do not represent the victim, we represent the community."<sup>146</sup> Chomel presented further reasons why the intent of the victim is irrelevant and "not controlling."<sup>147</sup> First, "recidivism is a huge issue" and the community has to be protected against offenders, whether the original victim wants him prosecuted or not.<sup>148</sup> This is especially true in the case of "serious crimes," as in the present case.<sup>149</sup> Second, Chomel explained, "Los Angeles County is the paradise of domestic violence, and lots of people are being pressed not to testify. The District Attorney has to go for it," regardless of whether or not the victim chooses to collaborate with the prosecution."<sup>150</sup>

Regarding the argument that Polanski had never been arrested in the 31 years that followed his escape, even though he openly spent much time in his Gstaad chalet, Chomel, as previously mentioned, pointed out that "the state has no obligation to find the defendant once he is convicted," that "it is the defendant's own doing that place[d] him beyond the jurisdiction of the court," before sarcastically concluding that "if [Polanski] had made himself a little more available, we would have arrested him a long time ago!"<sup>151</sup> Finally, rebutting the argument that Polanski was only prosecuted because he was famous, Chomel replied, "If you start making exceptions for rich directors, you risk more accusations" of favoring the rich and famous constituents of the community, he said.<sup>152</sup> "The office has always been drawn to treating everyone the same way . . . Justice never sleeps," he concluded.<sup>153</sup>

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

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

<sup>147</sup> *Id.*

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

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

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

<sup>152</sup> *Id.*

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

## F. CALLING UPON HILLARY CLINTON

Despite the fact that the arguments brought forward by Polanski's lawyers and friends lacked any grounds under applicable law, and that the French public opinion was overwhelmingly against Polanski, French executive-branch officials escalated the matter further. The French Ambassador to Switzerland, Joelle Bourgeois, expressed "dismay" on behalf of France.<sup>154</sup> Frederic Mitterrand, the Minister of Culture, pointed out being "the artists' Minister."<sup>155</sup> I must not abandon them," he said.<sup>156</sup>

Finally, making the matter an official case of France vs. USA, the French Minister of Foreign Affairs, Bernard Kouchner, wrote to his American counterpart, Secretary of State Hillary Clinton, to demand Polanski's release and the interruption of the criminal proceedings.<sup>157</sup> In a public statement, he criticized "the ways in which the judicial system is being used in this case."<sup>158</sup> He continued, "the Swiss cinema invites Roman Polanski and knows that he will come . . . this is not very pretty."<sup>159</sup> He further noted, "Frankly, this story is a bit sinister. Such a talented man, known throughout the world, all this is not very neat."<sup>160</sup>

## G. OF ELECTRONIC BRACELETS, GESTAPOS, AND CANNES RED CARPETS

In the wake of declarations amongst the highest ranking members of the French executive branch, the French "cultural milieu" continued its loud defense of Polanski in the French

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<sup>154</sup> *Le Festival du Film de Zurich en Émoi Après l'Arrestation de Roman Polanski*, LE PARISIEN (Sept. 27, 2009), <http://www.leparisien.fr/flash-actualite-culture/le-festival-du-film-de-zurich-en-emoi-apres-l-arrestation-de-roman-polanski-27-09-2009-654044.php> (Fr.).

<sup>155</sup> *La Polémique Mitterrand*, LE FIGARO (Oct. 10, 2009), <http://www.lefigaro.fr/politique/2009/10/08/01002-20091008ARTFIG00473-affaire-mitterrand-la-polemique-continue-d-enfler-.php> (Fr.).

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

<sup>157</sup> *Polanski: Kouchner a Écrit à Clinton*, *supra* note 10.

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

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

media. Superstar theatre director Robert Hossein declared that the core of the affair was the scapegoating of Polanski by the Swiss government because of issues of banks and laundered money.<sup>161</sup> Director Patrick Braoudé denounced a political conspiracy,<sup>162</sup> and legendary filmmaker Claude Lelouche went as far as comparing the methods used in the arrest to those of the Nazis' Gestapo.<sup>163</sup>

On December 4, 2009, as Swiss deportation proceedings were still ongoing, Polanski was released on bail and placed under house arrest in his *Milky Way* Gstaad chalet where he was required to wear an electronic bracelet<sup>164</sup>—something the always-media-savvy Henry-Lévy commented on: "so humiliating!"<sup>165</sup> Actress Mathilde Seigner, Polanski's sister-in-law, explained the role that the highest level of the French executive branch played in Polanski's release: "I am not going to go as far as saying that it is because of [French President] Nicolas Sarkozy that Roman was freed. But [the President] was great. And he supported [Polanski] a lot. The President was very efficacious."<sup>166</sup> Internationally-famous French director Luc Besson confirmed the President's involvement: "Nicolas Sarkozy was great," he declared.<sup>167</sup>

A new twist took place during the Cannes Film Festival, in May 2010. As the international glitter event took place and Polanski was still under house arrest in Switzerland, actress Charlotte Lewis, who had starred in Polanski's 1986 *Pirates*, accused the French director of having raped her when she was only 16.<sup>168</sup> The support of the executive branch of the French government and of French artists did not falter. President Sarkozy personally inquired about Polanski's situation by calling

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<sup>161</sup> *Le Cinéma le Soutient Toujours*, *supra* note 9.

<sup>162</sup> *Id.*

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

<sup>164</sup> *Polanski est Arrivé à Gstaad où il est Désormais Assigné à Résidence*, LE PARISIEN, (Dec. 4, 2009), <http://www.leparisien.fr/flash-actualite-monde/polanski-est-arrive-a-gstaad-ou-il-est-desormais-assigne-a-residence-04-12-2009-733146.php> (Fr.).

<sup>165</sup> *Les Soutiens de Polanski*, *supra* note 142.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* It was later reported that President Sarkozy personally and directly enquired about the status of the case with Swiss President Doris Leuthard. *Sarkozy S'enquiert*, *supra* note 13.

<sup>168</sup> *Nouveau Rebondissement*, *supra* note 142.

his Swiss counterpart.<sup>169</sup> Henry-Lévy issued a petition signed by many French guests of the Cannes festival, including famed directors Jean-Luc Godard, Agnes Varda, and Bertrand Tavernier.<sup>170</sup> Polanski also received the support of Woody Allen, the very-Francophile American director.<sup>171</sup> The French Fine Arts Academy released a statement demanding Polanski's release.<sup>172</sup> Additionally, the iconic former Minister of Culture Jack Lang, who mentioned keeping in close contact with Polanski over the phone and being in the process of planning a trip to Gstaad, again suggested that the arrest was the result of "a political manipulation in the United States."<sup>173</sup>

#### H. EPILOGUE

On July 12, 2010, Swiss authorities denied the U.S. extradition request for Polanski, on technicalities.<sup>174</sup> Polanski was free to leave and he was soon enjoying the luxuries of the ultra-select Saint-Tropez beach community in Southern France.<sup>175</sup> In an interview on Swiss *Télévision Suisse Romande*, Polanski thanked "all the inhabitants of Gstaad who brought

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<sup>169</sup> *Sarkozy S'enquiert*, *supra* note 13.

<sup>170</sup> *Nouveau Rebondissement*, *supra* note 142.

<sup>171</sup> *L'Affaire Polanski Divise la Croisette*, LE PARISIEN (May 15, 2010), <http://www.leparisien.fr/affaire-polanski/l-affaire-polanski-divise-la-croisette-15-05-2010-923415.php> (Fr.).

<sup>172</sup> *L'Académie des Beaux-Arts Soutient Roman Polanski*, LE PARISIEN (May 12, 2010), <http://www.leparisien.fr/affaire-polanski/l-academie-des-beaux-arts-soutient-roman-polanski-12-05-2010-919706.php> (Fr.).

<sup>173</sup> *Jack Lang: «La Suisse s'Honorerait en Libérant Polanski,»* LE PARISIEN (May 16, 2010), <http://www.leparisien.fr/politique/jack-lang-la-suisse-s-honorerait-en-liberant-polanski-16-05-2010-923602.php> (Fr.).

<sup>174</sup> *La Suisse Refuse d'Extrader Roman Polanski*, LE PARISIEN (July 13, 2010), <http://www.leparisien.fr/faits-divers/la-suisse-refuse-d-extrader-roman-polanski-13-07-2010-999236.php> (Fr.). The Swiss Justice Minister explained, with a nice double negative, that deep clarifications did not allow [her department] to rule out that the extradition request had a procedural defect. *Id.*

<sup>175</sup> *On a Retrouvé Roman Polanski*, LE PARISIEN (July 18, 2010), <http://www.leparisien.fr/loisirs-et-spectacles/on-a-retrouve-roman-polanski-18-07-2010-1004876.php> (Fr.).

[him] their support as well as flowers and bottles of wine," when he was under house arrest.<sup>176</sup>

On the other side of the pond, Los Angeles County Deputy District Attorney March Chomel had pointed out that "[i]t's not U.S. v. France, it's California v. Polanski. Nobody even knows that he's French!"<sup>177</sup> This feeling of cultural misunderstanding and disarray was echoed in a statement by Barbara Blaine, President of the Survivors Network of those Abused by Priests. "This is a travesty," she said in a statement, "our hearts go out to the tens of thousands of sexual assault victims whose perpetrators escaped justice by political clout, shrewd maneuvering or by running out the clock on the statute of limitations."<sup>178</sup> In Los Angeles, District Attorney Steve Cooley stated: "Mr. Polanski is still convicted of serious child sex charges."<sup>179</sup> He added: "I am deeply disappointed that the Swiss authorities denied the request to extradite Roman Polanski. Our office complied fully with all of the factual and legal requirements of the extradition treaty and requests by the U.S. and Swiss Departments of Justice and State."<sup>180</sup> Vowing to continue the pursuit of justice and the arrest of Polanski, State Department spokesman Philip Crowley (who was involved because matters of extradition are managed by the federal government even in state judicial cases, as in the present instance), added: "[a] 13-year-old girl was drugged and raped . . . [t]his is not a matter of technicality. To push this case aside

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

<sup>177</sup> Personal Interview with Marc Chomel, Los Angeles County Deputy District Attorney (Sept. 30, 2009) (on file with author).

<sup>178</sup> Press Statement by Barbara Blaine, President, Survivors Network of those Abused by Priests, *Sex Abuse Victims Respond to Polanski Decision* (July 12, 2010), [http://www.snapnetwork.org/snap\\_statements/2010\\_statements/071210\\_sex\\_abuse\\_victims\\_respond\\_to\\_polanski\\_decision.htm](http://www.snapnetwork.org/snap_statements/2010_statements/071210_sex_abuse_victims_respond_to_polanski_decision.htm), (on file with SNAP).

<sup>179</sup> Henry Chu & Joe Mozingo *Swiss Refuse Extradition, Free Polanski*, L.A. TIMES (July 12, 2010), <http://articles.latimes.com/2010/jul/12/local/la-me-0713-polanski-freedom-20100712>.

<sup>180</sup> *LA District Attorney Vows to Keep Seeking Polanski's Extradition if He's Arrested Again*, DEADLINE HOLLYWOOD (July 12, 2010), <http://deadline.com/2010/07/la-district-attorney-vows-to-seek-polanskis-extradition-if-arrested-elsewhere-53323/>.



based on technicalities we think is regrettable . . . [w]e think it sends a very important message regarding how . . . women and girls are treated around the world."<sup>181</sup> And for Cooley, "The Swiss could not have found a smaller hook on which to hang their hat."<sup>182</sup>

The tone in France was quite different. Henry-Lévy declared "besiding himself with happiness."<sup>183</sup> Culture Minister Frederic Mitterrand found much satisfaction in the Swiss decision and in the fact that the "unanimously admired work of Polanski" was back in center stage.<sup>184</sup> And former Culture Minister Jack Lang concluded: "Thank you Switzerland, congratulations Switzerland!"<sup>185</sup>

The case is now in what former federal prosecutor Laurie Levenson calls a perpetual stalemate.<sup>186</sup> Roman Polanski's legal team has tried for years to have the case dismissed, or the actual sentencing to take place, without him being present on U.S. soil.<sup>187</sup> On December 23, 2014, Los Angeles County Superior Court Judge James R. Brandlin again denied a request from Polanski's lawyers for an evidentiary hearing that they hoped would lead to a dismissal of the case, noting in particular that

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<sup>181</sup> Henry Chu and Paul Richter, *Roman Polanski Freeing Meets with Outrage from Prosecutors*, U.S. State Department, L.A. TIMES (July 12, 2010),

<http://latimesblogs.latimes.com/lanow/2010/07/roman-polanski-arrest-meets-with-outrage-from-prosecutors-us-state-department.html>.

<sup>182</sup> Chu & Mazingo, *supra* note 179.

<sup>183</sup> *Libération de Polanski: «La Fin d'un Cauchemar» Pour sa Femme*, LE PARISIEN (July 12, 2010), <http://www.leparisien.fr/affaire-polanski/liberation-de-polanski-la-fin-d-un-cauchemar-pour-sa-femme-12-07-2010-998565.php> (Fr.).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Dan Weikel & Geoffrey Mohan, *Roman Polanski Loses Bid for Dismissal of Sexual Assault Conviction*, L.A. TIMES (Dec. 24, 2014), <http://www.latimes.com/local/crime/la-me-polanski-20141225-story.html>.

<sup>187</sup> For example, in January 2010, a "state court judge ... rejected the director Roman Polanski's request to be sentenced while he remains under arrest in Switzerland ... 'I choose to insist' that Mr. Polanski appear, the judge said." Michael Cieply, *Polanski Denied Sentencing in Absentia*, N.Y. TIMES (Jan. 22, 2010), [http://www.nytimes.com/2010/01/23/movies/23polanski.html?\\_r=0](http://www.nytimes.com/2010/01/23/movies/23polanski.html?_r=0).

because Polanski had refused to comply with trial court orders, he had no legal right to relief while still a fugitive.<sup>188</sup> "Polanski," Brandlin wrote, "is not entitled to avail himself of this court's power to hear his demands while he openly stands in an attitude of contempt of a legal order from this very court."<sup>189</sup> Alternatively, *The Los Angeles Times* court report noted, "the judge stated that the filmmaker could pursue other remedies, such as cooperating with the extradition process and returning to California—a move that would give him the opportunity to obtain an evidentiary hearing."<sup>190</sup> But if history is any indication, such cooperation on the part of Polanski is unlikely to happen.<sup>191</sup> "There's no reason for him not to keep trying [to file motions], as long as he doesn't have to come back. And if he doesn't come back, I don't think the court will resolve his issues. It will be a stalemate, and it's likely to be a stalemate for all time," Levenson concluded.<sup>192</sup> As 2015 came to an end, Polanski's INTERPOL Red Notice was still in effect,<sup>193</sup> meaning that the convict, or "genius," however one wants to frame him, remains subject to arrest in any country willing to cooperate with the United States on the matter.

### III. COMPARATIVE ANALYSIS

The comparative analysis includes three parts. Part III.A. provides a historical and political background of French cultural policy in international relations and law. Part III.B. reveals the domestic implications of the Polanski case for French operational code. Part III.C. explains the otherwise hermetic reaction of the French executive branch of government and public intellectuals with reference to French cultural policy in international relations and law.

#### A. FRENCH CULTURAL POLICY IN INTERNATIONAL RELATIONS

The French reaction to the Polanski case is best understood through the lens of international communication

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<sup>188</sup> Weikel & Mohan, *supra* note 186.

<sup>189</sup> *Id.*

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

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See *INTERPOL Red Notice for Roman Polanski Remains Valid*, INTERPOL (Nov. 26, 2009), <http://www.interpol.int/en/News-and-media/News/2009/PR112/>.

theory, a field which has much to contribute within the comparative law methodological framework of immersion. It is well established that "information . . . is the vehicle for transmitting values and lifestyles" on a crossborder basis.<sup>194</sup> In this field, cinema historically plays a key role. "The internationalization of a new mass culture . . . began with the film industry," an industry that started in France:

[F]ollowing the first screening in Paris and Berlin in 1895, films were being seen a year later from Bombay to Buenos Aires. By the First World War, the European market was dominated by Pathé,<sup>195</sup> founded in 1907 in France, whose distribution bureaux were located in seven European countries, as well as in Turkey, the USA, and Brazil.<sup>196</sup>

From an international relations standpoint, culture, along with military force, is one of the tools that enabled Western countries to project "their version of reality."<sup>197</sup> As such, cinema is a hegemonic tool, in a Gramscian sense,<sup>198</sup> where consent of the ruled is built by ideological control of cultural production and distribution<sup>199</sup>.

While the United States legitimized its cultural projection endeavors under the free flow doctrine, which focused on free-market distribution mechanisms<sup>200</sup> and audience analysis,<sup>201</sup> France focused on the perceived intrinsic superiority

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<sup>194</sup> Juan Somavia, *The Transnational Power Structure and International Information*, 2 DEV. DIALOGUE 15, 16-17 (1976).

<sup>195</sup> *Id.*

<sup>196</sup> DAYA K. THUSSU, INTERNATIONAL COMMUNICATION: CONTINUITY AND CHANGE 13 (2d ed. 2006).

<sup>197</sup> P. HARRIS, *News Dependence and Structural Changes*, in CRISIS IN INTERNATIONAL NEWS: POLICIES AND PROSPECTS 357-58 (J. RICHSTAD & M. ANDERSON EDS., 1981).

<sup>198</sup> *See generally* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 20 (QUENTIN HOARE AND GEOFFREY NOWELL SMITH EDS., 1971).

<sup>199</sup> THUSSU, *supra* note 196, at 53; *see also generally* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (Pantheon Publishing 1988).

<sup>200</sup> *See generally* THUSSU, *supra* note 196.

<sup>201</sup> Schiller, *supra* note 42.

of its culture.<sup>202</sup> Referring to French public diplomacy efforts towards colonial Africa after WWII, Gerits suggests that “the target population was almost completely absent in French thinking about public diplomacy. Instead, attention was given to the quality of the cultural product. It was not questioned if target populations liked the culture that was offered, which went against U.S. psychological tactics.”<sup>203</sup> Comparing French cultural production to that of the British, for example, Leopold Senghor, the French Minister responsible for the French policy in international cultural matters, did not hesitate to declare that “France has nothing to lose by showing its work, its oeuvre. It is this oeuvre that has a superior quality compared to the work of the British.”<sup>204</sup> France, like other countries involved in imperialistic endeavors, framed and legitimized its hegemonic behavior by including them under the umbrella of universalism, a term suggesting that France's vision embraces universally-shared principles, which somehow have only been revealed to the French and must therefore be projected for the good of humanity. This vision is the theory that has supported the physical projection of France in international relations, in particular during and through the colonization era: “[D]escended from a long tradition of France’s *mission civilisatrice* (civilizing mission), the notion that a thoroughly particular French culture had universal relevance for all of humanity was a postwar site in which former antagonists could find reconciliation.”<sup>205</sup>

Traditionally, the United States is the primary enemy to French intellectual radiance through cinema. As noted by Pierre Bourdieu, “a large part of what we are observing in Franco-American relations is the product of a relationship structure that we must think of as the confrontation of two universalist imperialisms.”<sup>206</sup> Stanley Hoffman shares this analysis:

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<sup>202</sup> Frank Gerits, *An International Approach to the Cultural Cold War: French Public Diplomacy Towards Africa (1945-1965)*, 12 ZEITENBLICKE 1, 17 (2013).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> S. SCHLOESSER, JAZZ AGE CATHOLICISM: MYSTIC MODERNISM IN POSTWAR PARIS, 1919-1933 153 (Univ. of Toronto Press 2005), citing A. CONKLIN, A MISSION TO CIVILIZE: THE REPUBLICAN IDEA OF EMPIRE IN FRANCE AND WEST AFRICA, 1895-1930 4-6 (Stanford Univ. Press 1997).

<sup>206</sup> See Bourdieu, *supra* note 41, at 149.

[T]he USA and France are the only nations that present their values as universal, and give themselves as models to the rest of the world. Foreign policy conflicts that have opposed both countries since 1945 often have been economic, strategic or diplomatic struggles, but the rivalry of universalisms often has given these struggles a passionate twist.<sup>207</sup>

This antagonism was exemplified during the cold war by statements of the French ambassador to Ghana, Louis de Guiringaud, who was frustrated that “the Americans can attract more than a thousand people in their cinema in Accra, while there is little interest for the culture that has been produced in ‘civilized’ countries.”<sup>208</sup> Cultural flows originating from the U.S. are an impediment to France’s civilizing mission, since they provide a counter narrative to French claims of universalism. Competition between the two “social models” offered by the USA and France, Hoffman wrote,

[S]eems to be taking a turn for the worst as far as the French model is concerned. (One can note that both models have presented themselves both as universally viable and as exceptional: how many times did we hear about the exceptionalism of the ‘City on the Hill’ that Ronald Reagan was so fond of, about the special destiny and the unique mission of this country – that Wilson had already celebrated – and of the ‘French exception,’ this refusal to give way to cultural conformity). As of today, the French exception is blemishing, while the American model is a good export.<sup>209</sup>

Lamont & Thévenot concur:

The two countries have historically defined themselves as having privileged missions toward humanity in that, through their revolutions . . . they carried values for which universality is claimed: modernity, progress, rationality, liberty, democracy, human rights, and equality . . . Yet, these competing cultural models with hegemonic pretensions are partly defined in opposition to one another.<sup>210</sup>

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<sup>207</sup> Stanley Hoffman, *Deux Universalismes en Conflit*, 21(1) THE TOCQUEVILLE REVIEW 65 (2000) (Fr.).

<sup>208</sup> See Gerits, *supra* note 202.

<sup>209</sup> See Hoffman, *supra* note 207, at 68.

<sup>210</sup> Lamont & Thévenot, *supra* note 41, at 3.

This clash explains that the United States Information Agency (USIA)'s activities were studied extensively by the French during the cold war, "not only because they were successful but also because the French had traditionally focused on the U.S. as the most important threat to their colonial claims."<sup>211</sup> Where during the Cold War, the West and the East waged a physical war on international battlefields, cinema was, and remains, one of the battlegrounds where France and the U.S., otherwise allies, wage a battle for imposing their respective and distinct universalist vision of the world. The Polanski case is one of the sites where this battle plays out. The case plays on two levels that are complimentary: a domestic level and an international level. On both levels, France's operational code, "a set of political beliefs or more broadly . . . a set of beliefs embedded in the personality of a leader *or originating from the cultural matrix of a society*,"<sup>212</sup> is challenged by the United States, which explains the reaction of the French executive branch, the branch of government in charge of foreign policy.

#### B. DOMESTIC IMPLICATIONS OF THE POLANSKI CASE FOR FRENCH OPERATIONAL CODE

Historically, the French language and culture have been cores of French cohesion, enforced through an über-centralized and top-down state-society relations model. As such, they are part of French operational code. Not only did the "French 'revolutionary nation' accord a privileged place to the symbol of language in its own initial process of formation,"<sup>213</sup> in a process of simplification well explained by James Scott,<sup>214</sup> it also served as a crucial tool of creation of what Etienne Balibar called a "retrospective illusion," that of the "self-manifestation of the national personality."<sup>215</sup> From a pragmatic standpoint, it served to support the establishment of a centralized power, when local particularism and rule had been the reality. The Ordinance of Villers-Cotterêts in 1539, which mandated the use of French to

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<sup>211</sup> *Id.*

<sup>212</sup> See Walker et al., *supra* note 15 (emphasis added).

<sup>213</sup> Etienne Balibar, *The Nation Form: History and Ideology*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 104 (Chris Turner trans.) (1991).

<sup>214</sup> JAMES SCOTT, SEEING LIKE A STATE 72-73(1998).

<sup>215</sup> Balibar *supra* note 213, at 86.

record all court judgments, “was a step in the Crown’s long match to establish its authority over a diversity of rivals.”<sup>216</sup>

With the revolution of 1789, language unity as a means to establish centralized power became intertwined with ideology as “the ideal of the Revolution lay in uniformity and the extinction of particularisms.”<sup>217</sup> Language unity was a key to grounding the myth of National Unity. As such, it is a key part of France’s operational code. This coincidence of practical and ideological motives is perhaps best summarized by Eugen Weber: “teaching the people French was an important facet in ‘civilizing’ them, in their integration into a superior modern world.”<sup>218</sup> Contrary to Ernest Renan’s self-congratulatory remarks,<sup>219</sup> unity of language, and by extension unity of the state, was obtained by coercive measures.<sup>220</sup> Such coercive measures persist today, and are manifested in the 1994 *Loi Toubon* law on the use of the French language.<sup>221</sup> Under this statute, “[t]he use of French shall be mandatory for the designation, offer, presentation . . . of goods, products and services.”<sup>222</sup> Use of the French language is also “compulsory in all the programs . . . of radio and television broadcasting

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<sup>216</sup> EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914 70 (Stanford Univ. Press 1976).

<sup>217</sup> *Id.* at 72.

<sup>218</sup> *Id.* at 72-73. Here, one can observe the premises of what would become, on the international scene, modernization theory. Associated in particular with David Lerner, “modernization theory arose from the notion that international mass communication could be used to spread the message of modernity and transfer the economic and political models of the West to the newly independent countries of the South.” See THUSSU, *supra* note 196, at 42-43.

<sup>219</sup> Ernest Renan, *What is a Nation?* (1882), reprinted in BECOMING NATIONAL 50 (Geoff Eley & Ronald G. Suny eds., Martin Thom, trans., 1996).

<sup>220</sup> See Weber, *supra* note 216, at 67-94.

<sup>221</sup> Loi 94-665 du 4 août 1994 relative à l'emploi de la langue française [Law 94-665 of Aug. 4, 1994 on the Use of the French Language], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 4, 1994, p. 11392 [hereinafter *Loi Toubon Act*].

<sup>222</sup> *Id.*

organizations.”<sup>223</sup> Furthermore, “[a]ny inscription or announcement posted or made . . . in a place open to the public . . . must be expressed in French.”<sup>224</sup> Finally, the law requires that a significant percentage of music played over the French airwaves be “French music.”<sup>225</sup> The thriving existence of a unified national culture is a core of France’s operational code, which explains the existence of the law.

The *Loi Toubon* Act is a protectionist tool that, on a domestic level, plays in international relations as a levee against a foreign cultural penetration that would endanger national culture, and, by extension, national unity. Long gone are the days where the cultural trade balance oozed of surplus; in the field of cinema, long gone are the days where “French cinema . . . dominated world production”<sup>226</sup> and was a key tool of French imperialism through cultural hegemony - or, as is called in France, “French intellectual radiance.”<sup>227</sup> With World War I and World War II, the balance tipped the other way. As the Marshall plan was under way, French communists started warning against what *L’Humanité’s* editor-in-chief Pierre Hervé called “cocacolonization” in a famous 1949 editorial.<sup>228</sup> The term exemplifies the “emerging resistance to ‘Americanization’” and plays on the fact that “perhaps no commercial product is more thoroughly identified with America than Coca-Cola.”<sup>229</sup> In fact, a Coca-Cola official suggested at the time, “apparently some of our friends overseas have difficulty distinguishing between the United States and Coca-Cola.”<sup>230</sup> By asking “will we be cocacolonisés?,” French communists emphasized the fact that “Coca-Cola was part of the Marshall Plan’s strategy of colonizing France,” and “only one feature of a multifaceted

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> P. FLICHY, P, DYNAMICS OF MODERN COMMUNICATION 77 (1995).

<sup>227</sup> SCHLOESSER, *supra* note 205, at 153.

<sup>228</sup> Pierre Hervé, *Serons-nous Cocacolonisés?*, L’HUMANITE Nov. 8, 1949, at 1-2.

<sup>229</sup> R.F. Kuisel, *Coca-Cola and the Cold War: The French Face Americanization, 1948-1953*, 17 (1) FRENCH HISTORICAL STUDIES 96, 97 (1991).

<sup>230</sup> *Id.* at 98.



American 'invasion' that included Hollywood films, the *Readers' Digest*, and tractors."<sup>231</sup> Even the more moderate

*Le Monde* argued Coca-Cola represented the coming American commercial and cultural invasion . . . 'What the French criticize is less Coca-Cola than its orchestration, less the drink itself, than the civilization—or as they like to say the style of life—of which it is the symbol . . . What is now at stake is the moral landscape of France . . . Coca-Cola seems to be the Danzig of European culture."<sup>232</sup>

## Le plan Marshall... et la suite

Une grande enquête de Pierre HERVE

III

### Serons-nous cocacolonisés?

ON ne peut pas dire que la France soit un pays pauvre en vins de comptoir, bières, cidres et eaux minérales. On fabrique chez nous assez de limonades et de jus de fruits. De nombreuses entreprises, grandes ou petites, seraient directement menacées par la pénétration sur le marché français de la boisson dite hygiénique appelée Coca-Cola.

Or, des pourparlers entre la société Coca-Cola et le gouvernement français ont eu lieu. Des sociétés telles que Pernod, les Glacières de Paris, les Caves Lyonnaises, Cordial-Médoc ont conclu des contrats au terme desquels la mise en bouteille et la vente leur seraient confiées. Le directeur général de Coca-Cola a déclaré : « L'expérience que nous avons acquise dans 33 pays nous permet d'affirmer que nous arriverons au bout de trois ans à vendre quarante bouteilles par Français et par an. »

SUITE EN PAGE 2

Figure 1: *L'Humanité* editorialist Pierre Hervé asks: *Will we be cocacolonized?*<sup>233</sup>

Today, cocacolonization has been replaced by "omnigooglization." Omnigooglization refers to the diffusion of American ideology through language and culture in the digital age, and has been vilified by French intellectuals and government members.<sup>234</sup> As summarized by Sophie Meunier,

<sup>231</sup> *Id.* at 101-02.

<sup>232</sup> Kuisel *supra* note 229, at 113.

<sup>233</sup> See Hervé *supra* note 228.

<sup>234</sup> Scott Lamb, *Culture Wars in Cyber Space: What Does France Have Against Google?*, SPEIGEL ONLINE INT'L (Mar. 25, 2005), <http://www.spiegel.de/international/culture-wars-in-cyber-space-what->

"the controversy soon arose with a roar."<sup>235</sup> In January 2005, Jean-Noel Jeanneney, a noted historian presently head of the French National Library (BNF), wrote a long editorial in *Le Monde* entitled: "When Google Challenges Europe."<sup>236</sup> He argued that Google's plans to digitize books and make their content available on the Internet represented a threat to France because this would reflect a unipolar world view with a strong bias towards English works and American culture.<sup>237</sup> Although in the U.S. this project was portrayed as the long dream of humankind to have a universal library, in France it was presented as omnigooglization: "a crushing domination by America on future generations' understanding of the world."<sup>238</sup> French President Jacques Chirac responded by calling for a French "counterattack" by asking the national library to draw up plans to accelerate the digitization of its collections, and to work with other European nations to put their libraries online.<sup>239</sup> It is in this context that the Polanski case took place.

I argue that just like with omnigooglization, French intellectual elites and executive branch members perceived the attack on Polanski as an attack against France within its own territory. The reference by the Minister of Culture to "a certain America that frightens, and it is this America that just showed its face to us"<sup>240</sup> is reminiscent of visual artifacts created by the French Communist Party during the era of *cocacolonisation*, such as the poster depicted in Figure 2.

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does-france-have-against-google-a-348040.html.

<sup>235</sup> Sophie Meunier, *The Distinctiveness of French Anti-Americanism*, in ANTI-AMERICANISMS IN WORLD POLITICS 129, 134 (2006).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Meunier, *supra* note 235.

<sup>239</sup> Geoffrey Nunberg, *Letting the Net Speak for Itself: Fears of an "Anglo-Saxon" Takeover of the Online World are Unfounded*, SAN JOSE MERCURY NEWS (Apr. 17, 2005), <http://people.ischool.berkeley.edu/~nunberg/web1g.html>.

<sup>240</sup> Frédéric Mitterrand Juge, *supra* note 12.



Figure 2: French Communist Party poster, circa 1950. The American octopus, complete with dollar signs in its eyes, attempts to take over French territory. The poster reads: “No, France will not be a colonized country! Americans in America!”<sup>241</sup>

Because the uniform imposition of the French language within the domestic boundaries of the sovereign French State had been seen as a way to integrate the French into “a superior modern world,” to bring them a “higher level of civilization,” and to enable them “to read the same newspaper, published in Paris, which brings the ideas worked out in the great city,”<sup>242</sup> an attack on French culture is an attack on the core of French civilization within its territory. The attacks on French culture in the fifties were perceived as coming from the spread of U.S.

<sup>241</sup> PARTI COMMUNISTE FRANÇAIS, LES AMERICAINS EN AMERIQUE (poster, circa 1950).

<sup>242</sup> See Weber, *supra* note 216, at 73.

consumption of goods, such as Coca-Cola, and, as the communists also pointed out, Hollywood movies. This critique was later echoed in the work of Herbert Schiller. In his seminal essay, *Communication and Cultural Domination*,<sup>243</sup> Schiller warned that a

[L]argely one-directional flow of information from core to periphery represents the reality of power. So, too, does the promotion of a single language—English . . . [c]ultural-informational outputs represent much more than conventional units of personal-consumption goods: they are also embodiments of the ideological features of the world capitalist economy.<sup>244</sup>

Just like the French communists, Schiller pinpointed the *Reader's Digest* as one such cultural information output: “[t]he magazine exports the best in American life – in my opinion, the Digest is doing as much as the United States Information Agency to win the battle for men’s minds.”<sup>245</sup> Schiller also identified Disney products as prototypic artifacts bearing “the ideological imprint of the main centers of the capitalist economy.”<sup>246</sup>

Enter the Polanski case. I argue that the United States’ attack on a French movie director was interpreted by the French cultural elites and executive branch members as a perpetuation of the perceived U.S. attempt to colonize France. This attack triggered a boomerang effect where the in-group protected one of its own by, in turn, attacking the U.S. This in-group behavior was summarized explicitly by Arnaud d’Hauterives, the Perpetual Secretary of the French Fine Arts Academy, a state institution created by a Napoleonic law,<sup>247</sup> of which Polanski is a member, and with the mission to “protect the status of artists”:<sup>248</sup> “I am sure everyone has an opinion about what [Polanski’s] life

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<sup>243</sup> Schiller, *supra* note 42.

<sup>244</sup> *Id.* at 6.

<sup>245</sup> *Id.* (quoting David Ogilvy, *Confessions of a Magazine Reader*, READER’S DIGEST (promotional brochure, Sept., 1974).

<sup>246</sup> *Id.* at 10.

<sup>247</sup> *Une Institution*, L’INSTITUT DE FRANCE, <http://www.institut-de-france.fr/fr/une-institution> (last visited Apr. 2, 2016) (Fr.).

<sup>248</sup> L’Academie des Beaux-Arts, INSTITUT DE FRANCE, <http://www.institut-de-france.fr/fr/une-institution/les-acad%C3%A9mies/lacad%C3%A9mie-des-beaux-arts> (last visited April 2, 2016) (Fr.).

has been, the kind of shadiness he sometimes represents, which is something I find interesting and sympathetic about him.”<sup>249</sup> And to conclude with a smirk: “Roman Polanski is accepted. He is one of us, and we maintain an *esprit de corps*.”<sup>250</sup> In the eyes of intellectual elites and executive branch members, then, Polanski is not a common criminal subject to the efforts of a foreign prosecutor to obtain justice. Rather, he is the embodiment of French culture being assaulted by Hollywood *within French territory*.

### C. POLANSKI AND FRENCH OPERATIONAL CODE IN INTERNATIONAL RELATIONS

I further argue that Polanski's arrest was also perceived as an attack on France *in the international scene*. French culture and French cinema in particular, is a tool to project France's universal values on the world, just like the French Civil Code (a universal expression of natural law) once was a part of Napoleon's imperial views.<sup>251</sup> Weber describes this coincidence of domestic and international interests well. Referring to the perceived need to bring out “the ideas worked out in the great city of Paris,” he writes, “there can be no clearer expression of imperialistic sentiment: a white man's burden of Francophony, whose *first* conquests were to be right at home.”<sup>252</sup> When highlighted, this coincidence of domestic and international interests make clear that when the President of the French National Library, Jean-Noel Jeanneney, refers to omnigooglization as a “risk of crushing American domination in the way future generations conceive the world,”<sup>253</sup> he is referring

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<sup>249</sup> *ROMAN POLANSKI: WANTED AND DESIRED* (HBO documentary, 2008), at 1:34:02 – 1:39:50.

<sup>250</sup> *Id.*

<sup>251</sup> Legrand, *supra* note 19, at 289; R. Michaels, *Code vs. Code: Nationalist and Internationalist Images of the Code civil in the French Resistance to a European Codification*, 8 EUR. REV. OF CONTRACT L. 277 (2012).

<sup>252</sup> See Weber, *supra* note 216, at 73 (emphasis added).

<sup>253</sup> Jean-Noel Jeanneney, *Quand Google Défie l'Europe*, LE MONDE (Jan. 22, 2005), [http://www.lemonde.fr/archives/article/2005/01/22/quand-google-defie-l-europe-par-jean-noel-jeanneney\\_395266\\_1819218.html?xtmc=google\\_jeanneney&xtcr=27](http://www.lemonde.fr/archives/article/2005/01/22/quand-google-defie-l-europe-par-jean-noel-jeanneney_395266_1819218.html?xtmc=google_jeanneney&xtcr=27).

not only to French generations, but also to generations of peoples around the world, who but-for the flow of American-produced content, would benefit from what is considered to be the higher level of civilization brought to them by the French, not through swords, but through culture.<sup>254</sup> The clash also happens to take place at a time where one of the imperialisms is on the upswing, while the other is in decline,<sup>255</sup> and, to borrow from Bourdieu's previous interpretation of conflict in French-American relations, can probably be attributed in large part to feelings of revenge or resentment, though it cannot be excluded that parts of the reactions we might be tempted to attribute to anti-Americanism could and should be understood as strategies of legitimate resistance against new forms of imperialism . . . How can we distinguish between regressive, nationalist forms of defense that aim at preserving protected cultural markets, and legitimate forms of defense against the attacks of monopolistic concentration? The intellectual elites, who are first in line when it comes to the imperialism of the universal, find in an *ambiguous reality* innumerable occasions to feed their *bad faith* strategy.<sup>256</sup>

Bourdieu's theoretical insight finds a proper demonstration in the Polanski case.

The reality of the Polanski trial was in fact ambiguous. Although there is no question that Polanski committed "unlawful sexual intercourse, having had sexual relations with a female not yet 14 years old,"<sup>257</sup> who he had drugged, it has also been established that there were procedural flaws in the sentencing part of the trial, which in fact led to the removal of the judge in February of 1978.<sup>258</sup> Equally manifest, however, is the bad faith

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<sup>254</sup> *Id.*

<sup>255</sup> See Bourdieu, *supra* note 206, at 153.

<sup>256</sup> *Id.* at 153-154.

<sup>257</sup> See Transcript of Grand Jury Proceedings, *supra* note 1.

<sup>258</sup> See *ROMAN POLANSKI: WANTED AND DESIRED*, *supra* note 249, at 1:31:48. According to the victim's lawyer, "[Polanski] was supposed to be treated fairly in court, and he clearly was not." See *supra* note [Zenovich] at 1'32'18." Roger Gunson, the original prosecutor, in fact agreed to the Statement of Disqualification for Cause of Judge filed by Polanski's lawyer on February 14, 1978: "I reviewed that document before it was filed and I agreed with it." DECLARATION OF ROGER GUNSON (August 29, 2009). In fact, Gunson added: "I'm

of the intellectual elites and of government Ministers who claimed, amongst other things, that Polanski was the victim of “a political manipulation in the United States”<sup>259</sup> (as evidence of the bad faith, no details were revealed as to who was supposedly manipulating who) and that the methods used in the arrest were akin to those of the Nazis' Gestapo.<sup>260</sup> This confirms the argument: the French reaction to the U.S. criminal case should be seen as the manifestation of the clash of the two imperialisms, which are both based on inherently incompatible claims of universality.

Because French international influence has for so long been based on hegemony, anything that remotely resembles an attack on an internationally-known artifact of French culture is seen as an attack on France in the international scene. The Polanski arrest, I argue, was seen by French elites as an assault on French culture, and, therefore, as an assault against the integrity of the French state in an international context, because cinema is one of the arenas where the war for cultural influence is being played in the international scene. The highest ranking government Ministers involved in openly criticizing the American government is particularly revealing of the international relations implications of the case, for in France, in contrast to the United States where Congress plays a key role, foreign policy is the *domaine réservé* of the executive branch. The involvement of the Minister of Culture, the Foreign Affairs Minister, and the President of the Republic is indicative of the fact that the Polanski case was a matter of international relations at a crucial, ideological level. The case touched the heart of French operational code—that “set of political beliefs . . . originating from the cultural matrix of a society.”<sup>261</sup> The fact that the French have traditionally focused on the intrinsic qualities of their cultural products rather than on audience analysis<sup>262</sup> helps further explain the violent reaction of the Minister of Culture to the arrest of Polanski: “while there is a

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not surprised that [Polanski] left under those circumstances. *See supra* note [Zenovich] at 1'32'19.”

<sup>259</sup> *Jack, supra* note 173.

<sup>260</sup> *Le Cinéma le Soutient Toujours, supra* note 9.

<sup>261</sup> *See* Walker et al., *supra* note 15.

<sup>262</sup> *See* Gerits, *supra* note 202, at 25.

generous America which we love, there also is a certain America that frightens, and it is this America that has just showed its face to us.”<sup>263</sup>

The Polanski case was not about saving a Frenchman who was wrongly accused of a crime he did not commit or who was unjustly being prosecuted in a foreign country suspect of human right violations. This was not a case of Saving Private Polanski. This was a case of saving French cinema, and, through it, French international influence. Further textual analysis of the key players’ statements helps support this understanding of what I argue is the case’s bottom line. Polanski is never referred to by the intellectual elites and executive branch members as the convicted felon that he is. Similarly, he is never referred to as an ordinary French citizen, victim of a judicial error in a foreign land, who must be rescued because of his citizenship status. In the words of current and former top Ministers, Polanski must be saved because he is a “great European creator” (Jack Lang, former Minister of Culture and current head of the Arab World Institute, appointed by the Foreign Affairs Minister),<sup>264</sup> a “French citizen and internationally famous artist” whom Frederic Mitterrand (current Minister of Culture) must save in his capacity as “the artists’ Minister.”<sup>265</sup> Polanski, we learn, is the victim of “a political manipulation in the United States” (Jack Lang).<sup>266</sup> In fact, we are told to be critical of “the ways in which the judicial system is being used in this case . . . the Swiss cinema invites Roman Polanski and knows that he will come . . . this is not very pretty . . . Frankly, this story is a bit sinister. Such a talented man, known throughout the world, all this is not very neat” (Bernard Kouchner, Foreign Affairs Minister).<sup>267</sup> Thankfully (from the elites’ perspective), Mitterrand concluded, Polanski’s ultimate release ensured that his “unanimously admired work” was back at center stage.<sup>268</sup>

In the end, then, this was a case of defending a perceived frontal assault against one of France’s key instruments of international radiance, its movie industry, and, through it,

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<sup>263</sup> *Frédéric Mitterrand Juge*, *supra* note 12.

<sup>264</sup> *Stars*, *supra* note 128.

<sup>265</sup> *La Polémique Mitterrand*, *supra* note 155.

<sup>266</sup> *Jack*, *supra* note 173.

<sup>267</sup> *Polanski: Kouchner a Écrit à Clinton*, *supra* note 10.

<sup>268</sup> *Libération de Polanski*, *supra* note 183.



France's very operational code. The case was particularly salient, and the boomerang effect particularly brutal, because Polanski is the French director who has been the most successful, for the longest time, in the international scene. Although it is commonly thought that the French "cultural exception," the goal of which is to protect and promote domestic artists and other elements of domestic culture,"<sup>269</sup> was introduced by France in the General Agreement on Tariffs and Trade (GATT) negotiations in 1993,<sup>270</sup> its underlying principles go back in time much longer. From an international relations perspective, the French state's tradition is to anoint national champions to fight in the international ring—often against the United States.<sup>271</sup> In the 1970s, for example, companies like Bull and Alcatel were picked as the spearhead of a new French computer hardware and databases industry, which competed with a clearly designated enemy: IBM.<sup>272</sup> Big Blue, in the French mind, was in fact America's national champion, one that would dominate the database industry, and indirectly, world culture, but-for French efforts to counter American universalism.<sup>273</sup> Google came next, as discussed above. Polanski, in this sense, also embodies the French tradition of anointing national champions in order to fight in the international ring—with the Los Angeles district attorney (and by extension Hollywood) as the role of the American villain. Attack Polanski, attack France's civilizing mission and France's integrity in the international legal order.

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<sup>269</sup> *TTIP and the Cultural Exception*, EUR. PARLIAMENTARY RESEARCH SERV., (Aug. 29, 2014), <http://epthinktank.eu/2014/08/29/ttip-and-the-cultural-exception/>.

<sup>270</sup> *Id.*

<sup>271</sup> *See generally* PASCAL GAUCHON, *LE MODÈLE FRANÇAIS DEPUIS 1945* (2002).

<sup>272</sup> *See generally* Pierre Mounier-Kuhn, *Bull: A World-Wide Company Born in Europe*, 11 (4) *IEEE ANNALS OF THE HISTORY OF COMPUTING* 279 (1989); SIMON NORA AND ALAIN MINC, *THE COMPUTERIZATION OF SOC'Y* (1981).

<sup>273</sup> *See* NORA & MINC, *supra* note 272.

### CONCLUSION

The Polanski case reveals a mutual misunderstanding in Franco-American relations. Although the French side fails to understand the importance of the rule of law principle in American society, and the fact that from the criminal law standpoint, "[i]t's not U.S. v. France, it's California v. Polanski,"<sup>274</sup> the present case study provides insight for American law and political scholars who may have missed the importance of cultural policy in French operational code and its impact on French foreign policy in the international legal order.

From the French perspective, the Polanski case is an international law and politics case of U.S. v. France. Comparative law theory, and in particular, *immersion* methodology, enables us to unveil two realities on the French side. First, American international criminal procedure efforts to pinch Polanski in Switzerland were perceived by the French intellectual elites and executive branch members as an assault by Hollywood against the "moral landscape of France"<sup>275</sup> in the realm of the arts, in the tradition of *cocacolonization* and *omnigooglization*. Second, the attempt by the U.S. to seize Polanski was also perceived as an attack against France in the international scene—in particular, as an attempt to hinder France's civilizing mission and the projection of its universalist model.

The case also highlights a fundamental irony in France's position: the self-crowned spearhead against U.S. hegemony in the international legal order only relies on Gramscian arguments to better ground and justify its own civilizing mission, that is, cultural imperialism. These case insights are intended to foster a mutual understanding between American and French jurists and international relations scholars, and to foster constructive Franco-American relations.

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<sup>274</sup> Personal Interview with Marc Chomel, Los Angeles County Deputy District Attorney (Sept. 30, 2009) (on file with author).

<sup>275</sup> Kuisel *supra* note 229, at 113.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

COMMENT:

**POLANSKI: ANOTHER ITERATION OF FRENCH  
CULTURAL POLICY, AND BAD FOR FRANCE**

ANTHONY MARINO\*

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**INTRODUCTION**

It has been said that, “among all the living languages in the republic of letters, French is the only one which its presiding judges have sentenced not to enrich itself at the expense of the other languages.”<sup>1</sup> Beginning as early as 1539 C.E., with the enactment of the Ordinance of Villers-Cotterêts, France has shown a zealous penchant for using the rule of law to enforce the primacy of its own language in the national hierarchy by establishing it as the official language of what would become

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\* J.D. Candidate 2017, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> GIACOMO CASANOVA, THE MEMOIRES OF CASANOVA, COMPLETE THE RARE UNABRIDGED LONDON EDITION OF 1894, PLUS AN UNPUBLISHED CHAPTER OF HISTORY, BY ARTHUR SYMONS 34 (Arthur Machen trans., Project Gutenberg 2006), FREE INFO. SOC. (Nov. 2, 2006), <http://www.freeinfosociety.com/media/pdf/4363.pdf> (last visited May 20, 2016).

modern France.<sup>2</sup> Ten years later, in 1549 C.E., the same nationalistic fervor for the supremacy of the French language became a crusade of the French artistic elite when Joachim du Bellay penned his poem *La Deffence et Illustration de la Langue Françoise*.<sup>3</sup> Thirty years later, in 1579 C.E., Henri Estienne published his *De la Precellence du Langage François*, praising the pure French language, in reaction to a “fad” dialect of Italianized French known as *le frantalien*.<sup>4</sup> The same sentiment arose in the seventeenth century in reaction to a second dialect that blended French and Spanish, referred to in French as *le fragnol*.<sup>5</sup> In 1635 C.E., this policy asserting the purity of the French language was distilled into the Académie Française, with the purpose of “labor[ing] with all care and diligence to give certain rules to our language, and to render it pure, eloquent, and capable of treating the arts and sciences.”<sup>6</sup> Its charter further went on to state that the Academy would “cleanse the language from the impurities it has contracted in the mouths of the common people, from the jargon of the lawyers, from the misuses of ignorant courtiers, and the abuses of the pulpit.”<sup>7</sup> The Academy still pursues a version of these original goals today through the same method: the publishing of a dictionary showing “the current state of the very best French.”<sup>8</sup>

Modern developments of the policy of French language supremacy have centered around the enactment, and then replacement, of statutory law mandating the use of French and the hyper-vigilant protection of French cultural icons, embodied by the Polanski controversy.<sup>9</sup> This comment briefly explores this

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<sup>2</sup> DAVID D. LAITIN, *NATIONS, STATES, AND VIOLENCE* 86 (Oxford Univ. Press, 1<sup>st</sup> ed. 2007).

<sup>3</sup> Roderick Munday, *Legislating in Defence of the French Language*, 44 *CAMBRIDGE L.J.* 218, 222 (1985).

<sup>4</sup> *Id.* at 222-223.

<sup>5</sup> *Id.* at 223.

<sup>6</sup> *L'histoire*, ACADÉMIE FRANÇAISE, <http://www.academie-francaise.fr/linstitution/lhistoire> (last visited May 20, 2016); Munday, *supra* note 3, at 223.

<sup>7</sup> Munday, *supra* note 3, at 223.

<sup>8</sup> *Les Missions*, ACADÉMIE FRANÇAISE, <http://www.academie-francaise.fr/linstitution/les-missions> (last visited May 20, 2016); Munday, *supra* note 3, at 223.

<sup>9</sup> Stacy Feld, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31

statutory law within the context of the Polanski controversy and argues that the continuation of these policies is bad for France.

### I. BAS-LAURIOL, TOUBON, AND POLANSKI: MODERN FRENCH CULTURAL PRIMACY

#### A. THE BEGINNINGS OF MODERN DAY POLICY OF CULTURAL PROTECTION

The first law legislating French language supremacy was enacted in 1975.<sup>10</sup> Known colloquially as the *loi Bas-Lauriol* (“the Bas-Lauriol law”), the legislative history reflects a strong consumer protection rationale akin to ones used in American trademark jurisprudence.<sup>11</sup> Bas-Lauriol’s asserted purpose was to ban the use of “misleading language in the sale of goods and services.”<sup>12</sup> In execution, this meant that all business transactions, documents, and advertisements under the law’s jurisdiction were required to be in French.<sup>13</sup> The law also provided the terms that appeared in a censorship commission’s list of banned terms.<sup>14</sup> Bas-Lauriol also provided exceptions when a foreign or banned term had no French equivalent.<sup>15</sup> This allowed space for foreign companies to continue using their well-known foreign trademarks.<sup>16</sup>

France’s second (and current) law regulating language was enacted in July 1995, roughly fifteen years after Bas-Lauriol.<sup>17</sup> Drafted as a replacement for Bas-Lauriol, the *loi Toubon* (“the Toubon law”) functions in much the same way as

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VAND. J. TRANSNAT’L L. 153 (1998); *see generally* Julien Mailland, *Roman Polanski and the “Artists’ Minister”*: *American Criminal Law v. French Cultural Diplomacy*, 5 ARIZ. ST. SPORTS & ENT. L.J. 283 (Spr. 2016).

<sup>10</sup> Feld, *supra* note 9, at 162.

<sup>11</sup> *Id.*; *see generally* 1-1 Gilson on Trademarks § 1.03 (2015).

<sup>12</sup> Loretta Nelms-Reyes, *Deal-Making on French Terms: How France’s Legislative Crusade to Purge American Terminology from French Affects Business Transactions*, 26 CAL. W. INT’L L.J. 273, 280 (1996).

<sup>13</sup> *Id.* at 281.

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Law No. 94-665 of Aug. 4, 1994, Relative a l’emploi de la langue francaise, J.O., Aug. 5, 1994.

Bas-Lauriol in regards to commercial speech.<sup>18</sup> Toubon's policy rationale differs in that its scope was broadened to encompass the protectionist "cultural objective" that was implicit on the face of Bas-Lauriol.<sup>19</sup> This new, broader policy mandate has enabled the French legislature to expand Toubon's reach beyond that of Bas-Lauriol to further encompass the education, audiovisual, scientific, and "public" sectors.<sup>20</sup> Although the French Constitutional Court eventually struck down portions of Toubon,<sup>21</sup> it serves as a prime example of the lengths that France will go in its desire to protect its culture.

#### B. THE PROTECTION OF POLANSKI

Most recently, France has asserted its policy of cultural protection in the international realm through the power of its executive branch by protecting convicted child-molester and award winning filmmaker Roman Polanski.<sup>22</sup> Polanski, who drugged and raped a 13-year-old-girl, pleaded guilty to "unlawful sexual intercourse" in 1977.<sup>23</sup> Instead of facing what would most likely have been a lenient sentence of probation, Polanski fled to France where he was immune from sentencing and deportation.<sup>24</sup> The United States subsequently filed an international arrest warrant with INTERPOL, seeking to extradite Polanski to complete his sentencing.<sup>25</sup> In 2009, the United States used the United Bank of Switzerland's deferred fraud conviction in Miami court to leverage the Swiss government into arresting Polanski when he traveled to Switzerland.

French government officials' commentary concerning the arrest clearly displays the country's policy of cultural protection.<sup>26</sup> Frederic Mitterrand, the French Cultural Minister at the time, referred to the arrest as "repulsive" and "deprived of

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<sup>18</sup> Nelms-Reyes, *supra* note 12, at 290.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 290-291.

<sup>21</sup> Decision No. 94-345 DC of July 29, 1994, Conseil Constitutionnel, Loi Relatif a L'Emploi de la Langue Francaise.

<sup>22</sup> *See generally* Mailland, *supra* note 9.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

sense” while referring to Polanski as the victim of a “trap” against an “internationally famous artist.”<sup>27</sup> French President Nicolas Sarkozy mirrored Mitterand’s remarks.<sup>28</sup> The French Executive Branch even went as far as attempting to strong-arm then Secretary of State Hillary Clinton.<sup>29</sup> Bernard Kouchner, then the French Foreign Affairs Minister, publically stated that “this story is a bit sinister. Such a talented man, known throughout the world, all this is not very neat.”<sup>30</sup> Ultimately, the combined power of what seems like every official in the French Executive Branch was too much for the Swiss government and Polanski was released on a technicality.<sup>31</sup>

## II. WHY FRANCE SHOULD DITCH ITS CULTURAL PROTECTION POLICY

### A. UNITED STATES FIRST AMENDMENT PRINCIPLES

France walks a precarious tightrope with its policy of cultural protection. Although the policy objectives of preserving French culture seem noble, the main statutory tool used relies primarily on censorship of speech. A perfunctory look to the four major rationales in United States First Amendment jurisprudence shows the dangers of this approach. First, free speech is essential to self-government in a free society, as it allows “the voters to

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<sup>27</sup> *Frédéric Mitterrand Juge "Épouvantable" l'Arrestation de Roman Polanski*, LA DÉPÊCHE (Sept. 28, 2009), <http://www.ladepeche.fr/article/2009/09/28/682266-frederic-mitterrand-juge-epouvantable-l-arrestation-de-roman-polanski.html>. Translation from French by Google Translate.

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

<sup>29</sup> *See Polanski: Kouchner a Écrit à Clinton avec son Homologue Polonais*, LE PARISIEN (Sept. 28, 2009), <http://www.leparisien.fr/flash-actualite-politique/polanski-kouchner-a-ecrit-a-clinton-avec-son-homologue-polonais-28-09-2009-655158.php>. Translation from French by Google Translate.

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

<sup>31</sup> *La Suisse Refuse d'Extrader Roman Polanski*, LE PARISIEN (July 13, 2010), <http://www.leparisien.fr/faits-divers/la-suisse-refuse-d-extrader-roman-polanski-13-07-2010-999236.php>. Translations from French by Google Translate; *Les soutiens de Polanski se Félicitent de sa Libération Annoncée*, LE PARISIEN (Nov. 26, 2009), <http://www.leparisien.fr/affaire-polanski/les-soutiens-de-polanski-se-felicitent-de-sa-liberation-annoncee-26-11-2009-725489.php>.

acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>32</sup> Second, free speech is essential to the discovery of truth through what has been called the “marketplace of ideas.”<sup>33</sup> This argument postulates “that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”<sup>34</sup> Third, free speech promotes personal autonomy, as “[t]o engage voluntarily in a speech act is to engage in self-definition of expression.”<sup>35</sup> Fourth, free speech promotes tolerance in a society. By allowing free speech, a society “carve[s] out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”<sup>36</sup>

Although the simple requirement that public speech be in one language may not seem to chill free speech on its face, in light of an increasingly globalized world this becomes a powerful argument. For example, due to its severe penalties, Toubon law ensures that there will never be a political party that advocates members of the Muslim faith in their preferred language of Arabic.<sup>37</sup> This, in turn, has the effect of pushing the issues of the Arabic speaking Muslim minority underground where they are free to foment militant, anti-government messages that can result in terrorist attacks against the general populace. Although this may seem like a trail of horrors that “pile[s] inference upon inference,”<sup>38</sup> the consequences of this approach have already allowed a new form of radical and violent

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<sup>32</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1st ed. 1948).

<sup>33</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., Dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).

<sup>36</sup> LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9-10 (1st ed. 1986).

<sup>37</sup> See Nelms-Reyes, *supra* note 12, at 291.

<sup>38</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995).



Islam to grow roots in France.<sup>39</sup> Alternatively, allowing this speech in Arabic and in a public form would: (1) allow the populace to be informed and vote on these issues with their conscience; (2) subject this speech to the marketplace of ideas instead of an underground echo chamber; (3) promote personal autonomy in the Arabic immigrant population, thus allowing subsequent generations to break from oppressive cultural traditions; and (4) foster tolerance of Muslim traditions and avoid controversial and arguably oppressive reactions from the general French populace.<sup>40</sup>

#### B. ENCOURAGING A CULTURE OF IMPUNITY AMONG FRENCH ARTISTS

Polanski's case isn't the first time that France has pardoned one of their artistic elite after a committed crime. In the mid-20th century, the cherished French poet Jean Genet was living a life of crime.<sup>41</sup> By 1948, the poet was facing a life sentence,<sup>42</sup> only to be pardoned after the French President intervened.<sup>43</sup> At Genet's trial, fellow artistic elite Jean Cocteau proclaimed that Genet was "the greatest writer of the modern era" and that Genet only "stole to nourish his soul and his body."<sup>44</sup>

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<sup>39</sup> Loulla-Mae Eleftheriou-Smith, *Paris Terror Attacks: France Shuts Down Three Mosques in Security Crackdown*, THE INDEPENDENT (Dec. 2, 2015), <http://www.independent.co.uk/news/world/europe/paris-terror-attacks-france-shuts-down-three-mosques-in-security-crackdown-a6757596.html>.

<sup>40</sup> Suzanne Daley & Alissa Rubin, *French Muslims Say Veil Bans Give Cover to Bias*, N.Y. TIMES (May 26, 2015), <http://www.nytimes.com/2015/05/27/world/europe/muslim-frenchwomen-struggle-with-discrimination-as-bans-on-veils-expand.html>.

<sup>41</sup> Jon Henley, *Should Roman Polanski Be Above the Law?*, THE GUARDIAN (Sept. 28, 2009), <http://www.theguardian.com/film/2009/sep/28/roman-polanski-french-government>.

<sup>42</sup> *Jean Genet*, N.Y. REV. OF BOOKS, <http://www.nybooks.com/contributors/jean-genet/> (last visited May 20, 2016) [hereinafter *Genet*].

<sup>43</sup> Henly, *supra* note 41.

<sup>44</sup> *Id.* It is also the opinion of the author that Cocteau should

The correlations between Genet and Polanski are striking to say the least. Although neither artist has been subsequently jailed (Genet passed away in 1986),<sup>45</sup> the measures used by the French Executive Branch to protect its cultural icons risks telling its artistic elite that they are immune from the rule of law. The rule of law is extremely important in modern society, as it provides for, in the words of Locke, “the peace, safety, and public good of the people.”<sup>46</sup> The predominant modern danger of disregarding the modern rule of law for elected officials is the loss of popular consent from the people, resulting in those officials being voted out of office.<sup>47</sup> Popular opinion immediately following Polanski’s arrest in Switzerland has already shown a disconnect between French officials and the electorate.<sup>48</sup> In light of the fact that the Polish government has also refused to extradite Polanski,<sup>49</sup> it will be interesting to see whether the Polish people are as forgiving of their artists as the French.

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have gone to law school instead of being a poet. *Id.*

<sup>45</sup> *Id.*; *Genet*, *supra* note 42.

<sup>46</sup> Theo J. Angelis & Jonathan H. Harrison, *History and Importance of the Rule of Law*, at 15, WORLD JUSTICE PROJECT (2003), [http://worldjusticeproject.org/sites/default/files/history\\_and\\_importance\\_of\\_the\\_rule\\_of\\_law.pdf](http://worldjusticeproject.org/sites/default/files/history_and_importance_of_the_rule_of_law.pdf) (last visited May 20, 2016) quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 150 (Hollis ed. 1689), ONLINE LIBRARY OF LIBERTY, [http://lfs3.amazonaws.com/titles/222/Locke\\_0057\\_EBk\\_v6.0.pdf](http://lfs3.amazonaws.com/titles/222/Locke_0057_EBk_v6.0.pdf) (last visited May 20, 2016).

<sup>47</sup> Angelis & Harrison, *supra* note 46, at 3.

<sup>48</sup> *Arrestation de Polanski: des Voix Discordantes Troublent le Concert de Soutiens*, LE PARISIEN (Sept. 29, 2009), <http://www.leparisien.fr/flash-actualite-culture/arrestation-de-polanski-des-voix-discordantes-troublent-le-concert-de-soutiens-29-09-2009-656448.php>. Translation from French by Google Translate.

<sup>49</sup> Michal Kolanko & Michael Cieply, *Polish Judge Rejects Extradition of Roman Polanski*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/world/europe/roman-polanski-poland-extradiction.html>.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

**EVOLVING SPORTS TECHNOLOGY MAKES ITS MARK ON  
THE INTERNET OF THINGS: LEGAL IMPLICATIONS AND  
SOLUTIONS FOR COLLECTING, UTILIZING, AND  
DISSEMINATING ATHLETE BIOMETRIC DATA  
COLLECTED VIA WEARABLE TECHNOLOGY**

*PART ONE OF A TWO-PART SERIES*

KRISTY GALE\*

**ABSTRACT:**

*Professional sports leagues and teams utilize wearable technology to collect Athlete Biometric Data (ABD), which provides health and safety information to improve game play. As technology, fan expectations, and the market for ABD evolves, ABD will be commoditized and monetized, creating legal implications to be considered. As data analytics become more prevalent in the sports industry, this data will be used in peripheral offerings, such as enhanced fan content and fantasy sports. Data sets and statistics will also become more granular and will increasingly include ABD.*

*ABD is comprised of inherent characteristics which may make ABD protectable in the form of publicity rights, intellectual property rights, and Health Information. Because of this unique characterization, ABD should be considered distinct from other categories of sports information, statistics, or sports data. As a result of the sensitive nature of biometric information, and in addition to its level of high protection under U.S. privacy law,*

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\* LL.M. Sports Law and Business, 2015, Sandra Day O'Connor College of Law, Arizona State University. I wish to acknowledge and thank Ryan Rodenberg, assistant professor of sports law analytics at Florida State University, for providing insight and guidance pertaining to the landscape of sports information and data analytics for this article, as well as Rodney Smith, director of the Sports Law and Business Program at the Sandra Day O'Connor College of Law at Arizona State University, for his suggestions and guidance.

*ABD is entitled to special treatment so that it is not automatically categorized as First Amendment protected speech. Athletes must be granted greater control over the use and dissemination of their ABD, especially when it is commoditized, monetized, and exploited through new technologies. Immediate action must be taken to ensure all parties involved in ABD contribution, collection and use are fairly compensated, these parties' rights and interests are maximized and balanced in relation to one another and to prevent the erosion of athlete rights and to protect their data.*

*Part I in this series surveys the collection, use, and dissemination of ABD in light of emerging technology. It identifies potential uses for ABD, such as in next generation statistics, mobile applications, game-enhancing platforms, and fantasy sports data services. It then proceeds to discuss tensions between property rights and privacy rights, and the tensions between the sports industry players who contribute and distribute ABD. It will further examine and discuss ABD definitions to lay a foundation for analyzing ABD in relation to the sports industry and under applicable statutory and common law. Finally, Part I presents recommendations for taking a strategic approach when contemplating and thoughtfully defining ABD licensing rights.*

*Part II in this series will contemplate and analyze the legal treatment of ABD. Specifically, Part II will analyze policymaking, the existing regulatory framework, and relevant privacy, intellectual property, and publicity rights. Finally, Part II will present solutions and suggestions for encouraging innovation, optimizing opportunities for revenue generation while properly balancing privacy and property rights of the parties, and mitigating risk for parties involved in the contribution, collection, use, and dissemination of ABD.*

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## INTRODUCTION

On a warmer than usual Sunday afternoon at Mile High Stadium in Denver, Colorado, devoted fans fill the seats. The Denver Broncos meet the Baltimore Ravens for their first regular-season National Football League (NFL) game of 2015. On-field, the clash of helmets and shoulder pads, along with grunts from both offensive and defensive players, are heard as Broncos quarterback Peyton Manning is sacked three times in the first half. Bronco Mania, the frenetic energy generated by followers of Manning, eventually fuels the Broncos to their rocky 19–13 season-opener win.

During this game and throughout the 2015 season, when Manning scrambled to avoid a sack, “tiny sensors embedded into his uniform [gathered] information about how far he sprints.”<sup>1</sup> The NFL is using a network of sensors and radio frequency receivers to capture proprietary statistics as part of its Next Gen Stats initiative.<sup>2</sup> As of 2014, 2,000 NFL players were tagged and

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<sup>1</sup> Jonathan Vanian. *Inside the NFL’s Big Data Play*, FORTUNE (Sept. 11, 2015), <http://fortune.com/2015/09/11/nfl-big-data-stats/>.

<sup>2</sup> *NFL GSIS and Next Gen Stats New Distribution Partnership With Sportradar US*, SPORTSTECHIE.NET (Apr. 20, 2015), <http://sportstechie.net/nfl-gsis-and-next-gen-stats-new-distribution->

tracked, 20 receivers had been installed in each NFL stadium, an excess of 17,000 plays of next generation statistics were measured, nearly 1.7 million sets of XY player coordinates were transmitted and stored during NFL games, and roughly 68 billion bytes of player position data have been collected.<sup>3</sup>

Such exciting developments in the sports industry's sports technology segment prompt examination of the legal landscape governing the collection, use, and dissemination of sports-related data. There are two important factors contributing to the urgency of addressing this topic: (1) big data capabilities, and (2) the increasing speed of technology innovation and adoption that utilizes sports-related data. First, the types and volume of data that are being collected, analyzed, and utilized are expanding at an unprecedented pace. These unforeseen data types and uses may be outside the scope of existing legal framework and public policy. Second, the speed at which technology is evolving and being deployed creates opportunities to use data for sports entertainment in new ways. These new opportunities should be examined with a forward-looking approach to ensure the commercial and legal interests of affected parties are protected, rather than eroded.

In particular, it is imperative to address the issues surrounding the collection, use, and dissemination of athlete biometric data (ABD). This is especially vital as opportunities to commoditize and monetize ABD expand and society progresses into the next technological age where humans and devices are connected and communicating, or otherwise known as the Internet of Everything. These issues apply to amateur and professional sports, and even extend to consumers who adopt wearable technology such as mobile fitness applications and wristband fitness trackers; however, professional sports have the resources and greater monetary incentives to become early adopters. Consequently, the focus here will be on the impact of wearable technology and the collection, use, and dissemination of ABD on the professional sports industry.

Part I of this article provides examples of how technology is used to collect ABD, the purposes for collection, and the purposes for which ABD may be used in the future.

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partnership-with-sportradar-us/.

<sup>3</sup> Thor Olavsrud. *The Internet of Things Comes to the NFL*, CIO (Sept. 7, 2015), <http://www.cio.com/article/2980853/wearable-technology/the-internet-of-things-comes-to-the-nfl.html>.

Additional examples will provide context for the tensions between individual rights of impacted parties and ABD. Part II of this article discusses competing legal perspectives and provides suggestions on how to adopt balanced, pro-innovation public policy and how to utilize existing and emerging legal frameworks with respect to statutory and common law publicity rights, intellectual property rights, speech, privacy, and security. This article will conclude with initial solutions for parties involved in the collection, use, and dissemination of ABD. Such best solutions can be tailored and adopted to optimize utility and revenue generation while mitigating legal risk and preserving proprietary and other legal rights to ABD. Parties with an interest in these practices include:<sup>4</sup>

- Athletes (Primary Beneficiaries)
- Data controllers, including: leagues, teams, players unions, and others who collect and control proprietary ABD (First-Generation Beneficiaries)
- Data processors, including: (1) strategic or investment partners who provide services and capabilities to maximize the utility of ABD; and (2) vendors who process ABD on behalf of data controllers by obtaining, holding, retrieving, analyzing, utilizing, or disclosing ABD to other third-parties (Second-Generation Beneficiaries)
- Data users, such as the media and sponsors, endorsers, other licensed content creators, users who are in some way contractually affiliated with athletes, data controllers, or data processors, and others who generate revenue from the utilization of ABD (Third-Generation Beneficiaries)

Some parties may fall into different categories at different times depending upon the roles they are playing in

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<sup>4</sup> See summary of terms used under the United Kingdom's *Data Protection Act 1998* which shaped the definitions used here: Johnny Madill. *Wearable Tech in Sport: The Legal Implications of Data Collection*, LAW IN SPORT, (Apr. 9, 2015), <http://www.lawinsport.com/articles/item/wearable-tech-in-sport-the-legal-implications-of-data-collection>.

relation to the collection, use, and dissemination of ABD. It should be noted that sports fans and others who participate in the sports ecosystem, even on a limited basis, may be considered Fourth-Generation Beneficiaries as they increasingly create content and consume sports entertainment, both of which impact the legal rights of interested parties and impact revenue generation in the sports industry.

By implementing and following sound policies, procedures, and best practices that leverage one's rights, while respecting the rights of others, sports industry players will: (1) be in prime positions to take advantage of revenue-generating opportunities as technology evolves; (2) demonstrate regulatory compliance; and (3) enhance their reputations by being innovators and early adopters who contribute to society in positive and meaningful ways, in addition to reinforcing positive association with their brands.

#### **I. HOW AND WHY WEARABLE TECHNOLOGY IS USED IN SPORTS TO COLLECT ATHLETE BIOMETRIC DATA**

The sports industry is enthusiastically embracing new technologies that improve athlete health and safety, prevent injury, optimize athlete performance, and contribute to better gameplay and wins on the field. Technology is also used to increase fan engagement with the sport and promote products which increase revenue from existing and new revenue streams. For these reasons, the NFL utilizes wearable technology to track athlete data.

##### **A. OPTIMIZING EXISTING TECHNOLOGY**

To make this goal a reality, the NFL, in partnership with Zebra Technologies, a tracking technology company, is installing "technology in all 31 NFL stadiums to follow what happens on the field.<sup>5</sup> Players wear two of [Zebra's] chips inside their shoulder pads."<sup>6</sup> A chip the size of a quarter is embedded in each side of the shoulder pad, each emitting unique radio frequencies.<sup>7</sup> The chips collect real-time data regarding athlete position on the field, speed, distance traveled, and acceleration time.<sup>8</sup> That data is then transmitted to receivers installed in the

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<sup>5</sup> *Id.*

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

<sup>7</sup> Olavsrud, *supra* note 3.

<sup>8</sup> *Id.*



stadium utilizing wireless radio-frequency identification (RFID) transmitters.<sup>9</sup> The combination of chips and receivers in stadiums help Zebra understand the exact location and movements of each player on the field and calculate athlete speed and acceleration.<sup>10</sup>

Once the data is transmitted, it is stored in each stadium's servers and is analyzed using customized software.<sup>11</sup> Human analysis adds depth and meaning to the data—NFL employees log incomplete passes, penalties, and when plays end to differentiate between play-action data and data collected when athletes are on-field between plays.<sup>12</sup> Next, the data and analytics are sent to a NFL broadcasting truck, and then to the NFL's cloud data centers.<sup>13</sup> Zebra's command center in San Jose, California monitors the NFL's games to ensure information flows smoothly and troubleshoots any problems.<sup>14</sup>

Once the NFL's proprietary data is collected and analyzed, it is made available to fans through in-stadium displays,<sup>15</sup> “through the league's [application] and website,”<sup>16</sup> and to media partners and broadcasters calling the games.<sup>17</sup> This data subsequently powers the 2015 NFL application for Xbox One and Windows 10, which provides fans a “Next Gen Replay” feature, allowing fans to pull statistics for each player in a highlight clip posted to the application.<sup>18</sup> The data is also integrated with the NFL's fantasy football offerings.<sup>19</sup> In the future, fans will have access to paid subscriptions for this data, which may result in an even higher rate of engagement.<sup>20</sup>

According to Matt Swensson, senior director of Emerging Products and Technology at the NFL, “we've always

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<sup>9</sup> Vanian, *supra* note 1.

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

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

<sup>15</sup> Olavsrud, *supra* note 3.

<sup>16</sup> Vanian, *supra* note 1.

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

<sup>18</sup> Olavsrud, *supra* note 3.

<sup>19</sup> *Id.*

<sup>20</sup> Vanian, *supra* note 1.

had these traditional NFL stats. The league has been very interested in trying to broaden that and bring new statistics to the fans. This . . . really opens the doors to do more things at the venue.”<sup>21</sup>

Swensson also notes that the NFL has realized how data can be leveraged to “make workflow more efficient around the game.”<sup>22</sup> For example, coaching staff and athletes will have access to the data to improve game play and athlete performance.<sup>23</sup> Coaches may use this data to study athlete performance, track athlete training and improvement, and follow athletes in practice.<sup>24</sup>

Additional uses for the data will evolve.<sup>25</sup> Swensson says that “we’ve just scratched the surface of what we can do with the data.”<sup>26</sup> In addition, “every week there’s another thought about how we can expand upon the information we’ve pulled together.”<sup>27</sup> Zebra’s VP and General Manager of Location Solutions, Jill Stelfox, agrees: “The possibilities are truly endless.”<sup>28</sup>

The NFL’s partnership with Zebra is only one aspect of the NFL’s plan to increase fan engagement through the use of Next Gen Stats. In 2015, the NFL invested in<sup>29</sup> and partnered with Sportradar US, a subsidiary of Sportradar AG, the global leader [of] sports data and sports content.<sup>30</sup> Sportradar agreed to be the NFL’s “exclusive worldwide distributor of comprehensive

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<sup>21</sup> Olavsrud, *supra* note 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Vanian, *supra* note 1.

<sup>26</sup> Olavsrud, *supra* note 3.

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

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

<sup>29</sup> Eric Fisher & Daniel Kaplan, *NFL Buys Stake in Stats Firm*, STREET & SMITH’S SPORTS BUS. J., (Apr. 20, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/04/20/League-s-and-Governing-Bodies/NFL-sportradar.aspx>.

<sup>30</sup> Sean Cottrell, *NFL’s Next Gen Stats and Sportradar US Deal Explained: An Exclusive Interview with Ulrich Harmuth*, LAWINSPORT (June 10, 2015), <http://www.lawinsport.com/features/podcast/item/nfl-s-next-gen-stats-and-sportradar-us-deal-explained-an-exclusive-interview-with-ulrich-harmuth>.

NFL statistics to a range of media companies, digital platforms [and] fantasy sports providers.”<sup>31</sup>

These comprehensive statistics include traditional game statistics provided by the NFL and Next Gen Stats.<sup>32</sup> Traditional game statistics include newspaper box scores<sup>33</sup> and have expanded to include real-time game scores, player statistics, and play-by-play data.<sup>34</sup> The NFL’s Next Gen Stats currently include real-time location-based data for all players in all games.<sup>35</sup> The combination of traditional statistics and Next Gen Stats comprise a new sports technology data category that will be used to enhance broadcasts and sponsors’ return on investment while providing great experiences to the “rapidly growing sports data market” and to fans.<sup>36</sup> The NFL wants to revolutionize game day content with a deeper set of statistics to reshape the league, change how sponsors interact with fans, and determine what causes fan excitement in order to create better fan-friendly products.<sup>37</sup>

As a result, Next Gen Stats will expand. The NFL plans to add catchy visualizations, key data, and predictions to their Next Gen Stats offering so that fans can better understand the game’s athletic skill requirements.<sup>38</sup> Together, the NFL and Sportradar are “exploring all innovative possibilities this partnership opens up for both organizations” to both create and distribute products.<sup>39</sup> According to Sportradar’s Managing Director, Ulrich Harmuth, they will collaborate with the NFL to create products which will provide fans with information while they are in-stadium, at home, or on-the-go via their mobile devices, applications, and other platforms.<sup>40</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, (2015).

<sup>34</sup> *Id.*

<sup>35</sup> *See NFL GSIS, supra* note 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Fantasy football is another market segment that will benefit from data created by the NFL-Sportradar partnership. Fans are always looking for ways to improve their fantasy sports performance and for granular information that may affect athlete performance. Sportradar has partnered with fantasy sports provider FanDuel to provide the NFL's exclusive Next Gen Stats and traditional play-by-play statistics for fantasy players.<sup>41</sup> As of mid-2015, FanDuel has exclusive agreements with 16 NFL teams and 13 National Basketball Association (NBA) teams.<sup>42</sup> FanDuel's competitor, DraftKings, also partnered with 12 NFL teams in an effort to generate additional revenue.<sup>43</sup> Both companies have many professional sports league investors: the NBA has an equity position and a board seat with FanDuel;<sup>44</sup> the National Hockey League (NHL),<sup>45</sup> MLB Advanced Media (MLBAM, Major League Baseball's media company),<sup>46</sup> and Major League Soccer (MLS)<sup>47</sup> have invested in DraftKings. The NFL expects to benefit because fantasy sports drives "more and more viewership and interest in the NFL . . . It's proven that people who play fantasy sports, especially daily fantasy, follow the NFL more closely."<sup>48</sup>

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<sup>41</sup> *Sportradar to Provide NFL Data Feed to FanDuel*, SPORTS VIDEO GROUP (Aug. 31, 2015), <http://sportsvideo.org/main/blog/2015/08/31/sportradar-to-provide-nfl-data-feed-to-fanduel/>.

<sup>42</sup> Eric Fisher, *FanDuel Continues to Strengthen NBA Ties, Signing 13 Teams to Multiyear Deals*, SPORTS BUS. DAILY (June 23, 2015), <http://www.sportsbusinessdaily.com/Daily/Issues/2015/06/23/Marketing-and-Sponsorship/FanDuel.aspx?hl=nba%20exclusive&sc=0>.

<sup>43</sup> Kevin Kleps, *Daily Fantasy Sites Bring Real Business to Pro Sports Teams*, CRAIN'S CLEVELAND BUS., (Sept. 22, 2015), <http://www.crainscleveland.com/article/20150920/NEWS/309209984/daily-fantasy-sites-bring-real-business-to-pro-sports-teams>.

<sup>44</sup> Terry Lefton & John Ourand, *ESPN Agrees to Buy Stake in DraftKings*, SPORTS BUS. DAILY (Apr. 6, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/04/06/Media/DraftKings.aspx?hl=nba%20exclusive&sc=0>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Kleps, *supra* note 43.

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

The projected growth of the fantasy sports market is fueling the NFL's plan to provide more data to fantasy sports participants.<sup>49</sup> According to the Fantasy Sports Trade Association, an estimated 56.8 million people participated in fantasy sports in 2015.<sup>50</sup> In 2015, entrance fees alone totaled more than \$3.1 billion and DraftKings estimates that the daily fantasy sports market could reach \$20 billion by 2017.<sup>51</sup> Naturally, professional sports leagues want to leverage their data to increase viewership, fan base, and revenue.

Despite the fact that daily fantasy sports are under regulatory fire, facing investigation, and defending multiple lawsuits,<sup>52</sup> the insatiable appetite for fantasy sports entertainment and granular data reflecting athlete performance will also grow.

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

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

<sup>51</sup> Daniel Etna, *Those Sports Fantasy Sites Could Mean Real Revenue*, THE WALL ST. J. (Mar. 2, 2016), <http://www.wsj.com/articles/those-sports-fantasy-sites-could-mean-real-revenue-1456961791>.

<sup>52</sup> State legislatures and attorney general offices are individually addressing legal issues presented by daily fantasy sports. See *DFS State Watch: Monitoring Daily Fantasy Sports Action in State Government*, LEGALSPORTSREPORT.COM (Mar. 3, 2016), <http://www.legalsportsreport.com/dfs-state-watch/> for the status of legislative bills, findings, opinions, and legality of daily fantasy sports in each state updated regularly; Daniel Etna, corporate partner and sports-law group co-chairman at Herrick, Feinstein LLP, suggests that the legal and policy issues presented by daily fantasy sports is of national concern requiring congressional intervention. See Etna, *supra* note 51; The House Committee on Oversight & Government Reform announced that it would hold hearings on fantasy sports. Congress held a hearing on May 11, 2016, to address regulation of daily fantasy sports. Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE (May 11, 2016), <http://fortune.com/2016/05/11/fantasy-sports-hearing/>. U.S. Senator Robert Menendez defends lawmakers' initial exception for fantasy sports explaining, "We were thinking about friends getting together and playing fantasy sports where, at the end of the season, there would be a winner . . . [not] a multibillion dollar industry, daily games, hundreds of thousands of people playing, billions of dollars at stake." See *Lawmakers to Question Daily Fantasy Execs as Fallout from Scandal Continues Unabated*. SPORTS BUS. DAILY (Oct. 19, 2015), <http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/19/Sports->

Wearable technology will increasingly satisfy the demand for data as innovations continue. For example, at the 2011 NFL Combine, Under Armour revealed its E39 shirt<sup>53</sup> with embedded technology to measure an athlete's heart rate, speed, g-force, metabolism, body position, lung capacity, and other biometric information.<sup>54</sup> The shirt contains sensors that collect

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in-Society/DFS.aspx; A federal grand jury representing the U.S. Attorney's Office in Florida reportedly issued a subpoena as part of its investigation into the practices and legality of the unregulated fantasy sports industry. *Id.* The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) exempted fantasy sports as gambling where fantasy games require skill and knowledge rather than luck. When reports of insider trading arose claiming a DraftKings employee used information unavailable to other daily fantasy sports (DFS) participants, the Federal Bureau of Investigations (FBI) and U.S. Justice Department launched investigations which are ongoing. *See Legal Analysis of the Risks Facing the Daily Fantasy Sports Industry*. SPORTS ILLUSTRATED (Oct. 16, 2015),

<http://www.si.com/nfl/2015/10/16/draftkings-fanduel-daily-fantasy-sports-lawsuit>; Fantasy sports participants have filed several civil lawsuits seeking class-action status claiming insider trading violations and that FanDuel and DraftKings "deceived consumers through advertisements and public assurances into believing that they can win at DFS by being 'smarter than the average fan.'" *Id.* Class action suits continue to be filed, one adding fantasy sports operator investors: NBA, NHL, MLB and other sports-related companies. *See David Purdum, Class-action Suit Targets MLB, NBA Along with DraftKings, FanDuel*. ESPN (Nov. 21, 2015), [http://espn.go.com/chalk/story/\\_id/14188883/mlb-nba-sports-investment-groups-targeted-daily-fantasy-sports-class-action-suit-florida](http://espn.go.com/chalk/story/_id/14188883/mlb-nba-sports-investment-groups-targeted-daily-fantasy-sports-class-action-suit-florida); Washington Redskins player, Pierre Garcon, filed a class-action lawsuit alleging infringement on his and other athletes' right of publicity. Darren Heitner, *Why Pierre Garcon's Lawsuit vs FanDuel is a Loser*, FORBES (Oct. 31, 2015), <http://www.forbes.com/sites/darrenheitner/2015/10/31/why-pierre-garcons-lawsuit-vs-fanduel-is-a-loser/>; Garcon's claim has since been settled based upon undisclosed terms with FanDuel. *Pierre Garcon and FanDuel Reach Resolution on Legal Dispute*, THE WASH. POST (Jan. 19, 2016), <https://www.washingtonpost.com/news/football-insider/wp/2016/01/19/pierre-garcon-fanduel-reach-resolution-on-legal-dispute/>.

<sup>53</sup> Peter Ha, *Under Armour Armour39 Review: Beast Mode Unlocked*, GIZMODO (May 16, 2013), <http://gizmodo.com/under-armour-armour39-review-beast-mode-unlocked-506284006>.

<sup>54</sup> NickCKM, *Athlete Biometric Data Broadcast Live*, CKM

the data and broadcast it in real time.<sup>55</sup> It is anticipated that this technology will change the way “we watch team games, bet on them, and play fantasy sports” in addition to enhancing fan engagement, attracting new fans, providing an additional resource for coaches and trainers, providing metrics to athletes for use in contract negotiation, and creating ancillary revenue streams in major sports.<sup>56</sup>

Opportunities for wide application of ABD exist. For example, knowing whether a baseball player’s heart rate remains steady or escalates dramatically during at bats may impact fan decision making in fantasy sports.<sup>57</sup> Knowing that a basketball point guard can explode off the dribble faster to his left than his defender can cover to the right is valuable to coaches and fans.<sup>58</sup> ABD has already enhanced the fan experience by broadcasting in-depth and in real-time during the Tour De France.<sup>59</sup> The capability of the technology and resulting data sets are “just the tip of the iceberg;” “incredibly precise athlete information” will be available in the coming years as technology and the ways in which it may be used evolve.<sup>60</sup> The Internet of Things, big data, and the Internet of Everything is permeating the NFL and major sports.

#### B. THE USE OF TECHNOLOGY IN SPORTS AND THE TENSIONS IT CREATES

What does the Internet of Things, big data, and the Internet of Everything mean for sports? Technology enables computers to “observe, identify, and understand the world—without the limitations of human-entered data.”<sup>61</sup> This is known

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SPORTS MGMT., (May 6, 2013),

<https://sportbizbuzz.wordpress.com/2013/05/06/athlete-biometric-data-broadcast-live/>.

<sup>55</sup> *Id.*

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

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

<sup>61</sup> Adam D. Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns Without Derailing Innovation*, 21 RICH. J.L. & TECH. 8 (2015).

as “smart” technology, which is another way of referring to the Internet of Things (IoT).<sup>62</sup>

The Morrison Foerster law firm defines IoT as “the network of everyday physical objects which surround us . . . embedded with technology to enable those objects to collect and transmit data about their use and surroundings.”<sup>63</sup> The data collected and transmitted is known as “big data,” which many people define differently,<sup>64</sup> but the foundational concept is that there are “3 Vs” of big data: Volume, Velocity, and Variety.<sup>65</sup> Thus, big data is measured by a volume component, the unprecedented rate at which data is streamed and processed, and according to the many different data types.<sup>66</sup> This contributes to the connectedness of everyone and everything to a network.<sup>67</sup> Cisco estimates that 37 billion intelligent things will be connected and communicating by 2020.<sup>68</sup> These connections fuel the next phase of the Internet: the Internet of Everything (IoE).

For example, Cisco’s Connected Athlete system allows “people to track an athlete’s step-by-step performance” in real-time using sensors that collect and transmit data,<sup>69</sup> essentially creating a “wireless body area network” or WBAN. WBAN is comprised of the human body, wearable technology sensors, stadium transmitters, data, and the Cisco Intelligent Network, which sends feedback to athletes, secure mobile health applications, or physicians.<sup>70</sup> The IoE platform uses WBAN data

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<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.* at 8.

<sup>64</sup> Jennifer Dutcher, *What is Big Data?* DATASCIENCE@BERKELEY (Sept. 3, 2014), <https://datascience.berkeley.edu/what-is-big-data/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Big Data What it is and Why it Matters*, SAS INSTITUTE (2015), [http://www.sas.com/en\\_us/insights/big-data/what-is-big-data.html](http://www.sas.com/en_us/insights/big-data/what-is-big-data.html).

<sup>67</sup> Thierer, *supra* note 61, at 12.

<sup>68</sup> *Id.*

<sup>69</sup> Mark Hearn, *Verizon’s Connected Athlete Adds Sensors Data to Your Gear, Tracks Habits and More*, ENGADGET (Jan. 8, 2013), <http://www.engadget.com/2013/01/08/verizon-connected-athlete-sensors-sports-hands-on-ces-2013/>.

<sup>70</sup> *The Internet of Everything and the Connected Athlete: This Changes . . . Everything*, CISCO (2013), <http://www.cisco.com/c/en/us/solutions/collateral/service->



and analytics—both contextual and predictive—to take advantage of massive amounts and types of data for use by all parties who can utilize it, including coaches and athletes.<sup>71</sup>

The rapid expansion of the IoE and the potential uses for ABD creates tension between what some consider the highest and best uses of ABD, with those uses that unfairly, unethically, or unlawfully exploit and disadvantage athletes. Connections within the IoE are increasing quickly and the number of IoT developers are projected to grow from approximately 300,000 in 2014, to more than 4.5 million in 2020.<sup>72</sup> The growing market for data and wearable technology is quickly becoming a mainstream practice in many professional and amateur sports, with sensors increasingly being embedded in clothing and equipment.<sup>73</sup>

Catapult Sport, a sports technology and analytics company, deploys technology worn by “over 11,000 elite athletes at over 750 teams and institutes in 35 sports in 35 countries.”<sup>74</sup> Mark Cuban, the billionaire entrepreneur, owner of the Dallas Mavericks, and Catapult Sports equity-stake holder, combines technology and sports by finding complementary technologies that measure “hundreds of data points,” including biometrics.<sup>75</sup>

With respect to biometric data specifically, these technologies provide teams and leagues with more information about their players, “theoretically allow[ing] them to identify problem areas, improve more rapidly and avoid preventable injuries,” says Alan C. Milstein, a leading bioethics attorney and sports litigator who often represents NBA players.<sup>76</sup> However,

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provider/mobile-internet/white\_paper\_c11-711705.pdf.

<sup>71</sup> *Id.*

<sup>72</sup> Thierer, *supra* note 61, at 13.

<sup>73</sup> Stephen Mayhew, *Professional Sports Teams and Athletes Driving Wearable Technology*, BIOMETRIC UPDATE (Oct. 28, 2014), <http://www.biometricupdate.com/201410/professional-sports-teams-and-athletes-driving-wearable-technology>.

<sup>74</sup> *Catapult About Us*, CATAPULT SPORTS (Oct. 19, 2015), <http://www.catapultsports.com/about>.

<sup>75</sup> *How Wearable Technology will Change Sports*, CATAPULT SPORTS (Oct. 19, 2015), <http://www.catapultsports.com/media/how-wearable-technology-will-change-sports>.

<sup>76</sup> Eric Freeman, *Has the NBA's Biometric Data Tracking*

Milstein warns, monitoring athletes and utilizing biometric details for the purpose of predicting performance is not a health purpose, but instead an economic purpose that raises ethical and legal issues.<sup>77</sup>

The NBA's practices of collecting and utilizing ABD are enlightening and serve to frame the issues. Since the 2012–2013 season, NBA franchises have collected, analyzed, and formed decisions based upon data collected on and off the court.<sup>78</sup> For example, NBA teams have begun tracking athlete sleep, eating, and other patterns that may impact performance, in addition to administering blood and fluid tests.<sup>79</sup> Athletes are then instructed to modify practices to enhance their on-court performance.<sup>80</sup>

Advances in science and technology are “transforming how teams scrutinize, optimize and fundamentally think about their players” and the NBA is an “aspirational technocracy . . . leading society into the biometric revolution.”<sup>81</sup> Timberwolves trainer and chairman of the National Basketball Trainers Association Gregg Farban observes, “it’s the explosion of data and data collection.”<sup>82</sup> Despite the significance of the explosion, few steps have been taken to determine what data teams and other parties should be allowed access. If the potential impact of using ABD is not explored, then there may be far-reaching consequences. Answering questions around the collection, use, dissemination, and protection of ABD will lead to the creation of forward-thinking public policy and procedures, and the development of best practices to govern its collection, use, and

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*Boom Gone Too Far?* YAHOO SPORTS, (Oct. 7, 2014),  
<http://sports.yahoo.com/blogs/nba-ball-dont-lie/has-the-nba-s-biometric-data-tracking-boom-gone-too-far-070039861.html>.

<sup>77</sup> *Id.*

<sup>78</sup> Pablo S. Torre & Tom Haberstroh, *Players Union Looks at Data Protection*, ESPN (Oct. 6, 2014),  
[http://espn.go.com/nba/story/\\_/id/11652885/nba-players-union-wants-ensure-privacy-data-collection](http://espn.go.com/nba/story/_/id/11652885/nba-players-union-wants-ensure-privacy-data-collection) [hereinafter *Players Union*].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Pablo S. Torre & Tom Haberstroh, *New Biometric Tests Invade the NBA*, ESPN (Oct. 2, 2014),  
[http://espn.go.com/nba/story/\\_/id/11629773/new-nba-biometric-testing-less-michael-lewis-more-george-orwell](http://espn.go.com/nba/story/_/id/11629773/new-nba-biometric-testing-less-michael-lewis-more-george-orwell) [hereinafter *Biometric Tests Invade*].

<sup>82</sup> *Id.*

dissemination as ABD relates to health, safety, athlete and team performance, gameplay, and monetization.

Technological developments and the NBA's practices have occurred so "quickly and quietly" that some are not even aware of the widespread biometric advances, and even the National Basketball Players Association (NBPA) did not seem to have sufficient information or an established position when contacted by cable television network ESPN for comment in Fall 2014.<sup>83</sup> In 2015, Ron Klempner, counsel for the NBPA, said the association will have "serious privacy and other fairness concerns" and intends to address this issue at the next collective bargaining agreement discussions set to occur in 2017.<sup>84</sup> However, this issue cries to be addressed long before 2017 given the speed at which technological advances are occurring and with which teams are adopting practices to collect, utilize, and disseminate athlete biometric data. Fortunately, players unions sense the urgency in addressing this issue.

Recently, representatives from the players associations for the MLB, the NBA, NHL, NFL and MLS met specifically to discuss "the state of sensor technology and its use by teams and leagues."<sup>85</sup> Sean Sansiveri, NFLPA vice president of business and legal affairs, stated that "using sensor technology is moving forward regardless, and [players associations] need to be in a position to establish protection of information."<sup>86</sup> Dave Prouty, MLBPA general counsel, agrees and says the players associations are concerned about a number of issues, including the commercial sale and use of athlete personal data, player privacy, player rights, confidentiality, how information will be used, consent and access to information, and the data being used against athletes in contract negotiations.<sup>87</sup> Don Zavelo, NHLPA general counsel, expressed concern over the large amounts of data generated by wearable technology and said it raises "a

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<sup>83</sup> See *Players Union*, *supra* note 78.

<sup>84</sup> *Id.*

<sup>85</sup> Liz Mullin, *Unions Meet to Share Information on Use of Sensors*, STREET AND SMITH'S SPORTS BUS. J. (Nov. 2, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors-unions.aspx>.

<sup>86</sup> *Id.*

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

number of interesting issues and concerns that we are currently reviewing.”<sup>88</sup>

Collection of ABD is already raising issues in the NFL. The NFLPA filed a grievance against the NFL over the use of sensors by teams to monitor player sleeping patterns because the NFL’s collective bargaining agreement (CBA) does not authorize athlete monitoring and data collection off-field.<sup>89</sup> NFL spokesperson Greg Aiello said wearing the sleep sensors was voluntary and athletes chose to use them to improve player performance on the field.<sup>90</sup> According to Aiello, “[the NFL doesn’t] understand the PA’s resistance to technology that their players have chosen to utilize.”<sup>91</sup>

Biometric data collection is also raising issues in the NBA. ESPN writers Pablo S. Torre and Tom Haberstroh observe, “it is customary for NBA players to have blood drawn as part of a standard physical exam, but that is different from what some teams are using to test performance.”<sup>92</sup> Dallas Mavericks owner Mark Cuban confirmed to ESPN Magazine that the team utilizes periodic blood analysis but did not disclose methodology or frequency of such tests.<sup>93</sup> Cuban’s position is that it is smart to utilize data to optimize health-monitoring abnormalities and detecting illness.<sup>94</sup> Although some athletes agree,<sup>95</sup> issues arise from the lack of definition around what biometric data will be collected, for what purpose, to whom it will be disseminated, and how it will be protected. Further, it raises concerns about compensation to athletes for the use of their ABD as a commodity.

The NBA’s CBA currently contains no language restricting teams’ collection of bodily fluids or tracking off-court

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<sup>88</sup> Liz Mullin, *Sensor Tech has Attention of Leagues, Unions*, STREET AND SMITH’S SPORTS BUS. J. (Nov. 2, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors.aspx>.

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

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

<sup>91</sup> *Id.*

<sup>92</sup> See *Players Union*, *supra* note 78.

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

<sup>94</sup> *Id.*

<sup>95</sup> See *Biometric Tests Invade*, *supra* note 81.

data.<sup>96</sup> The NBPA fears “such classified information” could be used against players in contract negotiations or provided to unauthorized third parties.<sup>97</sup> Sacramento Kings General Manager Pete D’Alessandro justifies collecting ABD to impact players “in their private time,” in order to maximize on-court performance; he also encourages such partnership between athletes and teams.<sup>98</sup> Some athletes counter that such data could be leaked to the press and athlete employment could be contingent on accepting and consenting to invasive technology.<sup>99</sup> Athletes accept some monitoring as beneficial and necessary for their health, safety, and performance, but some athletes are concerned that the information revealed could be used against them.<sup>100</sup>

For example, Golden State Warriors star and the 2015 NBA Finals Most Valuable Player, Andre Iguodala, began wearing Jawbone’s UP wristband during the 2013–2014 season to track arm movement for the purpose of monitoring sleep habits.<sup>101</sup> Iguodala’s trainer analyzed the data transmitted from the wristband, and discovered that Iguodala slept less than he believed, which negatively impacted on-court performance.<sup>102</sup> The trainer then implemented new routines to increase the amount and quality of Iguodala’s sleep to improve on-court performance.<sup>103</sup> While Iguodala acknowledges the benefits, he also says, “I just hope we don’t become robots where they’re feeding us the same thing, every day, and then it’s time to flip a switch and go to sleep.”<sup>104</sup>

The Dallas Mavericks also use technology in an effort to minimize fatigue and load. The “patch” tracks sleep habits, skin temperature, body position, and heart rate variability.<sup>105</sup> This data can be used to indicate alcoholic intoxication as well as

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<sup>96</sup> *Id.*

<sup>97</sup> *See Players Union, supra note 78.*

<sup>98</sup> *See Freeman, supra note 76.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See Biometric Tests Invade, supra note 81.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

health levels.<sup>106</sup> Players hope their employers will analyze only what they are professionally asked to detect, but are aware of the additional risk that biometric data may reveal other performance-related substances “from marijuana to hormones to herpes” that they hope will be ignored.<sup>107</sup> Mavericks guard Devin Harris submits to blood tests during his pre-season physical but says he doesn’t “know what they do with it once they have it, but they definitely take it.”<sup>108</sup>

Veteran NBA forward Shane Battier says biological testing influenced his decision to retire.<sup>109</sup> “Big data is scary because you don’t know where it’s going and who’s seen it.”<sup>110</sup> Battier raises a valid point: whether an athlete will consent to the collection, use, and dissemination of biometric data may depend on where an athlete is at in his career and his value to the team.<sup>111</sup>

The concern is underscored by the future of biometric data collection practices. Dr. Leslie Saxon of the University of Southern California’s Center for Body Computing envisions using “minimally invasive implantables . . . injectables that stay in the body for a year or two. No fuss.”<sup>112</sup> She imagines the device transmitting biometric information to an individual’s phone and providing alerts to improve decision making.<sup>113</sup> Athletes are not exactly comfortable with this idea. Brandan Wright says, “If they ask me to put a chip in my body, I don’t know about that. I don’t want to be a complete lab rat [or] take it to the next level.”<sup>114</sup> Likewise, Tyson Chandler says, “I’m not down with the alien stuff.”<sup>115</sup>

These fears are recognized by NBA executives, team staffers, and inventors.<sup>116</sup> As a result, Dallas Maverick’s Athletic Performance Director, Jeremy Holsopple, provides players an

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

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

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

“explicit promise before sensitive monitoring takes place.”<sup>117</sup> He assures them that nobody sees their data except Holsopple, his staff, and the coaching staff—all of whom which will only receive the data they need, not information that “players can be judged upon.”<sup>118</sup> Yet, inevitably, the league and team will determine how ABD is used, so in actuality no real assurances can be guaranteed to athletes. Before providing ABD to teams and leagues, policies and procedures must be implemented by players’ associations, leagues, and teams. Athletes must have more than the assurance by team staff that the use and dissemination of ABD will be restricted. Athletes must also be informed on the precise data being collected and how the data will be used, maintained, and protected.

According to NBA executive D’Alessandro, the “holy grail” of ABD provides the ability to identify individuals who are genetically pre-disposed to high athletic performance by sequencing and understanding the genome. However, the Genetic Information Nondiscrimination Act makes it illegal for employers to discriminate against employees based on genetic factors for this reason.<sup>119</sup> The use of ABD to determine genetic predisposition and other related factors is another consideration for First-Generation Beneficiaries, including leagues and players associations.

The NBA seems to be setting the terms of the discussion by providing athletes “relatively little power over which information is collected from them.”<sup>120</sup> For now, teams like the Warriors utilize voluntary participation, which “slowly becomes a recommendation for any player worried about keeping a job.”<sup>121</sup> Practices must be implemented to ensure that the proper balance between employers and employees exist, and to prevent dystopian uses of ABD, regardless of which teams and leagues profess their “magnanimous desire to help players stay healthy for the good of the franchise” and prolong their careers.<sup>122</sup>

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<sup>117</sup> *Id.*

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

<sup>119</sup> *See* Freeman, *supra* note 76.

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

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

<sup>122</sup> *Id.*

The NFL's and NBA's practices are illustrative of the tensions that exist when ABD is collected, used, and disseminated in the sports industry as technology evolves. ABD that is initially collected for health and safety purposes may also be exploited in a number of ways by authorized and unauthorized parties, whether or not they are ethical and legal. This raises questions such as: (1) whether ABD may and should be collected; (2) what type of ABD may be collected; (3) what ABD may be used for; (4) who may distribute ABD and to whom ABD may be disseminated to; (5) how ABD will be protected; and (6) who should be compensated for ABD and how should they be compensated.

The use of wearable technology to collect ABD also provides a snapshot of things to come as teams and leagues provide increasingly immersive sports experiences to fans and as athletes increasingly look for ways to build their own brand through endorsement deals, social media and content distribution, and programming. Consider the potential scenarios that will develop as ABD pertains not only to existing sports entertainment experiences, but also to anticipated virtual reality sports experiences and other new forms of sports entertainment content and distribution.

During a 2014 TED talk, former NFL punter Chris Kluwe described the NFL's innovation and how augmented reality will change sports.<sup>123</sup> Fans want to experience what it feels like to be a NFL player on the field and want to be their favorite player, which is not only extremely profitable, but also possible through augmented reality.<sup>124</sup> Plus, coaches will want to collect and use data to enhance how the game is played during a live event (e.g., streaming real-time information from helmet sensors and accelerometers to Google Glass-like visors on player helmets where players can see the information and plays).<sup>125</sup> Utilizing data to create these experiences for fans and players

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<sup>123</sup> Chris Kluwe, *How Augmented Reality will Change Sports ... and Build Empathy*, TED.COM SUBTITLES AND TRANSCRIPT (May 22, 2014),

[https://www.ted.com/talks/chris\\_kluwe\\_how\\_augmented\\_reality\\_will\\_change\\_sports\\_and\\_build\\_empathy/transcript?language=en](https://www.ted.com/talks/chris_kluwe_how_augmented_reality_will_change_sports_and_build_empathy/transcript?language=en).

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

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



will “create massive excitement in the game [and] tons of people [will] watch.”<sup>126</sup>

The sports industry and its broadcast partners recognize that virtual reality (VR) “offers the holy grail of sports fan engagement and monetization—to be able [to] sell the same seat infinite times.”<sup>127</sup> As a result, companies are creating products that (1) capture immersive visual experiences, (2) provide technologies for player training and improvement, and (3) immerse social networking using embedded film content to more closely mimic the social experience of live games.<sup>128</sup>

One company, Virtually Live, is building a new medium that allows fans to experience not only the game, but also the atmosphere, social interaction, excitement, and sense of being there that drives fans to attend in the first place.<sup>129</sup> They seek to reduce the feeling of isolation that has historically accompanied engaging in VR, and instead utilize technology to create an immersive social experience that “enables fans to enjoy complete viewing flexibility and new perspectives.”<sup>130</sup> They do this using optically tracked 3D data or RFID data gathered by STATS, another sports data collection company, then transposes it into a “virtual stadium environment, in substantially real time.”<sup>131</sup> This will allow fans to select any viewing position and move around, even talking with other fans.<sup>132</sup> Fans may even get a seat right behind second base where they can watch a player make a two-run RBI and celebrate with the player.<sup>133</sup> This will result from a combination of actual footage and virtual reconstruction.<sup>134</sup> Inevitably, ABD will be utilized in addition to other forms of real-time sports data to create a more vivid experience.

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

<sup>127</sup> Tom Impallomeni, *How You Watch Sports is About to Change Forever with Virtual Reality*, SINGULARITYHUB (Aug. 19, 2015), <http://singularityhub.com/2015/08/19/how-you-watch-sports-is-about-to-change-forever-with-virtual-reality/>.

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

In addition to augmented reality and VR, other sports fan experiences and forms of engagement will eventually incorporate ABD. The NFLPA recently launched an original content business, Athlete Content and Entertainment (ACE Media), offering services to all athletes interested in creating athlete content<sup>135</sup> to be used in television shows, Internet shows, games, films, books, and other mediums on a variety of platforms.<sup>136</sup> The company is similar to Major League Baseball

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<sup>135</sup> IRVING REIN ET AL., *THE SPORTS STRATEGIST: DEVELOPING LEADERS FOR A HIGH-PERFORMANCE INDUSTRY* 87-90 (Oxford University Press 2015). Sports fans have become active content consumers and creators. This new dynamic necessitates greater two-way engagement between fans and those seeking to engage the fan (e.g., teams, leagues, sponsors, etc.). Fans are not passive observers but active participants in their sports and entertainment experiences and this requires more immersive content that offers four key elements: access, control, participation, and rewards. “Access” means providing fans with more information about players and games that gives fans a sense of actively engaging with the sports experience. “Control” means allowing fans to utilize new technology to control when, where and how they consume sports by customizing and personalizing their content experience regardless of the device or platform they use to engage in the sports entertainment experience. Participation offers fans a way to interact with other fans through technology that leverages the innate social behaviors of sports fans. Rewards incentivize sports audiences to return to the sports ecosystem and remain loyal to the team. Immersive content includes information, audio, video and other emerging media that is both broad and deep in the types of sports covered, the experiences offered and the connection it creates between the fan and the product. *Id.*; To drive revenue, media companies, agencies, vendors and properties within sports want new ways to encourage fans to incorporate the marketed product into their lives and conversations, even when fans are watching events from home instead of in-stadium. This occurs by providing relevant and engaging content through the right channels using mobile, social and digital platforms to drive engagement by delivering a compelling story around high-level brand exposure. Carolyne Savini, *Emerging Opportunities in Sports Entertainment Content Creation*, TURNKEY SEARCH (Aug. 19, 2015), <http://recruiting.turnkeyse.com/2015/08/19/emerging-opportunities-in-sports-entertainment-content-creation/>.

<sup>136</sup> Liz Mullen, *NFLPA Starts Content Company, Eyes Other Sports*, SPORTS BUS. J. (Sept. 21, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/09/21/Labor-and-Agents/NFLPA-ACE-Media.aspx>.

Advanced Media (MLBAM), which is a digital media company, but offers different content opportunities and distribution partners.<sup>137</sup> Such content will likely include information, photographs, videos, and more that athletes can post on Facebook's "Live" feature. Top-tier athletes use Facebook Live to "take fans behind the scenes, answer questions, share announcements and more."<sup>138</sup> Because fans want to be "one step closer to what an athlete is seeing, doing, and thinking," this will allow athletes like Serena Williams, Steph Curry, and Ricardo Kaká, who already use the feature, to have direct conversations and interaction with fans.<sup>139</sup> It is foreseeable that these and other similar forms of engagement will eventually incorporate ABD.

## II. NEW AND EXISTING FRAMEWORKS TO ADDRESS THE COLLECTION, USE, AND DISSEMINATION OF ABD

Examining the impact of IoE on sports is imperative, particularly as it relates to the collection, use, dissemination, contribution, and protection of ABD during this revolutionary period where the IoE is emerging. Attorneys and scholars familiar with the legal implications of using real-time sports data observe that the commodification of real-time information is one of the most important business issues confronting the sports industry.<sup>140</sup> All parties who collect, use, disseminate, and contribute ABD, real-time or otherwise, would be wise to contemplate the policy and legal implications of doing so. Today, professional athletes, leagues and their data-development and tech-development partners, teams, players associations, and sponsors, hold the biggest stake.

The manner in which the professional sports industry addresses big data and privacy concerns has the potential to shape their societal impact because amateur athletes and consumers confront some of the same issues. At the collegiate level, athletes submit to the collection of ABD.<sup>141</sup> These athletes,

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<sup>137</sup> *Id.*

<sup>138</sup> Mark J. Burns, *In Growing Broadcasting Space, Facebook "Live" Finds Success with Top-Tier Athletes*, FORBES (Sept. 15, 2015), <http://www.forbes.com/sites/markjburns/2015/09/15/in-growing-broadcasting-space-facebook-live-finds-success-with-top-tier-athletes/>.

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

<sup>140</sup> RODENBERG, HOLDEN & BROWN, *supra* note 33, at 65.

<sup>141</sup> Kinduct Signs NCAA Division I University of Louisville,

as well as the National Collegiate Athletic Association (NCAA), member universities, sponsors, and other third parties, have a stake in the legal treatment of ABD. Minors, such as high school football players seeking recruitment to play for a university will also be impacted. Because personal health devices and mobile applications like Fitbit fitness trackers are used by millions of people to collect, track, and disseminate biometric data, all citizens will be impacted to some extent by policymaking and the development and application of law in this area.<sup>142</sup> As data is increasingly transmitted from country to country in today's globalized economy, all of these parties will be impacted by laws governing trans-border dataflow. Therefore, all of these parties must thoroughly consider the impact of ABD collection, use, and dissemination, and the IoE on them. Although their considerations are outside the scope of this article, the societal impact will certainly be affected by major players in the professional sports industry.

To address the tensions inherent in utilizing wearable technology to collect, use, and disseminate ABD, public policy will be debated and evolve. Existing and emerging law will provide the framework for new solutions, and affected parties—leagues, teams, athletes, and third parties with a stake in the business—will adopt policies, procedures and best practices based upon sound public policy, the law, and mutually-beneficial business plans.

#### A. INITIAL CONSIDERATIONS AND SCOPE

To understand the applicability of existing law, and to explore ways in which the law will intersect with ABD collected via wearable technology and technologies developed in the future as the IoE evolves, three initial considerations must be clarified. First, a working definition of what ABD is and what it is not must be crafted. Second, foreseeable uses of ABD must be identified so they may serve to identify issues which the law will need to address. Finally, policy making and the legal landscape affecting the collection, use, dissemination, and protection of ABD must be presented.

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SportTechie, March 31, 2016,  
<http://www.sporttechie.com/2016/03/30/kinduct-signs-ncaa-division-university-louisville/>.

<sup>142</sup> Thierer, *supra* note 61, at 19-20.

### 1. *Athlete Biometric Data Defined*

A fundamental problem in determining how ABD should be treated is the result of definitional confusion. A precise definition is difficult to craft because of the many ways in which ABD interacts with the sports industry. The rapid pace of technological advancement and incorporation in sport, corresponding business practices, consumer demands, and emerging revenue streams present a steadily increasing set of circumstances that impact the definition of ABD as it is used in the sports industry. However, policymakers, industry players, and the courts can increase their understanding of what ABD is and what it is not based upon existing, inter-related terms. This understanding will increase the ability of these industry players to apply relevant laws and adopt appropriate policies and business practices. To create a working definition, we can look to definitions used (1) in the field of biometrics, (2) in common parlance by those in the sports industry, (3) under governing law and by the courts, and (4) in contractual language.

#### a. Biometric Data Definition

Biometric data is defined as a “measurable, physical characteristic or personal behavioral trait used to recognize the identity, or verify the claimed identity of an individual,”<sup>143</sup> according to the Smart Card Alliance, a multi-industry alliance advocating for the use of smart card technology which relies upon “biometric data to [protect] privacy and [enhance] data security and integrity.”<sup>144</sup> Zebra Technologies, the NFL’s shoulder pad sensor partner, is a Smart Card Alliance member.<sup>145</sup> Biometrics are unique biological (anatomical or physiological) or behavioral characteristics.<sup>146</sup> Biological characteristics include a fingerprint, blood vessel pattern in the

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<sup>143</sup> NickCKM, *supra* note 54.

<sup>144</sup> *About the Alliance: Overview*, SMART CARD ALLIANCE, <http://www.smartcardalliance.org/alliance/> (last visited May 8, 2016).

<sup>145</sup> *About the Alliance: Current Members*, SMART CARD ALLIANCE, <http://www.smartcardalliance.org/alliance-members/> (last visited May 8, 2016).

<sup>146</sup> Smart Card Alliance, *Smart Cards and Biometrics: A Smart Card Alliance Physical Access Council White Paper* (Mar. 2011), [http://www.smartcardalliance.org/resources/pdf/Smart\\_Cards\\_and\\_Biometrics\\_030111.pdf](http://www.smartcardalliance.org/resources/pdf/Smart_Cards_and_Biometrics_030111.pdf). (last visited May 8, 2016).

hand, an iris pattern, or other feature that is unchanging and unalterable without significant duress to the individual.<sup>147</sup> A behavioral characteristic is a reflection of a person's psychological makeup, such as a speech pattern or signature which may vary over time.<sup>148</sup>

Biometric characteristics are utilized to recognize or verify the identity of a person. This is precisely why they are of value to leagues and teams who want to increase fan engagement and revenue through the use of enhanced player statistics. The word "identity" includes a person's name, who that person is, or qualities, beliefs, and other characteristics that make a particular person different from others.<sup>149</sup> The term "identity" is important in defining ABD because it is used in relation to the right of publicity and other intellectual property claims, which a plaintiff may raise in a legal action. ABD is comprised of characteristics that differentiates one person from another and is used in connection with the owner's name, similar to the right of publicity.

b. Rights of Personality and Intellectual Property  
Definitions

Identity and characteristics are at the crux of defining publicity and trademark rights under statutory law, common law, and scholarship in this practice area. Rights of publicity include one's identity,<sup>150</sup> name, likeness, and activities.<sup>151</sup> In relation to sports specifically, courts have held that an athlete's voice and physical characteristics are also considered publicity rights.<sup>152</sup> Further, individual player statistics and "playing information" have been found to fall within the definition of publicity rights,

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<sup>147</sup> *Id.*

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

<sup>149</sup> *Identity Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/identity> (last visited May 8, 2016).

<sup>150</sup> See Zachary C. Bolitho, Note, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 935 (2006) (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 3 (2d ed. 2004)).

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

<sup>152</sup> WALTER T. CHAMPION ET AL., INTELLECTUAL PROPERTY LAW IN THE SPORTS & ENTERTAINMENT INDUSTRIES 132 (2014).

as a result of a court argument made by professional sports leagues.<sup>153</sup> One commentator adds that the right of publicity includes “symbolic representations, or anything else that evokes [a] marketable identity . . . [and] any trait that uniquely identifies . . . athletes implicates their marketable identities and should therefore be protected.”<sup>154</sup>

Under these definitions, ABD is considered a publicity right because it is comprised of unique biological and behavioral characteristics that identify a specific individual. ABD also reflects qualities, activities, playing information, and statistics that fall within the scope of publicity rights.

In conveying these rights, the terms that are used to define publicity rights in licenses, assignments, and contracts must adequately and unambiguously identify the right to be licensed or assigned.<sup>155</sup> Simultaneously, definitions should allow a sufficiently broad interpretation in anticipation of new technological innovations, including formats, features, and uses for the characteristic underlying the publicity right.<sup>156</sup> How ABD should be categorized and defined in relation to publicity and other intellectual property rights, especially as a component of statistics, sports information, and real-time data is unclear. For example, consider related terms used in NFL contracts:

TERM	DEFINITION
<b>“Publicity Rights” under Appendix A NFL Player Contract in which an athlete grants to his team and the NFL a license or the “right and authority to use and to</b>	Concerning ABD, “Publicity Rights” include the athlete’s voice and “any and all other identifying characteristics . . . [for] . . . any and all uses or purposes that publicize and promote NFL Football, the League or any of its member clubs in any way in any and all media or formats . . . now known or hereafter developed” <sup>158</sup>

<sup>153</sup> See *Dryer v. NFL*, 55 F. Supp. 3d 1181, 1193-94 (D. Minn. 2014), aff’d 814 F.3d 938 (8<sup>th</sup> Cir. 2016) (Summarizing the court’s treatment of the right of publicity under Missouri state law in *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8<sup>th</sup> Cir. 2007)).

<sup>154</sup> Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete’s Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 25 (1999).

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

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

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**authorize others to use” such rights<sup>157</sup>**


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**“Rights” Under Appendix A NFL Player Contract in which athlete assigns to the NFLPA and its licensing affiliates the “exclusive and unlimited right to use, license and sublicense” specified rights<sup>159</sup>**

Concerning ABD, “Rights” include an athlete’s voice, statistics, data, and other personal indicia for use in connection with any product, brand, service, appearance, product line or other commercial use, sponsorship, endorsement or promotion thereof when 5+ Rights are involved in any form, media or medium within a 12-month period under the NFLPA’s group media licensing program and to promote the NFLPA.<sup>160</sup>

Athlete “indicia,” which is included in the athlete’s assignment to the NFLPA, may or may not include ABD, but a plausible argument can be made that it does. See discussion below.

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<sup>158</sup> *See id.* The uses of Publicity Rights under the CBA include, “for the purpose of publicizing and promoting” aspects of the same, specifically, brands, games, ticket sales, game broadcasts and telecasts, and programming focused on the NFL, one or more NFL clubs and/or their games and events . . . “other NFL-related media offerings” including “branded content segments featuring NFL game footage and other programming enhancements,” media distribution platforms (“e.g., NFL.com, NFL Mobile and NFL Networks), official events, officially sanctioned awards programs, and public service or community oriented initiatives.” Athletes grant Publicity Rights to the club, the NFL and their *affiliates or business partners* (emphasis added) during and after the Term of the NFL Player Contract, the right and authority to use any Publicity Rights fixed in a tangible medium during the Term of the NFL Player Contract. The grant of rights does not create or authorize endorsement by athlete of the club, the NFL or third parties or their brands, products or services. Further, it does not grant any Publicity Rights for use in conjunction with licensed consumer products whether traditional or digital, other than for products that constitute programming as described in the NFL Player Contract or news and information offerings regardless of medium. *Id.*

<sup>157</sup> NFL PLAYERS ASS’N, *Collective Bargaining Agreement* (Aug. 4, 2011), [https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011\\_Final\\_CBA\\_Searchable\\_Bookmarked.pdf](https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf) (last visited May 8, 2016).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



Under a NFL Player Contract, Publicity Rights and Rights, as defined, are problematic because there exists some ambiguity regarding what publicity rights an athlete assigns to the NFLPA, and what is licensed to the NFL.<sup>161</sup> An athlete's characteristics (including his voice) could plausibly be construed to include ABD within "Publicity Rights," which are licensed to the NFL by an athlete because, by definition, biometric information is a measurable, physical characteristic or personal behavioral trait used to recognize the identity, or verify the claimed identity of an individual as defined by the Smart Card Alliance.<sup>162</sup> However, the Rights which an athlete assigns to the NFLPA include the athlete's voice, statistics, data, and indicia, which could be interpreted to include statistics and data comprised of biometric information—although that is not clearly stated.<sup>163</sup>

"Indicia" includes "distinctive marks,"<sup>164</sup> which are different from a "characteristic," which is "a distinguishing trait, quality, or property" as defined by the Merriam-Webster dictionary.<sup>165</sup> "Indicia" is what the athlete has assigned to the NFLPA.<sup>166</sup> "Characteristics" are what is licensed to the NFL.<sup>167</sup> The word "statistic" refers to "a number that represents a piece of information"<sup>168</sup> and, as used in the sports industry, pertains to a specific athlete and includes achievement and performance specific to the sport. With respect to the NFL Player Contract, "statistics" are assigned by an athlete to the NFLPA, but are not

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<sup>161</sup> *See id.*

<sup>162</sup> *About the Alliance*, *supra* note 144.

<sup>163</sup> *Collective Bargaining Agreement*, *supra* note 157.

<sup>164</sup> *Indicia Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/indicia> (last visited May 8, 2016).

<sup>165</sup> *Character Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/character> (last visited May 8, 2016).

<sup>166</sup> *NFL Player Contract*, <http://www.sec.gov/Archives/edgar/data/1573683/000141057815000153/fntx-20150408ex1024a674b.htm> [hereinafter *Player Contract*].

<sup>167</sup> *Id.*

<sup>168</sup> *Statistic Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/statistic> (last visited May 8, 2016).

specifically licensed to the NFL (unless licensed through a different ancillary licensing agreement).<sup>169</sup> Based on these definitions, there are at least two problems: (1) an athlete appears to have licensed Publicity Rights to the NFL in the form of characteristics that may or may not include statistics and data comprised of ABD, and simultaneously assigned Rights to the NFLPA in statistics and data comprised of ABD; and (2) “characteristics” and “indicia” are not interchangeable; nor are “characteristics” and “statistics” or “data.” ABD that is considered a *characteristic* would be licensed to the NFL for broadcasting, programming, news, and entertainment promoting the NFL; but, ABD that constitutes a *statistic* or *data* is assigned to the NFLPA.<sup>170</sup> It would appear that an athlete’s statistics would be partially comprised of a characteristic and/or data (because regardless of the format ABD is collected, it would be considered data and converted into data in order to use it). However, characteristics may not always be statistics. Additional types of characteristics and ABD should be considered in relation to the evolution of technology and how data may be used.

Based on this analysis, the NFL, NFLPA, and athletes may find it beneficial to more precisely define ABD and the rights that are assigned and licensed, particularly in the case of ABD that is commoditized and monetized. For example, the NFLPA may want athletes to assign their characteristics to the NFLPA in the event “statistics” or “data” is not comprised of characteristics. Conversely, the NFL may want to clarify that statistics comprised of ABD are licensed to the NFL by the athlete via the NFLPA. Due to this ambiguity and the increasing use of ABD by the league and opportunities to leverage it by athletes and the NFLPA for their own revenue-generating opportunities, the NFLPA and athletes would be wise to negotiate this point during CBA discussions and player contracts. Doing so would ensure that ABD and future-developed means of collecting athlete “characteristics” and the derivative ABD, data, statistics, and indicia may be used only under license and that athletes are fairly compensated. This is particularly beneficial where ABD and future statistics significantly enhance NFL revenue and where athletes are

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<sup>169</sup> *Player Contract*, *supra* note 166.

<sup>170</sup> *Id.*

entitled to receive compensation for the use of their publicity rights.

In addition to the terms used in the NFL Player Contract noted above, the definitions crafted by the NFL and NFLPA incorporate terms of art pertaining to federal trademark rights (e.g., “indicia for use in connection with any product, brand, service, appearance, product line or other commercial use, sponsorship, endorsement or promotion”) and copyright (e.g., “fixed in a tangible medium”).<sup>171</sup> For the purpose of crafting a definition in relation to ABD as a publicity and intellectual property right, a reasonable definition would be, “any and all athlete biometric characteristics, including without limitation, voice, statistics, data, indicia or any other characteristic regardless of whether such is fixed in a tangible medium.”

### c. Sports Industry and Common Law Definitions

ABD is a subset of data that may be collected, used, and disseminated for a variety of purposes in the sports industry. To some extent, the definition of ABD and how it will be treated under the law is shaped by the purpose for which ABD is collected, the manner in which it will be used, and the parties to whom it is disseminated. In this context, ABD is not clearly defined. Further complicating the matter, in the sports industry and under common law, “sports information,” “real-time data,” and “statistics” are used interchangeably, yet each denotes a fundamentally different concept. The terms are ambiguously defined but they are at times haphazardly used as if they are analogous within sports vernacular. However, sports information may or may not include real-time data. Real-time data may or may not include ABD. ABD is poised to be included in the definition of a statistic and may already be considered such where the NFL is using an athlete acceleration rate, which is a biometric measurement, as a part of Next Gen Stats in its product offerings. It appears from the NFL’s actions, that in order to increase its data offerings to Third and Fourth Generation Beneficiaries, that ABD may be included as a subset of statistics.

Several seminal cases have addressed the topic of sports data in relation to claims related to publicity rights, intellectual

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<sup>171</sup> *Id.*

property, privacy, and First Amendment speech.<sup>172</sup> In these cases, the definitions correspond to evolving technology to some extent and they are used in a way that corresponds to the issue at hand. The following summary identifies various definitions pertaining to sports data:

TERM	DEFINITION
<b>Historical Sports Information (Traditional Sports Statistics)</b>	Information typically found in a newspaper box score <sup>173</sup>
<b>Real-Time Information</b>	<p>Real-time game scores and information tabulated from television and radio broadcasts of games in progress, including score changes, team in possession of ball, whether a team is shooting a free throw, the quarter of the game, and time remaining in the quarter.<sup>174</sup></p> <p>The NBA's "informational products" are divided into the following categories: (1) generating information by playing games; (2) transmitting live, full descriptions of those games; and (3) collected and transmitted material that is strictly factual (e.g., box-scores in newspapers, summaries of statistics on television sports news, and real-time facts to be transmitted to pagers).<sup>175</sup></p> <p>Generally: information captured in real-time during gameplay which is not traditionally reflected in a newspaper box score</p>
<b>Real-Time Scores</b>	"Real-time scores . . . transmitted over the Internet contemporaneously,

<sup>172</sup> See RODENBERG, HOLDEN & BROWN, *supra* note 33, at 88 nn. 98-100.

<sup>173</sup> NBA v. Motorola, Inc. 105 F.3d 841 (2d Cir. 1997); Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004). C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P., 505 F.3d 818 (8<sup>th</sup> Cir. 2007).

<sup>174</sup> See NBA v. Motorola, Inc. 105 F.3d 841, 843-44 (2d Cir. 1997).

<sup>175</sup> *Id.* at 853.

	or nearly contemporaneously, to their being gathered and recorded at one central location on the golf course.” <sup>176</sup>
<b>Referred to as “Fantasy Sports Products,” “Fantasy Baseball Products,” and “Identity”</b>	(1) Names and information about major league baseball players; (2) names, player performance (as defined by MLBAM), and biographical data of actual major league baseball players delivered via a distributor’s Internet website, email, mail, and telephone (as defined by CBC); (3) names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player (as defined by the contract between the parties); and (4) information readily available in the public domain (court observation). <sup>177</sup>  Identity: name as a symbol of one’s identity and understood to be so by the audience (common law) <sup>178</sup>

The terms in the table above are intended to encapsulate athlete statistics as a subcategory of sports information transmitted in real time or near-real time, and used interchangeably at times. Of course there are times when sports information and real-time sports data is rebroadcast or used in programming and other platforms, which are not provided in real time. This is the case with ABD as well. At times, ABD will be collected, used, and disseminated in real-time. In some cases, ABD is collected, then used, and disseminated at a later time.

With respect to ABD used in relation to fantasy sports, ABD is likely to be collected, used, and disseminated in real time, in near-real time, and in daily updates because up-to-the-minute information is critical to the selection of successful fantasy sports players and teams. For this reason, the value of sports information and statistics in the fantasy sports industry is at its highest as soon as the information becomes available

<sup>176</sup> *Morris Commc’ns. Corp. v. PGA Tour, Inc.* 117 F. Supp. 2d 1322, 1324 (2000).

<sup>177</sup> *See C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

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

before selecting players and teams. In practice, ABD as a statistic is being collected, used, and disseminated by First and Second-Generation Beneficiaries in traditional ways, as well as in innovative ways as the sports industry discovers new opportunities for utilizing technology and data. In the sports industry, ABD is categorically but ambiguously included in sports information by professional sports leagues desiring to capitalize on this data. Under common law, ABD is not specifically included or even anticipated in the definitions presented above. This inconsistency is a double-edged sword for all Beneficiaries, which can benefit from or be disadvantaged by their uses of ABD, depending on various factors.

#### d. Privacy-Related Definitions

A final consideration when defining ABD is the impact of privacy rights in relation to the collection, use, and dissemination of personally identifiable information, particularly personal health information (PHI) that traditionally has enjoyed a higher level of protection under U.S. law. Personal health information is protected under the Health Insurance Portability and Accountability Act (HIPAA), which governs the collection, use, dissemination, and protection of individually identifiable health information created, received, maintained, or transmitted for covered entities and their business associates for the purpose of providing health care.<sup>179</sup> The American Reinvestment and Recovery Act (ARRA) expands HIPAA privacy and security requirements to a wide range of businesses.<sup>180</sup> Privacy laws and standards, as well as their applicability to the collection, use, and dissemination of ABD to promote sport will be discussed later, particularly with respect to data collected via wearable technology. However, for definitional purposes it is worth noting that professional sports leagues, such as the NFL and its teams,

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<sup>179</sup> *Health Information Privacy for Covered Entities and Business Associations*, U.S. DEP'T OF HEALTH & HUMAN SERV., (Oct. 29, 2015), <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html>.

<sup>180</sup> Ruth T. Griggs, *Does HIPAA Apply to Employers?*, LEXISNEXIS LEGAL NEWSROOM LABOR AND EMP'T LAW (Oct. 3, 2013), <http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2013/10/03/does-hipaa-apply-to-employers.aspx>.

collect PHI and are employers with certain roles and responsibilities under PHI.

Consider ABD in relation to PHI definitions:

TERM	DEFINITION
<b>Health Information</b>	Any information recorded in any form or medium that is created or received by an employer and relates to past, present, or future physical or mental health or condition of any individual or the provision of health care to an individual. <sup>181</sup>
<b>Individually Identifiable Health Information</b>	Information that is a subset of health information (1) collected from an individual and created or received by an employer; (2) information relates to the past, present, or future physical or mental health or condition of an individual or the provision of health care to an individual; and (3) identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual. <sup>182</sup>
<b>Protected Health Information</b>	Individually Identifiable Health Information that is transmitted or maintained by electronic media or in any other form or medium except in employment records held by a covered entity in its role as an employer. <sup>183</sup>

The definition of Health Information includes ABD because biometric data is by nature information pertaining to one's past, present, or future health. ABD is also included within the definition of Individually Identifiable Health Information (IIHI) because it is Health Information collected from an individual and created or received by the league or team as an

<sup>181</sup> See HIPAA 'Protected Health Information': What Does PHI Include?, HIPAA.COM (Oct. 29, 2015), <http://www.hipaa.com/hipaa-protected-health-information-what-does-phi-include/>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

employer and identifies an individual. ABD may also be considered PHI when it is transmitted or maintained electronically and in any form, except when it exists as an employment record. Because ABD falls within the scope of these definitions and leagues or teams are employers that can be considered “covered entities,” ABD falls within the governance of HIPAA.

Attorney Elizabeth Litten contends that, “athletes do not leave their HIPAA rights at the locker room door.”<sup>184</sup> In 2002, the U.S. Department of Health and Human Services (HHS), which enforces HIPAA, considered a comment suggesting that, “health information related to professional athletes should qualify as an employment record and therefore not qualify as PHI under HIPAA.”<sup>185</sup> In response, HHS found that a professional athlete has the same HIPAA rights as any other individual, stating “[n]o class of individuals should be singled out for reduced privacy.”<sup>186</sup> An athlete’s PHI may become part of an employment record if it is required by an employer to perform its obligations under law and for the employee to receive benefits or comply with performance requirements.<sup>187</sup>

For example, under the NFL’s CBA, the NFL may require all NFL players to wear equipment containing sensors or other non-obtrusive tracking devices during games and practices.<sup>188</sup> The use of the sensors is limited to the collection of information regarding “the performance of NFL games, including players’ performances and movements, as well as medical and other player safety-related data” and the NFL must obtain the NFLPA’s consent prior to using sensors for “health or

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<sup>184</sup> Elizabeth Litten, *Athletes Do Not Leave Their HIPAA Rights at the Locker Room Door*, ABOVE THE LAW (July 31, 2015), <http://abovethelaw.com/2015/07/athletes-do-not-leave-their-hipaa-rights-at-the-locker-room-door/>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* For example, permitted uses of PHI in an employment record includes recording occupational injury, disability insurance eligibility, sick leave requests and justifications, drug screening results (pursuant to employee’s authorization), workplace medical surveillance, and fitness-for-duty tests of employees. *See also The HIPAA Privacy Rule*, <http://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited May 8, 2016).

<sup>188</sup> *Collective Bargaining Agreement*, *supra* note 157, at 222.



medical purposes.”<sup>189</sup> In the NFL, ABD under this provision of the CBA, which is collected by sensors during game play and practices, falls within the definition of an employment record (e.g., players’ performance and movements) and PHI (e.g., player medical and safety-related data), all of which may be used for health or medical purposes, which renders all of this information Health Information and IIHI. Thus, ABD simultaneously falls within the definitions of Publicity Rights, Fantasy Sports Products, Identity, and in sports industry vernacular, statistics and real-time data. As ABD is increasingly incorporated into statistics and sports information presented during live games, it will naturally be considered Real-Time Information. However, under the CBA, there is no language specifically authorizing use of IIHI, PHI, or employment record data collected by employers for any purpose other than as specified above and clearly not for the purpose of commoditizing and monetizing ABD or other Health Information.

Based upon definitions pertaining to an athlete’s health information, ABD may fall into one of the following categories: (1) Health Information, IIHI, and PHI under HIPAA that remains confidential; or (2) part of an employment record that remains confidential. ABD that is collected, used, and disseminated for the purpose of providing health care, tracking job performance in an employment record, and to enhance league product offerings presents a special challenge because each category invokes a different definition and different legal treatment.

Tension has existed in the courts among an athlete’s right to privacy and publicity, the intellectual property rights of both the athlete and the league, and free speech with respect to the privacy of ABD as a category of Health Information, IIHI, and PHI.<sup>190</sup> According to Professor J. Thomas McCarthy, a noted authority on publicity rights, although First Amendment speech is a consideration for courts when weighing rights of publicity and intellectual property against the public’s right to

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<sup>189</sup> *Id.*

<sup>190</sup> *See E.g.*, *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 (1977); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995); *C.B.C. Distrib. & Mktg. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. MO. 2014).

engage in public discourse in matters of public concern, it does not automatically trump other rights because “[i]t is not a monolithic, solid block of constitutional immunity from liability.”<sup>191</sup> Therefore, First Amendment speech arguments favoring disclosure of ABD should be weighed against individual athlete privacy rights and the right of publicity to determine the extent of ABD collection, use, and disclosure.

e. Working Definition

To summarize, a definition of ABD should include the following elements:

A measurable and distinguishable physical characteristic or personal behavioral trait used to recognize one’s identity, including but not limited to name, nicknames, likeness, signatures, pictures, activities, voice, statistics, playing and performance records, achievements, indicia, data, and other information identifying a particular athlete.

Additional distinctions based upon circumstance include:

- 1) ABD that is in the public domain;
- 2) ABD that is collected, used, and disseminated in any form or medium relating to past, present, or future physical or mental health conditions of an individual and such information that identifies the individual;
- 3) ABD that is collected, used, and disseminated in any form or medium relating to past, present, or future physical or mental health conditions of an individual, which is *used to provide health care* and such information to identify the individual;
- 4) ABD that is collected, used, and disseminated in any form or medium relating to past, present, or future physical or mental health conditions of an identified individual, which is used to provide health care, *and such information is transmitted or maintained by electronic media*;
- 5) ABD that is collected, used, and/or disseminated in real time;
- 6) ABD that is collected, used, and/or disseminated in near-real time;

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<sup>191</sup> Bolitho, *supra* note 150, at 944.

- 7) ABD that is collected, used, or disseminated *not* in real time;
- 8) ABD that is transmitted electronically, digitally, or through another manner of transmission in any and all platforms, mediums, or technologies now existing or hereinafter developed;
- 9) ABD used in a manner or for any purpose other than to promote athlete health and safety, enhance performance, prevent injury, and/or improve gameplay;
- 10) ABD used as a commodity or for any purpose of monetization.

The adoption of a definition that incorporates the primary definition above and relevant distinctions, also listed above, is of especial importance in relation to wearable technology, IoT, and the IoE when ABD is collected, used, and disseminated for a variety of purposes, namely in the emerging market of commoditized and monetized ABD.

## 2. *Foreseeable Uses of ABD*

In order to anticipate which elements of a working definition for ABD are fitting for a particular situation and application of pertinent law, current and foreseeable circumstances involving ABD must be contemplated, bearing in mind the potential real world harms and consequences, rather than wild hypotheticals. Circumstances where ABD is currently used or currently contemplated in the near future include:

TYPE OF USE	CORRESPONDING DEFINITION
<b>Broadcast of live games</b>	<p>Real-time sports data comprised of what is considered “historical sports information” or box scores, next generation statistics, athlete biometric data, and future-developed data sets that may be used in conjunction with the broadcast of live sports events and disseminated to a specified audience by means of a specified method or platform.</p> <p>Information captured in real-time during gameplay which is not traditionally reflected in a newspaper box score and scores.</p> <p>Information transmitted over the Internet contemporaneously, or nearly contemporaneously, to its being gathered and recorded.</p>

	<p>Names and information, such as player performance, nicknames, likenesses, signatures, pictures, biographical data, and information in public domain, or a name as a symbol of one's identity understood to be so by the audience.</p> <p>ABD as defined above as appropriate for the situation which may or may not be in the public domain.</p>
<b>Rebroadcast of games and other programming that utilizes ABD</b>	Same definitions as above, including information that is not in real time.
<b>In-stadium, mobile apps, media/broadcasting, virtual reality</b>	Same definition as for the broadcast of live games. Any ABD that remains available subsequent to a live game and broadcast is defined as non-real time sports data or information.
<b>Sports reporting and media uses</b>	Same definitions as for the broadcast of live games. Any ABD that remains available subsequent to a live game and broadcast is non-real time sports data or information.
<b>Fantasy sports</b>	Real-time, near real-time, and non-real-time sports data comprised of athlete statistics and status that are in the public domain (unless athletes consent to dissemination of ABD in the public domain). Any ABD definition used here must be carefully crafted.
<b>Health, safety, and injury prevention</b>	<p>ABD used in a manner or for the purpose of promoting athlete health and safety, enhancing performance, preventing injury and/or improving gameplay and as otherwise defined in the CBA.</p> <p>Includes real-time and non-real-time collection, use, and dissemination to coaches and staff.</p> <p>If ABD is commoditized and used to provide, for example, regular updates via mobile app and for fantasy sports, additional ABD definition elements must be included.</p>
<b>Content creation and utilization by First-, Second-, and Third-Generation Beneficiaries</b>	Same definition as for the broadcast of live games, unless other definitional elements apply. May be in real-time or non-real-time where there's some delay from the time information is collected through the production process and until use and

	dissemination.
<b>Personnel records: confidential and never disseminated unless it falls into a category above and the athlete authorized dissemination and licensed his rights, if applicable</b>	Confidential personal health or medical information not for dissemination or use is not authorized in advance by PHI owner.
<b>Genetic predetermination of athletic ability</b>	Pursuant to law, this may not be collected, used, or disseminated to discriminate against a particular person or for any other unlawful purpose. Definitions for ABD would utilize appropriate language to carve this use of ABD out if the situation requires it.

In each circumstance, ABD will be defined somewhat differently. These circumstances will also determine the appropriate legal analysis to undertake when determining if and how ABD may be collected, used, disseminated, and protected.

#### B. INITIAL SOLUTIONS

The explosive growth of the sports technology market segment presents many exciting business opportunities for Beneficiaries and enriched entertainment experiences for sports fans. Many new technologies will utilize ABD to enhance product offerings, thereby reinforcing fan loyalty. Based upon the information presented, Beneficiaries can create a competitive advantage by (1) expanding their understanding of technological uses of ABD to build individual athlete brands, as well as brands of teams, leagues, partners, sponsors, and endorsers; (2) considering how they will use ABD now and in the future across existing and too-be-developed platforms to increase revenue; (3) determining a licensing strategy for their strategic partners; (4) carefully crafting definitions of ABD that correspond as closely as possible to the subject matter of contracted-for products and services so as to leave open other revenue streams available through different partners; and (5) thoughtfully anticipating the current and evolving regulatory landscape concerning property and privacy rights inherent in ABD.

### CONCLUSION

In addition to the considerations presented, Beneficiaries can get in front of the property and privacy issues by taking a forward-looking approach. Balancing the legal rights of each Beneficiary will benefit all parties as they collaboratively contribute and disseminate ABD in sports entertainment offerings. Part II in this series contemplates and analyzes the legal treatment of ABD. It contains important policymaking considerations, and analyzes the impact of the existing regulatory framework, and relevant privacy, intellectual property, and publicity rights regarding the collection, use, and dissemination of ABD. Business and legal solutions and suggestions for implementation of these solutions will be provided.

Generally, solutions to be examined and discussed will include:

1. Developing a position and strategy for athletes, players associations, leagues, and their partners/subsidiaries;
2. Ensuring rights with respect to ABD are properly defined and flow appropriately through all assignments, licenses, and other relevant contracts, current and future;
3. Drafting and adopting policies, procedures, and best practices to ensure protection of athlete property and privacy rights and reserving additional rights for athlete/player association exploitation as technology and the definition of "publicity rights" evolve;
4. Requiring by contract and under law that leagues, teams, and their partners who handle ABD respect athlete rights in ABD and comply with generally accepted cybersecurity practices for ABD depending on its designation as Health Information, Personally Identifiable Information, etc.; and
5. Strategically identifying and preserving revenue streams for athletes, players associations, their representatives, and media companies who may utilize ABD and other athlete characteristics as technology and mediums for ABD usage evolve.

These solutions will encourage innovation, optimize opportunities for revenue generation, promote implementation of internal policies and procedures to appropriately handle ABD with its attendant privacy and security requirements, reduce potential litigation and its reputational and financial costs, and mitigate risk for parties who are involved in the contribution, collection, use, and dissemination of ABD.

COMMENT:

**BIOMETRIC DATA AND THE *GIONFRIDDO* STANDARD**

MIRANDA STARK\*

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**INTRODUCTION**

The dissemination of athletes’ biometric data may be a parallel issue to the use of players’ statistics by Major League Baseball. In *Gionfriddo v. Major League Baseball*, the California Court of Appeals found that the publishing of sports statistics by Major League Baseball did not violate players’ rights of publicity. However, Athletic Biometric Data (ABD), which is gathered from athletes and potentially made available to the public, possibly goes too far. Providing players’ private data to the public could violate players’ rights of publicity.

**I. *GIONFRIDDO V. MAJOR LEAGUE BASEBALL*: CASE**

**SUMMARY**

In December 2001, the California Court of Appeals decided *Gionfriddo v. Major League Baseball*. In this case, the plaintiffs—former professional baseball players—filed a suit against Major League Baseball (MLB). The plaintiffs claimed that including the players’ names and statistics in programs and websites was unauthorized and violated their rights of publicity.<sup>1</sup> The superior court granted MLB’s motion for summary

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\* J.D. Candidate 2017, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 309 (Cal. App. 2001).

judgment, and the California Court of Appeals affirmed. The Court of Appeals found that the players had failed to demonstrate that they had a “substantial competing interest” in the information being distributed to the public, and that MLB’s uses of the players’ names and statistics were not considered commercial speech.<sup>2</sup> As the information is not considered commercial speech, “[t]hus even if Baseball used depictions of players playing the game or recited statistics or historical facts about the game to advertise the game and promote attendance, the commercial speech cases relied on by plaintiffs would be inapposite.”<sup>3</sup>

When analyzing the violation of the player’s rights of publicity, the *Gionfriddo* court looked at four factors: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”<sup>4</sup> The court then weighed these four factors against the public’s interest in the information.<sup>5</sup>

Applying these factors to the use of ABD, and weighing them against the public’s interest in the information, it appears likely that courts will not treat ABD in the same manner as other sports statistics. ABD is likely to have increased protection as compared to that of ordinary sports statistics.

In *Gionfriddo v. Major League Baseball*, four former professional baseball players filed suit against Major League Baseball (MLB) and several related entities.<sup>6</sup> MLB owns and maintains a website that includes “rosters, box scores, game summaries, lists of award winners, and video clips of historic moments from past games.”<sup>7</sup> Defendant entities also produce television shows containing “game performances and related activities.”<sup>8</sup> The plaintiffs claim was that these various uses were unauthorized and violated their rights of publicity.<sup>9</sup>

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<sup>2</sup> *Id.* at 316-18.

<sup>3</sup> *Id.* at 317.

<sup>4</sup> *Id.* at 313.

<sup>5</sup> *Id.* at 319.

<sup>6</sup> *Id.* at 310.

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 311.



The California Court of Appeals held that Major League Baseball's uses of the players' information fell under the "public affairs" exception under the California statute, so the players' consent was not required and, therefore, the trial court was correct to grant summary adjudication regarding the statutory right of publicity claim.<sup>10</sup> In addition to the statutory right to publicity, the court also recognized the common law right of publicity. At common law, the elements to a violation of a right of publicity are "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>11</sup> Even if all four elements are established, the common law does not always provide relief.<sup>12</sup> Most of the factors are very factual and objective. In addition to the objective factors used to determine whether a person's right of publicity has been violated and whether relief may be granted, a court, at a minimum, looks at: (1) the nature of the information conveyed, and (2) the context of the communication.<sup>13</sup>

In *Gionfriddo*, the court looked at these factors, and took the public's interest in the expression into account (in this case, historical data's importance in professional sports).<sup>14</sup> The nature of the information being conveyed included game statistics and information, as well as photos and videos taken during baseball games.<sup>15</sup> Under the public affairs exception, information used "in connection with [a] news, public affairs, or sports account . . . [does] not constitute uses for which consent is required."<sup>16</sup> The court also noted that baseball fans (and therefore the public) have a great interest in being able to access the historical data and statistics related to baseball, and that this access generates greater interest in the sport.<sup>17</sup> The court characterized the context of the communication as entertainment accounts of "mere bits of

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<sup>10</sup> *Id.* at 318.

<sup>11</sup> *Id.* at 313.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 314.

<sup>14</sup> *Id.* at 313.

<sup>15</sup> *Id.* at 314.

<sup>16</sup> *Id.* at 318.

<sup>17</sup> *Id.* at 315.

baseball's history.”<sup>18</sup> According to the court, these factors weighed against the public's interest to access the information, and did not warrant a finding that the athletes' right of publicity had been violated.<sup>19</sup>

## II. APPLYING THE *GIONFRIDDO* STANDARD TO ABD

Today, many professional sports teams have begun gathering Athletic Biometric Data (ABD) from athletes.<sup>20</sup> The use of players' names and statistics in programs and websites is comparable to the use of team-gathered ABD; both are information about athlete performance that can impact the outcome of a game. Both types of data can be used to increase interest in a sport and perhaps increase attendance at live sports games. There are many reasons for collecting this data, including to:

[I]mprove athlete health and safety, prevent injury, optimize athlete performance, and contribute to better gameplay and wins on the field.<sup>21</sup> Technology is also being used to increase fan engagement with the sport and promote products which increase revenue . . .<sup>22</sup>

When looking at ABD, the outcome would likely be different. Although these uses could be seen simply as “data and statistics,” and would therefore have no protection under a *Gionfriddo* analysis, ABD is much more personal, and should not necessarily be disseminated to the public as freely as other sports statistics. Even if contracts evolve to include provisions that allow the gathering and use of this information, it is too personal to be freely disseminated to the public. ABD is not observable by fans, instead it is gathered by monitoring athletes--and not only while they are in public. While the context of the communication may be similar to *Gionfriddo*, the nature of the

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<sup>18</sup> *Id.* at 314.

<sup>19</sup> *Id.* at 319.

<sup>20</sup> Stephen Mayhew, *Professional Sports Teams and Athletes Driving Wearable Technology*, BIOMETRICUPDATE.COM, (Apr. 11, 2016), <http://www.biometricupdate.com/201410/professional-sports-teams-and-athletes-driving-wearable-technology>

<sup>21</sup> Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications of and Solutions for Collecting, Utilizing and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337 (Spr. 2016).

<sup>22</sup> *Id.*

information makes distinguishable because ABD is not just “mere bits of baseball’s history.”<sup>23</sup> Rather, ABD is private, personal data gathered about athletes. Although the public might have an interest in the information, this interest is unlikely to outweigh the athletes’ interests in keeping this data private. Therefore, the players’ privacy interests outweigh the public’s interest in the data, even if the public does have an interest in the information.

Looking forward, it seems likely that that sports organizations and teams will change their player contracts to include players’ authorizations for the gathering and use of ABD, if they have not done so already. Players may feel pressured to accept these terms because they will likely be required to consent or otherwise lose their contracts.<sup>24</sup> While sports teams may technically be allowed to use the information without the athletes’ express permission under the *Gionfriddo* standard, this is an extreme invasion of privacy as expressed by the *Gionfriddo* court, an “appropriation of plaintiff’s name or likeness to the defendant’s advantage.”<sup>25</sup>

Although traditional sports statistics and ABD could be considered two sides of the same coin, the data is distinguishable in very important ways. Primarily, traditional statistics can be kept by anyone who carefully watches a sports game. When sports teams publish the information, they are simply recording the information for easier access. In comparison, ABD contains very personal data that can only be gathered by carefully monitoring athletes. As such, sports teams may use the ABD to increase interest in the sport and increase attendance at games.

In *Gionfriddo*, the athletes could not show that they had a substantial competing interest in the information being conveyed to the public.<sup>26</sup> ABD is different, and arguably, athletes *do* have a “substantial competing interest” in keeping this information private. Information of a more personal nature than game statistics is being gathered, including: sleeping habits, skin temperature, body position, and heart rate variability. ABD

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<sup>23</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 314.

<sup>24</sup> Gale, *supra* note 22.

<sup>25</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 313 (quoting *Eastwood v. Superior Ct.*, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342 (1983)).

<sup>26</sup> *Id.* at 317-18.

can even be used to indicate alcoholic intoxication.<sup>27</sup> This is not information that sports fans would be able to gather, nor is it simply “mere bits of a sports history.”<sup>28</sup> However, the court in *Gionfriddo* noted that baseball fans have an interest in being able to access the historical data and statistics related to baseball and that this access generates greater interest in the sport. In this way, ABD could be considered to serve the same purpose for various sports.<sup>29</sup> For example, the public may have an interest in the data due to the popularity of fantasy sports. Could this mean that the data is considered “commercial” speech?

[I]n relation to fantasy sports, ABD is likely to be collected, used and disseminated in real time, in near-real time and in daily updates since up-to-the-minute information is critical to the selection of successful fantasy sports players and teams. For this reason, the value of sports information and statistics in the fantasy sports industry is at its highest as soon as the information becomes available before selecting players and teams.<sup>30</sup>

This would mean that the information could be extremely valuable to fantasy sports companies. However, the *Gionfriddo* court noted that “profit, alone, does not render speech commercial . . . .”<sup>31</sup> Yet, according to the court, advertisements are considered commercial speech.<sup>32</sup> Therefore, unless sports teams and fantasy sports companies use ABD *primarily* as advertisements, it is unlikely a court would find that the data is commercial speech, and therefore the speech would be “entitled to a reduced level of constitutional protection, without regard to the precise information conveyed.”<sup>33</sup> The *Gionfriddo* court elaborated: “there is significant public interest in the information conveyed by the challenged uses, and Baseball is not exploiting that interest by inserting the data in an advertisement. Even if Baseball did use the information in such an advertisement, we question whether this would be determinative.”<sup>34</sup>

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<sup>27</sup> Gale, *supra* note 22.

<sup>28</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 314.

<sup>29</sup> See Gale, *supra* note 22.

<sup>30</sup> Gale, *supra* note 22.

<sup>31</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 315.

<sup>32</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 316.

<sup>33</sup> *Id.* at 315.

<sup>34</sup> *Id.* at 316-317.

**CONCLUSION**

ABD may parallel historic sports statistics, however, due to the invasive and personal nature of the data it seems unlikely that courts will treat ABD in the same manner. Although ABD may not be considered commercial speech, and therefore may be “entitled to a reduced level of constitutional protection,”<sup>35</sup> the information is extremely personal and therefore players may have a substantial competing interest in the information.

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<sup>35</sup> *Id.* at 315.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

**FLEDGLING MUSICIANS: DON'T LET NET NEUTRALITY  
DISTRACT YOU**

GLENTON W. DAVIS, JR.\*

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**INTRODUCTION**

The proposed merger between telecommunications giants Comcast and Time-Warner Cable, valued at over \$45 billion,<sup>1</sup> has reignited the long-running debate over the extent to which the Internet should remain open to content providers and

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\* J.D., 2016, Northwestern University Pritzker School of Law; M.B.A., 2016, Kellogg School of Management; B.A., 2007, Yale University.

<sup>1</sup> Cecilia Kang, *Comcast Time Warner Agree to Merge in \$45 Billion Deal*, WASH. POST (Feb. 13, 2014), [http://www.washingtonpost.com/business/economy/comcast-time-warner-agree-to-merge-in-45-billion-deal/2014/02/13/7b778d60-9469-11e3-84e1-27626c5ef5fb\\_story.html](http://www.washingtonpost.com/business/economy/comcast-time-warner-agree-to-merge-in-45-billion-deal/2014/02/13/7b778d60-9469-11e3-84e1-27626c5ef5fb_story.html).

end users.<sup>2</sup> This principle, that “all Internet traffic should be treated equally on providers’ networks,” is broadly known as net neutrality.<sup>3</sup> This debate has roused frustration and concern from Internet companies, entrepreneurs, investors, consumers, and notably, musicians.<sup>4</sup>

Musicians are particularly concerned with how net neutrality may affect their First Amendment rights to creative expression.<sup>5</sup> As a result, many musicians, from the superstars to the relative unknown, are investing political energy to protect the open Internet through net neutrality. Net neutrality, however, may be distracting these artists from more pertinent and pressing issues, such as how they can monetize their music content in ways sufficient to earn a sustainable living.

This article argues that musical artists, particularly the relative unknowns, are distracted. They are fighting for net neutrality when they should actually be focused on two serious and impending sub-issues related to, but fundamentally distinct from, net neutrality: (1) licensing agreements between Internet companies and independent labels that are discriminatory and inhibitive to new artist discovery, and (2) persistent copyright infringement and statutory rights violations that prevent lesser-known artists from being compensated for their creative work.<sup>6</sup>

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<sup>2</sup> See Barbara van Schewick, *The Case for Rebooting the Network-Neutrality Debate*, THE ATLANTIC (May 6, 2014), [http://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809/?single\\_page=true](http://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809/?single_page=true).

<sup>3</sup> Gautham Nagesh, *Obama Makes FCC’s Tight Spot on Net Rules Even Tighter*, WALL ST. J. (Oct. 13, 2014), <http://blogs.wsj.com/digits/2014/10/13/obama-makes-fccs-tight-spot-on-net-rules-even-tighter/> [hereinafter *FCC’s Tight Spot*].

<sup>4</sup> See Ira Teinowitz, *Latest Net Neutrality Supporters: The Roots, OK Go, R.E.M., Moby*, THE WRAP (Sep. 22, 2010), <http://www.thewrap.com/media/column-post/latest-net-neutrality-supporters-roots-ok-go-rem-moby-21109/>.

<sup>5</sup> See Anti-Flag et al., *Net Neutrality Letter*, FUTURE OF MUSIC COALITION (May 13, 2014), <https://futureofmusic.org/net-neutrality-letter-may-13-2014>.

<sup>6</sup> These sub-issues are particularly important for lesser-known artists, who matter to the mainstream music business far more than typically considered. Mainstream pop stars often take inspiration, or even entire creative works, from lesser-known artists. For example, pop superstar Beyoncé Knowles famously used rhythm sounds in her 2011

Part I of this article reviews the history of the net neutrality debate, while Part II segments the artist community into label artists, independent artists, and fledgling artists. Next, Part III outlines a hypothetical environment in which regulators codify net neutrality principles, and it explores what consequences await the fledgling artist. Part IV reviews more recent developments in the music industry: the rise of digital music streaming services, such as Pandora and Spotify. Part V envisages a scenario in which net neutrality fails, and considers the positive and negative effects of such a paradigm. Part VI introduces large Internet companies, their roles in the net neutrality debate, and how their business practices continue to shape the future of the music industry. Finally, Part VII offers fledgling artists three solutions and advises fledgling artists on how to protect and maximize their careers, despite this age of digital chaos.

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single “Run the World (Girls)” that originally appeared in a 2009 single produced by electronic music duo Major Lazer called “Pon the Floor.” See James Montgomery, *Beyoncé’s ‘Run the World’ Started Off As ‘A Joke’?*, MTV NEWS (May 3, 2012), <http://www.mtv.com/news/1684405/beyonce-run-the-world-girls-joke/>. The original, co-creator Diplo said, “never really had a push.” *Id.* However, the Knowles-incarnation had massive push. It went on to sell over 500,000 digital downloads and peaked at Number 29 on the U.S. Billboard Hot 100 charts. See *Gold & Platinum*, RIAA.COM, [http://www.riaa.com/gold-platinum/?tab\\_active=default-award&se=beyonce#search\\_section](http://www.riaa.com/gold-platinum/?tab_active=default-award&se=beyonce#search_section) (last visited May. 18, 2016). Further, Knowles performed her version live at the 2011 Billboard Music Awards using projection-based choreography based on similar choreography originally performed by Italian singer Lorella Cuccarini in 2010. See *Beyoncé Responds to Billboard Awards Performance Controversy*, RAP-UP (May 25, 2011), <http://www.rap-up.com/2011/05/25/beyonce-responds-to-billboard-awards-performance-controversy/>. Knowles first watched Cuccarini’s performance on YouTube. *Id.* Knowles has since expressed gratitude to YouTube for exposing her to lesser-known artists that could inspire her work. *Id.* YouTube could thereby be credited with helping the mainstream music business earn millions of dollars from less famous, lesser-known music that directly influences the hits that superstar artists release. Lesser-known artists therefore comprise a critical component of the music ecosystem worthy of attention and close analysis.



### I. NET NEUTRALITY: FROM THEN TO NOW

Net neutrality is the notion that Internet users should be able to control their individual relationships with the Internet.<sup>7</sup> Specifically, net neutrality provides that users should be free to “make their own choices about what applications and services to use, and . . . what lawful content they want to access, create, or share with others.”<sup>8</sup> The concept of net neutrality dates back to the promulgation of the Telecommunications Act of 1996 (Act of 1996).<sup>9</sup> The Act of 1996 granted the Federal Communications Commission (FCC) the authority to “promote Internet investment and to protect and promote voice, video, and audio communications services.”<sup>10</sup> Further, the Act of 1996 enumerated five declarations of U.S. policy pertaining to the Internet.<sup>11</sup> Three of these declarations carry special significance to net neutrality. First, the Act will promote the continued growth of the Internet.<sup>12</sup> Second, it will preserve the “vibrant and competitive free market” upon which the Internet was historically built.<sup>13</sup> Third, it will foster the development of technologies which “maximize user control” over what information they consume over the internet.<sup>14</sup>

The problem with the Act of 1996, however, is that it left much of the responsibility—and thereby the ownership—of broadband Internet investment to cable companies.<sup>15</sup> Regardless

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<sup>7</sup> See *A Guide to Net Neutrality for Google Users*, GOOGLE HELP CENTER, <http://web.archive.org/web/20080901084929/http://www.google.com/help/netneutrality.html> (accessed by searching for <http://www.google.com/help/netneutrality.html> on the Internet Archive Wayback Machine for Sept. 1, 2008) (last visited May 18, 2016).

<sup>8</sup> *Open Internet*, FCC.GOV, <https://www.fcc.gov/general/open-internet> (last visited May 18, 2016); Benton Foundation, *A Victory for Everyone Who Uses the Internet*, <https://www.benton.org/blog/victory-everyone-who-uses-internet>.

<sup>9</sup> Federal Communications Commission, Report and Order, In the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52 (2010).

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

<sup>11</sup> S. Res. 652, 104th Cong. (1996) (enacted).

<sup>12</sup> *Id.*

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

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

<sup>15</sup> Broadband Internet is a high-speed Internet service that is

of the legislative intent, its deference enabled cable companies to invest over \$84 billion in infrastructure between 1996 and 2005.<sup>16</sup> Such deference also allowed cable companies to control approximately 64 percent of the high-speed broadband market over the same time period.<sup>17</sup> Further, cable companies amassed significant legal advantages that incumbent telecom providers could not similarly exploit. For example, by law, incumbent telephone companies had to abide by structural open access mandates.<sup>18</sup> These mandates required telephone companies to share their infrastructure with intermediaries, such as Internet Service Providers (ISPs) and later, broadband Competitive Local Exchange Carriers (CLECs).<sup>19</sup> These CLECs wanted to provide Internet connectivity to end users.<sup>20</sup> In contrast, the FCC did not subject cable companies to comparable structural open access mandates.<sup>21</sup> Cable companies thereby had exclusive use of the massive infrastructure they built in the years following the passage of the Act of 1996.

Some policymakers and regulatory advocates began to express concern over cable companies' growing influence and control over Internet infrastructure.<sup>22</sup> They called upon federal regulators to impose structural open access mandates upon the cable companies, similar to those imposed upon incumbent telephone companies.<sup>23</sup> Federal regulators, however, seemed largely uninterested in such measures.<sup>24</sup> In response, a

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always on and accessible to consumers. In contrast to traditional internet, which relies on telephone lines for connectivity, Broadband Internet is usually faster. *See Types of Broadband Connections*, FCC.GOV, <http://www.fcc.gov/encyclopedia/types-broadband-connections> (last visited May 17, 2016); *See also* Adam Thierer, "Dumb Pipe" Mandates Smart Policy?: *Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOMM. & HIGH TECH. L. 275, 283 (2005) [hereinafter *Dumb Pipe*].

<sup>16</sup> Christiaan Hogendorn, *Broadband Internet: Net Neutrality Versus Open Access*, WESLEYAN.EDU 2 (July 18, 2007), <http://chogendorn.web.wesleyan.edu/oa.pdf>.

<sup>17</sup> *Dumb Pipe*, *supra* note 15, at 203.

<sup>18</sup> Hogendorn, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Dumb Pipe*, *supra* note 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

consortium of software and e-commerce companies formed the Coalition of Broadband Users and Innovators (CBUI).<sup>25</sup> The CBUI, whose members included Microsoft, Amazon, Apple, Disney, eBay, Yahoo!, among others, petitioned the FCC “to adopt rules to ensure that cable and telephone broadband service providers will not use their control of high-speed networks to disrupt consumer access to websites or other users.”<sup>26</sup>

Years of debate ensued, culminating in the FCC’s 2010 issuance of the Open Internet Order.<sup>27</sup> The Order proclaimed “the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression.”<sup>28</sup> It also set forth three tenants for achieving its proclamation: (1) transparency, (2) no blocking, and (3) no unreasonable discrimination.<sup>29</sup> Each of these three tenants supports the notion of a neutral Internet that treats all traffic equally.<sup>30</sup>

However, on January 14, 2014, a federal court of appeals reignited the net neutrality debate when it struck down the FCC’s Open Internet Order in *Verizon v. Federal Communications Commission*.<sup>31</sup> The court offered no reasoning to support why it shut down the FCC’s rules.<sup>32</sup> It simply deemed the legal foundation upon which the FCC relied to justify its regulations, as “insufficient.”<sup>33</sup>

The *Verizon* court’s decision effectively restored broadband and telecommunications companies’ power to block

<sup>25</sup> *Id.*

<sup>26</sup> Adam Thierer, “Net Neutrality”: Digital Discrimination or Regulatory Gamesmanship in Cyberspace?, POLICY ANALYSIS, Jan. 2004, at 2.

<sup>27</sup> Federal Communications Commission, *supra* note 9.

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

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

<sup>30</sup> See *FCC’s Tight Spot*, *supra* note 3.

<sup>31</sup> See *Verizon v. Fed. Communic’ns Comm’n*, 740 F.3d 623 (D.C. Cir. 2014) (upholding the Federal Communication Commission’s authority to promulgate rules governing the management of Internet traffic in accordance with Section 706 of the Telecommunications Act of 1996, but finding that anti-blocking and anti-discrimination rules could not be sustained for lack of meritorious argument).

<sup>32</sup> *Net Neutrality*, SAVETHEINTERNET.COM, <http://www.savetheinternet.com/net-neutrality> (last visited Oct. 13, 2014).

<sup>33</sup> *Id.*

and reasonably discriminate against certain broadband Internet users.<sup>34</sup> Four months after the *Verizon* decision, FCC Chairman Tom Wheeler released a statement to the public, inviting anyone to “comment on the best ways to define, prevent, and punish the practices that threaten an open Internet.”<sup>35</sup> Wheeler also offered for public debate a set of rules that, while preventing providers from knowingly restricting or slowing Internet connectivity, would allow content providers the option to pay Internet providers a premium to obtain a guaranteed “fast lane of [Internet] service.”<sup>36</sup>

Opponents of the proposed rules argue that such a scheme would effectively produce a “tiered Internet.”<sup>37</sup> One tier would be a *de facto* slow lane by virtue of providers’ ability to increase the connectivity speeds for customers who pay a premium for such services.<sup>38</sup> The FCC maintains that, irrespective of the proposed rules’ current anatomy, its primary goal is to work with the public to best ensure an open Internet.<sup>39</sup> The comment period on the aforementioned schema closed on September 15, 2014, with four million comments submitted.<sup>40</sup>

In November 2014, Wheeler released an initial proposal for net neutrality, which parties deemed sufficiently complicated to “confound even experts on the issue, and few people appear to fully understand its implications.”<sup>41</sup> The plan offered to reclassify “back-end” broadband service as a common carrier,<sup>42</sup>

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<sup>34</sup> See *Verizon*, 740 F.3d 623.

<sup>35</sup> Federal Communications Commission, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Notice of Proposed Rulemaking (May 15, 2014).

<sup>36</sup> Edward Wyatt, *F.C.C. Backs Opening Net Neutrality Rules for Debate*, N.Y. TIMES (May 15, 2014), [http://www.nytimes.com/2014/05/16/technology/fcc-road-map-to-net-neutrality.html?\\_r=0](http://www.nytimes.com/2014/05/16/technology/fcc-road-map-to-net-neutrality.html?_r=0).

<sup>37</sup> *Net Neutrality*, *supra* note 32.

<sup>38</sup> Wyatt, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> Gautham Nagesh, *FCC Likely to Delay Net-Neutrality Rules Until Next Year*, THE WALL ST. J., (Nov. 7, 2014), <http://online.wsj.com/articles/fcc-likely-to-delay-net-neutrality-rules-until-next-year-1415411184> [hereinafter *FCC Likely to Delay*].

<sup>41</sup> *Id.*

<sup>42</sup> The Communications Act of 1934 offers that “the term ‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio

much like traditional telephone networks. Such a reclassification would stringently regulate deals between content providers and cable companies.<sup>43</sup> The proposal also exerted light regulation over Internet providers' retail operations.<sup>44</sup>

On February 3, 2015, however, Wheeler offered a far simpler and declarative second proposal to resolve net neutrality issues.<sup>45</sup> On February 26, 2015, the FCC passed Wheeler's second proposal into law in a historic 3-2 vote.<sup>46</sup> The FCC definitively reclassified the Internet as a Title II common carrier in order to best protect net neutrality.<sup>47</sup> Title II of the Communications Act provides in part that, in addition to having regulatory authority over common carriers, the FCC can deem it unlawful for any common carrier to impose discriminatory pricing or general operating regimes on any person.<sup>48</sup> The FCC's vote did just that.<sup>49</sup> The agency has effectively banned the creation of Internet "fast lanes" or "slow lanes."<sup>50</sup> Further, it has prohibited cable companies from "blocking and throttling" online content and services.<sup>51</sup> Wheeler and his FCC colleagues believe that these measures best assure lasting Internet openness.<sup>52</sup>

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or in interstate or foreign radio transmissions of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C.A § 153(11) (2010).

<sup>43</sup> *FCC Likely to Delay*, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> Ted Johnson, *Net Neutrality: FCC Chairman Proposes to Reclassify Internet like a Utility*, VARIETY (Feb. 4, 2015), <http://variety.com/2015/biz/news/net-neutrality-fcc-chairman-proposes-to-reclassify-internet-like-a-utility-1201422752/>.

<sup>46</sup> Haley Sweetland Edwards, *FCC Votes 'Yes' on Strongest Net-Neutrality Rules*, TIME (Feb. 26, 2015), <http://time.com/3723722/fcc-net-neutrality-2/>.

<sup>47</sup> *Id.*

<sup>48</sup> 47 U.S.C.A. §§ 201-202 (2010).

<sup>49</sup> Johnson, *supra* note 45.

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

<sup>51</sup> *Id.*

<sup>52</sup> Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015), [http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality](http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality;);

The musician community views the aforementioned vote as a watershed victory for its content and ability to monetize their musical creations online.<sup>53</sup> However, the musician community—including a range of well-known and unknown artists—may be celebrating a victory that is actually irrelevant to the collective economic and legal challenges they currently face.

## II. SEGMENTING THE MUSICIAN COMMUNITY

The Bureau of Labor Statistics (Bureau) jointly defines a musician and a singer as “[an individual or group of individuals who] play[s] instruments or sing[s] for live audiences and in recording studios” in a variety of genres such as classical, jazz, or rock.<sup>54</sup> As of 2014, there were an estimated 174,300 people employed as musicians and singers in the United States.<sup>55</sup> However, it must be noted that musicians and singers exist in many forms and experience varying degrees of success. This article segments musicians and singers (hereinafter “artists”) into three categories: (1) label artists, (2) independent artists, and (3) fledgling artists.

Label artists are artists who record and perform music under a contract with a record label.<sup>56</sup> Record label contracts are highly individualized and are often subject to renegotiation or renewal.<sup>57</sup> However, these contracts generally offer artists the opportunity to receive recording, marketing, and promotional

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*See also* Steve Lohr, *In Net Neutrality Push, F.C.C. is Expected to Propose Regulating Internet Service as a Utility*, N.Y. TIMES (Feb. 2, 2015), <http://www.nytimes.com/2015/02/03/technology/in-net-neutrality-push-fcc-is-expected-to-propose-regulating-the-internet-as-a-utility.html>.

<sup>53</sup> *See FMC Welcomes Real Net Neutrality*, FUTURE OF MUSIC COALITION (Feb. 3, 2015), <https://futureofmusic.org/press/press-releases/fmc-welcomes-real-net-neutrality>.

<sup>54</sup> *Occupational Outlook Handbook, 2014-15 Edition*, Musicians and Singers Summary, BLS.GOV, <http://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm> (last visited May 17, 2016).

<sup>55</sup> *Id.*

<sup>56</sup> *See Major Label Contract Clause Critique*, FUTURE OF MUSIC COALITION (Oct. 3, 2001), <https://futureofmusic.org/article/article/major-label-contract-clause-critique>.

<sup>57</sup> *Id.*

support for their music in exchange for royalties on the revenues earned from selling the artist's recordings.<sup>58</sup> Historically, the majority of artists aspired to achieve "label" status because of the deep pockets record labels employed to turn relative unknowns into household names.<sup>59</sup>

Independent artists, by contrast, are artists who have historically recorded and performed music without being under contract with a record label.<sup>60</sup> The term "independent," however, is distinct from "fledgling" in this article. Such distinction exists in large part because of the Internet, which has given independent artists increased exposure to global audiences.<sup>61</sup> Online digital music streaming services, such as Pandora and Spotify, now connect label and independent artists alike with current and potential fans far more easily than traditional broadcast radio.<sup>62</sup> The Internet, however, has yet to prove as fruitful for "fledgling" artists.

Fledgling artists are those aspiring unknowns who, in today's environment, are only equipped with a computer, a wireless connection, and a dream.<sup>63</sup> Fledgling artists, like

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Macklemore & Ryan Lewis ("Macklemore") is a modern, and popular, example of an independent artist. See Nolan Feeney, *Macklemore's 'Thrift Shop' is First Indie Hit to Top Charts in Nearly Two Decades*, TIME (Jan. 25, 2013), <http://newsfeed.time.com/2013/01/25/macklemores-thrift-shop-is-first-indie-hit-to-top-charts-in-nearly-two-decades/>. Macklemore, alongside his production partner Ryan Lewis, recorded and released a pop rap album entitled *The Heist* in October 2012. *Id.* The duo successfully garnered mainstream success with one single from the album entitled "Thrift Shop." *Id.* The song earned the Number One spot on the Billboard Hot 100 charts without being under contract with a record label. Macklemore is the first independent artist to achieve this feat since Lisa Loeb did the same in 1994 with her song "Stay (I Missed You)." *Id.*

<sup>61</sup> See Claire Atkinson, *Indie Artists Are New No. 1 in Music Industry*, N.Y. POST (Jan. 2, 2014), <http://nypost.com/2014/01/02/indie-artists-are-new-no-1-in-music-industry/>.

<sup>62</sup> *Id.*

<sup>63</sup> TJay is an example of a fledgling artist. The rock guitar musician and singer has self-released three albums since 2007, all of which have resulted in minimal fanfare and sales. TJay performs gigs regularly; however, the vast majority are in local restaurants and coffee

independent artists, record and perform music, but have much further to travel on the path to music monetization than their independent or label peers.

Statistics on digital music sales reveal that fledgling artists occupy the vast majority of the digital territory.<sup>64</sup> Nielsen SoundScan, an organization that collects and tracks recorded music sales, revealed that of the approximately eight million digital songs released in 2011, 94 percent sold fewer than one hundred copies.<sup>65</sup> Further, 32 percent of those that sold fewer than one hundred copies sold just one copy.<sup>66</sup> As such, the vast majority of today's musical artists are fledgling. These artists release music physically, electronically, or both, with the hope of beating the odds and escaping the expansive land of the unsold.

Given that fledgling musicians occupy the vast majority of musicians in the music industry, this article focuses on how the net neutrality debate affects them. In the subsequent section, this article imagines a net neutral internet, and second, imagines a tiered internet, through the lens of the fledgling artist. What results for the fledgling artist is, hopefully, a realization that the debate over internet freedom should not be their primary concern.

### III. IMAGINING A NET NEUTRAL WORLD

A pure net neutral Internet would protect the status quo. It would keep the Internet open for free public use by any individual who desires to engage it.<sup>67</sup> Further, a pure net neutral Internet would treat all traffic flowing across a network equally.<sup>68</sup> In essence, with a pure net neutral Internet, consumers and businesses alike “can make their own choices about what applications and services to use and are free to decide what lawful content they want to access, create, or share with others.”<sup>69</sup> Traditional rhetoric would view such an outcome as a

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shops around New England. *See generally* TJAY, TJAYMUSIC.COM (last visited May 17, 2016)

<sup>64</sup> *See* Bob Lefsetz, *The Most Important Thing You Will Read All Day*, THE LEFSETZ LETTER (Oct. 16, 2013), <http://lefssetz.com/wordpress/index.php/archives/2013/10/16/the-most-important-thing-you-will-read-all-day/>.

<sup>65</sup> *Id.*

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

<sup>67</sup> *See Open Internet*, *supra* note 8.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*



victory for fledgling artists, but copyright law may reveal the opposite.

Consumers' ability to make such choices—particularly the choice to share content—autonomously creates ample opportunity for those consumers to share content, such as music, without providing compensation to those who first created or owned it. To do so is a violation of 17 U.S.C. § 106.<sup>70</sup> This statute enumerates six critical rights to “original works of authorship fixed in a tangible medium of expression”: (1) to make copies (reproduce); (2) to prepare derivative works (to make adaptations); (3) to control distribution copies (to [first] sell copies of copyrighted material, like books); (4) to control public performance (e.g., to put on a musical concert); (5) to display publicly; and (6) to non-traditional rights (e.g., moral rights).<sup>71</sup> A pure net neutral Internet enables the violation of many, if not all, of these rights.

The Recording Industry Association of America blames digital music piracy for many of the rights violations—and consequent monetary losses—artists across all three categories face on the open Internet.<sup>72</sup> For example, since peer-to-peer file-sharing emerged in 1999, music sales in the U.S. have declined by 53 percent, from \$14.6 billion to \$7.0 billion in 2013.<sup>73</sup> Further, Internet users “pirated” approximately 30 billion songs on file-sharing networks between 2004 and 2009.<sup>74</sup> As a result, an online ecosystem exists in which U.S. consumers paid for only 37 percent of the music they acquired.<sup>75</sup>

The Information Technology and Innovation Foundation also blames digital music piracy for clogged broadband

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<sup>70</sup> 17 U.S.C. §106 (1976).

<sup>71</sup> *Id.*

<sup>72</sup> *See Online Piracy*, GRAY ZONE, <http://grayzone.com/library/C38/> (last visited May, 19 2016).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

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

networks.<sup>76</sup> Clogged broadband networks may result from the country's current net neutral Internet paradigm.<sup>77</sup>

Broadband networks physically transmit data across the Internet using wider ranges of frequencies than more traditional data transmission networks (e.g., dial-up, which uses telephone networks to transmit data and information).<sup>78</sup> However, any given network has a maximum amount of data that it is able to transmit.<sup>79</sup> When a broadband network nears its maximum, it "clogs," slowing down data transmission speeds for any user on that particular network.<sup>80</sup>

The organization estimates that U.S. consumers use approximately 17.5 percent of the country's Internet bandwidth for digital piracy.<sup>81</sup> Digital music piracy may be responsible for between \$7 and \$20 billion in losses to the U.S. digital music industry.<sup>82</sup> It may also be responsible for an Internet ecosystem that cannot function at full capacity because it is clogged with pirated content.<sup>83</sup> Such losses and inefficiencies may persist so long as the Internet remains net neutral.

Individuals who are skeptical of the aforementioned findings highlight growth in online music streaming services as a potential replacement for current and lost digital music sales.<sup>84</sup> Kobalt Music Publishing, an organization that represents over six thousand songwriters, including Paul McCartney and Lenny Kravitz, reported that its catalogue earned thirteen percent more from Spotify than it earned from iTunes in the first quarter of

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<sup>76</sup> See David Price, *An Estimate of Infringing Use of the Internet*, ENVISIONAL, at 21 (Jan. 2011), [http://documents.envisional.com/docs/Envisional-Internet\\_Usage-Jan2011.pdf](http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf).

<sup>77</sup> See *id.*

<sup>78</sup> See *Types of Broadband Connections*, FCC.GOV, <http://www.fcc.gov/encyclopedia/types-broadband-connections> (last visited May 17, 2016).

<sup>79</sup> See *id.*

<sup>80</sup>

<sup>81</sup> Price, *supra* note 76, at 3, 55.

<sup>82</sup> See *Online Piracy*, *supra* note 72.

<sup>83</sup> See Price, *supra* note 76.

<sup>84</sup> See Elliott Mitchell, *Spotify Royalties Overtake iTunes Earnings in Europe*, GIGWISE NEWS (Nov. 6, 2014), <http://www.gigwise.com/news/95802/spotify-royalties-overtake-itunes-earnings-in-europe>.

2014.<sup>85</sup> Although these results are by no means comprehensive or conclusive, they may signal an important and impending consumer shift away from digital music sales to digital music streaming. Further, to those in support of net neutrality, these results may signal music streaming's emergence as a financially viable business innovation, which regulators must protect from potential data discrimination.<sup>86</sup>

#### IV. DEMYSTIFYING STREAMING SERVICES

Music, or audio streaming, is the process of delivering sound to an end user without first requiring the user to download files.<sup>87</sup> Instead, the streaming method divides a complete audio file into a continuous stream of "packets" and delivers those packets to end users via broadband networks.<sup>88</sup> So long as an end user's broadband network supports this continuous stream of packets, the end user will hear sound without any interruptions.<sup>89</sup>

Users are increasingly inclined to choose digital music streaming over digital music downloads for a number of reasons. First, digital music streaming allows users to store an unlimited number of songs<sup>90</sup> because these songs exist in the cloud instead of on a computer hard drive.<sup>91</sup> Second, users can access digital

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<sup>85</sup> *Id.*

<sup>86</sup> See Thomas Claburn, *Net Neutrality: 5 Things to Know*, INFORMATIONWEEK (Sep. 17, 2014), <http://www.informationweek.com/mobile/mobile-devices/net-neutrality-5-things-to-know/d/d-id/1315793> (defining data discrimination as the selective filtering of information by a service provider).

<sup>87</sup> Mark Harris, *What is Streaming Music?* ABOUT TECH. (June 10, 2015), <http://mp3.about.com/od/digitalmusicfaq/f/StreamingmusicFAQ.htm>.

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

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

<sup>90</sup> Bakari Chavanu, *The Pros and Cons of Streaming vs Downloading MP3s*, MAKEUSEOF BLOG (Oct. 17, 2011), <http://www.makeuseof.com/tag/pros-cons-streaming-downloading-mp3s/>.

<sup>91</sup> See Margaret Rouse, *Cloud Computing*, TECHTARGET (Feb. 2015) <http://searchcloudcomputing.techtarget.com/definition/cloud-computing> (last visited May. 17, 2016) (defining cloud computing as a term used to describe the delivery of material stored on a remote server through the Internet).

music streams from any location that has a wireless Internet connection.<sup>92</sup> Third, many users enjoy the social networks built into music streaming services.<sup>93</sup> These social networks allow users to share music with other users on the streaming network in ways that digital downloading sites have yet to replicate.<sup>94</sup> Finally, digital music streaming may be cheaper than digital music downloads. Many digital music streaming sites allow users free access to much of their catalogues and premium content for a low monthly fee.<sup>95</sup> These costs are far lower than the \$0.99 or \$1.29 that digital music downloading sites, such as iTunes, charge users per song.

As a result of these benefits, along with a widespread smartphone adoption and faster Internet connections, users have adopted music streaming at a rapid pace.<sup>96</sup> The subsequent sections examine two particularly well-known music streaming companies: Pandora and Spotify. These sections provide an overview of each company's business and artist payment models. An understanding of these models reveal that, for the fledgling artist, there may be nothing to gain from digital music streaming. As a result, the fledgling artist need not be concerned with how the net neutrality debate affects either company.

#### A. PANDORA

Tim Westergren founded Pandora Internet Radio in 2000 as a music streaming and personalized radio service.<sup>97</sup> Since its founding, Pandora has grown into a publicly traded company boasting \$637.9 million in yearly revenue<sup>98</sup> and 250 million

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<sup>92</sup> Chavanu, *supra* note 90.

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

<sup>94</sup> Mark Harris, *Top 4 Social Music Sites*, ABOUT TECH. (Aug. 4, 2015), <http://mp3.about.com/od/digitalmusicdelivery/tp/Top-Social-Music-Sites.htm>.

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

<sup>96</sup> *The Music Industry: Believing in Streaming*, THE ECONOMIST (Mar. 22, 2014), <http://www.economist.com/news/business/21599350-record-bosses-now-hope-online-streaming-could-become-big-enough-business-arrest-their>.

<sup>97</sup> *Biography: Tim Westergren*, PANDORA.COM, <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-govBio&ID=212488> (last visited May 17, 2016).

<sup>98</sup> *Pandora Media Inc.*, MARKET WATCH, <http://www.marketwatch.com/investing/stock/p/financials> (last visited

registered users.<sup>99</sup> Pandora must pay artists and their stakeholders royalties in exchange for disseminating its content, in accordance with copyright law.<sup>100</sup> As a result, Pandora pays two types of royalties for the music played on its platform.<sup>101</sup> It pays performance royalties to those who performed a given piece of music, and pays royalties to those who wrote, own, or wrote and own a given piece of music.<sup>102</sup>

The royalty payments do not, however, go straight to artists.<sup>103</sup> Instead, they get paid to performance rights organizations that collect, manage, and distribute performance and publishing royalties to artists and copyright holders.<sup>104</sup> Once these performance rights organizations deduct administration fees from the gross royalty payment received from Pandora, they distribute the remaining royalty amount to all stakeholders associated with a given piece of music based on each holder's percentage stake in the work.<sup>105</sup> Pandora currently pays rights holders approximately \$0.0014 in royalties per "stream" of a particular piece of music.<sup>106</sup>

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May 17, 2016).

<sup>99</sup> Matt Burns, *The Pandora One Subscription Service to Cost \$5 a Month*, TECHCRUNCH (Mar. 18, 2014), <http://techcrunch.com/2014/03/18/the-pandora-one-subscription-service-to-cost-5-a-month/>.

<sup>100</sup> Miguel de Braganca, *Pandora's Provocation*, MUSIC BUS. J. (Aug. 2013) <http://www.thembj.org/2013/08/pandoras-provocation/>.

<sup>101</sup> *Royalties and Spins*, PANDORA HELP, <http://help.pandora.com/customer/portal/articles/24788-royalties-and-spins> (last visited May 17, 2016).

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *About*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/> (last visited May 17, 2016).

<sup>105</sup> *About Digital Royalties*, SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/digital-royalties/> (last visited May 17, 2016).

<sup>106</sup> *See* Tim Westergren, *Pandora and Royalties*, PANDORA BLOG (June 26, 2013), <http://blog.pandora.com/2013/06/26/pandora-and-royalties/>; *see also* Michael Degusta, *Pandora Paid Over \$1,300 for 1 Million Plays, Not \$16.89*, THEUNDERSTATEMENT.COM (June 25, 2013), <http://theunderstatement.com/post/53867665082/pandora-pays-far-more-than-16-dollars>.

Pandora remains silent, however, on how much it actually pays artists in exchange for using their content.<sup>107</sup> Independent artists have come forward to offer insight into what many call meager earnings from the company.<sup>108</sup> Damon Krukowski is the former drummer of the now defunct American alternative rock band Galaxie 500.<sup>109</sup> Galaxie 500 released three albums during its five-year career,<sup>110</sup> all with record labels small enough in size and scope to keep the band within this article's category of "independent" artists. The band's 1988 single "Tugboat"<sup>111</sup> is currently part of Pandora's catalogue.<sup>112</sup> The performing rights organization responsible for managing the song's royalties reported to Krukowski that "Tugboat" had been played on Pandora 7,800 times over a three-month period.<sup>113</sup> Krukowski earned only seven cents in publishing royalties from those 7,800 streams.<sup>114</sup> Krukowski owns the copyright to "Tugboat," so no additional fees were deducted after those taken for his performance rights organization's administration expenses.<sup>115</sup> Krukowski also earned a second royalty from Pandora for being a performing musician on the track, in addition to a songwriter and copyright holder.<sup>116</sup> Krukowski's share of this royalty earned over the same time period, on average, equaled approximately thirty-three cents.<sup>117</sup>

Krukowski is a part of the six percent of artists whose work has sold greater than one hundred units.<sup>118</sup> For the 94

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<sup>107</sup> See Damon Krukowski, *Making Cents*, PITCHFORK (Nov. 14, 2012), <http://pitchfork.com/features/articles/8993-the-cloud/>.

<sup>108</sup> See *id.*

<sup>109</sup> Mike McGonigal, *Temperature's Rising: Galaxie 500*, PITCHFORK (May 3, 2010), <http://pitchfork.com/features/articles/7792-temperatures-rising-galaxie-500/>.

<sup>110</sup> See Jason Ankeny, *Galaxie 500 Biography*, ALLMUSIC.COM, <http://www.allmusic.com/artist/galaxie-500-mn000189678/biography> (last visited May 17, 2016).

<sup>111</sup> *Galaxie 500 Tugboat*, ALLMUSIC.COM, <http://www.allmusic.com/song/tugboat-mt0005911700> (last visited May 17, 2016).

<sup>112</sup> Krukowski, *supra* note 107.

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Krukowski, *supra* note 107.

percent who remain “fledgling,” however, earning potential vis-à-vis Pandora seems even more dismal, if not impossible.<sup>119</sup> The fledgling artist living in a net neutral world must therefore be prepared to earn nothing from digital music streaming, perhaps in perpetuity. The fledgling artist must also diversify his or her skill set in order to earn revenue from other sources, such as touring, merchandising, sponsorships, and unrelated ventures.<sup>120</sup> As a result, the fledgling artist’s most pressing concern should not be net neutrality. It should be finding a way out of the seemingly infinite “land of the unsold.”

#### B. SPOTIFY

Daniel Elk and his founding team launched the digital music streaming service Spotify in 2008.<sup>121</sup> Spotify’s business model is largely similar to that of Pandora. However, Spotify is legally distinct from Pandora.<sup>122</sup> Unlike Pandora, Spotify is not a radio station. Spotify users have the ability to select specific songs instead of logging reactionary preferences to Pandora’s personalized broadcasts.<sup>123</sup> Spotify must therefore obtain licenses from digital music rights holders to carry their songs.<sup>124</sup> This additional license is a kind of third royalty that Spotify must pay to artists and rights holders, whereas Pandora only pays two.<sup>125</sup>

Spotify, unlike Pandora, publishes a range of compensation per stream that it provides to rights holders.<sup>126</sup> A spokesman for the company confirmed that Spotify pays “between \$0.006 and \$0.0084” per stream.<sup>127</sup> By comparison,

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<sup>119</sup> *See id.*

<sup>120</sup> *See* Brian Anthony Hernandez, *Shaking off Spotify is Easy for Taylor Swift; For Everyone Else, It’s Complicated*, MASHABLE (Nov. 6, 2014), <http://mashable.com/2014/11/06/spotify-royalties-artists-payments-taylor-swift/>.

<sup>121</sup> *Spotify Announces Licensing Deals and Upcoming Launch*, PR NEWSWIRE (Oct. 7, 2008), <http://www.prnewswire.co.uk/news-releases/spotify-announces-licensing-deals-and-upcoming-launch-152707905.html>.

<sup>122</sup> *See* Krukowski, *supra* note 107.

<sup>123</sup> *Id.*

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

<sup>125</sup> *See id.*

<sup>126</sup> *See* Hernandez, *supra* note 120.

<sup>127</sup> Sterling Whitaker, *Jason Aldean Joining Taylor Swift in*

artists historically received “about \$1.00 in royalties for each full-priced \$16.98 CD sold through normal retail channels.”<sup>128</sup> Spotify maintains, however, that this per stream royalty is actually quite large.<sup>129</sup> It amounts to approximately 70 percent of the company’s revenue being paid out to artists and rights holders in varying capacities.<sup>130</sup>

Independent cellist Zoë Keating published her 2013 payouts from Spotify in early 2014.<sup>131</sup> Spotify users streamed Keating’s music 403,035 times during the year, earning her \$1,764.18 net, after any performing rights organization administration fees.<sup>132</sup> Therefore, on a “per stream” basis, Keating earned \$0.00438.<sup>133</sup> Keating is also one of the privileged six percent that has sold more than one hundred digital copies of her work.<sup>134</sup> Keating sold 3,862 albums on iTunes in 2013, making her a true “independent” artist, like Krukowski of Galaxie 500.<sup>135</sup> For the fledgling artist, Spotify disappoints in much the same way as Pandora. Although the service pays a hefty percentage of top-line revenues out as

*Pulling Music from Spotify*, TASTE OF COUNTRY (Nov. 8, 2014), <http://tasteofcountry.com/jason-aldean-taylor-swift-spotify/>.

<sup>128</sup> It is important to note, however, that an artist must recoup all expenses that his or her record label accrued in the process of launching his or her album. Because approximately 80% of all albums released never break-even, most artists, in fact, never receive a royalty check from their record label. See Stephen Marcone, *The Poverty of Artist Royalties*, MUSIC BUS. J. (May 2013) <http://www.thembj.org/2013/05/the-poverty-of-artist-royalties/> (last visited May 17, 2016); see also Anthony N. Luti, *Recording Contracts 101: The Basics*, TRUE MAG., <http://www.lutilaw.com/articles/TheBasics.pdf> (last visited May 17, 2016).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See Paul Resnikoff, *I’m A Successful Indie Artist. And This is What Streaming Services Are Paying Me...*, DIGITAL MUSIC NEWS (Feb. 24, 2014), <http://www.digitalmusicnews.com/permalink/2014/02/24/successful2014>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*



royalties, it fails to compensate individual artists and rights holders at levels that they might consider livable or equitable.<sup>136</sup>

### C. STREAMING FALLS SHORT ON ECONOMICS AND COPYRIGHT LAW

An understanding of Pandora and Spotify reveals that there is little for the fledgling artist to gain in digital music streaming—economically or legally. Streaming may not be the monetization goldmine that many hoped, even for the independent artist who has already achieved a certain amount of publicity, recognition, and sales.<sup>137</sup> Instead, streaming may be a vehicle for enhanced discovery, beneficial to independent artists only for the additional exposure it provides to new fans.

This model, however, likely violates the essence of copyright law.<sup>138</sup> It asks independent artists to accept the dissemination of their music for miniscule to zero compensation, and expects fledgling artists to enter the digital streaming world with the same expectation.

Unfortunately, copyright law in its current form offers few solutions.<sup>139</sup> The wide proliferation of digital copies of music in today's marketplace makes copyright enforcement impracticable.<sup>140</sup> Further, as music continues to trade in the digital ecosystem at close to zero value, it becomes less profitable for rights holders to pursue legal redress against those who do violate their copyright protections.<sup>141</sup>

Copyright law may only be useful if it can insert “bottlenecks in the [digital music] distribution chain,” as it once did for physical music, to ensure that consumers start paying for

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<sup>136</sup> See Hernandez, *supra* note 120; See also Krukowski, *supra* note 107; See also Resnikoff, *supra* note 131.

<sup>137</sup> Alex Cummings, *Is Piracy Killing Independent Music?*, THE BROOKLYN RAIL (Dec. 14, 2007), <http://www.brooklynrail.org/2007/12/music/is-piracy-killing-independent-music>.

<sup>138</sup> See 17 U.S.C. §106(3) (stating that copyright holders have the exclusive right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership).

<sup>139</sup> Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63, 93 (2011).

<sup>140</sup> *Id.*

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

music again.<sup>142</sup> Allowing data discrimination on the Internet could be the very bottleneck that artists and companies need. It could eradicate the piracy that continues to clog Internet bandwidth and it could restore artists' deserved copyright protections and income.<sup>143</sup>

#### V. THE TIERED INTERNET: THE OTHER, NOT SO DISASTROUS OPTION

A tiered Internet is one in which telecommunications providers divide the Internet into various "tiers" of differing connectivity speeds.<sup>144</sup> The concept was largely nonexistent until soon after two telecommunications companies, AT&T and SBC Communications, merged in 2005.<sup>145</sup> The new conglomerate envisaged an Internet "fast lane" that would operate at increased connectivity speeds for those businesses desiring preferred treatment.<sup>146</sup> It concurrently proposed a "slow lane" for those businesses inclined not to pay.<sup>147</sup> Some in the music industry support an incarnation of a tiered Internet.<sup>148</sup>

Proponents maintain that many of the broadband traffic jams American users currently experience are due to a high concentration of illegal downloads clogging Internet bandwidth.<sup>149</sup> A tiered Internet could thereby allow cable companies to join the fight against music piracy and broader copyright infringement.<sup>150</sup> Further, such anti-piracy activism by

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<sup>142</sup> *Id.* at 94.

<sup>143</sup> See *Online Piracy*, *supra* note 72; see also Price, *supra* at note 76.

<sup>144</sup> *The Current State of Affairs: Should the Internet be Tiered?*, OCF.BERKELEY.NET, <http://www.ocf.berkeley.edu/~raylin/tieredinternet.html> (last visited May 17, 2016).

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

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

<sup>147</sup> *Id.*

<sup>148</sup> See Neil Turkewitz, *Internet Governance 3.0: The Maturation of Principles Concerning Internet Governance*, RIAA NEWS (Apr. 28, 2014), <https://www.riaa.com/internet-governance-3-0-the-maturation-of-principles-concerning-internet-governance/>.

<sup>149</sup> See Price, *supra* note 76.

<sup>150</sup> Time Warner Cable, in its public comment and reply to the FCC's Notice on Proposed Rulemaking (NPRM), argued that (1) an open Internet supports its business interests and "corporate values . . . to give customers unfettered access to online content and services," and

cable companies could also pressure file-sharing websites to do the same.<sup>151</sup> Although large Internet companies, such as Google, are opposed to tiered Internet regimes irrespective of their effects on copyright infringement,<sup>152</sup> many can envision a world where large Internet companies pay for preferential treatment, or even build their own networks.<sup>153</sup>

However, not all parties stand to benefit from a tiered Internet. For example, companies like Spotify, which lack significant amounts of cash and stature,<sup>154</sup> when compared to companies like Google, could face palpable threats under a tiered Internet regime. Digital music streaming companies' unwillingness or inability to pay for preferred "fast lane" treatment could disrupt their connectivity. It could also erode

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(2) the FCC should exercise its broad authority under Section 706 of the Telecommunications Act of 1996 to "[maintain] vigilance and [act] only in response to demonstrated problems . . . ." Section 706 of the Telecommunications Act grants the FCC broad authority to "remove barriers to [telecommunications] infrastructure investment." Time Warner Cable, like its cable company peers, could thereby alert the FCC to any service or service provider whose use of broadband networks could signal the establishment of the aforementioned barriers. *See* Time Warner Cable and Latham & Watkins, Commentary, *Comments of Time Warner Cable Inc.*, In the Matter of Protecting and Promoting the Open Internet Framework for Broadband Internet Service, GN Docket No. 14-28 (2014). *See also* 47 U.S.C. § 706 (1996).

<sup>151</sup> *See* Ernesto, *Rapidshare Limits Public Download Traffic to Drive Away Pirates*, TORRENTFREAK (Nov. 8, 2012), <http://torrentfreak.com/rapidshare-limits-public-download-traffic-to-drive-away-pirates-121108/>.

<sup>152</sup> Brian Fung, *Google's Studied Silence on Net Neutrality Has Finally Broken*, WASH. POST (Sept. 10, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/10/googles-studied-silence-on-net-neutrality-has-finally-broken/>.

<sup>153</sup> *See* Bobby Burch, *Google Fiber Reveals Business Offering*, KAN. CITY BUS. J. (Nov. 7, 2014), <http://www.bizjournals.com/kansascity/blog/bizventures-kc/2014/11/google-fiber-small-business-service.html>.

<sup>154</sup> *See* Natalie James, *Spotify Looks to TPG Capital for Cash to Tackle Rivals*, TECH. NEWS TODAY (Feb. 29, 2016), <http://www.technewstoday.com/28780-spotify-looks-to-tpg-capital-for-cash-to-tackle-rivals/>.

their user experience, a critical component in their business models. Further, a tiered Internet could make it even harder for fledgling artists to find fans and for fans to find them.

Research shows, though, that American consumers still discover the majority of new music on broadcast radio.<sup>155</sup> Forty-eight percent of adult music consumers discover new music most often from broadcast radio.<sup>156</sup> Ten percent of adult music consumers discover new music through word-of-mouth, while only a mere seven percent of the same group utilizes YouTube for music discovery.<sup>157</sup> As a result, fledgling artists targeting adult listeners may find that a tiered Internet does not pose the threats to discovery that many have imagined.

An interesting, albeit unsurprising, finding from the Nielsen Music 360 Report is that 64 percent of teenagers discover most of their music on YouTube.<sup>158</sup> The next most popular means of artist discovery for teens are radio (56%), iTunes (53%), and CDs (50%).<sup>159</sup> For fledgling artists targeting a younger crowd, YouTube and other “technologically advanced methods” may prove to be more critical distribution channels.<sup>160</sup>

It is possible a tiered Internet may pose a threat to sites such as YouTube, and therefore may be of a concern. However, because radio continues to be almost as popular of an artist discovery vehicle as YouTube, the threat to fledgling artist discovery may remain minimal.<sup>161</sup> Therefore, tiered Internet may not be the enemy.

## VI. ARE INTERNET COMPANIES THE ACTUAL ENEMY?

Internet companies’ recent shifts away from free online content sharing into streaming services may, in fact, pose far greater threats to fledgling artists than a tiered Internet. For example, YouTube recently unveiled its new “YouTube Red” streaming music app—a music subscription service designed to

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<sup>155</sup> *Music Discovery Still Dominated by Radio, Says Nielsen Music 360 Report*, NIELSON.COM (Aug. 14, 2012), <http://www.nielsen.com/content/corporate/us/en/press-room/2012/music-discovery-still-dominated-by-radio--says-nielsen-music-360.html>.

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

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

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

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

compete with incumbent players like Pandora and Spotify.<sup>162</sup> The Google-owned site has also signed new licensing deals with major record labels.<sup>163</sup> YouTube will purportedly be removing the content of any smaller, independent label that does not agree to the new licensing terms associated with the site's new streaming product.<sup>164</sup>

The implications are severe for independent artists like K-Pop artist Psy, who earned over \$2 million dollars from ad-associated revenue attached to popular clips uploaded by YouTube users.<sup>165</sup> However, those clips may vanish.<sup>166</sup> Artists' ability to make ad related revenue from those clips may also vanish.<sup>167</sup> This is because those clips have been posted to the YouTube site by lay users, and not in accordance with YouTube sanctioned licensing agreements.<sup>168</sup>

Further, YouTube's new model may disproportionately affect lesser-known independent and fledgling artists. These artists may no longer have access to arguably the world's largest content sharing social network. As a result, a fledgling artist may face significantly greater obstacles along his or her path to recognition and monetization. This could fundamentally dampen, or silence, the careers of tomorrow's successful independent artists or superstars.<sup>169</sup>

Other services have adopted similar approaches to negotiating licenses with independent record labels.<sup>170</sup> Amazon,

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<sup>162</sup> Hugh McIntyre, *YouTube is About to Delete Independent Artists from its Site*, FORBES (June 18, 2014), <http://www.forbes.com/sites/hughmcintyre/2014/06/18/youtube-is-about-to-delete-independent-artists-from-its-site/>; see also Ben Popper, *YouTube Music is here, and it's a game changer*, THE VERGE (Nov. 12, 2015), <http://www.theverge.com/2015/11/12/9723496/youtube-music-app-offline-background>.

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

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

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

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> Independent record labels are record labels that are not associated with one of what the music industry calls the major record labels, or the "Big Four." The "Big Four" comprise Universal Music Group, Sony BMG, EMI, and Warner Music Group. *See id.*; see also

for example, offered to pay major record labels a pro-rata share of a \$25 million to \$50 million pool set aside for the launch of its Amazon Prime music product, in exchange for access to the major record labels' catalogues.<sup>171</sup> By contrast, Amazon only offered to pay independent record labels a pro-rata share of a \$5 million pool in exchange for access to their catalogues.<sup>172</sup>

Internet companies are thereby creating a content caste system within the music streaming business that mirrors what many fear may emerge out of the net neutrality debate.<sup>173</sup> Through these licensing agreements, Internet companies offer major record labels preferential treatment akin to the "fast lanes" that cable operators propose. The Internet companies then leave independent labels in the proverbial "slow lane." As a result, independent labels must choose to either not license their music catalogues to Internet companies at all, which inhibits their ability to promote their artists on popular streaming platforms, or to accept suboptimal licensing agreements.

The former ultimately hurts the independent artists underlying the transaction. As a result, independent labels must suffer suboptimal licensing arrangements. Further, Internet companies' pivots into digital music streaming pose even greater threats to fledgling artists by almost completely destroying artist discovery on internet companies' websites. These threats are more palpable and more urgent, than the First Amendment arguments that dissenters in the net neutrality debate pose.

## VII. THREE SOLUTIONS MOVING FORWARD

The information, analyses, and evaluations presented in this article should leave the fledgling artist frustrated. However, there are three solutions moving forward that can empower the

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Heather McDonald, *Indie Label*, ABOUT CAREERS (Dec. 4, 2014), <http://musicians.about.com/od/musicindustrybasics/g/IndieLabel.htm>.

<sup>171</sup> Ed Christman, *Amazon Launches Prime Music Streaming Service, Minus UMG*, BILLBOARDBIZ (June 12, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6114217/amazon-launches-prime-music-streaming-service-minus-umg>.

<sup>172</sup> *Id.*

<sup>173</sup> See Reply Comments of The Walt Disney Company, 21st Century Fox, Inc., Time Warner, Inc., CBS Corporation, Scripps Networks Interactive, Inc., and Viacom, Inc., In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28 (2014).

fledgling artist to focus on surmounting the issues most relevant to his or her current trajectory in the digital music business. First, fledgling artists should leave the net neutrality debate to entrepreneurs who use the open Internet to build new technologies and platforms for consumer consumption. Second, instead of fighting for net neutrality broadly, fledgling artists should engage the more nuanced fight to preserve open streaming ecosystems that foster artist discovery. Finally, fledgling artists should fight for copyright law reform.

#### A. LEAVE THE NET NEUTRALITY FIGHT TO TECHNOLOGY BUILDERS

Entrepreneurs and investors may be the more appropriate crusaders to spearhead the net neutrality debate. This is because they largely build—or fund the building of—often world-changing and enriching technology that leverages an open Internet.<sup>174</sup> Fledgling artists, in contrast, are often consumers who leverage builders’ applications and technologies to share their own content over an open Internet. As a result, entrepreneurs and investors are fundamentally closer to the issues truly at stake in the net neutrality debate, rather than fledgling artists.

For example, a tiered Internet could increase the level of investment an entrepreneur needs to start a new application or online business.<sup>175</sup> As a result, fewer online businesses would enter the Internet innovation ecosystem, stifling important pillars of the American economy, such as creativity, innovation, and progress.<sup>176</sup> A tiered Internet could also stifle investor participation in internet startups.<sup>177</sup> Currently, entrepreneurs have the opportunity to test and refine their businesses and applications before approaching the investor community because the costs of innovation are so low online.<sup>178</sup> This allows the

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<sup>174</sup> See *Schewick*, *supra* note 2.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* See also Comments of Microsoft Corporation, In the matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28 (2014).

<sup>177</sup> See *Schewick*, *supra* note 2.

<sup>178</sup> *Id.*; see also Arshad Chowdhury, *The True Costs of Launching a Startup*, FAST COMPANY (July 3, 2012), <http://www.fastcompany.com/1841912/true-costs-launching-startup>

entrepreneur to take a more viable product to investors for outside funding. However, a tiered Internet would reverse, and thereby destroy this process.<sup>179</sup> Entrepreneurs would need greater amounts of up-front capital in order to adequately test a potential product in one of the tiered Internet's "fast lanes." Early stage startups would therefore become too risky a gamble for the investor who previously relied on the open Internet to provide real-time insight into a new technology or application's viability.

Prominent Internet entrepreneurs and investors are leading the net neutrality charge. For example, Netflix CEO Reed Hastings has come forward as a strong supporter of net neutrality.<sup>180</sup> Hastings not only wants to protect entrepreneurship, he also wants to protect the online customer experience.<sup>181</sup> Further, a coalition of Internet powerhouses including Amazon, eBay, Facebook, Google, Twitter, Yahoo!, and others stand in solidarity with Netflix for net neutrality.<sup>182</sup> There are formidable forces working to protect the many benefits that consumers, including musicians, enjoy on the open Internet.<sup>183</sup>

#### B. FIGHT INEQUITABLE LICENSING PRACTICES

Artists of varying stature and influence have joined the fight for net neutrality. For example, the Roots, OK Go, and Moby have notably urged the FCC to take a firm stance in protection of the open internet.<sup>184</sup> However, net neutrality may be distracting them from a more urgent fight against inequitable licensing practices by Internet companies that stifle artist discovery online. These more influential artists should instead

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(reporting that for-profit informational websites, for example, are often cheap or free to build).

<sup>179</sup> *Id.*

<sup>180</sup> See Reed Hastings, *Internet Tolls and the Case for Strong Net Neutrality*, NETFLIX MEDIA CENTER (Mar. 20, 2014), <https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality>.

<sup>181</sup> *Id.*

<sup>182</sup> David Carr, *Warnings Along F.C.C.'s Fast Lane*, N.Y. TIMES, (May 11, 2014), [http://www.nytimes.com/2014/05/12/business/media/warnings-along-fccs-fast-lane.html?\\_r=1](http://www.nytimes.com/2014/05/12/business/media/warnings-along-fccs-fast-lane.html?_r=1).

<sup>183</sup> *Id.*

<sup>184</sup> Teinowitz, *supra* note 4.



use their influence to help protect equal and equitable digital music streaming ecosystems.

While lacking in clout, fledgling artists may be able to fill this void through community rallying. They can voice support for streaming platforms like Spotify. Spotify, in particular, has negotiated licensing agreements with independent labels in ways that are equitable and comparable to agreements negotiated with the major record labels.<sup>185</sup> Further, Spotify vocally supports independent and fledgling artists “just as important to a quality music repertoire” as major record label superstars.<sup>186</sup> These companies demonstrate that major label, independent, and fledgling music can coexist, and should coexist. A diverse music catalogue enhances not only artist discovery, but also consumer experience and the digital music ecosystem more broadly.<sup>187</sup> Fledgling artists should focus here to ensure that the gates to artist discovery remain open to consumers and fledgling artists alike.

### C. FIGHT FOR COPYRIGHT LAW REFORM

Independent superstar Taylor Swift recently made headlines when she pulled her entire song catalogue from Spotify.<sup>188</sup> The star noted that she is “not willing to contribute [her] life’s work to an experiment that . . . [does not] fairly [compensate] the writers, producers, artists, and creators of this music.”<sup>189</sup> Underlying Swift’s complaint is that the market still treats music like a free, or ostensibly free, good. Per stream royalties of virtually zero from digital music streaming services, and persistently rampant online music piracy, indicate that artists will continue to suffer copyright infringement.<sup>190</sup> These statutory rights deprivations must be resolved.<sup>191</sup> Unfortunately,

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<sup>185</sup> See Reggie Ugwu, *Why Indie Musicians Get Screwed by Streaming Services Like YouTube’s*, BUZZFEED (June 27, 2014), <http://www.buzzfeed.com/reggieugwu/why-indie-musicians-get-screwed-by-streaming-services-like-y>.

<sup>186</sup> *Id.*

<sup>187</sup> *See id.*

<sup>188</sup> Hernandez, *supra* at note 120.

<sup>189</sup> *Id.*

<sup>190</sup> *See* 17 U.S.C. § 106(3).

<sup>191</sup> *Id.*

debating net neutrality may do little to actually move copyright law reform forward.

### CONCLUSION

The net neutrality debate is complicated. There are a myriad of sub-issues affecting an array of constituents that must be thoughtfully and thoroughly managed. Although the FCC's decision does not specifically address many of the copyright and licensing sub-issues addressed in this article, it may not need to tackle those sub-issues right now. The fledgling artist, therefore, need not be alarmed or distracted. Instead, the fledgling artist should be equipped with nuanced information highlighting issues most relevant and urgent to their careers: the anatomy of licensing agreements and broader copyright reform. By focusing on these two sub-issues, fledgling artists can protect the road to success they overwhelmingly desire to traverse.

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

COMMENT:

**COPYRIGHT LOOPHOLE TO FCC’S NET NEUTRALITY  
RULES**

JAMES CHONG\*

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**INTRODUCTION**

The Federal Communication Commission (FCC) voted 3-2 on February 26, 2015 to adopt tough net neutrality rules, giving greater government oversight to internet service providers, such as Comcast and Verizon.<sup>1</sup> Tom Wheeler, FCC Chairman, created the proposal (the 2015 Order), which contains four hundred pages of arguments, rationale, dissents, and most importantly, rules. The 2015 Order prohibits unfair fast and slow lanes, blocking, or throttling of any legal content on a computer, tablet, or smartphone.<sup>2</sup> The entertainment industry celebrated at the FCC’s approval of the 2015 Order, and for good reason.<sup>3</sup>

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\* J.D., 2016, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> Meg James & Yvonne Villarreal, *Hollywood’s Creative Class Cheers FCC Passage of Net Neutrality Rules*, L.A. TIMES (Feb. 26, 2015), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-hollywood-fcc-net-neutrality-rules-20150226-story.html>.

<sup>2</sup> David Goldman & Jose Pagliery, *Net Neutrality is Here. What it Means for You*, CNN MONEY (June 13, 2015), <http://money.cnn.com/2015/06/12/technology/net-neutrality/>.

<sup>3</sup> James & Villarreal, *supra* note 1.

One of the many reasons the entertainment industry celebrated the FCC's decision was that, as a result of the 2015 Order, small companies would need not fear a two-tiered system favoring large companies who could afford faster delivery of their content.<sup>4</sup> Further, minority writers and producers embrace net neutrality because they see internet channels as a way to display their diverse voices without any prejudice.<sup>5</sup> These are only a few examples of how net neutrality positively affects the entertainment industry.

As discussed above, the 2015 Order has obvious positive benefits for entertainment; however, an ancillary benefit has been ignored and largely unused. The Motion Picture Association of America (MPAA), which represents major movie studios, stated “[o]ur narrow focus throughout the network neutrality debate has been to ensure that the rules do not thwart efforts to prevent copyright infringement, or otherwise chill production and distribution of innovative content.”<sup>6</sup> Not only will the efforts to prevent copyright infringement not be thwarted, but a neutrality loophole in the 2015 Order once again provides a solution to a problem that has plagued the entertainment industry since its inception.<sup>7</sup> More specifically, the 2015 Order contains a copyright loophole to net neutrality that could potentially be used to battle piracy in peer-to-peer sharing. However, it remains to be seen whether the 2015 Order will be used proactively or passively by Internet Service Providers (ISPs) to battle copyright infringement.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> The FCC adopted the Open Internet Order on May, 15, 2010, which contains the phrase, “[n]othing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity,” but was repealed in early 2014. *See* Report and Order, FCC 10-201, GN Docket No. 09-191 (Dec. 21, 2010) (2010 Net Neutrality Order), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf) (last visited May 20, 2016) [hereinafter FCC 10-201].

## I. BACKGROUND

### A. BRIEF HISTORY

Napster was created in 1999 by nineteen-year-old college-dropout Shawn Fanning.<sup>8</sup> Napster is a program that enables peer-to-peer sharing, which is a way to share media, including music, movies, and documents.<sup>9</sup> The technology enables computers and other electronic devices using the same or compatible peer-to-peer programs to share digital files directly with other computers and devices on the network.<sup>10</sup> Some other examples of peer-to-peer file sharing programs are BearShare, LimeWire, KaZaa, eMule, Vuze, uTorrent, and BitTorrent.<sup>11</sup> Napster became extremely popular upon its release and millions of people used it just one year after its release.<sup>12</sup>

It became clear, however, that Napster was being used by millions in the distribution of an “unprecedented number of copyrighted works, primarily sound recordings of musical works.”<sup>13</sup> Although Napster executives argued that they were not committing copyright infringement, the Ninth Circuit disagreed in *A&M Records, Inc. v. Napster*; the court held that “Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction . . . and distribution.”<sup>14</sup> After the lawsuit, Napster could not find a way to continue to operate

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<sup>8</sup> Greg Cochrane, *A Brief History, Music Industry Versus File-sharing*, BBC NEWSBEAT (July 6, 2011), <http://www.bbc.co.uk/newsbeat/article/14027777/a-brief-history-music-industry-versus-file-sharing>.

<sup>9</sup> *Peer-to-Peer File Sharing: A Guide for Business*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business>.

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Comm. on the Judiciary*, 108th Cong. 1 (2003) (statement of Marybeth Peters, Register of Copyrights), COPYRIGHT.GOV, <http://www.copyright.gov/docs/regstat090903.html> (last visited May 20, 2016) [hereinafter *Peters' Statement*].

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

<sup>14</sup> *A&M Records v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001).

and disappeared; however, other companies took its place and the music industry never fully recovered.<sup>15</sup>

#### B. MUSIC INDUSTRY LAWSUITS

As discussed above, the music industry began by filing lawsuits against the peer-to-peer file sharing technology. The recording industry sued peer-to-peer companies one by one.<sup>16</sup> Meanwhile, the number of file sharers and peer-to-peer applications continued to grow. Next, in 2003, the record industry sued four individual college students for developing and maintaining file sharing engines on their individual campus networks.<sup>17</sup> These cases settled for nominal amounts and the recording industry next went after individuals who shared files on peer-to-peer networks instead of college networks.<sup>18</sup>

On September 8, 2003, the Recording Industry Association of America (RIAA) sued 261 Americans for sharing music on peer-to-peer networks.<sup>19</sup> RIAA battled the Internet Service Providers to voluntarily hand over customer information tied to IP addresses. RIAA resorted to using special subpoenas allowed by the Digital Millennium Copyright Act (DMCA) in 1998.<sup>20</sup> This provision allowed a copyright owner to issue a subpoena to an ISP to get the name, address, and basic information of an alleged copyright infringer.<sup>21</sup> The ISPs and various public interest groups filed suit and argued “that every Internet user’s privacy was at risk if anyone claiming to be a copyright owner could, without ever appearing before a judge, force an ISP to hand over the names and addresses of its customers.”<sup>22</sup> The ISPs and public interest groups lost in court and were forced to hand over the information. By 2008, RIAA had filed, settled, or threatened legal actions against 30,000 individuals.<sup>23</sup> However, in late 2003, a federal decision brought

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<sup>15</sup> *Peters Statement, supra* note 12.

<sup>16</sup> *RIAA v. the People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later>.

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

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

the massive subpoena campaign to a halt by holding that “to use federal subpoena power to identify Internet users, it would have to file a lawsuit and conduct its efforts under the supervision of a judge.”<sup>24</sup>

In the next few years, RIAA used various methods to battle peer-to-peer copyright infringement, including a “Clean Slate Program,” which allowed users to come forward about their former copyright infringement, and “John Doe” lawsuits where RIAA sought approval from courts to authorize subpoenas.<sup>25</sup> In 2008, the lawsuits stopped.<sup>26</sup> The lawsuits were ineffective, counterproductive, and were bad publicity.<sup>27</sup> In 2009, RIAA shifted its approach to relying on the cooperation of ISPs.<sup>28</sup> ISPs could potentially halt a user’s service for continued copyright infringement after notification from RIAA. This approach continues to this day, but ISPs do not actually shut off service. Instead, if RIAA decides to pursue an individual for infringement, the ISP falls under the safe harbor of the DMCA if they effectuate a termination policy and issue warnings to users.<sup>29</sup> Basically, the ISPs do the bare minimum to avoid liability.

North American Statistics on copyright infringement today are alarming. From 2008 to 2014, there has been a 44 percent increase in file sharing.<sup>30</sup> In 2008 alone, 888,000,000 CDs worth of data were shared.<sup>31</sup> In 2014, 1,275,200,000 CDs worth of data were shared.<sup>32</sup> Experts believe that there will be a

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<sup>24</sup> RIAA v. Verizon, 351 F.3d 1229 (D.C. Cir. 2003).

<sup>25</sup> RIAA v. the People, *supra* note 16.

<sup>26</sup> David Silverman, *Why the Recording Industry Stopped Suing its Customers*, HARV. BUS. REV. (Dec. 22, 2008), <https://hbr.org/2008/12/why-the-riaa-stopped-suing/>.

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

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

<sup>29</sup> See Chloe Albanesius, *ISP Piracy Warnings: What You Need to Know*, PCMAG.COM (July 8, 2011), <http://www.pcmag.com/article2/0,2817,2388261,00.asp>.

<sup>30</sup> Robert Steele, *If You Think Piracy is Decreasing, You Haven’t Looked at the Data...*, DIGITAL MUSIC NEWS (July 16, 2015), <http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

51 percent increase in file sharing between 2014 and 2019.<sup>33</sup> Clearly, file sharing is not slowing down. Granted, it is unknown exactly how much of this file sharing is lawful; however, even if a small percentage of this file sharing related to copyright infringement, it still had a substantial effect on the entertainment industry. Album sales have been in sharp decline from 2000 to 2013 without a single year improving from the last.<sup>34</sup>

## II. COPYRIGHT EXCEPTION TO THE 2015 ORDER

The Open Internet Order of 2010 (2010 Order) contained the following statement: “[n]othing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.”<sup>35</sup> However, in 2014, Verizon was victorious against the FCC, vacating many portions of the 2010 Order, essentially stopping net neutrality.<sup>36</sup> In 2015, by classifying ISPs as common carriers, the 2015 Order was adopted.<sup>37</sup> The 2015 Order states:

[W]e affirm this tentative conclusion and re-state that open internet rules do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content to ensure that open internet rules are not used as a shield to enable unlawful activity or to deter prompt action against such activity. For example, the no-blocking rule should not be invoked to protect copyright infringement.<sup>38</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Peter Tschmuck, *The Recorded Music Market in the US, 2000-2013*, MUSIC BUS. RESEARCH (Mar. 21, 2014), <https://musicbusinessresearch.wordpress.com/2014/03/21/the-recorded-music-market-in-the-us-2000-2013/>.

<sup>35</sup> FCC 10-201, *supra* note 7, at 59.

<sup>36</sup> Nilay Patel, *The Wrong Words: How the FCC Lost Net Neutrality and Could Kill the Internet*, THE VERGE (Jan. 15, 2014), <http://www.theverge.com/2014/1/15/5311948/net-neutrality-and-the-death-of-the-internet>.

<sup>37</sup> Lily Hay Newman, *A Happy Day for Net Neutrality Advocates as FCC Votes to Reclassify Broadband*, SLATE (Feb. 26, 2015), [http://www.slate.com/blogs/future\\_tense/2015/02/26/the\\_fcc\\_will\\_reclassify\\_broadband\\_as\\_a\\_utility\\_under\\_title\\_ii\\_so\\_it\\_can.html](http://www.slate.com/blogs/future_tense/2015/02/26/the_fcc_will_reclassify_broadband_as_a_utility_under_title_ii_so_it_can.html).

<sup>38</sup> Report and Order on Remand, Declaratory Ruling and



Given these rules, one would assume that ISPs would be eager to throttle or block traffic from peer-to-peer networks. However, the copyright loophole has not gained much attention from the media and has not been largely invoked by the ISPs.

#### A. INCENTIVES TO ENFORCEMENT

As previously discussed, today, RIAA and other entertainment groups must go through the courts to deliver subpoenas to users in order to punish copyright violators.<sup>39</sup> Further, RIAA has been using ISPs in the past to warn copyright violators.<sup>40</sup> However, the data previously discussed shows that none of these methods have had a substantial impact on the downloading of copyrighted material. Throttling or blocking passage to torrent sites and programs would have a substantially positive affect on the protection of music, movies, and other copyrighted materials. In other words, downloads of copyrighted material would substantially decline.

With ISPs today developing their own web content, there is a strong incentive for ISPs to limit torrent programs and sites. For example, Comcast developed Stream TV in late 2015, a new streaming video service for Comcast broadband customers.<sup>41</sup> This service allows users to watch television stations like HBO, as well as live television shows on computers.<sup>42</sup> Binge On by T-Mobile USA provides a similar service to stream video from Netflix, HBO, and other sources for free.<sup>43</sup> With millions

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Order, FCC 15-24, GN Docket No. 14-28 (Feb. 26, 2015) (2015 Net Neutrality Order), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf) (last visited May 20, 2016).

<sup>39</sup> *IP: DMCA: Subpoena*, CYBERTELECOM (Feb. 23, 2016) <http://www.cybertelecom.org/ip/subpoena.htm>.

<sup>40</sup> Ernesto, *Verizon's "Six Strikes" Anti-Piracy Measures Unveiled*, TORRENTFREAK (Jan. 11, 2013) <https://torrentfreak.com/verizons-six-strikes-anti-piracy-measures-unveiled-130111/>.

<sup>41</sup> Jeff Fusco, *Comcast May Have Found a Major Net Neutrality Loophole*, WIRED (Nov. 20, 2015), <http://www.wired.com/2015/11/comcast-may-have-found-a-major-net-neutrality-loophole/>.

<sup>42</sup> *Id.*

<sup>43</sup> John D. McKinnon, *Net-Neutrality Proponents Warn of Loopholes*, WALL ST. J. (Dec. 13, 2015),

of users turning to peer-to-peer sharing to watch pirated television episodes, listen to pirated music, or read pirated books, where would they turn to if the torrent sites were throttled or turned off? Netflix and Amazon Prime only show movies and television programs that have aired a substantial time ago, but new episodes and movies appear on torrent sites within the same day of their release. And many ISPs have natural monopolies in small towns, limiting users' options to switch to a different ISP. Thus, Comcast and other ISPs could use the 2015 Order's copyright exception to vastly profit, and at the same time, curb copyright infringement in their service areas.

Further, the net neutrality debate began with Comcast systematically slowing down BitTorrent traffic to ease network conditions due to high traffic.<sup>44</sup> But in 2008, the FCC declared that Comcast's throttling of BitTorrent was illegal and handed Comcast a cease-and-desist letter.<sup>45</sup> It would be anomalous for Comcast to not take advantage of the new net neutrality rules, considering they lost in court on the issue of throttling BitTorrent a few years ago. If peer-to-peer sharing is using up a substantial portion of an ISP's bandwidth, they now have the option to throttle, which was an option they didn't have in 2008.

#### B. BARRIERS TO ENFORCEMENT

The 2010 Order contained a transparency rule that still remains in effect today.<sup>46</sup> The rule states:

[A] person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content,

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<http://www.wsj.com/articles/net-neutrality-proponents-warn-of-loopholes-1450053858?cb=logged0.02311345376074314>.

<sup>44</sup> Peter Fricke, *'Copyright Loopholes' Rankles Internet Activists*, THE DAILY CALLER (Mar. 16, 2015), <http://dailycaller.com/2015/03/16/copyright-loophole-rankles-internet-activists/>.

<sup>45</sup> Declan McCullagh, *FCC Formally Rules Comcast's Throttling of BitTorrent was Illegal*, CNET (Aug. 20, 2008), <http://www.cnet.com/news/fcc-formally-rules-comcasts-throttling-of-bittorrent-was-illegal/>.

<sup>46</sup> FCC 15-24, *supra* note 35, at 9.

application, service, and device providers to develop, market, and maintain Internet offerings.<sup>47</sup>

This transparency rule makes it difficult for ISPs to voluntarily and actively block or slow illegal activity without potentially losing business, because they have to inform customers of network management policies. Thus, a person who heavily downloads illegal copyrighted material does not want an ISP that slows or prohibits them from doing so. In areas where multiple ISPs exist, said person could choose an ISP that does nothing. ISPs might find themselves balancing whether enforcement or no enforcement is more profitable.

In addition to transparency, it would be difficult for ISPs to be able to pinpoint exactly what a user is downloading without the support of copyright holders. Currently, ISPs are not keeping tabs on our downloads.<sup>48</sup> Basically, when a user distributes a copyrighted file on a peer-to-peer network, that file includes an IP address associated with the account, and the content holder will contact the ISP with the IP address.<sup>49</sup> Essentially, we have not yet seen ISPs act alone. It would be a public relations nightmare to mistakenly turn off the Internet of an elderly person trying to download legal content or a student trying to write a term paper.

#### CONCLUSION

ISPs are not actively using the copyright exception to battle piracy. With greater participation from organizations such as the RIAA, it would be possible for ISPs to battle copyright infringement by throttling and shutting off the Internet of copyright infringers, as long as it would be reasonable under the 2015 Order. With ISPs actively throttling websites and programs like BitTorrent, peer-to-peer companies might be forced to actively participate with ISPs in the battle against copyright infringement to survive. However, it will be necessary for all large ISPs to actively participate, or else users will be able to forum shop for the ISPs that do not actively battle copyright infringement.

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<sup>47</sup> *Id.*

<sup>48</sup> *See* Albanesius, *supra* note 29.

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

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

COMMENT:

**MUSIC STREAMING SERVICES: THE INEQUITABLE  
SOLUTION TO PIRACY**

HEIDI PURTZER\*

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**INTRODUCTION**

The invention of the Apple iPod in 2001 changed the music industry forever.<sup>1</sup> While portable CD players made it possible to listen to music anywhere, the iPod (and its successor, the iPhone) allows its users to listen and create playlists containing songs from various artists. The iPod has exponentially changed the way users listen to music.<sup>2</sup> As a result of the iPod, MP3 players, and other wireless options, music has become readily available to consumers, spurring change in the music industry.<sup>3</sup> In an effort to fight illegal music streaming, Internet-based services such as Spotify, Pandora, and Apple Music emerged in the late 2000s.<sup>4</sup>

Under federal copyright law, both performing artists and songwriters are entitled to royalties any time their music is publicly performed; this includes radio play and live

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\* J.D. Candidate 2017, Sandra Day O'Connor College of Law at Arizona State University.

<sup>1</sup> Amy Mae Elliot, *The Impact of the iPod*, MASHABLE (Oct. 23, 2011), <http://mashable.com/2011/10/23/impact-of-ipod/#S5mimGJzquf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

performances.<sup>5</sup> Originally, copyright law did not extend to recordings of a composition onto a physical medium.<sup>6</sup> Rather, copyright law only protected the written composition of music itself; thus, only composers were entitled to royalties and copyright protection.<sup>7</sup>

Section 115 of the Copyright Act of 1976 grants songwriters the right, with certain restrictions, to make and distribute “mechanical reproductions”<sup>8</sup> of their compositions.<sup>9</sup> In addition to the right to mechanical distribution, section 115 grants songwriters the right to a compulsory license “for the reproduction and distribution of nondramatic musical works.”<sup>10</sup> Also under the section, songwriters have the sole right to perform their work.<sup>11</sup>

Performance Rights Organizations (PROs) were established to oversee the rights granted to songwriters.<sup>12</sup> PROs charge users a set fee, and in turn, grant the radio station a blanket license.<sup>13</sup> The blanket license gives the radio station the

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<sup>5</sup> Caitlin Kowalke, *How Spotify Killed the Radio Star: An Analysis on How the Songwriter Equity Act Could Aid the Current Online Music Distribution Market in Failing Artists*, 6 CYBARIS AN INTELLECTUAL PROP. L. REV. 193, 198-201 (2015).

<sup>6</sup> *Id.* at 199.

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

<sup>8</sup> *See Section 115 Compulsory License: The Register of Copyrights Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights, Copyright Office), <http://www.copyright.gov/docs/regstat031104.html> (last visited May 20, 2016) (“Originally, reproductions were referred to as “mechanical” because the composition was being “mechanically” recorded on media such as a phonography record or piano roll. Today, “mechanical reproductions” are referred to as “phonorecords” and come in formats such as compact discs, cassette tapes, records, and even digital phonorecords such as MP3s.”

<sup>9</sup> Kowalke, *supra* note 5, at 199.

<sup>10</sup> 17 U.S.C. § 115(a)(1) (2012).

<sup>11</sup> Kowalke, *supra* note 5, at 201 (citing *Severe Records, LLC v. Rich*, 658 F.3d 571, 574 (6th Cir. 2011)).

<sup>12</sup> Kowalke, *supra* note 5, at 201

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

right to play any composition represented by the PRO.<sup>14</sup> Once the PRO deducts the overhead costs, the remaining money from each agreement is distributed as royalty to the songwriters.<sup>15</sup>

In 2004, Congress passed the Copyright Royalty and Distribution Reform Act (“the Reform Act”), which created a Copyright Royalty Board (CRB) to determine the rates and terms for statutory licenses.<sup>16</sup> Under the Reform Act, the CRB sets statutory rates through either voluntary negotiations or trial type hearings before a panel of three judges.<sup>17</sup> As a supplement to the Reform Act’s limitations, The Digital Performance Right in Sound Recordings Act of 1995 and The Digital Millennium Copyright Act of 1998 grant a performance right for sound recordings.<sup>18</sup> Thus, as of 1998, copyright law now requires that the consumer of music pay the sound recording’s copyright owner for the public performance of that music.<sup>19</sup>

Accordingly, because artists, songwriters, publishers, and distributors are entitled to royalties through copyright law,<sup>20</sup> the medium they choose to sell and play their songs is very important. This comment discusses the positive and negative effects of Spotify’s business structure and artist relationships, while also considering various issues surrounding music streaming services as a whole.

## I. THE SPOTIFY REVOLUTION

Spotify, like Pandora, offers a free radio streaming service.<sup>21</sup> Each service uses its own technology to research and analyze the users’ likes and dislikes, and creates personalized

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<sup>14</sup> *See id.* at 202. There are three PROs today and together they make up ninety-seven percent of all American compositions. After the PRO deducts the overhead cost. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 202-03.

<sup>17</sup> *Id.* at 203.

<sup>18</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

<sup>19</sup> 17 U.S.C. § 114 (2012).

<sup>20</sup> *Id.*

<sup>21</sup> Sarah Mitroff & Xiomara Blanco, *Apple Music v. Spotify: What’s the Difference?*, CNET (July 2, 2015), <http://www.cnet.com/news/apple-music-vs-spotify-whats-the-difference/>.

stations.<sup>22</sup> Each service shares similar functions, yet each uses a slightly different structure. In comparison to Apple Music, which provides radio, playlists from the iTunes library, and a more mainstream service, Spotify offers a more diverse musical selection and community.<sup>23</sup> Streaming services such as Spotify and Apple Music have proven to be controversial for artists.<sup>24</sup>

Since Spotify's 2008 launch, the music provider has been the subject of both copyright infringement and unpaid royalty claims.<sup>25</sup> Thousands of artists license their music to Spotify and receive royalties per play of the song.<sup>26</sup> The service provides an Internet venue for new and independent artists within Spotify's diverse music community.<sup>27</sup> The Spotify model appeals to new artists for two main reasons. First, digital distribution methods are more cost-effective than traditional avenues for music retail.<sup>28</sup> By using digital distribution, the industry benefits from online music networks through accessible market research and lower promotional costs related to album sales.<sup>29</sup> Second, online music networks provide the music industry with a unique opportunity to rely on consumers to promote artists and songs through song reviews and sharing

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Taylor Swift, *For Taylor Swift, the Future of Music is a Love Story*, WALL ST. J. (July 7, 2014), <http://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219>.

<sup>25</sup> Ed Christman, *Spotify Hit with \$150 Million Class Action Over Unpaid Royalties*, BILLBOARD MUSIC (Dec. 29, 2015), <http://www.billboard.com/articles/business/6828092/spotify-class-action-royalties-david-lowery-cracker-150-million>.

<sup>26</sup> *Spotify Explained*, SPOTIFY ARTISTS, <http://www.spotifyartists.com/spotify-explained/> (last visited Mar. 30, 2016) (hereinafter *Spotify Explained*).

<sup>27</sup> Kevin Cornell, *10 Reasons Why Every Artist Should Be On Spotify*, TUNECORE BLOG (Oct. 29, 2014), <http://www.tunecore.com/blog/2014/10/10-reasons-every-artist-spotify.html>

<sup>28</sup> Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT L.J. 259, 298-300 (2007).

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

among followers.<sup>30</sup> By embracing this interactive network, Spotify provides the music industry with additional ways to gather consumer information, thus resulting in better content output.<sup>31</sup>

## II. AN INEQUITABLE BUSINESS STRUCTURE?

The business structure of each Internet-based music-streaming store or service varies.<sup>32</sup> For example, once a person purchases a song through Apple iTunes,<sup>33</sup> the consumer receives an ownership right to listen to the music and, to some extent, make further copies.<sup>34</sup> Conversely, in Spotify's Premium<sup>35</sup> service, ownership is not an option. Once a user downloads or clicks the song title, the user is "licensing the right to listen to the song in that particular moment, whether you pay a subscription or sit through an ad."<sup>36</sup>

Spotify first launched in 2008, in Sweden; its United States launch followed in 2011.<sup>37</sup> Spotify, which offers both a free radio service<sup>38</sup> and the premium service mentioned above, maintains a library of over 30 million tracks, and as of a 2015

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<sup>30</sup> Kowalke, *supra* note 5, at 235.

<sup>31</sup> *Id.*

<sup>32</sup> See Perritt, Jr., *supra* note 28.

<sup>33</sup> *Id.* at 330. "iTunes is an Internet-based virtual store maintained by Apple Computer Company through which consumers can purchase music in digital form to be played on Apple's iPod, a portable piece of hardware, smaller than a deck of cards, capable of storing and playing thousands of individual songs, depending on the model. Most major performers and most popular music are available through iTunes. *Id.* Each song is priced at \$0.99, with albums also available at prices ranging from \$6-16 dollars. Under current license deals, a record company gets 65% of 99 cents and iTunes keeps 35%. The artist signed to a major label can expect 8-14 cents per song, after the label takes its cut." *Id.* at 329-30.

<sup>34</sup> Jacob Ganz, *How Streaming is Changing Music*, NPR MUSIC (June 1, 2015), <http://www.npr.org/sections/therecord/2015/06/01/411119372/how-streaming-is-changing-music>.

<sup>35</sup> SPOTIFY, [www.spotify.com/us](http://www.spotify.com/us) (last visited May 20, 2016).

<sup>36</sup> Ganz, *supra* note 34.

<sup>37</sup> Cornell, *supra* note 27.

<sup>38</sup> Similar to Pandora, users can select an artist, song or genre and without any further control from the user, the service will play similar music. SPOTIFY, *supra* note 35.



report, has more than 75 million active users in 58 countries.<sup>39</sup> Furthermore, over 20 percent of those users are subscribed to Spotify Premium.<sup>40</sup> Those statistics alone provide a wide market that is accessible for up-and-coming artists to be heard.

It would seem that with 60 million users listening to music up to 24 hours a day, seven days a week, Spotify would provide artists with generous royalty payouts. On the contrary, Spotify works with record labels directly for their licenses; as a result, each artist or entity is paid along the way.<sup>41</sup> This structure leaves little money for the actual performers.<sup>42</sup> Spotify has not yet published the exact numbers per-share that performing artists receive, rather it publishes a range of compensation per stream that it provides to rights holders; and, Spotify also states that it pays the rights-holder (the label or publisher), who subsequently divides the royalties to the artists per their respective deals.<sup>43</sup> Researchers suggest the artist payout can be as little as \$0.001128 per-song play.<sup>44</sup> It should be noted that while Spotify claims that 70 percent of its total revenue is distributed back to the rights-holders, that 70 percent is actually split among rights-holders based on the popularity of the music on the service.<sup>45</sup> As a result, more popular artists and their corresponding partners receive larger payouts per-song than lesser known artists.<sup>46</sup>

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<sup>39</sup> *Spotify Explained*, *supra* note 26.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Spotify claims to pay publishers and labels between \$0.006 and \$0.0084 per stream. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Stuart Dredge, *How Much Do Musicians Really Make from Spotify, iTunes And Youtube?*, THE GUARDIAN (Apr. 3, 2015), <http://www.theguardian.com/technology/2015/apr/03/how-much-musicians-make-spotify-itunes-youtube>.

<sup>45</sup> *Spotify Explained*, *supra* note 26.

<sup>46</sup> An artist's royalty payments depend on the following variables, among others: 1) In which country people are streaming an artist's music; 2) Spotify's [number] of paid users as a [percentage] of total users; higher percentage paid, higher "per stream" rate; 3) Relative premium pricing and currency value in different countries; 4) An artist's royalty rate. *Spotify Explained*, *supra* note 26.

### III. ARTISTS ARE FIGHTING BACK

Although this structure benefits the larger popular artists, Spotify is still a channel for new, unknown artists to achieve mainstream popularity.<sup>47</sup> For example, Ron Pope, an independent American artist, received \$334,363 from over fifty million plays.<sup>48</sup> It should also be noted that Ron Pope is a singer, musician, songwriter, producer, and label owner; thus, Pope is likely receiving all or most of the revenue himself, without the money being divided between various entities.<sup>49</sup> Further, through Spotify's streaming service, Pope's music is played worldwide.<sup>50</sup> As a result of his worldwide exposure, Pope has been invited to perform at well-known festivals around the world.<sup>51</sup> Moreover, Pope believes that the exposure Spotify has provided directly correlates to his increase in ticket sales.<sup>52</sup>

While artists such as Ron Pope are crediting Spotify with their success, others are boycotting Spotify's streaming services.<sup>53</sup> Spotify's benefits for artists like Pope include a worldwide market, free promotion from social-media generated recommendations,<sup>54</sup> recognition on music charts, and a decrease in piracy.<sup>55</sup> However, top world artists do not view these benefits in the same regard.<sup>56</sup>

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<sup>47</sup> Ron Pope, *An Independent Artist's Take on Spotify*, HUFFINGTON POST ENTMT U.K. (Feb. 2, 2014), [http://www.huffingtonpost.co.uk/ron-pope/spotify-independent-artists\\_b\\_4803404.html](http://www.huffingtonpost.co.uk/ron-pope/spotify-independent-artists_b_4803404.html).

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

<sup>49</sup> *See id.*

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* "I'm seeing tangible effects from Spotify every day in my career. I can now sell hundreds of tickets in cities I'd never heard of just a few years ago. Last year, in countries where Spotify is popular, such as Norway and Sweden, I made eight times more per capital than I did in the United States." *Id.*

<sup>53</sup> Swift, *supra* note 24.

<sup>54</sup> "When people listen on Spotify it's social and your fans become promoters just by listening. Spotify also automatically recommends nearby concerts to fans who listen to a lot of your music or follow you, and nearby concerts are shown to users visiting your artist discography page on Spotify." Perritt, *Supra* note 23.

<sup>55</sup> *Id.*

<sup>56</sup> Steve Knopper, *Islands in the Stream: The 10 Biggest*

Taylor Swift, Adele, and Garth Brooks<sup>57</sup> are a few of the mainstream artists refusing to make their music available on Spotify. Before Taylor Swift's 2014 release of her album *1989*, she made headlines in her op-ed piece for the *Wall Street Journal*.<sup>58</sup> In her article, she stated that:

Music is art, and art is important and rare. Important, rare things are valuable. Valuable things should be paid for. It's my opinion that music should not be free, and my prediction is that individual artists and their labels will someday decide what an album's price point is. I hope they don't underestimate themselves or undervalue their art.<sup>59</sup>

In addition to Swift's claims that she is boycotting Spotify because of her value of art, Swift also blamed streaming services for the decline in album sales.<sup>60</sup> Swift has twice been featured on *TIME Magazine's* "Public Figures that Have Made the Most Global Impact;" an artist of her stature will sell music regardless of the platform.<sup>61</sup>

Social media's rise is at least partially responsible for Swift's power.<sup>62</sup> Swift uses social media to closely interact and engage with her fans, and arguably succeeds at this better than any of her contemporaries.<sup>63</sup> Further, Swift uses social media to create her band, to market her music, and even to fight against online music streaming.<sup>64</sup> Despite Swift's respected relationship

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*Holdouts in Digital Music*, ROLLING STONE (Jan. 2, 2015), <http://www.rollingstone.com/music/news/artists-refuse-stream-music-20150102>.

<sup>57</sup> Additionally, Garth Brooks refuses to make his music available on any internet-based streaming service. *Id.*

<sup>58</sup> See generally Swift, *supra* note 24.

<sup>59</sup> Swift, *supra* note 24.

<sup>60</sup> Dave Smith, *Taylor Swift is Wrong About Spotify*, BUS. INSIDER (May, 28, 2015), <http://www.businessinsider.com/taylor-swift-is-wrong-about-spotify-2015-5>.

<sup>61</sup> Jack Dickey, *The Power of Taylor Swift*, TIME (Nov. 13, 2014).

<sup>62</sup> Jessica Yoo, *How Taylor Swift Used Social Media to Rule the World*, CHATTERBLAST (Oct. 8, 2015),

<http://chatterblast.com/blog/how-taylor-swift-used-social-media-to-rule-the-world/>.

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

<sup>64</sup> Taylor Swift, *To Apple, Love Taylor*, TUMBLR (June 9,

with Apple, at the wake of the company's Apple Music launch, Swift penned an open letter to Apple through her Tumblr page.<sup>65</sup> In her letter, Swift wrote that because Apple Music was not going to pay artists royalties for the first three months of the radio streaming service, she was withdrawing her music from the service.<sup>66</sup> In response to Swift's letter and withdrawal of music, Apple immediately released a statement and change in policy: they would be paying the artists all royalties earned through Apple Music.<sup>67</sup> Swift is often criticized for basing her music streaming decisions on her personal economic interests,<sup>68</sup> however, one of the concerns she referenced in her letter was the future of music, and the establishment of and equity to new artists.<sup>69</sup>

Although Swift may be the most outspoken artist regarding the structure of music streaming services, another artist recently became more vocal about her dislike of such services: Adele. Most recently, Adele decided against streaming her record-breaking album, *25*, on Spotify.<sup>70</sup> The decision proved fruitful for Adele, her label Columbia, songwriters, and the album producers; *25* sold four million in pure album sales in

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2015), <http://taylorswift.tumblr.com/post/122071902085/to-apple-love-taylor> (hereinafter *To Apple, Love Taylor*).

<sup>65</sup> *Id.*

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

<sup>67</sup> Tim Bejarin, *How Taylor Swift Saved Apple Music*, TIME (June 30, 2015), <http://time.com/3940500/apple-music-taylor-swift-release/>.

<sup>68</sup> Smith, *supra* note 60.

<sup>69</sup> "Thankfully I am on my fifth album and can support myself, my band, crew, and entire management team by playing live shows. This is about the new artist or band that has just released their first single and will not be paid for its success. This is about the young songwriter who just got his or her first cut and thought that the royalties from that would get them out of debt. This is about the producer who works tirelessly to innovate and create, just like the innovators and creators at Apple are pioneering in their field...but will not get paid for a quarter of a year's worth of plays on his or her songs." *To Apple, Love Taylor*, *supra* note 64.

<sup>70</sup> Ben Sisario, *Adele is Said to Reject Streaming for '25'*, N.Y. TIMES (Nov. 19, 2015), [http://www.nytimes.com/2015/11/20/business/media/adele-music-album-25.html?\\_r=0](http://www.nytimes.com/2015/11/20/business/media/adele-music-album-25.html?_r=0).

2015 (despite its November release).<sup>71</sup> Adele's *25* was the first album to sell more than four million records in a calendar year since her album *21* released in 2012.<sup>72</sup>

Although Taylor Swift and Adele can withhold their music from streaming services and still sell record-breaking albums, this practice has become the anomaly in the music industry. Most artists, like Ron Pope, share their music to the streaming companies; some make it big, and others receive royalties totaling less than 20 dollars in a calendar year.<sup>73</sup>

#### CONCLUSION

The new model for music is in a state of constant change. Technological advancements continue to push the industry away from its traditional model. Regardless of top artists' resistance to the streaming services, as long as Spotify and other music streaming services remain legal, these services are not going away any time soon.<sup>74</sup> As Dave Smith stated, "[Spotify] exists simply because people love music, and it's better and safer than piracy."<sup>75</sup> People do love music, and Spotify provides millions of songs to users for a nominal fee; it grants no rights to its users, but the art of music is alive, partly because of the accessibility of music streaming.

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<sup>71</sup> Keith Caulfield, *Adele's '25' Sales Rise to Over 4 Million in U.S.*, BILLBOARD (Nov. 30, 2015), <http://www.billboard.com/articles/columns/chart-beat/6778038/adele-25-sales-4-million>.

<sup>72</sup> *Id.*

<sup>73</sup> Interview with Sean Arata, artist, in Oregon, (Nov. 7 2014).

<sup>74</sup> *To Apple Love Taylor*, *supra* note 64.

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

**SPORTS & ENTERTAINMENT LAW JOURNAL**  
**ARIZONA STATE UNIVERSITY**

VOLUME 5

SPRING 2016

ISSUE 2

**PRESCRIPTION PSYCHOSTIMULANTS AND COLLEGE  
SPORTS: FOCUSING ON A PRACTICAL SOLUTION**

SHANE A. ROSS\*

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\* J.D. Candidate 2017, Sandra Day O'Connor College of Law  
at Arizona State University.

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### INTRODUCTION

Adults and elementary-aged children alike use prescription psychostimulants dextroamphetamine (*Adderall*,<sup>1</sup> *Dexedrine*)<sup>2</sup> and methylphenidate (*Ritalin*)<sup>3</sup> to treat the impulsivity and inattentiveness of adult attention-deficit/hyperactivity disorder (ADD) and attention-deficit/hyperactivity disorder (ADHD) respectively.<sup>4</sup> Additionally, college students are frequently written prescriptions to use psychostimulants for medicinal purposes to treat these disorders.<sup>5</sup> Despite the drugs' intended purposes, some students also use psychostimulants for nonmedical uses, such as cramming for exams or taking them recreationally to obtain a mental edge or focus.<sup>6</sup> These psychostimulants—notably amphetamines like *Adderall*—are among the National Collegiate Athletic Association's (NCAA) banned classes of drugs due to performance and health related reasons.<sup>7</sup> Student-

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<sup>1</sup> See *Adderall*, DRUGS.COM, <http://www.drugs.com/adderall.html> (last visited May 19, 2016).

<sup>2</sup> See *Dexedrine*, Drugs.com, <http://www.drugs.com/mtm/dexedrine.html> (last visited May 19, 2016).

<sup>3</sup> See *Ritalin*, Drugs.com, <http://www.drugs.com/ritalin.html> (last visited May 19, 2016).

<sup>4</sup> GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 3:39 (2004).

<sup>5</sup> See Rick Nauert, *Colleges Gear Up to Help Students with ADHD*, PSYCH CENTRAL (Aug. 3, 2012), <http://psychcentral.com/news/2012/08/03/colleges-gear-up-to-help-students-with-adhd/42648.html>.

<sup>6</sup> Arianna Yanes, *Just Say Yes? The Rise of 'Study Drugs' in College*, CNN (Apr. 18, 2014), <http://www.cnn.com/2014/04/17/health/adderall-college-students/>.

<sup>7</sup> *2014-15 NCAA Banned Drugs*, NCAA (Nov. 7, 2014), <http://www.ncaa.org/health-and-safety/policy/2014-15-ncaa-banned-drugs>.

athletes who use them may test positive and lose their eligibility to compete in collegiate sports.<sup>8</sup> However, student-athletes who obtain medical exemptions can continue using these substances.<sup>9</sup> In 2009, in response to a three-fold increase in the number of student-athletes who tested positive for stimulants such as these, the NCAA modified its medical exemption requirements.<sup>10</sup> The stricter application now requires student-athletes to “provide[] adequate documentation of a diagnostic evaluation of ADHD and appropriate monitoring of treatment.”<sup>11</sup> However, after seven years, the medical exemption requirement modifications have not accomplished the goals set out by the NCAA.<sup>12</sup> The quantity of medical exemptions utilized by student-athletes for the use of prescription psychostimulants, such as amphetamines, are on the rise.<sup>13</sup> If left unchecked, an increase in the number of student-athletes who utilize medical exemptions and compete while taking prescription stimulants can affect the health and

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<sup>8</sup> *See id.*

<sup>9</sup> *2015-16 Drug Testing Exemption Procedures (Medical Exemptions)*, NCAA, <http://www.ncaa.org/health-and-safety/sport-science-institute/2015-16-drug-testing-exceptions-procedures-medical-exceptions> (last visited May 19, 2016) [hereinafter *2015-16 Drug Testing*].

<sup>10</sup> *See NCAA Banned Drugs and Medical Exceptions Policy Guidelines Regarding Medical Reporting for Student-Athletes with Attention Deficit Hyperactivity Disorder (ADHD) Taking Prescribed Stimulants*, NCAA (Jan. 30, 2009), <http://www.ncaa.org/sites/default/files/1%20%20NCAA%20Guidelines%20to%20Document%20ADHD%20Treatment%20with%20Banned%20Stimulant%20Medications%2001302009.pdf>.

<sup>11</sup> *NCAA Guidelines to Document ADHD Treatment with Banned Stimulant Medications Addendum to the January 2009 Guidelines*, NCAA (Jul. 20, 2010), <https://www.ncaa.org/sites/default/files/Frequently%20Asked%20Questions%20ADHD%20Q%20%20A%20July%202010%20update.pdf> [hereinafter *NCAA Guidelines*].

<sup>12</sup> *Id.*

<sup>13</sup> *See* Markie Rexorat, *NCAA National Study of Substance Use Habits of College Student-Athletes*, NCAA, [http://www.ncaa.org/sites/default/files/Substance%20Use%20Final%20Report\\_FINAL.pdf](http://www.ncaa.org/sites/default/files/Substance%20Use%20Final%20Report_FINAL.pdf) (last visited May 19, 2016) (This study was published in August 2014 using data from 2012-2013).



safety of student-athletes, and can lead to increased dependency at the professional sports level.

The NCAA should develop and implement a two-pronged approach to solve this issue. Specifically, the approach should focus on new policy modification and implementation at an internal and external level. First, internally, by amending its most recent medical exemption requirements, the NCAA can more confidently grant ADHD medical waivers to student-athletes who use psychostimulants medicinally (while optimizing compliance); and second, externally, through more accurate diagnoses of ADD and ADHD disorders at an early stage in a student-athlete's career.

## I. BACKGROUND

### A. HISTORY OF MEDICAL USES OF AMPHETAMINES

While amphetamines were first synthesized in 1887, they were not marketed for medical use as *Benzedrine* until 1932 when it was discovered that the drug could raise blood pressure, enlarge the nasal and bronchial passages, and stimulate the central nervous system.<sup>14</sup> In 1937, amphetamines were used for the first time to help children with an inability to concentrate.<sup>15</sup> Interestingly, the discovery that stimulants, like amphetamines, could be used to curb behavioral issues and subsequently increase the performance of children in the classroom was largely accidental.<sup>16</sup> Amphetamines were frequently used during World War II by the American, British, German, and Japanese militaries to counteract fatigue and elevate the moods of soldiers.<sup>17</sup> In the years that followed, amphetamines were routinely prescribed to treat depression, and a black market for amphetamines subsequently emerged.<sup>18</sup> Nonmedical uses of amphetamines were reported as early as 1940 by truck drivers striving to stay awake on their transcontinental routes.<sup>19</sup> Other nonmedical users of the drug included students, turning to “pep

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<sup>14</sup> UELMEN & KREIT, *supra* note 4.

<sup>15</sup> *Id.*

<sup>16</sup> Joseph Chien, *Between Scientific Discourse and Lay Knowledge: Understanding the Non-Medical Use of Stimulants*, 22 S. CAL. REV. L. & SOC. JUST. 185, 189 (2013).

<sup>17</sup> UELMEN & KREIT, *supra* note 4.

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

<sup>19</sup> *Id.*

pills,” instead of caffeine supplements when cramming for exams, and athletes, who desired energy boosts and enhanced focus during competitions.<sup>20</sup>

#### B. PRESCRIPTION PSYCHOSTIMULANTS AND ADHD

Although stimulants like *Benzedrine* were discovered and used to treat hyperactivity in children in the 1930's, the widespread use of stimulants for ADHD is more of a recent phenomenon.<sup>21</sup> Largely, amphetamine abuse was a concern during the early stages of amphetamine discovery, and ultimately, the introduction into mainstream society for medicinal applications to treat ADHD were stifled.<sup>22</sup> In response to the drug's frequent abuse, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“the Act”), which created five schedules of drugs in an effort to control their distribution.<sup>23</sup> Psychostimulants, such as amphetamines, have been classified as a Schedule II drug by the United States Controlled Substances Act since 1972, which characterizes the drug with a high potential for abuse and allows availability of the drug only through a prescription that cannot be refilled.<sup>24</sup>

Since the Act was implemented, psychostimulant use—including amphetamines and methylphenidate (*Ritalin*), has increased substantially. From 1987 to 1996, the number of children aged eighteen and younger using psychostimulants to treat ADHD increased fourfold.<sup>25</sup> In 1996, *Adderall* was approved by the FDA for the treatment of ADHD in children.<sup>26</sup> Subsequently, the production of legal psychostimulants

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<sup>20</sup> *Id.*

<sup>21</sup> Chien, *supra* note 16, at 190.

<sup>22</sup> Nicolas Rasmussen, *America's First Amphetamine Epidemic 1929-1971, A Quantitative and Qualitative Retrospective with Implications for the Present*, 98 AM. J. PUB. HEALTH 974, 974-77 (2008).

<sup>23</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>24</sup> Chien, *supra* note 16, at 190.

<sup>25</sup> *Id.*

<sup>26</sup> Ted Gargano, *ADHD and Adderall®: Effects on the Heart and Personality?*, VANDERBILT UNIV. HEALTH PSYCH. DEP'T (Oct. 5, 2009), <http://healthpsych.psy.vanderbilt.edu/2009/Adderall.html>.

methylphenidate (*Ritalin*) and amphetamine (*Adderall*, *Dexedrine*) is unable to keep up with demand.<sup>27</sup> Because of the drugs' classification as potential drugs for abuse under the Act, the Drug Enforcement Agency (DEA) sets quotas on production by regulating the amount of drugs that can be produced each year in accordance with demand and legitimate uses, and to minimize or curtail the nonmedical or illegal use of these psychostimulants by preventing surplus medication production.<sup>28</sup> Yet, quotas on production are generously increased annually.<sup>29</sup> For example, the quota on methylphenidate production increased from 1,768 kilograms in 1990 to 14,957 kilograms in 2000.<sup>30</sup> Similarly, the quota on amphetamine production increased from 417 kilograms in 1990 to 9,007 kilograms in 2000.<sup>31</sup>

According to IMS Health, a private prescription auditing firm, the vast majority of amphetamine and methylphenidate prescriptions are for children diagnosed with ADHD.<sup>32</sup> Consumption (prescriptions) of methylphenidate dramatically increased in the early 1990's from roughly 3 million per year to approximately 9.5 million per year, but has since remained steady at approximately 11 million prescriptions per year.<sup>33</sup> Amphetamine prescriptions, primarily *Adderall*, grew slowly from under 1 million prescriptions per year in 1990 to under 3 million in 1995. However, prescriptions have increased dramatically since, rising from 1.3 million in 1996 to approximately 6 million in 1999.<sup>34</sup>

### C. PRESCRIPTION PSYCHOSTIMULANTS AND COLLEGE STUDENTS

*Adderall* is a "single-entity amphetamine product combining the neutral sulfate salts of dextroamphetamine and amphetamine, with the dextro isomer of amphetamine saccharate

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<sup>27</sup> *Statistics on Stimulant Use*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/medicating/drugs/stats.html> (last visited May 19, 2016).

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

<sup>29</sup> *See id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

and d, I-amphetamine aspartate.”<sup>35</sup> *Adderall* and other central nervous system stimulants function to enhance concentration by stimulating the production of dopamine and norepinephrine in the brain.<sup>36</sup> *Adderall* is available in two forms—*Adderall* and *Adderall XR* (extended release).<sup>37</sup> *Ritalin* or methylphenidate hydrochloride is available as *Ritalin*, *Ritalin LA* (extended release), and *Ritalin SR* (sustained release).<sup>38</sup> The medical use of psychostimulants to treat ADHD and other related disorders in patients exhibiting symptoms of inattentiveness, impulsivity, and hyperactivity is widely known. However, college students who do not have attention deficit related disorders also seek them out in order to gain an advantage in the classroom.<sup>39</sup> The active ingredients in *Adderall* help to balance dopamine and norepinephrine in people that suffer from ADHD, yet, they also have the potential to shift the balance of the two chemicals in non-ADHD users.<sup>40</sup> The increase of dopamine and norepinephrine allows those students who use *Adderall* for non-ADHD applications to focus and concentrate on tasks better, thus resulting in the use of *Adderall* to increase academic performance.<sup>41</sup> Students who take psychostimulants to increase academic performance report an enhancement in concentration, reduced distractibility, and increased energy, enabling prolonged periods of study.<sup>42</sup> A recent study reaffirmed that students taking psychostimulants, such as *Adderall*, for academic enhancement consistently performed better in school and had improved performances on reaction tests than those who did not take *Adderall* or other related psychostimulants.<sup>43</sup>

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<sup>35</sup> *Adderrall*, *supra* note 1.

<sup>36</sup> *Id.*

<sup>37</sup> Kelline R. Linton, *Scholastic Steroids: Is Generation Rx Cognitively Cheating?*, 39 PEPP. L. REV. 989, 996 (2012).

<sup>38</sup> *Id.* at 997.

<sup>39</sup> Stefanie Stolz, *Adderall Abuse: Regulating the Academic Steroid*, 41 L.J. & EDUC. 585 (2012).

<sup>40</sup> James Pavisian, Note, *The Case for Human Ingenuity: How Adderall Has Sullied the Game*, 48 WASHBURN L.J. 175, 179 (2008).

<sup>41</sup> *Id.* at 180.

<sup>42</sup> *Id.* at 181.

<sup>43</sup> *Id.* at 180; See generally C. Thomas Gualtieri & Lydia G. Johnson, *Medications Do Not Necessarily Normalize Cognition in ADHD Patients*, J. OF ATTENTION DISORDERS (Mar. 2007),

Recent surveys suggest that as many as 25% of college students surveyed admitted to taking *Adderall* to boost their performance on college exams.<sup>44</sup> Additionally, a 2006 study revealed that 8.3% of college students used a psychostimulant without a prescription at some point over their lives, and 5.9% of college students admitted to doing so over the past year.<sup>45</sup>

#### D. PRESCRIPTION STIMULANTS, COLLEGIATE SPORTS, AND HEALTH CONCERNS

Similar to how non-ADHD college students use psychostimulants like *Adderall* for academic performance boosts, collegiate student-athletes also use psychostimulants for performance enhancing benefits on the field. It is easy to see how the effects of taking psychostimulants—enhancement in concentration, reduced distractibility, decreased pain perception, increased aggression, and increased energy—could also be helpful during practice, training, or competition. Additionally, some student-athletes may use psychostimulants as an appetite suppressant for weight control.<sup>46</sup> These documented performance enhancing characteristics of psychostimulants are the primary justifications for the banning of psychostimulants from competitive collegiate sports.<sup>47</sup>

##### 1. Ergogenic Use of Psychostimulants

In 2006, the NCAA conducted a study to measure the substance use habits and patterns of NCAA college student-athletes.<sup>48</sup> The study revealed that the use of psychostimulants

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<http://www.ncneuropsych.com/research/add-normalize.pdf> (last visited May 19, 2016).

<sup>44</sup> See Pavisian, *supra* note 40, at 183.

<sup>45</sup> *Id.*

<sup>46</sup> Adam E. Perrin, M.D. & Vijay M. Jotwani M.D., *Addressing the Unique Issues of Student Athletes with ADHD*, J. FAM. PRACTICE (May, 2014), <http://www.jfponline.com/specialty-focus/psychiatric/article/addressing-the-unique-issues-of-student-athletes-with-adhd/6283d6e5206a0cb3da5ef21b9b658553.html> (last visited May 19, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> See *Substance Use*, NCAA Study of Substance Use of College Student-Athletes 5 (2006), <http://files.eric.ed.gov/fulltext/ED503214.pdf> (last visited May 19, 2016) (this study is the sixth in a series conducted for or by the NCAA

increased since 1997 among all student athletes, in all divisions, and in both men's and women's sports.<sup>49</sup>

## 2. Health Concerns

Outside of the potential performance enhancing benefits of psychostimulants like *Adderall*, the National Collegiate Athletic Association ("NCAA") currently lists psychostimulants, including but not limited to, Amphetamine (*Adderall*) and methylphenidate (*Ritalin*) on its list of Banned Drugs.<sup>50</sup> The secondary justification for these psychostimulants' classifications as banned substances, apart from the obvious alignment with the Federal Schedule II Classification, is the NCAA's policy considerations regarding student-athletes' health and safety.<sup>51</sup>

The NCAA Sports Science Institute ("SSI") functions as a research, education, and policy organization with the NCAA to "promote and develop safety, excellence and wellness in college student-athletes, and to foster life-long physical and mental development."<sup>52</sup> SSI outlined nine "strategic priorities" as the focus for serving and educating student-athletes, including "Doping and Recreational Drug Use."<sup>53</sup> Additionally, the World Anti-Doping Agency ("WADA") has listed amphetamines and

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to measure the substance-use patterns of NCAA college student-athletes. The initial National Study of the Substance Use and Abuse Habits of College Student-Athletes was presented in 1985. Subsequent studies, now known as the Study of Substance Use of College Student-Athletes, have been conducted at four-year intervals. This study was published in 2006 using data from 2005-2006).

<sup>49</sup> *Id.* (according to the study, the highest use of psychostimulants was in Division III. Psychostimulant use increased in all men's sports except basketball, football, and swimming. Use increased in all women's sports except tennis, gymnastics, soccer, and volleyball.); Perrin & Jotwani, *supra* note 46.

<sup>50</sup> See *2015-16 Banned Drugs*, NCAA, <http://www.ncaa.org/2015-16-ncaa-banned-drugs>, (last visited May 19, 2016).

<sup>51</sup> See *Health and Safety*, NCAA, <http://www.ncaa.org/health-and-safety>, (last visited May 19, 2016).

<sup>52</sup> See *Sport Science Institute*, NCAA, <http://www.ncaa.org/health-and-safety/sport-science-institute>, (last visited May 19, 2016).

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

methylphenidate among its list of prohibited stimulants for in-competition sport uses.<sup>54</sup> WADA's justification for banning these stimulants relies on the substances' actual or potential risks to an athlete's health, rather than the ability of the substances to create an unfair competitive advantage.<sup>55</sup>

### 3. *Adverse Side Effects and Dependency*

Common side effects for *Adderall* include headache, stomach ache, trouble sleeping, weight loss, dry mouth, fast heartbeat, decreased appetite, nervousness, mood swings, and dizziness.<sup>56</sup> *Ritalin* shares many of the same common side effects as *Adderall*, with the exception of weight loss, dry mouth, and mood swings.<sup>57</sup> *Ritalin* use may also present nausea.<sup>58</sup> Other serious side effects of *Adderall* include slowing of growth (height and weight) in children, seizures (mainly in patients with a history of seizures), and eyesight changes or blurred vision.<sup>59</sup> *Ritalin* shares these serious side effects, but also includes priapism.<sup>60</sup> Additionally, serious side reactions to both medications include stroke, seizure, heart attack, blurred vision, psychiatric disturbance, and death.<sup>61</sup> Overdose can result in drug-induced psychosis and cardiac arrest.<sup>62</sup> Psychostimulants *Adderall* and *Ritalin* also have a high potential for abuse and likelihood of dependency.<sup>63</sup>

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<sup>54</sup> See *Prohibited List 2016*, WADA, <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2016-prohibited-list-en.pdf>, (last visited May 19, 2016).

<sup>55</sup> Linton, *supra* note 37, at 1011.

<sup>56</sup> See Medication Guide: Adderall XR, FDA.GOV (2013), <http://www.fda.gov/downloads/Drugs/DrugSafety/ucm085819.pdf> (last visited May 19, 2016).

<sup>57</sup> See Medication Guide: Ritalin, FDA.GOV (2013), <http://www.fda.gov/downloads/Drugs/DrugSafety/ucm089090.pdf> (last visited May 19, 2016).

<sup>58</sup> *Id.*

<sup>59</sup> Medication Guide: Adderall XR, *supra* note 56.

<sup>60</sup> Medication Guide: Ritalin, *supra* note 57.

<sup>61</sup> Linton, *supra* note 37, at 1012.

<sup>62</sup> Shaheen E. Lakhani & Annette Kirchgessner, *Prescription Stimulants in Individuals with and Without Attention Deficit Hyperactivity Disorder: Misuse, Cognitive Impact, and Adverse Effects*, BRAIN AND BEHAVIOR, Sept. 2012, at 661-67.

<sup>63</sup> Chien, *supra* note 16, at 190.

#### 4. *Challenges to Purported Adderall Safety*

Health complications stemming from prescription psychostimulant use have prompted a variety of product liability and medical malpractice litigation. In 2005, Pio Zammit asserted product liability claims against defendant drug manufacturer Shire US, Inc., alleging that after being prescribed and taking *Adderall*, he suffered a heart attack and heart damage as a direct result of the use of the medication.<sup>64</sup> His complaint alleges that the use of the product caused him to experience a pounding heartbeat, tightness in his chest, palpitations, and nausea.<sup>65</sup> Further, after immediately discontinuing use, he suffered a heart attack which resulted in permanent damage to his heart.<sup>66</sup>

In another case, after decedent's death at the age of 39, plaintiffs alleged that her doctor violated her standard of care by improperly prescribing amphetamine salts in disregard of the decedent's prior heart condition.<sup>67</sup> Further, they alleged that the amphetamine salts were prescribed without reviewing the decedent's blood pressure or without performing any other cardiovascular exam.<sup>68</sup>

## II. THE NCAA, BANNED STIMULANTS, AND MEDICAL WAIVERS

### A. OVERVIEW

The NCAA list of banned drug classes is composed of substances that are generally known to be performance enhancing, detrimental to the health and safety of student-athletes, or both.<sup>69</sup> Yet, an exception to the policy exists. If a

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<sup>64</sup> *Zammit v. Shire US, Inc.*, 415 F. Supp. 2d 760, 762 (E.D. Mich. 2006) (holding that the existence of a Michigan products liability immunity statute supports the granting of summary judgment where a drug manufacturer obtains prior approval by the FDA).

<sup>65</sup> *Id.* at 763.

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

<sup>67</sup> *Brannan v. Northwest Permanente, P.C.*, No. CO5-5157 FDB., 2006 WL 2781337 at \*1 (W.D. Wash. Sept. 25, 2006) (holding that a general dispute of material fact pertaining to standard of care and causation supported the denial of plaintiff's motion for summary judgment).

<sup>68</sup> *Id.*

<sup>69</sup> *See 2015-16 Drug-Testing Exceptions Procedures (Medical*



student-athlete with a documented medical history demonstrates the need for treatment by a banned medication for a legitimate medical purpose, a medical waiver may be granted to allow for the use of the banned substance.<sup>70</sup> Stimulants, including *Adderall* and *Ritalin*, are among the classes of banned drugs in which medical waivers may be granted.<sup>71</sup>

#### B. PROCEDURE TO OBTAIN A MEDICAL WAIVER FOR MEDICATIONS OTHER THAN THOSE THAT TREAT ADHD

Generally, medical waivers are applied retroactively, and only effectuate to provide a remedial solution to a positive drug test. Dissemination of instructional guidelines to each institution provides suggestions for how to establish sufficient documentation to support a medical waiver in the event of a positive drug test. For example, the institution should maintain documentation to support the use of medication in the student-athlete's medical record on campus, which may include a letter or copies of medical notes from the prescribing physician outlining the medical history of the ailment that requires the need for the banned substance.<sup>72</sup> Additionally, the letter should contain information relevant to the diagnosis, including medical history and dosage information.<sup>73</sup> The NCAA further instructs institutions not to send the student-athletes' medical records or physicians' letters to the NCAA unless specifically requested, nor should the student-athlete feel compelled to report their use of a substance to the drug testing crew at the time of a drug test.<sup>74</sup>

If a student-athlete is drug tested, and a student-athlete tests positive, the institution will be informed of the positive result by the NCAA.<sup>75</sup> If the institution desires an exception, it should submit the student-athlete's documentation to Drug Free

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*Exemptions*), NCAA, <http://www.ncaa.org/health-and-safety/sport-science-institute/2015-16-drug-testing-exceptions-procedures-medical-exceptions>, (last visited May 19, 2016).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

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

Sport.<sup>76</sup> If Drug Free Sport does not receive the documentation from the institution, the student-athlete will be withheld from competition until the information is received; once received, Drug Free Sport will grant the exception via a valid medical waiver.<sup>77</sup>

### C. PROCEDURE FOR OBTAINING MEDICAL WAIVERS FOR STIMULANTS TO TREAT ADHD

In 2009, in response to an increase in the overall diagnoses of ADHD on college campuses, which resulted in a three-fold increase in student-athletes testing positive for stimulant medications, and an inadequacy in documentation previously submitted in support of the request for a medical waiver, the NCAA modified its medical waiver procedure as it relates to stimulants used to treat ADHD.<sup>78</sup>

In the event that a student-athlete tests positive for a banned stimulant, the process for obtaining a medical waiver begins.<sup>79</sup> The NCAA advises student-athletes to have documentation on file at the athletics department of their respective institutions—including a comprehensive clinical evaluation, recording observations and results from ADHD rating scales, a physical exam and any lab work, previous treatment for ADHD, and the diagnosis and recommended

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<sup>76</sup> *Id.*; See DRUG FREE SPORT, <http://www.drugfreesport.com/index.asp> (last visited May 19, 2016) (the National Center for Drug Free Sport, Inc. is a team of accessible, world-class experts in partnership with leading sport organizations around the world (like the NCAA), providing unbiased and customized drug-testing programs and other drug prevention initiatives to ensure fair and safe sport).

<sup>77</sup> *2015-16 Drug-Testing Exceptions*, *supra* note 69.

<sup>78</sup> See *NCAA Guidelines*, *supra* note 11 (Beginning in January 2008, all institutions who are members of the NCAA received notification of the effective date of the stricter application -- August 2009 – in the form of NCAA News articles, notices in email communications, and the posting of a video describing the rationale and expectations of the stricter application. This 18-month period of notice would allow member institutions to inform current and incoming student-athletes to be prepared to gather the necessary documentation of the diagnosis, course of treatment and current prescription); see also *Substance Use*, *supra* note 48.

<sup>79</sup> See *NCAA Guidelines*, *supra* note 11.

treatment.<sup>80</sup> Similar to the procedure for all other medical waivers as described previously, the documentation should be kept on file until a drug test yields positive results for the banned stimulant.<sup>81</sup> If results are positive, the institution should submit all documentation on file to the drug testing authority for the evaluation of whether a medical waiver will be granted, in order to determine whether a student-athlete will be eligible to compete.<sup>82</sup>

The NCAA has explained that a simple statement by the student-athlete's physician, merely explaining that the physician is treating the student-athlete for ADHD with the banned substance, is not enough to grant a medical exception waiver.<sup>83</sup> Finally, the NCAA requires, at a minimum, an annual follow-up with the student-athlete's prescribing physician, as reflected in a letter from the physician, or a copy of the medical record indicating the continued need for the prescribed ADHD medication.<sup>84</sup>

#### D. ISSUES WITH CURRENT PROCEDURE

##### 1. *Emphasis on Pharmacologic Treatment*

While student-athletes are evaluated by physicians when gathering the necessary documentation to support their ADHD treatments, "[t]he NCAA does not require that physicians

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<sup>80</sup> *Id.* at 2 (the physician can provide documentation of the above either with a cover letter and attachments or provide the medical record. The NCAA considers the totality of the clinician's evaluation that should be reflected in the documentation); *See also NCAA Medical Exception Documentation Reporting Form to Support the Diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Treatment with Banned Stimulant Medication*, NCAA, <http://www.ncaa.org/sites/default/files/ADHD%20reporting%20form.pdf> (last visited May 19, 2016).

<sup>81</sup> *NCAA Guidelines*, *supra* note 11.

<sup>82</sup> *Id.*; *See Perrin & Jotwani*, *supra* note 46 (Psychostimulant medication is prohibited during competition in events sanctioned by WADA or IOC ("International Olympic Committee"). The only FDA-approved ADHD medication allowed for use in competition by all governing bodies is atomoxetine. Student-athletes should check governing organization web sites to review current restrictions on use of psychostimulants in competition).

<sup>83</sup> *NCAA Guidelines*, *supra* note 11.

<sup>84</sup> *Id.*

prescribe a trial of non-psychostimulant medications prior to prescribing psychostimulants[.]”<sup>85</sup> The procedures only advise the prescribing physician to merely consider non-psychostimulants before prescribing psychostimulant medications.<sup>86</sup> In fact, the NCAA acknowledges that the non-psychostimulant medication may not be as affective in treating ADHD as psychostimulant medication.<sup>87</sup>

Although the NCAA should not attempt to restrict or place unreasonable limits on a physician’s ability to diagnose and treat patients as they see fit, a policy requiring a student-athlete to use non-psychostimulant medication as a trial prior to psychostimulant medication would serve as an affective mechanism for reducing psychostimulant use. Perhaps this directive could come in the form of a cover sheet, describing the hypothetical policy in favor of non-psychostimulants, and required for submittal with the relevant documentation. The student-athlete could bring the cover sheet to the examination, resulting in understanding and compliance by the physician.

## *2. Compiling Documentation Prior to Each Year of Eligibility*

Medical waivers are applied retroactively and only provide a remedial solution to a positive drug test. In order for student-athletes to obtain medical waivers to treat ADHD, the NCAA advises student-athletes to have relevant documentation on file at the athletics department of the respective institutions to support their use of psychostimulant medication. Yet, these documents will only be used if the student-athlete is drug tested. It is possible that some student-athletes may avoid compiling sufficiently thorough documentation based on an assumption that a drug test will not be conducted. Issues may also arise if student-athletes ignore previous warnings from their institutions to compile their documentation, ultimately resulting in a loss of eligibility if a drug test occurs. Further, other non-ADHD student-athletes who use psychostimulants may also ignore previous institutional directives, may go their entire collegiate

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<sup>85</sup> Lakhan & Kirchgessner, *supra* note 62.

<sup>86</sup> *Id.*

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

careers without a drug test, or may lose their eligibility if a positive test result does occur.

As a solution, the NCAA should require all student-athletes to compile their required documentation as currently required, with an additional requirement to submit all documentation to the NCAA prior to each year of eligibility. This policy would ensure nearly optimal compliance by student-athletes seeking to use psychostimulants to treat ADHD, and would decrease the overall number of student-athletes who slip through the cracks by failing to compile necessary documentation prior to a positive drug test.

### 3. *Only One Submission Required*

For many student-athletes, the evaluation and initiation of pharmacological treatment begins during grade school.<sup>88</sup> In this case, the NCAA allows student-athletes to submit documentation of the prior evaluation, along with the history of treatment and current prescription to the student-athlete's sports medicine staff upon matriculation.<sup>89</sup> In subsequent years of eligibility, the NCAA requires, at minimum, an annual follow-up with the student-athlete's prescribing physician, as reflected in a letter by the physician or a copy of the medical record, indicating the continued need for the prescribed ADHD medication. Yet, due to the policy differences of each institution, enforcement of the NCAA's annual follow-up directive may not be strictly enforced.<sup>90</sup> As recommended above, if the NCAA requires all

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<sup>88</sup> *NCAA Guidelines*, *supra* note 11, at 3.

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

<sup>90</sup> See *Varsity Student Athlete Information about NCAA Medical Exception Documentation Reporting Form to Support Diagnosis of ADHD and Treatment with Banned Stimulant Medication*, [http://www.muhlenberg.edu/pdf/main/athletics/athletic\\_training/NCAA\\_ADHDBergstudentLetter\\_Form.pdf](http://www.muhlenberg.edu/pdf/main/athletics/athletic_training/NCAA_ADHDBergstudentLetter_Form.pdf) (last visited May 19, 2016) (this letter to Muhlenberg University student-athletes requires students to submit NCAA required documentation to the Athletic Training Office prior to the student-athletes' pre-participation exam. It also requires the student-athlete to submit annual follow-up documentation per the NCAA's recommendations. Yet, it is the student-athlete's responsibility to ensure that this documentation is complete and returned to the Athletic Training Office); *cf. Maryland Sports Medicine*,

student-athletes to submit all documentation to the NCAA prior to each year of eligibility, including documentation evidencing annual follow-ups with the prescribing physician, the NCAA would be able to both ensure nearly optimal compliance by student-athletes seeking to use psychostimulants to treat ADHD, and manage subsequent waiver renewals.

### III. PROPOSED SOLUTIONS: TWO-PRONGED APPROACH

#### A. RECOGNIZING THE NEED

In August 2014, the NCAA published the results of a more recent survey, which measured the substance use patterns of NCAA student-athletes.<sup>91</sup> The study concluded that the use of psychostimulants increased among all student-athletes, in all divisions, and in both men's and women's sports.<sup>92</sup>

Additionally, the use of psychostimulants does not end at the collegiate sports level. Even after the NCAA modified their policy towards medical waivers and ADHD medication in 2009, athletes competing at the professional level continue to test positive for the banned psychostimulant substances.<sup>93</sup> Between May 2011 and September 2013, more than one dozen NFL

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13/misc\_non\_event/ADHD\_medical\_exceptions\_packet.pdf?DB\_OEM\_ID=29700 (last visited May 19, 2016) (University of Maryland requires all student-athletes to submit all NCAA required documentation, including required follow-up documentation to the University of Maryland Sports Medicine Department in order for the student-athlete to participate in intercollegiate athletics. The letter is sent directly to the student-athlete's provider to ensure more effective compliance).

<sup>91</sup> See Rexorat, *supra* note 13.

<sup>92</sup> *Id.* (according to the study, the highest use of psychostimulants was in Division III. Psychostimulant use increased from 2009 to 2013 in all men's sports except football, lacrosse, and tennis. Use increased in all women's sports except field hockey, lacrosse, softball, swimming, and track).

<sup>93</sup> See Luke Kerr-Dineen, *Birdies in a Bottle?*, GOLF DIGEST (May 10, 2015), <http://www.golfdigest.com/story/adderall-use> (According to an interview conducted by the Vancouver Sun, Seattle Seahawks cornerback Richard Sherman, "about half" of the NFL's players take Adderall because it helps them quickly analyze situations. Although Sherman later mentioned that he was misquoted, the Vancouver Sun stood by its' reporting).

players have been suspended for using *Adderall* or *Ritalin*.<sup>94</sup> Many NFL players claim that they did not know that these psychostimulants were banned by the league.<sup>95</sup>

A solution is needed at the collegiate sports level, at a time when adolescents are forming habits that have the potential to shape much of their adult lives. Ensuring an approach that focuses on modifying the internal medical waiver system already in place and establishing an external collaborative approach to focus on treatment and education is needed to curb the use of psychostimulants.

## B. TWO-PRONGED APPROACH

Decreasing the over-use of psychostimulants in college sports will require implementation of reform to the NCAA's medical waiver procedure. To accomplish reform, a two-pronged approach should be developed to better manage the issue: (1) internal modification, and (2) external modification.

### 1. *Internal Modification*

Once a student-athlete matriculates into an institution, he or she is required to file necessary documentation supporting the need for psychostimulant medication to treat ADHD, and submit the documentation to the respective athletic department.<sup>96</sup> Each institution differs with respect to how internal policies govern the management of this procedure with respect to the student-athlete, physician, and athletic department. The documentation is precautionary, and is only used remedially in the event a drug test is given, and the test yields positively for a banned

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<sup>94</sup> See Bill Bradley, *Report: Adderall Remains Drug of Choice for Many NFL Players*, NFL NEWS (Sept. 10, 2013), <http://www.nfl.com/news/story/0ap1000000242017/article/report-adderall-remains-drug-of-choice-for-many-nfl-players>.

<sup>95</sup> *Id.* (according to Denver Broncos running back Wesley Woodyard, the NFL communicates nearly once a week with players informing them about the banning of a new drug or supplement); see also Stephen Smith, *Adderall: NFL's Popular New Drug or Easy Alibi?*, CBS NEWS (Dec. 5, 2012), <http://www.cbsnews.com/news/adderall-nfls-popular-new-drug-or-easy-alibi/> (Some suspended players, like New York Giants safety Tyler Sash have said that they had no idea that the substance was banned).

<sup>96</sup> See *NCAA Guidelines*, *supra* note 11.

psychostimulant. At this point, the documentation, assuming it is on file and complete, is sent to the NCAA whereupon the medical waiver will either be granted or denied, thereby determining whether the student-athlete will be eligible for competition. This system has many loopholes which can and should be closed.

To solve the problem internally, medical waivers should be obtained prior to any potential drug test. The NCAA should require each student-athlete, who either has previously been treated for or who desires to be treated for ADHD using psychostimulants, to compile all required documentation from the student-athletes' physicians. The file should be sent directly to the NCAA prior to competition. Upon the NCAA's determination whether a student-athlete has fulfilled all requirements to support the student-athlete's proposition to use a psychostimulant, a determination will be made to either grant or deny the student-athlete a medical waiver.

Additionally, the medical waiver would expire one year from the date of granting. The student-athlete would be required to renew his or her waiver by submitting an updated application, consisting of an annual follow-up with the student-athlete's prescribing physician as reflected in a letter from the physician, or a copy of the medical record indicating the continued need for the prescribed ADHD medication.

By requiring student-athletes to submit medical waiver applications prior to the participation in intercollegiate competition, the NCAA can develop a variety of analytics geared towards understanding and managing student-athletes and psychostimulants—including how many student-athletes have requested waivers, the number of waivers granted versus waivers denied, and the number of waivers granted per institution. The data collected over time could, in combination with the external modification, help to develop policy aimed at decreasing the number of student-athletes using psychostimulant medication to treat ADHD.

## *2. External Modification*

A policy aimed at decreasing the number of student-athletes using psychostimulant medication to treat ADHD should have proper and structured diagnosis, evaluation, and treatment



components.<sup>97</sup> Although institutional resources vary, ideally, this prong will involve collaboration between the student-athlete, the institution, and the student-athlete's physician. A student-athlete will typically fall into one of two categories: (1) either the student-athlete has not been previously diagnosed with ADHD, or (2) a family physician has already diagnosed the student-athlete with ADHD prior to competition in intercollegiate athletics.

First, a student-athlete may notice symptoms in his or her daily academic, athletic, or social life which the student-athlete may suspect to be symptoms of ADHD.<sup>98</sup> Additionally, an athletic trainer or director at the institution may also notice these symptoms during conversations with the student-athlete or after noticing difficulties in the classroom, on the field, or both.<sup>99</sup> The athletic trainer may recommend or refer the student-athlete to a physician for an examination to screen for ADHD.<sup>100</sup>

Second, once the referral has been made, the student-athlete should be sent to a physician either within or outside the institutional health system who specializes in ADHD diagnoses and utilizes an ADHD screening assessment to determine the presence and severity of symptoms. The nationwide list of physicians who use the ADHD screening assessment should be published by the NCAA in partnership with the American Psychiatric Association, and would be made available to each membership institution.<sup>101</sup> This establishes a uniform method of accurate diagnosis of ADHD to which all parties—the NCAA, institutions, and physicians—would benefit. If a positive ADHD diagnosis is made, the physician should then refer the student-athlete to the next step: assessment by the student health center.<sup>102</sup>

The third step is a referral by the diagnosing physician to a psychologist, psychiatrist, or medical doctor at the student

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<sup>97</sup> Christopher J. Richmond, *ADHD and the Student Athlete*, NCAA, <http://www.ncaa.org/health-and-safety/medical-conditions/adhd-and-student-athlete> (last visited May 19, 2016).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.psychiatry.org> (last visited May 19, 2016).

<sup>102</sup> *See* Richmond, *supra* note 97.

health center, where the student-athlete would complete a series of assessments to evaluate the full extent of the student-athletes' ADHD.<sup>103</sup> The assessments would include interviews, rating scales, psychological tests, and review of the student-athlete's previous academic records.<sup>104</sup> The NCAA should allow the differences in each institution's financial and human resources to dictate the breadth and scope of these tests. Yet, the underlying purpose for the multi-faceted assessment subsequent to a diagnosis of ADHD is to understand the complexity of the individual's ADHD beyond a simple medical diagnosis.<sup>105</sup> Upon completion of the assessment, the student-athlete will move onto the treatment phase.

The fourth and final step in this prong is treatment. Each treatment plan will be different depending on the results of the diagnosis and assessment.<sup>106</sup> The treatment may include any combination of cognitive-behavioral strategies, goal-oriented strategies, nutritional strategies, psychotherapy, and management of medication.<sup>107</sup> If psychostimulant medication is required as part of the treatment, the student-athlete should then complete the necessary steps required to comply with the NCAA's ADHD medical waiver policy.<sup>108</sup>

### C. LEGISLATION AND IMPLEMENTATION

Each year, prior to participation in intercollegiate competition, the NCAA currently requires that student-athletes sign and submit a Student-Athlete Statement, a form which includes information related to eligibility, recruitment, financial aid, amateur status, previous positive-drug tests, and involvement in organized gambling activities in relation to intercollegiate or professional athletics competition within the NCAA's legislative framework.<sup>109</sup> Form 15-3a,<sup>110</sup> as it is also

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

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

<sup>108</sup> *Id.*

<sup>109</sup> NCAA DIVISION I MANUAL § 12.7.2.1 (2015), <http://www.ncaapublications.com/productdownloads/D116JAN.pdf> [hereinafter NCAA D1 MANUAL]; NCAA DIVISION II MANUAL § 14.1.3 (2015), <http://www.ncaapublications.com/productdownloads/D216.pdf>

known, is required for student-athletes to sign and return before their first competition each year to their respective director of athletics.<sup>111</sup> Because this is required of each student-athlete prior to their first competition each year, it is practical and reasonable that an amendment to the Student-Athlete Statement to include a section relating to medical waivers would most successfully allow this new policy change to be implemented.

### *1. Reform the Student-Athlete Statement*

Currently, for Division I student-athletes, the Student-Athlete Statement is a six-part form.<sup>112</sup> First, the NCAA should amend Page 1 of the Student-Athlete Statement to add: “7. *Medical waiver.*”

Second, the NCAA should add an additional page, corresponding to the first suggested modification above, which should plainly describe the necessary steps a student-athlete

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[hereinafter NCAA D2 MANUAL]; NCAA DIVISION III MANUAL §14.1.3 (2015),

<http://www.ncaapublications.com/productdownloads/D316FEB.pdf>

[hereinafter NCAA D3 MANUAL].

<sup>110</sup> Form No. 15-3a is the required Student-Athlete Statement pertaining to Division I student-athletes, whereas Form No. 15-3b pertains to Division II student-athletes, and Form No. 15-3c pertains to Division III student-athletes.

<sup>111</sup> NCAA, FORM 15-3a (2016),

<https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf> (last visited May 19, 2016)

[hereinafter FORM 15-3a]; NCAA, FORM 15-3b (2016),

<http://www.ncaa.org/sites/default/files/Form%2015-3b%20-%20Student-Athlete%20StatementDII.pdf> (last visited May 19, 2016);

NCAA, FORM No. 15-3c (2016),

[https://www.ncaa.org/sites/default/files/Combined%20form%2015-3c-%20Student-Athlete%20Statement%20Form%20and%2015-3f-%20Drug%20Testing%20Consent%20\(Condensed%20and%20Legal%20Size\).pdf](https://www.ncaa.org/sites/default/files/Combined%20form%2015-3c-%20Student-Athlete%20Statement%20Form%20and%2015-3f-%20Drug%20Testing%20Consent%20(Condensed%20and%20Legal%20Size).pdf) (last visited May 19, 2016).

<sup>112</sup> FORM 15-3a, *supra* note 105, at 1 (the six-parts: “1. A statement concerning eligibility; 2. A Buckley Amendment consent; 3. An affirmation of status as an amateur athlete; 4. Results of drug tests; 5. Previous involvement in NCAA rules violation(s); and 6. An affirmation of valid and accurate information provided to the NCAA Eligibility Center and admissions office, including ACT or SAT scores, high school attendance, completion of coursework and high school grades.”).

should take when applying for a medical waiver. This page should be titled: “*Part VII: Medical Waiver to Support the Diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Treatment with Banned Stimulant Medication.*” The contents of the page will follow the Two-Pronged approach as advocated in this article.

Third, the NCAA should amend Part IV of the Student-Athlete Statement to effectuate a catchall provision to allow the NCAA to begin developing a comprehensive set of data to measure the effectiveness of the new policy. Part IV of the Student-Athlete Statement is labeled “*Results of Drug Tests,*” and is divided into two sections.<sup>113</sup> The first section requires the student-athlete to sign and acknowledge, that in the future, should the student-athlete test positive for a banned substance by the NCAA, test positive for a banned substance by a non-NCAA athletics organization, violate a drug-testing protocol, or fail to show up for a drug test at any time, the student-athlete must report the results to their respective director of athletics.<sup>114</sup> The second section requires the student-athlete to sign and acknowledge whether or not the student-athlete has failed to show up for or has failed a past drug test.<sup>115</sup> Within this section, two new questions should be drafted as follows:

*Have you previously tested positive for stimulant medication prescribed to you by a legitimate medical provider?*

*Are you applying for an NCAA Medical Waiver to Support the Diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Treatment with Banned Stimulant Medication?*

The legislative intent behind these two additional questions is two-fold. First, in order to make a smooth transition from the former to the new policy, the NCAA should ensure clear and transparent communication to student-athletes and athletic directors about the proposed changes to ADHD medical waiver policy. By reading Page 1 of the Student-Athlete Statement, the student-athlete and athletic director will already be aware that an ADHD medical waiver application should be submitted concurrently when the Student-Athlete Statement is

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<sup>113</sup> *Id.* at 5.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

submitted. However, new policy changes may become overlooked by athletic directors during their routine facilitation of the Student-Athlete Statement with the student-athlete. In the event either the student-athlete or athletic director overlooked Page 1, these additional questions will serve as additional constructive notice to both parties prior to submittal. Second, the addition of these questions will aid the NCAA in their data collection about student-athletes to measure the effectiveness of the new policy.

2. *Amend Bylaws 12.7.2.1 and 12.7.3.2(b)*

In conforming with the amendments to the Student-Athlete Statement, the NCAA should subsequently amend the Bylaws to ensure consistency of messaging and to put forth a policy that encourages student-athletes to comply with the new policy. The Two-Pronged approach is designed to allow the NCAA to better understand the scope of student-athletes who use psychostimulants to treat ADHD and related medical disorders. It is also designed to manage the health and welfare of the student-athletes who use psychostimulants, by working collaboratively on treatment and education, with the goal of curbing the use of psychostimulants. This new policy and its goals should be transparent, and should simplify how student-athletes and athletic directors apply for medical waivers, so the NCAA can take full advantage of this opportunity.

The NCAA should revise Bylaw 12.7.2.1 as follows:

Prior to participation in intercollegiate competition each academic year, a student-athlete shall sign a statement in a form prescribed by the Council in which the student-athlete submits information related to eligibility, recruitment, financial aid, amateur status, previous positive-drug tests administered by any other athletics organization, *open or closed applications for an NCAA Medical Waiver to Support the Diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Treatment with Banned Stimulant Medication*, and involvement in organized gambling activities related to intercollegiate or professional athletics competition under the Association's governing legislation . . . .<sup>116</sup>

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<sup>116</sup> NCAA D1 MANUAL, *supra* note 109, §12.7.2.1 (author's addition to Bylaw in italics) (similarly, this article suggests the NCAA

Additionally, the NCAA should revise Bylaw 12.7.3.2(b) as follows:

The athletics director or the athletics director's designee shall disseminate the list of banned drug classes to all student-athletes and educate them about products that might contain banned drugs. *The athletics director or the athletics director's designee may recommend or refer the student-athlete to a physician for an examination to screen for Attention Deficit Hyperactivity Disorder (ADHD).* All student-athletes are to be notified that the list may change during the academic year, that updates may be found on the NCAA website ([www.ncaa.org](http://www.ncaa.org)) and informed of the appropriate athletics department procedures for disseminating updates to the list . . . .<sup>117</sup>

### 3. Revenue and Reputational Impacts

Developing major policy changes like those advocated for in this article have the potential to curb the use of and better manage psychostimulant medication within collegiate sports. Yet, implementation of major policy changes of this caliber does not come without costs.

The NCAA Division I Committee on Infractions ("COI") is an administrative body comprised of volunteers from NCAA member institutions, conferences, and members of the general public with legal training.<sup>118</sup> Among its authority and responsibilities, the COI functions to prevent an NCAA member institution from obtaining a competitive advantage over another

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revise Bylaw 14.1.3.1 and Bylaw 14.1.3.1 in the NCAA D2 Manual and NCAA D3 Manual, respectively).

<sup>117</sup> *Id.* at §12.7.3.2(b) (author's addition to Bylaw in italics) (similarly, this article suggests the NCAA revise Bylaw 14.1.4.2 and Bylaw 14.1.4.2 in the NCAA D2 Manual and NCAA D3 Manual, respectively).

<sup>118</sup> See *Division I Committee on Infractions*, NCAA, <http://www.ncaa.org/governance/committees/division-i-committee-infractions> (last visited May 20, 2016) (COI has authority to address prehearing procedural matters, set and conduct hearings or reviews, find facts, conclude violations of NCAA legislation, prescribe appropriate penalties and monitor institutions on probation to ensure compliance with penalties and terms of probation, as well as conduct follow-up proceedings as may be necessary).

NCAA member institution.<sup>119</sup> Assuming that the NCAA implements the policy changes advocated for in this article, and the NCAA begins to collect data about student-athletes to measure the effectiveness of the new policy, it is easy to see how quantification of this policy change can subsequently allow for a new subset of violations within the purview of the COI. Costs associated with ensuring compliance will be realized by each member institution, effectively creating a revenue negative implication among the NCAA.

Currently, some member institutions may already be experiencing competitive advantages over others. The ineffectiveness of the NCAA's current policy is likely allowing more student-athletes to utilize the performance enhancing benefits of psychostimulants than what perhaps should be allowable if an internal and external policy modification were in place.<sup>120</sup> The current policy can be summarized as a revenue positive implication among the NCAA.

Ultimately, by implementing the new policy as advocated in this article, the NCAA will likely experience an organization-wide revenue neutral impact. In order to minimize the potential for competitive advantages among member institutions, the NCAA should implement the new policy across all divisions and conferences. By doing so, the revenue negative costs associated with ensuring compliance with the new policy will serve to balance out the revenue positive benefits the NCAA currently experiences as a result of the current policy, yielding revenue neutral implications.

#### D. EVALUATING AND DISMISSING THE ARGUMENTS SUPPORTING INCREASED DRUG-TESTING

It can be argued that effectuating a policy that outlines an increased frequency of drug testing in collegiate sports would dramatically decrease abuse of psychostimulant medication and would serve as a deterrent to non-ADHD student-athletes who use psychostimulants as an ergogenic aid in training or on the field.<sup>121</sup> However, in order to make a substantial impact on

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<sup>119</sup> NCAA D1 MANUAL, *supra* note 109, at §19.1.1-3.

<sup>120</sup> Perrin & Jotwani, *supra* note 46.

<sup>121</sup> See Pavisian, *supra* note 40, at 207 (arguing that increasing drug testing for *Adderall* in high school and college would decrease use).

psychostimulant use amongst all NCAA member institutions, a uniform drug testing policy would have to be set in place.<sup>122</sup> Current drug testing policies differ widely amongst almost all collegiate programs. Additionally, constitutional challenges would almost certainly present themselves should conference-wide or league-wide drug testing policies be set into motion.

### 1. *Current Policy*

With the NCAA's approval of Proposal No. 30 at the January 1986 NCAA Convention and Proposal Nos. 52-54 at the January 1990 Convention, NCAA institutions reaffirmed their dedication to the ideal of fair and equitable intercollegiate competition.<sup>123</sup> Subsequently, the NCAA drug-testing program was created to protect the health and safety of the competing student-athletes to ensure that no participant might have an artificially induced advantage, and to ensure that no participant might be pressured to use chemical substances in order to remain competitive.<sup>124</sup> According to the NCAA's constitution, every academic year, students-athletes are required to sign consent forms for any drug testing, which may be conducted annually.<sup>125</sup> Testing can occur both in-season and out of season.<sup>126</sup> Additionally, testing can occur randomly or immediately subsequent to a competition.<sup>127</sup> Institutions vary with respect to warnings, suspension policies, and penalties after positive drug test results.<sup>128</sup>

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<sup>122</sup> See Sharon Terlep, *The NCAA's Drug Problem*, WALL ST. J. (Mar. 24, 2015), <http://www.wsj.com/articles/the-ncaas-drug-problem-1426792929>.

<sup>123</sup> NCAA, *Drug-Testing Program* (2015-16), <http://www.ncaa.org/sites/default/files/Drug%20Testing%20Program%20for%202015%20FINAL.pdf> (last visited May 19, 2016) [hereinafter *NCAA Drug-Testing Program*].

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

<sup>125</sup> NCAA D1 MANUAL, *supra* note 109, § 12.7.3.1; *NCAA Drug-Testing Program*, *supra* note 123 (in year-round testing events, student-athletes may be selected on the basis of sport, position, competitive ranking, athletics financial-aid status, playing time, directed testing, an NCAA-approved random selection or any combination thereof).

<sup>126</sup> See *NCAA Drug-Testing Program*, *supra* note 123, at 5.0 - 5.8.5.1.

<sup>127</sup> *Id.*

<sup>128</sup> See Terlep, *supra* note 122 (a first positive test results in a



## 2. *Uniform Policy across the NCAA*

According to Brian Hartline, who was appointed as the NCAA's first Chief Medical Officer in 2013, "the NCAA's doping policy is outdated, and there needs to be more consistency among schools."<sup>129</sup> Hartline is seeking to implement a policy where the "Big Five" conferences, as opposed to individual schools, would be in charge of setting a uniform drug testing policy, and would be responsible for conducting drug testing.<sup>130</sup> According to Hartline, creating a transparent policy in the Big Five would send a clear message to those aspiring to play at the collegiate level that performance enhancing substances are not tolerated.<sup>131</sup> Additionally, because the NCAA cannot afford to increase its testing frequency enough to sufficiently police all of college sports, conferences are better equipped to manage a drug testing policy.<sup>132</sup> Currently, individual schools are not required to do any drug testing above and beyond the minimum requirements of the NCAA.<sup>133</sup>

## 3. *Constitutionality of a Uniform System*

If a uniform drug testing policy is created to impose additional testing requirements of student-athletes, constitutional challenges will amount. In *Hill v. National Collegiate Athletics Association*, the California Supreme Court settled the question of constitutionality pertaining to the NCAA's drug testing program, and the Court created the precedent to support drug testing throughout college sports.<sup>134</sup> The opinion outlined three factors for deciding whether an invasion of freedom from observation during urination (drug test) was serious enough and whether the

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possible suspension at Arizona State University but a first positive test results in suspension of 50% of games at the University of Florida).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (the "Big Five" or "Power Five conferences" generally include: the ACC, Big Ten, Big 12, Pac-12, and SEC); *see also* Brett McMurphy, *Power Five Coaches Polled on Games*, ESPN (Aug. 7, 2014), [http://espn.go.com/college-football/story/\\_/id/11320309/majority-power-five-coaches-want-power-five-only-schedules](http://espn.go.com/college-football/story/_/id/11320309/majority-power-five-coaches-want-power-five-only-schedules).

<sup>131</sup> *See* Terlep, *supra* note 122.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; *see also* *NCAA Drug-Testing Program*, *supra* note 123.

<sup>134</sup> *Hill v. NCAA*, 865 P.2d 633, 669 (Cal. 1994).

student-athletes' interests in the privacy of medical treatment and information was egregious enough to warrant a determination of an unconstitutional right to privacy.<sup>135</sup> The decision hinged on an analysis of the diminished expectation of privacy of student-athletes and how this expectation was outweighed by the NCAA's "legitimate regulatory objectives in conducting testing for proscribed drugs."<sup>136</sup> Additionally, as a governing body responsible for protecting the health and safety of its athletes, the Court upheld drug testing to be a reasonable method for achieving a drug-free athletic competition.<sup>137</sup>

Yet, according to dissenting Justice George, the majority refused to adopt a traditional constitutional balancing test, namely the "compelling interests" test in its analysis.<sup>138</sup> Unlike the majority, dissenting Justice George analyzed the case under this traditional test, and identified that the NCAA had a compelling interest in (1) ensuring that student-athletes do not have an unfair advantage over one another during competition, and (2) in ensuring the health and well-being of student-athletes during competition.<sup>139</sup> Although Justice George still found the NCAA's drug testing methods to be constitutional under the traditional constitutional analysis, his dissenting opinion makes clear that the majority's choice to replace the traditional "compelling" interest with a simple "competing" or "legitimate" interest, not only increases the plaintiff's burden of establishing a

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<sup>135</sup> *Id.* at 658-69 (factors included: (1) reasonable expectations of privacy; (2) seriousness of invasion; (3) and competing interests).

<sup>136</sup> *Id.* at 637 (holding that a student-athlete has a diminished expectation of privacy because "[u]nlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.").

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 677 (George, J., concurring in part and dissenting in part) (hypothesizing that the majority's reluctance to use the compelling interests test was based on a concern that such a standard would place too high of a burden on defendants).

<sup>139</sup> *Id.* at 678.

prima facie violation of privacy, but also decreases the defendant's burden to justify it.<sup>140</sup>

Though not binding, Justice George's dissenting opinion raises serious questions about whether a conference-wide policy implementing another layer of drug testing beyond those required by the NCAA would promote constitutional challenges to privacy interests under the traditional "compelling interests" test. Additionally, even if the majority approach is used, should student-athletes unionize in the future, constitutional questions will certainly surface and could withstand arguments supporting the invocation of frequent and additional drug testing.<sup>141</sup>

### CONCLUSION

Psychostimulants like *Adderall* and *Ritalin* are among NCAA's banned classes of drugs due to performance and health related reasons.<sup>142</sup> Although student-athletes who use them may test positive and lose their eligibility to compete in collegiate sports, medical exemptions allow student-athletes to avoid being declared ineligible after a positive drug test.<sup>143</sup> Even after the NCAA modified its ADHD medical waiver procedure to require more documentation from physicians, the modifications have not accomplished the goals set forth by the NCAA. Due to the increase in psychostimulants in college sports and the popularity of psychostimulants in professional sports, the NCAA needs to develop a better solution.

To curb psychostimulant use, a two-pronged approach should be developed. The approach should focus on both internal and external policy changes, including: (1) modifying the existing medical waiver system, and (2) establishing a collaborative approach to focus on treatment and education.

Although it can be argued that increased drug testing would serve as an effective deterrent and would decrease the amount of student-athletes using psychostimulants, the argument has many fallacies. Current drug testing policies differ widely

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<sup>140</sup> *Id.* at 677.

<sup>141</sup> See Marc Edelman, *Should College Athletes Be Allowed to Unionize?*, WALL ST. J. (Sept. 15, 2015), <http://www.wsj.com/articles/should-college-athletes-be-allowed-to-unionize-1442368889>.

<sup>142</sup> See 2014-15 NCAA Banned Drugs, *supra* note 7.

<sup>143</sup> See 2015-16 Drug Testing, *supra* note 9.

amongst almost all collegiate programs. A uniform drug testing policy with more frequent mandatory tests would have to be created and implemented in order to curb widespread psychostimulant use. Additionally, constitutional challenges would almost certainly present themselves should conference-wide or league-wide drug testing policies be set into motion.

It is evident that a problem exists. The line between deterring substance abuse and effectively managing and regulating a student-athlete's use of psychostimulants for medicinal reasons is thin. The NCAA Sports Science Institute ("SSI") already functions as a research, education, and policy organization with the NCAA to "promote and develop safety, excellence and wellness in college student-athletes, and to foster life-long physical and mental development."<sup>144</sup> Developing and implementing a policy aimed at decreasing the number of student-athletes using psychostimulant medication to treat ADHD should fit comfortably within the SSI's existing paternalistic functions and would avoid invasive and potentially unconstitutional drug testing roadblocks.

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<sup>144</sup> *Sport Science Institute, supra* note 52.

