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Catalyzing Fans

Dan Markel,[Z"L]* Michael McCann,** and Howard M. Wasserman***

For which team should basketball superstar LeBron James play? Where should celebrity statistician Nate Silver ply his craft of predictive wizardry? On which network should Jon Stewart flash his mordant wit? For some reason, the answers to these disparate questions are only indirectly related to the desires of third-party fans. Indeed, it is a puzzle that fans do not already have more influence on the recruitment or retention of their sports or entertainment heroes ("talent").

This paper proposes that fans can adopt forms of crowdfunding to mobilize and empower fans to play a larger role in the decision-making associated with which "teams" the talent will work. By creating Fan Action Committees ("FACs"), fans could directly compensate talent or donate to

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* 1972-2014. Dan Markel died in July 2014; at the time of his untimely and tragic death, he was the D'Alemberte Professor of Law at Florida State University College of Law. Dan was the driving force behind the idea of FACs and this use of crowdfunding. This article is published in his memory.

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charities favored by talent. We discuss both obstacles and objections from a variety of policy and legal perspectives ranging from competitive balance to distributive justice. Finally, we consider possible extensions of the FAC model as well as offer some ruminations on why FACs have not already developed.

Importantly, FACs create the potential for more efficient valuations of talent by registering not only the number of fans but also the intensity of their preferences. This insight, which stresses the upside of price discrimination, has relevance for a wide range of human endeavors where bilateral contracts have effects on third parties that are neither calibrated nor valued adequately.

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Introduction

Disappointment is endemic to fandom.[1] Clevelanders were stung that basketball hero LeBron James took his talents to South Beach, when he signed with the Miami Heat in 2010,[2] while Miami fans were equally disappointed when James returned to Cleveland in 2014.[3] Many fans of TV's "Downton Abbey" were crushed when actor Dan Stevens (the actor who played male romantic lead Matthew Crawley) left the show in 2013.[4] Students, faculty, and alumni at the University of Chicago are undoubtedly still upset about losing one of the most prolific scholars, Cass Sunstein,[5] to Harvard Law School a few years ago.

The choices of where high-profile talent "perform" in an organizational context—athletes, academics, chefs, network newscasters, actors, opera singers, faculty members—present a puzzle. On the one hand, "teams"—the organizations that employ talent[6]—try to anticipate the preferences of fans to capture their dollars. On the other hand, fans are largely

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[1] *See* Daniel L. Wann et al., Sports Fans: The Psychology and Social Impact of Spectators (2001).

[2] Michael Lee, *LeBron James will Leave Cleveland Cavaliers to Join Dwayne Wade, Chris Bosh with the Miami Heat*, Wash. Post (July 9, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070806865.html.

[3] LeBron James (as told to Lee Jenkins), *I'm Coming Home*, SI.com, (July 11, 2014), http://www.si.com/nba/2014/07/11/lebron-james-cleveland-cavaliers.

[4] *See* Leslie Messer, *Dan Stevens Says His Exit from Downton Abbey Was An Emotional Experience*, ABC News (Jan. 19, 2014), http://abcnews.go.com/Entertainment/dan-stevens-calls-watching-downton-abbey-emotional-experience/story?id=21578846.

[5] Paul H. Edelman & Tracy E. George, *Six Degrees of Cass Sunstein*, 11 Green Bag 2d 19 (2007).

[6] We say teams because our paradigm for this paper will be contract negotiations between an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, a symphony, etc.

shut out of the conversations between talent and team. We wonder why fans are not more proximately involved in talent's choices. Even if disappointment for fans is inevitable, utter powerlessness is not—or so we argue here.

Instead, fans can overcome that powerlessness through crowdfunding.[7] Crowdfunding empowers fans to collect and use money to influence the choices talent makes regarding where to perform or for what team. As we see it, groups of fans, what we call Fan Action Committees ("FACs"), would engage in coordinated influence mongering, raising and offering money in an effort to collectively affect the key choices made by stars or teams regarding recruitment and retention. FACs, in short, allow fans to put their money where their hearts are. A fancier way of saying this is that FACs can respond to and reflect the intensity of third-party preferences affected by bilateral contracts. Additionally, FACs will be particularly valuable when opportunities for price discrimination, which occurs when suppliers are able to charge different prices to different consumers for the same product, are unavailable or under-utilized under existing market conditions.[8]

This Article unfolds over three parts. Part I discusses the basic structure of FACs and how they differ from traditional crowdfunding projects. Under the conventional crowdfunding model, there is a bilateral arrangement between an artist or entrepreneur and the patron. To use a recent example, there was a bilateral relationship between Hollywood producer Rob Thomas and the Marshmallows, a.k.a. the fans of *Veronica Mars*, in Thomas's efforts to use Kickstarter crowdfunding to make a *Veronica Mars* movie. Our innovation is to extend the crowdfunding mechanism from bilateral relationships to trilateral contexts, where members of a bilateral relationship can be influenced by third parties—fans—with an interest in that relationship's texture or existence. We offer two approaches to designing FACs. One is direct compensation, in which fan money goes directly to the talent as supplemental income, comparable to endorsement deals. The other is charitable contributions, in which fan money goes to some charitable cause favored by the star.

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[7] Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1459 (2013).

[8] Price discrimination was historically regarded with suspicion as evidence of a firm's monopolistic ambitions and capacities. In more recent decades, however, it has been understood also as a vehicle for consumer welfare inasmuch as it can increase efficiency and consumer surplus when it allows for competition among sellers at various stages of a product's life-cycle. *See generally* Joel B. Dirlam & Alfred E. Kahn, *Price Discrimination in Law and Economics*, 11 AM. J. ECON. & SOC. 281 (1952); LOUIS PHLIPS, THE ECONOMICS OF PRICE DISCRIMINATION (1981).

Part II considers a number of obstacles and objections to FACs under either structure. For reasons discussed below, we focus our discussion primarily on the professional sports context. In our view, sports leagues in particular may oppose FACs because they risk jeopardizing competitive balance across teams. More generally, however, FACs might be challenged as either pernicious (because they facilitate the rich getting richer) or futile (because of suspicions that they will get little done). We engage these and other challenges and explain how to surmount them. Part II also explains our reasons for preferring the charitable FAC model.

Finally, in Part III, we offer some big picture thoughts. First, we consider some of the incentives that might help make FACs more likely to occur. For the most part, we think that FACs could make markets for talent across a range of activities more efficient; in doing so, they can re-shape many areas in which bilateral contracts generate externalities to third parties who wish to promote or avoid those externalities. Second, we consider why, if FACs can create gains from voluntary transactions, we do not see them more often. Accordingly, we consider some of the transaction costs and social norms that are relevant to the discussion.

Two caveats should be issued before we proceed. First, as mentioned above, we focus our efforts on the domain of professional team sports. We do so because FACs in this domain would probably draw the most fan involvement, raise the most money, and have the greatest effect on talent choices. Professional team sports involve the paradigmatic trilateral relationship among an organization (such as a sports franchise), talent, and passionate, emotionally invested fans. Moreover, because of competitive balance concerns distinctively arising in professional team sports, that domain may present the most difficulty for FACs. Accordingly, we think that FACs have tremendous promise in the realm of professional team sports, but also some peril. That said, the institutional structures we envision are relevant for fans of virtually any form of coordinated activity where contractual arrangements generate substantial third party benefits—or harms.

Second, this is an "idea" paper, one meant to spur further conversation without attempting to provide the final word on the matter. As such, the recommendations and comments we make are somewhat tentative and yet, we hope, somewhat tantalizing too.

I. Fan Action Committees: An Overview

A. Crowdfunding in Bilateral Relationships

Fans organizing into groups is nothing new. In the realm of sports, for example, fans unite by attending games (and pregame tailgates) or by watching and discussing them together at home, in bars, or in online forums. Many teams have official or unofficial fan clubs, some of which even outlast the team itself.[9] Outside of sports, celebrity websites and fan clubs are ubiquitous, for everyone from chefs to actors. Fan networks preceded the Internet, but their presence has only exploded with the rise of social media. Websites allow fans to revel in their shared love of the team, personally experience the team's success and failure, and express devotion and frustration alike.[10] Whether for Lady Gaga or the Chicago Bulls, fans express their enthusiasm or disdain by buying tickets and licensed t-shirts—or not.

Crowdfunding provides another vehicle through which fans can monetize that support and affection. This is already true for fans of emerging or struggling artists or entrepreneurs without ready access to capital. In a typical crowdfunding arrangement, fans use online websites such as Kickstarter and Indiegogo to pledge money to support an author or musician in some endeavor. In perhaps the most famous and successful example to date, more than 91,000 fans pledged more than $5 million to help produce a *Veronica Mars* movie.[11] Crowdfunding is ripe for even more growth following revisions to federal securities laws allowing shares in start-up companies to be offered through crowdfunding mechanisms.[12] In short, crowdfunding arrangements already exist, are effective at filling market demand, and, because of the ways in which the Kickstarter-type intermediaries serve as trustworthy escrow agents, are essentially risk-free for contributors. They need not worry that FACs or the funded talent will simply abscond with the money.[13]

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[9] Barry Levinson, The Band That Wouldn't Die (ESPN Films, 30-for-30, 2009) (telling story of Baltimore Colts Marching Band, which continued to perform in the decade after the Colts left Baltimore).

[10] Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. Pitt. L. Rev. 525, 555 (2006).

[11] Veronica Mars (Rob Thomas Productions 2014); Jason Cohen, *Reviving an Old Series the New Way: Fan-Financing*, N.Y. Times, Apr. 27, 2013, http://www.nytimes.com/2013/04/28/us/veronica-mars-will-return-thanks-to-fan-financing.html.

[12] Schwartz, *supra* note 7 at 1458–59; *see also* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 301–05 (codified in 15 U.S.C. (2012)).

[13] *Cf.* Brandon Gurney, *From Chicago to Provo? BYU Fans Plan T-shirt Campaign for Jabari Parker*, Deseret News, (Nov. 2, 2012, 2:44 PM), http://www.deser-

B. The FACs Innovation: Crowdfunding Trilateral Relationships

Two things are notable about the typical crowdfunding situation. First, it is largely bilateral between funders and funded. Fans give money directly to the artist so the artist can perform her skill (writing the book, producing the CD, producing the movie, etc.) or so the entrepreneur can establish her company. Second, and relatedly, crowdfunding is frequently essential for the completion of these projects. Without fan contributions, the artist will usually be unable to complete her project or otherwise perform her art.

FACs extend the crowdfunding model from the conventional bilateral arrangement to a trilateral relationship involving a team, its fans, and a star talent. Using the same crowdfunding processes and mechanisms, fans can pledge, collect, and offer money to or for the benefit of that talent in exchange for him joining or remaining with "their" preferred team. Through collective effort, or even the effort of just one wealthy fan with an interest in the outcome, fans take an active and empowering role in recruiting and retaining talent.

Several features define the trilateral relationships at the heart of FAC activity. First, the primary relationship is between the team and the star. The team pays the star a (usually substantial) salary and the star performs even without FAC involvement. FAC-raised funds are not necessary for stars to ply their trade, but rather act as a supplement to the primary relationship. Second, fans' strongest loyalty is primarily (if not exclusively) to the team; fans want the talent to join their team only so their team can win. Fans may previously not have cared about the player or even actively rooted against him on his old team, but quickly change allegiance once the player has changed affiliations.[14] (This will not be the case in other domains.). Third, the talent and team control the conversation; if the team is not interested in signing or keeping the player, or if the player is utterly uninterested in playing for the team, the fans remain powerless. In most cases, FACs cannot overcome recalcitrant management or its refusal to recognize the value and benefit of signing the fans' preferred player because the team typically must be the first mover.[15] Finally, we expect FACs to be nonetheless

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etnews.com/article/865565918/From-Chicago-to-Provo-BYU-fans-plan-T-shirt-campaign-for-Jabari-Parker.html (noting concerns of fans who raised money for t-shirts to be used in recruiting college basketball players to BYU).

[14] As comedian Jerry Seinfeld put it, "you're actually rooting for the clothes when you get right down to it." *Seinfeld: The Label Maker* (NBC television broadcast Jan. 19, 1995).

[15] It is possible that FAC efforts might help change the choices of team managers or players. Perhaps the FAC's efforts convince a star to sign with an organization he

particularly effective in a sport such as basketball, which involves fewer players and in which one or two superstar players can make a team a champion. Fans thus can focus their crowdfunding efforts on those two stars, with some confidence that their presence will bring team success.

When FACs perform their intended function, fans no longer act as passive and inconsequential consumers. Rather, FACs provide, if not a seat at the bargaining table, a powerful and potentially influential voice in the process of recruiting or retaining talent by helping to create the most appealing offer and atmosphere and to convince the talent to come to (or stay in) their team's city. They do so by arranging a transaction directly with, or for the benefit of, the talent, rather than with the team. That this new voice may put teams in a difficult spot at times is precisely the point of allowing fans to develop this powerful, perhaps contrary, voice that actually may influence or change the behavior and preferences of teams and players.[16]

A FAC need not assume any particular form. It could be established either as a distinct organization or as an offshoot of an existing larger (unofficial) fan club. The FAC itself could be a formal legal organization or it could be one person or a group of individuals joined by physical or virtual space, reaching out and encouraging fundraising efforts among the fan base. It can utilize existing crowdfunding platforms and mechanisms, and the efficiency and security they provide, with fans pledging contingent funds, paid only if the recruitment effort succeeds. The FAC serves as advocate and accountant—publicizing recruitment and funding efforts, urging fans to contribute funds, tracking funds raised, and announcing the amounts pledged as part of media efforts to recruit talent. As with other mechanisms that channel money and influence, FACs likely would evolve over time, becoming more responsive, effective, and adaptable to changing free-agent markets and situations.

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had not previously considered. Or perhaps the FAC's efforts convince the organization to reconsider its decision to fire or not re-sign a star.

[16] We are aware that empowering FACs this way could disrupt the plans of management vis-à-vis compensation. For instance, management may wish to reward recently improving players more than players with equivalent statistics but who have plateaued or worsened over the years. FACs might have other objectives, which theoretically could conflict with management's strategy. In corporate law, shareholders are generally not the managers for various reasons, and perhaps there are similarly valid reasons to deny fans this kind of influence. Importantly, management is independent of the fans and can always resist their efforts if they think the fans are misguided, since the team remains wholly separate from the FAC. Whether epistemic deference to management is something that should be granted in the first instance is a more complicated question and we discuss some of the costs and benefits regarding epistemic deference to management, *infra* in Part II.B.7."

Payments to FACs could consist of a few large contributions from a small number of wealthy fans, many small contributions from a large number of non-wealthy fans, or even symbolic payments from the youngest fans.[17] Most likely, it combines all of the above. If the *Veronica Mars* Kickstarter project is typical, then there is no reason to believe similar numbers of fans could not raise sufficient money, on top of the star's actual salary, to provide an additional incentive for the star to join their favorite team. Granted, it likely will not be sufficient to thoroughly replace the player's salary or to overcome a team's lowball offer. However, FACs are not intended to replace the organization, only to facilitate fans' influencing the organization's recruiting or retention efforts. When competing salary offers from competing teams are relatively close, the extra FAC money may provide a meaningful incentive to a player to sign with one team.

Moreover, while we initially envision this as a way to help attract talent to teams, fans could use FACs to express support for players and teams for any number of reasons, such as rewarding a current player for exceptional performance (perhaps the player is, relative to the league, "underpaid") or helping a player who has gotten in trouble with the league by collecting money to offset his fine.[18] It even is conceivable that a group of anti-fans could use a FAC to express dislike for a player through negative incentives—say, by pledging money to convince a player to play for a different team or to retire.

The critical requirement—at least in the team sports context—is that FACs remain independent of the organization because, in some sports, league rules prohibit coordination or cooperation between fans and the team

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[17] Ohm Youunmisuk, *Brandon Jacobs Bonds with Fan*, ESPN.COM (June 21, 2012, 9:04 PM), http://espn.go.com/new-york/nfl/story/_/id/8080528/san-francisco-49ers-brandon-jacobs-refills-joseph-armento-piggy-bank (discussing a six-year-old fan who sent an NFL player $3.36 upon hearing that the player's former team could not afford to pay him).

[18] This is ripe for abuse, of course. If players suspect they would be immunized from the financial consequences of breaking rules, crowdsourcing would create a moral hazard in which bad behavior is incentivized. This sort of payment should be limited to league, rather than legal, trouble, and only when the fine was deemed "unjust." In a somewhat analogous example, fans of the University of Mississippi donated more than $75,000 in a matter of hours to cover costs and fines the university incurred after fans ran on the field and tore down the goalposts following a football victory. Hugh Kellenberger, *Fans Have Covered Costs of Ole Miss' Goalposts, Fine*, THE CLARION-LEDGER, Oct. 8, 2014, http://www.clarionledger.com/story/mississippistatesports/2014/10/07/ole-miss-goalposts-fans-fundraising/16870129/. This example lacks that moral hazard, since the fans were paying for costs they created through their misconduct, rather than indemnifying another's misconduct.

in putting together offers to players. Accordingly, there must be one exchange between team and talent, entirely independent of FAC-raised and -pledged funds; FAC funds operate independently of the primary relationship.

This raises the final issue: If crowdfunded money is a supplement to that basic agreement, where should these funds go? We see two likely options.

First is a *direct compensation model*, under which FACs pay the money directly to the star. This would comprise additional income for the player, comparable to outside income athletes regularly earn from endorsements and appearances. And that income would be taxable as such; it comes attached to a *quid pro quo* ("We will give you this money if you sign with Team X"), making it compensation to the player as part of a market exchange, not a mere gift from the fans.[19]

Alternatively, under what we call the *charitable model*, FACs could give the money to a charity associated with the talent. Many professional athletes and other entertainers establish charitable foundations, dedicated to causes ranging from at-risk youth to the quality of life for cancer patients.[20] Sometimes these charitable endeavors are quite personal to the star.[21] Some athletes even negotiate contributions to their foundation as an explicit part of their contracts with teams or other entities with which they do business.[22] In fact, with James's free agency pending in 2014, two Miami radio hosts organized LeBron-a-thon, urging fans to donate money to Boys and Girls Club of Broward County (a cause with which James has long been involved) as a show of support and affection for the player.[23]

The charitable model may provide the additional benefit that money donated by fans to a charitable foundation will not (likely) qualify as income to the star, assuming the star is not directly coordinating with the fans or

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[19] C.I.R. v. Duberstein, 363 U.S. 278, 285–86 (1960).

[20] PEYBACK FOUNDATION, http://www.peytonmanning.com/peyback-foundation (last visited Sept. 22, 2012); THE BREES DREAM FOUNDATION, www.drewbrees.com/foundation (last visited Sept. 22, 2012).

[21] For example, one former football player's foundation works with autism, in honor of the player's son, who lives with autism. DOUG FLUTIE JR. FOUNDATION FOR AUTISM, http://www.dougflutiejrfoundation.org/ (last visited Feb. 15, 2013).

[22] DAVE WINFIELD, WINFIELD: A PLAYER'S LIFE (1988) (discussing conflicts with team ownership over payments team promised to pay to charitable foundation).

[23] *WQAM's Crowder Donates $1000 to Keep LeBron James in Miami*, 560 WQAM, (June 27, 2014), http://wqam.com/2014/06/27/wqams-crowder-donates-1000-to-keep-lebron-james-in-miami/; *see also* Howard Wasserman, *Catalyzing Miami Heat Fans*, PRAWFSBLAWG, (June 30, 2014, 9:01 AM), http://prawfsblawg.blogs.com/prawfsblawg/2014/06/catalyzing-miami-heat-fans.html.

directing their contributions to any particular place.[24] And because the money is going to charitable organizations, there is even some possibility that fan contributions will be tax deductible, as would an ordinary independent contribution to the player's foundation.[25] The IRS might be suspicious of this arrangement, of course.[26] An alternative tax treatment would treat FAC donations as includable income to the talent, then tax-deductible (up to a point) by him as a charitable donation to his own foundation.[27]

Either way, we ultimately doubt tax issues will substantially affect fans' willingness to either organize a FAC or contribute to it. First, typical fans are motivated more by love of their team than by tax benefits, so even non-deductibility is unlikely to deter participation. The general success of crowdfunding in other contexts shows that people are willing to spend on these sorts of efforts without needing tax benefits, especially when individual donations are relatively small. Second, many low- and middle-income fans that would make small contributions to support their favorite players and teams may not take itemized deductions; their inability to deduct the contribution would therefore not affect their tax situation. Seeing plausible arguments on both sides, we leave further exploration of the tax issues for another forum.

Our strong preference is for the charitable model. As we show in the next Part, both models are subject to various concerns and objections, which we hopefully show are unfounded. But the charitable model offers some comparative public policy and public-relations advantages, making it the normatively preferable approach to this type of crowdfunding.

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[24] C.I.R. v. Giannini, 129 F.2d 638, 641 (9th Cir. 1942).

[25] 26 U.S.C. § 170 (2006).

[26] The tax law issues raised here are somewhat tricky. On one hand, one might question whether fan contributions should be deductible. The *sine qua non* of a charitable contribution is that money or property is transferred without adequate consideration, meaning only "unrequited" payments qualify for deduction. *See* Hernandez v. C.I.R., 490 U.S. 680, 690–91 (1989). This is determined by examining the external features of the transaction, without regard to the taxpayer's subjective motivations. *Id.* at 691; McLennan v. United States, 24 Cl. Ct. 102, 106 (Cl. Ct. 1991). FAC payments, even as charitable contributions, involve a *quid pro quo*—"here is money that we fans will donate to your foundation if you sign with the team."

That said, we can envision two arguments in favor of deductibility. First, any benefit to the donors is "intangible," merely the psychic benefit of having a great player on their team and giving their team a chance to win. Second, any such benefit is "incidental or tenuous," lacking any value so as to make the contributions a non-deductible purchase. 26 C.F.R. § 53.4941(d)-2(f)(2); William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 56 (2011).

[27] 26 U.S.C. § 170(b).

II. Objections and Responses

This Part considers a variety of anticipated obstacles and objections to our proposal. Our hope is that we will reveal these impediments or challenges to be surmountable, particularly where funding efforts are directed to charity.

A. League Reactions

Outside of professional team sports, there is every reason to think that the FAC model could be used effectively to influence the choices talent make regarding where and whether to perform, teach, or cook, etc. But, professional team sports raise an unusual set of issues. The principal challenge is that leagues will invoke concerns about competitive balance, referring to their various regulations and contracts to generate arguments that might prevent FACs from affecting team relationships with the talent. That said, we can also imagine why leagues also might come to support FACs, in which case, it remains speculative as to what teams will think about FACs and crowdfunding.

1. An Optimistic Scenario for FACs

On the positive side, we could see why teams and leagues will embrace FACs, and even welcome and celebrate that level of involvement and influence. After all, it is not unprecedented for fans to hold a stake in the relationship between teams and talent. The NFL's Green Bay Packers, for example, are a community-owned team.[28] With a storied history and legendarily committed fan base, the Packers demonstrate that the public can be effective stakeholders in a team without running afoul of the law or disturbing competitive balance. Similarly, the Seattle Sounders FC, a professional soccer team, has invited input from season ticket-holders and official booster-club members on team matters that are far from ceremonial and that comprise significant operating decisions, including choosing a team nickname and deciding whether to retain the team's general manager.[29]

FACs, of course, are distinct from both situations. A FAC seeks to encourage a player, who already shares mutual interest with the team, to

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[28] *See Community: Shareholders*, Packers.com, http://www.packers.com/community/shareholders.html (last visited Feb. 15, 2014).

[29] *Sounders FC First Fan Vote for General Manager*, SoundersFC.com, http://www.soundersfc.com/news/articles/2012/09-september/gm-vote.aspx (last visited Oct. 20, 2012).

make a choice about his place of employment. But it does not go much farther; the FAC is not seeking, for instance, to control the team's management of its concession stands. The basic logic remains the same, however: fans act as stakeholders and, through FACs, more directly try to influence the players, and thus, the team.

2. A Pessimistic Scenario for FACs

Less optimistically, teams may be apprehensive about fans linking themselves financially to players, particularly on the direct compensation model, where a FAC is essentially paying money directly to the talent. The basic objection rests with leagues' commitments to competitive balance and parity. The leagues' goal is to preserve an association of teams all possessing a reasonable chance to pay, attract, and retain top players, and thus to compete for championships. Without some efforts meant to achieve parity across teams, the competitive balance theory goes, fans will lose interest if their favorite teams cannot compete.[30] Accordingly, team owners divide revenue among teams and players and establish manageable annual increases in player salaries.[31] Teams and leagues may fear that FACs, by offering players the possibility of substantial additional money, will upset that sought-after parity and balance.

The question before us is whether a league, under current rules, could do anything to stop FACs from forming and operating. The answer is "no," although the issue warrants discussion. We use the National Basketball Association (NBA) to illustrate the point, in part because fan funding of free agents likely would be most effective in that sport, where the addition of one or two great players, attracted to the team with the help of FAC money, may turn a team into a championship contender. Regardless, the analysis and conclusions should be substantially the same as to all major professional sports team leagues.

It is tempting to think of a sports league as an "it" that speaks with one voice. In truth, the major professional leagues are associations of inde-

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[30] John R. Crooker & Aju J. Fenn, *Sports Leagues and Parity: When League Parity Generates Fan Enthusiasm*, 8 J. SPORTS ECON. 139, 141 (2007); Andrew S. Zimbalist, *Competitive Balance in Sports Leagues: An Introduction*, 3 J. SPORTS ECON. 111, 112 (2002).

[31] Zach Lowe, *NBA Labor Negotiations Enter Crunch Time*, SI.COM (Sept. 28, 2011, 11:29 AM), http://sportsillustrated.cnn.com/basketball/nba/blogs/nba-point-forward/2011/09/28/nba-labor-negotiations-enter-crunch-time/index.html.

pendently owned franchises.[32] For example, the NBA is an unincorporated association of thirty independently owned franchises, run by a board of governors comprised of one representative from each franchise.[33] The NBA's commissioner centralizes league operations and serves as the league's official voice.[34]

In challenging FAC payments, the NBA could draw upon three sources of rules: 1) the collective bargaining agreement ("CBA") negotiated between the league and the players' union; 2) the uniform player contract between the individual player and his team, attached to and incorporated into the CBA;[35] and 3) the league constitution, particularly as it empowers the commissioner to act in the "best interests" of the game.[36]

a. Conventional Agreements and Sources

For our purposes, it is safe to say that the CBA and uniform contract together control player compensation. Most notably, NBA teams can only pay players through their employment contracts.[37] They cannot offer investment opportunities, property and vehicle transfers, or other potential forms of services compensation. Teams are also barred from naming a player as a player-coach and paying him two salaries or from giving an equity stake in the team.[38]

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[32] The exception is Major League Soccer, in which the league owns all the teams, then surrenders control of individual teams to certain investors only as to particular matters. Fraser v. Major League Soccer, 284 F.3d 47, 53–54 (1st Cir. 2002).

[33] *See* Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HARV. J. SPORTS & ENT. L. 40, 49 (2010) (discussing the league's corporate form and system of governance).

[34] *Id.*

[35] *See* NBA Collective Bargaining Agreement, art. II, § 1 (2011) (stating that a player contract must be a Uniform Player Contract) [hereinafter NBA Agreement].

[36] *Id*. at Exhibit A ¶ 5(d) (incorporating by reference Article 35 of League Constitution). Like other leagues and players' associations, the NBA and National Basketball Players' Association use CBAs to regulate players' working conditions. Leagues are motivated to collectively bargain rules because such bargained rules, so long as they relate to players' wages, hours and other working conditions, are exempt from Section 1 of the Sherman Act. *See* Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 740–41 (2010).

[37] NBA Agreement, *supra* note 33, § 12 (c), (d).

[38] NBA Agreement, *supra* note 33, art. XXIX, § 8 ("[N]o NBA player may acquire or hold a direct or indirect interest in the ownership of any NBA team.").

The CBA also imposes non-negotiable minimum and maximum boundaries on player salaries and contract length.[39] Even the best players can only sign for a maximum of five years with their team.[40] Although maximum salaries depend on several factors—including a player's NBA service time and the amount of annual income received by the NBA and its subsidiaries—a "maximum" contract signed in 2012 was expected to be worth about $19 million per season.[41] Collective bargaining has also gently capped the total money teams can spend on player salaries, imposing a "luxury tax" on teams that spend beyond the cap.[42] Teams and players are further prohibited from negotiating bonuses based on team success,[43] although the uniform player contract may be amended to provide monetary incentives for a player's individual success, as defined from earning awards or achieving statistical benchmarks.[44]

Importantly, the NBA has strictly enforced the prohibition on players receiving compensation from teams outside of their employment contract.[45] Penalties include fines of up to $3 million, the loss of draft picks, and voiding of the player contract at issue.[46]

While the uniform player contract and CBA primarily govern compensation matters, the NBA league constitution mostly controls internal operations and the relationship between teams and the league. Importantly, the constitution is drafted by league officials, owners, and their representatives, and it regulates their actions without touching players directly. That said, the constitution's "best interests clause" is incorporated by reference in the uniform player contract, which itself is incorporated by reference in the CBA, thus binding the players. That clause empowers the commissioner to sanction any player who, in the commissioner's determination, makes statements injurious to "the best interests of basketball or of the Association" or commits misconduct that conflicts with notions of morality and fair play.

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[39] Ira Winderman, *NBA CBA: Official NBA Agreement Document*, SUNSENTINEL .COM (Nov. 27, 2011, 9:49 AM), http://blogs.sun-sentinel.com/sports_basketball_heat/2011/11/nba-cba-official-nba-agreement-document.html.

[40] *See* Larry Coon, *NBA Salary CAP FAQ: 2011 Collective Bargaining Agreement*, CBAFAQ.COM, http://www.cbafaq.com/salarycap.htm#Q55 (last updated, July 9, 2014).

[41] *See id*.

[42] *See id*.

[43] NBA Agreement, *supra* note 33, at Exhibit A ¶ 3(c) (2005).

[44] *Id.* art. II, § 3(b).

[45] *See* Coon, *supra* note 40.

[46] *Id.*

Nevertheless, the clause has seldom been invoked, and it is typically limited to cases of player misconduct on (or off) the court.[47] That said, the expansive wording theoretically empowers the NBA to bar a player from taking money from fans on the grounds that doing so would undermine "fair play."

The problem with such a broad reading is that it is impossible to realistically distinguish a range of unquestionably permissible outside income available to players from FAC income. As discussed earlier, a direct payment from a FAC would simply constitute another source of income for the player who signs with a given team. Players receive income from a range of sources beyond their teams, most obviously through commercial endorsements. In 2013, LeBron James, then the NBA's best player, earned $17.6 million per year from his team but $39 million per year in endorsements.[48] Less obviously, players earn income through other activities, including appearances in films.[49] While these opportunities all trade on the player's fame and athletic success, none of this income is deemed to contravene salary limitations or other league regulations.

One might try to distinguish FAC payments from ordinary endorsements because of differences in what the talent does to earn that money. Endorsement money is earned in exchange for endorsing a product, not for playing a sport, and an endorsement deal may last beyond the player's contract with the team and even beyond his playing career. FACs give something to (or for the benefit of) the player purely in consideration of his playing the game for a particular team for a period of time—precisely what is covered by his playing contract. But this distinction is not inherent or necessarily true in every case. Endorsement deals (especially for players who are not the greatest superstars) could be structured to last only as long as the player remains an active player for the team. Moreover, a company benefits from having an athlete endorse its product only if he plays his sport at a high level, meaning the money is at least indirectly related to player performance.

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[47] *See, e.g.*, NBA v. Nat'l Basketball Players Ass'n, 2004 U.S. Dist. LEXIS 26244, *5–6 (S.D.N.Y. 2005) (discussing NBA's use of best interests clause to punish Indiana Pacer Jermaine O'Neal for misconduct during a game).

[48] Craig Davis, *LeBron Second-Highest Paid Athlete in U.S.*, SUN-SENTINEL.COM (May 15, 2013), http://articles.sun-sentinel.com/2013-05-15/sports/sfl-lebron-secondhighest-paid-athlete-in-us-20130515_1_lebron-james-endorsements-si-list.

[49] *See Ballers Being Actors*, OKLAHOMAN, Oct. 10, 2011, at 13B (listing NBA players who have appeared in movies, including Michael Jordan in *Space Jam* (Warner Brothers Pictures, et al. 1996), Ray Allen in *He Got Game* (40 Acres & A Mule Filmworks, et al. 1998), and Shaquille O'Neal in *Blue Chips* (Paramount Pictures 1994)).

No matter the league's concern for how FACs might affect competitive balance, current league rules and regulations do not preclude FAC payments to players. Of course, a league always could seek to change these rules in subsequent rounds of collective bargaining, but only with consent of the players' union.

b. Corruption and the Best Interests Power

Alternatively, the commissioner might assert the "best interests" power out of concerns for corruption. Professional athletes have historically not been above taking payoffs from gamblers to throw games.[50] The NBA is also especially sensitive in the wake of a former referee pleading guilty to charges stemming from corruption.[51]

On the margin, FACs might increase opportunities for organized crime to influence players. But flatly prohibiting fans from monetizing their support for their teams and their players out of fear of nefarious actors seems an unnecessary over-reaction. Players willing to engage with gamblers or organized crime do not need FACs as a vehicle to do so, just as organized criminals seeking to influence athletes do not need FACs as a vehicle to do so. Moreover, FACs present an ineffectual vehicle for gamblers or criminals seeking to influence sports. Their contributions would be mixed in with legitimate contributions from legitimate fans, diluting any connection or influence they hope to establish. Even with FACs, gamblers and criminals appear more likely to employ an existing method of influence: illegal direct payments to players to use less than best efforts.

c. Tortious Interference With Contract?

Even if a league's internal rules do not currently prohibit FAC activity, there remains the question of whether general principles of private law might give leagues or team owners a basis to object to FACs. A team might claim that, by offering something of value to the talent, the FAC tortiously interferes with the talent's contractual relationship or prospective business relations with that team.

But neither claim works. As to a contractual relationship, the players targeted by FACs would be free agents not in a contractual relationship with

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[50] *E.g.*, ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 5 (1998) (discussing Chicago Black Sox scandal, in which eight players threw the 1919 World Series).

[51] Howard Beck, *Donaghy's Charges Weigh on a League*, N.Y. TIMES, June 12, 2008, at D1.

any team and free to make decisions about where and whether they perform.[52] With regards to prospective business relations, most courts require overtly wrongful misconduct independent of the interference itself before finding tort liability.[53] On this understanding of the tort, mere persuasion (for example, a pledge to give $ 5 million to a player's charitable foundation) to break a relationship is not sufficiently wrongful. Rather, the wrongful act must be "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard."[54] Furthermore, this argument is even less plausible when fan money goes to charity, such that the FAC is not giving the player anything.

B. Policy Considerations

Beyond existing league regulations and general principles of private law, FACs may be subject to a range of normative objections. That is, even if FACs (on either a direct compensation or charitable model) are permissible under law and league rules, they may simply be a bad idea.

In this section, we respond to a cluster of possible policy objections to FACs following the direct compensation model. Some of them are really only plausible in the professional sports team context while others are more generally applicable.

1. The Rich Get Richer . . . and What Do Fans Get? The Distributive Justice Objection

The obvious objection, particularly to a direct compensation scheme, is that there is something facially unseemly about little Timmy breaking open his piggybank to enrich already-wealthy basketball stars.

As between fans and particular athletes, the "rich getting richer" concern is not a decisive normative objection in a society that already distrib-

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[52] *See* Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980); Restatement (Second) of Torts § 766 & 767 (1979).

[53] Sections 766 and 767 of the Restatement (Second) of Torts, which govern these "interference" torts, require that the defendant's behavior be "improper." *See also* Top Service Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (1978) (interference with economic relations requires evidence that the "injury to another is wrongful by some measure beyond the fact of the interference itself."); Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 746, 755–57 (Cal. 1995) (Mosk, J. concurring in judgment) (arguing that interference torts are dangerous encroachments on values of free speech, free competition, and free association, and thus should be narrowly applied).

[54] Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 954 (Cal. 2003).

utes many goods and services through markets. As philosopher Robert Nozick famously argued, one could begin with a perfectly egalitarian distribution of wealth, but if there is a great basketball talent (he uses the 1960s exemplar, Wilt Chamberlain) who wants to charge people a quarter to watch him play, then he will end up with more money from others because of the joy he provides them.[55] That inequality is not an obvious injustice. If fans knowingly, voluntarily, and intelligently make these payments, and do so with awareness that they may earn nothing tangible in return, there is little reason to stop them by blocking that exchange.

Nozick's position is not free of controversy, of course. After all, one must believe that, notwithstanding voluntary distributions, the quality of consumer deliberations and resource allocations is beyond question. If people are spending money foolishly or in tension with their prior commitments, the mere fact of voluntary exchange between consumer and supplier may be morally inadequate to support the new pattern of inequality.[56] Still, to block the free exchange between talent and fans acting through a FAC is presumptively problematic when viewed against the backdrop of all other voluntary market-based exchanges in professional sports and entertainment, many of which directly involve fans.[57]

To be sure, we need not accept the current convention, which encourages sports fans to share their money with teams but not with talent as such. But as long as we permit fan-team transactions, along with other deals in which third parties reward players for endorsements or appearances, then the "rich getting richer" objection to FACs seems quite peculiar. It is hard to know why exchanges involving FACs and players would be uniquely unjust or morally undesirable compared with exchanges between a company and its professional-athlete endorser. At best, one can say that this is a set of free choices that, all other things being equal, makes the distribution of resources less equal. It is still not clear, however, why the fact of the resulting inequality is adequate to block this exchange.[58]

Some might press the distributive justice option further by suggesting that FACs will only further shut out poor fans, since, on the margins, those with less money will have less influence on the exit or loyalty options of

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[55] *See* Robert Nozick, Anarchy, State and Utopia (1974).

[56] These are two of the reasons traditionally raised in opposition to gambling.

[57] *See* Michael J. Sandel, What Money Can't Buy: The Moral Limits of Markets 163–79 (2012) (discussing and critiquing the "skyboxification" of sports through named stadiums, luxury skyboxes, and autographed sports memorabilia).

[58] Presumably the tax system or other institutions could be used to alleviate the harms associated with these resulting inequalities too.

their favorite stars. Such concern is, at first blush, an understandable one.[59] However, we are talking about commercial sports and entertainment. As long as we have accepted a market for distributing access and influencing the decisions made in professional sports or restaurants or television broadcasting, we must accept that there will be patterns of inequality related to consumption and enjoyment. Distributive justice obligations are far more pressed to prioritize access to medical care, food, adequate housing, daycare, and education (and reasonably so). Put bluntly, creating opportunities for the poor to influence where Wilt Chamberlain (or to bring Nozick into the 21st century, LeBron James) plays is, comparatively speaking, hardly a moral urgency.

2. Will FACs Be Futile?

A second policy objection to FACs is the prospect of futility. Stated briefly, fan payments and pledges may have no material effect on a player's decision if competing FACs cancel one another out with equal competing offers. The talent then chooses whichever team offer is better, which means he lands precisely where he would have landed without FACs; fans will not have influenced the choice. If FACs from different cities are just competing against each other in pointless stalemates, then fans themselves may rationally forbear from forming or engaging with FACs. Alternatively, fans of one team might not agree on which player to support, so they organize and contribute to rival FACs dedicated to influencing different players; if the competition splits the team's fan base, neither FAC may have enough money pledged to influence the player.

Our principal response is that the futility objection is wholly speculative. The claim that FAC payments will lead to stalemates is an empirical

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[59] For example, Sandel distinguishes our having a market economy to our being a market society. On his view, we must be wary of two concerns about market values pervading society. First, there is the unfairness to those less financially fortunate because they will be shut out from purchasing the goods or services that would otherwise be distributed along nonmarket values such as queue or luck or desert. Second, there is the concern that market-based thinking across various domains will somehow corrupt or injure the civic values and experiences associated with those goods. Thus, when companies hire homeless people to stand in line for lobbyists to get a seat at a congressional hearing, Sandel argues, we are exhibiting a misguided set of values that debases our political culture. SANDEL, *supra* note 57, at 10.

While we may be sympathetic to those claims in the context of political contributions or who gets to attend congressional hearings, we don't think Sandel's two principal criticisms (unfairness and corruption) have much traction against FACs in professional team sports for reasons adumbrated later.

prediction, not a fact. As with political financing by crowds instead of centralized public financing, there is always the chance that crowdsourced financing in sports will allow for influence or surprises, and some of these might turn out to be for the better. Taken seriously, the futility objection also has no stopping point, as it would suggest that market distributions of virtually all goods and services are inappropriate because competing purchasers might refuse to buy above a certain price.

More importantly, we reject the suggestion that fans enjoy no benefits if they pledge money to an unsuccessful recruiting effort. Rather, fans still might enjoy the purely expressive benefit of having tried to lure or retain a favorite player on their preferred team, of showing support for their teams, and of being able to share in that process of trying to better their team. Fans are going to be talking and fretting about the team's efforts to sign free agents, which has absolutely no effect on the outcome; contributing money towards these efforts cannot have any less influence and just might have some.

Fans already spend a substantial amount of money on their love of sports—in tickets, merchandise, cable television packages, and even taxes to fund new stadiums and arenas.[60] And, as one study shows, their willingness to pay for games and merchandise increases when star players are in those games or associated with the merchandise.[61] FACs would only enhance fans' connection to star players and capitalize on their willingness to spend for stars. If fans are willing to do so, it is because they value the expressive benefit of their expenditures independent of whether they actually tip the balance of a player's decision.

Importantly, FAC contributions measure not only fan support of the team and its player (which ticket sales or television ratings already do), but also the intensity of that support. The amount fans pledge is a financial indicator of *how much* fans want that player to join or remain on their team and *how much* they want their team to succeed. FACs, in other words, become economically useful or efficiency-promoting whenever firms are otherwise unsuccessful at engaging in optimal levels of price discrimination. When price discrimination occurs, it facilitates an increase in the likelihood of value-adding transactions between willing buyers and sellers.

Moreover, these transactions are all voluntary. Unlike taxpayers compelled to support a new stadium through mandatory taxes, fans who wish

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[60] We might even think of such taxes as a form of crowdfunding, albeit indirectly with respect to the talent and potentially involuntary.

[61] See Jerry A. Hausman & Gregory K. Leonard, Superstars in the National Basketball Association: Economic Value and Policy, 15 J. LAB. ECON. 586 (1997).

not to participate in a FAC need not do so. Those who do wish to participate gain an avenue for expression and influence that they do not currently enjoy. Given the various ways people spend their money foolishly, crowdfunding mechanisms to benefit talent (or their charities) constitute a relatively harmless perversion. On the upside, it may foster a sense of community or civic pride and generate money for charitable causes.

A final futility argument is that this simply will not work because the FAC will not raise sufficient amounts as to offer a meaningful incentive to the star. Again, this is speculative. More importantly, the success and growth of crowdfunding suggests reason for optimism. The producers of a movie raised money from 91,000 fans.[62] If Los Angeles Lakers fans raised a comparable $62 per person from a similar number of fans, that means $5 million to offer for the benefit of a superstar player, on top of the $19 million he gets from the team. That certainly may be significant enough to affect the player's calculus in choosing his team.

3. Do Bigger Cities Unjustifiably Get Better Teams?

The next objection has less to do with distributive injustices involving money and more with patterns that distribute talent unevenly. On this view, FACs will probably be more successful in larger cities with larger and wealthier fan bases, thereby unfairly disadvantaging teams in smaller markets.

To understand this concern better, consider how the NBA treats broadcasting revenue. While NBA teams equally divide national television revenue to the tune of approximately $30 million per team, they keep their own local broadcasting revenue, which in some cases, is substantially larger.[63] This arrangement has led to enormous disparities; while the Los Angeles Lakers receive $150 million in local broadcasting revenue, the Sacramento Kings snag just $11 million.[64]

It is probably true that teams in large cities will have more fans, on average, than teams in small cities, and more fans usually means more money. This is not an ineluctable truth; perhaps a billionaire such as Bill

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[62] *See* Cohen, *supra* note 11.

[63] *See* Steve Aschburner, *Revenue Sharing a Vital (Yet Secretive) Component to Talks*, NBA.COM (Sept. 21, 2011, 8:09 AM), http://www.nba.com/2011/news/features/steve_aschburner/09/20/revenue-sharing-still-vital/index.html.

[64] *See* Tom Ziller, *Sacramento Kings Win Second Life, and NBA's Economic Inequity Has Never Been More Important*, SB NATION (May 2, 2011, 1:51 PM), http://www.sbnation.com/nba/2011/5/2/2149458/sacramento-kings-relocation-maloofs-anaheim.

Gates is a fan of the poorest team and he is willing to bankroll a FAC. The original point does have an intuitive feel to it, however. Perhaps we should feel sheepish about creating yet another situation where teams from large cities benefit by virtue of the largeness of the city to which they are attached.

This is a complicated question and we do not hope to resolve it here with any firmness. But the answer again emphasizes the presumptively defensible virtues of allowing people to make their own free choices. Large cities become large in part because they are doing something right to retain or attract people to live there. In a world where jurisdictional competition (i.e., federalism) is a non-laughable explanation for why some cities and states succeed while others do not,[65] there might be reason to credit the claims of large cities (or, more precisely, their boosters) that such cities should be rewarded for creating attractive places to live. To the extent cities are able to draw and keep talent based on good governance; professional, educational, and economic opportunities; or other distinctive virtues, then it is not clear why FACs associated with teams in vibrant cities should be hindered. Preserving some market incentives for cities to innovate or govern well is an article of faith for the jurisdictional competition literature.[66] If more successful FACs are one way in which that good governance is rewarded, we should be leery of regulating them simply because they are associated with teams in large cities.

Moreover, the important consideration is not the size of the media market in which the team plays but the size of a team's fan base. The two are not necessarily co-extensive, particularly in the age of individual mobility, the Internet, and national media. "Red Sox Nation" extends well beyond New England; many small-market teams—such as the NFL's Green Bay Packers and the NBA's Oklahoma City Thunder—enjoy broad national followings. A FAC can reach fans in the diaspora, who may welcome the chance to contribute and to feel more closely connected to their team. Moreover, because crowdfunding works through many smaller contributions, the significant factor in a FAC's success may be the number of fans supporting the team, not the wealth of individual (or even average) fans. If, as we ex-

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[65] The classic piece on jurisdictional competition is Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416 (1956). For other discussions, see generally, Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1833 (2005); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997).

[66] *See* sources cited *supra* note 65.

pect, fans of all teams will develop their own FACs, market competition among fan bases will bolster market competition among teams.

Two final points. First, as with the "rich get richer" objection, this one suffers from a baseline problem. That large cities may benefit more from FACs is not a persuasive reason to oppose them. After all, leagues and teams have never attempted to tie player salaries to outside income or to limit or prohibit players from earning as much endorsement income as possible. Nor have they suggested lowering the salary cap or salary-offer figures for teams in large cities because players can earn more in outside income by playing there.[67] Indeed, leagues and teams have made no efforts to preclude outside income at all, including outside income that is available precisely because the player is a star and his stardom may be enhanced by living in a media-drenched location. There is no reason to single out income paid directly by fans as uniquely subject to leveling.

In addition, talented stars consider a number of factors in choosing where to perform or play; these include state tax implications, opportunities to contend for championships or other prizes, proximity to family, desirable weather, and social opportunities. A league's collective bargaining agreement, its uniform player contracts, and its constitution in no way regulate these considerations because they fall outside the collective bargaining relationship. A FAC payment is basically no different.

4. The Shibboleth of Competitive Balance: Does Wealth Disparity Diminish Competitive Enterprises?

The next objection is that, holding all else equal, competitive sports are more attractive or aesthetically enjoyable when the playing field is not distorted by wealth. Regardless of whether players receive anything, fan contributions are designed to persuade players to play for one team instead of others.

But as one sports economist has observed, competitive balance "is like wealth. Everyone agrees it's a good thing to have, but no one knows how much one needs."[68] Or what exactly it means. We try to unpack some of the difficulties of this claim as it touches the case for FACs.

First, assuming that competition is good and that competition is hurt by wealth disparity, this argument is less relevant in non-sports commercial

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[67] In other words, the New York Knicks are not limited to paying their top player only $15 million per year, because he can get $4 million in endorsements playing in New York, while the Memphis Grizzlies are able to pay $18 million because endorsement opportunities in Memphis are only worth $1 million.

[68] Zimbalist, *supra* note 30, at 111.

entertainment contexts that are less directly competitive, such as the recruitment, retention, or direction of chefs, newscasters, musicians, stage actors, etc. If FACs emerge in those areas, there are no real competitive balance considerations worthy of extended deliberation.

Second, even focusing on professional team sports, the argument is merely that FACs make watching sports worse in some way. But many aspects of professional sports might have similar effects, so it again is not clear that FACs are distinctly unjust or deserving of specially unfavorable treatment. Ultimately, skepticism toward private ordering in this context must be justified, as must skepticism toward one particular form of private ordering.

Third, as economist Allen Sanderson argues, competitive balance is not solely a product of resource distribution and allocation.[69] Indeed, there are many non-pecuniary influences on competition—technology, demography, playing rules, playing conditions, science, and medicine. With respect to these influences, leagues and fans welcome and applaud adaptation and innovation, even when it gives some teams a competitive advantage.[70] Moreover, it is difficult to separate "natural" from "unnatural" benefits as they affect the development of skill and performance and, in turn, competitive balance.[71] There is no reason that advantages gained from wise player evaluation are significantly different in kind than advantages gained from having a larger or more affluent fan base.

Consider, for example, the rise of sabermetrics, the use of more sophisticated statistical methods of player evaluation and game strategy, allowing teams to identify and exploit inefficiencies in conventional methods strategies.[72] Increasingly, teams hire front office personnel with strong math and statistics backgrounds to maximize these strategies. As described in the book *Moneyball*, baseball teams playing in small markets and working with relatively modest budgets have outperformed larger-market, big-budget teams.[73] No one, however, has seriously asserted that "competitive balance" requires that teams be restricted in the hiring of front office personnel or in efforts to exploit inefficiencies. In that same vein, even if FACs would negatively affect competitive balance, the welter of other causes that also contrib-

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[69] Allen R. Sanderson, *The Many Dimensions of Competitive Balance*, 3 J. SPORTS ECON. 204, 205 (2002).

[70] *See id.* at 205.

[71] *Id.* at 220, 224.

[72] Note, Losing Sight of Hindsight: The Unrealized Traditionalism of Law and Sabermetrics, 117 HARV. L. REV. 1703, 1710–12 (2004).

[73] Michael Lewis, Moneyball: The Art of Winning an Unfair Game (2003)

ute to that imbalance weigh against special objections to this one, new form of allocation.

Furthermore, as a legal matter, courts have been consistently skeptical of leagues' competitive-balance arguments. Where sports leagues are subject to antitrust limits, competing teams are expected to behave as competitors. For instance, the Seventh Circuit rejected the NBA's arguments for limiting the number of games that individual NBA franchises could broadcast on cable.[74] The league argued that its network television contracts would be less valuable if individual teams could enter into agreements to broadcast games to national audiences, and that some teams would enjoy an unfair advantage in placing games on cable.[75] But the competitive balance argument fell to the concern that the limitation would have diminished fan access to NBA games.[76] This same interplay motivated the Supreme Court to invalidate an NCAA rule, also motivated by competitive-balance concerns, limiting broadcasts of college games[77] and a federal district court to nix an NFL bylaw that called for teams to equally share television revenue.[78] These decisions emphasize that competition anticipates and expects winners and losers, an expectation that FACs advance.

Finally, competitive balance often is justified as a way to maintain fan optimism, thereby maintaining fan interest in their team, the league, and the sport. Fans "want to begin each season with hope and expectation."[79] And given the perceived link between league parity and fan interest in the league, a decline in the former could hamper the latter.[80]

But FACs enable a level of direct fan involvement that overcomes this objection in two respects. First, if we are correct that many different fan

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[74] Chicago Prof'l Sports L.P. v. NBA, 961 F.2d 667 (7th Cir. 1992).

[75] *Id.* at 675.

[76] Chicago Prof'l Sports L.P. v. NBA, 1995-2 Trade Cas. (CCH) P 71,253, at *27 (N.D. Ill. 1995); *see also* David A. Balto, *Networks and Exclusivity: Antitrust Analysis to Promote Network Competition*, 7 GEO. MASON L. REV. 523, 573–75 (1999) (providing a rich discussion of this litigation).

[77] NCAA v. Board of Regents, 468 U.S. 85, 104–15 (1984) (reasoning that rule designed to promote competitive balance of college sports programs cannot unduly harm consumers).

[78] United States v. NFL, 196 F. Supp. 445, 447 (E.D. Pa. 1961). Congress responded to that decision with the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291, which removed the NFL, along with the NBA, MLB and National Hockey League (NHL), from the reach of Section 1 of the Sherman Act with respect to sponsored sports broadcasting. *See* Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 574 (1995).

[79] Zimbalist, *supra* note 30, at 112.

[80] Crooker & Fenn, *supra* note 30, at 157–58.

bases will create and support FACs, FACs actually may help foster competitive balance by providing another incentive that teams can offer to prospective free agents. Second, even if FACs ultimately produce disparity, it is the fans themselves creating the purported competitive imbalance through the very interest they show for the sport and their teams. In other words, FACs might beget competitive imbalance precisely because they result from fans wanting their teams to succeed and wanting to express that desire monetarily. We can imagine a scenario where FACs cause fans of teams from smaller cities or with smaller fan bases to lose interest in the sport because some big-city/large-fan-base teams come to dominate. But we also can imagine FACs stimulating greater fan interest and more interesting professional sports if fans see themselves as competing for affection nationwide and trying to brand themselves in distinctive and quirky ways.

If it is not obvious, we will emphasize it again: we do not deny the concern for competitive balance altogether. Rather, we believe those concerns are over-emphasized, relevant as a critique only to professional team sports, and thus only one activity where FACs could be used. And even such limited concerns are generally outweighed by considerations of liberty, commerce, and the pleasure fans take in expressing their preferences.

5. Speech, Money, and Corruption

FACs embody the idea that there is an expressive component to at least some financial transactions,[81] particularly charitable ones.[82] Because this expression is articulated in shekels, some might be concerned for corruption. FACs merge political action committees (PACs) with booster clubs and bring that union to professional sports. PACs facilitate the gathering of resources and support for or against particular political candidates, parties, positions, and causes.[83] Booster clubs serve similar functions for high school and college sports.

At the simplest level, booster clubs are the vehicle through which parents contribute to schools to help buy uniforms or other equipment, making the clubs indispensable to cash-strapped public schools. On the other hand, booster clubs and high-profile individual boosters have had pernicious ef-

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[81] Citizens United v. FEC, 558 U.S. 310, 351 (2010); N.A.A.C.P. v. Claiborne Hardware, 468 U.S. 886, 908 (1982).

[82] Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002).

[83] PACs are regulated to various degrees because of the several ways in which money corrupts the integrity of the political process. For a spirited overview of the problem, see LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT (2011).

fects on big-time college[84] and even high school sports.[85] Stories of illicit payments—whether in cash, merchandise, sex, or drugs[86]—suggest that booster clubs are a problem for amateur sports. Given the negative perception of both PACs and booster clubs, why should we extend those models to professional sports or other areas of commercial entertainment?

To the extent that the infusion of money in politics and amateur sports is problematic, it is precisely because those are perceived as domains that should operate under different "spheres of justice."[87] We understand the intuition that politics or amateur sport should be relatively immune from the influence of money. A college football team should not win a championship just because its boosters are wealthy, just as a candidate should not win an election because her supporters are billionaires willing to flood the airwaves with political ads. Professional sports, by contrast, are principally a form of commercial entertainment and thus should be amenable to arguments in favor of private ordering: no different than the norms governing restaurants, airport fiction, and network TV shows. As such, there is no intrinsic reason why the norms of commerce and private ordering should not govern in that domain.[88]

For what it is worth, this vision of politics as being above or beyond money has been losing support in the political and legal arena.[89]The real concern with the influence of money in politics is corruption—that an elected official will be indebted to, and subject to undue influence by, his funders.[90] That concern seems inapplicable to fans giving money to talent (or their preferred charities) in professional sports and other fields of commercial entertainment. As discussed earlier, the only *quid pro quo* risk as to professional athletes—gamblers or criminals with access to the players—is unlikely to arise through FAC activities.

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[84] Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011, 5:37 PM), http://sports.yahoo.com/news/renegade-miami-football-booster-spells-213700753—spt.html.

[85] H.G. Bissinger, Friday Night Lights: A Town, a Team, and a Dream (1990).

[86] Robinson, *supra* note 84.

[87] Michael Walzer, Spheres of Justice (1983). *See also* Sandel, *supra* note 57.

[88] And that is why we are largely unmoved by Professor Sandel's complaints about the new markets in sports autographs, naming rights of stadiums, and skyboxes in professional sports arenas. *See* SANDEL, *supra* note 57, at 163–79.

[89] As a First Amendment matter, paupers and billionaires, not to mention corporations and unions, can spend lots of money with little restriction (or even transparency) in advancing their preferred political positions, issues, groups, and candidates. *See Citizens United*, 558 U.S. at 337–40; MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2002).

[90] *Citizens United*, 558 U.S. at 359–60.

6. Salary Concerns

One might object that FACs will hurt players by lowering their salaries, as teams leverage FAC pledges to reduce what they must pay. This is the same theory on which economists question the practice of tipping—that it causes restaurants to pay lower salaries, expecting workers to make up the difference in tips. This concern is unfounded for several reasons.

First, past experience demonstrates that teams do not reduce player salaries or contract offers based on potential outside income. LeBron James does not make less money, and no team would have made a lower contract offer to him, based on his outside endorsement income. Second, to the extent teams are competing to sign star players, such an attempt to lowball salaries would be unwise. If Team X offers less money to a player in reliance on anticipated FAC money, it may lose out to a higher offer from Team Y, as the player can choose to reject a lower offer that depends on the fortuity of FAC money. Again, the relationship between the team and the talent remains critical, with the FAC offering primarily a supplemental incentive to tip an equipoise in its favor. It is unlikely teams or talent will rely on that third party because of its speculative and contingent nature. Third, there is nothing inherently problematic with FACs causing teams to offer (and players to accept) less money. As discussed earlier, players join (or remain with) a particular team for a number of reasons, even at lower salary; the existence of FAC money would merely be one more reason to do so.

In any event, this concern arises only on the direct compensation model, and thus provides merely another reason to favor the charitable model. No team is likely to offer less money in salary because of some amount of money donated to the player's foundation. Of course, if a team did that, and the talent accepted the lower offer, that exchange would presumptively benefit the foundation and its charitable efforts while enhancing the talent's public reputation.

7. Fan Psychology and Epistemic Deference

A final set of issues relates to fan psychology and reactions. We spot them and briefly respond here, without necessarily resolving them in full.

First, one might argue that fans will quickly become disaffected when their money becomes directly intertwined with fickle player movements. Fans who contributed to a FAC to lure Player A may be angry when he returns to his original team four years later, or worse, when he asks the FAC for more money on threat of leaving. Feeling burned once, perhaps fans will

be reluctant to contribute to a FAC in the bidding for the next superstar to replace the departed Player A.

But fans' anger will not necessarily stop them from contributing in the future. Just as team management might be willing to "rent" star players for only a year or two if it means a chance to win, fans might similarly be willing to contribute their own money to FACs for that opportunity. Some fans will gladly pay for two championships, even if the player departs in year three; while disappointed by the player's departure, fans savor those two successful seasons and likely see it as being worth the cost. Those same fans might gladly contribute to the FAC the next time if they perceive a new chance for additional team success.

Second, one might fear that fans, teams, and talent may all be subject to psychologically hot and situational bargaining biases, such that FACs may end up creating a tax on foolishness. One might even suggest that the idea of fans becoming too attached to talent is irrational, especially in team enterprises. On this view, fans have a transient preference and are likely to mis-predict how sad they will be if their preferred player leaves, largely because people revert to their mean level of happiness over time. All this might be true. But again, if people can buy pet rocks, they can buy the chance to influence what star player they want on their favorite basketball team. Crowdfunding has developed and thrived on that very notion. In a free society with a market-based economy, where voluntary exchanges are already the dominant mode of distributing various goods and services, there is no distinctively persuasive reason to block one voluntary exchange in commercial entertainment or sports.

To be sure, the desirability of promoting athletic or other performance-related virtues may limit the spaces in which FACs are tolerable. Indeed, inasmuch as society should promote non-commercial virtues, the question of whether to encourage FACs becomes, at least partially, a question of expertise and deference.

This raises a distinct point: who likely better predicts what makes a good team: fans or team management? If the latter, and if we think epistemic deference to those who know is warranted, perhaps FACs are unwise. This is plausible. But consider two responses. First, as noted above, in most cases, FACs depend on the choices of the team in question to retain or recruit the talent; fan preferences will not trump those of management. For example, a FAC would have been useless for Jeremy Lin if he wanted to stay

with the New York Knicks once the Knicks decided they did not want to keep him on the team.[91]

Moreover, we can question how relevant epistemic deference should be in commercial enterprises. If the owners of the professional sports team want to manage their team poorly, that is their choice. If fans believe management is doing a bad job, one solution is to abandon the team in protest by not attending or watching games or otherwise giving money and support to the team. FACs offer another way: influence (or try to influence) management's decisions by influencing (or trying to influence) players through payments to or for their benefit, hoping to produce better results.

C. Policy Concerns Unique to the Charitable Contribution Model

As previously stated, we think the more attractive approach is for FACs to donate money to the talent's charitable foundation or other preferred cause. In addition to the arguments we canvassed concerning FACs above, two additional considerations specifically support the charitable model.

1. Distributive Justice and Charitable Contributions

The distributive-justice objection to FACs largely disappears under the charitable model. Talent, already making a lot of money, is not financially enriched at the expense of fans, especially fans of lesser means. In fact, contributions to charitable foundations usually affirmatively advance the cause of distributive justice, because charities presumably will do, on average, more good with the money than a private person would.[92] What is more, the opportunity to contribute through a FAC might encourage charitable engagement from people who do not otherwise do much giving.

Talent also may prefer this model, using the charitable benefits to boost their public image. A charitable FAC allows a star to proudly proclaim, "I am sorry to leave Team X behind, but Team Y's offer was unbeatable when its wonderful fans pledged another $5 million to my foundation.

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[91] Of course, we can also envision a third FAC model that might develop, in which the FAC gives money to the team rather than the talent, enabling the funded organization to defray its costs or change its priorities. For example, imagine if billionaire Michael Bloomberg said to the New York Knicks management, "Keep Jeremy Lin, and I'll give you $50 million." The league would no doubt have something to say about such an arrangement.

[92] This assumption explains why charitable contributions are tax-advantaged. *See* 26 U.S.C. § 170; *cf.* Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777, 785–812 (2012) (discussing welfarist arguments in favor of subsidizing charitable giving).

I must do what I can for the kids I have long been committed to helping." We readily imagine that substantial donations to the talent's favored cause coupled with a public-image victory may affect the choices of at least some talent. Of course, a player might object to such charitable FAC contributions for similar reasons, complaining that fan contributions make it impossible to turn down Team Y, thereby negating that $5 million donation and creating a public-image problem.

There also is a chance that one distributive justice objection would persist, even under the charitable model. Because charitable giving is finite, the charity-focused FACs could engender a distribution of goods that is worse than in a world without FACs. For this scenario to unfold, charitable FACs would have to crowd out normatively better charitable giving. For example, if stars choose wasteful or misguided charities, then on the margins we might see a sub-optimal distribution of charitable dollars that would otherwise have gone to better places.[93] Rather than mitigating distributive justice concerns, perhaps the player's charities only benefit the wealthy (e.g., the Center for the Study of Dressage). Moreover, concerns have been raised about the management of some athletes' charitable foundations and the percentage of funds actually going to charity.[94] One also might question the motivation behind these donations—the commitment is not really to the charitable cause, but to getting the star player to join or remain with the team.

But the premises of crowding-out remain speculative. We have no reason to believe fans would not give generously to both their usual charities and to the charities of their sports heroes; on the margin, they might simply buy fewer shoes, lipsticks, or tennis balls. Moreover, we have no reason to assume that the current distribution of voluntary charitable dollars is correct or that the talent's choice of charities are, as a whole, much worse.

2. Sports Leagues and the Charitable FAC

Although stars do not receive anything from fan donations, FACs still are offering something of value to the player (even if the value is purely psychological or moral) to persuade him to play for one team over another. This still may appear to leagues as third-party intrusion into player movement and distribution of talent. Our response remains the same—neither

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[93] Miranda Perry Fleischer, Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice, 87 WASH. U. L. REV. 505, 557 (2010).

[94] Paul Lavigne, *Athlete Charities Often Lack Standards*, ESPN.COM (Mar. 31, 2013, 9:05 AM), http://espn.go.com/espn/otl/story/_/id/9109024/top-athletes-charities-often-measure-charity-experts-say-efficient-effective-use-money.

private law nor internal league rules prohibit fans from collecting and spending money in a way that might influence an athlete's choices.[95]

Indeed, the league would stand on even weaker ground in objecting to charitable FACs. After all, the talent is not receiving anything directly and fans are not entering into any sort of direct business relationship with the talent. The only people acting are the fans themselves and the foundations, neither of which is subject to league control. Indeed, it is impossible to see a difference between a group of fans raising $10,000 to give to a player's foundation and a group of fans spending $10,000 to rent a billboard or an airplane to fly a banner urging him to sign with the team.[96] The league simply lacks any authority to regulate the expenditure of independent fan money.

It also is unlikely that a league could or would try in future collective bargaining to prohibit charitable contributions. It would suffer a public-relations disaster in even suggesting limits on fans' charitable contributions or on what money foundations could accept. Even if fans explicitly attempt to tie their contributions to the talent joining (or remaining on) their favorite team, leagues will quickly realize that such efforts are not worth trying to regulate.

Moreover, opposition to charitable contributions would strike the league's key constituencies, including ticket-holders and corporate sponsors, as hypocritical. It would be at odds with most leagues' own charitable ventures, which have raised substantial money for various causes.[97] For example, since its creation in 2005, NBA Cares boasts that it "has raised more than $200 million for charity, provided more than 1.9 million hours of hands-on service, and built more than 720 places where kids and families can live."[98] The NBA could not repudiate fans' donations to players' causes while simultaneously championing its signature charitable enterprise.

Charitable donations are also unlikely to resemble a zero-sum game, where a donation to one charity means another charity does not receive that

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[95] *See supra* Part II.A.

[96] Anticipating James's 2014 free agency, Cavs fans organized several recruiting efforts, including renting a billboard near James's old high school in Akron and distributing t-shirts to fans and asking them to tweet photos of themselves. Dan Favale, *Cavs Fans Create 'Come Home LeBron' Campaign to Lure James Back to Cleveland*, BLEACHER REPORT (Nov. 25, 2013), http://bleacherreport.com/articles/1864744-cavs-fans-create-come-home-lebron-campaign-to-lure-james-back-to-cleveland.

[97] *NFL and Players' Union Donating $1 Million*, SI.COM (Nov. 1, 2012, 7:41 PM), http://www.si.com/nfl/2012/11/01/sandy-nfl-union-donations-ap (noting donations by the major sports leagues and players' associations to hurricane relief).

[98] *Overview of NBA Cares*, NBA.COM, http://www.nba.com/cares/overview.html (last visited Sept. 12, 2012).

donation.[99] For one, NBA Cares' core activities focus on team and player charitable activities and on partnerships with other enterprises in complex community ventures.[100] For example, in 2012 NBA Cares briefly partnered with the "Hoops 4 Hope" charity, through which customers at NBA-owned stores could donate used sneakers in exchange for a store discount.[101] This charitable program certainly warrants support. But, a fan who donates money to a player's foundation as part of free-agent recruiting is not less likely to donate old sneakers in exchange for a store discount. For that reason, FAC money for foundations favored by talent would neither diminish nor endanger the league's civic outreach efforts.

III. FACs Everywhere and Nowhere

A. FACs Everywhere?

Our focus has been on professional team sports because that is where money and attention are most likely to flow. Professional sports present the most obvious trilateral relationships, and sports fans are uniquely aware of and interested in athletes' comings and goings, providing the information necessary to allow a FAC to form and to raise money in a recruiting effort.

Similar crowdfunding efforts might likewise succeed in other trilateral relationships. We do not aim to exhaustively describe the extensions of the FAC model to other areas of human activity; instead, we just sketch some suggestions for use in other areas of commercial entertainment.

FACs are likely to succeed only where the obstacle to a deal is not the organization's ability or willingness to pay the talent, but the talent's willingness to join the organization. In those situations, FAC crowdfunding serves not to make the talent-team relationship financially possible so much as it serves as an expression of fan support and affection and thus a monetized reason for the talent to want to join. Crowdfunding offers a supplemental incentive, especially when fan money is going to the talent's preferred charitable causes. That said, we can also see how FACs might be

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[99] *See* Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 355 (4th Cir. 2005) (Duncan, J., dissenting) (explaining the impact of charities competing for "the finite charitable donation dollar").

[100] *NBA Cares Community Partners*, NBA.com, http://www.nba.com/cares/partners.html (last visited Sept. 12, 2012).

[101] *Recycling Dreams*, NBA.com, http://www.nba.com/nycstore/footwear_drive.html (last visited Sept. 22, 2012).

used to completely alter the incentives of a team that was not otherwise interested in signing a particular talent.[102]

Consider the following circumstances in which fans could, through crowdfunding efforts, help facilitate a desired relationship between talent and team/organization.

- Fans of the symphony or opera in one city want to help attract a renowned conductor, violinist, or soprano from another company or city.
- Fans of Nate Silver's statistical analysis may attempt to influence his decision about whether to stay at the New York Times or to decamp to ESPN.[103]
- Patrons of a restaurant can help it attract or retain a celebrity chef.
- Fans of TV's "Downton Abbey" might organize and offer money to actor Dan Stevens (who played the leading male role in the show's first three seasons, but no longer wanted to be on the show) to convince him to remain with the show.
- Fans of "The Daily Show" might collect money to convince Jon Stewart not to take a sabbatical from the show, as he did in the summer of 2013,[104] whether out of love for Stewart or aversion to his replacement.
- FACs might even be used to recruit or retain academic talent, such as legal luminaries Larry Lessig or Cass Sunstein.[105]

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[102] *See supra* note 91.

[103] Marc Tracy, *What Nate Silver's Move Means for the 'Times' and ESPN*, NEW REPUBLIC (July 22, 2013), *available at* http://www.newrepublic.com/article/113967/what-nate-silvers-move-means-times-and-espn. The element of fan loyalty to the entity is arguably absent here—few readers have intense loyalty to a particular media outlet itself (certainly not loyalty comparable to a sports team) and many Silver fans will read him whether he is at ESPN or the Times. On the other hand, Silver would be expected to write more about sports at ESPN, so perhaps a group of fans wanting to read more of his sports analysis would try to encourage him to switch to a sports-oriented outlet.

[104] Lauren James, *Jon Stewart Returns to 'The Daily Show' After Summer Sabbatical*, CONTRACTMUSIC.COM (Sept. 4, 2013), http://www.contactmusic.com/article/jon-stewart-daily-show-return-2013_3848865.

[105] This extension of the FAC model might be the most controversial of the bunch. Unlike commercial entertainment and professional sports, the academy might hold itself out as ungoverned by market considerations and more bound by a set of norms appropriate to knowledge-building and dissemination. While higher education is different from commercial entertainment in that far fewer "firms" are motivated by profit maximization, it does not mean that academic institutions are not substantially participating in markets to hire leading academics for their ser-

In each of these situations, as with team sports, the money is not necessary to make it financially feasible for the targeted star to join or remain with the organization; the organization can and will pay the talent to perform.[106] In fact, FACs might be more effective in these contexts than in professional sports, because these industries do not require or encourage individual firms to be concerned with the preservation of competitive balance—there is no National Restaurant Association ensuring that each restaurant has similar amounts to spend on chefs and a similar opportunity to succeed. Furthermore, none of these industries or markets have rules barring coordination or cooperation between the production team and the fans or between the talent and the fans.

FACs are valuable because they provide a mechanism for talent and team to capture gains based on intensity of preferences. Comedy Central, for example, makes money from "The Daily Show" through advertisements whose pricing varies based on viewers within large demographic groups said to be watching the show. In other words, the number of viewers matter significantly (even exclusively) in some markets. By contrast, FACs provide an opportunity for talent to capture gains based on the intensity of preferences belonging to particular individuals. If Bill Gates, or 50,000 individual fans, love Stewart so much, they might be willing to use a FAC to persuade him not to go on sabbatical. Markets must be conducive to that possible exchange if they are to effectively engage in wealth maximization.

FACs could even extend beyond sports and commercial entertainment. The literature on jurisdictional competition already addresses the problems and possibilities of cities or states trying to lure businesses to site their factories in particular places.[107] One could imagine how FACs and crowdfunding might impact these decisions. Perhaps Seattle is trying to lure Smelly Corp. and its 200 jobs to the area by offering $10 million in tax breaks or other advantages. Smelly Corp. could also announce that it is amenable to being persuaded to go somewhere else—and there is no reason a FAC (per-

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vices. Charles T. Clotfelter, *The Familiar but Curious Economics of Higher Education: Introduction to a Symposium*, 13 J. ECON. PERSPECTIVES 3 (1999).

[106] If some organizations (such as the symphony seeking a violinist or a law school seeking a cyberlaw professor) find themselves short on funds, they likely would turn directly to their donor "fans" to fill any monetary shortage, obviating the need for fans to work independently through a FAC. But we also imagine situations where the artistic director of a symphony or dean of a law school has interests and priorities at odds with the fans, and the fans might be able to alter the incentives through its FAC and the intensity of preferences it announces. The FAC cannot put a gun to the artistic director's head, obviously; but crowdfunding might affect her balance of reasons in favor or against a course of action.

[107] *See* sources cited *supra* note 65.

haps supported in part by a wealthy local) could not offer them $11 million to go elsewhere, if the FAC supporters think Smelly Corp. is bad for Seattle. Citizens often speak out against government efforts to attract businesses to the area; FACs allow them to speak with their dollars.[108]

In sum, the use of charitable donations or direct payments by third parties to motivate behavior is not limited to a few discrete areas of endeavor. Instead, it is applicable to any area where members of a committed base are willing to express themselves financially to try to influence relevant decision-making with respect to an organization about which they care. FACs provide a vehicle for voluntarily reassigning one's comparative abundance to achieve goals held in common with others, efforts that have failed in the past because of a lack of coordinated organization. These means can be used to achieve positive ends or to avoid negative ones, although we recognize that what counts as positive or negative will often be in the eyes of the beholder.

B. FACs Nowhere?

So where are the FACS, whether in team sports, commercial entertainment, or elsewhere? As the old economics joke goes, if a ten-dollar bill is lying on the ground, then it must not really exist because someone would have picked it up already.[109] Perhaps FACs are the equivalent of that ten-dollar bill. As with any innovation, sometimes ingenuity happens, which explains why demand for some products is higher than it is for others. Crowdfunding itself has existed for only about five years and its parameters and potential applications are still being discovered. Even so, we have seen a few small-scale efforts in this direction, especially in connection with team sports.[110]

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[108] FACs might even enter slightly more peculiar markets, such as offering money, directly or to charity, to encourage a public official (Supreme Court Justice, congressman, cabinet official) to step down. Our sense is that federal ethics rules would make this an impermissible quid pro quo, even if one might view the retirement from office as more like a cessation of official action than an official action itself. *Cf.* Ross E. Davies, *The Judiciary Fund: A Modest Proposal that the Bar Give to Judges What Congress Will Not Let Them Earn*, 11 GREEN BAG 2D 354 (2008) (arguing that the organized bar can collectively provide financial support for underfunded judges and judiciary); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387 (1998) (arguing that check-off boxes on tax returns can be used as a polling measure to gauge intensity of preferences with respect to contested policies).

[109] *See, e.g.*, ROGER A. ARNOLD, ECONOMICS 472 (8th ed. 2008).

[110] *See* Favale, *supra* note 96; *WQAM*, *supra* note 23.

As much as we would like to believe the absence of ingenuity is the reason for the current absence of FACs, we must be open to other explanations.

1. Coordination Costs

One possibility is that FACs require coordination across a number of actors—talent, agents, teams, leagues, along with the fans who organize and participate in the crowdfunding efforts. These coordination costs are high. This highlights a more general commercial problem—consumers' voices are often not heard clearly or correctly. Even taking into account the pervasiveness of marketing research through focus groups, the intense preferences of some viewers might be economically relevant when deciding whether to cancel a television show or trade a popular player.[111] FACs can respond to this problem; in some ways, fans become more like spectators in a Roman arena, where the pitch and yaw of the crowd's mood had an intensely meaningful impact on the gladiators' well-being.

2. Information Hurdles

There are information costs as well. The public knew that LeBron James was a free agent (twice) who wanted to take his talents elsewhere—this is the main reason team sports are the most obvious context for initial FAC efforts. The public may be less aware that Maria Callas is looking for a new opera home or that Jon Stewart is thinking of taking a hiatus from his show. For FACs to work, there must be a way for stars to credibly signal that they are interested in being wooed by another entity so that the recruiting entity does not feel that it is wasting too much of its agents' time. That signal from the talent must reach fans who will undertake their own fundraising efforts.

3. Social Norms

A third variable includes the stickiness of social norms. As discussed earlier, FACs do not raise plausible claims of tortious interference with contract. But, the penumbra of that tort shades social norms surrounding the supposed sanctity of privity in contract and social inertia against tampering

[111] Of course, had the show been more popular—that is, had more fans watched the show—it likely would not have been canceled. But that show might be valuable to a few very devoted watchers and the intensity of their preferences might matter to the show's producers if there's a way of monetizing them.

with contractual relationships. There also remains the awkwardness of ordinary fans spending money to benefit or influence wealthy stars and teams.[112] These social norms might impede the emergence of FACs.

One way to overcome that inertia is to organize FACs in a way that incentivizes entrepreneurs to surmount those hurdles. A FAC might absorb a small percentage of the money that is raised to cover administrative costs and furnish some profit or financial return for the person spearheading the effort. Moreover, online crowdsourcing platforms lower the costs of these efforts, much as technology has facilitated the lowering of costs associated with increasingly standardized legal instruments.[113]

Conclusion

Fans currently do not financially direct or even influence where stars choose to perform; fans instead are left to scream about it from the sidelines. They deserve better. The same people who devote mental and emotional energy and passion for talent and teams also spend their hard-earned salaries buying tickets and knick-knacks. This makes them stakeholders in the various choices made by talent. By harnessing imagination, resources, and energy, FACs are a catalyst for the realization of fan power.

FACs are not the only way to bring fans into the decision-making mix. Teams could be capitalized and directed through publicly traded stocks under affiliated rules of corporate governance; alternatively, they could be organized as community cooperatives. Those structures would also empower fans, although we leave the merits of such competing models for another day.

In our view, whether enriching stars through direct payments or facilitating contributions to charitable causes, FACs are permissible and easily created. While their existence might impose some costs, FACs should spur some important conversations about professional entertainment and sports, and what we expect from these fields of endeavor and why. Finally, when structured under the charitable model, FACs can incidentally lead to im-

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[112] This criticism has been levied at several well-known artists who have undertaken crowdfunding efforts despite personally possessing sufficient money to make their projects happen. *See* Kathryn Shattuck, *The Roar Over the Funds of the Crowd*, N.Y. Times, July 9, 2014, http://www.nytimes.com/2014/07/13/movies/the-roar-over-the-funds-of-the-crowd.html (discussing criticism of Hollywood star using Kickstarter to fund movie).

[113] *See, e.g.*, Legalzoom, http://www.legalzoom.com (last visited Feb. 17, 2014) (providing low cost options for wills, family law, incorporation of LLCs, trademarks, and other areas of "mass" or store-front law).

proved access to medicine and the arts and the alleviation of other social inequalities, all while helping the local team win. FACs, in short, offer promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effects positive social change.

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Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement

Kimberlianne Podlas*

Introduction: Online Leaks

Producing a film or television program involves a number of risks: financing collapsing, a marquee actor dropping out, or the studio delaying the project. Another threat, unique to the digital age, is that a script, television episode, or rough cut will be leaked online.[1] Leaks can provoke negative buzz,[2] diminish audience interest,[3] and even cause the cancellation of a project.[4] In the past few months alone, *The Expendables 3*,[5] upcoming *Doctor Who*

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[1] *See, e.g.*, Nicole Sperling, *The Big Batman Fake-Out,* Ent. Weekly (July 18, 2004), http://www.ew.com/ew/article/0,,20835929,00.html, [http://perma.cc/U4Z4-EQB4]; Andy Dehnart, *Survivor Spy Exposed,* The Daily Beast (Jan 31, 2011), http://www.thedailybeast.com/articles/2011/01/31/survivor-spoiler-exposes-russell-hantz-as-his-source.html, [http://perma.cc/67P3-9C9E]; Andy Dehnart, *Survivor Spoiler Missyae Sued,* Reality Blurred (Feb. 1, 2011), http://www.realityblurred.com/realitytv/2011/02/survivor-redemption-island-survivor_spoiler_missyae, [http://perma.cc/G47X-G99B].

[2] *See, e.g.*, *The Reid Report* (MSNBC television broadcast July 25, 2014) (reporting fan criticism of Ben Affleck and the release of photos of Ben Affleck as *Batman* and the trailer for Fifty Shades of Grey).

[3] *See* Sperling, *supra* note 1.

[4] *See* Complaint, Tarantino v. Gawker Media, LLC, No. 2:14-cv-00603 (C.D. Cal. Jan. 27, 2014) (hereinafter "Complaint").

[5] Eriq Gardner, *Lionsgate Granted Temporary Restraining Order Over 'Expendables 3' Leak*, Hollywood Reporter (Aug. 5, 2014, 8:37 AM), http://www.hollywoodreporter.com/thr-esq/lionsgate-granted-restraining-order-expendables-723391#, [http://perma.cc/S8T9-N567].

episodes,[6] a draft script for the new *Batman* movie,[7] and Quentin Tarantino's *The Hateful Eight* screenplay[8] have all been leaked online.

Although leaks have been a perennial problem for the entertainment industry, the Internet has increased their frequency and harm.[9] In fact, despite praising the Internet's boon to creativity, The Lonely Island, Neil Gaiman, Trent Reznor, and others have complained that "pervasive leaks of unreleased films and music regularly interfere with the integrity of [their] creations."[10] Additionally, information online not only spreads quickly, but also can be linked to and reposted on an infinite number of sites.[11] This is exacerbated by both online media outlets driven to scoop the competition and attract readers[12] and rabid fans eager to share information and spoilers.[13] Moreover, once the public knows that Darth Vader is Luke Skywalker's father, Olivia Pope's mother is alive, and River Song is Amy's time-traveling daughter, those facts can be repeated without legal repercussion. Indeed, courts have consistently held that the underlying facts and ideas in a copy-

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[6] Clark Collis, *Once Upon a Time Lord*, ENT. WEEKLY (Aug. 18, 2014), http://www.ew.com/ew/article/0,,20741515_20839792_6,00.html, [http://perma.cc/3AF8-TUGW].

[7] Sperling, *supra* note 1. The studio has insisted that the script was fake and others opined the leak was a publicity stunt, but the truth remains unclear. *Id.*

[8] Complaint, *supra* note 4, at 2.

[9] Sperling, *supra* note 1.

[10] Nate Anderson, *The Lonely Island Gets Off the Boat to Oppose SOPA*, ARSTECHNICA (Jan 18, 2012), http://arstechnica.com/tech-policy/2012/01/the-lonely-island-gets-off-its-boat-to-oppose-sopa/, [http://perma.cc/8235-WWAK].

[11] *See generally* Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1364 (2006) (discussing the unprecedented rates of copyright infringement in the digital age).

[12] *See generally* Daniel S. Park, *The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369, 374–76 (2010) (describing economic realities and challenges of online media); Julian Sanchez, *AP Launches Campaign Against Internet "misappropriation,"* ARSTECHNICA (Apr. 6, 2009), http://arstechnica.com/tech-policy/2009/04/ap-launches-campaign-against-internet-misappropriation/, [http://perma.cc/8F5P-MC27]. A century ago, the Supreme Court stated that news has "peculiar value. . . in the spreading of it while it is fresh; . . . [a value that] cannot be maintained by keeping it secret." Int'l News Serv. v. Associated Press, 248 U.S. 215, 235 (1918).

[13] Spoiling reality shows by identifying participants before they are officially announced, identifying who is eliminated or will win, or revealing twists has become common practice online. *See, e.g.*, Dehnart, *Survivor Spy Exposed, supra* note 1.

righted work are "free for the taking,"[14] and the media is not liable simply because they published information that was illegally obtained by a third party.[15]

This Article examines the problem of scripts, television episodes, and movies being leaked online, and whether news and fan sites that link to such works are liable for copyright infringement. Although this article focuses on linking to leaked entertainment works, it applies to the broader issue of whether linking to copyrighted material infringes either directly or secondarily.

To contextualize the issue, this Article begins by recounting several high-profile leaks and the entertainment industry's response, specifically asserting copyright infringement. Next, it outlines the pertinent provisions of the United States Copyright Act and case law addressing direct and secondary infringement. With this foundation, and guided by the Supreme Court's 2014 decision in *ABC v. Aereo,*[16] this Article analyzes whether linking to copyrighted works implicates the public performance and public display rights as defined by the Copyright Act's Transmit Clause. It articulates a dichotomy distinguishing automated search engine links from volitional links, details when links will infringe, and evaluates potential defenses, including fair use. Ultimately, this Article concludes that volitional links to leaked entertainment works are transmissions that presumptively infringe, but may often qualify as non-infringing fair use. Consequently, copyright infringement is both a promising legal strategy for creators seeking to guard against the unauthorized release of their works and a hazard of which linkers must be aware.

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[14] Facts are not copyrightable. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 354 (1991) ("Facts contained in existing works may be freely copied"). Nor are ideas underlying a copyrighted work: "no author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). Therefore, the idea and plot of a script or novel can also be disclosed without violating the author's copyright. *Feist*, 499 U.S. at 345.

[15] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971); *see also* Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media From Newsgathering Torts*, 32 HARV. J. L. & PUB. POL'Y 1093, 1102–08 (2009) (detailing Supreme Court jurisprudence confirming that media may publish true information that was illegally obtained).

[16] ABC, Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014).

INADEQUACY OF TRADITIONAL REMEDIES

Some in the entertainment industry have attempted to prevent unauthorized releases of copyrighted works by adding non-disclosure and liquidated damages clauses to contracts,[17] disciplining employees who leak copyrighted works,[18] and even suing third parties for the disclosure of "trade secrets."[19] This summer, BBC Worldwide "took disciplinary action" against employees, after a rough cut of *Doctor Who*'s Series 8 premier (featuring Peter Capaldi as the new Doctor) and six scripts were leaked to a publicly accessible website.[20] *Survivor* sued an online leaker for "misappropriation of trade secrets,"[21] and threatened others who linked to *Survivor*'s internal materials and a participant contract with copyright infringement lawsuits.[22]

These strategies, however, do not cover many situations. For instance, a limousine driver who finds a screenplay or a hotel clerk who overhears a conversation disclosing a spoiler has violated no contractual covenant with the production company, and it is questionable whether a trade secrets claim

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[17] *See* Andy Dehnart, *Survivor Heroes vs. Villains Spoiler Boot List: Accurate So Far*, Reality Blurred (May 6, 2010), http://www.realityblurred.com/realitytv/2010/05/survivor-heroes-vs-villains-boot_list/, [http://perma.cc/VAJ6-ZYG4]. Everyone involved in the CBS television series *Survivor* and *The Amazing Race* signs extensive confidentiality agreements. *See* Dehnart, *Survivor Spy Exposed*, *supra* note 1. Participant contracts for *Survivor* and *Amazing Race* include liquidated damages clauses of $5 million and $10 million, respectively. *Dehnart, Survivor Heroes vs. Villains*, *supra* note 17.

[18] Some states permit employers to raise a disclosure of trade secrets claim based on an implied confidential relationship, but the employer must prove that there was a confidential relationship and a clearly articulated expectation and obligation of confidentiality. *See, e.g.*, Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1549–1550 (11th Cir. 1996).

[19] *See* Dehnart, *Survivor Spy Exposed*, *supra* note 1. Jim Early was sued by *Survivor* creator Mark Burnett's production company for "misappropriation of trade secrets" and "tortious interference with contract" for disclosing *Survivor* spoilers. *Id.* The lawsuit was dismissed when Early chose to cooperate with producers to identify the source of the leak. *Id.*

[20] George Szalai, *'Doctor Who' Script Leak: BBC Worldwide Takes Disciplinary Action*, THE HOLLYWOOD REPORTER, (JULY 18, 2014), *available at* http://www.hollywoodreporter.com/news/doctor-who-leak-disciplinary-action-719538, [http://perma.cc/Q7TE-PHUV]; Collis, *supra* note 6, at 27.

[21] Dehnart, *Survivor Spy Exposed, supra* note 1.

[22] Andy Dehnart, *Survivor Contract, Rule Book Are Back Online*, REALITY BLURRED, (Aug 31, 2010), http://www.realityblurred.com/realitytv/2010/08/reality-blurred-survivor_contract_back/, [http://perma.cc/X99L-5R8Y].

can succeed against a fan who shares information.[23] Other times, the source of a leak cannot be identified.

Accordingly, creators have begun looking to other areas of law, specifically, copyright infringement, for relief. Recently, creators and producers have asserted that, regardless of the source of the leak, third parties and websites that link to copyrighted works are liable as direct or secondary copyright infringers.[24] Not only does this avoid the problem of identifying the leak, but also it expands potential liability to media outlets, congregator websites, and fan sites.

Alternative Theories of Liability: Recent Litigation

A growing number of litigants are employing copyright infringement and secondary liability theories. For instance, a few weeks before its August premier, *The Expendables 3* was leaked online and available on several BitTorrent sites.[25] Lions Gate asserted that hosting or linking to the film directly and secondarily infringed on its reproduction, distribution, and performance rights, and obtained a restraining order that not only prohibited sites from hosting the film, but also from linking to sites on which it was available.[26] The Motion Picture Association of America (MPAA) has also begun suing websites that link to films, as infringing on the copyright owner's right to display.[27] And Twentieth Century Fox sued a woman for $15 mil-

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[23] Misappropriation of trade secrets claims typically are litigated against an employee or someone associated with the production, not a third party leaker. Dehnart, *Survivor Spy Exposed*, *supra* note 1 (quoting Jordan Susman, who specializes in entertainment litigation).

[24] Timothy B. Lee, *MPAA: You Can Infringe Copyright Just by Embedding a Video*, Ars Technica, (Apr. 10, 2012), http://arstechnica.com/tech-policy/2012/04/mpaa-you-can-infringe-copyright-just-by-embedding-a-video/, [http://perma.cc/YJL3-Y2VU]; Nate Anderson, *"We Just Link to Videos!" Won't Stave off MPAA Lawyers,* Ars Technica, (Dec 18, 2008), http://arstechnica.com/tech-policy/2008/12/we-just-link-to-videos-wont-stave-off-mpaa-lawyers/, [http://perma.cc/V3BN-N36L]; Complaint, *supra* note 4, at 2; *see* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929–330 (2005) (underscoring viability of secondary copyright infringement); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001) (embarking on litigation strategy to pursue digital music file sharing as secondary infringement).

[25] Gardner, *supra* note 5.

[26] *Id.*

[27] *See* Lee, *MPAA*, supra note 24*;* Anderson, *"We Just Link to Videos!", supra* note 24; David Kravets, *MPAA Reining in Illicit Movie Sites, Downloading Unabated,* wired.com (Dec 17, 2008), http://www.wired.com/2008/12/mpaa-reining-in/, [http://perma.cc/9JX9-QVUV]. Others have also framed online linking as some

lion when it discovered she had posted a script of one of its movies in production.[28]

CBS and the production company behind *Survivor* have been particularly aggressive in protecting what it deems "secrets." Not only have they sued individuals who leaked program details, but they have initiated legal action against journalists reporting on the production. When journalist and journalism professor Andy Dehnart published an analysis of an annotated *Survivor* cast contract, CBS sent a Digital Millennium Copyright Act takedown notice to Scribd.com, the document hosting service used to present the files to which the story linked; CBS claimed that "[s]uch copying and use of this material constitute[d]" copyright infringement under the Copyright Act and DMCA.[29]

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form of copyright infringement. The AP sued a headline and news aggregation service for copyright infringement and misappropriation, but the case settled on undisclosed terms. *Press Release, AP Settles Lawsuit Against Moreover and VeriSign,* THE ASSOCIATED PRESS (Aug. 18, 2008), *available* at http://www.ap.org/Content/AP-in-the-News/Archive/AP-settles-lawsuit-against-Moreover-and-VeriSign, [http://perma.cc/G37Q-VTWS]. Righthaven brought a wave of cases claiming that posting a news article that links to the original story is copyright infringement. Nicole Downing, *Using Fair Use To Stop A Copyright Troll From Threatening Hyperlinkers*, 12 N.C. J.L. & TECH. ONLINE EDITION 155, 155 (2011). Righthaven also sued The Drudge Report for linking to a copyrighted photo along with a story about airport security on the Law Vegas Review-Journal website. Eriq Gardner, *Copyright Troll Righthaven Sues for Control of Drudge Report Domain*, ARS TECHNICA (Dec. 9, 2010), http://www.arstechnica.com/tech-policy/2010, [http://perma.cc/BX8B-Q3GU]. Blues Destiny Records sued Google for linking to one-click download site Rapidshare, which had the label's music available for download. Nate Anderson, *Why Google Sued a Tiny Blues Music Label,* ARS TECHNICA (May 7, 2010), http://arstechnica.com/tech-policy/2010/05/why-google-sued-a-tiny-blues-music-label/, [http://perma.cc/PTV3-7A3G]. And a Dutch court held that the website Filefactory's linking to photos constituted infringement. Timothy B. Lee, *Dutch Court Rules Linking to Photos Is Copyright Infringement,* ARS TECHNICA (Sept. 14, 2012), http://arstechnica.com/tech-policy/2012/09/dutch-court-rules-linking-to-photos-is-copyright-infringement/, [http://perma.cc/QEJ5-UDLK].

[28] Mike Masnic, *Fox Sues Woman for 15 Million*, TECH DIRT (Nov. 29, 2010), https://www.techdirt.com/articles/20101128/23101612026/fox-sues-woman-15m-because-she-aggregated-tv-movie-scripts-she-found-online.shtml, [http://perma.cc/SJP3-ZBV5].

[29] Dehnart, *Survivor Spy Exposed*, *supra* note 1. The material was removed, but when CBS did not follow up with an independent copyright infringement lawsuit against Dehnart, the *Survivor* material was back online. Andy Dehnart, *Survivor Contract, Rule Book Are Back Online*, REALITY BLURRED (Aug 31, 2010), http://www.realityblurred.com/realitytv/2010/08/reality-blurred-survivor_contract_back/, [http://perma.cc/X99L-5R8Y].

Perhaps the most high-profile dispute highlighting linking as copyrighted infringement was Academy Award-winning writer/director Quentin Tarantino's one million dollar lawsuit against Gawker Media and AnonFiles .com for linking to his leaked screenplay.[30] After Tarantino discovered that his screenplay for *The Hateful Eight*, an ensemble western that he planned to direct, had been leaked,[31] he gave a "widely reported" interview in which he declared that he would no longer make the film.[32] The next morning, online news organization Gawker reported the leak and cancelation of the film.[33] That article, *Quentin Tarantino Throws Temper Tantrum After Script Leak*, stated that "[a]fter learning Tuesday that his script for *The Hateful Eight* was leaked, Quentin Tarantino . . . decided to cancel the movie" and "then called Mike Fleming Jr. at *Deadline* so he could make his anger public."[34] Gawker's article added, "if anyone would like to . . . leak the script to us, please do so at [the provided email address]."[35]

The next day, the website "The Wrap" published an article claiming that it had "obtained a copy of Tarantino's script that's making its way around Hollywood" and that "Hollywood assistants are now promulgating a link anyone can use to download a PDF of the script that will no doubt end up online in the coming days."[36] The screenplay then appeared on AnonFiles.com and Scribd.com.[37] Later that day, Gawker published a follow-up article reporting that "a document that appears to be the script has been made public online."[38] Gawker did not post the screenplay, but inserted links to AnonFiles.com and Scribd.com, with a note: "Enjoy!"[39]

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[30] Complaint, *supra* note 4, at 13.

[31] He learned of the leak January 21, 2014. Order Granting Defendant Gawker Media's Motion to Dismiss at 2, Tarantino v. Gawker Media, LLC., No. CV 14-603, 2014 WL 2434647 (C.D. Cal. 2014) (hereinafter "Order").

[32] In the interview, Tarantino also stated that he had given the screenplay to six people, and opined the source of the leak. He added that he still planned to publish the screenplay. *Id.*

[33] *Id*.

[34] Lacey Donohue, *Quentin Tarantino Throws Temper Tantrum After Script Leak*, GAWKER (Jan. 22, 2014), http://defamer.gawker.com/quentin-tarantino-throws-temper-tantrumafter-script-le-1506541036, [http://perma.cc/3QQT-FQ7E]; Order, at 2.

[35] Complaint, *supra* note 4, at 6.

[36] Order, at 2.

[37] *Id*.

[38] Lacey Donohue, *Here Is the Leaked Quentin Tarantino Hateful Eight Script*, GAWKER (Jan. 23, 2014), http://defamer.gawker.com/here-are-plot-details-from-quentin-tarantinos-leaked-1507675261, [http://perma.cc/Z79U-HX3A].

[39] Complaint, *supra* note 4, at 2, 5.

Tarantino sued Gawker and AnonFiles.com. He alleged that by posting its articles and links, Gawker was "contributing" to the infringement of the copyrighted script and hurting its market value,[40] and that AnonFiles.com directly or indirectly caused, contributed to, enabled, facilitated, aided, abetted, induced and/or participated in the infringement.[41] Peremptorily, Tarantino added that Gawker had exceeded the bounds of fair use, because it had not merely reported the leak, but "crossed the journalistic line by promoting itself to the public as the first source to read the entire Screenplay illegally" as evidenced by their headline boasting "Here Is the Leaked Quentin Tarantino *Hateful Eight* Script," and inserting links for downloading the screenplay.[42]

Gawker moved to dismiss, asserting that Tarantino had not alleged any direct infringement on which to ground his claim. The court agreed and dismissed Tarantino's complaint. The court began by stating that the complaint alleged that Gawker was a contributory, rather than a direct, copyright infringer because it "facilitat[ed] and encourag[ed] the public's violation of plaintiff's copyright in the screenplay" by providing links to the copies posted on AnonFiles.com and Scribd.com.[43] That said, the complaint had not identified any third-party infringer, the exact right that was infringed, the date or details of any instance of third-party infringement, or how Gawker caused, induced, or materially contributed to such infringement.[44] Rather, the complaint merely speculated that direct infringement must have occurred.[45] Nonetheless, "[s]imply viewing a copy of allegedly infringing work on one's own computer does not constitute the direct infringement" sufficient to support a claim of contributory infringement;[46] as

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[40] *Id*. at 7–9; Matthew Belloni, *Quentin Tarantino's Gawker Law Suit Dismissed But Can Be Refiled,* THE HOLLYWOOD REPORTER (Apr. 22, 2014), http://www.hollywoodreporter.com/thr-esq/quentin-tarantinos-gawker-lawsuit-dismissed-698331, [http://perma.cc/KN8K-9ABE].

[41] Complaint, *supra* note 4, at 6–7.

[42] *Id*. at 2.

[43] Order at 4.

[44] *Id.*

[45] *Id*. (citing, *inter alia*, Flava Works, Inc. v. Clavio, 2012 WL 2459146, at *3 (N.D. Ill. Jun. 27, 2012) dismissing contributory infringement claim where complaint failed to allege facts that some third-party was "infringing with the assistance and knowledge of" defendant).

[46] *Id*. at 3 (citing Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146, 1169 (9th Cir. 2007) (viewing pages containing infringing images, but not "stor[ing] infringing images on their computers," is not infringement)).

long as a viewer did not download and store the screenplay, viewers had not infringed.[47]

Copyright Infringement

These legal disputes underscore that whether a linker to copyrighted material is liable for infringement remains unclear. Although *Grokster*[48] countenanced secondary liability for the infringing acts of third parties, courts have had little occasion to address the copyright implications of linking, and most claims have involved automated search engines, rather than individuals who actively choose to link to copyrighted content. *Aereo* has now clarified that under the Copyright Act's Transmit Clause, Internet transmissions and communications of copyrighted materials implicate public performance and public display rights. This standard both brings the linking issue to the forefront and recalibrates direct and secondary liability arising out of linking to copyrighted works.

The Rights Granted to a Copyright Owner

To state a claim for copyright infringement, a plaintiff must establish that she owns a valid copyright in the work at issue and that one of its exclusive rights granted by the Copyright Act has been violated.[49] The Copyright Act grants the copyright owner the exclusive rights: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to display the copyrighted work publicly."[50] Because the copyright owner possesses only

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[47] *Id* at 4.

[48] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[49] *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1290 (11th Cir. 2011).

[50] 17 U.S.C. § 106 (2002). There is also a sixth right applicable only to sound recordings.

these rights in relation to the work, many unauthorized uses of a copyrighted work do not infringe.[51]

Determining whether linking to a copyrighted screenplay, television program, movie, or other copyrighted work infringes requires reviewing the rights potentially at issue: the rights to reproduction, distribution, public performance, and public display.

The Right to Reproduce Copies

The Copyright Act grants the owner of a copyrighted work the exclusive right to reproduce or make copies of that work. According to the Act, a copy is a material object "in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[52] A work is "fixed" if it is in a tangible medium in some sufficiently permanent form.[53] This excludes "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television . . . or captured momentarily in the 'memory' of a computer."[54] Therefore, simply viewing, listening to, reading on-line, or watching a visual display of a copyrighted work does not infringe on the reproduction right, because no new tangible, permanent copy of the work is made.[55]

In the textual world determining whether a copy has been made is relatively easy; in the digital world, making that determination is more difficult. Courts have found that screen shots,[56] scanned versions of student

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[51] Los Angeles News Service v. CBS Broad. Inc., 305 F.3d 924, 936–37 (9th Cir. 2002).

[52] 17 U.S.C. § 101 (2010).

[53] *Id.*; Matthew Bender & Co., Inc. v. W. Pub. Co., 158 F.3d 693, 702 (2d Cir. 1998); *see* Capital Records, LLC v. ReDigi, Inc. 934 F. Supp. 2d 640, 649 (S.D.N.Y. 2013); Order at 5–6 (the creation of a new material object defines the reproduction right). The House and Senate Reports on the Copyright Act explained: "the right 'to reproduce the copyrighted work in copies' means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form . . . ." H.R. REP. NO. 94-1476, at 61 (1976); S. Rep. No. 94-473, at 58 (1975).

[54] H.R. REP. NO. 94-1476, at 53.

[55] *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 517 (9th Cir. 1993); Religious Technology Center v. Netcom On-Line Communication Services Inc., 907 F. Supp. 1361, 1378 (N.D. Cal. 1995); *see also* David Nimmer & Melville B. Nimmer, NIMMER ON COPYRIGHT § 8.02 ("in order to infringe the reproduction right, the defendant must embody the plaintiff's work in a 'material object'").

[56] *See* Sony Entm't. Am., Inc. v. Bleem, 214 F.3d 1022, 1026 (9th Cir. 2000) (screen shot used in advertising found to be fair use).

papers,[57] digitized library books,[58] and text and photographs posted to a website, stored on a computer server, or in the computer's permanent memory[59] all constitute copies. Software[60] and digital materials (such as digital musical files[61]) downloaded to a computer are also copies, because the downloader's computer transfers a version of the material into its own memory or hard drive;[62] this renders the item "fixed" in a sufficiently "stable" form to qualify for protection under the Act.[63] As one court addressing the transfer of digital music files explained, the "Internet transfer of a file results in a material object being reproduced . . . This understanding is, of course, confirmed by the laws of physics. It is simply impossible that the same 'material object' can be transferred over the Internet."[64]

By contrast, audio streams, images, and audiovisual displays that appear transiently or contemporaneously on a television or computer screen, but disappear once the computer, television, or video game is turned off are

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[57] *See* Vanderhye v. iParadigms, 562 F.3d 630, 641 (4th Cir. 2009) (finding student papers digitized and used in conjunction with a computer program to detect plagiarism were copies).

[58] Authors Guild, Inc. v. HathiTrust, 755 F.3d 90, 91 (2d Cir. 2014) (finding books digitized for visually-impaired patrons and to enhance searchability were copies).

[59] *Perfect 10*, 508 F.3d at 1160 (citing *MAI Sys. Corp.*, 991 F.2d at 517–18; 17 U.S.C. § 101); Soc'y of The Holy Transfiguration Monastery v. Gregory, 689 F.3d 29, 55 (1st Cir. 2012).

[60] *MAI Sys. Corp.*, 991 F.2d at 517–18 (quoting 17 U.S.C. §101).

[61] *Napster*, 239 F.3d at 1014; Capital Records v. ReDigi, Inc., 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013); Order at 6.

[62] *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

[63] *Perfect 10*, 508 F.3d at 1160 (quoting 17 U.S.C. §101); *see MAI Sys. Corp.*, 991 F.2d at 517–18; *London-Sire Records*, 542 F. Supp. 2d at 166; *ReDigi*, 934 F. Supp. 2d at 649.

[64] *ReDigi*, 934 F. Supp. 2d at 649; Order at 6; *London-Sire Records*, 542 F. Supp. 2d at 173. Although the material object requirement requires a copy of the work to be made, destroying that copy does not negate the copying. Recently, Capital Records sued on-line music re-seller, ReDigi. ReDigi argued that since the First Sale doctrine permits a purchaser of a CD to resell it, it also permits a purchaser of digital music to resell it. Additionally, because the transfer protocol used by ReDigi destroyed the seller's original file upon completion of the transfer (ensuring that the total number of music files existing remained the same), the reproduction right was not implicated. The court stated that the transfer process involved a reproduction: Because digital music files are embodied in a new material object following their transfer via the Internet, the reproduction right is necessarily implicated. "Simply put, it is the creation of a *new* material object and not an *additional* material object that defines the reproduction right." *ReDigi*, 934 F. Supp. 2d at 649.

not reproductions.[65] For example, for a viewer to "view" online content on a computer screen, a temporary "copy" of the display is loaded into the RAM of the user's computer. If not, no image will appear on the user's monitor.[66] Yet, because the image disappears once the computer is turned off, it does not constitute a copy.[67] Devices and computer code that interact with or temporarily alter a copyrighted work's appearance to the viewer are also not reproductions, because they are not incorporated into any permanent, or "stable," form.[68] To illustrate, the Game Genie was a device that video game players could use to improve their play: it enabled players to alter individual features of a Nintendo game, such as a character's strength or speed, by selectively "blocking the value for a single data byte sent by the game cartridge to the [Nintendo console] and replacing it with a new value."[69] Nintendo asserted that the Game Genie-mediated audiovisual displays seen by players using a Game Genie were copies and derivative works of Nintendo's copyrighted videogame. The court disagreed, saying that since the displays were not fixed in any concrete or permanent form, but disappeared when the game ended or was turned off, no copies were created.[70]

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[65] *MAI Sys. Corp.*, 991 F.2d at 517–18; Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1378 (N.D. Cal. 1995).

[66] Kara Beal, Comment: *The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions*, 1998 BYU L. REV. 703, 708 (1998) ("When viewing a web page, the user's computer accesses the data detailing the page from the Internet and the image of the page is stored in the random access memory (RAM) of the computer. This image remains in the computer's RAM for the time that the user is viewing the page and then is replaced by other data.").

[67] *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1111 (9th Cir. 1998). Indeed, the legislative history of the Copyright Act cites an image on a computer screen as an example of something that is not a copy. H.R. REP. NO. 94-1476 (1976).

[68] *See Micro Star*, 154 F.3d at 1110–11. The Ninth Circuit illustrated this with an imaginary low-tech product it called the Pink Screener, i.e., a piece of pink cellophane stretched over a frame. When placed in front of a television, the Pink Screener makes the televisual image look pinker. That pink audiovisual display observed by the television viewer, however, does not constitute a copy of the work because it does not incorporate the modified pink image in any permanent or concrete form. If someone filmed the program by filming the screen covered by the Pink Screener, a tangible, permanent copy is created. *Id.* at 1111.

[69] Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992).

[70] *Id*. at 968. In *Micro* Star, the court remarked, "The Game Genie was dumb; it functioned only as a window into the computer program, allowing players to temporarily modify individual aspects of the game." 154 F.3d at 1111. In a case involving the video game World of Warcraft, the Ninth Circuit stated that if "a player's computer creates a copy of the game's software in the computer's random access

The Right to Distribute Copies

Related to the right to make copies, the Copyright Act grants the owner of a copyrighted work the right to distribute copies. According to the Copyright Act, a "distribution" occurs when a copy "changes hands"[71] or is actually distributed to the public by sale, other transfer of ownership, rental, lease, or lending.[72] For example, selling or sharing digital music files or copies of DVDs are distributions.[73]

Where no copy changes hands or transfer of ownership occurs, however, there is no distribution.[74] Similarly, distributing a device used in conjunction with (or code that operates on) a copyrighted work does not amount to a distribution of the underlying work. For example, the lawsuits against

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memory ('RAM'), . . . [t]his copy potentially infringes . . . ." MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 938 (9th Cir. 2011) (citing Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1121 (9th Cir. 1999)).

[71] Fox Broad. Co. v. Dish Network LLC, 747 F.3d 1060, 1070 (9th 2014); Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (citing 17 U.S.C. §106(3)). The term "publication" is sometimes used interchangeably with distribution, but is a legal word of art. For more detail on "publication" and its history, see John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 36 (1st Cir. 2003).

[72] 17 U.S.C. § 106(3); *see e.g.* Kernel Records Oy v. Mosely, 694 F.3d 1294, 1303 (11th Cir. 2012).

[73] U.S. v. Am. Soc'y of Composers, Authors, and Publishers, 627 F.3d 64, 73 (2d Cir. 2010) (holding that a transmission of a copy is a distribution, but not a performance); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 174 (D. Mass. 2008) (concluding that electronic file transfers fit within the definition of "distribution of a phonorecord"); Matt Jackson, *Linking Copyright to Homepages*, 49 FED'L COMMUN. L.J. 731, 748 (April 1, 1997); Reno v. ACLU, 521 U.S. 844, 853 (1997) ("any person or organization with a computer connected to the Internet can 'publish' information").

[74] 2 PAUL GOLDSTEIN, COPYRIGHT § 5.5.1, at 5:102 (2d ed. 2000, 2005 supp.) (to infringe the distribution right, "an actual transfer must take place; a mere offer for sale does not suffice"); 2 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.11[D] (2007) (infringement of the distribution right requires an actual dissemination of copies); Elektra Entm't Grp., Inc. v. Barker, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) ("support in the case law for the 'make available' theory of liability is quite limited"); *London-Sire Records*, 542 F. Supp. 2d at 169 ("defendant cannot be liable for violating the . . . distribution right unless a 'distribution' actually occurred"). In *ReDigi*, Capitol Records argued that, independent of whether a sale occurred, ReDigi had violated the distribution rights simply by making Capitol's recordings *available* for sale, but the court disagreed. It did, however, determine that a reproduction has been made and that right infringed. Capitol Records v. ReDigi, Inc., 934 F. Supp. 2d 640, 640 (finding infringement of the reproduction and distribution rights, but not the public performance right).

satellite provider Dish alleged that by enabling viewers to watch "Hopper-enabled" blocks of primetime programming (i.e., designated blocks of programming into which Dish had inserted code that caused the recording to skip commercial blocks), Dish had distributed copyrighted content. For purposes of ruling on that aspect of the motion, the court concluded that even if copies had been made by Dish, no copies had changed hands.[75] Instead, only data changed hands (such as the marking announcements and computer code that tell AutoHop when commercials begin and end).[76] Therefore, Dish did not violate the distribution right.[77]

The Rights to Perform and Display the Copyrighted Work Publicly

The Copyright Act also gives an owner of a copyrighted work the rights to both "perform" a work publicly[78] and "display" the work publicly.[79] These are corollary rights, realizing that some works are performed, some are displayed, and some can be both performed and displayed; consequently, they are discussed here (and in the statute's notes) in conjunction.[80] The Transmit Clause makes these rights both broader than they appear on their face and especially relevant to the online environment and contemporary communications media.[81]

According to the Transmit Clause, the right to "display" or "perform" encompasses performing, displaying, or showing a copyrighted work at a place open to the public *as well as* "transmitting or otherwise communicating" it to the public "either directly or by means of a film, slide, television image, or any other device or process."[82] This includes "the transmission of an image by electronic or other means, and the showing of an image on a

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[75] Fox Broad. Co. v. Dish Network, 747 F.3d at 1070; Fox Broad. Co v. Dish Network, 905 F. Supp. 2d 1088, 1106 (C.D. Cal. 2012); *see* Andrew Wallenstein, *Dish DVR Spurs Warning*, DAILY VARIETY, May 29, 2012, at 1.

[76] Fox Broad. Co. v. Dish Network, 905 F. Supp. 2d at 1106 (noting data changes hands but not the copyrighted work).

[77] *Id.*

[78] 17 U.S.C. § 106(4) (2012). Section 110 also designates eleven types of performances that do not infringe within the meaning of the Act.

[79] 17 U.S.C. § 106(5) (2012).

[80] *See* H.R. REP. NO. 94-1476 (1976); 17 U.S.C. § 101 (2012).

[81] *See Aereo*, 134 S.Ct. at 2510; Hubbard Broad. v. S. Satellite Sys., Inc., 777 F.2d 393 (8th Cir. 1985).

[82] The Act's Transmit Clause defines this to include the right to "transmit or otherwise to communicate a performance or display . . . to the public, by means of any device or process . . . ." 17 U.S.C. § 101. The amended statute clarifies that to "perform" or display an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Id*.

cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system."[83] Essentially, the Transmit Clause provides that one can perform or display by transmitting, or circularly, a transmission of a copyrighted work constitutes a performance or display of it. Indeed, Congress clarified that the definition of "transmit" is purposely broad enough so as to include:

> *all conceivable forms and combinations* of wires [sic] or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public *in any form*, [it constitutes a public performance or display] within the scope of clauses (4) or (5) of section 106.[84]

This section of the Copyright Act was an amendment to undo the Supreme Court's prior holdings that cable television providers retransmitting copyrighted broadcasts did not "perform" those works, and so were not infringing on them.[85] Hence, §106(4) and §106(5) clarify that a transmission (or retransmission) of a copyrighted work constitutes a performance or display of it.[86] As such, a singer performs within the meaning of §101(4) when she sings a copyrighted work, a broadcaster performs or displays (via transmission) when it telecasts that performance, and a viewer displays/performs (via transmission) when it watches that performance on a computer or television screen.[87]

Recently, the Supreme Court applied the Transmit Clause to hold that internet television service Aereo "performed" copyrighted works "publicly" by transmitting them online to viewers.[88] Aereo captured broadcast signals, translated them into data, transmitted that data over the Internet, and saved them in viewer-specific folders on Aereo's central hard drive. Then, when an Aereo subscriber wanted to stream a particular television show, she went online, clicked the corresponding selection, and Aereo transmitted the pro-

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[83] H.R. REP. NO. 94-1476.

[84] *Id*. (quoting 17 U.S.C. § 101) (emphasis added).

[85] *Aereo*, 134 S.Ct. at 2510.

[86] *Id*. at 2514.

[87] *See id.*; *Am. Soc'y of Composers, Authors, & Publishers*, 627 F.3d at 74. In *Aiken*, also a pre-1976 Copyright Act case, the Court said that a recipient of a broadcast, such as a listener, does not perform when he turns on a radio that broadcasts a performance of a musical work. Twentieth Century Music Corp. et al. v. Aiken, 422 U.S. 151, 161–63 (1975). Under the 1976 Copyright Act's articulation of the public performance right, this is no longer the case. *Aereo*, 134 S.Ct. at 2505–06.

[88] *Aereo,* 134 S.Ct. at 2510.

gram to her. Aereo asserted that it was not performing or transmitting content, but was providing equipment, like a cable system or DVR, and that any act that infringed was committed by the viewers using Aereo's equipment.[89]

The Supreme Court rejected this argument.[90] It explained that when Aereo streams a program over the internet by means of technology,[91] Aereo's system is communicating the copyrighted work by means of a device or process."[92] Because the work's "images and sounds are contemporaneously visible and audible on the subscriber's computer (or internet-connected device)," Aereo is transmitting a performance whenever its subscribers watch a program.[93] Consequently, Aereo was involved in the process of transmitting content, and, thus, "performed" that content.[94]

The Court further stated that a transmission or communication can involve a set of actions.[95] As such, when an entity "communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."[96] Indeed, to perform or display publicly encompasses indirect transmission to the ultimate public or the acts that result in the public seeing it.[97] In one case, satellite carrier Primetime 24 captured and uplinked copyrighted NFL broadcasts to satellite subscribers in Canada.[98] Primetime 24 asserted that this was not a public display of the broadcast, because the only display or performance occurred during the downlink from its satellite to viewers in Canada where the U.S. Copyright Act does not apply. The Second Circuit, however, held that the uplink signal transmission captured in the United States was a critical step in the

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[89] *Id.* at 2507.

[90] *Id.*

[91] *Id*. ("Here the signals pursue their ordinary course of travel through the universe until today's 'turn of the knob'—a click on a website—activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet.")

[92] *Id.* at 2509.

[93] *Id.*

[94] *Id.*

[95] *Id*.

[96] *Id.* As one court explained in the context of digital music streaming, the "stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory: This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission." *Am. Soc'y of Composers, Authors, & Publishers*, 627 F.3d at 74.

[97] WGN Continental Broad. Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982).

[98] NFL v. Primetime 24 Joint Venture, 211 F.3d 10 (2d Cir. 2000).

process by which the copyrighted work made its way to and was displayed or transmitted to a public audience. Accordingly, these actions infringed on the NFL's public display right.[99]

Further, the performance and display rights apply only to *public* displays and performances, not private ones.[100] In other words, only a transmission, performance, or display that is public infringes.[101] The "public" is defined as a substantial number of people, outside of a normal circle of family and social acquaintances, or a group of significant number.[102] The people comprising "the public" need not be situated together, spatially or temporally, or watch the transmission on the same device.[103] A display or performance to the public need not even be received or perceived at the same time.[104] Indeed, in *Aereo*, the Court rejected the notion that sending content to multiple individual subscribers to watch on their individual pieces of equipment at varying times, rather than to one group of subscribers all at once, constituted multiple private transmissions. Instead, the transmissions were deemed public.[105]

Forms of Liability for Copyright Infringement

Direct Infringement

The rights of a copyright owner can be infringed directly or secondarily.[106] Direct infringement occurs when an individual engages in volitional conduct[107] that trespasses on the copyright owner's rights or acts on the copyrighted work directly.[108] An individual who has not directly commit-

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[99] *Id.* at 10–13.

[100] *Aereo,* 134 S.Ct. at 2516.

[101] *Id.*; Cartoon Network LP v. CSC Holdings, Inc. 536 F. 3d 121, 136 (2d Cir. 2008) (the statute does not encompass private transmissions).

[102] *Aereo*, 134 S.Ct. at 2509–10. Designating a group as a "private club" or transmitting a communication to thousands of individuals separately does not render it private. *See id*.

[103] *Id.* at 2510.

[104] *Id.* at 2509.

[105] *Id.* at 2507–10.

[106] *Grokster*, 545 U.S. at 937.

[107] *Id.* at 936–37; Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1168 (C.D. Cal. 2002); Bartholomew & Tehranian, *supra* note 11, at 1367.

[108] *See Aereo*, 134 S. Ct. at 2512–13 (Scalia, J., dissenting) (conduct must be directed at the copyrighted materials); *Cartoon Network*, 536 F.3d at 130–31; CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004) (there must be a culpable, causal nexus between the defendant and the direct infringement); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 147–48 (S.D.N.Y. 2009).

ted[109] or is too attenuated from the infringing act[110] is not directly liable.[111] When multiple parties are involved or technological systems are used in the allegedly infringing act, a court must determine which party engaged in the volitional conduct that violated the Act.[112] This usually rests on who actually copied, distributed, performed, or selected the copyrighted content.[113]

One who manufactures or provides a product (such as a DVR or copy machine), or services that permit automated copying or storage by others, but do not themselves copy, are not a direct infringers.[114] Accordingly, Internet service providers, cable companies, and other services that simply facilitate the transfer or storage of content or operate systems that automatically respond to a user request, but do not choose or act on content, do not commit direct acts of infringment.[115] Every circuit court that has considered the direct liability of an Internet provider or automated system service provider has adopted this rule.[116] By contrast, video-on-demand ser-

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[109] *See* Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060, 1066–68 (9th Cir. 2014); *CoStar Group*, 373 F.3d at 550; Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1369–70 (N.D. Cal. 1995) (direct infringement requires a volitional act by defendant).

[110] *Grokster,* 545 U.S. at 937; *CoStar Group*, 373 F.3d at 550 ("There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner [used by others to make illegal copies] himself trespassed on the exclusive domain of the copyright owner."). *See also Cartoon Network*, 536 F.3d at 130–133 (the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render provider directly liable for copyright infringement); *Netcom*, 907 F. Supp. at 1369–70 (direct infringement requires a volitional act by defendant; automated copying by machines occasioned by others does not suffice).

[111] "[V]olitional-conduct is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant's conduct is infringing . . . ." *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting).

[112] *See id.* at 2512 (Scalia, J., dissenting).

[113] *Id.* at 2513 (Scalia, J., dissenting); *Cartoon Network*, 536 F.3d at 131–32; *CoStar Group*, 373 F.3d at 550.

[114] *See Grokster*, 545 U.S. at 960 (Breyer, J., concurring); N.Y. Times Co. v. Tasini, 533 U.S. 483, 489 (2001) (print publisher obtained, coded, and transmitted articles); *CoStar Group*, 373 F.3d at 550; Parker v. Google, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006).

[115] *See N.Y. Times Co.*, 533 U.S. at 489; *Netcom*, 907 F. Supp. at 1369–70.

[116] Fox Broad. Co. v. Dish Network L.L.C., 747 F.3d 1060, 1066–68 (9th Cir. 2013); *CoStar Group*, 373 F.3d at 550; *Cartoon Network*, 536 F.3d at 130–33; Field v. Google Inc., 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (internet search engine not directly liable for automatic copying made during the engine's caching process); Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (electronic bulletin-board operator not directly liable for users who made infringing copies by uploading to or downloading bulletin board content).

vices (such as Netflix or Time Warner Entertainment On Demand) that curate and provide content, or a service that locates and uploads content itself[117] act directly on the copyrighted content. Even though the service has an element of automaticity in that it transmits in response to a subscriber's click of a mouse or remote control, before that content could be made available as a viewing option, a human (i.e., the service) committed a volitional act by choosing that specific copyrighted content and making it available.[118]

For example, Internet service provider Netcom was sued because a user posted copyrighted Scientology works on an electronic bulletin board (which were then automatically stored on Netcom's server) that other users accessed.[119] The court held that Netcom was not directly liable for any infringement, because it did not commit any volitional, infringing act of copying or posting. The court reasoned that Netcom's system, which allowed users to copy materials "is not unlike that of the owner of a copying machine who lets the public make copies with it."[120] The owner does not infringe simply by making his machine available, even though some customers might use it for infringing purposes.[121] Similarly, Cablevision offered a remote-storage DVR system[122] which recorded and stored TV programs not on an in-home DVR, but on a central hard drive maintained remotely by Cablevision.[123] With regard to the copies made in this process, the court assigned liability based on the volitional conduct of who caused the copy to be made.[124] In doing so, the court distinguished making a request of a human employee who then operates a copying system to make a copy from issuing a command directly to a system, which automatically obeys and engages in no volitional conduct.[125] Since it was the viewer, not

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[117] *N.Y. Times Co.*, 533 U.S. at 489.

[118] *Aereo*, 134 S. Ct. at 2514 (Scalia, J. dissenting). Although the dissenters in *Aereo* urged that Aereo was not engaged in any volitional conduct "for the sole and simple reason that it does not make the choice of content," *id.*, this article suggests that Aereo did, in fact choose content: it affirmatively chose to provide and would transmit upon request all of the copyrighted content it could find. Aereo made available every television program available to its customers.

[119] *Netcom*, 907 F. Supp. at 1365–66.

[120] *Id.* at 1369.

[121] *See id.*

[122] *Cartoon Network*, 536 F.3d at 124.

[123] *Id.* at 124.

[124] *See id.* at 131.

[125] *Id.* at 131. The court explained that the doctrine of causation-based liability places liability on one "whose 'conduct has been so significant and important a cause that [he or she] should be legally responsible.'" *Id.* at 132 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 42, at 273 (5th ed. 1984)).

Cablevision, who actually caused the copies to be made, Cablevision was not directly liable.[126]

This does not mean that the acts are lawful, but only that they do not result in *direct* liability. Instead, liability must be assessed using the principles of secondary infringement.[127] Indeed, most copyright infringement complaints against equipment manufacturers and service providers assert secondary infringement.[128]

Secondary Infringement

Secondary infringement holds one responsible for the infringing acts of a third party.[129] Although not expressly articulated in the Copyright Act,[130] the Supreme Court has applied the concept of secondary infringement for more than a century.[131] It is particularly apt to the digital world: when a service or product is used by others to infringe directly,[132] it is often more effective for a copyright owner to sue the third party who contributed to or vicariously benefitted from that direct infringement than to sue multiple direct infringers individually.[133]

Importantly, secondary infringement is not a version of less culpable infringement akin to a misdemeanor infringement, but is instead premised on an act of direct infringement and extends liability to certain parties who were culpably involved in, central to, or controlled and benefited from that infringing act.[134] As such, if there is no direct infringement, there can be no

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[126] *See Cartoon Network*, 536 F.3d at 132.

[127] *Aereo*, 134 S. Ct. at 2514 (2014) (Scalia, J., dissenting); *see Cartoon Network*, 536 F.3d at 132–33.

[128] *See Aereo*, 134 S. Ct. at 2512.

[129] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984); *Grokster*, 545 U.S. at 930; Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 149 (S.D.N.Y. 2009).

[130] *See Sony*, 464 U.S. at 434–35 ("The Copyright Act does not expressly render anyone liable for infringement committed by another. . . .The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.").

[131] *See* Kalem Co. v. Harper Bros., 222 U.S. 55, 62–63 (1911).

[132] *In re* Aimster Copyright Litigation, 334 F.3d 643, 651 (7th Cir. 2003).

[133] *See Grokster*, 545 U.S. at 929–30.

[134] *See Sony*, 464 U.S. at 437 (speaks to the relationship between the direct and secondary infringers); *Napster*, 239 F.3d at 1013 n.2. Judge Posner likened a contributory infringer to "an infringer's accomplice." Flava Works, Inc. v. Gunter, 689 F.3d 754, 754–55 (7th Cir. 2012).

secondary infringement.[135] The Supreme Court has identified two forms of secondary copyright infringement: contributory infringement and vicarious infringement.[136]

Contributory Infringement

"One infringes contributorily by intentionally inducing or encouraging direct infringement."[137] Contributory liability requires evidence that the defendant: (1) knew or should have known that infringement was occurring or that its product, device, or service could be used to infringe, and (2) materially contributed or actively assisted in, facilitated, or induce such infringement.[138]

For example, in *Grokster*, there was ample evidence that the defendants not only were aware that patrons were using their hosting services to infringe, but also took affirmative steps to promote their products for infringing uses.[139] There, record labels and movie studios alleged that users of Grokster's and Streamcast's peer-to-peer file-sharing services (including Morpheus and Gnutella) were directly infringing by "sharing" copyrighted materials over the network and that Grokster and Streamcast were contributorily infringing because they knowingly induced and furthered these acts.[140] The Supreme Court agreed[141] that when there is sufficient evidence that the defendant not only made or distributed a product or service that is used to infringe but also intended and affirmatively encouraged people to use it in that way,[142] liability for the infringing acts of third parties is appropriate.[143]

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[135] Fox Broad. Co. v. Dish Network, L.C.C., 905 F. Supp. 2d 1088, 1097–98 (C.D. Cal 2012); *Perfect 10*, 508 F.3d at 1169.

[136] *See Grokster*, 545 U.S. at 930.

[137] *Id.* at 930.

[138] *Id.* at 936–37*; see also Napster*, 239 F.3d at 1019–120; Arista Records, LLC. v. Doe 3, 604 F.3d 110, 118 (2d Cir. 2010).

[139] *Grokster*, 545 U.S. at 937–40.

[140] *Id.* at 939–41. *Grokster*'s "inducement rule," borrowed from patent law, as was *Sony's* staple article of commerce doctrine, provides that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 936–37.

[141] *Id.* at 934–35.

[142] *Id.* at 939–40.

[143] *Id.* at 935.

Among the evidence corroborating Grokster's and Streamcast's unlawful objective and affirmative actions to foster or induce infringement,[144] the services promoted themselves as Napster-substitutes,[145] solicited former Napster users,[146] gave away software to help former Napster users convert Napster files, distributed promotional materials touting itself as the "#1 alternative to Napster,"[147] and answered user questions about locating and playing music.[148] Additionally, neither company attempted to "develop filtering tools or other mechanisms to diminish the infringing activity using their software."[149] Under the circumstances, this combination of particularized knowledge and actions made "[t]he unlawful objective . . . unmistakable," thereby supporting secondary liability.[150]

Recently, the Ninth Circuit applied these principles to hold the operator of BitTorrent sites secondarily liable for users' infringements.[151] Although the defendant argued that he had not developed or distributed a "device" or "software" used to infringe (as Grokster and Sony had), the court disagreed.[152] It explained that the file-sharing systems the defendant operated provided "the site and facilities" for the infringement by users, and the record was replete with instances of the defendant personally responding to queries from users, helping them upload torrent files, locating requested copyrighted materials, troubleshooting playback issues, and instructing how to burn infringing content onto DVDs.[153] In combination and context, this

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[144] *Id.* at 934–37.

[145] Napster was also found secondarily liable for the infringements of its users. Napster, the grandfather of file-sharing sites such as Gnutella and Morpheus, was an integrated service that enabled users to locate, transfer, and download digital music files. It supplied users with software to download materials and links to music files. *Napster*, 239 F.3d at 1019; *see also Grokster*, 545 U.S. at 924 (describing Napster as a "notorious file-sharing service").

[146] *Grokster*, 545 U.S. at 937–38.

[147] *Id.* at 925; *see also Napster*, 239 F.3d at 1013; *In re* Aimster Copyright Litigation, 334 F.3d 643, 653 (7th Cir. 2003).

[148] *Grokster*, 545 U.S. at 938.

[149] *Id.* at 939.

[150] *Id.* at 939–41.

[151] For a description of the technology and protocols involved in Bit Torrent, see Columbia Pictures v. Fung, 710 F.3d 1020 (9th Cir. 2013).

[152] *Id.* at 1033. The court explained that *Grokster* was not limiting secondary liability to instances where a device was used to infringe, but was instead addressing the defendant's argument that it was insulated from liability (for commercial products capable of significant non-infringing uses), just as Sony was insulated from liability for infringing uses of the Betamax. *Id.* at 1033 (citing *Grokster*, 545 U.S. at 931–34).

[153] *Id.* at 1036.

evidence supported the conclusion that the defendant knew of and purposely and materially contributed to the infringement.[154]

By contrast, a defendant will not be liable where there is no evidence that he encouraged or induced infringement or possessed the culpable intent to infringe.[155] Therefore, neither creating or distributing products or services that could be used to infringe, nor the mere awareness of the potential for infringement is sufficient for liability.[156] For example, in *Sony*, Sony's awareness that its product could be used by consumers to infringe was not alone by itself sufficient to impute to it liability for infringement.[157] Universal Studios and Disney claimed that because Sony's VCRs enabled viewers to copy copyrighted works, Sony was enabling infringement, and should be held responsible as a contributory infringer.[158] The Court, however, held that secondary liability required more acute fault than awareness that a product could be used to infringe.[159] Rather, liability was appropriate only if Sony had sold the equipment knowing that consumers would use it to make unauthorized copies of copyrighted materials *and* had actively furthered or contributed to this illegal use.[160] Because Sony had not so furthered illegal uses and the product was capable of and generally used for non-infringing uses[161] (such as time-shifting and making copies for private home use), the Court concluded that most consumer uses of VCRs were fair use and did not infringe.[162] As there was no direct liability by users of the VCR, there was no basis for secondary liability of Sony.[163]

Generally, provided it does not curate or directly act on content, an Internet provider is not liable for the infringing acts of third parties. In one

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[154] *Id.* at 1023–24.

[155] *Perfect 10*, 508 F.3d at 1172.

[156] *Grokster* further stated that neither profiting from nor failing to prevent infringement *alone* is sufficient to prove the unlawful intent necessary for contributory liability, but when combined with other evidence, can support an intent to induce infringement. 545 U.S. at 937, 939–40; *see also* Jackson, *supra* note 74, at 741.

[157] *Grokster*, 545 U.S. at 932–33.

[158] *Sony*, 464 U.S. at 420, 434.

[159] *Grokster*, 545 U.S. at 932–33. The Supreme Court drew from patent, copyright's kin, for this concept. It cautioned that trademark, however, is fundamentally different from copyright, so its concepts of contributory infringement and liability often are inapplicable to copyright. *Sony*, 464 U.S. at 439 n.19. In particular, it rejected the standard for contributory trademark infringement articulated in *Inwood Laboratories, Inc v. Ives Laboratories*. 456 U.S. 844, 854–55 (1982).

[160] *Sony*, 464 U.S. at 439.

[161] Therefore, Sony's "equivocal conduct of selling an item with substantial lawful as well as unlawful uses" was absolved. *See also Grokster*, 545 U.S. at 932–33.

[162] *Sony*, 464 U.S. at 454–56.

[163] *Id.*

case, a user posted copyrighted content on a forum which was then automatically copied onto an Internet provider's system and distributed to users.[164] The court said that despite ISPs being conduits, they were not secondarily liable for the infringement of the poster.[165] Similarly, the requisite knowledge and action are typically lacking with search engines that compile materials automatically and generate results in response to a user request. Owners of copyrighted works available online have claimed that search engines infringe when they generate results and links corresponding to those works,[166] but courts have uniformly rejected these claims. The nature of a search engine is to automatically search for, compile, and catalogue information, and then automatically generate a list of links in response to a user request.[167] This automaticity removes any volitional aspect; therefore courts have found there is not sufficient basis for secondary liability.[168] This does not mean that linking does not infringe, but that under such circumstances, a search engine is not a direct infringer.[169]

In addition, the Digital Millennium Copyright Act (DMCA) provides that ISPs, search engines, and similar information location services are not subject to liability for infringement claims that arise "by reason of the storage at the direction of a user material that resides on a system or network controlled or operated by or for [a] service provider."[170] If, however, the

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[164] Religious Technology Center v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1367–69 (N.D. Cal. 1995) (online service was not liable for direct or vicarious infringement, but a triable issue existed as to whether it was liable for contributory infringement).

[165] *Id.* at 1370, 1372.

[166] *Field*, 412 F. Supp. 2d at 1115.

[167] A search engine uses an automated process wherein an automated program continuously crawls the Internet to locate, analyze, and catalog Web pages into searchable Web index (the search engine). *Id.* at 1110. It also stores the HTML code from those pages in a temporary repository or a cache. *Id.*

[168] *Id.* at 1106 (Internet search engine not directly liable for automatic copying made during the engine's "caching" process); Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 800–02 (9th Cir. 2007); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170 (9th Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).

[169] *See Field*, 412 F. Supp. 2d at 1118–22. In one of the Google cases, the district court opined that it if anyone was creating a copy, it was the users who clicked on the hyperlink to request the cached page. *Id.*

[170] Pub. L. 105-304, 112 Stat. 2860, 17 U.S.C. §§ 512(c)(1), (d); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012). Section 512(d) states that a service provider is not liable by reason of "linking users to an online location containing infringing material or infringing activity, by using information location

entity either has actual or constructive knowledge that the material or activity is infringing, or, upon becoming aware, fails expeditiously to remove or to disable access to the material, this defense is lost.[171] Additionally, 17 U.S.C. § 512(b)(1)(C) shields Internet service providers[172] from liability for the activities of their users and storage of web pages carried out through "an automated technical process" and "for the purpose of making the material available to users . . . who . . . request access to the material from [the originating site]."[173] The protection is lost if the entity receives a financial benefit directly attributable to the infringing activity[174] and fails to terminate repeat infringers.[175] Consistent with this standard, the Ninth Circuit

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tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

> (1) (A) does not have actual knowledge that the material or activity is infringing;
>
> (B) . . .is not aware of facts or circumstances from which infringing activity is apparent; or;
>
> (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
>
> (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
>
> (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity . . . .

[171] 17 U.S.C. § 512(d)(1).

[172] 17 U.S.C. § 512(k) defines "service provider" more broadly for purposes of subsection (c) than it does for subsection (a). "As used in . . . section[s] other than subsection (a), the term 'service provider' means a provider of online services or network access, or the operator of facilities thereof, and includes an entity described in subparagraph (A)."

[173] 17 U.S.C. § 512; H.R. REP. NO. 105-551, pt. 1, at 24 (1998); *see also Viacom*, 676 F.3d at 28, 39 (explaining that service providers are not limited to those who merely store material); UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 667 F.3d 1022, 1026, 1035 (9th Cir. 2011) (publicly accessible website that enables users to share videos with other users); Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2011) ("Because Photobucket offers a site that hosts and allows online sharing of photos and videos at the direction of users, Photobucket, like YouTube qualifies as a 'service provider' under § 512(k)(1)(B)"); Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 633-34 (S.D.N.Y. 2011); Corbis Corp. v. Amazon.com, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) ("Amazon operates web sites, provides retail and third party selling services to Internet users" but does not sell its own inventory).

[174] 17 U.S.C. § 512(d).

[175] 17 U.S.C. § 512(i)(1)(A).

stated that, to the extent that search engines' cached webpages constitute "copies," they were intermediate and temporary, thus falling within the DMCA's safe harbor.[176]

Vicarious Infringement

Another form of secondary copyright infringement is vicarious infringement. One "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[177] It is based on the maxim that whoever acts through another, acts as if he were doing so himself.[178] Vicarious liability does not require the defendant to know of the infringing act,[179] but arises out of the defendant's authority or control over the direct actor.[180] One is deemed to exercise control over an infringer when she has both the legal right to stop or limit the infringer's actions (and infringement) and the practical ability to do so.[181] For example, employers can be vicariously liable for the acts of employees,[182] and owners of restaurants and clubs can be vicariously liable for DJs and bands performing copyrighted music in their establishments.[183]

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[176] 17 U.S.C. § 512(b); *see Perfect 10*, 508 F.3d at 1169. Section 512(b) gives certain service providers a safe harbor against monetary damages for infringement if their activities involve copying only for "intermediate and temporary storage."

[177] *Grokster*, 545 U.S. at 930.

[178] *See* RESTATEMENT (SECOND) OF AGENCY § 212, cmt. a (1958) (stating the "general rule . . . that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result"); Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 745 (D. Md. 2003).

[179] Unlike contributory infringement, which has a relatively specific knowledge requirement, knowledge is not an element of vicarious liability. *See* Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); *see also* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262–63 (9th Cir. 1996).

[180] *See Sony*, 464 U.S. at 437 (noting that in many lower court copyright cases, the secondary infringer is in a position to control the infringement).

[181] *Grokster*, 545 U.S. at 930 n.9.

[182] *See* Vance v. Ball State University, 133 S. Ct. 2434, 2448 (2013); RESTATEMENT (THIRD) OF AGENCY, § 7.08 (2005).

[183] Broad. Music, Inc. v. Meadowlake, Ltd., 754 F.3d 353, 354 (6th Cir. 2014); Range Road Music, Inc. v. East Coast Foods, Inc., 668 F.3d 1148, 1155 (9th Cir. 2012); Warner Bros., Inc. v. Lobster Pot, Inc., 582 F. Supp. 478, 482 (N.D. Ohio 1984) (restaurant owner who hired musician to play in restaurant was vicariously liability when the musician infringed on copyrights); Warner Bros., Inc. v. O'Keefe, 468 F. Supp. 16, 20 (S.D. Iowa 1977) (individual who owned and ran a bar that featured live and jukebox performances of copyrighted material was vicariously liable for infringement).

In addition to possessing control over the infringer, to be liable one must profit from that direct infringement.[184] For liability, there must be a causal relationship between the infringing activity and the revenue, such that the defendant enjoys "an obvious and direct financial interest in the exploitation of copyrighted materials."[185] Evidence that "customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available,"[186] or that the infringing activity was the main draw, will suffice;[187] that an ISP receives revenue for providing Internet service will not.[188]

To illustrate, the Sea Bird Jazz Lounge and adjoining Roscoe's House of Chicken and Waffles hosted bands and DJs that performed copyrighted music.[189] Rather than suing the various performers, the copyright owners sued the owner of the venues, claiming he was vicariously liable for the infringements.[190] The court agreed that the owner derived financial benefit from the music (as it drew crowds) and had managerial authority over the employees, the power to hire and fire, and the power to stop the musical acts from appearing.[191] Consequently, the court found the owner vicariously liable.[192] In a similar case, the owners of a bar and grill popular for playing records and hosting live bands were sued.[193] One of the bar's owners averred that since *he* had not personally played the music and was unaware of the infringing actions, he was not liable.[194] The court rejected this argument,

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[184] *Grokster*, 545 U.S. at 930. To be clear, the Supreme Court's definition required that the defendant profit from the "direct infringement," not that the defendant directly profit from the infringement. *Id.* The Copyright Act defines "financial gain" as including "receipt, or expectation of receipt, of anything of value." 17 U.S.C. § 101 (2012). In *Napster*, the Ninth Circuit described this as having a direct financial interest in or realizing a financial benefit from the activities. *Napster*, 239 F.3d at 1022–23.

[185] Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963); *see also* Ellison v. Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004).

[186] *Ellison*, 357 F.3d at 1079.

[187] *See id.*; *Napster*, 239 F.3d at 1023 (finding that copyrighted music was primary draw for users).

[188] *See Ellison*, 357 F.3d at 1079. In *Ellison*, because there was inadequate proof that "customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available," the defendant was not vicariously liable. *Id.*

[189] *Range Road Music*, 668 F.3d at 1151.

[190] *Id.* at 1152.

[191] *Id.*

[192] *Id*. at 1155.

[193] *Broad. Music*, 754 F.3d at 354.

[194] *Id.*

stating that because the owner had the right and ability to supervise the performances and had an obvious financial interest in the infringement (inasmuch as it attracted customers)[195] he was vicariously liable.[196]

By contrast, the owners of a multi-media messaging network were not vicariously liable for third parties who sent copyrighted content over the network because they did not supervise the network's carriers or the content sent.[197] Indeed, merely possessing the general ability to locate infringing material and terminate users' access does not amount to the degree of control necessary to impute vicarious liability.[198] That a defendant could have implemented a system to prevent third-party infringements may suggest that it has some degree of control over infringers, but does not substitute for proof of a supervisory relationship to support vicarious liability.[199] Similarly, the right and ability to control necessary to remove an Internet provider from DMCA protection requires the provider to "exert[ ] substantial influence on the activities of users."[200]

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[195] *Id*.

[196] *Id.* Indeed, the court referenced *Sony,* in which the owner of a dance hall was vicariously liable when an orchestra hired to play music for the customers performed copyrighted works: "Substitute 'restaurant that offers dancing' for 'dance hall' and you have this case." *Meadowlake*, 754 F.3d at 355 (citing *Sony*, 464 U.S. at 437 n.18). Radio station owners who sold airtime to "independent" disc jockeys were also vicariously liable for the copyright infringement of those disc jockeys. Realsongs v. Gulf Broad. Corp., 824 F. Supp. 89, 92 (M. Dist. La. 1993); *see also* Boz Scaggs Music v. KND Corp., 491 F. Supp. 908, 913 (D. Conn. 1980) (corporate vice-president and general manager of radio station was vicariously liable for infringing conduct of radio station, since he oversaw operations, had a direct financial interest in the station, and failed to take any precautions against infringement).

[197] Luvdarts, LLC v. AT&T Mobility, LLC, 710 F.3d 1068, 1072 (9th Cir. 2013).

[198] UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006, 1030 (9th Cir. 2013); Viacom Int'l, Inc. v. YouTube, Inc., 676 F3d 19, 38 (2d Cir. 2012) ("the 'right and ability to control' infringing activity under § 512(c)(1)(B) 'requires something more than the ability to remove or block access to materials posted on a service provider's website'" (citing Capital Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

[199] *See Luvdarts*, 710 F.3d at 1072. To hold otherwise would confer liability based on the failure to change behavior, and blur the distinction between contributory and vicarious liability. *Id.* at 1071–72. Notwithstanding, the failure to implement a system can be circumstantial evidence of the intent to promote and foster infringement as a contributory infringer. *See Grokster*, 545 U.S. at 936–37.

[200] *Viacom*, 676 F.3d at 38; *see* 17 U.S.C. § 512(c)(1)(B) (2012); *Fung*, 710 F.3d at 1045.

Does Linking Implicate Copyright?

Defining Links and Linking

Determining whether linking to copyrighted material infringes, directly or secondarily, requires ascertaining what a link is and what it does in relation to the copyrighted work. As a threshold matter, complaints about linking do not fit within the same legal rubric any more than crimes, torts, and contract claims involving baseball bats fall under a single doctrinal heading of "Baseball Bat law."[201] Therefore, two different allegations of infringement must be distinguished: (1) using copyrighted materials *to designate a link* to copyrighted content, and (2) *linking to* the copyrighted material. The former asserts that the use of copyrighted material (usually by a search engine) as thumbnail or image link infringes on the reproduction, distribution, or derivative works rights.[202] For example, in *Kelly v. Arriba Soft Corporation*, a search engine downloaded images from websites, generated smaller, lower resolution versions of them, and used these thumbnails as links to the source websites.[203] In another set of cases brought by Perfect 10, Google and similar engines[204] created and stored in their caches (in con-

[201] For example, some complaints are about deep-linking that bypasses home pages. In these, the proprietor of the website hosting the linked-to material makes that material available publicly, but the link allows viewers to bypass the original sources' home pages (on which they sell advertising). Beal, *supra* note 67, at 704; Downing, *supra* note 27, at 158–59. For example, Ticketmaster complained that Tickets.com's linking to the Ticketmaster site infringed on Ticketmaster's copyright. The Court rejected the claim, explaining that no copying was involved; rather, the user is transferred to the genuine web page. The court analogized this to traditional indexing techniques or footnoting to a source, because a hyperlink "tells the reader where to find the referenced material." Ticketmaster Corp. v. Tickets .com, Inc., No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553, at *5–6 (C.D. Cal. Mar. 27, 2000).

[202] *See, e.g.,* Perfect 10, Inc. v. Visa Int'l Ass'n, 494 F.3d 788, 800–02 (9th Cir. 2007); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170 n.11 (9th Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1116–17 (9th Cir. 2007); *Kelly*, 336 F.3d at 815; *Field*, 412 F. Supp. 2d at 1118–22; *see also* Playboy Enter., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997) (images downloaded from website and posted on defendant's website infringed on display right).

[203] 336 F.3d at 815–16.

[204] Perfect 10, Inc. v. Amazon.com, Inc., *consolidated with* Perfect 10 v. Google, Inc., 508 F.3d 1146 (9th Cir. 2007); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 2007 U.S. App. LEXIS 11420 (9th Cir. Cal., 2007), *summary judgment granted* Perfect 10, Inc. v. Amazon.com, Inc., No. CV 05-4753 AHM (SHx), 2009 U.S. Dist. LEXIS 42341 (C.D. Cal. 2009); Perfect 10, Inc. v. Google, Inc. 653 F.3d 976 (9th Cir. 2011).

nection with links to content) thumbnail images of Perfect 10's copyrighted photos.[205] In each instance, the courts held that the defendants' uses of the copyrighted works were fair use:[206] the links were used for limited, archival and indexical purposes, helped users efficiently locate pertinent content, had been transformed into directory-like formats, and served a very different function than the originals.[207] The copies also did not substitute for, diminish the market for, or reduce the value of the originals.[208] These are traditional copyright and fair use cases despite the technological medium, so they do not pronounce a rule regarding copyright liability for linking.

Links may be easy to use, but they are not necessarily easy to define. Courts attempting to apply copyright principles from the textual, tangible world to the digital realm have been analogized to the following: footnoting or placing references in a printed text,[209] a library card catalogue that directs users to books,[210] a directory of the location of copyrighted works,[211] and roadway signs on "the information superhighway that both indicate direction [and] . . . take one almost instantaneously to the desired destination . . . ."[212] None of these, however, captures the unique communicative and technological operations of a link.[213]

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[205] *Perfect 10*, 508 F.3d at 1154, 1156; *Field*, 412 F. Supp. 2d at 1106.

[206] *Perfect 10*, 508 F.3d at 1160; *Field*, 412 F. Supp. 2d at 1118–22; *Kelly*, 336 F.3d 811 at 818–22; *see also* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (computer algorithm that identified and displayed thumbnails of video clips that were "related" to videos selected by user was closely related to, and followed from, storage itself, and was narrowly directed toward providing access to material stored at direction of users, fell within § 512(c) safe harbor protection).

[207] *Kelly*, 336 F.3d at 819–22; *Perfect 10*, 508 F.3d at 1165.

[208] *Perfect 10*, 508 F.3d at 1168; *Kelly*, 336 F.3d at 818; *Field*, 412 F. Supp. 2d at 1122.

[209] Jackson, *supra* note 74, at 734. Indeed, the ability to link documents has revolutionized both information retrieval and reading itself. *Id.*

[210] Beal, *supra* note 67, at 711.

[211] Flava Works, Inc. v. Gunter, 689 F.3d 754, 761 (7th Cir. 2012); *cf. Perfect 10*, 508 F.3d at 1159–61 (providing list of locations where copyrighted works are performed is not tantamount to performing or infringing on those works); *In re* Aimster Copyright Litig., 334 F.3d 643, 646–47 (7th Cir. 2003).

[212] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 339 (S.D.N.Y. 2000), *aff'd* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

[213] A link's URL may be an address or similar to the Dewey Decimal System, but a card catalogue does not take the patron to the book, deliver the book's content, or supply it if it has been checked out; an address of where copyrighted works may be found or performed is not the same as taxiing the viewer to the location or handing her a copy of the play; a footnote in an article does not provide a copy of the book cited.

A link is a mechanism of communication or transmission.[214] As most commonly understood by a computer user, a link is a designated line of text or image[215] that when clicked automatically reveals content on another webpage.[216] Hence, a link both "conveys information" and possesses "the functional capacity to bring the content of the linked web page to the user's computer screen."[217]

In terms of its operation, a link is essentially a request-response communication protocol—specifically, HTTP, hypertext transfer protocol—by which online content is accessed and displayed to computer users.[218] The web is composed primarily of HTML (Hypertext Markup Language) documents[219] located on and transmitted from servers.[220] A link is the Internet's uniform communication and transmission process by which web browsers (requestors) and servers (responders on which content is located) communicate and transmit information.[221] This is accomplished automatically: inserting a link into a document inserts a code containing the URL or "web address" of the linked-to document (i.e., the server on which that document

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[214] *See* Vangie Beal, *Link,* WEBOPEDIA.COM, http://www.webopedia.com/TERM/L/link.html, [http://perma.cc/74JY-KDLH] ("In communications, a link is a line or channel over which data is transmitted"); Tim Berners-Lee & Dan Connolly, *Hypertext Markup Language Version 2.0*, ACM DIGITAL LIBRARY, http://dl.acm.org/citation.cfm?id=RFC1866, [http://perma.cc/76TM-S3EU]; Tim Berners-Lee, *Making a Server*, WC3, http://www.w3.org/Provider/ServerWriter.html, [http://perma.cc/MUC7-6TH6].

[215] *See Link*, TECHTERMS.COM, http://www.techterms.com/definition/link, [http://perma.cc/TE7T-HW2R] (explaining a "link"); *Flava Works*, 689 F.3d at 756. An in-line (img-src) link uses an image rather than text. Commonly that image is of the linked-to material, such as a screenshot of a frame of a video or a thumbnail image of a photo. Framing, though sometimes used interchangeably with linking, refers to a specific type of img-src hyperlink that uses an image such as an opening frame of a video on the linked-to site. *See Flava Works*, 689 F.3d at 756.

[216] *See, e.g.*, *Corley*, 273 F.3d at 455 ("A hyperlink is a cross-reference (in a distinctive font or color) appearing on one web page that, when activated by the point-and-click of a mouse, brings onto the computer screen another web page.").

[217] *Id.*; *Perfect 10*, 508 F.3d 1155–56; Kelly, 336 F.3d at 816; *Link,* WEBOPEDIA.COM, supra note 215.

[218] *See* Berners-Lee & Connolly, *supra* note 215; Berners-Lee, *supra* note 215.

[219] The document is comprised of text interspersed with code or instructions. *Hyperlink*, WIKIPEDIA, http://en.wikipedia.org/wiki/Hyperlink, [http://perma.cc/9LQM-ZJBW].

[220] *Id.*; Berners-Lee & Connolly, *supra* note 215; Berners-Lee, *supra* note 215.

[221] *Hyperlink*, *supra* note 220.

is located)[222] and "a computer instruction that associates the link with the URL."[223] When a user clicks a link, her web browser automatically requests from the server the document specified by the URL,[224] thereby accessing the linked-to content and displaying it.[225] The viewer therefore sees or hears the content on the original site, "but does so without leaving the linking document."[226]

This understanding of links as a request-response-display transmission mechanism or communication process, by which content is accessed and displayed, can be evaluated vis-a-vis the rights of reproduction, distribution, public performance, and public display.

Does a Link Copy?

It is clear that a link is not and does not copy. A link enables a viewer to access and see linked-to content on the original website (or host server)[227] but does not reproduce or create any tangible, permanent version of it.[228] In fact, the legislative history for the Copyright Act states that images on a computer screen or "transient reproductions" captured in the "memory of a computer" are not copies,[229] and courts have held that a copyrighted work viewed on a screen is not a reproduction.[230] Accordingly, a link does not

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[222] *Flava Works*, 689 F.3d at 756; *see also* Beal, *supra* note 67, at 715–16 (regarding operation of the programming that allows one to "display that image on the site currently being viewed").

[223] *Corley*, 273 F.3d at 455; *Hyperlink*, *supra* note 220. "A 'computer program' is defined as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101 (2012).

[224] *See Flava Works*, 689 F.3d at 756; *Corley*, 273 F.3d at 455; Beal, *supra* note 67, at 737; *see also* Berners-Lee & Connelly, *supra* note 215; Berners-Lee, *Making a Server*, *supra* note 215.

[225] *See Corley*, 273 F.3d at 455 ("The code for the web page containing the hyperlink includes a computer instruction that associates the link with the URL of the web page to be accessed, such that clicking on the hyperlink instructs the computer to enter the URL of the desired web page and thereby access that page"); *see also Flava Works*, 689 F.3d at 756; Beal, *supra* note 67, at 710; *Kelly*, 336 F.3d at 816.

[226] *Kelly*, 336 F.3d at 816; *Flava Works*, 689 F.3d at 756.

[227] *See Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at *6.

[228] Although creating the hypertext link requires typing or inserting the URL of the hosting site, this is not copyrightable content, but an address or fact. Beal, *supra* note 67, at 724.

[229] H.R. REP. NO. 94-1476, at 53 (1976).

[230] *Perfect 10*, 508 F.3d at 1169; MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993); Religious Technology Center v. Netcom On-Line Communication Services, Inc. 907 F. Supp. 1361, 1378 (N.D. Cal. 1995).

implicate, let alone, infringe on the reproduction right.[231] Furthermore, because there is no direct infringement on the reproduction right, there can be no secondary infringement on the part of the linker.

Does a Link Distribute?

A link is not a distribution. A distribution requires that a material copy be disseminated or change hands.[232] Since viewing a copyrighted work online does not result in a copy being made, no copy can change hands. Consequently, a link does not infringe on the distribution right.[233]

If, after the accessing the copyrighted work, a viewer downloads or transfers it, there may be a reproduction or distribution *by that viewer*, but that is not caused by the link. Rather, it is an independent act committed by the viewer. With regard to secondary liability, the link is not a "but for" cause and does not affirmatively encourage that separate act of infringement. In fact, the nature of surfing the net is to browse content, not save and download it.

One caveat is that this traditional analysis presumes a tangible or permanent copy must be made to effect a distribution. Ultimately, this may not be true of the Internet. The Supreme Court has observed that methods of Internet communication are "constantly evolving and difficult to categorize precisely,"[234] and the Second Circuit has recognized that the Internet permits instantaneous worldwide distribution of copyrighted material without ever creating a tangible copy.[235] This view suggests that because clicking a link in the digital world makes a copyrighted work available to multiple people in multiple places on-line, inserting a link to content may be comparable to a distribution of tangible copies in the textual world.[236]

Does a Link Perform or Display?

Because a link is a request-response-display communication protocol or transmission process by which online material is accessed and made visible, it necessarily implicates the Transmit Clause of the Copyright Act. Pursuant to the clause, the rights "to perform" and "to display the copyrighted work

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[231] *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at *6; *Kelly*, 336 F.3d at 817.

[232] *See Kelly*, 336 F.3d at 817 (noting that to infringe on the distribution right, a reproduction must be made and distributed).

[233] *See Perfect 10*, 508 F.3d at 1161–64.

[234] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997).

[235] *Corley*, 273 F.3d at 453.

[236] *Id.*

publicly" include the right to "transmit or otherwise to communicate [it] . . . by means of any device or process . . . ."[237] As the mechanism or process by which online content is transmitted (hence displayed or performed), inserting a link to a copyrighted work transmits it (or is part of a process resulting in the display/performance of it).[238] Links transmit content, so links *are* performances or displays (or both) of that content.

The Supreme Court in *Aereo* underscored that a transmission itself effects a display or performance.[239] In that case, subscribers to Aereo's cloud-based television service would peruse Aereo's program guide, click a selection, and then Aereo would stream the program to the subscriber's webrowser.[240] Although the system was inert until clicked by the viewer, and involved several steps (including cycling the content through a secondary location) before it reached the viewer, the Court held that transmissions occured.[241] Even the dissent agreed that this process "fits the statutory defi-

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[237] 17 U.S.C. § 101 (2012).

[238] In *Fortnightly Corp. v. United Artists Television, Inc.*, a CATV provider placed antennas on hills and used coaxial cables to carry the signals received to the television sets of subscribers. The system amplified and modulated the signals, but the Court ruled that the CATV provider "neither edited the programs received nor originated any programs of its own." 392 U.S. 390, 392 (1968). Rather, a subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *Id.* The Court thus concluded that this did not constitute a performance by the CATV provider. *Id.* at 400. The Court "drew a line" that placed the originating broadcaster (who selected, procured, and propagated the programs) on one side, and anyone who received or enabled access to the broadcasts (be it a viewer or cable television operator) on the other. The former performed; the latter did not. *Id.* at 399–400. The 1976 Copyright Act's Transmit Clause changed this; now the broadcaster, retransmittor, and viewer all "perform" or display.

[239] *Aereo*, 134 S.Ct. at 2507–09 (holding that one who transmits a work to the public is displaying or performing that work publicly); *see also* 17 U.S.C. § 101 (to "transmit" is to communicate by any device or process whereby images or sounds are received beyond the place from which they are sent," and to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible"). Indeed, the legislative history of the Copyright Act removes any doubt: "any act by which the initial performance . . . is transmitted, repeated, or made to recur would itself be a 'performance.'" H.R. REP. NO. 94-1476, at 63 (1976).

[240] *Id.* Chloe Albanesiuis & Jamie Lendino, *Aereo: Everything You Need to Know*, PC WORLD, Apr. 22, 2014, *available* at http://www.pcmag.com/article2/0,2817,2417555,00.asp, [http://perma.cc/8AQN-HCDV].

[241] *Aereo*, 134 S. Ct. at 2511. Ultimately, the technology of how the content was delivered to the viewer was irrelevant. *Id.* at 2508. What was relevant was that "by means of its technology" Aereo's system "receive[d] programs that have been re-

nition of a performance to a tee" because it "showed" the copyrighted content; it disagreed with the majority over who was responsible for the transmission, not whether there was one.[242]

With regard to how inserting a link effects a performance or display, the key is that by virtue of (or as a result of) a transmission of the copyrighted work, a display or performance has occurred or been otherwise communicated: when one links to a movie or script posted online and a computer user clicks that link, it causes the instantaneous display or performance of the content.[243] Just like the viewers in *Aereo* who clicked a button corresponding to the television show, which then "activate[d] machinery that intercepts and reroutes" content over the Internet to the subscribers' screens,[244] computer users who click a link to copyrighted content activate machinery that locates and displays that content on their screens. This is a transmission. That the process involves HTML and multiple steps is irrelevant.[245] Indeed, the Supreme Court has stated that a transmission is often accomplished through multiple steps, "a set of actions,"[246] or "multiple, discrete transmissions."[247] While the dissenting justices in *Aereo* were persuaded by Aereo's argument that it did not perform the copyrighted works[248] because Aereo's server automatically responded to subscribers' clicks requesting content, the majority rejected this view.[249]

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leased to the public and carr[ied] them by private channels to additional viewers." *Id.* at 2506 (citing *Fortnightly*, 392 U.S. at 407).

[242] *Id.* at 2514 (Scalia, J., dissenting). In the dissent's opinion, the viewers called all the shots, so the transmission was not a product of Aereo's volitional conduct. *Id.*

[243] "The Web was designed with a maximum target time to follow a link of one tenth of a second." Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844, 849-53 (1997).

[244] *Aereo*, 134 S. Ct. at 2507. In fact, much like a link shows nothing and transmits nothing until clicked, but once clicked automatically and immediately shows content, Aereo's system remained inert until a subscriber clicked a program she wanted to watch. *Id.* at 2501.

[245] Even if the HTML address, code, and the copyrighted content are considered separate components, they are, nevertheless, parts of a process that results in the transmission of the copyrighted content. In fact, the Copyright Act says that a display can occur directly (presumably by showing a copy or the original) *or* by "any other device or process." 17 U.S.C. § 101 (2012). Inserting a link that transmits code and an Internet address is one such "other process" by which the work or a copy of it is shown.

[246] *Aereo*, 134 S. Ct. at 2509.

[247] *Id.*

[248] *Id.* at 2514 (Scalia, J., dissenting). "[I]t is only the subscribers who 'perform' when they use Aereo's equipment to stream television programs to themselves." *Id.* at 2504 (explaining Aereo's position).

[249] *Id.* at 2507.

The notion that a link transmits or otherwise communicates, and thus can subject a linker to liability, is consistent with the DMCA. DMCA section 512 exempts network service providers and search engines which meet certain conditions from liability by reason of "linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link."[250] This exemption presumes that linking to copyrighted material *can* infringe, for if there could be no liability from linking, there would be no need to exempt certain linkers. Additionally, the DMCA's exemption only applies to certain entities.[251] While some linkers are exempt, others remain liable. In fact, that section 512 protection is lost when the entity either (a) has notice that linked-to content is copyrighted and that actions infringe, or (b) financially benefits from the act of linking and has the ability to control it.[252] If an entity can lose protection from liability, then, obviously, it can be liable for linking.

Does a Link Perform or Display "Publicly"?

Depending on the number of people who can access a link, the performance or display may be public. When a link is inserted into a website or online document accessible by the public, available to multiple users, or sent to a number of individuals, the link's transmission is public. As noted in *Aereo,* it is not necessary that every viewer clicks or receives the content at the same time or on one piece of equipment (as they are theoretically able to do).[253] This is a matter of aggregate numbers, not labels or membership privileges. In other words, that a site requires a subscription or payment does not make it private. If, by contrast, the link is only sent to a few friends or family members or is only available to a limited number of internal users, it can be deemed private.[254]

In contrast, because only a *public* performance or display infringes, generally a computer user who clicks on a link does not infringe. Recall that under the Transmit Clause, anyone who transmits or retransmits a copyrighted work performs or displays it. This means that a person who watches the broadcast of a copyrighted work also performs or displays it.[255] Similarly, a computer user who clicks a link and watches or reads the copy-

[250] 17 U.S.C. § 512(d).
[251] 17 U.S.C. § 512(d).
[252] 17 U.S.C. §§ 512(c)(1)(A)-(B).
[253] *Aereo*, 134 S. Ct. at 2510.
[254] *Id.*; *see also Cartoon Network*, 536 F. 3d at 134.
[255] *Aereo*, 134 S. Ct. at 2500.

righted work is displaying or performing that work. To infringe, however, the display or performance must be "public." An individual computer user who clicks a link and watches on her own screen is performing or displaying privately, not publicly.[256] Therefore, there is no *public* display or performance, and no infringement.

Mixed Signals Prior to *Aereo*

Prior to *Aereo*, only a handful of courts had considered the copyright implications of linking, and most cases involved search engines that automatically produced links in response to user request, rather than sites or individuals who affirmatively inserted links. It is, therefore, important to review the vitality of these decisions in light of *Aereo*.

The Second Circuit has acknowledged that clicking on a link must be understood in relation to causing an instantaneous effect.[257] That court addressed linking in a DMCA circumvention of technology case. The DMCA imposes liability on one who "presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it."[258] After a number of defendants were enjoined from continuing to post "DeCSS" DVD decryption software,[259] one posted links to hundreds of sites offering DeCSS and actively encouraged others to copy and disseminate the code.[260] The trial court found that this violated its injunction, because by linking to sites providing the code, the defendant

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[256] For example, a US district court determined that ringtones on phones are not performances, because they are not public. Jacqui Cheng, *Judge: Ringtones Aren't Performances, So No Royalties,* ARSTECHNICA.COM (Oct. 15, 2009), http://arstechnica.com/tech-policy/2009/10/judge-ringtones-arent-performances-so-no-royalties/, [http://perma.cc/VHY9-Z5LW].

[257] *Corley*, 273 F.3d at 451–52.

[258] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000). The DMCA makes it unlawful for anyone to circumvent copy-protection measures intended to protect copyrighted material from unauthorized copying. 17 U.S.C. § 1201(a)(2).

[259] Movie studios sued the defendants, alleging that posting software violated the DMCA. *Corley*, 273 F.3d at 440–41, 447–49. The plaintiffs sought to enjoin defendants both from posting DeCSS and from electronically linking their sites to others that had posted DeCSS. *Id.* at 436. *See also* Mark Sableman, *Link Law Revisited: Internet Linking Law at Five* Years, 16 BERKELEY TECH. L.J. 1273, 1321–22 (2001).

[260] *Corley*, 273 F.3d at 435–36.

made it available,[261] and the statute made it unlawful not only to provide the technology but also to otherwise traffic in it.[262]

In affirming,[263] the Second Circuit explained that when dealing with computer code and the Internet, cause and effect must be analyzed differently than in traditional copyright cases.[264] Indeed, the single click of a mouse "can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet."[265] The Second Circuit quoted the lower court:

> There was a time when copyright infringement could be dealt with quite adequately by focusing on the infringing act. . . . [T]he digital world is very different. [A copyrighted work] can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiffs' copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear. . . . These considerations drastically alter consideration of the causal link between dissemination of computer programs such as this and their illicit use.[266]

Consequently, the Second Circuit held the defendant liable for linking to the forbidden content. This focus on the operation and cause-effect of the link is consistent with *Aereo*.

Links to copyrighted content were also examined in the search engine cases discussed above, but the reasoning of those courts regarding transmissions was not endorsed in *Aereo*. In those cases, the plaintiffs complained not only about the image-links, but also that linking to their copyrighted content on their webpage infringed on the public display right, because the linking caused the content to be displayed via transmission on the user's

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[261] The court's conclusion extended its reasoning that hyperlinking to sites that automatically commenced downloading DeCSS was the functional equivalent of transferring code, thus hyperlinks to pages that contain code (and with the option of downloading) were virtually the same. *See* Sableman, *supra* note 260, at 1324.

[262] *See* Sableman, *supra* note 260, at 1324. After all, users do not visit a site that posts a code in order to read the code, but to download the code. *Corley*, 273 F.3d at 446 ("computer code is not likely to be the language in which a work of literature is written. Instead, it is primarily the language for programs executable by a computer"). By contrast, when users visit a website that posts a screenplay or a handbook, they do so in order to read the content.

[263] *Corley*, 273 F.3d at 429–30.

[264] *Id.* at 451–52 (citing *Universal*, 111 F. Supp. 2d at 331–32).

[265] *Id.* at 451.

[266] *Id.* at 452 (citing *Universal*, 111 F. Supp. 2d at 331–32).

screen.[267] In *Kelly,* the Ninth Circuit initially agreed that linking constituted a display, because it was a method, means, or transmission by which a copyrighted work was shown.[268] In doing so, the court relied on the legislative history accompanying the Copyright Act stating that a projection of an image on a screen by any method, the transmission of an image by electronic or other means, or the showing of an image on a television screen or similar viewing apparatus connected with any sort of information storage and retrieval system would be a display.[269] This is consistent with *Aereo.* Five months later, however, the court withdrew that opinion[270] and refiled an opinion stating that that the lower court should not have ruled on whether linking constituted a display, because neither party had moved for summary judgment on that issue.[271]

When the Ninth Circuit next considered the issue, in a group of lawsuits brought by Perfect 10 against Google and Amazon.com, it reached a different conclusion.[272] This time, the court held that a link did *not* display or transmit a copyrighted work, because it did not actually communicate or transmit any copyrighted image.[273] Instead, it transmitted the HTML instructions (and an address where images are stored)[274] that caused the browser to interact with the server storing the images (thereby causing them to appear on the user's screen).[275] The court reasoned that "HTML instructions do not themselves cause infringing images to appear on the user's computer screen."[276] Rather, it is the interaction between the user's web browser and the computer storing the copyrighted work that causes an image to appear on the user's computer screen:

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[267] *Perfect 10*, 508 F.3d at 1159.

[268] Kelly v. Arriba Soft Corp., 280 F.3d 934, 945 (9th Cir. 2002).

[269] H.R. REP. NO. 94-1476, at 64 (1976).

[270] Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) *opinion withdrawn and superseded on denial of reh'g*, 336 F.3d 811 (9th Cir. 2003). *Originally filed February 2002, at* 280 F.3d 934.

[271] The court remanded on that issue and, ultimately Kelly obtained a default judgment (against defendants that were no longer in business), but the issue of linking was never litigated. *Id.*

[272] *Perfect 10*, 508 F.3d 1146.

[273] *Id.* at 1161.

[274] *Id*. at 1146.

[275] *Id*. at 1160–61. "Google's activities do not meet this definition because Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself." *Id*. at 1161.

[276] *Id.* at 1161.

> Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser website to publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen.[277]

In addition, the court interpreted the right "to display the copyrighted work publicly" to require that a copy of the work, i.e., a "material object," be shown.[278] It then reasoned that since Google did not store the full-sized images, it did not possess "copies";[279] since it did not possess copies, Google did not and "could not communicate a display of the work itself."[280] Consequently, the court held that the search engine links did not infringe. In a subsequent search engine linking case, a Nevada district court adopted the Ninth Circuit's reasoning to conclude that Google's links to an author's publicly available works did not violate his public display right.[281]

To the extent that the *Perfect 10* cases have been interpreted to mean that linking does not infringe, they must be confined to automated links provided by search engines (and to the fair use of works). More importantly, they are at odds with *Aereo*. First, the Ninth Circuit artificially separated the steps of the transmission process, assigning liability to some, but not others. This is tantamount to concluding that a shooter who fires a loaded gun at a person is not responsible for any injury, because the shooter only pulled the trigger, which initiated a mechanical operation and interaction of elements that caused the ejection of a bullet that then went into the victim's body, so the *bullet* injured the victim. In any event, *Aereo* stated that the multiple steps in a transmission are, nonetheless, part of a process of transmission, and, therefore, a display or performance within the meaning of the statute.[282] Second, the *Perfect 10* holdings are premised on the notion that a

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[277] *Id*.

[278] *Id.* at 1160–61.

[279] *Id.*

[280] *Id.* at 1161.

[281] Righthaven LLC v. Choudhry, No. 2:10-CV-2155 JCM (PAL), 2011 WL 1743839 (D. Nev. May 3, 2011).

[282] The *Perfect 10* court's premise that one must possess a material copy in order to transmit or display it confuses the terminology in §106(1) and (2) with the rights granted by the statute. The Copyright Act gives a copyright owner the rights "to perform the copyrighted work publicly" and "to display the copyrighted work pub-

material copy must be made in order for a transmission to occur. Yet, neither *Aereo* nor the statute requires this. To the contrary, the House Report explicitly states that whereas a "reproduction" would require a tangible copy, a "display" would not,[283] and that the display or performance rights might be infringed "even though nothing is ever fixed in a tangible form."[284] Consequently, the continuing authority of these holdings is questionable.

Nonetheless, one aspect of these decisions remains sound: they distinguish between automated search engines that generate links in response to user requests and individuals who locate copyrighted content and insert a link to it into a document or webpage.

A Linker's Direct Liability for Infringing Links: Distinguishing Automatic Linking from Volitional Linking

All links are not created equal. For the most part, links to content are either volitionally inserted by a person who has chosen the copyrighted content and linked to it ("volitional links") or generated automatically, as by a search engine in response to a user request ("automatic links"). These differences are critical to assigning liability for infringement.

Direct liability requires a volitional act. Choosing specific copyrighted content and inserting a link to it, thereby making it available to anyone who clicks the link, is such a volitional act, but automatically generating a list of links in response to a third party command is not. Therefore, many entities and services lack the volitional action necessary to hold them directly liable for copyright infringement.

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licly." These do not limit rights to performances and displays of copies; to the contrary the Transmit Clause defines them to include the right to "transmit or otherwise to communicate a performance . . . [or display] to the public, by means of any device or process . . . ." §101. In fact, under the Ninth Circuit's version, a television viewer of a performance would not be "performing" or "displaying", because she would not possess a material copy of the episode. This is clearly incorrect, as the statute and the Supreme Court have stated that a viewer of a transmitted performance *is* performing. In fact, even *Aiken* and *Fortnightly* acknowledged that works could be performed or transmitted without possessing any copy of the work: The broadcaster "supplies his audience not with visible images but only with electronic signals." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 161 (1975) (citing Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398–399 (1968)).

[283] H.R. Rep. No. 94-1476 § 106 (1976).

[284] *Id*.

Automatic Links: Search Engines

Generally, search engines and similar internet services that automatically produce a list of links would not be liable for copyright infringement, because there is no volitional action in choosing content and supplying the specific links. A search engine's bot automatically crawls the web locating, compiling, and cataloguing content. Then, and only in response to a specific user search request, it generates a list of links to content.[285] A search engine does not think or assess the quality of linked-to content. This automaticity in collecting information and providing links precludes any finding of volitional action.[286] Indeed, it is akin to other automated systems and providers (such as DVR or ISPs) that are not directly liable.

Even if there were a volitional act, the DMCA exempts from liability certain search engines, Internet providers, and similar information tools. Additionally, entities that do not fit within the DMCA safe harbor still have other statutory defenses. As noted, several courts have held that a search engine's linking and use of copyrighted works is fair use.[287]

"Volitional" Links

Unlike a search engine, an individual who chooses to insert a link into a document or website is engaged in decision-making and committing a volitional act directed at specific copyrighted content. Links do not automatically or surreptitiously insert themselves into online documents and websites. The linker must locate and choose content to which to link, decide to insert a link, determine where in the document or webpage to insert the link, and decide how to label and contextualize it.[288] This process involves

[285] With regard to works identified and linked-to by search engines, a set of widely recognized industry protocols have been adopted by which Web site owners can automatically communicate their preferences to search engines with "meta-tags" within the computer code (HTML). *Field*, 412 F. Supp. 2d at 1112. Thus, copyright owners who post works online can insert these preferences, thereby limiting search engine linking.

[286] *See generally Aereo*, 134 S.Ct. 2498 (2014); "Direct Infringement," *supra*.

[287] *Perfect 10*, 508 F.3d at 1165 (Google's use of copyrighted images in search engine was "highly transformative"); *Kelly*, 336 F.3d at 818–22; *see generally* "Defining Links and Linking," *supra*.

[288] In fact, when a linker inserts a link, she knows exactly what the content is and has chosen how to designate that content. When a computer user clicks a link, the user does not have all of that information. A link labeled "the copyright lawsuit" could potentially link the viewer to pleadings, motions, an appellate decision, a newspaper article about the dispute, video of a deposition, or a CNN anchor reporting.

both choice and affirmative action in relation to showing the linked-to copyrighted work, and thus supplies the volitional action necessary for direct liability.[289] Hence, a volitional link made available to members of the public is *prima facie* evidence of infringement.[290] Nevertheless, a linker can avail herself of statutory defenses, most notably fair use.

Fair Use in Volitional Linking

Any copyright infringement claim is subject to certain statutory exceptions, most notably fair use.[291] Because this Article focuses on liability for linking to leaked scripts, television episodes, and similar creative works, it does not endeavor to provide an exhaustive analysis of the permissible uses of such works; rather, the principles of fair use are outlined here to help illuminate liability for linking to leaked works.

In determining whether the use of a copyrighted work is a non-infringing fair use, a court must weigh: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.[292]

(1) Purpose and Character of the Link's Use of Leaked Materials

With regard to the first factor, uses that are legitimately informational and factual, such as using copyrighted works for indexing, referencing, sourcing content, or corroborating facts, strongly favor a determination of fair use.[293] News reporting and commentary on a work also favor fair use.[294] That an event is worthy of news or deserving of critique, however, does not mean that copying or broadcasting a copyrighted work itself is news-

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[289] This is analogous to Aereo locating copyrighted content and sending it, via the Internet, to its subscribers. But, whereas Aereo's system was inert until the subscriber chose to watch a program, in this case, a link has already curated and located the content, and is awaiting transmission.

[290] If a link is made available to only a small number of people, such as a spouse or a few friends, it is not public and thus does not infringe.

[291] 17 U.S.C. §§ 106, 107 (2006).

[292] 17 U.S.C. § 107 (2006).

[293] *See, e.g.*, *Harper & Row*, 471 U.S. at 563; L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997); L.A. News Serv. v. Tullo, 973 F.2d 791, 798 (9th Cir. 1992).

[294] *Harper & Row*, 471 U.S. at 563.

worthy.[295] The original expression within the work remains copyrightable.[296] In other words, it may be newsworthy that a former president wrote a book in which he explains his past actions, but that does not render wholesale use of the book fair use. "News" is not a blanket protection.[297] Therefore, the issue is "whether a claim of news reporting is a valid fair use defense to an infringement of *copyrightable expression.*"[298] For instance, in *Harper & Row Publishers,* publishing the "heart" of a soon-to-be published book supplanted the copyright holder's first publication right, not to mention eviscerated the market for it. Accordingly, though a portion of the copyrighted work was used in the context of, or under the auspices of, reporting, it was not fair use.[299]

It is also relevant whether the copyrighted work was used to supplant or exploit the original[300] or if it was used in a way that is transformative,[301] that is, in a way that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[302] For example, a link within a law journal article to a cited article or a link in a news report to video of the incident reported is informative, and the authors use the original essentially as corroboration of or as a springboard for analysis in the new works. They do not intend to displace the

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[295] *See* L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 938 (9th Cir. 2002); *see also* L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998) (Although the purpose of Reuters is to report news, its use of copyrighted works was not transformative; Reuters copied and transmitted footage it to news organizations, but did not explain, comment on, or edit the content of the footage); *KCAL-TV Channel 9*, 108 F.3d at 1122 ("Although KCAL apparently ran its own voice-over, it does not appear to have added anything new or transformative to what made the LANS work valuable—a clear, visual recording of the beating itself"); Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 307 (3d Cir. 2011) ("[N]ews reporting does not enjoy a blanket exemption from copyright).

[296] *See Harper & Row*, 471 U.S. at 557.

[297] *See generally* Fargo & Alexander, *supra* note 15, at 1101–04 (explaining the limits of claims to newsworthiness).

[298] *Harper & Row*, 471 U.S. at 561 (emphasis in original). "[T]he news element—the information respecting current events contained in the literary production [or creative work]—is not the creation of the [work], but is a report of matters that ordinarily are *publici juris*; it is the history of the day." Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918).

[299] *See Harper & Row*, 471 U.S. at 550–51; *see also* Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 778–82 (9th Cir. 2006) (copying software to avoid cost of purchasing additional copies was not a fair use).

[300] *Napster*, 239 F.3d at 1015 (exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies).

[301] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[302] *Id.*

originals, but to say something beyond them or about them. In fact, by sourcing to the originals, the links credit to the author and present the unvarnished sources. This is consistent with fair use. On the other hand, copying and distributing an article to every incoming freshman (thereby obviating their need to purchase it) or retransmitting a news broadcast instead of producing one's own use the copyrighted works in their original forms, with no alteration, for their original purposes, are textbook examples of infringement.

Typically, when a television episode or script is leaked online, it is posted in full with no alteration. There is no intention to integrate it into some other work or use it in a way different than the original. To the contrary, the point of leaking (and then linking) is to reveal the original *as it exists* and to do so before the copyright owner does so. The purpose and character of the use is no different from how and why the original would be used, and usurps the creator's right to control the release and timing of the expression.[303] This significantly undercuts any claim of fair use by those who link to such works. That a work has not yet premiered or been made publicly available also militates against fair use.[304] For example, when *The Expendables 3* was leaked,[305] the court granting the restraining order noted that the leak had "stripped Lions Gate of the critical right of first publication" and deprived the company of revenue.[306]

This reasoning also applies to news sites that link to copyrighted works. For instance, Gawker claimed that its use of the Tarantino *Hateful Eight* script was fair use, because it was central to Gawker's reporting the leak and Tarantino's cancellation of the film. There is, however, no absolute protection for news reporting[307] and, in any event, the "news" item was not about the content of the copyrighted script, but that the script was leaked—

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[303] *See Harper & Row*, 471 U.S. at 564. The right of first publication is "the author's right to control the first public appearance of his expression." *Id*. This encompasses "the choices of when, where, and in what form first to publish a work." *Id*.

[304] *Id*. at 564 (noting that the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his work weighs against the use of his work before its release). *See also* FOX Broad. Co., Inc. v. Dish Network L.L.C., 747 F.3d 1060, 1069 (9th Cir. 2013).

[305] *See* Gardner, *supra* note 5.

[306] *See* Gardner, *supra* note 5; Preliminary Injunction at 2, Lions Gate Films v. John Does 1-10, No. 2:14-cv-06033, 2014 WL 3895240 (C.D. Cal 2014).

[307] *See* Fargo & Alexander, *supra* note 15, at 1101–03.

a fact no one disputed[308]—and that Tarantino had canceled the film. Therefore, linking to the script did not corroborate the fact of the leak; it merely exploited the script's availability for commercial advantage.[309] In fact, Gawker did not endeavor to explain why providing the full script was critical to reporting the film's cancellation or Tarantino's rage. Simply that audiences might be interested to know what happens in the movie or TV show does not make revealing those works newsworthy or fair use.[310]

(2) The Nature of the Leaked Work

In the context of linking to leaked entertainment properties, the second factor, the nature of the copyrighted work, also weighs against fair use. This factor acknowledges that "[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works."[311] Television shows, scripts, and movies are creative works situated at the end of the spectrum receiving greater protection, and factual and historical works are situated at the opposite end of the spectrum, receiving lesser protection.[312] As such, there is less justification for disseminating entertainment-oriented scripted works.[313]

(3) The Amount and Substantiality of the Copyrighted Work Used

The third factor asks whether the amount and substantiality of the copyrighted work used, in relation to the work as a whole, "are reasonable in relation to the purpose of the copying."[314] Although copying an entire work militates against fair use,[315] the extent of permissible copying varies with

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[308] Moreover, even if showing a portion of the script was justified as proof that the script was actually leaked or in the possession of the media, there is no justification for providing the entire work.

[309] *See* L.A. News Serv. v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992) (emphasizing that ultimately using copyrighted material for "research, scholarship, and private study" does not provide a shield of liability when a party nonetheless "willfully infringes the copyright . . . for purposes of commercial advantage").

[310] *See* Fargo & Alexander, *supra* note 15, at 1106 (detailing the "difference between being interesting and being of public interest").

[311] *Napster*, 239 F.3d at 1016 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

[312] *Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").

[313] *See Kelly*, 336 F. 3d at 820.

[314] *Campbell*, 510 U.S. at 586.

[315] *See Kelly*, 336 F.3d at 820 (copying an entire work militates against fair use); *but see* Worldwide Church of God, Inc., v. Philadelphia Church of God, Inc., 227

the purpose of the use.[316] For example, in the case of a news article about *Survivor*'s participant contract, it makes sense to link to the entire contract in order to substantiate allegations and analysis: a contract must be read as a whole, and including only portions might distort the document's meaning or raise claims of misrepresentation. Additionally, as the nature of the document falls on the factual end of the spectrum, supplying the whole does not destroy the value of the work, and it does not reveal some spoiler or plot twist. By contrast, prematurely releasing the penultimate episode of *Survivor* in which the finalists are determined would eviscerate the episode's heart and have little purpose other than to release the content before the air date.

With a link, the entire copyrighted work (or the entire portion posted) is transmitted. This typically precludes a legitimate claim of fair use, unless it can be otherwise justified. As noted, when one links to and provides the public with a not-yet-broadcast *Doctor Who* episode or movie a few weeks before its premiere, there is little purpose to leak other than to be the first to release the work. Moreover, even in news reporting, it would be often difficult to justify using an entire creative work. As in Gawker's linking to the Tarantino screenplay, it is not simply that Gawker could report news of a leak without needing to provide the copyrighted film or television show, but that providing the copyrighted work does nothing to add to the reporting.[317] This belies fair use.

(4) The Impact of the Link's Use on the Market for the Original

The final factor, which the Supreme Court has called "the most important element of fair use,"[318] is "the effect of the use upon the potential market for or value of the copyrighted work."[319] This factor considers the extent to which the infringing use adversely impacts the potential market

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F.3d 1110, 1118 (9th Cir 2000) (finding fair use despite the copying of an entire work).

[316] *See Campbell*, 510 U.S. at 586–87; *Perfect 10*, 508 F.3d at 1167 (in evaluating the amount of the work used, it is appropriate to consider why the work was used).

[317] That the leak was newsworthy and that the underlying facts and ideas of the script or television episode could be recounted does not make it fair use to make the entire work available.

[318] *Harper & Row*, 471 U.S. at 566.

[319] 17 U.S.C. § 107(4) (2006).

for the original[320] or derivative works,[321] interferes with the marketability of the work, or fulfills the demand for the original.[322]

When an entertainment product is linked to and made available before its official release date, it not only substitutes for the original in terms of whether a viewer would pay to see it (either by purchasing a ticket, renting it, or buying a copy), but also can diminish potential audiences' interest in seeing the work in its intended form or forum. Especially with a movie or television episode, a viewer who watches a leaked version online has no reason to pay to watch. The court said as much in granting the injunction when *The Expendables 3* was leaked.[323]

This is also true of the unauthorized release of a television episode, although the economics are slightly different. Whereas most movies operate on a pay-to-see model, most television episodes do not.[324] As a result, linking to a leaked film will have a direct negative effect on ticket sales, rentals, and DVD purchases, but linking to a leaked television episode will likely cause only a reduction in viewers. Additionally, in the multi-faceted litiga-

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[320] *Campbell,* 510 U.S. at 590.

[321] *Harper & Row*, 471 U.S. at 568.

[322] *Campbell,* 510 U.S. at 590; Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155–56 (9th Cir. 1986). Although this Article is concerned with unauthorized releases of copyrighted works meant to be kept secret, when a copyright owner posts a copyrighted work on a publicly available website for free, the owner obviously intends the public to see, hear, and even publicize it. To some degree this may imply a limited license for use, which functions as an affirmative defense to a copyright infringement claim. *See* Bourne v. Walt Disney Co., 68 F.3d 621, 631 (2d Cir. 1995). Independently, in terms of fair use, a link to publicly available works will seldom have a negative economic impact on the market for that work. *See generally Kelly*, 336 F.3d at 820 (noting that since photographer had already put images on the Internet, before search engine used them, plaintiff's claim of infringement was not as strong, and defendant's fair use argument was stronger). To the contrary, linking may increase public awareness and popularity. This is the very model of YouTube-generated fame, where Internet content's going viral can increase the creator's profile and enable her to monetize her creative works. Indeed, comedy trio The Lonely Island, author Neil Gaiman, and Oscar-winner Trent Reznor all came out against SOPA and PIPA, proposed legislation in 2011 that would have given greater rights to copyright holders to remove uses of their content, noting that a free and open Internet has enabled them to reach out to fans, cultivate new audiences, and popularize their works. *See* Anderson, *Lonely Island*, *supra* note 10.

[323] *See* Gardner, *supra* note 5.

[324] *See* Kimberlianne Podlas, *Artistic License or Breach of Contract?: Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs*, 33 LOY. L.A. ENT. L. REV. 67, 86 n.156, 96 (2013). Even subscribers to streaming services, typically do not pay per program, but for the service. *Id.*

tion against DISH, the court suggested that the copying of TV programs could undermine the copyright owner's ability to license these programs to streaming services such as Hulu, Netflix, or Amazon Instant Video.[325]

The impact on the market for a screenplay or script is somewhat different. For most audience members, reading a script is not a substitute for the visual, multi-sensory experience of seeing the TV show or movie. Consequently, linking to a leaked script might have little negative impact on a future film or the purchase value of the script. Furthermore, although a disclosure will necessarily reveal spoilers, that information within the work is not, itself, copyrightable—only the expression of it is. Therefore the "harm" of the public's awareness of the plot is not a cognizable harm for purposes of analyzing the impact on the market.[326] Nonetheless, in the entertainment industry, scripts possess independent value as source material for films and entertainment properties. As a result, the release of a script may impact whether it is optioned, what price is paid to license rights in it, or lead to the cancellation of a film in pre-production. This likely explains why Tarantino made a point of telling the media that he often publishes his screenplays for substantial royalties. This is not to suggest that there is no harm or that this factor weighs in favor of fair use, but just that the harms are different or difficult to quantify.

The Linker's Secondary Liability for Infringement

A linker who is not directly liable may, nonetheless, be secondarily liable for the acts of third parties. In fact, the dissent in *Aereo* opined that Aereo might be secondarily liable for the infringement of its subscribers,[327] as did the Ninth Circuit in the *Perfect 10* search engine cases.[328] To be clear, this Article does not argue that a volitional linker is a secondary infringer, but analyzes secondary liability as an alternative theory of liability. If a volitional link is not a transmission or the linker is not deemed a direct infringer, then the linker's potential secondary liability becomes relevant.

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[325] FOX Broad. Co., Inc. v. Dish Network, L.L.C., 905 F. Supp. 2d 1088, 1105 (C.D. Ca. 2012).

[326] *See Campbell*, 510 U.S. at 569 (explaining the relevance of substitution value and that a distinct market for a new work, even if disfavored by copyright author, does not negatively impact market for original).

[327] *Aereo*, 134 S.Ct. at 2514 (Scalia, J., dissenting) (noting that Aereo could also be liable for other aspects of the service that were not presently before the Court).

[328] *Perfect 10*, 508 F.3d at 1170–73, 1161 ("Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues").

That linking contributes to the harm of a leak or benefits the linker does not by itself amount to contributory or vicarious infringement within the meaning of the Copyright Act.[329] Rather, any secondary liability of the linker must be premised on a third party's act of direct infringement.[330] The third parties who potentially infringe are the posting site (which originally posted the leaked work) and the clickers of the link to those materials.[331] Accordingly, a linker's secondary liability must be assessed in relation to direct infringement by the posting site and clicker of the link.[332]

Secondary Liability for Infringement

Infringement by the Third Party Posting Site

Assuming that the posting site infringes by having copied copyrighted material and displayed or performed it publicly by posting it, the linker is not a contributory infringer to those acts. Quite simply, the linker's act of linking is *subsequent* to and independent from the poster's acts. Consequently, the linker could not cause, enable, or induce the posting site's infringement. Conversely, the posting site did not rely on the linker to post the content, and it may not even know that the linker has linked. This is also true with regard to the poster's performance or display—it is accomplished before the linker ever enters the equation. Consequently, the linker cannot have materially aided or encouraged that the act. Additionally, though the linker performs or displays the posted content by linking to it, the linker is not assisting or contributing to the posting site's doing so. Instead, the linker is committing her *own* direct act of performing or displaying.

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[329] *See* FOX Broad. Co., Inc. v. Dish Network, L.L.C., 905 F. Supp. 2d at 1097–98.

[330] *Napster*, 239 F.3d at 1013 ("secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party").

[331] The Linker's secondary liability cannot be premised on its own direct liability.

[332] Some copyright owners have misconstrued the doctrine of secondary liability and attempted to use it to hold parties responsible for acts that are not prohibited by statute, but are disfavored by a copyright owner or impede ancillary revenue streams. Accordingly, the Ninth Circuit has cautioned that "it is important that we not permit inducement liability's relatively lax causation requirement to 'enlarge the scope of [copyright's] statutory monopolies to encompass control over an article of commerce'—such as technology capable of substantial non-infringing uses—'that is not the subject of copyright protection.'" *Fung*, 710 F.3d at 1037–38 (9th Cir. 2013) (quoting *Sony*, 464 U.S. at 421).

With regard to vicarious infringement, the linking site may benefit from the posting site's leaking or posting of the copyrighted work, but vicarious liability requires that a secondary infringer obtain some benefit from the direct infringement and possess control or authority over the infringer. Here, there is neither. There is no evident monetary benefit by linking, even if it increases user traffic to a web site. People do not pay to read or cancel a subscription to a fan site or news site because it may sometimes link to infringing material that could simply be obtained directly from the posting site. When subscribers *do* pay for a news service or website access, the payment is for the service overall, not for links to infringing materials, specifically. Even assuming that the linker obtained some tangible economic benefit from the posting site's infringement, the linker possesses no legal or actual control over the posting site. Indeed, if a linker removes its offending link, it has no impact on the posting site's infringement. Accordingly, the linker is not vicariously liable for the infringement of the posting site.

Infringement by the Third Party Users Who Click Links

With regard to a computer user who clicks a link, viewing a copyrighted work on one's own computer does not infringe on either the reproduction or distribution right. Because these do not amount to direct infringement by the clicker, they cannot support secondary infringement on the part of the linker.[333]

If the clicker subsequently copies or distributes the copyrighted material, the linker has not proximately caused this, but rather it is an independent volitional act committed by the clicker. Additionally, because the link enables the clicker to see the content at its source, copying or downloading is unnecessary. There is no reason that the linker would presume that clickers would necessarily infringe or any evidence that the linker encouraged such acts. Therefore, the linker is not contributorily liable. In fact, any copying or distribution by the clicker is subsequent to and independent of the link. Moreover, the linker has no actual or practical control over the clicker, and receives no direct monetary benefit from the clicker's acts. At best, the linker informs clickers where they can locate copyrighted content, but this is tantamount to telling someone where to buy drugs or find counterfeit goods.[334]

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[333] *See Perfect 10*, 508 F.3d at 1169 (finding users viewing pages containing infringing images, but not "stor[ing] infringing images on their computers," does not amount to infringement).

[334] If a website informed readers where they could locate the material, without inserting a link that transmitted material, it would be analogous to the person who

For example, myVidster is an online service on which users can "bookmark" Internet videos.[335] When a user bookmarks Internet content, myVidster automatically creates a link (usually a "thumbnail" of a video's opening screen shot) that other users can then click to watch the video.[336] Flava Works, which produced videos hosted on websites behind a "pay wall," discovered that some of its paying viewers had bookmarked its videos on myVidster,[337] and sued myVidster for contributory infringement vis-à-vis non-paying viewers who accessed videos through bookmarks.[338] Flava claimed that by providing the link, myVidster was encouraging people to circumvent Flava's pay wall, thereby reducing Flava's income. The court held that myVidster was not a contributory infringer of Flava's exclusive right to copy and distribute its copyrighted works.[339] While acknowledging that myVidster provided a connection between the server hosting the video and the computer of the myVidster user,[340] the court explained that myVidster could not be liable for secondary infringement unless the viewers were liable for direct infringement. Although viewers were watching for free, viewing copyrighted content does not infringe on any copyright.[341] Rather, the court analogized, the viewers' actions were akin to sneaking into a movie theater without buying a ticket or stealing a copyrighted book from a bookstore and reading it.[342] "That is a bad thing to do (in either case) but it is not copyright infringement."[343] In turn, the facilitator of that non-fringing conduct cannot be a contributory infringer.[344] Moreover, unless those visitors copy the Flava videos they are viewing, "myVidster isn't increasing the

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gives directions to Fight Club or to the theatre performing infringing works. Like those people, the website would not be providing or transmitting copyrighted materials, so would not infringe. Consequently, it would not be directly or secondarily liable.

[335] *See Flava Works*, 689 F.3d at 756.

[336] *Id.* As with other links, the video is not housed on myVidster, but is viewed on the video's host server. *Id.*

[337] Under Flava's terms of use, viewers who paid could watch the videos and download them to their computers for "personal, noncommercial use," but agreed not to copy, transmit, or sell them. *Id.* at 756.

[338] *Id.* at 754–56.

[339] *Id.* at 760.

[340] *Id.* at 757. It also noted that myVidster did not touch the data stream, so was not "transmitting or communicating" the content. *Id.* at 761.

[341] *Id.* at 757.

[342] *Id.* at 757–58.

[343] *Id.* at 757.

[344] *Id.* at 758.

amount of infringement due to copying."[345] Similarly, an employee of Flava who embezzled corporate funds would also be reducing Flava's income, but would not be infringing Flava's copyrights by doing so.[346] The court opined that the direct infringers, about whom Flava had *not* complained, were actually Flava's customers who copied and uploaded videos.[347]

With regard to infringing on public performance and public display rights, when the clicker views the content, that content has been transmitted and thus performed or displayed.[348] Yet, as explained, this is not the linker's enabling someone else's direct act of transmission: it is the linker *directly* performing or displaying that content publicly (just like Aereo). Hence, the linker's liability would not be based on a third party's infringing act, but on its own infringing act. Of course, the clicker's act of watching the copyrighted work *also* renders the clicker as one who directly performs or displays. Nonetheless, because a clicker typically watches on her own screen or in a non-public setting, the clicker's performance or display is not public and thus does not infringe. Since there is no direct liability on the part of the clicker, there is no foundation for secondary liability on the part of the linker. Nevertheless, inasmuch as the link to the material transmits that material, it constitutes a public display of the work. Hence, post-*Aereo*, a linker could be directly liable.[349]

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[345] *Id.* at 757–58; see also Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 797 (9th Cir. 2007).

[346] *Flava Works*, 689 F.3d. at 758.

[347] *Id.* at 757. "A customer of Flava is authorized only to download the video for personal use. If he uploads it to the Internet, he creates a copy (because he retains the downloaded video on his computer and is now providing to myVidster users a copy) and is infringing." *Id.*

[348] *Aereo*, 134 S. Ct at 2506.

[349] In some limited instances, the facts may support a linker's contributory liability, but such cases are relatively rare. Secondary liability was assigned on the basis of linking where operators of a web site critical of The Church of Jesus Christ of Latter-day Saints posted copies of the copyrighted Church Handbook. When the Church sued, the defendant consented to an injunction enjoining it from posting the material, but then posted links to other sites that offered similar materials, publicized them, and instructed users how to obtain the materials. The court granted a second injunction prohibiting the defendant from posting these links. While the injunction can be defended as just, because the defendant's linking subverted the purpose of the original injunction, its premise of liability is questionable. The court held that viewers of the sites directly infringed, because in order to view the copyrighted material, they made copies of it. In turn, the defendant could be held secondarily liable for those acts. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1291–92 (D. Utah 1999).

Conclusion

Links are incredibly useful tools that have dramatically advanced information retrieval and the Internet. This utility, however, does not exempt them from the Copyright Act. To the contrary, under the Transmit Clause, a volitional link to a copyrighted work is a "transmission," and thus a display or performance of the work. Although acknowledging this premise calls into question many online practices so common that they are given little thought, it does not expose everyone who clicks on or inserts a link to liability; nor does it render the information superhighway so perilous as to stall progress.

Nonetheless, as detailed in this Article, it will be difficult for a volitional linker to justify as fair use linking to a leaked entertainment work. This is true of fan and spoiler sites and media sites alike: a leak and its reverberations are certainly newsworthy, but disclosing the totality of the creative work leaked is not necessary to reporting. Indeed, had Quentin Tarantino taken the path of Lions Gate (regarding *The Expendables*) and pleaded that Gawker *directly* infringed on his *right to display* publicly the screenplay, rather than portraying Gawker as secondarily infringing on the reproduction or distribution right, his complaint would have had merit. Gawker would have been hard-pressed to justify its link as doing anything more than exploiting the leaked material. Consequently, linking as direct infringement of public performance or display rights is a viable legal strategy for creators and producers who discover that their works have been leaked online, as well as a salient threat of which linkers to such works must be aware.

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A European Solution to America's Basketball Problem: Reforming Amateur Basketball in the United States

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I. INTRODUCTION

In America, athletic pursuits and achievements receive almost unparalleled regard and importance. We immortalize star athletes in our minds and in our culture, keeping their names alive for generations after they retire.[1] We crowd around the television for major sporting events, foregoing other important things to get a glimpse of our best athletes competing at the highest level.[2] Our professional leagues are multibillion-dollar ventures that dominate and set the standards in their respective sports.[3] On a more personal level, we develop relationships, build ourselves, find an escape, and learn lessons about life through athletics.[4] From the moment we can hold a ball and grasp the rules of the game, we learn and grow through sports.

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[1] *See* Raymond L. Schmitt & Wilbert M. Leonard II, *Immortalizing the Self Through Sport*, 91 AM. J. SOC. 1088, 1090 (1986).

[2] *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 9 (2000) (comparing sports to religion and noting his impression "that as many adults are zealously devoted to 'the game' on any given day as are devoted to a worship service at a religious institution").

[3] *See generally* Brad R. Humphreys & Yang Seung Lee, *Franchise Values in North American Professional Sport Leagues: Evidence from a Repeat Sales Method* (N. Am. Ass'n of Sports Economists, Working Paper No. 09-14, 2009) (discussing the valuation of professional sports teams and the overall upward trend of league value and revenues).

[4] Andy Rudd, *Which "Character" Should Sport Develop?*, 62 PHYSICAL EDUCATOR 205, 206 (2005).

Just as sports have the ability to build up an individual and teach skills necessary to achieve success, they also have the capability, if abused, to break someone down and compromise their future promise. Stories of our athletic system taking advantage of and breaking its promises to athletes can make the headlines.[5] Athletics is big business and an easy way to profit[6] off an uninformed workforce. There is, of course, a multitude of success stories in American sports: stories appear in the news every single day advertising the many young men and women who make it to the pinnacle of their profession and see their goals fulfilled. In addition, there are many professionals and adults engaged in the business of youth sports and athletics who are mentors, caregivers, and teachers. However, those success stories should not preclude examination of their counterparts, stories of athletes whose promise went unfulfilled, whose goals were left unattained, and whose development were stunted by unscrupulous and unmonitored adults.

While other sports in America (most notably American football) generate comparable interest and have developmental systems suffering from their own inherent flaws and risks, this paper focuses solely on basketball, specifically the Amateur Athletic Union ("AAU") and National Collegiate Athletic Association ("NCAA") organizations and the developmental systems that have grown to dominate the youth and amateur levels of the sport.[7] In terms of coaching and development at the middle and high school level,

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[5] *See e.g.* Harvey Araton, *Star-to-Be Who Never Was*, N.Y. TIMES (Mar. 3, 2012), http://www.nytimes.com/2012/03/04/sports/basketball/lenny-cooke-star-to-be-who-never-was.html?pagewanted=all&_r=0 (detailing the story of Lenny Cooke, a former top prospect whose personal struggles and influences, magnified without a support system, derailed his career); GEORGE DOHRMANN, PLAY THEIR HEARTS OUT: A COACH, HIS STAR RECRUIT, AND THE YOUTH BASKETBALL MACHINE (2012) (providing an in-depth expose of the shady side of AAU basketball that primarily covers the journey of one AAU basketball coach, Joe Keller, and his star recruit, Demetrius Walker. Walker, lauded as one of the top players in the country while in middle school, had immense talent but, under the burden of improper coaching and influence, encountered trouble at several college programs and ultimately failed in his NBA aspirations).

[6] Maureen Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports' Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581, 589 (2008) (noting that as technology develops, so do "opportunities for emerging and lucrative markets for sports-themed products").

[7] *See generally* DAN WETZEL & DON YAEGER, SOLE INFLUENCE: BASKETBALL, CORPORATE GREED, AND THE CORRUPTION OF AMERICA'S YOUTH (2000) (examining the influence of AAU basketball and the quid pro quo relationship that exists between the organizations operating under the AAU banner, shoe and apparel companies, and NCAA universities).

basketball in America has, for a variety of reasons, distinguished itself from other sports and systems of athletics.

First, over a sustained period of time, a unique system of talent management and development has firmly entrenched itself within the youth basketball apparatus. This system, embodied in organizations such as the NCAA and AAU, has helped to organize and spread basketball across the country, but has also brought with it an underbelly rife with corruption, greed, and other immoral behavior.[8] Second, basketball has developed substantial connections with national broadcasters and is shown consistently during primetime on major television networks.[9] This connection between college sports and mass media has contributed greatly to the spread and popularity of the game. However, it has also injected unprecedented money and promotion into a system that is supposed to be, at those levels, an amateur endeavor. This wealth has not only greatly enriched the universities and their athletic programs, but has also attracted agents, publicists, and other professionals looking to profit from the on-court successes of impressionable young men and women.[10]

Many of the young athletes most at risk to the perils of the system are minorities from unstable backgrounds and poor communities: a ten-year study conducted by Joshua Kjerulf Dubrow of the Polish Academy of Sci-

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[8] Dohrmann, *supra* note 5, at 87-88; *see also* Eric Prisbell & Steve Yanda, *It's a Whole New Ballgame, and Maryland's Williams Isn't Playing*, WASHINGTON POST (Feb. 13, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/12/AR2009021202299.html?sid=ST2009021102913.

[9] In 2010, the NCAA signed a 14-year, $10.8 billion dollar contract with CBS and Turner Broadcasting for the rights to the NCAA's highly popular men's basketball tournament. Brad Wolverton, *NCAA Agrees to $10.8-Billion Dollar Deal to Broadcast Its Men's Basketball Tournament*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 22, 2010), http://chronicle.com/article/NCAA-Signs-108-Billion-De/65219/. The move was estimated to net NCAA member schools nearly $740 million dollars annually. *Id.* Individual NCAA conferences, including the Big East, Big 12, and Pac-12, also negotiate their own lucrative and long-term television deals for the rights to their basketball games. Those three conferences, for example, have sold their rights to major networks, including ESPN and Fox Sports 1, for the foreseeable future as the Big East signed a twelve-year deal in 2013. Steve Lepore, *Fox Sports 1 Gambles with Massive Big East Basketball Deal*, SBNATION.COM (Sept. 6, 2013, 1:54 PM), http://www.sbnation.com/college-basketball/2013/9/6/4700268/big-east-2013-tv-schedule-basketball-fox-sports-1.

[10] According to Forbes, the three most valuable teams in college basketball in 2013 were the University of Louisville Cardinals, the University of North Carolina Tar Heels, and the University of Kansas Jayhawks (worth $36.1 million, $29.6 million, and $28.2 million respectively). Chris Smith, *College Basketball's Most Valuable Teams,* FORBES (Mar. 12, 2012, 10:49 AM), http://www.forbes.com/sites/chrissmith/2012/03/12/college-basketballs-most-valuable-teams/.

ences and Jimi Adams of Arizona State University, which focused on NBA players and their backgrounds, found that among African-Americans, a child from a low-income family has 37 percent lower odds of making the NBA than a child from a middle- or upper-income family.[11] Even outside of racial minorities, socioeconomic statuses still greatly influence one's success; for example, socioeconomically disadvantaged white NBA-caliber athletes are 75 percent less likely to become NBA players than similarly talented middle-class or well-off whites.[12] Despite the risks and tremendous odds, thousands of young men and women every year pursue their basketball dreams under the shadow of a multi-million dollar, predatory business model.[13] These athletes are susceptible to manipulation and exploitation, often by the very institutions that regulate and provide order to the system.

This paper will first discuss the history of the NCAA and AAU organizations and pinpoint where the current problems of commercialization and professionalization originated. Integral to telling this history is relating horror stories of recruiting and other examples of young talents who were taken advantage of by unscrupulous actors, both of which continue today. The paper will then analyze the three factors that heavily influence and buoy this unfair system. These factors include the power of athletic shoe and apparel companies to influence the tactics and organization of the youth game, the rampant commercialization of young basketball talent, and the money behind both the NCAA and the universities and colleges who play under its banner.[14] Each of these factors plays a huge role in bolstering and perpetuating the current system of youth basketball in America.

After identifying the inherent problems with these different factors, we will discuss what we can do to solve the issue. In this section, we first address the hotly-debated proposition of paying college athletes, offering possible solutions for the impasse between the pay-to-play advocates and their detractors. In addition to that discussion, we will touch on other, smaller initiatives that could make a difference in the process. Finally, the paper concludes with a look to the European system of amateur athletics and

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[11] Joshua K. Dubrow & Jimi Adams, *Hoop Inequalities: Race, Class, and Family Structure Background and the Odds of Playing in the National Basketball Association*, 47 INT'L REV. FOR SOC. SPORT 43, 52 (2010).

[12] *Id.* at 51-53.

[13] *See College Basketball & Scholarship* Opportunities, http://www.scholarshipstats.com/basketball.htm (last visited Apr. 21, 2014).

[14] As a membership organization, the NCAA implements policies created and pushed forward on behalf of the member institutions. *How We Work: NCAA Membership & the National Office*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/about/who-we-are/national-office (last visited Apr. 21, 2014).

the radical solution of reforming the current system to more resemble the sports academies that can be found abroad. With the amount of money and power behind the current system, reform will not be easy. However, if we are to protect and best assist our nation's youth, reform of these systems is necessary.

II. The History of the AAU and NCAA Organizations

A. AAU Basketball: The Roots of the Game

For over a hundred years, the Amateur Athletic Union has provided structure and organization to youth sports across the United States. Founded on January 1, 1888,[15] the organization is "dedicated exclusively to the promotion and development of amateur sports and physical fitness programs."[16] The organization originally represented amateur athletic interests on the international stage, but the Olympic and Amateur Sports Act ("Amateur Sports Act") of 1978 shifted the responsibility of Olympic amateur regulation away from the AAU.[17] In response to this legislation, the AAU's presence quickly shifted to providing opportunities for over 1.1 million members[18] in over thirty competitive sports on the domestic stage.[19] Recently, the AAU has been most associated with its youth basketball programs, although its history with the sport runs much deeper. It held the first men's national basketball championship in 1897 and the first women's basketball championship twenty-nine years later.[20] Today, basketball can be considered the major driver of the AAU, with nearly 50 percent of the 1.1 million memberships stemming from that sport.[21]

Within amateur basketball, AAU programs involve select teams of elite basketball players who compete on a national scale during the high

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[15] Ryan Wood, *The History of AAU Basketball,* USA Basketball (Mar. 29, 2010), http://www.usab.com/youth/news/2010/03/the-history-of-aau-basketball.aspx.

[16] *FAQs*, The Amateur Athletic Union, http://www.aausports.org/FAQs (last visited Oct. 31, 2014).

[17] *Amateur Sports Act of 1978*, Team Unify, http://www.teamunify.com/eznslsc/UserFiles/File/Background%20-%20Amateur%20Sports%20Act%20of%201978.pdf (last visited Nov. 29, 2014).

[18] Wood, *supra* note 15.

[19] Paul Pogge, *Full Court Press: Problems Plaguing Youth Basketball in the United States and an Aggressive Plan to Attack Them*, 8 U. Denv. Sports & Ent. L.J. 4, 5 (2010).

[20] *Id.*

[21] Wood, *supra* note 15.

school basketball offseason.[22] The nation's best high school players form incredibly talented teams, often affiliated by regional or geographic proximity, and play in sponsored, highly lucrative tournaments over the summer months. After the recent restructuring of the NCAA recruiting calendar, summer basketball has been more strongly emphasized than traditional high school basketball.[23] AAU and non-AAU summer tournaments now serve as one primary evaluation window for college coaches.[24] Summer basketball is now colloquially referred to as "AAU basketball" and has become a large, separate industry, supporting coaches, insiders, and agents during the basketball offseason.[25] The monetary aspects of AAU basketball have had some negative effects on the program. In recent years, the AAU system has faced several scandals and widespread allegations of improper behavior by coaches, mentors, and others associated under the wide-ranging AAU banner.[26] These scandals often can be linked to one of four different inherent problems in AAU basketball system.

The first of these problems is the little-regulated access that power brokers, agents, and unprincipled coaches are allowed to have with kids competing on AAU basketball teams. Agent runners, who can often be AAU coaches,[27] act as intermediaries between agents (who are barred by the NCAA from talking to players until they declare for the draft) and players (who face sanctions and punishment if the NCAA determines that they receive improper benefits from agents).[28] They have often been described as some of the most toxic actors in the game of college basketball.[29] An illustrative example of the corrosive nature of these arrangements can be found in the story of Ben McLemore, a former player for the University of Kansas

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[22] Mike Salerno, *Traveling Violation: A Legal Analysis of the Restrictions on the International Mobility of Athletes*, 25 N.Y. INT'L L. REV. 1, 29 (2012).

[23] Wood, *supra* note 15.

[24] *See* Dohrmann, *supra* note 5, at 382.

[25] Wood, *supra* note 15.

[26] Michel Martin, *The Seamy Side of Youth Basketball*, NPR (Mar. 9, 2012, 12:00 PM), http://www.npr.org/2012/03/09/148299513/the-seamy-side-of-youth-basketball.

[27] Josh Peter & Dan Wetzel, *Agents and AAU: Unrequited Love,* YAHOO! SPORTS (Mar. 11, 2009), http://sports.yahoo.com/ncaa/basketball/news?slug=ys-agents031109.

[28] Eric Prisbell, *AAU Coach: I Took Money Intended to Steer Ben McLemore*, USA TODAY SPORTS (June 21, 2013, 3:37 AM), http://www.usatoday.com/story/sports/ncaab/big12/2013/05/04/kansas-jayhawks-ben-mclemore-darius-cobb/2131775/.

[29] Tom Keegan, *Opinion: McLemore Case Exposes the Seedy Underworld of College Basketball,* KUSPORTS.COM (May 6, 2013), http://www2.kusports.com/news/2013/may/06/opinion-mclemore-case-exposes-seedy-underworld-col/.

Jayhawks and currently of the NBA's Sacramento Kings. As he entered college, McLemore, who was one of the top recruits in his high school class, faced allegations in the press that he had received almost $10,000 in cash, was gifted free trips to Los Angeles, and had meetings with agents with the help of his AAU coach, Darius Cobb, and Rodney Blackstock, known in the industry as an "agent runner."[30] An agent runner is often paid $100,000 or more in order to talk to a basketball player, influence him on major career decisions, and pass along the agent's message, often disguised as advice on which school to choose and with which agent to sign.[31] McLemore and the University of Kansas faced serious NCAA violations for the relationship with the agent runner, although no sanctions were eventually levied.[32] McLemore's story is not unique; rather, it provides an example of the kinds of people that can gain access to high-level players through the AAU system and the destructive influence agent runners can have.

The second problem is the lack of oversight of many coaches in the AAU, which allows those coaches to mold and create their own teams with their personal goals in mind. Certification as a coach by the AAU requires a $16 fee and completion of a background check and online clinic.[33] This relatively low bar for membership has allowed many different types of people, some with self-serving and destructive goals, to gain legitimacy and access to the program and to young players.

One particularly riveting account of a coach taking advantage of this system was detailed by Sports Illustrated writer and Pulitzer Prize-winner George Dohrmann in *Play Their Hearts Out: A Coach, His Star Recruit, and the Youth Basketball Machine*.[34] Over the course of eight years, Dohrmann followed the story of Joe Keller, a Southern California-based AAU coach with unscrupulous and often damaging tactics, and Demetrius Walker, a star basketball player once ranked as the top eighth grade player in the country who fell under Keller's influence and led his team to AAU dominance. The book paints a vivid picture of Keller's relationship with Walker and the rest of his team, a relationship often marred by betrayal, anger, and distrust. Less a coach and more of a master showman, Keller recklessly used the team and the talents of his star players to make a name for himself in AAU circles and

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[30] Prisbell, *supra* note 28.

[31] *Id.*

[32] Prisbell, *supra* note 28.

[33] Amateur Athletics Union, How to Start an AAU Athletics Program, *available at* http://image.aausports.org/dnn/athletics/2013/2013AAUAthletics-GetStartedPacket.pdf.

[34] Dohrmann, *supra* note 5.

obtain sponsorships and funding from major shoe companies.[35] He did so at the cost of the basketball careers of some of his players, including Walker (whose questionable behavior, including fighting with teammates and opponents, he enabled and whom he stopped supporting after Walker lost his usefulness on the court).[36] Dohrmann's writing depicts Keller as someone who should never have an influential role in the development of young basketball players. Unfortunately, Keller's approach is not unique to the basketball system, and the other stories that Dohrmann documented make this reality painfully clear.[37]

To compound the problem of unregulated agent-runners and coaches, many of these AAU teams require a great deal of funding, and the rules and regulations governing the sources of money for these teams are uneven and rarely enforced very heavily.[38] None of the players in the AAU system are paid and, as a result, teams that are formed (such as Joe Keller's team) are often mislabeled as amateur programs. In fact, they generate huge sources of income for their coaches and managers. Keller, for instance, was shown to have landed a six-figure compensation package with Adidas.[39] While both the AAU code and the NCAA do not permit athletes to be paid directly, neither regulating body actively restricts the amount of other benefits such as apparel, trips, and meals that are showered on teams and their players.[40] Determining whether these benefits reach the level of a formal violation is often left to the NCAA, which rarely levels significant penalties in those cases.[41] So while money freely flows into AAU teams (and often into the coach's pockets), the NCAA and AAU essentially turn a blind eye.[42] Be-

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[35] *Id.* at 24-25, 46, 54-55.

[36] PJ Carr, *The Cautionary Tale of Demetrius Walker*, ONCAMPUSSPORTS.COM, http://oncampussports.com/2013/12/cautionary-tale-demetrius-walker/ (last visited Oct. 31, 2014).

[37] Dohrmann, *supra* note 5, at 44-46 (discussing the shady tactics and models used to entice players employed by other AAU coaches, including Pat Barrett, a man deemed "Southern California's AAU kingpin," and the Pump brothers, David and Dana. These coaches, and others, were integral parts of the growth of AAU basketball in Southern California but also contributed to the seedy methods that have become commonplace throughout the system).

[38] *Id*.

[39] Taro Greenfeld, *The Fast Track,* SPORTS ILLUSTRATED (Jan. 24, 2005), http://157.166.253.202/vault/article/magazine/MAG1104412/index.htm.

[40] Salerno, *supra* note 22, at 29.

[41] Violations are often handed down for improper behavior on the part of the university or an agent and rarely on any conduct through the AAU team. *Id.*

[42] *See id.* (noting that any violations generally stem from universities providing improper benefits to a player, not the AAU program). NCAA investigations usually revolve around payment of money and other benefits such as cellular phones or cars

yond the money itself, professionals such as apparel company executives and agents exert influence in this realm. This influence allows them to entrench themselves into the process, representing athletes but not keeping their best interests in mind.

Not only has the AAU been dogged by accusations of impropriety among some of its coaches, it has faced questions over whether a few of its coaches, charged with mentoring some of the nation's best high-school players, have criminal records that should preclude them from any sort of youth development and leadership role. In August 2013, Curtis Malone, founder and coach of "D.C. Assault," a prominent Washington D.C.-area AAU team that counts several NBA players among its alumni, was arrested on drug trafficking charges.[43] Malone, who pled guilty and currently faces five to ten years in jail,[44] was described as a "power broker" for youth basketball in and around D.C., despite having a history of legal problems and NCAA sanctions for improper benefits.[45] While this may be shrugged off as an isolated incident, the presence of such individuals in positions of considerable power among youth basketball circles is a troubling issue in the industry.

These problems have all contributed to create a broken system of basketball development. The corrosive side effects of the AAU system have been publicly acknowledged at the professional and collegiate levels.[46] Every year during the lead up to the professional basketball draft, young athletes are analyzed, dissected, and critiqued to a high degree.[47] Some

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to AAU players. *See, e.g.*, Eric Crawford, *The Vault: The Marvin Stone-NCAA Saga*, ERICCRAWFORDSPORTS.WORDPRESS.COM (May 31, 2010), http://ericcrawfordsports.wordpress.com/2010/05/31/the-vault-the-marvin-stone-ncaa-saga/ (discussing an NCAA investigation into an AAU basketball player who allegedly received improper benefits from a university).

[43] *AAU Big Shot Arrested on Drug Charges*, FOX SPORTS (June 2, 2014, 3:05 PM), http://msn.foxsports.com/collegebasketball/story/aau-dc-assault-founder-coach-curtis-malone-arrested-washington-dc-drug-trafficking-charges-power-broker-081213.

[44] Rob Dauster, *DC Assault Co-founder Curtis Malone Pleads Guilty, Facing 5-10 Years in Prison*, NBC SPORTS (Mar. 13, 2014, 12:07 PM), http://collegebasketballtalk.nbcsports.com/2014/03/13/dc-assault-co-founder-curtis-malone-pleads-guilty-facing-5-10-years-in-prison/.

[45] *Id.*

[46] *See* Eamonn Brennan, *Steve Kerr on the Age Limit and AAU*, ESPN (May 8, 2012, 2:30 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/58828/steve-kerr-on-the-age-limit-and-aau.

[47] *See* Zach Braziller, *Prepping for NBA Draft a Grind for Russ Smith,* N.Y. POST (June 23, 2014, 12:58 AM), http://nypost.com/2014/06/23/prepping-for-nba-draft-a-grind-for-russ-smith/ (telling the story of one NBA hopeful, Russ Smith, and the whirlwind he went through leading up to the 2014 NBA Draft).

teams, including the NBA's San Antonio Spurs, have not only acknowledged these problems but have taken a step further in moving away from drafting and developing American players who come up through the AAU system.[48] The Spurs' strategy has been defined, in part, by a perceived disinterest in American players who, in team officials' minds, have been ruined by playing AAU basketball and participating in a system that glosses over fundamentals in favor of highlight plays and empty showcases of talent.[49] Their penchant for drafting international players, and the sustained success they have obtained in doing so, has certainly influenced other NBA teams in varying degrees.[50] While no other teams have completely adopted the Spurs' model, their approach certainly speaks to a greater mindset present in the NBA that at least questions, if not outright critiques, the model of AAU basketball in America.

Colleges and college basketball coaches feel the downsides of the AAU system even more directly. When asked about AAU coaches and their role in the hierarchy of youth and amateur basketball, Duke University basketball coach Mike Krzyzewski, one of the most well respected and decorated basketball coaches in NCAA history, expressed his misgivings on their role and their goals for the kids on their teams. "They don't answer to anybody," Krzyzewski said in a newspaper interview, "Who is funding them [and] what are their goals? What race are they running? You know what race a high school coach is running for his or her school."[51] Krzyzewski's comments, while demonstrative of the lack of inherent accountability and supervision for AAU coaches, also reflect the possibility of conflicts of interest inherent in a system that exists as a third-party beneficiary to the college and professional athletics systems.[52] Without a doubt, the AAU basketball

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[48] Seth Wickersham, *Made Not in America*, ESPN THE MAG. (June 11, 2013), http://espn.go.com/nba/story/_/id/9364989/san-antonio-spurs-doing-right-drafting-international-athletes-espn-magazine.

[49] *Id.*

[50] The philosophy of Spurs coaching and management has spread as students of its system have taken over coaching and General Management positions throughout the NBA. *Spurs' GM/Coaching Tree Expands To 11*, REALGM WIRETAP (Aug. 13, 2013, 5:47 PM), http://basketball.realgm.com/wiretap/229378/Spurs-GM/Coaching-Tree-Expands-To-11.

[51] Tom Davis, *Krzyzewski Sees Pros, Cons of AAU*, FORT-WAYNE NEWS SENTINEL (Sept. 30, 2011), http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20110930/SPORTS/110939999/1002.

[52] *See* Welch Suggs, *Tragedy and Triumph in Title IX,* 7 VAND. J. ENT. L. & PRAC. 421, 424 (2005) (describing AAU basketball programs as complex series of tournaments and camps that increasingly prioritize athletic skills to the detriment of academic and social development).

system has a number of institutional problems that have contributed to the problems that plague the U.S. amateur system. However, the NCAA also has its own substantial role to play in the process and associated issues.

B. The NCAA and the Big Business of College Basketball

The National Collegiate Athletic Association began in the early 20th century.[53] In response to the growing popularity and complexity of college sports (particularly football) and the lack of standardized college rules, the White House and Congress created the International Athletic Association ("IAA"), which was charged with reforming and creating intercollegiate sporting rules.[54] The IAA changed its name to the National Collegiate Athletic Association in 1910 and began fulfilling its mandate.[55] For much of its early existence, the NCAA was charged with merely creating and maintaining the rules and had little oversight or governance features.[56] As college sports became more popular and lucrative in the mid-20th century and the NCAA obtained football television contracts, the organization took on a greater role and increased not only its governance capabilities but also its enforcement capacity.[57] The NCAA is currently "an unincorporated association consisting of approximately 960 public and private universities and colleges {that} adopt rules governing member institutions' recruiting, admissions, academic eligibility, and financial aid standards for student athletes."[58] The NCAA regulates all aspects of intercollegiate athletics, including recruiting, eligibility, and academic standards. In addition, the NCAA supervises and coordinates regular season and sponsors post-season competitions and championships.[59]

The rise of commercialization, increased innovations in television and broadcast media, and greater interest in sports across the nation led to the NCAA developing greater control mechanisms for college sports and college athletes.[60] Court decisions, such as *NCAA v. Tarkanian*,[61] freed the NCAA

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[53] Smith, *supra* note 2, at 12.

[54] Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 257-58(2003).

[55] Smith, *supra* note 2, at 12.

[56] *Id.* at 13.

[57] *Id.* at 14 (citations omitted).

[58] *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 179 (1988).

[59] *Trustees of Cal. State Univ. & Colleges v. Nat'l Collegiate Athletic Ass'n*, 147 Cal. Rptr. 187, 189 (Cal. Ct. App. 1978).

[60] Allie Grasgreen, *Tough Choices for Athletes' Advisers*, INSIDE HIGHER ED (May 9, 2012), https://www.insidehighered.com/news/2012/05/09/ncaa-academic-rules-frustrate-advisers-athletes.

from much due process scrutiny and empowered the organization to take greater steps in enforcing regulations and restrictions on not only athletes but also universities and athletic departments.[62] As a voluntary organization, the NCAA cannot be sued as a state actor.[63] While the NCAA suffered other defeats in the federal court system, particularly on the issue of antitrust allegations,[64] it nonetheless expanded its mandate and grew exponentially along with the growth of interest in amateur athletics. Today, the NCAA is charged with administering and governing college sports in America and has done much to protect its position and the benefits it has received from the meteoric rise of revenue in college sports due to increased television and broadcast agreements.[65]

Much of what the NCAA does, especially concerning college basketball, is indeed beneficial. College basketball has become a huge business with expanding revenues, growing fan bases, and increasing pressure on not only college players, but also universities and coaches, to succeed on and off the court. However, there are also three issues within the NCAA system that have contributed to the current poisonous state of amateur athletics in the country.

The first of these issues is that the rules place heavy restrictions on the mobility of college athletes, not only between amateur and professional levels but also between different universities. In the 2005 incarnation of the NBA's Collective Bargaining Agreement (CBA) on the amateur-professional

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[61] 488 U.S. 179 (1988).

[62] *See* John P. Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian, ___ U.S. ___, 109 S. Ct. 454 (1988)?*, 21 ARIZ. ST. L.J. 621, 622 (1989) (positing that the NCAA can continue to regulate amateur athletics at the college level free from constitutional restraint).

[63] *See Tarkanian*, 488 U.S. at 199 (holding that the NCAA was not a state actor, freeing the NCAA from defending against due process allegations brought by Coach Jerry Tarkanian). Other actions of the NCAA are also protected due to its categorization as a noncommercial activity. For another NCAA legal victory, see *R.M. Smith v. Nat'l Collegiate Athletic Ass'n,* 266 F.3d 152, 159 (3rd Cir. 2001) (holding that through its enforcement of an eligibility bylaw, which prohibited a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which her undergraduate degree was obtained, the NCAA did not engage in commercial or business activities).

[64] *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (holding that NCAA rules are subject to antitrust scrutiny and should be upheld if they foster economic competition while ruling that the NCAA television plan violated the Sherman and Clayton Antitrust Acts).

[65] *See* Steve Berkowitz, *NCAA Had Record $71 Million Surplus in Fiscal 2012*, USA TODAY (May 2, 2013, 8:58 AM), http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/.

divide, the NBA Players Association and the NBA agreed to "raise the age floor for draft entry from 18 to at least 19 years of age, effective in the 2006 NBA Draft."[66] As a result, amateur players would no longer be able to jump directly from high school to the NBA, and instead would have to wait at least one year from the date of their high school graduation. This mandatory year-in-waiting following graduation strengthened the position of the NCAA, creating the expectation that this year would be spent playing collegiate basketball.[67] While the NCAA had little control over the creation and implementation of the year-in-waiting, it benefitted greatly from the rule. With the new NBA commissioner, Adam Silver, now considering raising the minimum age again by one more year[68] and thereby assuring that athletes must wait two years after graduating high school before entering the NBA, the NCAA only stands to benefit further. However, while the NCAA benefits from these increasing age restrictions, such movement and progress restrictions create a whole host of issues for the athletes, including increasing the risk of injury and jeopardizing an athlete's career or draft status, and the immense financial benefit that universities and the NCAA stand to gain with popular basketball stars being forced to stay on campus another year.[69] While the stated goals of this action seem legitimate (such as giving players more seasoning in the game and added maturity before being thrown into the professional pressure cooker), such regulations unfairly punish the athletes and actually conflict with established data on player development, which suggests that players develop more in the NBA than they would in an extra few years in college.[70]

In addition to this proposed expansion of the minimum age rules, the NCAA has also placed unfairly harsh transfer rules on basketball players who wish to leave one program and attend another.[71] Whereas a basketball

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[66] Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 832 (2006).

[67] Nitin Sharma, *An Antitrust and Public Policy Analysis of the NBA's Age/Education Policy: At Least One Road Leads to Rome*, 7 RUTGERS J. L. & PUB. POL'Y 481, 485 (2010).

[68] Rob Mahoney, *NBA Commissioner Adam Silver to Push for Higher Age Limit*, SPORTS ILLUSTRATED (Feb. 14, 2014), http://nba.si.com/2014/02/14/nba-higher-age-limit-adam-silver/.

[69] *Id.*

[70] *Id.*; *see also* Kevin Pelton, *NBA Develops Players Better*, ESPN (Mar. 11, 2014, 5:32 PM), http://insider.espn.go.com/nba/story/_/id/10588150/nba-why-nba-develops-players-better-college.

[71] Shannon J. Owens, *Time for NCAA to Relax Transfer Guidelines Student-Athletes*, ORLANDO SENTINEL (Dec. 19, 2011), http://articles.orlandosentinel.com/2011-12-

coach can leave one program and coach another in one year's time,[72] a player often has to sit out for one year, unless granted a transfer exception by the NCAA. This puts many players at a disadvantage as they lose a prime playing year and the exposure that comes with it. The two rules have also both added an extra layer of pressure on athletes, which creates indecision that negative influences, such as agents and agent runners, can exploit through gifts, advice, or simply being the voice in their ear.

A second issue is that a number of people and entities, including the NCAA itself, profit off the names, likenesses, and on-field successes of college athletes who receive no compensation other than scholarships to their schools. This ongoing issue has only become more pronounced with the increase in television broadcasts of college games, the jump in sales of sports merchandise through the university, and the development of video games focused on college sports.[73] These developments have flooded universities, their athletic departments, and the NCAA itself with an unprecedented amount of money. In 2013, it was reported that the NCAA had recorded a near $71 million surplus in its 2012 fiscal year, an all-time high for the organization.[74] In the same financial statement, the year-end net assets of the NCAA were totaled at $566 million, double the amount that was calculated at the end of the fiscal year in 2006.[75] Moreover, of the NCAA's 2012 revenue, which totaled around $872 million, almost $709 million came from television and marketing rights fees.[76] While expenditures by the NCAA and member schools have also seen a corresponding jump,[77] the vast amount of money generated in this system has made the model untenable and unfair in its current form.

The NCAA and member schools are certainly allowed to expand their league and brand with lucrative television deals, broadcast agreements, and merchandising opportunities. However, controversy and argument have

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19/sports/os-shannonowens-ncaa-asu-1220-20111219_1_student-athletes-football-coach-transfer.

[72] *Id*.

[73] *See* Darren Rovell, *NCAA Holds Firm: No Pay for Play*, ESPN.COM (Dec. 11, 2013, 5:30 PM), http://espn.go.com/college-sports/story/_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming.

[74] Berkowitz, *supra* note 65.

[75] *Id.*

[76] *Id.*

[77] In 2012, big-time athletic programs increased operational spending by $665 million, against a $385 million increase in revenue. Steve Berkowitz & Jodi Upton, *NCAA Member Revenue, Spending Increase*, USA TODAY (July 1, 2013, 4:25 PM), http://www.usatoday.com/story/sports/college/2013/05/01/ncaa-spending-revenue-texas-ohio-state-athletic-departments/2128147/.

grown over the fact that these increased profits and revenue streams have been born and developed on the backs of talented players who are, essentially, unpaid labor.[78] Two legal challenges appear primed to bring the NCAA's established model of financial and economic success to the brink. One suit, brought by former UCLA basketball star Ed O'Bannon, has received great publicity in its challenge of the NCAA's antitrust mechanism.[79] In concert with this, a recent win by Northwestern football players seeking to be recognized as possible union employees by the National Labor Relations Board has put the amateurism model of the NCAA under the spotlight.[80]

Finally, the NCAA has created an enforcement and punishment structure that puts undue pressure on young, easily manipulated college athletes. From what gifts they can accept to what food they can eat, NCAA athletes are heavily monitored by the entire organization and face punitive punishments in the form of financial remuneration or game suspensions if they are caught with improper benefits.[81] In a recent concession, the NCAA allowed member schools to supply their athletes with unlimited food and snacks.[82] This move was met with widespread ridicule, given its delay and ineffective solution to the much more insidious problem of unpaid labor.[83] Rather than a system that places the onus of decision-making and maturity on eighteen- and nineteen-year-old athletes, we should have a system in place that prevents them from falling into such scenarios in the first place and isolates them from negative influences.

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[78] *See* discussion *infra* Section III.

[79] *In Re Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

[80] Both of these legal challenges will be discussed later, but each has tremendous implications for the NCAA's economic and regulatory model.

[81] Dustin Hockensmith, *Worse Violation of NCAA Student-Athlete "Culture": North Carolina or Penn State?*, PENNLIVE.COM (Jan. 29, 2014, 10:16 PM), http://www.pennlive.com/pennstatefootball/index.ssf/2014/01/worse_infringement_on_ncaa_stu.html.

[82] Matt Norlander, *NCAA Votes to Allow Unlimited Food Supply for Players*, CBS SPORTS (Apr. 15, 2014, 5:54 PM), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24528113/ncaa-votes-to-allow-unlimited-food-supply-for-players.

[83] *See* Kevin Trahan, *NCAA Allows 'Unlimited Meals' (days after Shabazz Napier claimed hunger)*, SBNATION (Apr. 15, 2014, 5:26 PM), http://www.sbnation.com/college-football/2014/4/15/5618236/new-ncaa-rules-meals-snacks-SNACKS.

III. Fixing the Broken System: The Problems and Their Solutions

Even the AAU and NCAA institutions and leading individuals within those institutions acknowledge that the system of basketball development in America has serious, fundamental problems.[84] These problems have plagued both the AAU and NCAA for a number of years and have led to many stopgap solutions that have done little to stem the tide or erase the subversive elements of the system.[85] The problems are numerous and often amorphous, spread out across the country and rearing their heads in many different situations and circumstances. Sports reform activists are focused on a vast array of problems within the intercollegiate landscape including damage to the integrity of higher education, academic fraud, harm to non-athletes, exploitation of athletes, gender inequities, and the perpetuation of racial injustices.[86] These more specific issues of the system can be traced to two overarching problems that have, in part, shaped and defined much of the current landscape of college basketball: the commercialization and professionalization of college athletics. Academics attribute the causes of these overarching professionalization and commercialization problems to our runaway sports culture, commoditization, the political economy of college sports, or university administrators.[87] Regardless of the cause, each of these problems, while wide-ranging, can be addressed by overarching reforms that could do much to repair the American amateur basketball system. The overarching framework of commercialization and professionalization allows us to turn to the European system of basketball for approaches to redefine amateurism and reform the American basketball system.

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[84] *See* Smith, *supra* note 2, at 16-17 (noting that "university presidents increasingly found themselves caught between the pressures applied by influential members of boards of trustees and alumni, who often demanded winning athletic programs, and faculty and educators, who feared the rising commercialization of athletics and its impact on academic values."); *see also* Rodney K. Smith, *Reforming Intercollegiate Athletics: A Critique of the Presidents Commission's Role in the N.C.A.A.'s Sixth Special Convention*, 64 N.D. L. Rev. 423, 427 (1988).

[85] *See* Michelle Brutlag Hosick, *Board revamps recruiting regulations*, NCAA (Oct. 27, 2011), http://www.ncaa.com/news/basketball-men/article/2011-10-27/board-revamps-recruiting-regulations.

[86] Robert D. Benford, *The College Sports Reform Movement: Reframing the "Edutainment" Industry*, 48 The Soc. Q. 1, 9, 22 (2007) (approaching the analysis by focusing on five major topics: (1) commercialization of intercollegiate athletics; (2) university involvement in the entertainment industry; (3) damage to the integrity of higher education; (4) exploitation of athletes; and (5) harm to non-athletes).

[87] *Id.* at 6.

A. Problem #1: Commercialization of Amateur Basketball

As early as 1929, in a report by the Carnegie Foundation, college athletics have been found to be "highly organized commercial enterprises" and "highly profitable enterprises."[88] In the report, the authors attempted to diagnose the causes of the cheating and financial scandals associated with college sports. The report concluded that:

> the heart of the problem facing college sports was commercialization: an interlocking network that included expanded press coverage, public interest, alumni involvement and recruiting abuses. The victim was the student-athlete in particular, the diminishing of educational and intellectual values in general. Also, students (including non- athletes) were the losers because they had been denied their rightful involvement in sports.[89]

This commercialization and increased revenue then creates economic incentives for conduct, which may conflict with a university's academic mission, and exploit student-athletes.[90] Today, the NCAA continues to ignore the detrimental effects of this collision, noting instead "the need for revenue gained through commercial activity associated with intercollegiate athletics is as essential to the successful future of the enterprise as is the continued integration of intercollegiate athletics with the values of higher education."[91]

The Ecosystem of College Athletics

The college sports industry today has swelled to $60 billion annually.[92] While critics commonly point to the $16 billion generated from television

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[88] *Id.* (citing HOWARD J. SAVAGE ET AL., THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS ix (1929)).

[89] JOHN THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS 26 (1994).

[90] Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 781 (2010).

[91] *See* Nat'l Collegiate Athletic Ass'n Final Report of the NCAA Task Force on Commercial Activity in Division 1 Intercollegiate Athletics (2009), http://web1.ncaa.org/web_files/DI_Amateurism_Cab/2009/February/Supplement%20No.%207-a.pdf; *see also* Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27 ENT. & SPORTS LAW. 1, 5 (2009).

[92] *See* Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athletic*, 11 FLA. COASTAL L. REV. 639, 646 (2010) (citing *The News Hour: Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001), *available at* http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html (discussing the prospect of reforming college athletics)); *see also* Richard G.

contracts for the NCAA and its conferences,[93] the college sports industry as a whole also generates revenue from advertising, ticket sales, sponsorships, and betting wages.[94] The economics of intercollegiate sports are particularly robust due to the great number of organizational actors involved in this arena.[95] The colleges, including their athletic departments, administration, academic units, governing boards, and booster clubs, are united by unifying organizations such as athletic conferences and the NCAA. The broadcasting companies, including television and radio, have lucrative contracts with the overarching NCAA,[96] individual conferences, and some individual schools. The supporting organizations include service providers such as sports medicine, sports merchandising, and sports media. The individuals within each of these larger actors can be members of professional or trade associations such as the National Athletic Trainers' Association,[97] National Association of Collegiate Directors of Athletics,[98] National Sports Marketing Network,[99] and the College Sports Information Directors of America.[100] Lastly, and perhaps most importantly, companies from a variety of industries can use college athletics as a marketing tool through sponsorships and nam-

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Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until* Oliver v. NCAA, 11 FLA. COASTAL L. REV. 459, 599 (2010).

[93] Karen Gullo, *NCAA Can't Argue Keeping Player Revenue Helps Women's Sports*, BLOOMBERG (Apr. 11, 2014, 8:34 PM), http://www.bloomberg.com/news/2014-04-12/ncaa-can-t-argue-keeping-player-revenue-helps-women-s-sports-1-.html.

[94] *See* Zak Cheney-Rice, *Here's How Many Billions College Players Will Make During March Madness This Year*, MIC.COM (Mar. 19, 2014), http://www.policymic.com/articles/85763/here-s-how-many-billions-college-players-will-make-during-march-madness-this-year.

[95] Benford, *supra* note 86, at 6; *see also* Mitten, *supra* note 90, at 844 n.18 (listing the constituencies of major college sports).

[96] *See* Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167, 180-81 (1996) (discussing the increased involvement of corporations in intercollegiate athletics).

[97] THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION, http://www.nata.org/ (last visited Oct. 31, 2014).

[98] NATIONAL ASSOCIATION OF COLLEGIATE DIRECTORS OF ATHLETICS, http://www.nacda.com/ (last visited Oct. 31, 2014). Also note that the National Association of Collegiate Directors of Athletics Official Athletic website is a partner of CBS College Sports Networks, Inc. *See id.*

[99] NATIONAL SPORTS MARKETING NETWORK, http://sportsmarketingnetwork.com/ (last visited Oct. 31, 2014).

[100] COLLEGE SPORTS INFORMATION DIRECTORS OF AMERICA, http://www.cosida.com/ (last visited Oct. 31, 2014).

ing rights.[101] This college sports economy is then bookended by mirrored economies at the inputs and outputs stages (the high school and professional level), putting more pressure on these actors within the multi-organizational college sports landscape. Linking these economies together, assisting in the movement of athletes from high school and AAU to college and then to the NBA, are individual actors such as sports agents, coaches, and managers.[102]

Viewed through this multi-organizational context, commercialization takes place through the relationships of each actor with each other.[103] For example, the interactions of individual universities with sports merchandise companies include multi-million-dollar licensing deals, such as the University of Notre Dame's $90 million deal with Under Armour.[104] In another instance, the University of Texas's expansion of its "international brand" implicates its relationship with football fans as well as corporate sponsors.[105] In the licensing context, the NCAA previously sponsored the EA Sports video game series, driving part of the $3 billion that the NCAA generates in

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[101] Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition it has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 327 (2003) (noting that companies that are not the manufacturers of athletic apparel or equipment get name recognition for their products through sports sponsorship and using Alltel's sponsorship of the University of Florida athletics department as an example).

[102] Dohrmann, *supra* note 5, at 16.

[103] *See* Mary Vitale, *Financial Exploitation of Student-Athletes: Three Possible Solutions for Leveling the Playing Field Between Division I Men's Basketball and the NCAA*, 1 ST. JOHN'S ENT., ARTS, & SPORTS L. J. 73, 75 (2012) (explaining that NCAA Division I basketball revenues are derived from four sources: university revenue and publicity, broadcasting revenue, merchandise and endorsement deals, and player image and likeness).

[104] Darren Rovell, *Under Armour Signs Notre Dame*, ESPN.COM (Jan. 21, 2014, 3:06 PM), http://espn.go.com/college-football/story/_/id/10328133/notre-dame-fighting-irish-armour-agree-most-vble-apparel-contract-ncaa-history; *see also* Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1087 (2010) (discussing the University of Kansas Jayhawks's signing of a $26.67 million contract with Adidas in which it agreed to don its players in jerseys featuring the famous three-striped logo after winning the NCAA Division I men's basketball championship).

[105] The first-year athletic director has already scheduled a men's basketball game against Washington in China for 2015, and the program will participate in a three-city basketball event with Michigan State, North Carolina and Florida in 2018. Max Olson, *Steve Patterson: Focus not on Aggies*, ESPN (Apr. 1, 2014, 5:10 PM), http://espn.go.com/college-football/story/_/id/10710069/texas-longhorns-ad-steve-patterson-not-interested-rivalry-texas-aggies.

licensing revenue.[106] The clients of the Collegiate Licensing Company represent a $3.68 billion retail market for collegiate licensed merchandise.[107] Solo actors, such as coaches and administrators, receive lucrative multi-million dollar contracts and performance bonuses from their respective universities based on team achievements.[108] Even more importantly, these coaches are able to further capitalize on their publicity with product sponsorships.[109] Perhaps most importantly, the NCAA recently entered into a fourteen-year, $10.8 billion deal with CBS/Turner for broadcasting rights to the NCAA Division I men's basketball championship.[110] Even outside of the NCAA's organizational confines, universities are able to capitalize on the popularity of their athletic departments. Many universities' branding rights are not owned by the NCAA, but rather the Collegiate Licensing Company, the nation's leading collegiate trademark licensing and marketing firm.[111] This represents the universities' acknowledgement of collegiate licensing as a

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[106] Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 20 (2010). The NCAA arguably allowed EA Sports to use the likenesses of current and former athletes in its video games. While the origins of these allegations stem from the O'Bannon lawsuit, the plaintiffs' focus has shifted almost entirely to game broadcasts. Stewart Mandel, *Judge Allows Ed O'Bannon v. NCAA to Proceed to Trial*, SPORTS ILLUSTRATED (June 10, 2014), http://sportsillustrated.cnn.com/college-football/news/20140220/ed-obannon-lawsuit-proceeds-to-trial/#ixzz2y8xW0T00.

[107] *About CLC*, THE COLLEGIATE LICENSING COMPANY, http://www.clc.com/About-CLC.aspx (last visited Oct. 31, 2014).

[108] Coaches' compensation packages not only include substantial base salaries, typically the highest in the university, but also revenues from summer camps, media shows, and shoe and apparel contracts. As James Duderstadt, former president of the University of Michigan, observed, "It is ironic, indeed, that among all the members of the university community, athletics' coaches are the only ones allowed to profit personally from the reputation and activities of the university." Benford, *supra* note 86, at 11.

[109] *See, e.g.*, Richard Salgado, *Educating Someone Who Can't or Doesn't Want to be Educated: The Shifting Fiduciary Duty Continuum of Big-Time College Sports*, 3 WILLAMETTE SPORTS L.J. 27, 34 (2006) ("Duke basketball coach Mike Kryzewski accepts $375,000 annually from Nike in exchange for requiring his players to wear Nike shoes during games.") (citing R. Hurst and J. Grief Pressley III, *Payment of Student-Athletes: Legal and Practical Obstacles*, 7 VILL. SPORTS & ENT. L. FORUM 55, 56 (2000)).

[110] Wolverton, *supra* note 9. In 1999, the NCAA and television network CBS entered into a $6 billion contract, and the previous deal was a $1.725 billion contract between the two organizations Wong, *supra* note 104, at 1086.

[111] The Collegiate Licensing Company represents nearly 200 colleges, conferences, bowl games, and athletic conferences. *About CLC*, THE COLLEGIATE LICENSING COMPANY, http://www.clc.com/About-CLC.aspx (last visited Oct. 31, 2014).

substantial revenue driver that incorporates the entire university. While a university's brand as an institution of higher learning is certainly marketable without intercollegiate sports, high-profile athletic departments can substantially increase the value of branded goods.[112] The interconnectedness of college basketball and the NBA also plays a critical role in commercialization. College basketball plays a pivotal role as the developmental league for the NBA.[113] For individual athletes, the economic incentives to leave school and reach professional status can lead to irrational decisions regarding jumping to the NBA and foregoing years of college.[114] Unfortunately, the NCAA does not allow athletes to receive payment in excess of scholarship dollars or to capitalize on their personal image.[115] However, the fair market value of a college basketball player is about $375,000[116] while the lost in-

[112] The top selling merchandising royalties from universities represent some of the top athletic programs in the country. *See Collegiate Licensing Company Names Top Selling Universities and Manufacturers for First Fiscal Quarter of Fiscal Year 2013-14*, THE COLLEGIATE LICENSING COMPANY (Nov. 11, 2013), http://www.clc.com/News/Archived-Rankings/Rankings-Q3-2013.aspx; Press Release, National Association of Collegiate Directors of Athletics, *Stanford Wins 2012-13 Division I #LSDC* (June 27, 2013) (*available at* http://grfx.cstv.com/photos/schools/nacda/sports/directorscup/auto_pdf/2013-14/misc_non_event/June27release.pdf).

[113] Sports reform author Andrew Zimbalist observes that, "[n]either the NBA nor the NFL has player development systems, and their teams do not have substantial player development expenses. Practically all their player development occurs at the college level . . . . Yet neither the NBA nor the NFL contributes a penny to college basketball or football." Benford, *supra* note 86, at 11 (quoting ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 197 (1999)).

[114] *See* Nick Sugai, *The Effect of Early Entry to the NBA* 47, https://www.amherst.edu/media/view/329619/original/Sugai-EffectEarlyEntrytoNBA.pdf (explaining that only the top-five American high school players benefit from jumping to the NBA). *But see* Chris Johnson, *Examining the Results of College Basketball's One-And-Done Era,* SPORTS ILLUSTRATED (Apr. 11, 2014), http://www.si.com/nba/2014/04/11/nba-one-and-done-history-zach-lavine (documenting the outcomes of "one-and-done" NBA draft picks who declared for the draft after a year playing in the NCAA).

[115] NCAA, NCAA DIVISION I MANUAL, art. 12 (2013-14); *see also id.* at art. 14-15 (describing permitted financial aid and limiting an athlete's compensation to tuition, fees, room and board, transportation, and books).

[116] RAMOGI HUMA & ELLEN J. STAUROWSKY, NATIONAL COLLEGE PLAYERS ASS'N & DREXEL UNIVERSITY SPORT MANAGEMENT, THE $6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM (2012), *available at* http://www.ncpanow.org/news/articles/the-6-billion-heist-robbing-college-athletes-under-the-guise-of-amateurism.

come over a four-year career for the average NCAA Division I men's basketball player is $1,063,307.[117]

This list of college sports revenue generation is neither exhaustive nor exclusive. Instead, revenue generation illustrates that the relationships between the actors in the college basketball ecosystem are economic in nature. In an overarching manner, this commercialization has distorted the values within higher education not just on college campuses, but within our entire sports culture.[118]

The Effects of Commercialization on AAU

While college athletics has faced criticism and reform efforts since its inception, the pre-college system has received less attention. Scrutiny in this area is usually directed at the coaches, "handlers" or "agent runners" of these all-star teams, recruiting violations, and the involvement of college boosters. However, it is shoe and apparel companies, under little oversight from the AAU, who actually play the key role in the inflow and outflow of funds in amateur basketball.[119]

Power of the Shoe Companies: An Example of Commercialization

The power of the shoe companies reveals how both commercialization and the interconnectedness of the AAU system with the rest of the basketball landscape create an environment for exploitation. While organizations such as institutions of higher education or athletic departments mainly act within the intercollegiate athletics framework, shoe companies play a distinct role in being a consistent figure in the pre-college, college, and professional ecosystem. It is a role that has greatly expanded over the past thirty years. There are two names that are synonymous with growth of the shoe business in American professional and amateur sports: John "Sonny" Vaccaro and Michael Jordan.[120] In 1978, with the shoe market dominated by one company, Converse, Vaccaro approached Phil Knight, founder of Nike,

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[117] *Id.*; *see also* Chris Smith, *College Basketball's Most Valuable Teams 2014: Louisville Cardinals On Top Again*, FORBES (Mar. 17, 2014, 9:29 AM), http://www.forbes.com/sites/chrissmith/2014/03/17/college-basketballs-most-valuable-teams-2014-louisville-cardinals-on-top-again/ (using the Equity in Athletics Data Analysis Cutting Tool to value NCAA college basketball teams); *College Athletics Union Could Put Billions at Stake*, NBC SPORTS (Apr. 9, 2014, 4:13 PM), http://www.nbcsports.com/basketball/nba/college-athletes-union-could-put-billions-stake.

[118] Benford, *supra* note 86, at 11.

[119] *See generally* Wetzel & Yaeger, *supra* note 7.

[120] Dohrmann, *supra* note 5, at 46-47.

with a proposition.[121] With the goal of eating away at Converse's monopoly in the market, Vaccaro and Knight joined forces and began initiating a plan to connect Nike to some of the biggest college basketball coaches in the nation.[122] The thinking was that if the coaches and the school were on board with Nike sponsorship, the athletes would wear the shoes and become walking billboards for the products.[123]

After some initial success with several schools, Vaccaro and Nike scored its biggest coup with the signing of Michael Jordan in 1984.[124] Although at the time he was just a college sophomore, Jordan's signing with Nike has been lauded as a touchstone moment in athlete marketability.[125] Jordan would go on to win six NBA titles with the Chicago Bulls and is acknowledged, by general acclaim, to be the greatest basketball player of all time.[126] Jordan's role in the growth of the influence of shoe companies stems from his own success. His athletic endeavors, worldwide fame, and marketing prowess combined to redefine the standards of athletic professionalism and the commercial sports market. Nike's competitors saw the success Jordan had with the company and scrambled to replicate it, searching for "the next Michael Jordan" to sell.[127]

While Jordan's relationship with Nike set the benchmark for the market, it was also Vaccaro's move to Adidas in 1991 that set the path the market is currently on today.[128] At Adidas, Vaccaro was tasked with building the basketball brand and stealing Nike's market share.[129] Because the best college programs were already signed with Nike, Vaccaro had to look elsewhere. In Vaccaro's words, "I had to go younger. The only place I could do battle with Nike was at the youth level."[130] Within his first couple of years at Adidas, Vaccaro brokered deals with some of the top high schools and most successful AAU programs in America.[131] By reaching players that young, Vaccaro was able to snap up much of the market even before the players set foot on a college campus.

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[121] *Id.*
[122] *Id.* at 46.
[123] *Id.*
[124] *See* Wetzel & Yaeger, *supra* note 7, at 3-5.
[125] *Id.*; *see also* Dohrmann, *supra* note 5, at 46.
[126] *Legends profile: Michael Jordan*, NBA.com, March 4, 2013, http://www.nba.com/history/legends/michael-jordan/.
[127] Dohrmann, *supra* note 5, at 47.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 46.
[131] *Id.*

Nike soon followed Adidas's lead and, by 1996, the two shoe companies sponsored AAU teams and high school coaches in every urban center in America.[132] In recent years, they have been joined by other shoe and apparel companies, including Under Armour, in their pursuit for young talent.[133] It is this competition for talent that has driven the downward spiral that has enveloped much of the youth basketball game. In a market so thoroughly dominated by two behemoths, others wishing to get a piece of the pie have found it necessary to circumvent barriers of entry in ways that have hurt much of the amateur game. Sponsorships and commercialization in the youth and amateur game has been set on a race to the bottom, where people willing to find talent at an incredibly young age will have a good shot at gaining sponsorships and endorsements from two of the world's largest sports apparel corporations.

The story of Joe Keller, detailed in George Dohrmann's book, is a great example of the underbelly in amateur basketball that this intense competition for resources has bred.[134] Keller, in his first efforts to get a sponsorship for his AAU basketball team, faced a paradox: "[w]ithout a shoe deal, it would be difficult to recruit and keep top players. And without great players, he would never get a shoe deal."[135] To deal with this, Keller went younger, recruiting players, like his prized star Demetrius Walker, straight from middle school.[136] Keller's efforts were successful—he became a well-paid coach for a Nike-sponsored AAU team—but his methods reflect the highly suspect behavior that has become more prevalent in today's AAU game.[137] By any measure, Keller's actual coaching ability and basketball knowledge were poor.[138] As depicted by Dohrmann, he was prone to outbursts at his players, enamored by unorthodox and damaging lineups, and was almost chiefly concerned with his own bottom line.[139] Yet while coaches like Keller should be marginalized or even removed from the youth game, the sponsorships and financial assistance from shoe companies allow them to stay in business and reap rewards off the successes of their young athletes.

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[132] *Id.* at 47.

[133] Sarah Meehan, *Can Under Armour Eat into Nike's Basketball Dominance with Stephen Curry Signing?*, BALTIMORE BUSINESS JOURNAL (Oct. 1, 2013), http://www.bizjournals.com/baltimore/news/2013/10/01/can-under-armour-eat-into-nikes.html?page=all.

[134] Dohrmann, *supra* note 5.

[135] *Id.* at 46.

[136] *Id.* at 47.

[137] *Id.* at 333-34.

[138] *Id.* at 24-25.

[139] *Id.*

In essence, the "shoe wars" of the 1990s and early 2000s have allowed for the introduction of rampant corporate greed into the grassroots basketball game.[140] It is a practice that still continues unabated: every summer, Nike, Adidas, and other shoe companies compete for the attendance of the best basketball players in the nation at their AAU showcases.[141] These events, such as the Reebok Summer Championships, Nike Main Event, and the Adidas Super 64, allow college coaches and other interested observers an unparalleled look at the skills and abilities of the nation's top players.[142] However, they also further commercialize and improperly expose unprepared young athletes to the unforgiving basketball economy. Shoe companies also sponsor traveling AAU teams, like Joe Keller's, as another method to highlight their products and develop connections with the athletes. In the late 1990s, it was estimated that these companies spent $5 million a year on such programs, a number that has only gone up since then.[143]

Shoe companies are also continuing to make their mark outside of these avenues. Corporations have embedded themselves in the lives of the athletes and the decisions they make about their futures. Recent examples include prep phenomenon Shabazz Muhammad opting to play for Adidas-sponsored UCLA and Andrew and Aaron Harrison, top-ranked guards in the class of 2013, considering schools sponsored by Under Armour, who had an endorsement deal with their AAU team.[144] This level of influence on players' decisions and future plans is, as of now, a legal part of the grassroots game.

Giant apparel makers continue to sign deals with schools as well, ensuring their products will be on the feet of some of the nation's most captivating athletes. In April 2014, the University of Louisville signed a five-year $40 million shoe and apparel deal with Adidas.[145] This deal is actually dwarfed by deals signed by other schools, including the University of Michigan, whose recent deal with Adidas is worth $82 million over ten years, and the aforementioned University of Notre Dame, who signed with Under Armour for an average of $9 million a year.[146]

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[140] *See id.* at 46-47; Wetzel & Yaeger, *supra* note 7, at 12-13.

[141] Dohrmann, *supra* note 5, at 383.

[142] *Id.*

[143] Lee C. Bollinger & Tom Goss, *Cleaning Up College Basketball*, N.Y. TIMES (Sept. 5, 1998), http://www.nytimes.com/1998/09/05/opinion/cleaning-up-college-basketball.html.

[144] Tom Gieryn, *Is It All in the Shoes?*, DUKE CHRONICLE (Oct. 3, 2012), http://www.dukechronicle.com/articles/2012/10/04/it-all-shoes.

[145] Brett McMurphy, *Sources: Louisville Stays with Adidas*, ESPN (Apr. 17, 2014), http://espn.go.com/mens-college-basketball/story/_/id/10795147/louisville-cardinals-receive-40-million-5-year-deal-adidas.

[146] *Id.*

In sum, the current state of the amateur sports climate, not only amateur basketball, has allowed for these incredibly lucrative deals to be signed and for these schools to profit off the careers of their athletes. This issue aside, the actions of major shoe and apparel companies in the grassroots basketball game has had a negative influence on the integrity of basketball development and has contributed to the unfettered commercialization of the amateur basketball game. Any steps to change the system must address this point and work to break the influence these companies have over college, high school, and AAU basketball programs across America.

Exploitation of College Basketball and the NCAA's Role as the NBA Minor League

Within the commercialization context, the exploitation of unpaid college basketball players adds another leg to the table propping up the big business of amateur basketball. Mr. Walter Byers, Executive Director of the NCAA from 1952 to 1987, likens the NCAA to a slave plantation that exploits student athletes in order to reap the profits generated by collegiate athletics.[147] Other articles similarly express his sentiments when investigating the economics of the collegiate athletic system.[148] Reformists' sugges-

[147] Bradley S. Pensyl, *Whistling A Foul on the NCAA: How NCAA Recruiting Bylaws Violate the Sherman Antitrust Act*, 58 SYRACUSE L. REV. 397, 398 (2008) (citing Dave Zirin, *The Madness of March: Heroes Don't Get Paid*, L.A. TIMES, Apr. 2, 2006, at M2 ("The coaches own the athletes' feet, the colleges own the athletes' bodies and the supervisors retain the large rewards. That reflects a neo-plantation mentality on campuses.") (internal quotation marks and alterations from original omitted)).

[148] *See, e.g.*, Symposium, The Uniform Athlete Agents Act, 13 SETON HALL J. SPORTS L. 345, 374 (2003) (where attorney and sports agent Craig Fenech calls NCAA athletes the "last indentured servants of our society"); Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13 (2010) (describing the NCAA as a system of apartheid with the NCAA effectively sanctioning the exploitation of African American men); Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL'Y 17, 18 (2012) (describing college football and men's basketball teams as a "regime [that] adversely burdens African Americans who are required to relinquish the pecuniary fruits of their labor"); Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 568 (2009) (positing that college play can resemble major league tryouts with ever-escalating potential salaries and bonuses); *see* also Marc Edelman, Reevaluating Amateurism Standards in Men's College Basketball, 35 U. MICH. J.L. REFORM 861, 862 (2002) ("[B]y not paying student-athletes, the Principle of Amateurism leads to windfall profits for college coaches and administrators, who receive disproportionately high salaries and additional endorsement/promotion opportunities."); Sarah M. Konsky, Note, An Antitrust Challenge to the NCAA Transfer

tions of paying college athletes have been rejected. The NCAA claims its policies support amateurism and level playing fields, but they actually are a device to divert the money elsewhere.[149] By not paying their athletes and creating lucrative national brands off their accomplishments, the NCAA has reaped incredible profits and opened the door to rampant commercialization of the sport. With the individuals being marginalized in favor of the teams or schools, the NCAA has attained a monopoly in the market and, in effect, has allowed greed to influence many of its decisions.

Compounding this problem, the NCAA acts as a developmental league for the NBA.[150] Due to the NBA's rule restricting players under nineteen from entering the league, the NCAA has experienced increased competition and growth.[151] More importantly, the NCAA has cemented its status as a training ground for future NBA players.[152] This commercialization is compounded because athletes have little choice but to play in the NCAA—no longer able to jump from high school to the NBA and other options, including overseas basketball, drastically affect their chances at being drafted. While the remuneration that players receive is strictly regulated and en-

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Rules, 70 U. CHI. L. REV. 1581, 1585 (2003) ("[T]he NCAA maximizes profits beyond a competitive rate and keeps the windfall in the hands of select few administrators, athletic directors, and coaches."); Daniel E. Lazaroff, The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?, 86 OR. L. REV. 329, 357 (2007) (noting several commentators' belief that the "economic impact of the NCAA's amateurism rules creates a wealth transfer from the players to their schools").

[149] Pensyl, *supra* note 147, at 397 (citing *Big Money Rules, Ex-NCAA Chief Says*, LEXINGTON HERALD-LEADER, Aug. 29, 1995, at C1 (internal quotation marks omitted)).

[150] *See* Edelman, *supra* note 148, at 867 (describing "the NCAA role as a minor league in which professional sports leagues maintain a developmental stake")*; see also* Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 733-34 (2006) (describing the rule as furthering the NCAA as "the NBA's de facto minor-league system . . . in which players develop skills without financial compensation"); Steve E. Cavezza, *"Can I See Some Id?": An Antitrust Analysis of NBA and NFL Draft Eligibility Rules*, 9 U. DENV. SPORTS & ENT. L.J. 22, 49 (2010) (describing the NCAA acts as the NBA's farm system with no cost to the professional league).

[151] *See* Chris Mannix, *Age Before Beauty: Union Stance Against* NBA *Age Limit Misses Benefits of Time, Maturity*, SPORTS ILLUSTRATED (Dec. 1, 2004), http:// sportsillustrated.cnn.com/2004/writers/chris_mannix/12/01/age.limit/index.html (arguing that an NBA age limit would make the college game better because college fans would be exposed to top prospects, and these top prospects would have the chance to develop their talent against a lower level of competition).

[152] McCann & Rosen, *supra* note 150.

forced,[153] the NCAA has few regulations in its bylaws limiting commercial influences on its member institutions.[154] The revenue created by these rules and regulations generates money shared by the presidents, coaches, and other people in positions of power within the universities.[155] It is in the best interest of these decision-makers to increase revenues or at a minimum, maintain the status quo.

B. Problem #2: Professionalization of NCAA Division I College Basketball

Combined with the economic incentives for success with the minor leagues of college basketball, the professionalization of the student-athlete generates friction between the university's educational mission and the athletic development of the player. The professionalization takes the form of a deletion or dilution of the academic portion of a student-athlete's career. This professionalization also seeps into the structures and culture of higher education where the athlete does not receive equal access to education.[156]

Missing the Student in "Student-Athlete"

A major transition away from the NCAA college basketball amateurism and towards professionalization is derived from the pressures of commercialization.[157] The NCAA plays a substantive role in regulating the education of its athletes.[158] In a high revenue opportunity environment,[159]

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[153] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984) ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.").

[154] Rosenthal, *supra* note 104, at 321*; see generally* Erin Abbey-Pinegar, *The Need for A Global Amateurism Standard: International Student-Athlete Issues and Controversies*, 17 IND. J. GLOBAL LEGAL STUD. 341, 349 (2010) (citing Lazaroff, *supra* note 148, at 338 (bucketing NCAA regulations into two general categories: (1) rules designed to promote and to preserve eligibility status and (2) rules created for economic purposes)).

[155] McCormick & McCormick, *Race and Interest*, *supra* note 148, at 24 ("This evidence shows that the players—a largely African American work force—are generating tremendous wealth by creating the product of college sports, but are forbidden from sharing in that wealth. On the contrary, NCAA amateurism rules *guarantee* that the money generated in substantial part by the athletes' arduous and often dangerous work will be reserved to benefit the overwhelmingly European American managers of the college sports industry.").

[156] Benford, *supra* note 86, at 14 (citing Diane Carman, *CU Shouldn't Investigate Its Own Mess*, DENVER POST (Feb. 4, 2004) at 1B).

[157] Muenzen, *supra* note 54, at 262.

[158] Rosenthal, *supra* note 101, at 323.

conferences have realigned across even great geographical distances.[160] Additionally, schools are scheduling games around the world for marketing and branding purposes, using the collegiate athletes as professional promoters. Recently, the Athletic Director of the University of Texas turned down the opportunity to reinitiate the in-state football rivalry with Texas A&M University, choosing instead to focus on games in stadiums across China and overseas to grow University of Texas's "international brand."[161] An insightful contrast with the University of Texas agenda is the approach of the Ivy League,[162] which has refused to create a postseason conference tournament for its basketball programs.[163] The Ivy League points to its philosophy of the student-athlete and the logistical issues of that tournament as the prominent reasons for refraining from creating a conference tournament even

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[159] Vadim Kogan & Stephen A. Greyser, *Conflicts of College Conference Realignment: Pursuing Revenue, Preserving Tradition, and Assessing the Future* (Harvard Bus. Sch., Working Paper No. 14-073) *available at* http://www.hbs.edu/faculty/Publication%20Files/14-073_ea70abf6-d99c-4529-96b2-e8bef262a4e6.pdf.

[160] Overall, the 25 relocations examined yield a 21% total net increase in travel mileage; however, Boise St. and San Diego St. account for about half of that total figure. Removing those two programs from consideration, the remaining conference-movement results in a mere 10.6 % total mileage increase. *NCAA Conference Realignment and Travel Mileage*, WIN AD (March 1, 2012), http://winthropintelligence.com/2012/03/01/conference-realignment-and-travel-mileage/. *See also* Steve Berkowitz, *Las Vegas becomes Hot Spot for Conference Hoops Tourneys*, USA TODAY (March 3, 2011), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-03-las-vegas-conference-tournaments-cover_N.htm (discussing three conference championship tournaments being held in Las Vegas due to the "[f]an experience, destination city and the revenue it generates"); Jon Wilner, *Pac-12 Basketball: More Sunday Games, Tough travel and Fan-unfriendly Scheduling . . . Send Your Complaints to the CEOs*, MERCURY NEWS (Jan. 23, 2014) http://blogs.mercurynews.com/collegesports/2014/01/23/pac-12-basketball-more-sunday-games-tough-travel-and-fan-unfriendly-scheduling-send-your-complaints-to-the-ceos/. For analysis of travel during the NCAA Division I Men's Championship Tournament, *see* Matt Norlander*, MAP: Locations, Travel Distances for 2014 NCAA Tournament Teams*, CBS SPORTS (March 19, 2014) http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24491591/map-locations-and-travel-distances-for-this-years-ncaa-tournament-teams; John Branch, *After Filling the Brackets, Finding the Charters*, NY TIMES (March 23, 2014), http://www.nytimes.com/2014/03/24/sports/ncaabasketball/after-filling-the-brackets-figuring-out-the-charters.html?_r=0 .

[161] Olson, *supra* note 105 (the Athletic Director believes that it is "essential to use athletics as a platform to tell the university's story").

[162] *About The Ivy League*, THE IVY LEAGUE, http://www.ivyleaguesports.com/history/overview (last visited December 3, 2014).

[163] Marc Beck, *Ivy League Drawbacks*, YALE DAILY NEWS (Oct. 28, 2009), http://yaledailynews.com/blog/2009/10/28/ivy-league-drawbacks/.

when the commercial incentives are lucrative.[164] Additionally, the Ivy League declines to offer athletic scholarships for their student-athletes.[165] For the other NCAA Division I conferences, the incentives of commercialization and the expansion or realignment of major conferences, the focus of the student-athlete has shifted from the classroom to the basketball court.

The day-to-day schedule of a student-athlete is directly affected by this commercialization, as their schedule is tightly managed by the coaching staff and prioritized based on team-related activities.[166] In college basketball today, amateur basketball at the NCAA Division I level is no longer a leisure activity. Instead, a player's commitment is more than 50 hours per week.[167] Even the structure of the basketball season, starting in October[168] and running until "March Madness," creates a complete year-long intrusion on the academic calendar. The hypocrisy of the "student-athlete" system colleges and the NCAA trumpet is obvious from the schedule of the player who must squeeze in "student," when "athlete" is the priority.[169] This emphasis on athletics hurts the student.

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[164] *See* Kyle R. Wood, *NCAA Student-Athlete Health Care: Antitrust Concerns Regarding the Insurance Coverage Certification Requirement*, 10 IND. HEALTH L. REV. 561, 580 (2013) (discussing the concept that the Ivy League's policies prohibiting athletics-based scholarships and foregoing postseason participation foster the high academic standards of the member institutions).

[165] *Prospective Student-Athletes Information*, THE IVY LEAGUE, http://www.ivyleaguesports.com/information/psa/index (last visited December 3, 2014).

[166] *See e.g., Compliance Corner: A Typical Day's Work*, INDIANA UNIVERSITY ATHLETICS (September 18, 2013). http://www.iuhoosiers.com/sports/c-varsityclub/specrel/091813aaa.html.

[167] Nw. Univ. Employer & Coll. Athletes Players Ass'n (Capa) Petitioner, 198 L.R.R.M. (BNA) ¶ 1837, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014). *See also* Vitale, *supra* note 103, at 75 (making a "conservative estimate of a player's commitment to his team [at] more than 50 hours per week").

[168] *See* NCAA Division I Manual, 17.3.2.1 Men's Basketball at 240 (2013-2014), *available at* http://www.ncaapublications.com/productdownloads/D114.pdf ("An institution shall not commence on-court preseason basketball practice sessions before the date that is 42 days before the date of the institution's first regular season contest.").

[169] *See generally 2014-2015 Schedule,* UConn Men's Basketball, http://www.uconnhuskies.com/sports/m-baskbl/sched/conn-m-baskbl-sched.html (last visited Dec. 4, 2014); *2013-2014 Schedule,* Kentucky Men's Basketball Archive, http://www.ukathletics.com/sports/m-baskbl/archive/kty-m-baskbl-sched-2013.html (last visited Dec. 4, 2014); *Men's Basketball 2013-2014 Schedule*, ArizonaWildcats.com, http://www.arizonawildcats.com/SportSelect.dbml?SPSID=750089&SPID=127128&Q_SEASON=2013 (last visited Dec. 4, 2014).

Integrity of Higher Education Institutions

The commercialized form of college sports, as a high-profile multibillion-dollar business, "coexists uneasily with its host—nonprofit, tax-exempt institutions dedicated to education and research."[170] In an environment where the professional duties of a player and the academic requirements of a college conflict, ethical issues arise surrounding the academic careers of "student-athletes." Colleges with revenue-generating athletic programs can compromise the institution's academic integrity for the sake of competition.

Eligibility Mills

Due to the commercialization of college sports and the professionalization of the amateur athlete, institutions of higher education have been caught in cheating scandals. Commercialization creates a high-stakes environment where the overarching integrity of the institution can be tested. In every step of the process, from admissions to eligibility to graduation, the NCAA regulations and the pressure to compete in a high-stakes commercialized environment conflict. The educational mission of the university conflicts with the economics of college sports, and some universities prioritize the latter, turning institutions of higher education into eligibility mills.

Even more perplexing is the dilution of the academic experience for the sake of deeming a college basketball player a "student-athlete." An "eligibility mill" describes academic support services within the athletics program that are "designed and administered to maintain an athlete's eligibility rather than to provide him/her with the tools to get the most out of available educational opportunities."[171] On its face, maintaining eligibility seems like an admirable goal, but combined with the yearlong game schedule this encourages a façade for student-athlete success.

Recruiting in college sports revolves around the AAU. These high school graduates with minimal academic qualifications are then professionalized via a full-time job as a basketball player at a Division I NCAA school, and are "somehow [supposed to] get up to college-level reading and writing skills at the same time that they're enrolled in college-level classes."[172]

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[170] Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMBERG BUSINESS WEEK (Feb. 27, 2014), http://www.businessweek.com/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower.

[171] Benford, *supra* note 86, at 15.

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Evidence from Mary Willingham, a University of North Carolina ("UNC") Center for Student Success and Academic Counseling employee, examined the achievement gaps between student-athletes and their peers at institutions with major sports programs. Willingham examined the reading levels of 183 UNC-Chapel Hill athletes who played football or basketball from 2004 to 2012. According to her research, 60 percent of the college athletes currently read between fourth- and eighth-grade levels and between 8 and 10 percent read below a third-grade level.[173]

Several headline news scandals serve as a glimpse into some of the unethical tactics of diploma mills. Diploma mills can use cheating tactics, easy courses, classes that do not actually exist, and altered grades[174] to maintain the eligibility of their student-athletes. Several institutions, such as Minnesota, Tennessee, Louisiana State University, Texas Tech, Drake, Georgia, Marshall, Ohio State, St. Bonaventure, Alabama, and Auburn, have had their institutional images tarnished by blatant cases of cheating by athletes with the assistance of tutors, academic support services, and faculty.[175]

In the late 1990s, former University of Tennessee English Professor Linda Bensel-Meyers reported "tutors doing far too much work for athletes who were far too under-prepared for college coursework."[176] Bensel-Meyers incurred substantial personal and professional costs when she blew the whistle on the cheating scam.[177] In 2005, Louisiana State University instructor Tiffany Terrell-Mayne alleged she was told to change grades to keep football players eligible for a bowl game and later settled a lawsuit with the school.[178] In 2009, adjunct lecturer Sally Dear-Healey of Binghamton University reported that she was pressured to change her grading policy for basketball players who were missing classes.[179]

While cheating scandals may be rampant in college sports, these specific examples stem from investigations, whistleblowers, or self-reporting. Graduation rates serve as a universal proxy, at a minimum reflecting the

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[173] *Id.*

[174] Julia Sims, *Former UNC-Chapel Hill professor indicted in academic scandal*, WRAL.COM (Dec. 3, 2013), http://www.wral.com/former-unc-chapel-hill-professor-indicted-in-academic-scandal/13172648/.

[175] Benford, *supra* note 86, at 13.

[176] Sara Ganim, *Women who blew whistle in student-athlete cases and what happened next*, CNN (Jan. 9, 2014), http://www.cnn.com/2014/01/09/us/ncaa-athlete-literacy-whistle-blowers/; *Show 6 transcript: Tennessee - Athletics vs. Academics*, ESPN (May 7, 2000), http://espn.go.com/page2/tvlistings/show6transcript.html.

[177] Ganim, *supra* note 176; *Bensel-Meyers suffers*, UT DAILY BEACON (Sept. 18, 2000), http://utdailybeacon.com/sports/2000/sep/18/bensel-meyers-suffers/.

[178] Ganim, *supra* note 176.

[179] *Id.*

mission of an athletics program and either its focus on the education of its athletes or the lack thereof. Overall, Division I college basketball programs report low graduation rates.[180] In fact, historically, the graduation rate for men's basketball is among the lowest of any sport.[181] Between 1999 and 2002, the graduation rate for more than a quarter of the 320-plus men's Division I basketball programs stood at less than 50 percent, including at traditionally elite programs like the University of Texas and the University of Kentucky.[182]

The graduation rates from Division I programs cut in either direction. Low graduation rates could mean that the academic curriculum at a particular school is arduous enough that a professionalized college player is either unprepared for undergraduate studies or the hours devoted to athletics have priority over the hours needed for academic studies.[183] The statistics do not reflect students who forgo college for the NBA, as "the NCAA no longer penalizes schools in graduation-rate reports for players who leave early for the pros, as long as they were in good academic standing."[184] Higher graduation rates may reflect flaws in the institution's integrity or this statistical marker may be less valuable due to institutional dilution.

Learned Helplessness

Even if the graduation rates of a particular basketball program are high, academic support can contribute to the athlete's "learned helplessness."[185] In fact, graduation rates may mask the extent to which student-athletes leave college with adequate academic preparation.[186] The accommo-

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[180] John Slosson, *Restoring Joy to Bracketville: Problems Facing College Basketball Stimulate Responses from the NCAA and the Newly Formed Student Basketball Council*, 8 SPORTS LAW. J. 125, 128 (2001).

[181] *Id.* at 128 (citing Press Release, NCAA, Report of the NCAA Division I Working Group to Study Basketball Issues (Aug. 20, 1999).

[182] Steve Wieberg, *Federal Stats show College Athletes Graduating in Record Numbers*, USA TODAY (Nov. 18, 2009), http://usatoday30.usatoday.com/sports/college/2009-11-18-graduation-rates_N.htm.

[183] Many low graduation rates do not appear surprising when one considers the amount of time student-athletes devote to sports. Timothy Davis, *An Absence of Good Faith: Defining A University's Educational Obligation to Student-Athletes*, 28 Hous. L. Rev. 743, 756–58 (1991) (also noting that graduation rates may mask the extent to which student-athletes leave college with adequate academic preparation).

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[185] Benford, *supra* note 86, at 3 (citing Martin E. P. Seligman & Steven F. Maier, LEARNED HELPLESSNESS: A THEORY FOR THE AGE OF PERSONAL CONTROL (1995)).

[186] Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 678 (1995) (positing that the unconscious

dations and academic advisors take a paternalistic approach and expect other members of the faculty and staff to make special accommodations on athletes' behalf.[187]

Devaluation of the Education of Non-athletes

The devaluation of academic programs can occur regardless of the regulations that the NCAA tries to enforce. Once admitted to institutions, student-athletes are often encouraged and counseled to take courses that will enable them to maintain their athletic eligibility, even though such courses will not provide them with substantive educational benefits.[188]

The devaluation of an institution's undergraduate diploma can harm both athletes and non-athletes.[189] A poignant example of this academic dilution occurred at University of North Carolina.[190] A three-month investigation into academic fraud at the University of North Carolina revealed that

racism fostered by racist athletic stereotypes results in the "devaluation of the African-American student-athlete's academic interest," thereby raising the issue of the "exploitation of black student-athletes who provide valuable services, yet too often leave their institutions . . . without having obtained the academic preparation necessary . . . to cope successfully").

[187] Philip Caulfield, *UNC Tutor reveals Pitiful, 10-sentence Paper that earned Football Player an A-*, N.Y. DAILY NEWS (March 28, 2014), http://www.nydailynews.com/sports/college/unc-tutor-reveals-10-sentence-term-paper-earned-football-player-a-phony-class-article-1.1737861 ("Two former Tar Heels . . . [reported that] . . . UNC athletics officials shuttled them into easy-A courses and even chose their majors for them. Bryon Bishop, a former offensive lineman, said he was handed a predetermined schedule on the first day he stepped on campus. Throughout his tenure, athletic department honchos told him, 'To stay on course for graduation, you need to take these courses.'").

[188] Davis, *An Absence of Good Faith*, *supra* note 183, at 757.

[189] Indiana English Professor Murray Sperber concluded that "[m]any big-time university officials, knowing that their schools cannot provide the vast majority of undergraduates with meaningful educations, try to distract and please these consumers with ongoing entertainment in the form of big-time college sports. For all its high expenses, an intercollegiate athletics program costs far less than a quality undergraduate education." Murray Sperber, BEER AND CIRCUS: HOW COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 224 (2000).

[190] In addition to the academic scandal, three players were ruled permanently ineligible for sports agent contact. In March 2012, the UNC football team also received institutional punishment in the form of scholarship limits and post-season bowl bans. A defensive coach was also punished for failing to report outside income from a sports agent. *See* Bruce Feldman, *Despite Being Cleared in Scandal at UNC, Davis Still Waiting for a Gig*, CBSSPORTS.COM (Dec. 11, 2013), http://www.cbssports.com/collegefootball/writer/bruce-feldman/24372078/despite-being-cleared-in-unc-scandal-davis-still-waiting-for-next-gig.

student-athletes were not the only students given added academic benefits within the school's African and Afro-American Studies department.[191] Students at large benefited from anomalies specific to the department, such as unauthorized grade changes, forged faculty signatures on grade rolls and limited or no class time.[192] In this same year, UNC's football team was acknowledged for its 75 percent football graduation success rate, 6 percentage points higher than the national average.[193] This dichotomy illustrates the university's conflict between maintaining academic integrity and capitalizing on the professionalized college athlete.

The focus on college athletics also directly impacts non-athletes in other ways. Instead of increasing the quality of higher education, athletic departments are engaged in a cycle of increased spending, colloquially known as the athletics "arms race."[194] In his book *Beer and Circus: How College Sports Is Crippling Undergraduate Education*, Indiana University English Professor Murray Sperber concluded that: "[m]any big-time university officials, knowing that their schools cannot provide the vast majority of undergraduates with meaningful educations, try to distract and please these consumers with ongoing entertainment in the form of big-time college sports."[195]

Racial Injustices in the College Basketball Landscape

Defenders of the current NCAA model point to the free education that many athletes receive thanks to their scholarships at NCAA member schools.[196] However, the quality of the education that many of these athletes

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[191] Barrett, *supra* note 170.

[192] Sara Ganim, *Women who blew whistle in student-athlete cases and what happened next*, CNN (Jan. 9, 2014), http://www.cnn.com/2014/01/09/us/ncaa-athlete-literacy-whistle-blowers/; *Show 6 transcript: Tennessee - Athletics vs. Academics*, ESPN (May 7, 2000), http://espn.go.com/page2/tvlistings/show6transcript.html.

[193] *NCAA Athlete Graduation Rates Top National Average*, UNC GENERAL ALUMNI ASSOCIATION (Oct. 28, 2010), http://alumni.unc.edu/article.aspx?SID=7915.

[194] Frank Fitzpatrick & Gilbert M. Gaul, *The Rise of the Major-College Athletic Empires*, PHILADELPHIA INQUIRER, Sept. 10, 2000, at A1 (quoting Gary R. Roberts, Professor of Law, Tulane University). Jim Delaney, Commissioner of the Big Ten Conference, stated, "if you've got $22 million in revenue, you're going to spend $22 million. If you have $38 million, you'll spend $38 million. Right now, all of the effort is to grow the program. Nobody wants to hear that they don't compete nationally." *Id.*

[195] Sperber, *supra* note 189, at 222.

[196] *See* Sally Jenkins, *NLRB ruling on Northwestern football players opens up more questions than answers*, WASHINGTONPOST.COM (March 29, 2014), http://www.wash-

receive is questionable, and the conflict between student and athlete particularly injures African-Americans.[197] First and foremost, the proposition that amateur basketball players receive a free education is challenged by the drastically low graduation rates relative to their non-athlete classmates and in comparison to their athlete peers who are white.[198] White student-athletes continue to graduate at a considerably higher rate than their African-American counterparts do.[199]

Generally, the NCAA's uniform rules and regulations are premised on a notion of colorblindness. Despite their assumed neutrality, however, the NCAA rules appear to impact black student-athletes disproportionately.[200] For example, the NCAA rules limiting the income that an athlete can receive disproportionately burden black athletes, who come from households with lower socioeconomic status.[201] Similarly, eligibility rules produce disproportionate injury to African-American student-athletes and their communities.[202]

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ingtonpost.com/sports/colleges/nlrb-ruling-on-northwestern-football-players-wont-help-what-ails-college-athletics/2014/03/29/054e2942-b6af-11e3-b84e-897d3d12b816_story.html; Pat Forde, *Myth of Exploited, Impoverished Athletes*, ESPN.COM (July 18, 2011), http://espn.go.com/college-sports/story/_/id/6779583/college-athletes-far-exploited.

[197] McCormick & McCormick, *Race & Interest*, *supra* note 148, at 43.

[198] In men's basketball, 72 of the 327 Division I programs in the study saw fewer than half their players earn diplomas—including 2010 regional finalists Tennessee (40%), Kansas State (40%), and Kentucky (44%). Steve Wieberg, *NCAA Football Grad Rates at All-time High, but Top Schools Falter*, USA TODAY (Oct. 27, 2010) http://usatoday30.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study_N.htm.

[199] Davis, *Superspade*, *supra* note 186, at 676.

[200] *Id.* at 660.

[201] In contrast to their white counterparts, black student-athletes come from families with lower incomes and less educated parents. *See* Robert M. Sellers et al., *Life Experiences of Black Student-Athletes in Revenue-Producing Sports: A Descriptive Empirical Analysis*, ACA ATHLETIC J. 20, 32–33 (1991); Am. Insts. for Res., Rept. No. 3: Experiences of Black Intercollegiate Athletes at NCAA Division I Institutions 13, 32–33 (1989); Davis, *Superspade, supra* note 186, at 698.

[202] Davis, *Superspade*, *supra* note 186, at 698 (citing *Black Caucus Backs Basketball Coaches*, DETROIT FREE PRESS, Oct. 20, 1993, at 2C (noting black coaches' criticisms of uniform rules which more severely impact the interests of African-American student-athletes); *Black Coaches Seek Help on Capitol Hill*, CLEVELAND PLAIN DEALER, Oct. 20, 1993, at 1D (discussing how several NCAA policies disparately impact African-Americans)).

Segregation in the Workplace

The institutional wrong is much broader than professionalization of individual student-athletes; due to the revenue forces at work, the magnitude of the racial injustice is substantial. The exploitation of amateur basketball players has racial undertones, as the college sports decision-makers and institutional leaders are primarily white and the players primarily are black.[203] While the integration of college sports is a much better alternative than the previously segregated system,[204] the commercial interests of white college administrators drove racial integration in revenue-generating sports.[205] The self-interest that led to early integration on the playing field, but not within college institutions,[206] is still reflected in the demographics of coaching staffs and administrators.[207] One writer noted that, "[w]hile dominant racial ideology has worked to turn black men into entertainment commodities in sports, it has nearly kept them completely out of management positions in sport organizations."[208] The NCAA is akin to a "company

[203] *See* McCormick & McCormick, *Apartheid*, *supra* note 148, at 14 ("Major college sports in the United States flourish on the basis of an apartheid system . . . .").

[204] *See, e.g.*, Davis, *Superspade, supra* note 186, at 624 (describing the history of formal and informal rules of exclusion in college sports); Lane Demas, *Integrating the Gridiron: Black Civil Rights and American College Football*, 2 (2010) ("[B]lack athletes . . . endured more than one hundred years of struggle before they could fully participate in college [football,] . . . [and] there were entire decades when [Black] participation was zero . . . ."); Charles H. Martin, *Jim Crow in the Gymnasium: The Integration of College Basketball in the American South*, 10 INT'L J. HIST. SPORT 68, 68 (1993) (noting the history of racial exclusion in college basketball).

[205] *See* McCormick & McCormick, *Race & Interest*, *supra* note 148, at 25–41 (tracing the history of racial integration in college sports to demonstrate that it occurred when it simultaneously served the economic interests of white-run bowl organizations and universities to field the most competitive teams and thereby to enjoy the consequent financial reward).

[206] *See id*. (reviewing the history of integration efforts in college football and basketball then applying interest convergence analysis to college sports suggesting that the lack of full integration in campus life demonstrated that racial integration was white self-interest, not altruism, prompting the admission of black athletes).

[207] *See* Davis, *Superspade, supra* note 186, at 653 (describing the limited opportunities for African-Americans within the administrative infrastructure of collegiate athletics and specifically the paucity of African-American executives within the NCAA administration).

[208] Jean A. Coakley, SPORT IN SOCIETY: ISSUES AND CONTROVERSIES, 255 (5th ed. 1994).

store" and its predominantly black employees are forced to live below the poverty line.[209]

C. Exploitation: The Clash of Professionalization and Commercialization in College Basketball

The commercialization of Division I men's college basketball has fostered some unintended, but damaging, outcomes. Essentially, it "creates an inherent tension with their academic missions and has the potential to overshadow or marginalize the educational aspects of intercollegiate athletics."[210] This combination of a professionalized student-athlete and the commercialization of the student-athlete directly causes the economic exploitation of the college basketball player.[211]

Court battles have sought to attack this exploitation and break the NCAA monopoly on two fronts: the O'Bannon lawsuit attacked the commercialization and revenue generating thread, and the Northwestern players' attempt at union certification calls for the official classification of college football players as *employees*.

The O'Bannon Lawsuit and the NCAA's Revenue Model

One of the most direct challenges to the NCAA's economic model of commercialization and revenue is an ongoing antitrust suit led by a former NCAA basketball player. The suit was originally brought in 2009 on behalf of Ed O'Bannon, a former basketball star at UCLA in the early 1990s.[212] Originally concerned with the NCAA profiting off the likenesses of former players in video games produced by EA, the case gained national prominence when, in January 2014, a federal judge ruled that current players could also join the action and that plaintiffs could seek damages from everyone that profited or is profiting off their likenesses.[213] This includes not only

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[209] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 71, 78–79 (2006).

[210] Mitten, *supra* note 90, at 801.

[211] Vitale, *supra* note 103, at 74 (positing that the "NCAA bylaws allow for substantial economic disparity between the NCAA and its players, promoting the exploitation of student-athletes that even borders on the line of illegality").

[212] The O'Bannon lawsuit was later consolidated with a suit brought by former University of Nebraska quarterback Sam Keller to form what is now known as *In re NCAA Student-Athlete Name and Likeness Litigation*. In re NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

[213] Mandel, *supra* note 106.

the NCAA but its member schools and their conferences as well. After EA and the college athletes reached a $40 million settlement in May 2014, this case stands as perhaps the first crack in the NCAA's amateurism model.[214]

Simply put, *O'Bannon v. NCAA* threatens to overturn the NCAA's current business model. Centrally at issue in the case is the revenue generation the NCAA retains from the licensing of its workforce.[215] As currently constructed, the NCAA reaps incredible revenue from the accomplishments and achievements of college athletes. In return, these athletes are cut out of the equation and receive a relatively paltry amount of reward for their services. As discussed earlier, the fair market value of a star college basketball player is around $300,000,[216] while the average NCAA Division I men's basketball player is worth approximately $1,063,307 for a full four-year career to his school.[217] While one may argue that the scholarships and education these athletes receive are rewards in themselves, such flimsy compensation is wholly disproportionate to the billions in revenue that the NCAA and its member schools are making each year through lucrative broadcast and media rights deals. While still pending, *O'Bannon* appears to be the tip of the iceberg of the challenges being mounted against the NCAA model of amateurism and commercialization.

Northwestern Lawsuit & Professionalization

Scholars indicate that amateurism's historical roots can be traced back to Great Britain, and the term "amateur" was first synonymous with the elite socioeconomic class of that time.[218] Amateurism's privileged classes en-

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[214] Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN (May 31, 2014, 1:22 PM), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

[215] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190, at *2 (N.D. Cal. Feb. 8, 2010) (where plaintiff Keller claims that because the NCAA has rights in perpetuity to images of him during his collegiate career, the NCAA, along with its co-conspirators, fix the price for the use of his image at "zero"); Carrabis, *supra* note 106, at 19-20 (describing the O'Bannon lawsuit and noting that licensed products generate roughly $3 billion per year).

[216] Huma & Staurowsky, *supra* note 116.

[217] *Id.*; *see also* Smith, *supra* note 10 (using the Equity in Athletics Data Analysis Cutting Tool to value NCAA college basketball teams); *The Value of One Year of a Division I Men's Basketball Scholarship*, USA TODAY (Mar. 29, 2011, 10:53 PM), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-value-of-college-scholarship.htm.

[218] Benjamin A. Menzel, *Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857, 858 (2002).

gaged in sport "purely for enjoyment and to become well-rounded gentlemen."[219] In fact, limiting wages was used to control access to soccer in the 19th century.[220] When the NCAA was established in 1905,[221] the NCAA forbade compensation via financial aid, or the singling out of students for their athletic achievements.[222] The notions of amateurism at the time were that rewards for athletic compensation were intrinsic and not linked to sporting endeavors.[223] Later, in a shift to allow for granting need-based aid, the NCAA loosened its regulations and allowed for scholarships that were based solely on need and did not cover room and board.[224] In 1956, attempting to eradicate scandals and under-the-table payments to athletes, the NCAA voted to allow full-tuition athletic scholarships including room and board and an additional small stipend.[225] This shift in the ideals of amateurism represents the changing role of student-athletes from intrinsically rewarded persons to paid representatives of the university. However, the lack of compensation beyond full-tuition scholarships and room and board distinguishes NCAA basketball players from their peers in the NBA.[226]

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[219] Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 676 (2003) (quoting Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS (Jan. 3, 2000, 4:07 PM), http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate+on+amateurism+has+evolved+over+time+-+1-3-00.html).

[220] Brian Phillips, *The Northwestern Decision: An Explainer*, GRANTLAND (Apr, 1, 2014), http://grantland.com/features/northwestern-ncaa-college-athletics-union/#fn-1.

[221] Abbey-Pinegar, *supra* note 154, at 347.

[222] Muenzen, *supra* note 54, at 260 (citing ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 32 (1998)).

[223] *Id.*

[224] *Id.* (citing ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 23 (1999)).

[225] *Id.* (citing ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 23 (1999)).

[226] *See* Rosenthal, *supra* note 101, at 323 (citing Nat'l Collegiate Athletic Ass'n, 2002-03 NCAA DIVISION I MANUELart. 1.3.1, at 1 (2002) [hereinafter NCAA Bylaws] ("The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.")); Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 744 (M.D. Tenn. 1990); *see also* NCAA Bylaws art. 2.9, at 5 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and

The intersection between the commercialization and professionalization of collegiate athletics is also reflected in the recent labor law ruling allowing the unionization efforts of Northwestern University football players to continue.[227] On Wednesday, March 26, 2014, the Chicago office of the National Labor Relations Board ("NLRB") ruled that NCAA football players at Northwestern University were statutory employees for the purposes of the National Labor Relations Act ("NLRA") and could choose to unionize.[228]

Recognizing that the relationship between these athletes and Northwestern University was economic in nature, the Regional Director of the NLRB found that college football players receiving grant-in-aid scholarships (tuition, fees, room, board and books) from Northwestern University who have not exhausted their playing eligibility are employees under Section 2(3) of the NLRA.[229]

The Regional Director applied the Supreme Court's broad definition of "employee" under Section 2(3) of the NLRA and in doing so considered the common law definition of "employee."[230] Under the common law, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment.[231]

The *Northwestern* decision contrasted sharply with the NLRB decision in *Brown University v. UAW AFL-CIO*, where the court held that graduate student research and teaching assistants were not employees for the purposes of the NLRA.[232] The critical factors in *Brown University* regarding the student-university relationship included:

> (1) The research assistants were graduate students enrolled in PhD programs.
>
> (2) They were required to perform research to obtain their degree.

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by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

[227] Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (Capa*)*, No. 13-RC-121359, slip op. at 1, 198 L.R.R.M. (BNA) ¶ 1837 (N.L.R.B. Mar. 26, 2014).

[228] *Id.* The Director ordered that an immediate secret ballot election be held among the eligible employees in the bargaining unit to determine whether they should be represented by a union, the College Athletes Players Association (CAPA), in collective bargaining with Northwestern. *See id.*

[229] *Id.* at 21.

[230] *Id.* at 12 (citing NLRB v. Town & Country Electric, 516 U.S. 85, 94 (1995)).

[231] Brown Univ., 342 N.L.R.B. 483, 490 n.27 (2004) (citing NLRB v. Town & Country Electric, 516 U.S. at 94); *see also* RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958).

[232] Brown Univ., 342 N.L.R.B. 483 (2004).

> (3) They received academic credit for their research work.
>
> (4) Although they received a stipend from the university, the amount was not dependent on the nature or intrinsic value of the services they performed or their skill or function, but instead was a form of financial aid.[233]

The general rationale in *Brown University* was that the relationship between the university and their graduate school student research assistants and teaching assistants was academic and not economic in nature, hence finding the students not to be statutory employees for the purposes of the NLRA.[234]

Using fact-specific analysis regarding the nexus between Northwestern University and the scholarship football players, the NLRB Director distinguished the college football landscape from the *Brown University* facts.[235] First, the Regional Director established that "[g]rant-in-[a]id [s]cholarship [f]ootball [p]layers [p]erform [s]ervices for the [b]enefit of the [e]mployer for [w]hich [t]hey [r]eceive [c]ompensation."[236] The major factor in the Regional Director's rationale was Northwestern's control over the players in the performance of their duties as football players.[237] The Regional Director pointed to the team and athletic department rules, which are not applicable to the regular student population, as distinguishing traits of the college football players from other Northwestern students.[238] Finally, the Regional Director concluded that because of the time devoted to football, Northwestern scholarship football players are not "primarily students," but paid workers.[239]

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[233] *Id.*

[234] *See id.* (significantly, the dissent argued that the majority ignored empirical research that suggests the relationship between graduate assistants and colleges is increasingly economic and consistent with a traditional employer-employee relationship, not a student-teacher relationship).

[235] The Northwestern NLRB decision can be viewed as a return to the *NYU* decision, which *Brown University* overturned. *See* N.Y. Univ., 332 N.L.R.B. 1205 (2000) (ruling that New York University's (NYU) graduate student teaching assistants were employees within the meaning of the NLRA), *overruled by* Brown Univ., 342 N.L.R.B. at 483.

[236] Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (Capa), No. 13-RC-121359, slip op. at 12, 198 L.R.R.M. (BNA) ¶ 1837 (N.L.R.B. Mar. 26, 2014).

[237] *See id.* at 13 (describing the schedules of the players throughout the calendar year and the amount of control the coaches and administration exert over their schedules).

[238] *Id.*

[239] *Id.* ("[I]t cannot be said that they are 'primarily students' who 'spend only a limited number of hours performing their athletic duties.'").

Although this limited holding only applies to private universities, the principles and analysis behind the decision reveal the staying power behind the commercialization and professionalization of college athletics. Furthermore, analysis of NCAA Division I basketball reflects fact patterns that parallel football.[240]

IV. SOLUTIONS

A. The European Club Model of Amateur Sports

Overview

The basketball landscape in Europe differs greatly from the American amateur system.[241] In Europe, formal basketball opportunities are nearly non-existent in high schools and colleges, unlike in the United States, which operates on a largely scholastic-based system.[242] Instead, the club system serves as the formalized European sporting device, serving both amateur and professional functions at times across multiple sports.[243] These clubs are affiliated with their localities rather than a particular high school or school

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[240] *See* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206 (1990) (comparing Division I football and basketball revenues); Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1223 (1993) (discussing the pooling and distribution of profits from intercollegiate football and basketball).

[241] *See generally* Maureen A. Weston, *Internationalization in College Sports: Issues in Recruiting, Amateurism, and Scope*, 42 WILLAMETTE L. REV. 829 (2006) (providing a background into the internationalization of sport in its entirety); Salerno, *supra* note 22, at 26; Abbey-Pinegar, *supra* note 154, at 343 ("The structure of the laws and regulations of sports organizations overseas differ greatly from the collegiate structure of athletics we have become familiar with in the United States.").

[242] Salerno, *supra* note 22, at 26 (citing Athanasios Laios, *School Versus Non-school Sports: Structure, Organization and Function in Greece, Europe and the USA*, 9 INT'L J. EDUC. 4, 6 (1995) (noting that a minimal portion of money spent on education in Europe supports school sports)); *see also* Marc Isenberg, *A Thorough Exam of the Euro*, BASKETBALL TIMES, at 28, 28 (2009), *available at* http://www.moneyplayersblog.com/files/bt-eurocamp-0906.pdf (acknowledging that Europe does not have college basketball); Zachary R. Roth, *International Student Athletes and NCAA Amateurism: Setting an Equitable Standard for Eligibility After Proposal 2009-22*, 46 VAND. J. TRANSNAT'L L. 659, 670–71 (2013) (explaining that eligibility to participate in NCAA-sponsored athletic competition arises in part from educational performance prior to enrollment in an NCAA institution).

[243] Roth, *supra* note 242, at 669.

system.[244] As an amateur player advances in the club and wants to play more advanced competition, the player will eventually play against professional athletes as a member of the professional team.[245] An amateur player in the European system cannot sign a professional contract until he or she is eighteen.[246] This model is known as the "socio-cultural" federalized club-based model, contrasting with the "commercialized" sports model of the United States.[247] Even though these clubs are "financed through membership fees, corporate sponsors, and local government funding. . .[,] these clubs are not structured by a stark demarcation between amateur and professional players."[248]

Ken Foster offers a description of the two models of sport governance.[249] The European model's distinguishing characteristics include:

- Sporting competition as the major organizational motive;
- Open pyramids with promotion and relegation as the league structure;
- Vertical solidarity as the governing body's role;
- National leagues, local teams, and little to no relocation of teams; and
- A single representative federal body as governance structure.[250]

In summary, "the socio-cultural model emphasizing traditional values and the educational character of sport still appears to be the major defining factor in EU sport policy, delineating between EU and US sport."[251]

The European model contrasts sharply with the American system, whose distinguishing characteristics include:

- Profit as the major organizational motive;

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[244] *See, e.g.*, Abbey-Pinegar, *supra* note 154, at 346 ("The United States is the only country in the world with such an extensive system of competitive sports teams connected to colleges and universities.").

[245] Weston, *supra* note 241, at 848.

[246] *See* Int'l Basketball Fed'n, INTERNAL REGULATIONS 2010, § H.3.4.2 (2010) (declaring that on or after the player's 18th birthday, the club or other organization for which a player is licensed at his 18th birthday has the right to sign the first contract with that young player).

[247] Anastasios Kaburakis, *The US and EU Systems of Sport Governance: Commercialized v. Socio-Cultural Mode Competition and Labor Law*, 3 INT'L SPORTS L. J. 108, 109 (2008).

[248] Abbey-Pinegar, *supra* note 154, at 348.

[249] Kaburakis, *supra* note 247, at 119 (citing Ken Foster, *Alternative Models for the Regulation of Global Sport*, *in* THE GLOBAL POLITICS OF SPORT 63, 63-86 (Lincoln Allison ed., 2005)).

[250] *Id.*

[251] *Id.* at 111.

- Closed, ring-fenced[252] league as the league structure;
- Profit maximization and promotion of elite stars as the governing body's role;
- Franchises without a cultural identity;
- Non-existent or minimal interest for international competition; and
- A league or commissioner as governing structure[253].

Generally, the European sports context, particularly in relation to amateur sports, is steered against the principle and efforts of commercialization.[254]

B. Policy Solutions from the European Club Model

Three key concepts stem from the European club model that American basketball amateurism should consider in its reform:

1. The creation of a governing organization for pre-college amateur basketball;
2. The development of an American basketball club system; and
3. The fostering of a workable relationship between a club model and the current NCAA system.

(1) America's National Governing Body for the Regulation of Pre-College Amateur Basketball

While the college game remains under the thumb of the NCAA, there is no organization chiefly tasked with controlling, monitoring, and adjudicating problems in the AAU and pre-college grassroots system. It is in this leadership vacuum that many of the current problems have been allowed to develop and fester.

The European model provides a system for how a national governing body could be created in the United States. The overarching organization governing amateur Basketball for international competition[255] is the Fédéra-

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[252] "Ring-fenced" is a term stolen from finance terminology and refers to the static structure of the league where the teams remain constant from year to year. This contrasts with some European leagues, which promote the best teams from a lower division into a higher division while relegating the worst teams from a higher division into a lower division.

[253] Kaburakis, *supra* note 247, at 119 (citing Ken Foster, *Alternative Models for the Regulation of Global Sport*, *in* THE GLOBAL POLITICS OF SPORT 63, 63-86 (Lincoln Allison ed., 2005)).

[254] *Id,*

[255] Abbey-Pinegar, *supra* note 154, at 346 ("The [international federations] have the responsibility and the duty to manage and monitor the quotidian operation of

tion Internationale de Basketball ("FIBA").[256] As previously mentioned, the "European [m]odel of sport is sponsored through a club-based system, with a national sport federation as its governing body."[257] Each European country has its own "National Federation,"[258] which is a national governing authority that runs the league within its respective country, but adheres closely to FIBA rules and regulations regarding amateurism.[259] Since its foundation, FIBA has allowed for the development of a standardized system of rules and coaching to develop within European amateur basketball.[260] The two major amateurism sports organizations in the world, FIBA and the NCAA, rely on separate amateurism rules to determine athlete eligibility.[261] FIBA prohibits compensation of a player or team during the Olympic Games, but it otherwise permits players to enter into written contracts for payment with club teams.[262] Under FIBA regulations, amateurs can receive stipends, living expenses, housing, and scholarships.[263] The influence of agents is permitted in this process, but agents are regulated: they are required to have clear con-

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the world's various sport disciplines and the supervision of the development of athletes practicing the sports at every level.").

[256] Fitt, *supra* note 148, at 583.

[257] Abbey-Pinegar, *supra* note 154, at 348 (citing Weston, *supra* note 241, at 848).

[258] *See FIBA National Federations and League Search*, FIBA.COM, http://www.fiba.com/pages/eng/fc/FIBA/fibaStru/nfLeag/p/openNodeIDs/984/selNodeID/984/sear.html (last visited Jan. 10, 2014).

[259] *See National Federation Manual,* FIBA.COM, http://www.fiba.com/pages/eng/fc/FIBA/fibaProg/NFManual.asp (last visited Jan. 10, 2014).

[260] *See id.* (publication "to help facilitate the process of measuring progress, assisting the federations and providing guidance in whichever way they can.").

[261] In the U.S. basketball context, the U.S. Olympic Committee relies on FIBA standards in determining amateurism. Abbey-Pinegar, *supra* note 154, at 345 (analyzing the differences in amateurism standards between the U.S. Olympic Committee and the NCAA).

[262] Fédération Internationale de Basketball, Internal Regulations 2008: Regulation H Rules Governing Players, Coaches, Support Officials, and Players' Agents (2008), http://www.fiba.com/downloads/training/agents/Eligibility_NationalStatus_International_Transfers_of_Players.pdf ("H.1.6 Players may enter into a written contract with a club. This contract may state that the player will receive payment.; H.1.7 Players who participate in professional leagues must belong to organizations which are members of the member federation; otherwise they will not be able to participate in the official competitions of FIBA; H.1.8 No financial remuneration for the performances of a player or a team is permitted during the Olympic Games.").

[263] Fitt, *supra* note 148, at 583-84.

tractual terms and abide by ethical rulings.[264] Generally, FIBA regulations allow for a free market system of international and intra-national player movement.[265]

When combining the principles of FIBA with the European socio-cultural model, an American national governing body overseeing pre-college athletics participation would provide comprehensive oversight over a longer time horizon than AAU or state high school sports federations.[266] Especially with government support, a national governing body could provide leadership and clarity to a system that currently has none. The governing body, tentatively identified here as the American Amateur Basketball Association ("AABA"), would reflect much of the European model of basketball development and regulation. The system would be a hybrid of FIBA's principal mandate of regulating amateurism and the socio-cultural inspiration of European national governing bodies. However, three aspects are critical for the feasibility of implementing such a system: determining the governing body's mandate; implementing player income under the system; and finding support to implement such a governing body.

Proposed Mandates and Structure of a Pre-College National Governing Body

As a regulating body, the strength of the AABA would be in its regulations and procedures. The governing body would have three integral mandates:

1. Creating and propagating standardized procedures and rules, including revised coaching methods and qualifying tests for coaches
2. Enforcing rules limiting or at least overseeing the influence of shoe companies, agents, middlemen, and corporate monies

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[264] *See* Fédération Internationale de Basketball, Internal Regulations 2008: Rules Governing Players, Coaches, Support Officials, and Players' Agents, at H.5.6.2.1(p), http://www.fiba.com/downloads/training/agents/Eligibility_Players_Agents.pdf (stating that the agent's duty is "to demonstrate integrity and transparency in all of his dealings with the client"); *id.* (Annex 1 to Regulation H5 provides a short standard contract between player and agent).

[265] *See* Dustin C. Lane, *From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization*, 13 PAC. RIM L. & POL'Y J. 127, 134 n.40 (2004) ("According to FIBA's internal regulations, '[a]ny basketball player shall have the right to play basketball in any country in the world.'") (internal citations omitted).

[266] In the European club system, organized participation in sports can begin as early as three-years-old, with the first competitions occurring in the ten-and-under age group. Abbey-Pinegar, *supra* note 154, at 348-49.

3. Implementing a punitive system for agent and coach violations and other impermissible infractions, which would move the onus off of the athletes

Similar to FIBA regulations controlling inter-league basketball disputes,[267] AABA implementation on a national level would have an inter-league function, regulating high school and AAU athletics. The organization would be designed to closely mimic FIBA's model of centralized management and a clear, concise set of organizational procedures. When deciding who would comprise the leadership of the AABA, members of the NBA's executive and coaching ranks, appropriate government agencies, and basketball figures, whether in the media or in the retired coaching and playing ranks, would add to a diverse pool of candidates for the organization's key management positions. Funding for such an organization would be best served coming from the NBA, which has a pronounced interest in the revitalization of the grassroots game, or from government agencies (especially under initiatives concerning childhood exercise and fighting obesity).

In addition to a sustainable structure, AABA's core mandates are crucial to combat the problems of grassroots basketball. The current oversight provided under the AAU system is woefully subpar. Many programs that purport to be under the AAU banner do so in name only and have little connection to the athletics organization trusted with youth sports in America. In a model that mimics FIBA's success in the European game, a U.S. amateur basketball governing organization has three key mandates. First, it must be chiefly concerned with propagating and enforcing standardized rules and coaching methods. With the rules simply reflecting the already generally accepted rules of high school basketball, the more important task here involves the regulation and oversight of not only generally accepted coaching principles and tasks but also a strict adherence to coaching excellence. Under the FIBA system, coaches are required to undergo intensive testing and clinics before being allowed to coach under the banner.[268] As seen in the case of coaches like the aforementioned Joe Keller, requiring American coaches to all meet the same standards would be a vital step.

Second, AABA must concern itself with introducing rules to limit or at least oversee the influence of shoe companies and agents as well as the flow

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[267] *See* Lane, *supra* note 264, at 143 (discussing Chinese basketball players' national team obligations and the FIBA regulations that oblige the NBA teams to honor the arrangement).

[268] Questions & Answers Concerning FIBA Certified Coaches, FIBA.COM, http://www.fiba.com/pages/eng/fc/expe/coac/fibaCertCoac/p/openNodeIDs/20492/selNodeID/20492/qa.html (last visited Jan. 10, 2014).

of corporate money into the grassroots game. If access by these entities, especially shoe companies, is allowed, coaches and teams under this system must register their affiliations and gain approval before a relationship between corporation and team can be established. Denying access to these elements would be a drastic step and could run afoul of competition and fair market rules that have been generally accepted in the United States. However, similar to the FIBA model, all commercial business for this hybrid model should flow through a relevant committee for examination and approval.

Finally, enforcement and punishment mechanisms, similar to the NCAA's model, must also be developed and incorporated. However, such procedures would be chiefly aimed at possible violations on the part of coaches and other team individuals, not the players. Coaches and team officials should be incentivized to protect their players from these elements, and, as the adults closest to possible violations, should be placed with the heaviest burden of following organizational rules and procedures. The implementation of such an expansive organization will be a challenge, especially considering the entrenchment of the current AAU mentality in the grassroots game. However, following FIBA's pan-European model, such a governing body would be the necessary first step in controlling and overseeing a grassroots basketball model that, through greed and improper regulation, has been allowed to fall into disrepair.

Paying for Player Expenses Before College in an American FIBA-based Model

Initially, such a governing body must consider if basketball players under the AAU banner should be paid and, if so, how they should be paid. One of the main differences between the American scholastic model and the European club model is that payment is forbidden in the scholastic model and allowed (and sometimes expected) in the club model.[269] As previously mentioned, athletes under the FIBA model are able to openly receive stipends, free gear, and tournament money.[270] Yet in the current U.S. understanding of "amateurism," such payments would violate the integrity of the game and unduly professionalize these young athletes.

However, these athletes are already being professionalized, even without the ability for them to make money off their own talent. In fact, athletes are already being provided for before they step foot on college campuses.

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[269] Roth, *supra* note 241, at 669-70; *see also* Abbey-Pinegar, *supra* note 154, at 349 (explaining the conflict with NCAA "amateurism" standards when international student-athletes are given stipends, receive free gear, and obtain prize money for competition).

[270] *See* Abbey-Pinegar, *supra* note 154, at 349.

The financial support that shoe and apparel companies provide for AAU teams has been discussed earlier and is a trend that has been increasing since the advent of the post-Michael Jordan era of athlete marketing. In the late 1990s, several young NBA players such as Tracy McGrady, Alonzo Mourning, and Cherokee Parks benefitted from relationships with shoe companies very early in their career.[271] More recent prospects such as prep phenomenon Andrew Wiggins have been rumored to be facing deals that break $100 million, even before they make a decision on whether to enter the NBA draft.[272]

Beyond these deals, many athletes receive free gear, trips, food, and other gifts from these corporations through the guise of their AAU teams. For example, Jabari Parker, one of the top recruits in the nation in 2013 and future high NBA draft pick, has gotten free Nike gear, and been obligated to wear it on the court, since he was a sophomore in high school (as a result of a deal between the apparel maker and Parker's high school coach).[273] As part of the deal, Nike provides Parker's high school with nearly $26,000 worth of merchandise every year but reaps nearly $1 million worth of exposure and press off Parker's exemplary play.[274] Such deals are common and toe the line separating improper benefits from proper sponsorships.[275]

The commonplace nature of these deals, indeed the connections that have grown between shoe companies, AAU programs, and the nation's best basketball players, comes chiefly from the intense competition that has materialized between the largest shoemakers in the country. As discussed earlier, the "shoe wars" of the early 1990s and the resulting race between companies to sign the best players and reap the biggest market share have allowed a culture to materialize where sponsorship of youth athletes and

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[271] Travis Mewhirter, *AAU Basketball Teams Attracting Corporate Money: Apparel Companies Offer Free Gear to Top High School Athletes to Build Brand Loyalty*, GAZETTE.NET (July 18, 2013), http://www.gazette.net/article/20130718/SPORTS/130719108/1027/aau-basketball-teams-attracting-corporate-money&template=gazette.

[272] *Report: Adidas Ready to Throw $180 Million at Andrew Wiggins*, CBS SPORTS (Oct. 15, 2013, 2:20 PM), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24088008/report-adidas-ready-to-throw-180-million-at-andrew-wiggins.

[273] *How Nike Scored Exclusive Rights to Jabari Parker's Feet*, CHICAGO SUN-TIMES (Feb. 22, 2013, 12:00 AM), http://voices.suntimes.com/business-2/grid/jabari-parker-simeon-nike-basketball-high-school-chicago/#.U1LaVvldWSo.

[274] *Id.*

[275] Amy Donaldson, *High School Sponsorship Contracts Raise Concerns, but also Benefit Programs*, DESERET NEWS (Mar. 5, 2013, 9:30 AM), http://www.deseretnews.com/article/865574959/Sponsorship-contracts-raise-concerns-benefit-programs.html?pg=all.

their AAU teams is accepted. Indeed, the current relationship between shoe manufacturers and the AAU system sometimes is seen as simply the fruits of a naturally occurring free market.

A governing body must decide whether this free market system should persist. In the current system, where money dominates the conversation, players are wooed by great facilities and the best coaches—all things that money can buy. It would be in the best interest of all parties for rules to be laid down to allow for such athletes to be paid, under the framework offered by FIBA, but to mandate the AABA to tightly enforce how and when such payment can be handed down.

Support for the Implementation of a National Governing Body

Finally, the AABA must have a source of support. Reviewing the current basketball landscape and the lessons learned from FIBA's evolution, one primary supporter of such a system emerges: the National Basketball Association. For years, there have been stories of NBA teams dissatisfied with the toxic culture of AAU basketball in America. Most famously, the NBA's San Antonio Spurs have demonstrated their distrust by constructing a team that primarily consists of international players while also publicly denigrating the AAU system.[276] Some of the NBA's most prominent players, like Lebron James, Kobe Bryant, Chris Paul, and Carmelo Anthony, have also either directly voiced their displeasure with the current AAU game or have attempted to combat the problems by financing their own teams.[277] In truth, there is little similarity between the NBA and AAU game, the latter of which sacrifices many of the team concepts that are essential to success in the former.[278] There have been calls for the NBA to use its power to supplant shoe companies as the main drivers of the AAU game.[279] With an improvement to the AAU structure comes a corresponding rise, in these young athletes, in overall talent, maturity, and personal development—on and off the court.

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[276] Jonathan Tjarks, *The AAU System and How the NBA Could Fix It*, REALGM .COM (Aug. 30, 2013, 3:38 PM), http://basketball.realgm.com/article/229624/The-AAU-System-And-How-The-NBA-Could-Fix-It.

[277] *NBA Stars Take Stand to Clean Up AAU Basketball's Image*, NBA.COM (June 11, 2010, 2:51 PM), http://www.nba.com/2010/news/06/11/nbastars.aau.ap/index.html?rss=true; *see also* Matt Norlander, *Chris Paul, Melo, Other Pros Redefining AAU-NBA Relationship*, CBS SPORTS (July 27, 2013, 1:38 PM), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/22913196/chris-paul-carmelo-anthony-other-pros-fostering-strong-roots-between-aau-and-nba.

[278] Tjarks, *supra* note 276.

[279] *Id.*

A rise in overall talent level and development is attractive to the NBA for two salient reasons. First, a rise in the overall talent level begets a corresponding rise in the overall play on the court. In a league that relies on the singular talents of its players perhaps more than any other and markets its product at least82 times a year based on those talents,[280] overall play is incredibly important. Second, the NBA is primed for expansion. With the price of league franchises skyrocketing and open markets like Seattle, Washington openly pining for another team, the league is in an enviable position of being able to exploit this potential tremendous growth in the next decade.[281] However, an increase in the number of teams requires an increase in the number of available, talented players who can support a new franchise. With worries that the current NBA talent pool is not deep enough, such thoughts about expansion have been tabled.[282] With support of a grassroots system, the NBA can work to assure an influx of talent into its system in the near future—talent that may not have been nurtured under the current AAU model. For the NBA, explosive growth cannot be built on a weak base. By funding and helping to create a governing body for the AAU, the base of basketball talent in the nation, on which the NBA can expand and grow, would be greatly enriched.

While the NBA should be considered as the main driver behind the governing body, the FIBA model also suggests one other area of support: the communities, whether local or regional, geographically surrounding these basketball programs. Under the FIBA model, clubs are tied closely to their communities, with many players joining the clubs based around their homes and communities developing close connections to the teams who represent them.[283] Replicating, or at least emulating, such a model would allow for community-wide involvement in the process; communities could support their local teams, a crucial factor for many current AAU teams that are based around certain hotbeds of basketball talent. Increasing the connection between communities and these teams also serves as an oversight function in itself. If a community becomes involved in the management or control of a team, there are simply more people invested in the team and the players. While major funding cannot be expected to come directly from the commu-

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[280] Tom Hoff, *NBA Teams Rely on Stars*, THE HOYA (Nov. 1, 2013), http://www.thehoya.com/nba-teams-rely-on-stars/.

[281] Brian Windhorst, *Adam Silver: Seattle's Hopes on Hold*, ESPN (Feb. 12, 2014, 2:07 PM), http://espn.go.com/nba/story/_/id/10442963/nba-commissioner-adam-silver-talks-expansion.

[282] *Is Expansion Good or Bad for NBA?*, ESPN (Feb. 13, 2014), http://espn.go.com/nba/story/_/page/5-on-5-140213/expansion-right-nba.

[283] Kaburakis, *supra* note 247.

nity, save for a donation or sponsorship program, tying the program to communities would help ensure the continued health of the grassroots game.

(2) The American Club Basketball System: Basketball Academies

Beyond the grassroots level of the game, the European model of basketball development also provides the framework for what can be considered a more drastic overhaul of the amateur basketball system. Namely, it provides a structure for the implementation of a U.S. basketball club model. Under such a system, the nation's best basketball players would play for fifteen to twenty regional teams in a developmental basketball league.[284] Centered on America's urban centers, focusing on youths aged thirteen to eighteen, this league and system would provide a strong alternative to college for many of the nation's best and would allow them to gain the necessary schooling while also maximizing their chances for basketball development. Such a model has been advocated for, or at least hinted at, by several prominent voices in the basketball world.[285] These clubs would be the next step in basketball development in America and would address many of the inequalities and problems that have infected much of the NCAA model, such as labor disputes and unequal commercialization.

The Impetus for a U.S. Club Basketball System

While the implementation of a governing body for the pre-college amateur basketball would be a significant step towards regulatory progress, further solutions to the problems plaguing American amateur basketball would be realized with the creation and support of an American club basketball system, based nominally on the European model.

There has been a groundswell in recent years for age-related solutions to the problems inherent in the relationship between the NBA and the NCAA.[286] Recently, new NBA commissioner Adam Silver began discussions with NBA owners and NCAA executives concerning raising the minimum age requirement for NBA players from nineteen to twenty.[287] The previous

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[284] *See* Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 230 (2004) ("[A] minor league system for both football and basketball ought to be developed.").

[285] *See* Dohrmann, *supra* note 5, at 434-35.

[286] Matt Moore, *NCAA President Mark Emmert Meets with NBA Owners on Age Limit Issue*, CBS SPORTS (Apr. 18, 2014, 2:33 PM), http://www.cbssports.com/nba/eye-on-basketball/24531693/ncaa-president-mark-emmert-meets-with-nba-owner-on-age-limit-issue.

[287] Mahoney, *supra* note 68.

"one and done" rule, implemented in the late 2000s in response to the growing evidence that the prep-to-pro's system was producing problems in talent and maturity, has done much to change the landscape of amateur basketball. Players who previously would have been allowed to jump straight to the NBA are now mandated to stay on campus and generate revenue for the schools as unpaid labor. Such movements indicate a general discomfort in professional basketball circles with the current system, both in terms of basketball development and professional preparedness.

The proposed model addresses the exploitation of college basketball players—the result of commercialization and professionalization that plague the current NCAA. Specifically, the model works to rectify both the lack of revenue sharing and the artificial merger of higher education with minor league professional athletics. The current model of understanding concerning the worth and rights of college athletes is woefully outdated. Enacting a club system to combat these problems may appear to be a drastic solution. However, accounting for the financial and economic enormity of the current NCAA issues, such a solution stands as a credible and appealing alternative.

A Plan for Building the U.S. Club System: Lessons from the European Model

While the U.S. club system would be based upon the European model, it would be created with several unique characteristics aimed at righting many of the wrongs inherent in the current basketball system. First, the clubs would be based around fifteen to twenty areas of either substantial urban populations or demonstrated high levels of historical basketball talent. Los Angeles and New York can be considered the two anchors of this system and could, along with other major metropolitan areas, support more than one club team. The clubs under this league would be tied heavily to the community, through their names and their players. Players themselves would be matched with the team that best represents their home region.

The club system would be limited to the top 150-200 players in the nation. Identifying these players is already a cottage industry in amateur basketball, with some rankings going as low as eighth grade to determine the nation's best players.[288] Setting the cutoff at the top 150 or 200 players would allow a sizable, sustainable league to develop. It would also focus efforts on helping the players who drive much of the industry when it comes to commercialization of amateur basketball. The top recruits in the nation are the ones signing incredibly lucrative contracts and providing their schools, and simultaneously the shoe companies, with unparalleled exposure.

[288] Dohrmann, *supra* note 5, at 113-16.

Under a club system, this commercialization could be much better regulated and controlled. However, these players would not be mandated to play under the club system. Upon senior year of high school, they would instead be presented with a choice to attend college for a possible two years under the NCAA model or join their regional club. While the more traditional college approach would appeal to some players, the clear professional and development advantages of the club system, expounded on below, make joining a club a more appealing option, especially considering the NCAA's current attitude towards player compensation and movement.

As part of the club program, players would play year-round for their clubs for a maximum of two years. This two-year requirement reflects the predicted rule change, on behalf of the NBA, that is going to require college athletes to stay in school for two years, as opposed to the current "one-and-done" rule. Club league games would be played primarily during the summer months, mimicking the current AAU model. During the two years under the club system, players would be required to follow an intensive curriculum of core university classes, taught by educators hired under the club's direction, and sit through mandatory training on the rigors of professional basketball life. The latter programs would be extensions of programs already instituted by the NBA, such as the Rookie Transition Program. In essence, the best form of this system would serve as a developmental league for the NBA. Recent analysis conducted by ESPN strongly suggests that learning under an NBA regimen is actually more beneficial for a young player than learning under the college game.[289] The league has already begun expanding operations in the NBA Developmental League for the very goals pursued by a U.S. basketball club model: increased talent level among American players and a stable system of basketball development.

As mentioned previously, in the context of the establishment of a governing body, the NBA has real incentives to improve the U.S. amateur basketball system. By financing and supporting a club system, the NBA would be taking a major step forward in defeating many of the problems in AAU and NCAA basketball that have begun to affect their own operations. While it would contain necessary educational requirements, this club system would be centered around the development of the country's best basketball players, as talents and as professionals. Within this club system, players, who have already been identified as future professional prospects, will simply enter professional life and skip the amateur status currently enforced under the NCAA. As part of the club, players will be given a small stipend but will be able to generate most of their income off their skills and likenesses, core

[289] Pelton, *supra* note 70.

rights currently being fought for by college athletes across the nation. The previously created governing body, AABA, would also be tasked with implementing and regulating this club system. The dearth of many other professional sports options during the summer months, save for baseball, bodes well for the marketing and television options that the club league may encounter, options that would further convince the NBA to fund its operations.

Implementing such a basketball club system would be a massive undertaking that would completely reverse much of the current thinking on basketball in America. Despite its multiple unique qualities, there would also be several similarities between the American model and its European cousin. First, it would be built around a regional approach. The regional aspect would be incredibly important to developing legitimate ties between the clubs and the areas they are located, something that NCAA member schools have been doing over decades. Second, it would be centered around the players and their connections to their families and communities. The club system would place great emphasis on the professional, emotional, and athletic development of participating athletes. Finally, the U.S. club system would, similar to its European counterpart, serve as a feeder for professional leagues.

The current model of the student-athlete is dying. The commercialization and professionalization of high school and college basketball has revolutionized the worth of star basketball talent and has built an industry on what was previously a wholly amateur endeavor. The club system proposed here would embrace the current nature of basketball amateurism and, while doing so, correct many of the problems that have been allowed to fester under the archaic NCAA system.

Challenges of Structuring a U.S. Club System in the Current Amateur Context

As tempting as it is to advocate a complete replacement of the current amateur basketball apparatus under this proposed system, there are elements of the current system that, due in part to their dominance in the current landscape, must be incorporated in any establishment of a club system. Any discussion on a club system requires the inclusion of shoe companies, agents and the NBA, three of the most powerful entities currently involved in the process. As the current system is constructed, each of these groups is inexorably tied to the basic reality of amateur basketball.

There are a number of reasons any change to the system will require the full support of these actors. First, as previously mentioned, these entities have become cornerstones of basketball development in America. With the

rise of Michael Jordan and the brand-name athlete, shoe and apparel companies have firmly entrenched themselves as necessary parts of the basketball market. For the NBA and sports agents, the dependence is of a more professional nature: the NBA is the ultimate goal for many of these athletes, and agents are required to represent the athlete and deal with NBA front offices.

Second, any change to the system as we have proposed requires a large amount of financial support. Much of the funding and support of this system should be derived from the NBA and, in small part, from shoe companies, both of whom have a legitimate interest in a new club model. For the NBA, the benefits, which have already been touched on, are numerous. The club model would propose a more regulated and controlled system of basketball development. With their guidance, clubs could act as incubators for basketball talent. And as a rising tide lifts all ships, a healthier grassroots game would also help increase, even incrementally, the talent level and maturity of new NBA players. For shoe companies, supporting these clubs would mimic the support they already provide for AAU and high school teams, with one mitigating difference. With AAU and high school teams, the value of each dollar a company spends on the sponsorship is diluted unnecessarily. While some teams may have several star players, heading for big-time college programs, there are several other players, whom the company are outfitting *gratis*, who may never help the company in terms of exposure or marketing their product. With club teams, which would consist of the best players from different parts of the country, shoe companies would be getting unparalleled access to not only the best teams but also all of the best players under one organization or team. While government funding is a possibility due to their regional status and connection to the players, giving the NBA and shoe companies a seat at the table (which they are incentivized to accept), would solve many of the financial issues that would arise with the implementation of an entirely new model of grassroots basketball.

Beyond the general acceptance of the NBA, the shoe companies, and agents into this new model, each could have a special role to play in the club system. The shoe and athletic apparel industry has grown exponentially with the rise in popularity and prevalence of amateur basketball in America. Legislating and regulating these companies' abilities to contract with underage professionals or organizations nominally comprised of underage basketball players would be a bold first step in correcting the problem of unfettered influence these corporations have on the grassroots game. However, it is important to note that such a system should not require these shoe companies to work together. As Dohrmann intimates in *Play the Hearts Out*, previous youth basketball initiatives, including a $30 million sponsorship from the NBA and NCAA, have been non-starters because they relied on these

companies to work together.[290] The shoe wars and the current race to sign the best players fostered a sense of intense competition between Nike, Adidas, and other groups. There are only two solutions in this area: either keep the companies out completely or accept the competition and build a system around it. The latter option is more realistic, embraces the power of the market, and allows more money to flow into the system in a heavily controlled manner.

The path for including sports agents in the process is much stickier. Agents, as currently regulated,[291] already operate under strict rules that govern how much contact they can have with players, who they can support, and when they can meet with players or their representatives.[292] The current regulatory system places the interests of the NCAA above the interests of the athlete.[293] In the proposed club system, sports agents would be extremely essential to the process. Under a new club system, agents would be necessary for the promulgation of a free market while adhering to an ethical standard similar to their European counterparts. The players in the club system could use sports and marketing agents to capitalize on their abilities and generate more income.

Finally, as previously discussed, the NBA, from the team owners to players, must play a huge role. The reality is that many of the basketball players who would be most affected and targeted by the implementation of a European club model, say, the top 150 players in the country, have a legitimate shot of playing professional basketball in the future, whether in the NBA, the NBA's Developmental League, or overseas. As the premier profes-

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[290] Dohrmann, *supra* note 5, at 400.

[291] See, e.g., Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7805 (2012) (providing NCAA member schools with a private cause of action against sports agents that pay college athletes).

[292] Unlike the United States, most countries do not regulate sports agents. *See* Anastasios Kaburakis & Jacob Solomon, *Mind the Gap*, 1 INT'L SPORTS L.J. 37, 44 (2005) (discussing how NCAA member institutions wishing to recruit foreign athletes should be aware that many foreign agents are unregulated and may be related to club teams). For example, under the FIBA and the Union of European Basketball Leagues (ULEB), agents often have relationships with specific clubs and may sign players as young as twelve-years old in order to compete with those clubs. This is an important fact because FIBA organizes most basketball competition worldwide and ULEB establishes the Euroleague for top European club teams. Thus, international student-athletes in the sport of basketball are raised under a system in which they can sign with sports agents at an early age. *See also* Roth, *supra* note 241, at 670 ("Agents have access to athletes at a very young age in a club system, while under the American system, involvement with agents does not exist because of the contract-less nature of scholastic competition.").

[293] Edelman, *supra* note 148, at 147-48.

sional league in the world, one that has had demonstrated issues with player development on and off the court, it is in the interest of the NBA to support a stronger and healthier amateur basketball system. In recent years, many NBA organizations and people have decried the AAU basketball system and the corroding influence that the current system has on the entire system of basketball in America. Organizations such as the San Antonio Spurs have accounted for the AAU culture in their drafting and development analysis by preferring to draft international players over players in the AAU system.[294]

Some NBA players have already made a mark in the AAU system by sponsoring their own teams and running some of their own star-studded summer camps.[295] Involving these players, including Lebron James and five-time NBA champion Kobe Bryant, adds a sense of legitimacy to the process, especially when it comes to reaching young basketball players. From the perspective of young players, NBA players are the goal. They are the ones who have made it and been successful in this process, despite the underbelly of the system that can bring so many talented players down. Getting current and former NBA players to support the club system, either as coaches or financial benefactors, would help the clubs reach out to the best players in the nation. In essence, it would paint the clubs as the best possible pipeline for NBA talent to reach the highest professional leagues.

(3) Reconciling the European Model and the Current NCAA System: Creating a Sustainable Framework

Perhaps the most important consideration in implementing the club basketball model is the relationship it will have with the current NCAA system. As it currently stands, NCAA basketball is firmly entrenched, both financially and socially, in America's cultural landscape. Teams from across the nation fill arenas every year with rabid supporters. Every March and April, the NCAA tournament captures the attention of much of the nation and is the NCAA's biggest cash cow. In 2013, the NCAA made $912.8 million in revenue, 84 percent of which was generated from the NCAA

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[294] Tjarks, *supra* note 276.

[295] *List of Pro Players Sponsoring Youth Basketball Teams*, ORLANDO SENTINEL (July 24, 2012, 4:06 PM), http://articles.orlandosentinel.com/2012-07-24/sports/os-hs-aau-sponsors-box-20120724_1_youth-basketball-amar-e-stoudemire-dwight-howard.

Division 1 men's basketball tournament.[296] Television contracts for the Division 1 tournament are worth over $680 million alone, accounting for a large portion of the NCAA's overall revenue.[297] In the past two decades, the NCAA's revenue stream has exploded, from approximately $230.7 million in 1996 to $912.8 million in 2013.[298] This rapid influx of revenue has served as the impetus for much of the recent outrage concerning the relationship between the NCAA and its unpaid athletes. Much of the influx is driven by the popularity of the men's college basketball game, which has grown expansively on what is now an untenable model.

The NCAA certainly has a vested interest in seeing a governing body such as the AABA being created. The NCAA has a direct interest to have a stable organization below them, helping young basketball players mature and grow in a healthy basketball environment. Many college coaches have spoken out against the AAU basketball system and the improper role of agents in its composition.[299] However, the NCAA has no such interest in this European model being implemented alongside their current structure and acting as another path for young players to reach the NBA. Several elements of this relationship must be identified and prepared for before implementing a U.S. club system.

First, the environment for a free market must develop, fashioning a choice between the NCAA and the club system. The well-document cases of Brandon Jennings and Jeremy Tyler are certainly examples of a competitive free market with a player-option between club basketball and the NCAA route.[300] Brandon Jennings graduated high school in 2007, and then spent the 2008 season playing professionally overseas before returning to the NBA in the 2009 NBA Draft.[301] Jeremy Tyler similarly left high school early, spending the equivalent of his senior year of high school and first year of

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[296] Mark Alesia, *NCAA Approaching $1 Billion per Year Amid Challenges by Players*, INDIANAPOLIS STAR (Mar. 27, 2014, 11:06 PM), http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/.

[297] *Id.*

[298] *Id.*

[299] Davis, *supra* note 186.

[300] The other interesting example of taking this rule to the extreme was the case of Jeremy Tyler—a high school standout from San Diego who decided after his junior year to play overseas in 2009. This decision meant that he would be paid for two years and then was draft eligible for the 2011 draft—selected in the 2nd round by the Charlotte Bobcats. *See* Pete Thamel, *Basketball Prospect Leaving High School to Play in Europe*, N.Y. TIMES (Apr. 22, 2009), http:// www.nytimes.com/2009/04/23/sports/ncaabasketball/23prospect.html.

[301] Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 172

college overseas before becoming draft eligible in 2011 when the Charlotte Bobcats selected him in the second round.[302] Currently, few basketball players use the existing European clubs as a way to receive income and hone their basketball talents while waiting to become eligible for the NBA draft.[303]

While courts have denied the existence of a market for the services of student-athletes,[304] our policy proposal would fill the market void for a minor league system free from the guise of "amateurism" and the exploitation of young athletes. Once players leave the club system, they would enter the draft like their collegiate counterparts. A regional draft system, in which the clubs are direct feeders into the franchises in their geographic area, is tempting but with the expansion and growth of basketball scouting in the past decade, talent is surely able to be identified, regardless of source.

Second, substantial changes could transform the NCAA if players received compensation off their own likenesses. Plaintiffs in the O'Bannon lawsuit are requesting that trust funds be set up for players' compensation following their amateur careers.[305] Another method of compensation is a "revenue sharing program that would entail sharing profits produced by a sport and disbursing those profits by percentages based on seniority."[306] If the NCAA accepts and propagates such measures, it would level much of the playing field in terms of providing these athletes with equal treatment and the best possible chance at professional development. However, the or-

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n.80 (2012) (citing Chris Broussard, *Exchange Student*, ESPN (Dec. 8, 2008, 9:44 AM), http:// sports.espn.go.com/espnmag/story?id=3715746).

[302] *Id.* (citing Thamel, *supra* note 300).

[303] *Id.* at 172 (discussing how the NBA age restriction "essentially mandates that every domestic basketball player go to college where he must abide by the rules and regulations of the NCAA.").

[304] Tristan Griffin, *Payment of College Student-Athletes at Center of Legal Battles*, 75 TEX. B.J. 850, 852 (2012) (citing Lazaroff, supra note 148).

[305] Michael McCann, *O'Bannon Expands NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 1, 2012), http://www.si.com/more-sports/2012/09/01/obannon-ncaa-lawsuit; *see also* Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 45 (1996); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 18 (1991) (suggesting trust funds for college athletes modeled after the International Olympic Committee's (IOC) practice of setting up trust funds for amateur athletes).

[306] Mary Catherine Moore, *There is no "I" in NCAA: Why College Sports Video Games do not Violate College Athletes' Rights of Publicity Such to Entitle Them to Compensation for Use of Their Likeness*, 18 J. INTELL. PROP. L. 269, 280 (2010) (citing Michael P. Acain, Note and Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 337 (1998)).

ganization appears highly reluctant to embrace such changes and scrap their incredibly lucrative economic model. Barring an unforeseen shift in thinking by NCAA leaders, the relationship between the NCAA and a proposed club system will be one defined by an extreme disadvantage on the part of the former. Regardless of the manner of compensation, the proposed U.S. club system could use market forces and collective bargaining to ensure just player compensation.

Finally, a concern with the club model is that it would result in the nation's best talent, the players people pay for tickets to see, being stolen from NCAA schools, effectively denying those schools a chance at the best on-court product and the huge swaths of revenue and endorsements that come with interested viewership. However, this concern is mitigated by two factors. First, the club system, as we have proposed, will not be mandatory. The debate will be framed as the player's choice of joining a system that is geared towards professional success or one that relies on an archaic model of amateurism. Undoubtedly, some top players will still elect, for personal reasons, to attend a traditional university format and will be allowed to under this system.

Second, it is dubious whether these players not playing for university teams will actually greatly affect the popularity of the college game. Critics have recently criticized the college game of unappealing and diluted play, even with the participation of some of the country's best players.[307] An increase in entertainment and viewership of college basketball requires a change in the rules, not a change in the overall talent level. As a sociological point, fan identity is based upon the benefits it provides in a community sense.[308] For an individual, being a fan of a team offers strong feelings of "camaraderie, community, and solidarity."[309] In essence, for many college basketball supporters, they have a personal connection to their favorite teams that is not based upon their favorite players on that team.[310] Graduat-

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[307] Brian Goff, *College Basketball Unlikely to Solve Physical Play Problem*, FORBES (Mar. 11, 2013, 10:59 AM), http://www.forbes.com/sites/briangoff/2013/03/11/college-basketball-unlikely-to-solve-physical-play-problem/.

[308] Beth Jacobson, *The Social Psychology of the Creation of a Sports Fan Identity: A Theoretical Review of the Literature*, 5 ONLINE J. SPORT PSYCHOL. 1, 2 (2003).

[309] *Id.*

[310] *See* Forde, *supra* note 196 (explaining that college sports are more popular than minor league sports because "[m]ost college sports fans identify more with the school than the players. They root for the place they attended, or grew up with – the old front-of-the-jersey cliché."); *see also* Goldman, *supra* note 240, at 228 (positing that even if professional athletes were included in the same market as the NCAA, "the small number of professionals relative to college athletes still would leave the NCAA with substantial market power.").

ing from an institution or growing up in the institution's region each result in fandom that would not be defeated easily by a perceived lack of basketball talent. This concern and the other possible points of contention mentioned above are interesting wrinkles to this model but do not support sufficient argument against the necessary establishment of a U.S. club basketball system.

V. Conclusion

The current system of amateur basketball in America faces dire problems at every level. In the AAU game, a lack of oversight and rampant corporate influence have improperly commercialized and professionalized the grassroots game. This has blurred the amateur status of young basketball players and created an underbelly of unscrupulous agents, coaches, and middle-men. At the NCAA level, an untenable inequality has developed between the organization, its member schools, and the collegiate athletes playing under the NCAA banner. The current economic model enforced by the NCAA relies exclusively on the idea of amateurism, effectively shutting out athletes and denying them the ability to profit off their own successes and talent. With historic increases in revenue and growth in college sports in the last decade, and the immense financial potential of college sports, we have reached a breaking point. Lead by two landmark legal challenges, this unfair system faces extinction.

As discussions on the status of these amateur athletes dominate the national conversation, it has become apparent that the ground is set for a drastic change to the system. To find solutions for these problems, we must look eastward to the lessons learned from the European model of basketball management. Our proposed model is twofold. First, we advocate the formation of a governing body, charged with regulating and protecting American amateur basketball and controlling the influence of corporate elements. In concert with this governing body would be the establishment of a U.S. club basketball system. This club league would act as a professional feeder system open to the nation's best basketball players, while also mandating that players receive proper education and professional development essential for a successful transition to adult life. These steps would signal an overhaul of the current thinking of sports in America. However, they have become necessary considerations in resolving the issues so prevalent in America's amateur basketball environment.

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Quarterback by Committee: A Response in Memory of Dan Markel

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* Associate Professor of Law, University of Colorado Law School. This Response is dedicated to the memory of Dan Markel. Dan and I bonded as co-winners of the 2012 Federalist Society Young Legal Scholars Paper Competition. He presented a powerful paper on criminal law in a democracy that would go on to be published as the lead article in the first volume of the Virginia Journal of Criminal Law, which dedicated its entire inaugural issue to Dan's article. *See* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012); Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135 (2012); Michael T. Cahill, *Politics and Punishment: Reactions to Markel's Political Retributivism*, 1 VA. J. CRIM. L. 167 (2012); R.A. Duff, *Political Retributivism and Legal Moralism*, 1 VA. J. CRIM. L. 179 (2012); Dan Markel, *Response, Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205 (2012). That was just one of the many impactful articles that Dan published before his life was tragically cut short in 2014. And, as we mourn his passing, Dan's scholarly record should bring us some solace. While Dan may be lost to us in a physical sense, he will be remembered through his scholarly publications, and his published ideas will endure in perpetuity—to be appreciated, built upon, and challenged by future scholars. *See* Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. __ (forthcoming 2015) (observing that scholars can achieve a lasting legacy by publishing their work); *cf.* Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 773-77 (2012) (contrasting human mortality with the perpetual nature of the corporate form).

INTRODUCTION

In *Catalyzing Fans*,[1] Dan Markel, Michael McCann and Howard Wasserman propose so-called "Fan Action Committees" ("FACs"), whereby fans would crowdfund a sum of money and then spend it to influence the personnel decisions of their favorite teams.[2] This novel form of crowdfunding may prove to be a success, but this Response suggests that an effective FAC could upset a team's overall hiring and compensation system, thereby risking a downturn in team performance to the detriment of all concerned.

Consider the example of the 2012 Denver Broncos' quarterback controversy when the team had to choose between Tim Tebow and Peyton Manning. Manning, a future Hall-of-Famer, was clearly the superior on-field quarterback, but Tebow was a charismatic young player who had recently become a pop culture icon by engineering a miraculously successful season for the Broncos. If it were up to the fans—or if there had been a sufficiently powerful FAC in place—the Broncos may well have stuck with Tebow. As it happened, the Broncos front office went with Manning, and this was clearly the right call. Manning promptly led the Broncos to the Super Bowl, setting several league records along the way, while Tebow washed out of the league shortly thereafter. As this anecdote suggests, this Response raises the concern that a powerful FAC can inflict significant harm on the team it is trying to help.[3]

I. *CATALYZING FANS*

Crowdfunding comes in a variety of types; *Catalyzing Fans* adds a new entry to the list. To crowdfund is to raise funds over the Internet from many people, each of whom only provides a small dollar amount.[4] The lead-

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[1] Dan Markel et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

[2] The terms "team" and "fan" are meant expansively. *Id.* at 3 n.6 ("We say teams because our paradigm for this paper will be contract negotiations between an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, etc.").

[3] I raised this point with the co-authors while *Catalyzing Fans* was in draft form, and they address my concern in footnote 16 and Part II.B.7. *See id.* at 9 n.16, 29-31 (recognizing that FACs "could disrupt the plans of management vis-à-vis compensation").

[4] *Crowdfunding*, OXFORD ENGLISH DICTIONARY (last visited Feb. 28, 2015), http://www.oxforddictionaries.com/us/definition/american_english/crowdfunding, *archived at* http://perma.cc/5WWL-U26W. ("The practice of funding a project or

ing type is probably "reward" crowdfunding, in which the funding participants receive the fruits of the project, such as a book, CD, or video game. Websites such as Indiegogo and Kickstarter have been practicing reward crowdfunding for nearly a decade, during which time more than $1 billion in projects have been funded.[5]

Other types of crowdfunding are also practiced (or will soon be practiced). In donation-based crowdfunding, people simply make a contribution and receive nothing tangible in return.[6] Sometimes the contribution funds a charitable project,[7] while other times it funds a vacation or other personal spending.[8] In securities crowdfunding, the funding participants receive a bond, a share of stock, or some other security from the crowdfunding company.[9]

Catalyzing Fans posits another sort of crowdfunding where groups of fans can organize themselves into FACs.[10] A FAC is roughly analogous to a Political Action Committee (PAC).[11] Whereas a PAC raises and spends money to support (or oppose) a politician or political cause, a FAC raises and spends money in order to "affect the key choices made by stars or teams regarding recruitment and retention."[12] FACs would raise money via

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venture by raising many small amounts of money from a large number of people, typically via the Internet.").

[5] Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1459-60 (2013). This is a cumulative figure.

[6] They may receive intangible benefits from making a contribution. Andrew A. Schwartz, *The Nonfinancial Returns of Crowdfunding*, 34 REV. BANKING & FIN. L. __ (forthcoming 2015)

[7] *See, e.g.*, CROWDRISE, www.crowdrise.com (last visited February 20, 2015).

[8] Charlie Wells, *People Are Using Crowdfunding Sites to Pay for Overseas Travel, Classes*, WALL ST. J., Oct. 22, 2014, at D1, *archived at* http://perma.cc/QD9T-SCMS ("regular people . . . look to crowdfund everything from birthday parties to Italian getaways.").

[9] Schwartz, *supra* note 5, at 1460.

[10] Markel et al., *supra* note 1, at 1. The concept of a FAC is new to the literature. *Id.* at 1 n* ("Dan was the driving force behind the idea of FACs and this form of crowdfunding.").

[11] *Id.* at 27 ("FACs merge political action committees (PACs) on the one hand and booster clubs on the other, applying that union to professional sports (as well as other avenues of entertainment.").

[12] *Id.* at 4 ("Crowdfunding empowers fans to collect and use money to influence the choices talent makes regarding where to perform or for what team. As we see it, groups of fans, what we call Fan Action Committees ("FACs"), would engage in coordinated influence mongering, raising and offering money in an effort to collectively affect the key choices made by stars or teams regarding recruitment and retention."). The terms "team" and "fan" are meant expansively. *Id.* at 3 n.6 ("We say teams because our paradigm for this paper will be contract negotiations between

crowdfunding and spend it by either paying a star directly or by donating it to a charity favored by the star.[13]

For example, if the fans of the Dallas Cowboys football team wanted to recruit quarterback Andrew Luck once his current contract expires, interested Cowboys fans could set up a crowdfunding website to collect donations with the idea that the amount collected would be paid over to Luck (or his favorite charity) if he joins the Cowboys. The crowdfunded money acts as a "supplemental incentive" for Luck to head to Dallas.[14] If this sum is sufficiently large, it could act as a significant inducement to both Luck, who would receive the bonus, and the Cowboys, who could presumably offer Luck lower compensation due to the supplement.[15]

In this scenario, Luck is happy, the Cowboys are happy, and the fans get the star they want. What could be wrong with that? The problem, as the next Part will claim, is that FACs can interfere with the long-term planning and success of the team, which is ultimately what the fans really care about.

II. The Risk to Team Performance

The authors of *Catalyzing Fans* are favorably disposed to FACs,[16] and this new form of crowdfunding may prove to be beneficial, or at least benign. Yet this Part raises the concern that FACs may negatively affect the teams they intend to support by undermining the ability of a team's centralized management to make core business decisions for the organization—

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an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, etc.").

[13] *Id.* at 4-5.

[14] *Id.* at 29.

[15] This would be helpful not only in saving money for the Cowboys, as with any business, but also because it would free up money subject to a team-wide salary cap imposed by the league.

[16] *See, e.g.*, *id.* at 39 ("[Fans] deserve better. . . . By harnessing imagination, resources, and energy, FACs are a catalyst for the realization of fan power. . . . In our view, . . . FACs are permissible and easily created. [W]hen structured under the charitable model, FACs can incidentally lead to improved access to medicine and the arts and the alleviation of other social inequalities, all while helping the local team win. FACs, in brief, lend promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effectuates positive social change."). *But cf. id.* at 5 ("[T]his is an 'idea' paper, one meant to spur further conversation without attempting to provide the final word on the matter. As such, the recommendations we make are somewhat tentative . . . .").

namely whom to employ and how to compensate them. Without this centralized control, team performance may deteriorate.

This is a lesson from corporate law, which provides as a first principle that corporations are not to be managed by the shareholders, but rather by a small, centralized body, the board of directors.[17] Centralized management is one of the key institutional features that allowed corporations to achieve such a powerful position in the modern economy.[18] Yet FACs would undermine the ability of professional managers to make personnel and compensation decisions for their teams.[19]

The authors candidly acknowledge as much, saying that FACs "could disrupt the plans of management vis-à-vis compensation" and potentially "conflict with management's strategy" in any number of ways.[20] Yet they contend that this will not lead to problems because centralized management will retain ultimate control over business decisions: "Importantly, management is independent of the fans and can always resist their efforts if they think the fans are misguided."[21]

That rationale may not hold up to careful scrutiny, however, as FACs can use their money to directly impact and constrain the choices available to a team. For instance, a FAC that favored star A over star B could offer to pay the lion's share of star A's compensation if she joined the team, but

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[17] *See, e.g.*, DEL. CODE tit. 8, ch.1 § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . .").

[18] AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. VI, Intro. Note (1994).

[19] The "teams" that *Catalyzing Fans* applies to, whether sports teams, universities or newspapers, *see* Markel et al., *supra* note 1, at 35, are generally organized as corporations or other business organizations with centralized management.

[20] *Id*. at 9 n.16; *id.* at 8 (the presence of FACs "may put teams in a difficult spot at times").

[21] *Id*. at 9 n.16; *id.* at 30 ("FACs depend on the choices of the team in question to retain or recruit the talent."); *id.* at 7 ("[T]he talent and team control the conversation; if the team is not interested in signing or keeping the player, or if the player is utterly uninterested in playing for the team, the fans remain powerless. In most cases, FACs cannot overcome recalcitrant management or its refusal to recognize the value and benefit of signing the fans' preferred player . . . ."). In addition to this primary argument, the authors add two others to buttress it. First, they assert that we live in a "free society with a market-based economy," so the law ought to allow side payments from FACs to stars. *Id*. at 30. This Response is focused on the wisdom of FACs, not their legality, and therefore does not question that portion of their argument. Second, they suggest that FACs offer fans a way to "monetize" their views. *See id.* at 6. This Response does not intend to challenge or inhibit anyone's ability to express him or herself. *See generally* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

decline to pay a penny toward star B.[22] For a team with a finite amount of money to spend, this makes star A more attractive than star B, especially if there is a salary cap involved. If the team had to pay out of pocket, its management might prefer star B, but if star A can be had for a bargain price thanks to the side payment by the FAC, this significantly changes the calculus.

Or a FAC that adamantly favored star A over star B could offer a side payment to star B in exchange for a promise to stay away from the team.[23] While it is true that the team's central management retains formal power over personnel decisions, it is clear that such a maneuver could effectively prevent the team from signing star B.

Consider again the real life example of the 2012 Denver Broncos quarterback controversy between Tim Tebow and Peyton Manning. Free-agent Manning had already won the Super Bowl and four league MVP awards and was destined for the Hall of Fame, whereas Tebow's throwing mechanics were so poor that he had completed fewer than half of his passes.[24] But Tebow, a devout Christian,[25] had led the Broncos to such an

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[22] The authors presuppose that "the primary relationship is between the team and the star. . . . FAC-raised funds are not necessary for stars to ply their trade, but act as a supplement to the primary relationship." Markel et al., *supra* note 1, at 7. This is not necessarily the case, however, for a FAC could conceivably raise sufficient funds to make payments that rival or exceed those made by the team in the "primary" relationship.

[23] The authors specifically conceive of this possibility. *Id.* at 9 ("It even is conceivable that a group of anti-fans could use a FAC to express dislike for a player through negative incentives—say, by pledging money to convince a player to go somewhere else or to retire.").

[24] Pete Thamel, *After Being a Florida Icon, Tebow Becomes an N.F.L. Question Mark*, N.Y. TIMES, Jan. 1, 2010, at B9, *archived at* http://perma.cc/QP6D-9U7H (quoting an anonymous NFL director of player personnel as saying, about Tebow, "[h]is mechanics are flawed and his throwing motion is awkward."); Woody Paige, *Paige: McD says Tebow has the "It" factor*, THE DENVER POST, May 7, 2010, at C1, *archived at* http://perma.cc/Q462-5YZB] ("NFL scouts, coaches and analysts offered . . . alarming criticisms about Tebow the quarterback."); *Tim Tebow: Career Stats*, NFL .COM, http://www.nfl.com/player/timtebow/497135/careerstats (last visited February 28, 2015), *archived at* http://perma.cc/YUW4-5ETZ (reporting 47.9% career completion percentage and 46.5% in the 2011 season).

[25] *E.g.*, Dan Barry, *He's a Quarterback, He's a Winner, He's a TV Draw, He's a Verb*, N.Y. TIMES, Jan. 13, 2012, at A1, *archived at* http://perma.cc/VJ7B-995L (reporting that Tebow is frequently seen thanking his "lord and savior"). Tebow was famously known to kneel in prayer on the football field—a maneuver that came to be known as "Tebow-ing" and sparked a pop-culture moment. *Id.* ("Around the world, people are 'tebowing'—kneeling in prayer, with head resting on one hand, oblivious to surroundings, just as Tebow does after victories.").

inspired 2011 season that it led to a national cultural phenomenon known as "Tebowmania."[26]

A second-year player at the time, Tebow took over the role of starting quarterback after the team won only one of its first five games of the season. He then led the Broncos to seven wins in their next eight games, six of which were come-from-behind victories, each more improbable than the last.[27] Week after week, Tebow and the Broncos would play poorly for nearly the whole game—and then lead a dramatic comeback to win at the last moment.[28] The fourth quarter was rechristened "Tebow Time"[29] and, at the end of the season, Tebow and the Broncos won their division and a playoff game. Tebow's unflagging optimism in the face of almost certain

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[26] *See*, *e.g.*, Jason Gay, *Sympathy for the Tebow*, WALL ST. J., Mar. 11, 2012, http://www.wsj.com/articles/SB10001424052702304537904577275560584626748, *archived at* http://perma.cc/T6VD-686J ("In the space of a couple months, Tebow became a national frenzy, one that straddled sports, religion and entertainment, and saw a back-up quarterback elevated as an icon of underdogs. . . . He drove football purists bananas, but fans responded. Tebow made an 8-8 club the center of the universe. That mania was genuine, not a marketing scam."); Vicki Michaelis, *Tebow's late TD run lifts Broncos over Jets*, USA TODAY, (Nov. 18, 2011, 10:47 AM), http://usatoday30.usatoday.com/sports/football/nfl/story/2011-11-17/tim-tebow-broncos-stun-jets/51278022/1, *archived at* http://perma.cc/73X9-DGLE ("Week by week, Tebow is quieting his detractors and turning up the volume on 'Tebow-mania.'"); Lindsay H. Jones, *Marketing TebowMania*, THE DENVER POST (Oct. 23, 2011, 1:00 AM), http://www.denverpost.com/ci_19174688?source=infinite, *archived at* http://perma.cc/27SC-U84Z.

[27] Barry, *supra* note 25 (describing Tebow as "the country's favorite active athlete" and "a cultural touchstone"); Mark Kiszla, *Kiszla: Tim Tebow has the Broncos believing they can't lose*, THE DENVER POST (Dec. 12, 2011, 1:00 AM), http://www.denverpost.com/ci_19527521, *archived at* http://perma.cc/Y8EC-AUHG ("The magic of Tim Tebow is bigger than football and grows larger with each late-game miracle by the Broncos.").

[28] Arnie Stapleton, *It's the late show in Denver Broncos rally, then upend Bears in OT*, BOSTON.COM (Dec. 12, 2011), http://www.boston.com/sports/football/articles/2011/12/12/its_the_late_show_in_denver/, *archived at* http://perma.cc/8D6A-9REZ ("Wild wins are becoming routine for Tim Tebow and the Denver Broncos, who flail away through most of four quarters before coming through in the clutch. . ..After failing to score on their first dozen possessions, the Broncos (8-5) erased a 10-0 deficit in the final 2:08 of regulation," and then won in overtime.); Michaelis, *supra* note 26 (Tebow "once again saved his best for last, leading Denver to a 17-13 victory over the New York Jets with a 95-yard scoring drive capped by his 20-yard touchdown run at the 58-second mark.").

[29] *E.g.*, Stapleton, *supra* note 28.

defeat[30] inspired himself, his teammates, his fans, and countless others, many of whom had little previous interest in football.[31]

It therefore looked like Tebow had a bright future with the Broncos. After the 2011 season, however, Peyton Manning became a free-agent, and the Broncos found themselves in position to choose between the two. Despite Manning's obviously superior talent,[32] a majority of Broncos fans hoped the team would choose Tebow because of his charisma, his piety, and his exciting and unorthodox playing style; a giant billboard in Denver that called for an Internet poll between Tebow and Manning led to more than 20,000 votes being cast, with Tebow winning convincingly.[33]

Broncos senior management, led by legendary ex-Broncos quarterback John Elway, ignored the public outcry for Tebow. In March 2012, the team signed Manning to a multi-year contract and cut Tebow shortly thereafter. Tebow was then picked up by the New York Jets but, after a 2012 season where he saw sporadic action and little success,[34] he was released and has not played NFL football since. Manning, by contrast, led the Broncos to the Super Bowl, was named the league MVP, and set important all-time records in passing and touchdowns.

With hindsight, the Broncos management made the right call. Yet if a pro-Tebow FAC had been in place at the time, there is a real chance that

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[30] Judy Battista, *Tebow Wills Broncos to Win With His Late-Game Play*, N.Y. TIMES, Oct. 24, 2011, at D2, *archived at* http://perma.cc/RB25-CZ6U (reporting on "the ineffable quality Tebow seems to summon when things appear bleakest").

[31] *E.g.*, Stapleton, *supra* note 28 ("Never say never. . . . That's a great characteristic of this team.") (quoting Broncos wide receiver Eric Decker); *id.* ("I think we're rewriting the book on 'keep fighting.' Our guys never blink. They remain positive. [T]he guy who dropped a couple of passes caught the touchdown. That's kind of the M.O. on this bunch.") (quoting Broncos coach John Fox).

[32] Gay, *supra* note 26 ("If Tim Tebow were to be sprinkled with magic Lombardi dust and simultaneously possessed by the spirits of Johnny Unitas, Otto Graham and Popeye the Sailor-Man, he would be lucky to be one-quarter as good as Peyton Manning at his best. Even at 35 and recovering from an injury—actually, even if he drank a 12-pack of Meister Bräu and wore a Big Bird costume—Manning is surely a better passer and game manager than Tebow is after his second year of pro quarterbacking.").

[33] Nate Davis, *Tebow has nearly 60% of votes over Manning in billboard poll*, USA TODAY (Mar. 12, 2012, 1:06 PM), http://content.usatoday.com/communities/thehuddle/post/2012/03/broncos-qb-tim-tebow-has-nearly-60-of-fan-votes-over-peyton-manning-in-billboard-poll/1#.VPKJrbDF9fY, *archived at* http://perma.cc/58HH-A82M.

[34] In his one season as a Jet, Tebow achieved a total of 39 passing yards and 102 rushing yards, and accounted for no touchdowns. *Tim Tebow: Career Stats*, NFL.COM, http://www.nfl.com/player/timtebow/497135/careerstats (last visited February 28, 2015), *archived at* http://perma.cc/G4KX-EYYU.

Tebow would have remained the Broncos quarterback, which almost certainly would have meant less success on the field. Considering the phenomenal level of public support for Tebow, a pro-Tebow FAC could have possibly crowdfunded millions of dollars to keep him in Denver, significantly changing the financial calculus for the Broncos. A FAC could have promised to buy a certain number of Broncos season tickets contingent on the team keeping Tebow. At the most extreme, a pro-Tebow FAC could have paid Manning to sign with another team, directly spoiling the plans of Broncos' senior management.[35]

The authors set forth essentially two rebuttals to this anticipated critique. First, the fans may make better decisions than expert managers.[36] Although this is theoretically possible, the authors pretty quickly acknowledge that expert managers are likely better than fans at putting together a successful team.[37] For example, in the Tebow-Manning decision, John Elway, himself a Hall-of-Fame quarterback with multiple Super Bowl rings, demonstrated his superior expertise on quarterback matters.

The authors' other rebuttal is that even if the fans are misguided, they should be allowed to use their own money to express their view of how the team ought to be managed: "If fans believe management is doing a bad job, one solution is to . . . influence (or try to influence) management's decisions [through a FAC], hoping to produce better results."[38] To the extent that fans want to express themselves on issues about which they care deeply, they can and should do so. But expressing a view can be accomplished in many ways apart from paying money to or on behalf of stars, and most other techniques would not have the unwelcome effect of directly interfering with central management on key business decisions. For instance, an online poll of the sort that sprung up in the Tebow-Manning controversy was an effective way for fans to make their voices heard, while letting the Broncos management make the final decision unfettered.[39]

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[35] *See* Markel et al., *supra* note 1, at 23.

[36] *Id*. at 30 ("who likely better predicts what makes a good team: fans or team management?").

[37] *Id*. at 9 n.16 ("In corporate law, shareholders are generally not the managers for various reasons, and perhaps there are similarly valid reasons to deny fans this kind of influence.").

[38] *Id*. at 31.

[39] One final rebuttal, though not one pressed by the authors, *id*. at 7, ("fans want the talent to join their team only so their team can 'win'"), would be that the fans should get what they want, whether it is a winning team or a losing team populated by their favorite stars. The authors are wise not to press this argument, as it is clear from experience that fans ultimately want their team to succeed and that competitive teams are the most popular. If entertainment were more important than com-

Conclusion

The concept presented in *Catalyzing Fans* of using crowdfunding to finance a Fan Action Committee has great potential. Indeed, this Response presented the concern that FACs may become so powerful that they challenge central management for effective control over team personnel decisions. Even so, this respondent looks forward to seeing the first FACs established, knowing that the memory of Dan Markel will live on through this new type of institution.

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petition, the Harlem Globetrotters would be more valuable than the New York Knicks; in fact, the value of the Knicks is orders of magnitude more than the Globetrotters.

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Contextualizing Fan Action Committees: A Comment on *Catalyzing Fans*

David Fagundes*

Introduction: The Sports Fan and The Law Professor

I have loved sports since I developed a consuming obsession with the Los Angeles Dodgers as a kid back in the 80s. My Comment on Markel, McCann, and Wasserman's *Catalyzing Fans*[1] thus comes from the perspective of a fan interested in how Fan Action Committees (FACs) might impact the fortunes of the teams I support, as well as from the perspective of a law professor interested in examining the authors' argument critically.

Inspired by this dual perspective, I will make two related points. First, I will say a bit more about the history of direct fan participation in sports, partly to provide context for the authors' discussion of FACs but also to raise some baseline concerns that complicate the authors' assumptions about how FACs would operate in the contemporary sports environment. Second, I want to say more about wealth effects and FACs. The authors address this issue, particularly in terms of franchise parity, but I think there's more to say about it, especially in terms of the possibility that FACs would accelerate the concerning trend of making professional sports an activity that is controlled by—and that caters to—the uber-wealthy. Finally, I will conclude with a brief reflection about my friend, Dan Markel, who was taken from us too soon.

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* Professor of Law, Southwestern Law School. Thanks to Jessica Roberts for insightful comments on an earlier draft of this essay, and to the late Dan Markel for being a great friend and colleague.

[1] Dan Markel et al., *Catalyzing Fans*, 6 Harv. J. Sports & Ent. L. 1 (2015).

I. Fan Influence in Sports: Some History and Context

The authors of *Catalyzing Fans* decry the plight of the disenfranchised sports fan, for whom "disappointment is endemic" and who experiences "utter powerlessness" with respect to control over her team's fate.[2] There is some truth to this pessimistic lament. Serious fans live and die with their teams' successes and failures, but they don't get to make decisions about who plays, or what strategies to use, or even how uniforms are designed. But the authors' premise that supporters have no sway, financial or otherwise, over their teams overlooks a number of ways that fans actually do have some degree of influence.

First, fans can cast or withhold votes of confidence with their wallets. Most obviously, fans can choose to buy tickets for games or absurdly overpriced merchandise. The equation is pretty simple: More popular and successful teams sell more tickets and merchandise, and this requires teams to be responsive to fan interests, at least if they care about their financial bottom line.[3] The surprising success of the long-suffering Kansas City Royals during the 2014 Major League Baseball (MLB) season was accompanied by a not-so-surprising attendance boost, with the team drawing more fans than it had drawn in any season since before the 1994 MLB players' strike.[4] Wins are not the only factor driving fan willingness to attend games. The presence or absence of popular players can also lead to butts in seats. The Cleveland Cavaliers' re-acquisition of LeBron James was not cheap for the team, but has been rewarded with increased attendance—while Miami fans have punished their franchise by staying away from games.[5] Success also drives purchases of exorbitantly priced team-branded loot, as the sudden burst in

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[2] *Id.* at 3-4.

[3] Not all owners do care about their bottom line, of course. Before he was outed as a boor on racial issues, Donald Sterling was derided among L.A. sports fans for his frugality with the Clippers, letting them languish with a weak (and cheap) roster while making money thanks to the National Basketball Association (NBA)'s revenue-sharing rules.

[4] Blair Kerkhoff, *Royals attendance is up, even as Ned Yost's comments touch a nerve with fans*, The Kansas City Star (August 28, 2014, 11:57 AM). http://www.kansascity.com/sports/mlb/kansas-city-royals/article1312830.html, *archived at* http://perma.cc/588U-H3KK (providing a graph showing that Royals attendance fluctuates in concert with the team's win/loss ratio).

[5] Andrew Flowers, *Trying to Measure the 'LeBron Effect' on Game Attendance*, FiveThirtyEight (June 25, 2014, 2:47 PM), http://fivethirtyeight.com/datalab/how-the-lebron-effect-affects-attendance/, *archived at* http://perma.cc/P6E3-WXXA.

demand for Royals gear during the team's recent World Series run illustrates.[6]

Buying and abstaining from buying tickets or merchandise are not the only ways fans can affect their teams' financial bottom lines. While no fans have developed FACs quite yet, supporters have come up with a number of creative ways to express their collective opinions about their teams and to pressure decision-makers for outcomes they want. The most familiar example is the good old boycott, which fans frequently use to register their displeasure with a team's performance, management, or even social issues related to their team. In March 2014, for example, hardcore supporters of Italian soccer team Lazio organized a boycott of the team's home game against Atalanta that left the Stadio Olimpico empty, powerfully expressing their distaste for owner Claudio Lotito's questionable personnel decisions.[7] During the first round of the 2014 NBA playoffs, thousands of Clippers fans stayed home as a protest against Donald Sterling's tasteless racial remarks.[8] Just this past season, St. Louis's Time Out Bar & Grill announced that they were withdrawing support for the local National Football League Rams after some of its players staged a "Hands up, don't shoot" protest in support of victims of Ferguson police abuses.[9] And in a more positive vein, fans may provide financial support to charities favored by players they want to recruit

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[6] Haley Harrison, *Royals fans rush to buy playoff merchandise*, KMBC (October 1, 2014, 10:05 PM), http://www.kmbc.com/news/royals-fans-rush-to-buy-playoff-merchandise/28363624, *archived at* http://perma.cc/Z2YW-RK4R.

[7] Brian Homewood, S*tadio Olimpico lies almost empty as Lazio fans hold boycott in protest to club's owner*, THE DAILY MAIL (March 9, 2014), http://www.dailymail.co.uk/sport/football/article-2576937/Stadio-Olimpico-lies-Lazio-fans-hold-boycott-protest-clubs-owner.html, *archived at* http://perma.cc/S2C2-RLUR.

[8] David Leon Moore, *Ex-NBA star Mychal Thompson says black fans will boycott Clippers,* USA TODAY (April 27th, 2014, 3:13 PM), http://www.usatoday.com/story/sports/nba/clippers/2014/04/27/los-angeles-clippers-donald-sterling-mychal-thompson/8295737/, *archived at* http://perma.cc/QV7E-6FET. In a similar vein, the fan community "Vikings Message Board" shut down in protest when the Minnesota Vikings' reinstated Adrian Peterson despite allegations that he had engaged in child abuse. Ryan Grenoble, *Vikings Fan Shuts Down Popular Message Board Following Adrian Peterson Revelations*, THE HUFFINGTON POST (September 17, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/09/16/vikings-fans-shut-message-board-adrian-peterson_n_5831588.html, *archived at* http://perma.cc/UJE8-G4UF.

[9] And, in turn, local residents offended by Time Out's boycott of the Rams organized a protest and boycott of the bar in retaliation. Lonnie K. Martens*, St. Louis Bar boycotts 'bone-headed' Rams; becomes target of angry protests*, BIZPAC REVIEW (December 3rd, 2014), http://www.bizpacreview.com/2014/12/03/st-louis-bar-boycotts-bone-headed-rams-becomes-target-of-angry-protesters-162853, *archived at* http://perma.cc/6M6Y-FMEV.

or to continue playing for their team. The authors, for example, point out that when the Miami Heat were trying to retain LeBron James in early 2014, area radio personalities organized a drive to get Heat fans to donate to James' preferred charity, the Boys and Girls Club of Broward County.[10]

Sports teams' supporters also use a variety of other collective devices to make their voices heard. The Green Bay Packers, for example, are the only publicly owned major sports team in America. The small-market Packers have flourished thanks in part to the revenue raised by five public offerings of stock in the team. While these shares are not tradable, they do entitle holders to attend the Packers' yearly shareholder meeting held at Lambeau Field, where owners can grill the Board of Directors about anything from financial strategies to why the team isn't running the ball more.[11] And some particularly organized—and motivated—fan clubs have agitated for changes in management, occasionally achieving some leverage in doing so. The "Save the Islanders Coalition" was instrumental in facilitating the near-acquisition of the New York Islanders hockey team by Dallas businessman—and total fraud—John Spano, who covered his chicanery in part by inviting leaders of the high-profile fan club to work in the Isles' front office.[12]

I offer these examples to provide context for the FACs proposal. While *Catalyzing Fans*' authors argue that fans experience "total powerlessness" over team decisions, this is not and has never quite been true. Indeed, the average fan does not wield anything like the control that owners or managers do, of course. But the notion of collective fan influence is not a proposal unique to *Catalyzing Fans*. The preceding examples are just some of many ways that supporters have organized themselves to make their voices heard by team management.[13]

That FACs are not sui generis does not mean that they are not a good idea. But the context I have provided has at least two implications for *Catalyzing Fans*. The first is that it answers a question posed by the authors: If

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[10] Markel et al., *supra* note 1, at 10.

[11] *Shareholders*, Green Bay Packers, http://www.packers.com/community/shareholders.html (last visited Feb. 28, 2015), *archived at* http://perma.cc/D63D-RXWN.

[12] *30 for 30: Big Shot* (ESPN television broadcast Oct. 22, 2013).

[13] Fans have even directly influenced the outcome of games on occasion. Boston's rowdy Royal Rooters, supporters of the Red Sox in the very early 1900s, taunted the opposing Pittsburgh Pirates mercilessly throughout the first World Series in 1903. Some Pittsburgh players later conceded that the Royal Rooters had hurt their performance and tipped the balance of the series in favor of Boston, who won by five games to three. Lawrence Ritter, The Glory of Their Times: The Story of the Early Days of Baseball Told by the Men Who Played It 27 (2010).

FACs are an attractive idea, why haven't they emerged already?[14] An answer that the authors don't consider is that there are extant means by which fans seek to influence the fates of their favorite teams. Second, and related, the existence of these various avenues for collective clout shows that the normative appeal of FACs is comparative, not absolute. That is, the right way to frame the question is not whether FACs are a good idea, as the authors have it, but rather "are FACs a superior means of organizing fans compared to present means of collective influence?" Acknowledging that FACs would be one of many ways, rather than the only way, for fans to leverage their influence on teams raises important concerns about tradeoffs. If the best way for fans to use their limited resources to shape the fates of the teams they support is to buy (or abstain from buying) tickets to games, for example, then creating FACs might siphon off crucial resources better spent elsewhere.

II. For Love or Money? Wealth Effects and FACs

The authors of *Catalyzing Fans* are well aware of the potentially problematic wealth effects that FACs may have on sports leagues, though they focus on one particular concern: competitive parity within leagues.[15] As the authors argue, it seems entirely plausible that creating one more way for money to influence sports would favor already rich large-market teams at the expense of undercapitalized small-market ones. In this Part, I seek to explore a broader range of wealth effects and other disconnects between the idea of crowd-funding and aggregate fan happiness.

The appeal of the FAC derives from a simple equation: Money is a good measure of how much you love your team, so more devoted fans will be willing to contribute more to FACs, and influence will more or less track one's passion for one's team. This reasoning ignores the familiar fact that wealth is relative, not absolute. For a very rich fan, a FAC donation of $10,000 may represent a tiny amount relative to his or her total wealth that he or she will never know is gone. For a poorer fan, giving $25 to a FAC may make the difference between attending a game or staying home (or even between eating dinner and going hungry). The relativity of wealth means that absolute dollar value is a terrible measure of real fan passion. A deeply devoted, less wealthy fan who scrapes together $50 to give to a FAC will have his or her influence swamped by a tycoon who tosses in $5,000, even though the former may represent a much greater relative sacrifice and thus represent much greater devotion to a team.

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[14] Markel et al., *supra* note 1, at 37-39.

[15] *Id. passim*.

These wealth effects mean that FACs may not be a good measure for fan happiness, because they privilege the influence of the wealthy few over the many poor, falsely equating fans' passion with their financial liquidity. And this is all the more concerning as professional teams, concerned for their bottom line, increasingly tailor the fan experience more toward the wealthy fans who can shell out more for tickets, merchandise, and food, and less toward the working class people who comprise the broad base of their fan support. English soccer fans, for example, have lamented the orientation of teams toward the "prawn sandwich" brigade of relatively indifferent people who show up at games to enjoy a VIP corporate experience rather than passionately supporting the team.[16] American venues have gone in the same direction, introducing skyboxes and high-end amenities that increase profits but exclude average fans from the game-day experience.[17] FACs thus threaten to further exacerbate the rich/poor gap in sports by providing yet another means by which wealthier individuals enjoy advantages, even over more passionate but less wealthy middle- and lower-class fans.[18]

A related concern is that highly wealthy fans who are also intensely passionate about their teams may use FACs to wield outsized influence.[19] This is not necessarily a problem. A devoted and wealthy supporter could provide a much-needed capital boost needed to acquire key personnel or help fund a new facility. But even a well-meaning plutocrat could use FACs to make attempts at improvements to a team that end up doing more harm than good. Most fans probably think they know better than management how best to help the team. FACs would allow them to put their money where their mouth is, which is a concerning thought if one believes in the expertise of sports management professionals.[20] A related concern is that the

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[16] Andy Hunter, *United price hike targets prawn sandwich brigade*, THE INDEPENDENT (April 11, 2006), http://www.independent.co.uk/sport/football/premier-league/united-price-hike-targets-prawn-sandwich-brigade-473667.html, *archived at* http://perma.cc/F74Z-38UK.

[17] Eddie Brown, *Man caves are problem for NFL*, U-T SAN DIEGO (September 12, 2014, 5:31 PM), http://www.utsandiego.com/news/2014/sep/12/man-caves-nfl-football/, *archived at* http://perma.cc/KV5Y-XF9T.

[18] One poll found that the overwhelming majority of fans who attended the 2014 World Cup in Brazil were wealthy and white, even though Brazil is a highly diverse country both racially and socioeconomically. The Associated Press, *Most Attendees are White and Rich, Poll Suggests*, N.Y. TIMES, June 30, 2014, at D8, *archived at* http://perma.cc/FLC2-CLKW.

[19] The authors hint at this possibility, noting that FACs could consist of a large number of fans, or just a few. Markel et al., *supra* note 1, at 8.

[20] I'm honestly agnostic about whether sports management professionals would systematically do a better job of decisionmaking than fan collectives. One upside of

uber-rich could deploy FACs as a weapon of destruction aimed at a hated rival. Fans of the rival team could, of course, rally in its support to create a counterbalancing FAC, but this kind of arms race would then end up becoming a deadweight loss.[21] And in all of these cases, FACs would not be representing a broad cross-section of fan opinion, but the personal preferences of a few affluent supporters (or antagonists)—a concern all the more real as distribution of wealth in America becomes increasingly skewed.

But even if FACs did fairly reflect fan preferences, would that lead to good outcomes for supporters? Not all supporters want the same thing, of course. One fan could care only about maximizing wins, while another may care only about seeing exciting performances, while still another could want to see his or her favorite athlete get a lot of playing time. This variety of preferences may be an argument in favor of FACs: Different fans with different definitions of team success could use them to express their different preferences. But the result may well just be a cacophony. With tens of FACs each pushing in different directions, the marginal effect they each have would end up simply canceling each other out, again resulting in massive deadweight losses.

Next, consider the social costs of further monetizing fans' experience of sports. Everyone knows that professional sports are, well, professional. For all the high-minded talk about the glory of athletics and the way winning teams create civic pride, pro sports teams exist to generate revenue. But there are tiny corners of fandom that don't yet seem fully dominated by the almighty dollar, and one of them is the act of simply being a fan—rooting for your favorite players, cursing the ones you think aren't worth a damn, feeling the joy of victory and the agony of defeat. FACs could provide a way to deepen one's connection with a team. But it is also possible that giving people a financial incentive could soak every last aspect of the fan experience with the taint of cash. Don't like a player? Well don't just curse his name, pony up to the FAC devoted to getting rid of him. Worried that your top quarterback will be traded? Hey, if you don't shell out to the FAC that is raising money to keep him around, then you probably don't care about it all that much. As much behavioral research has shown, money changes everything: If you introduce a little money into the fan experience, you risk

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FACs is that (at least when they have a large number of contributors) they may harness collective wisdom that can check the tendency of single individuals to make shortsighted or biased decisions. *See generally* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004).

[21] This phenomenon is the inverse of what some economists have identified as the inefficiency of gift-giving. H. Kristl Davison, et al., *Confounding Issues in the Deadweight Loss of Gift-Giving*, 8 J. FOR ECON. EDUCATORS 1 (2008).

crowding out any of the idealistic, purely fun aspects of the professional sports fan experience that still remain.[22]

All of the points in this Part represent distinct critiques that raise difficult-to-answer empirical questions. But as the conversation about FACs continues, it is worth focusing on two questions that lie implicit in *Catalyzing Fans*. First, what kind of expertise do we trust the most? Are fans' collective opinions a valuable source of input about team decisions, or simply the ignorant, shortsighted voices of the uninformed masses? Are general managers subject to the kinds of behavioral biases that warrant correction, or are they experts whose decisions warrant deference? This question matters because giving fans greater influence is only a good idea if that influence will actually achieve the outcomes they want. Second, and related, what do fans want to maximize? The answer, as both the authors and I have noted, may not be uniform. Fans are supposed to want wins and championships above all else, but there are numerous other considerations at play. Some fans may prefer a team that plays a flashy style, while others may want to see defense—all regardless of win/loss records. Supporters may also favor players who are beloved for reasons unrelated to their skills, such as local heroes or purported "good guys," and these preferences may work at cross-purposes with the desire to rack up wins. These questions don't have easy answers, but that is all the more reason to highlight them since part of whether FACs are a good idea requires some notion of what fans want and who is best situated to make that happen.

Conclusion: The Death of Time

The foregoing parts have cast FACs in a critical light, but I want to be clear about my sense of the project: It's interesting, creative, and could prove to be a promising development for professional sports. But since the authors bill *Catalyzing Fans* as an "idea" paper, my comments have been designed to push on some unexplored aspects of the proposal, both descriptive and normative, in order to help enrich the discussion about it.[23] I hope that both of the points I've made in this brief essay—providing more context for the notion of fan activism and raising concern about the wealth effects of introducing even more commerciality into pro sports—do just that. But before concluding, I want to share a reflection about my friend, Dan Markel.

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[22] *See, e.g.*, Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (2008); Ernst Fehr & Simon Gächter, *Do Incentive Contracts Crowd Out Voluntary Cooperation?* (Ctr. for Econ. and Pol'y Research, Discussion Paper No. 3017, 2001).

[23] Markel et al., *supra* note 1, at 5.

When I heard last year that Dan Markel was co-authoring an article on sports, I was pleased but also very surprised. While I am a sports fan, my impression was always that Dan was not one. I base this conclusion on the exactly one conversation I had with Dan about sports. We were at a weekend workshop that he organized in late 2010, and I groused about having to miss seeing my Patriots play the hated Jets. Dan expressed bafflement at this, and a typically Markelian conversation[24] developed, as I tried to convince him of the virtues of being a fan. I don't think I succeeded, since Dan concluded that watching sports seemed to him a waste of time. Actually, he referred to it as "the death of time," invoking a phrase that he recalled rabbis using in Hebrew school to dismiss trivial diversions.[25]

What Dan was a fan of, though, was a well-crafted argument, regardless of subject matter. The fact that one of his last articles concerned a subject not particularly close to his heart provides the best illustration of this point: Dan's interests were truly ecumenical, embodying Susan Sontag's observation that a real writer is "someone who is interested in everything." And while many of his friends and colleagues have rightly noted that among the many tragedies of Dan's early passing is that so many articles will remain unwritten and arguments will remain unmade, I prefer to think of the more optimistic inverse of this point: Dan, in his too-brief time with us, produced a depth, range, and quality of work that would constitute a complete, highly distinguished career for most academics. And the possibility that *Catalyzing Fans* may start a serious conversation about how FACs might enhance fans' experience of sports is just one of the many ways that Dan's work will produce a humane legacy that will continue on even though he has left us.

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[24] By this, I mean a serious intellectual inquiry, even about something as unserious as watching sports, that is leavened by wit and good humor.

[25] Dan's phrasing really stuck with me. When I find myself tempted to watch some random game instead of working, I think to myself, "Is this the death of time?"


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Promoting Values: A Comment on *Catalyzing Fans*

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Danny Markel was a true original. He was smart and imaginative, broad-ranging in his interests, exceedingly generous, self-promoting, friend-promoting, and full of life. His death, too early and too violent, was a tragedy—for his family, most of all, but also for his legion of friends, for the students who will be deprived of his insight and mentorship, and for the world of legal scholarship. *Catalyzing Fans,*[1] if not as profound or fully developed as the best of Danny's work, nonetheless exemplifies his characteristic scholarly virtues: it is innovative, clearly reasoned, and thought-provoking. I am honored to have been asked to offer a few thoughts in reaction.

The central conceit behind *Catalyzing Fans* is simple enough: fans of professional sports teams can combine into "Fan Action Committees" ("FACs") that will raise money for the purpose of influencing free-agent athletes, when weighing offers from competing clubs, to sign with the FAC's preferred team.[2] FACs could achieve this influence either by paying the athlete directly or, in a model that Danny and his co-authors Michael McCann and Howard Wasserman strongly prefer,[3] by making contributions to one or more charities associated with the athlete. In either model, FACs would thereby empower fans and increase aggregate preference-satisfaction. Under the charitable model, they would also, plausibly, increase total charitable giving.

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[1] Dan Markel et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

[2] Although the article notes that FACs could be used to influence the movement of non-sport entertainment figures, it focuses on athletes in professional sports leagues in the United States. That will be my sole focus in this short essay.

[3] Markel et al., *supra* note 1, at 11.

The authors are explicit that *Catalyzing Fans* is intended as "an 'idea' paper, one meant to spur further conversation without attempting to provide the final word on the matter."[4] In precisely that spirit of continued conversation, I will offer two thoughts, both tentative and exploratory.

First, I will register strenuous disagreement with the article's characterization or conception of professional sports. In the authors' view, professional sports are simply one form of commercial entertainment, no more and no less. I believe that is an impoverished view of sport. Sport is not only a source of entertainment, but a domain of value and virtue. If this is so, then the worth of FACs might be, in large measure, a function of the extent to which they promote or retard the values and virtues characteristic of sport.

Second, I will ask how FACs fare when professional sports are conceived as crucibles for the development and manifestation of human values and not merely as sources of entertainment. The short answer is that I have precious little idea. But consideration of one factor (that allowing wealth disparities to influence sporting outcomes is harmful to sporting values) leads me to suggest that FACs might be more attractive when geared toward lower profile sports than the big four of professional baseball, football, hockey and men's basketball. Indeed, FACs for low-popularity sports might be an even better idea than Danny and his co-authors envision.

I. SPORT AND VALUE

What is professional sport? According to the authors, professional sports

> are principally a form of commercial entertainment and thus should be amenable to arguments in favor of private ordering, no different than the norms governing restaurants, airport fiction, and network TV shows. Professional sport is just one aspect of commercial entertainment and there is no intrinsic reason why the norms of commerce and private ordering shouldn't govern in that domain.[5]

I do not share that conception of sport. To be sure, professional sports contests *are* a form of commercial entertainment. But they are not *only* that. They are elite sporting competitions. *Sport* is a domain of human life with an unusual capacity to promote value and virtue—beauty, drama, grace, fortitude, resilience, grit, courage, discipline, teamwork, camaraderie, and sportsmanship, among others—along with the full range of somatic excellences such as strength, speed, agility, and coordination. *Elite* sport is a

[4] *Id.* at 5.
[5] *Id.* at 28.

region within that domain that (at its best) can help realize for the athletes, and make manifest for the rest of us, the highest degrees of sporting value, virtue, and excellence. Professional sport therefore has (at least) two different aspects or logics: athletic competition and commercial entertainment.

Any change in, or concerning, professional sport can be evaluated both in terms of how it promotes or retards the sport's ability to serve sporting excellences and in terms of how it affects the sport's value qua entertainment. *Catalyzing Fans* concentrates its attention on the latter question. I would place greater weight on the former. But whatever the optimal emphasis might be, insofar as we should care at all about professional sports qua sports, and not merely qua modes of entertainment or amusement, then the norms that properly govern professional sports *are* meaningfully different from the norms that properly govern, for example, restaurants, airport fiction, and sitcoms.

II. Beyond the NBA

Much of the exposition in *Catalyzing Fans* focuses on the NBA. And the focus is on the NBA "because fan funding of free-agents is likely most effective in that sport."[6] My instinct differs. I would not focus on the NBA, or on any of the major professional sports leagues, for reasons of both efficacy and desirability. First, I suspect that fan funding of free agents is much more likely to be effective in (what I will call) low-popularity sports such as the WNBA and MLS than in the high-popularity sports that make up the four "major" North American sports leagues: the NBA, the NFL, the NHL, and MLB. Second, and assuming that FACs could be (comparably) effective for both low-popularity and high-popularity sports, I think that they are more likely in the former context than the latter to promote sport-related values to which we should be committed.

There are two reasons to doubt that FACs would significantly influence an athlete's (re)location decision in high-popularity sports. First and more obviously, total athlete compensation (mostly, salaries plus endorsement deals) in the high-popularity sports is so great that sums offered by FACs are unlikely to affect the athlete's deliberation. The mean annual salary in the NBA sits comfortably north of $4 million. The total value of multi-year contracts signed by top stars exceeds $100 million.[7] Major League Baseball

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[6] *Id*. at 13.

[7] *See Player Contracts*, Basketball-Reference.com, http://www.basketball-reference.com/contracts/players.html, (last visited Feb. 17, 2015), *archived at* http://perma.cc/A9HX-FU46.

sees similar mean annual salaries, and even higher total contract values.[8] Given such astronomical sums, it is hard to imagine that FACs can raise enough money to affect a player's economic calculus. This is especially true given that the figure that might potentially influence an athlete's decision is not the total sum that a FAC offers but the *difference* between the sums offered by competing FACs. Of course, because FACs don't (yet) exist, it is entirely speculative how much money they could collect and distribute, and I don't claim that my own speculation on this question deserves respect from others whose speculations differ. Still, I might as well announce my own guess that the sums would not be nearly large enough.

Athletes in low-popularity sports do not merely earn less than their counterparts in high-popularity sports; their salaries are tiny fractions of what athletes in high-income sports pull in. Take the WNBA. Although their finances under the newest collective bargaining agreement are not public, salaries under the last agreement ranged from a minimum of $38,000 to a maximum of $107,000.[9] Minimum salaries in the MLS are almost exactly the same, with the median salary around $92,000.[10] At these compensation levels, FACs would not have to collect vast sums from fans to be able to offer inducements sufficient in magnitude to plausibly make a difference to an athlete's financial calculation—especially in the direct-contribution model, but also perhaps in the charitable model. Even an extra $5,000 to $10,000 is real money to an athlete earning $50,000.

The second reason to suspect that FACs can be more effective in low-popularity than high-popularity sports is, I concede, even more speculative: it concerns the likely receptivity of the leagues. Markel, McCann and Wasserman find it easy to imagine that "teams and leagues will embrace FACs, and even welcome and celebrate that level of involvement and influence."[11] I do not. From where I sit, the major sports leagues appear to value only one thing nearly as much as they value money: control. (Exhibit A might as

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[8] *See, e.g.*, Ronald Blum, *Dodgers Top Spender, ending Yanks' 15-year streak*, ASSOCIATED PRESS (Mar. 26, 2014, 2:07 AM), http://bigstory.ap.org/article/dodgers-top-spender-ending-yanks-15-year-streak, *archived at* http://perma.cc/KPM2-JN2A.

[9] Russ Wiles, *Mercury title run puts spotlight on pay gap in sports*, THE ARIZONA REPUBLIC (Sept. 6, 2014, 5:27 PM), http://www.azcentral.com/story/money/business/2014/09/06/mercury-wnba-unequal-sports-pay/15217833/, *archived at* http://perma.cc/6Y8J-CYPT.; Nate Parham, *WNBA's new collective bargaining agreement reflects owners' interest in limiting offseason play in foreign leagues*, SB NATION (Mar. 10, 2014, 8:00 AM), http://www.swishappeal.com/2014/3/10/5485828/wnba-collective-bargaining-agreement-time-off-bonus, *archived at* http://perma.cc/W5BG-ZVK6.

[10] Andrew Keh, *Many in M.L.S. Playing Largely for Love of the Game*, N.Y. TIMES, Oct. 26, 2014, at D1, *archived at* http://perma.cc/5CSE-UAWU].

[11] Markel et al., *supra* note 1, at 12.

well be the NFL, which had been branded a "dictatorship" even before Roger Goodell's heavy handed approach to player discipline in the Ray Rice and Adrian Peterson cases.)[12] Accordingly, I find the notion that the NBA and its peers would "welcome and celebrate" a high level of "influence" by fans—really, by anyone other than owners—naïve. And if a league does not want player movement to be influenced by FACs, I have little doubt that it possesses levers sufficient to neuter them.

Here too, low-popularity sports just might be different. Partly out of necessity, and partly because wealth and power are corrupting, low-popularity sport leagues might be more receptive than their high-popularity counterparts to FAC involvement. In general, young ventures and struggling ones tend to be more open to new ideas.

Recall that the two considerations I have just briefly discussed (vast differences in player compensation, and potential differences in league receptivity to FACs) serve the same basic claim—namely, that FACs are more likely to be effective in low-popularity than in high-popularity sports. But now let us assume that I'm mistaken about that, and that they are likely to be comparably (and nontrivially) effective in both contexts. The question then becomes whether they are likely to be comparably conducive—or deleterious—to sport-relevant values and virtues in the two contexts. In truth, I am unsure whether FACs would significantly affect the realization of sporting excellences one way or another. My hunch, however, is that FACs in high-popularity sports are more likely to exacerbate problems that fall under the broad heading of "competitive balance."

Catalyzing Fans expressly addresses objections or concerns that sound broadly in "competitive balance" or "parity," and in the potentially distorting or corrupting effects that disparities of wealth may produce. But the article does not make entirely clear just what competitive balance involves or why wealth disparities might be problematic. A few words on this subject are therefore warranted. This is a complex topic that I cannot address in the depth it deserves, so I will simplify pretty ruthlessly.

Sports are generally viewed as a subset of games. Orthodoxy in the philosophy of sport maintains that sports are games that involve physical excellences of some sort—physical prowess or exertion, or the deployment of gross motor skills, or something else along these lines. As it happens, I (and others) have raised some doubts regarding whether all sports are games.[13]

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[12] Alex Koppelman, *The N.F.L. Dictatorship*, The New Yorker (Sept. 25, 2012), http://www.newyorker.com/news/sporting-scene/the-n-f-l-dictatorship, *archived at* http://perma.cc/MY89-W83V.

[13] *See, e.g.*, Mitchell N. Berman, *Sprints, Sports, and Suits,* 40 J. Phil. Sport 163 (2013).

But even I agree that the team sports that FACs are apt to involve are games. What such sports are not, however, are games *of chance*. They are games of skill. As such, it is built into the nature of such contests that they should be structured, to the extent possible or practicable, to make outcomes sensitive to the exercise of sport-relevant skills or excellences. This may be the core commitment underlying the regulatory ideal of a "level playing field."

The principal skills and excellences at issue in most sports are, roughly speaking, athletic—speed, strength, hand-eye coordination, and the like. But the relevant excellences often include as well mental excellences related to the crafting and execution of strategies and tactics, and holistic virtues such as resilience and courage. Furthermore, the excellences in team sports are not limited to those displayed by the athletes themselves: coaches and managers also contribute to the success of sport teams, and the excellences that are characteristic of their roles count among the excellences that team sports properly incentivize and reward.

If all the foregoing is true, we can see why disparities in the resources that teams have available to lure and retain athletes run counter to the desideratum that outcomes be sensitive to the exercise of sport-relevant excellences.[14] It is hard to build a successful team because player evaluations can be difficult and opportunity costs loom large. The more equal are the sums that owners are allowed to spend on players, the greater is the extent to which success or failure in team composition may be attributed to managerial skill. (Of course, successful team construction is never entirely a function of skill: unforeseeable over- and under-performance due to injuries among other causes can never be entirely eliminated.) In contrast, if owners have radically divergent sums to spend, then outcomes are sensitive to wealth disparities. And if these disparities are not fairly attributable to sport-relevant skills of players, coaches, and managers, then the outcomes are sensitive to luck or chance, which, by hypothesis, is inimical to the inner

[14] Concededly, as *Catalyzing Fans* emphasizes, many other disparities that influence the movement of talent—from climate to state income tax laws—are also in tension with this "excellence-sensitivity" desideratum. It is not clear, though, exactly how that fact should bear on the extent to which background or fortuitous wealth disparities should also be allowed to influence the ability of clubs in the same league to construct rosters. In places, the authors appear to believe that just because some clubs will always enjoy the benefit of structural advantages such as good weather (and others will always suffer the detriment of bad weather), we should be unconcerned with the extent to which wealth disparities are allowed to influence and shape the composition of teams. *See, e.g.,* Markel et al., *supra* note 1, at 24-25. I believe that much more argument must be supplied before we should draw that lesson.

values of sport. Notice that this is not an *aesthetic* argument for minimizing the influence of wealth disparities. Pace Markel and his co-authors, the argument is *not* "merely that FACs make watching sports worse in some way."[15]

Consider fantasy sports. As far as I am aware, fantasy leagues that assign players to teams by auction rather than by snake draft uniformly allot the same auction budget to all owners. Whether or not it would be "unfair" to allow each owner to create as large or small an auction budget as she wishes, out of her own funds, such an approach would certainly be inimical to the notion that fantasy sports are contests of skills of the fantasy owners and not only of the real-life athletes. The same is true of professional sports. That the Yankees and Dodgers have vastly more money to spend on players than do, say, the Twins or the Brewers, due only to the different sizes of the fan bases that the teams can "naturally" capture, so to speak—i.e., that the teams will attract with the exercise of average skill—makes fortunes on the playing field too sensitive to sport-irrelevant factors, and therefore is a less good test of skill.

What does this have to do with FACs? Simply that FACs of large market teams have a built-in advantage over FACs of small market teams. Markel, McCann, and Wasserman insist that FACs reflect intensity of preference or passion and not sheer numbers, and they are right. But only up to a point. All else equal: (a) teams with larger fan bases will generate more passion, hence more money for FACs, and (b) teams in cities with larger populations will have larger fan bases. So if FACs ever become effective in influencing player movement in the NBA, it is foolish to expect that FACs associated with or devoted to the Oklahoma City Thunder or the Memphis Grizzlies will generate resources remotely comparable to the resources assembled by FACs for the Knicks, Lakers, Celtics, or Bulls. FACs, in short, exacerbate the influence of wealth disparities that have nothing to do with sport-relevant excellences.

You might think that the same analysis applies to low-popularity sports. And it does, to a degree. But there is a difference born of the fact that support for low-popularity teams is very low as a percentage of potential audience. Low-popularity leagues have vastly more *untapped* fan potential than do high-popularity leagues. Suppose that High-Popularity League H (say, the NBA) and Low-Popularity League L (say, the WNBA) both have teams in Big City B and Small City S, and that City B has twice the population of City S. Suppose too that, on average, teams in League H enjoy support from 40% of the residents of the team's city, and that teams in League L enjoy support from 4% of their city's population. (Such a difference is just

[15] *Id.* at 25.

what it means for H to be high-popularity and for L to be low-popularity.) If each team in each league in each city has its own FAC, and holding all other factors constant, City S's FAC for League H can compete successfully against City B's FAC only if it attracts support from 80% of S's population. But City S's L-League FAC can compete against its City B rival if it attracts support from only 8% of S's population. These are highly stylized assumptions, of course. But they suggest that the task facing the FAC for the low-popularity league (L) in the small city (S) is doable, if difficult, while the FAC for the high-popularity league (H) in the small city (S) faces a truly hopeless challenge.

* * *

One virtue of Fan Action Committees, Markel, McCann, and Wasserman conclude, is that they "should spur some important conversations about professional entertainment and sports, and what we expect from these fields of endeavor and why."[16] I think that is true, and I have argued (albeit very sketchily) against the too-common temptation to reduce professional sports to entertainment. Professional sports are entertaining (at least often), but they contribute much more to our lives than mere entertainment, which is why they can be worthy objects of our serious engagement. That caution notwithstanding, I see little reason to resist or reject the authors' hope that FACs "offer promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effects positive social change."[17] That's an optimistic picture, in my opinion, but not a fanciful one. If that vision comes someday to be realized, FACs will serve as fitting tribute to the memory of Danny Markel, a thoughtful scholar and a good man.

[16] *Id.* at 39.
[17] *Id.* at 40.

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The Tax Consequences of Catalyzed Fans

Adam Chodorow*

This article, in honor of Dan Markel, explores the tax issues that would arise were fans to band together as a Fan Action Committee (FAC) to offer players additional compensation or a donation to a favored charity as an incentive to sign with the fans' team, the proposal at the heart of one of Dan's last articles. Both the direct compensation and charitable models raise questions regarding whether the players and owners have income, the tax consequences for the FAC of both contributions and distributions, and the fans' ability to deduct contributions to the FAC. Exploring these questions will help pave the way for FACs to move from academic discourse to the real world, offers the opportunity to consider a number of important tax policy issues that have far broader application, and seems like a wonderful way to honor Dan's memory.

I. Introduction

Dan Markel had an unquenchable desire to organize and connect people. If you were a legal academic over the past 10 years, Dan was either someone you knew or someone you knew about. Perhaps because we were in different fields (he in criminal law, I in tax), I fell into the latter category. That all changed in the summer of 2013, when we both attended the law and economics boot camp hosted by George Mason University School of Law, which, among its many virtues, brings together legal academics from a variety of fields. Dan was everything his reputation suggested, and more. The conference took place at Beaver Creek in Colorado, and, consistent with his reputation as a connector, Dan quickly organized a group of us to hike

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up the mountain after each session.[1] Consistent with his reputation as an intense intellectual, he insisted that we discuss our current scholarly projects, no mean feat when huffing and puffing up a mountain.

Calling us the 10,000 feet legal theory workshop, Dan marched over hill and dale as we talked about reshaping the joinder and claim preclusion rules,[2] considered how evidentiary rules might be changed to account for the ways that emotional influences subtly reshape jury perceptions,[3] and defended the propriety of writing about the tax consequences of a zombie apocalypse.[4]

Dan's contribution to the "workshop" was an interesting, off-topic article he was working on about how to involve fans in a team's decision whether to acquire or retain top talent.[5] The idea was that fans could form Fan Action Committees (FACs) and offer to pay players to sign with their team. Alternately, they could donate to a charity in the player's name.[6] Dan argued that fans should be considered third-party beneficiaries to the contract between the players and owner, and therefore they should have some say in the decisions that affected them. Dan always thought big, and he argued that this idea had applications far beyond sports teams.[7]

To a man with a hammer, every problem is a nail, and,as a tax professor, I have to admit that I fall prey to this tendency. Thus, when Dan began talking about the idea, I immediately began thinking of the tax consequences. Would amounts donated to charity be considered income to the player? Could the FAC deduct amounts transferred directly to the player or to charity? Could contributors to the FAC deduct amounts they gave?

While trying not to pass out from exertion (it was the altitude, I swear), I posed these and other questions to Dan, as others peppered him with their own questions. Despite Dan's focus on criminal law, he had a really good grasp of the tax questions. However, keen to get every last

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[1] The group consisted of Dan, Dan's Florida State colleague Mark Spottswood, Michael Mooreland at Villanova, Alan Trammell (the law professor, currently a Fellow at Columbia, not the former shortstop), and me.

[2] Alan Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1121 (2014).

[3] Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41 (2014).

[4] Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207 (2013).

[5] Dan Markel et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

[6] This proposal could work equally for male or female athletes. However, given the dominance of male professional sports in the U.S., and to avoid confusion occasioned by switching back and forth, I will refer to the athletes as "he" throughout this article.

[7] My personal favorite was fans banding together to induce a player to leave a hated enemy, but I was also taken by the idea of restaurant customers banding together to retain or attract a top chef.

detail correct, Dan put me in touch with his co-authors to explore further the issues we had discussed.

In the end, the article contained the following brief discussion of the tax issues raised by this innovative idea:

> This raises the final issue: If crowdfunded money is a supplement to that basic agreement, where should these funds go? We see two likely options.
>
> First is a direct compensation model, under which FACs pay the money directly to the star. This would be additional income for the player, comparable to outside income athletes regularly earn from endorsements and appearances. And it would be taxable as such; it comes attached to a quid pro quo ("We will give you this money if you sign with Team X"), making it compensation to the player as part of a market exchange, not a mere gift from the fans.
>
> Alternatively, under what we call the charitable model, FACs could give the money to a charity associated with the talent. . ..
>
> The charitable model may provide the additional benefit that money donated by fans to a charitable foundation will not (likely) qualify as income to the star, assuming the star is not directly coordinating with the fans or directing their contributions to any particular place. And because the money is going to charitable organizations, there is even some possibility that fan contributions will be tax deductible, as would an ordinary independent contribution to the player's foundation. The IRS might be suspicious of this arrangement, of course.[8] An alternative tax treatment would treat FAC donations as includable income to the talent and then tax-deductible (up to a point) by the talent as a charitable donation to his own foundation.
>
> . . .Seeing plausible arguments on both sides, we leave further exploration of the tax issues for another forum.[9]

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[8] The authors elaborated on this point in a footnote: "The tax law issues raised here are somewhat tricky. On one hand, one might question whether fan contributions should be deductible. The *sine qua non* of a charitable contribution is that money or property is transferred without adequate consideration, meaning only "unrequited" payments qualify for deduction. This is determined by examining the external features of the transaction, without regard to the taxpayer's subjective motivations. FAC payments, even as charitable contributions, involve a *quid pro quo*—"here is money that we fans will donate to your foundation if you sign with the team."

That said, we can envision two arguments in favor of deductibility. First, any benefit to the donors is "intangible," merely the psychic benefit of having a great player on their team and giving their team a chance to win. Second, any such benefit is "incidental or tenuous," lacking any value so as to make the contributions a non-deductible purchase." Markel et al., *supra* note 5, at 11, n.26 (citations omitted).

[9] *Id.* at 11-12 (footnotes omitted).

I am honored to have the opportunity to take Dan and his co-authors up on the invitation to explore more fully the tax issues raised by this innovative proposal, and perhaps bring it one step closer to reality. In doing so, I hope to honor the memory of Dan and contribute in a small way to his legacy as a legal scholar.

II. The Tax Consequences of a Fan Action Committee. . .

A. When a FAC Transfers Funds Directly to a Player

Under the direct pay model, the FAC would agree to pay the athlete for signing with a team, raising a host of tax issues, including whether: (1) the player has income, (2) the owner has income, (3) the FAC has income on receiving the contributions or could deduct the payment to the player, and (4) the donors could deduct their contributions to the FAC. I address each in turn.

1. Player Income

Whether the player has income is the easiest of the questions to answer. Code Section 61[10] defines income broadly, and the Supreme Court has made clear that it includes any clearly realized accession to wealth.[11] Player receipt of a payment from a FAC is clearly an accession to wealth.

However, we need not rely on the broad, general definition of income. Although the player does not have a traditional employment relationship with the FAC, the transfer falls into the compensation category, explicitly included in income.[12] The player receives the payment for agreeing to sign with and play for the team.[13] In this regard, the payment is no different from a signing bonus.

As a matter of contract law, the FAC's offer to pay the player if he signs is a classic unilateral contract,[14] the acceptance of which occurs when the

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[10] Unless otherwise specified, all code sections refer to the Internal Revenue Code of 1986, as amended.

[11] C.I.R. v. Glenshaw Glass, 348 U.S. 426 (1955).

[12] I.R.C. § 61(a)(1).

[13] For ease of reference, I will use the term "sign" to refer to both signing and playing.

[14] The Restatement (Second) of Contracts uses the term "options contract." However, that term seems confusing, given that actual options contracts exist, and I will stick to the old-fashioned term " classic unilateral contract" here.

player performs by signing with the team.[15] But what happens when a player signs with a team without regard for the offer? Could he claim that he hadn't earned the money and that it therefore couldn't be compensation?

For instance, the player might claim that he had no knowledge of the offer. This seems unlikely, given that the whole purpose of a FAC is to induce the player to sign. However, as a legal matter, lack of knowledge of an offer would defeat the formation of a contract.[16] The player could also disavow the offer before signing, thus giving up any contractual right to the payment.[17] Or the player could claim that, although he knew of the offer, it did not affect his decision to sign.[18]

While such claims may raise interesting questions of contract law, for tax purposes, the existence of a contract is not dispositive. Regardless of whether a player acted in expectation of being paid, he has income, with or without a contract, if he accepts the money.[19] Either it is compensation or an accession to wealth, which must be included in income absent an exemption.

The most promising tax-free category for the transfer would be a gift, but it does not fit within that category. As Markel and his co-authors note, whether a transfer qualifies as a gift is governed under the principles set forth in *Duberstein*.[20] Generally speaking, gifts proceed from disinterested generosity and do not involve a quid pro quo.[21] While the player might argue that *he* was not engaged in a quid pro quo, because he would have signed with the team regardless of the transfer, *Duberstein* makes clear that the analysis depends on the *donor's* intent. The very premise of the FAC is

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[15] *See generally* Rene Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L. J. 136 (1916). Much of the scholarly debate about unilateral contracts has focused on whether an offeror can withdraw the offer once someone begins to perform. That is not an issue for FACs.

[16] Glover v. Jewish War Veterans of the United States, Post No. 58, 68 A.2d 233 (D.C. 1949) (holding that a person must know about the offer to accept it through performance, at least in a private contract setting).

[17] *See, e.g.*, C.I.R. v. Giannini, 129 F.2d 638, 641 (9th Cir. 1942), Rev. Rul. 66-167.

[18] *See* Glover v. Jewish War Veterans of the United States, Post No. 58, 68 A.2d 233 (D.C. 1949) (noting that performance must be made with "the intention of accepting" an offer).

[19] A more interesting question arises if the player refuses to accept the money he has earned through performance. Some authorities suggest that he would have income, because disavowals must occur prior to earning the income. *See* Giannini, *supra* note . However, it seems wrong to assert that a player would have income if he refused to accept it.

[20] Markel et al., *supra* note 5, at 10.

[21] C.I.R. v. Duberstein, 363 U.S. 278, 285-86 (1960).

that it will pay the player if he signs, thus taking the transfer out of the gift realm, regardless of the player's intent.

No other exempt category suggests itself, leaving the transfer as income to the player, as Markel and his co-authors suggest.

2. Owners Income

A second question, and one that the authors do not address, is whether the *owners* would have income as a result of this transfer.[22] At first blush, it seems like a silly question. The deal as described in the article is between the player and the fans. The owners are third party beneficiaries at most and receive no money. However, they may have received a benefit. If the player would have signed regardless of the FAC's offer, the owners received no benefit and should not have income. If the player signed as a result of the extra money, the owners will get the player for less money than they would otherwise have had to pay. The question is whether this benefit rises to the level of income.

From a doctrinal perspective, taxpayers need not receive money to be considered to have received income. For instance, if someone satisfies a taxpayer's obligation, the payment is constructively seen as flowing through the taxpayer.[23] However, the owners were not relieved of an obligation under these facts, and therefore should not have income, at least under this theory. The owners may still benefit, but not all benefits create tax liability. I may benefit if my daughter earns money she can use to pay her tuition, but I do not have income. While the owners may be fortunate if a FAC steps in and pays a player, they should not be seen as having income.

The transaction could be reframed (either by changing the offer or recasting it) as a deal between the FAC and the owners, in which the FAC agrees to transfer funds to the player, if the owners will agree to sign the player. Such a framing would make the payment appear to be compensation for the owners' action, and not the player's. It seem likely that the IRS would try to recast the deal in this way. And even if the deal were structured or recast as a deal between the FAC and the owners, any income the

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[22] This issue is somewhat analogous to the question addressed in the article regarding whether ancillary payments to players should count toward the salary cap. If the payments are deemed to flow through the owners to the players, they might count. However, if the owners are not considered to be in the loop, these payments should not be considered for salary cap purposes. Markel et al., *supra* note 5, at 16.

[23] *See, e.g.*, Old Colony Trust Co. v. C.I.R., 279 U.S. 716 (1929) (holding that employee has income when employer pays his tax liability).

owners would have would likely be offset by a deemed transfer of the funds from the owners to the player, which would be deductible as salary.[24]

3. FAC Income and Deductions

The next questions are whether a FAC would have income as a result of the contributions it receives and, if so, whether it could deduct the amounts it transfers to the player. The answer to the former depends in part on how the FAC is organized and how it receives the money. The answer to the latter depends on whether a deduction provision applies to this kind of transfer.

The article notes that a FAC:

> need not assume any particular form. It could be established either as a distinct organization or as an offshoot of an existing larger (unofficial) fan club. The FAC itself could be a formal legal organization or it could be one person or a group of individuals joined by physical or virtual space, reaching out and encouraging fundraising efforts among the fan base.. . .As with other mechanisms that channel money and influence, FACs likely would evolve over time, becoming more responsive, effective, and adaptable to changing free-agent markets and situations.[25]

Given the *ad hoc* nature of FACs, it seems likely that most would be loose collections of people contributing to the same cause, as typically happens on Kickstarter, Indiegogo, and other crowdfunding sites. However, in the interests of being thorough, I will consider the possibility that a FAC would organize as a formal entity.

To the extent that the FAC serves only as a conduit between the donors and the player, whether formally organized or not, it could likely avoid income in the same way that escrow agents do on the sums deposited with them. If they do not take title to the funds but rather hold them and then

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[24] Another possibility is that the transfer could be viewed as a gift to the owners, with a corresponding transfer to the player. Under this approach, it could be tax-free to the owners, *see* I.RC. § 102, but create a deduction because the corresponding transfer would be seen as compensation. However, this result seems unlikely. As noted above, gifts typically involve disinterested generosity. The donors in this case are not disinterested. They are trying to induce the owner to sign the player and the player to stay. Thus, if the benefit were seen as flowing to the owners in a non-gift setting, there would be both income and an offsetting deduction.

[25] Markel et al., *supra* note 5, at 8.

pass them along to their rightful recipients, they shouldn't have income.[26] This seems the most likely outcome.

If the FAC takes title to the money, it clearly has an accession to wealth, and the question will be whether the contributions fall into a category exempt from income or whether the FAC itself is exempt from income tax. First, the contributions might be seen as gifts and therefore not taxable.[27] As discussed above, the outcome depends on whether there is a quid pro quo. The donors expect the FAC to aggregate the contributions and transfer them to the player if he signs. It is not clear whether such expectations are the kind of quid pro quo that defeats gift status. However, focusing on what the FAC will do with the money may not be appropriate. The purpose of the contribution is to induce the player to sign and will be made only if the player signs. This is a clear quid pro quo. Running the contribution through a FAC should not permit donors to avoid the underlying quid pro quo and turn their contributions into gifts.

Second, the FAC could organize as a for-profit business, such that the contributions could be considered tax-free contributions to capital.[28] While this might work, the difficulty is that the contributors would then be considered shareholders, partners, or members of the FAC. This could create significant management issues and seems an unlikely approach.[29]

Finally, the FAC could escape income if it obtains tax-exempt status. Contributions to a tax-exempt organization will not create tax liability for that organization.[30] As noted above, it seems unlikely that FACs will formally organize. Moreover, if they do, it seems highly unlikely that they would seek tax-exempt status, a process that takes significant time. However, they might. Code Section 501(c)(7) affords exemption for "clubs organized for pleasure, recreation, and other non-profitable purposes." However, donations to 501(c)(7) organizations are not tax deductible. Thus,

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[26] In some cases, the FAC may collect only pledges that are fulfilled and immediately transferred when the player signs. Thus, it only has temporary control over the money.

[27] I.R.C. § 102.

[28] *See* I.R.C. § 721 and § 1032.

[29] Even if the FAC does not formally organize, there is some risk that the IRS could deem it to be a partnership for tax purposes, in which case I.R.C. § 721 might apply. Being deemed a partnership would also subject the FAC to all the reporting requirements imposed on partnerships. Given the lack of profits or profit sharing, this seems unlikely.

[30] There is a slim chance that contributions could be considered "unrelated business income," on which charities must pay taxes. I.R.C. § 511 *et seq*. This possibility seems very remote insofar as the whole point of the FAC is to raise funds to transfer to a player or a charity.

a FAC might try to organize under Code Section 501(c)(3). It seems highly unlikely that transferring funds to multi-million dollar athletes could ever qualify under that section.

If a FAC has no income, as seems likely, or if the FAC is tax exempt, deductions are not relevant. However, if the receipts are considered income subject to tax, deductions could prove quite valuable. Deductions are a matter of legislative grace.[31] Thus, the FAC would have to demonstrate that the transfer to the player fit within a statutory provision permitting a deduction. Unfortunately for FACs, the transfer would not likely qualify for a deduction.

The workhorse provision is Code Section 162, which permits a deduction for ordinary and necessary expenditures incurred as part of a trade or business. Even if FACs incorporate or organize as a partnership or LLC, they would likely not be considered to be engaged in a trade or business. Arguably, FACs are paying the owners' expenses, and the owners are clearly engaged in a trade or business.[32] However, it is well established that one cannot deduct the expenses paid on behalf of another.[33]

Code Section 212 permits a deduction for expenditures incurred for the "production or collection of income" or "for the management, conservation, or maintenance of property held for the production of income." However, FACs are not engaged in a for-profit activity. Their purpose is to induce a player to stay.

This leaves Code Section 183, which permits deductions to the extent of income from an activity, even absent a profit motive.[34] Deductions are allowed only if they would have been allowable had the activity been entered into for profit, that is, if it would have qualified for a deduction under Code Section 212 but for the lack of a profit motive.[35] If the transfer were viewed

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[31] White v. U.S., 305 U.S. 281, 292 (1938). In some cases, Congress believes deductions to be constitutionally mandated. Accordingly, it permits a deduction for the cost of goods sold with regard to income from the illegal sale of drugs, while denying all other deductions. *See* I.R.C. § 280E.

[32] *See, e.g.*, Federal Baseball Club v. National League, 259 U.S. 200 (1922) (describing baseball as a business, but declaring it an intra-state business so as to avoid application of the Sherman Antitrust Act).

[33] *See* Welch v. Helvering, 290 U.S. 111 (1933).

[34] The goal is to offset income in situations where taxpayers have expenses so that they pay taxes only on true accessions to wealth. For instance, if Joey raises frogs for fun and pays $400/year for frog food, he can't deduct the cost because it is a personal expense. I.R.C. § 262. However, if he wins $300 in a frog-hopping contest, Code Section 183 permits him to deduct the costs to the extent of his gains, thus zeroing out his income from this activity.

[35] I.R.C. § 183(b)(2).

as an ordinary and necessary expense of the FAC (giving away money to induce a player to stay is the whole purpose for the FAC), the deductions would likely be allowed to the extent of any income.

It is hard to conceive of a FAC as a profit-seeking enterprise, or an organization with ordinary expenses, even if it has income as a result of donations. Simply put, Code Sections 162, 212 and 183 fit poorly, suggesting that there may be some merit to the argument Boris Bittker and George Rahdert raised years ago in defense of tax exemption, namely that the concept of profit makes little sense for organizations that solicit donations and give away the money they receive.[36]

One last point must be made. Assuming payment to a player could be considered a deductible expense, it could nonetheless be subject to capitalization if it created benefits that extended beyond 12 months.[37] For instance, if a FAC paid a player $5 million dollars for signing a 5-year contract, only $1 million might be deductible each year. Plumbing the depths of the capitalization rules is beyond the scope of this article.

4. Donor Deductions

The final question is whether those who donate to a FAC with the idea that the FAC transfer the money to a player if he signs would be entitled to a deduction. Unfortunately for donors, contributions would not likely qualify under any deduction provisions.

Donors, even more so than FACs, would not be considered to be engaged in a trade or business and thus would not qualify for a deduction under Code Section 162.[38] Nor would they qualify under Code Section 212 because they have no profit motive. Code Section 183 permits deductions for non-profit-seeking activities, but only to the extent of that activity's income. Donors have no income from this activity, and therefore Code Section 183 cannot help them.

The final possibility would be a deduction under Code Section 170, which permits deductions for charitable donations. For this to apply, the FAC would need to be recognized as a charity under Code Section 501(c)(3).

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[36] Boris L. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation,* 85 YALE L.J. 299 (1976).

[37] INDOPCO, Inc. v. Comm'r, 503 U.S. 79 (1992); Treas.Reg. § 1.263(a)-4.

[38] If the donor owns a business that benefits from the team's success, such as a parking lot near the stadium or arena, the donation could arguably be seen as a business expense, on the theory that retaining a player will be good for the donor's business. The ordinary and necessary requirement is fairly loose, but this may fall on the wrong side of the line.

As noted above, it seems highly unlikely that a FAC would organize as a corporation or seek tax-exempt status. Even if it did, it would not likely be granted tax-exempt status under Code Section 501(c)(3). Thus, charitable deductions are likely unavailable.

B. When a FAC Transfers Funds to a Charity

For a variety of reasons, the authors express a preference for the charitable model, under which the FAC would donate funds to a charity if the player signs with a team. The tax issues that arise under this model are more complex than under the direct compensation model and provide a wonderful opportunity to explore the assignment of income and constructive receipt doctrines, and the rules governing charitable deductions. More important, exploring these tax issues reveals a number of ways that FACs can minimize the tax risks to players and increase the chances that donors will be able to deduct their contributions. In particular, FACs should operate as conduits for donors and not as stand-alone entities. They should also make pledges to charities, as opposed to offers to players.

1. Player Income

The first question to be answered is whether the player has income if a FAC makes a charitable donation when he signs with a team. While it is true that the player receives no cash, the receipt of cash does not determine whether he has income.[39] The Supreme Court made clear in *Lucas v. Earl* that income is taxed to the person who earns it.[40] Thus, the question is whether a player signing with a team earns income when his signing triggers a donation to charity. As described in the article, the transaction is structured as a deal between the FAC and the player. However it could be structured (or recharacterized by the IRS) as a deal between the FAC and the owners or even between the FAC and the charity. The tax consequences to the player may well depend on how the transaction is structured or characterized.

a. FAC Offer to Player

If the FAC's offer is to the player, the issue will be whether the player has earned income and then assigned it to the charity. For instance, if I

[39] Old Colony Trust Co. v. C.I.R., 279 U.S. 716, 729-731 (1929).

[40] Lucas v. Earl, 281 U.S. 111 (1930) (holding that income earned by husband is taxed to husband despite contract between husband and wife to share it).

direct my employer to pay my salary to charity, whether before I earn it or after, I still have income. The transaction is simply recast as if the salary had been paid to me and I then donated it to the charity. In many cases, a charitable contribution deduction would offset the income, but not always.[41]

This outcome is made clear in Treasury Regulation 1.61-2, which addresses services contributed directly to a charity and situations where services are provided to a third party in return for a charitable donation. The former is tax free:

> Where, however, pursuant to an agreement or understanding, services are rendered to a person for the benefit of an organization described in section 170(c) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services.[42]

Revenue Ruling 71, which considered an earlier version of this regulation, described a typical case in which the quoted language applied as one where a movie producer hires an artist and, by agreement with the artist, transmits the artist's payment to a charity picked by the artist.[43] In such cases, the artist has income and a corresponding charitable deduction.[44]

This regulation and ruling would appear to cover a player agreeing to sign with a team if a FAC donates to charity, even if it is the FAC that offers to donate, as opposed to the player insisting that the money go to charity. Nonetheless, the player might escape having income in two ways. First, the tax laws are often lenient regarding assignment when amounts are given to charity. While there is no statutory authority here, one can readily imagine the IRS using its administrative discretion to hold that the player has no income in such a situation. Second, one can always work for free, and play-

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[41] The charitable deduction is only available to those who itemize. *See* I.R.C. §§ 62 and 67(b). Even for those who itemize, charitable deductions are capped at a percentage of a taxpayer's "contribution base." Thus, if the donation is too large relative to the taxpayer's income, the deduction would be limited, and any unused amounts would be carried forward. I.R.C. § 170(b). Finally, most itemized deductions, including charitable deductions, are reduced if a taxpayer's AGI exceeds $300,000, as adjusted for inflation. I.R.C. § 68.

[42] T.R. Sec. 1.61-2(c).

[43] C.B. 1953-1, 18. *See also* Rev. Rul. 77-290, 1977-2 C.B. 26. *But see* Rev. Rul. 57-135, 1957-1 C.B. 307, in which the IRS held that those who donated services to a charitable organization, which lent them out to other organizations and received donations in return, did not have wages for purposes of FICA.

[44] The ruling further states that an attempt to avoid this result by having the artist donate his services to the charity, which then lends the artist out to a movie producer in return for a donation, will yield the same result.

ers may be able to argue that they did not intend to accept the offer by signing and therefore didn't earn the income at issue.

i. Administrative Leniency

The assignment of income and constructive receipt doctrines are designed to prevent taxpayers from avoiding tax when they earn income and yet receive no cash. Typically, this occurs when employers agree to satisfy a taxpayer's obligations,[45] the taxpayer directs the employer to transfer amounts earned to someone else,[46] or where the taxpayer had the right to be paid but opted not to collect. When taxpayers instruct their employers or others to transfer amounts they earn to charities, many of the concerns that motivate the doctrines are reduced. While not a perfect offset,[47] the charitable deduction often leads to the taxpayer having no income.[48] Perhaps in light of this, Congress has created a number of exceptions to the rules. For instance, certain direct distributions from IRAs to charities are excluded from income entirely, rather than included and then deducted.[49] The same treatment applies to certain prizes donated to charity.[50]

No statutory provision applies to FACs. However, the IRS has significant leeway when it comes to applying the doctrines. Sometimes the leniency is formal.[51] For instance, after Hurricanes Katrina and Sandy and after 9/11, the IRS issued notices permitting direct donations of employee salaries to be excluded from the employee's income and precluding a charitable deduction.[52] It has done the same where professors and doctors assign certain outside income they earn to their employers.[53]

At others, it is more informal. For instance, the IRS is unlikely to rule that you have income when I promise to donate to charity if you complete a walk-a-thon, shave your head, or pour ice water over your head. Many em-

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[45] Old Colony Trust Co. v. C.I.R., 279 U.S. 716 (1929).

[46] C.I.R. v. Giannini, 129 F.2d 638, 641 (9th Cir. 1942).

[47] *See* Lucas v. Earl, 281 U.S. 111 (1930).

[48] Charitable deductions do not offset payroll obligations. Thus, an amount included in income and then deducted in full will still lead to payroll tax liability.

[49] I.R.C. § 408(d)(8). This provision expired on December 31, 2013, but it may be resurrected and possibly made permanent.

[50] I.R.C. § 74(b).

[51] Bloomberg BNA Portfolio TM 502.

[52] Notice 2012-69, 2012-51 I.R.B. 712 (Hurricane Sandy); Notice 2005-68, 2005-40 I.R.B. 622 (Hurricane Katrina); Notice 2003-1, 2003-2 I.R.B. 257, modifying and superseding Notice 2001-69, 2001-46 I.R.B. 491 (Sept. 11, 2001, terrorist attacks); Notice 2001-69, 2001-46 I.R.B. 491 (Sept. 11, 2001, terrorist attacks).

[53] Rev. Rul. 74-581; GCM 39028 (IRS GCM), 1983 WL 197934.

ployers will match employee donations to charities. This is clearly a fringe benefit provided to employees. However, rather than include the match in the employee's income and then allow a deduction, if appropriate, the IRS simply excludes the match from income.

Ideally, if fans begin to form FACs, the IRS will issue formal guidance as to whether players have income under these circumstances.[54] If not, the question will come down to whether a player signing is more like traditional income earned and then donated to charity, or an act, such as shaving one's head, that leads to a charitable donation. Unlike most of the assignment cases, the player is not an employee of, or performing services for, the FAC or ultimate donors. . However, the player's signing is more than a dare or challenge that is typical of the informal rule that preserves the charitable donation for walk-a-thons and the like. The player is engaged in a recognized commercial activity for which he typically gets paid . . . a lot. If nothing else, this would make a great exam question.

ii. Disavowal

A second way in which a player might avoid income is to argue that he has not actually earned the income in question and therefore cannot have assigned it. One can always work for free, and the case law permits an employee to avoid income if he disavows his salary *before* earning it and exercises no control over where it goes.[55] Indeed, the seminal case in the area involved a bank executive who, half-way through the year told his employer that he would work for free for the rest of the year and that his employer should do something useful with the salary he would have earned. The employer donated the foregone salary to the University of California at Berkeley to establish a Foundation of Agricultural Economics in the employee's name. The IRS argued that the employee should include the donation in income and take a corresponding deduction. However, the court sided with the taxpayer and held that the disavowal before the income was earned, coupled with the purported lack of control, defeated the claim that the salary should be included in the employee's income.[56]

Just what constitutes control has not been developed in the case law. The IRS has held that knowledge of what will happen to the money if it is

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[54] FACs could always seek Private Letter Rulings, but they are expensive and take time. Given the likely ad hoc nature of FACs, this path may not work.

[55] C.I.R. v. Giannini, 129 F.2d 638, 641 (9th Cir. 1942).

[56] *Id.*

disavowed does *not* rise to the level of control.[57] However, it is uncertain whether disavowal and a suggestion, strong or otherwise, of where the funds should go would permit a taxpayer to escape income under *Giannini*. Norms can be as strong as legal obligation, and a rule based solely on legal control permits significant game playing by those seeking to avoid income.

The acceptance mechanism involved with unilateral contracts and the fact that the benefit was never supposed to be paid to the player make it unclear how these principles will play out in the FAC context. If the player signs with the team in response to the FAC's offer, it seems clear that the player has income. Signing constitutes acceptance, and a binding contract is formed. The benefit that flows directly to the charity would be seen as a quid pro quo for signing and would be re-characterized as flowing first to the player and then to the charity. The only out would be IRS leniency of the type described above.

It gets far more complicated when a player signs with a team purportedly without regard for the offer. If the player could demonstrate that he had no knowledge of the offer, he cannot be said to have exchanged his performance for the offer. No contract was formed, and the player has no legal right to force the FAC to donate.[58] Thus, he has not earned any benefit. It seems wrong to claim that player has income as a result of a transfer of which the player had no knowledge.

A harder case is where the player knew of the offer at the time he signed but claims that it did not affect his decision. Typically, assignment of income depends on the existence of a contractual right to be paid or the control over where the money goes. Indeed, this is what distinguishes *Lucas v. Earl* from *Giannini*. In the former case, Mr. Earl performed the work and had a contract right to the income against his employer, even though he had assigned his right to half the income to his wife in a side deal. In the latter case, Mr. Giannini disavowed any right to the income before performing the work. Thus, although the donation is connected to the work he did, he does not have income.

As a matter of contract law, if a player signs without an intent to accept the FAC's offer, no contract is formed, and the income cannot be said

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[57] Rev. Rul. 66-167 (executor who states up front that he will not accept payment does not have income even though he knows that the foregone income will be split between himself and his son as a tax-free inheritance).

[58] Glover v. Jewish War Veterans of the United States, Post No. 58, 68 A.2d 233 (D.C. 1949) (holding that a person has to know about the offer to accept it through performance, at least in a private contract setting).

to have been earned.[59] However, unlike the direct pay model, where the player could simply refuse to accept money he has disavowed, in the charity model, here the player gets precisely what he would have received had he signed with the intent to create a contract, that is, a donation to charity. Arguably, this is equivalent to rejecting the offer in the direct pay model and yet still receiving the FAC's payment, which in that context leads to income.[60]

It may well be that the bright-line test focused on the existence of a contract right to enforce the payment is the best rule. In such case, one might require an express disavowal before signing to avoid the evidentiary problems associated with the ex post claim that the offer did not motivate the signing.[61] However, this could create a trap for the unwary. Alternately, one could create a special rule for FACs, such that the donations will not be deemed to flow through the player, regardless of any contract rights. If we assume that the income will largely be offset by a corresponding charitable donation deduction, little harm will be done to the public fisc. Either way, clear guidance from the IRS would be helpful.

b. FAC Offer to Owners

The FAC could make its offer to the owners instead of the player. If the owners sign the player, the FAC will donate to charity. Thus, the owners could "earn" the donation by performing. The analysis under this scenario is the same as for offers made to the player.

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[59] *See* Glover v. Jewish War Veterans of the United States, Post No. 58, 68 A.2d 233 (D.C. 1949).

[60] Rev. Rul. 66-167 might permit the player to avoid tax on the theory that knowing where the money will go is not the same as earning it and directing its disposition. A player who disavows a FAC's offer knows that the FAC will donate regardless of his disavowal. Under the ruling, this knowledge should not amount to control or otherwise create income for him absent a contract right to the income. The key difference between Rev. Rul. 66-167 and the charity model is that, in the charity model, the player receives the exact same thing – a donation to charity – whether he accepts the offer or not. Thus, it is not simply a case of knowing where the money will go, but rather a question of whether the disavowal actually alters the benefit received.

[61] Even if the player disavows the obligation and cannot be said to receive the payment, he receives some benefit. As the authors note, "[a]lthough stars do not receive anything from fan donations, FACs still are offering something of value to the player (even if the value is purely psychological or moral) to persuade him to play for one team over another." Markel et al., *supra* note 5, at 37. If the player has no direct income because of the disavowal, it seems unlikely that these more amorphous benefits would be considered income.

c. FAC Pledge to Charity

Finally, the deal could be structured or recast as between the FAC and the charity to which the money will be donated. In essence, the FAC would pledge to the charity that it will make a donation if the player signs. While such a pledge would lack consideration, such pledges are often enforceable, either because of some actual or presumed reliance.[62] While the player has to perform to trigger the obligation to donate, he is not performing services in return for the donation and therefore likely need not include it in income. For instance if I pledge to donate $100 to the American Red Cross if the Padres win the World Series and they actually win (an admittedly wishful hypothetical), the Padres should not have income when I make good on that pledge. This should be true even if they learned of my pledge and it motivated them to win. Structuring the deal this way makes it look more like a walk-a-thon pledge, for which no income is typically recorded.[63]

The outcome here may inform one's thinking about the other structures discussed above. That this form would likely avoid tax to the player strongly supports the notion that the IRS look leniently on the deal if it is structured as an offer directly to the player.

2. Owners' Income

The analysis of whether owners have income as a result of a FAC's donation to a charity is the same as that above. If the deal is with the player, the owners are not being relieved of any obligations under the deal described in the article. Any benefit they receive is tangential. However, were the deal structured as a promise from the FAC to the owners, then the owners might earn the donation by signing the player. Even if the owners were seen to earn income, they would likely have an offsetting deduction,

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[62] Allegheny College v. National Chautauqua County Bank of Jamestown, 159 N.E. 173 (N.Y. 1927) (actual reliance substitutes for consideration); Rest. 2d Contracts § 90, Pt. 2 (reliance presumed for charitable pledges); Salsbury v. Northwestern Bell Telephone Co., 221 N.W.2d 609 (Iowa 1974) (finding reliance to be presumed in charitable subscription cases, where the pledge is evidenced in writing). *But see* Congregation Kadimah Toras-Moshe vs. DeLeo, 405 Mass. 365 (1989) (involving an oral pledge, but also upholding a requirement of detrimental reliance).

[63] In this example, the Padres are not performing services for me. Nor are they completely in control of whether they perform. As described above in Part II.B.1.a., if services are provided to me in return for a donation, I will be seen as paying for the services and therefore not entitled to a deduction.

either as compensation to the players who would get an offsetting charitable deduction, or as a direct charitable donation.

3. FAC Income and Deductions

The issue of whether the FAC has income is the same as in the direct pay model, discussed above in Part II.A.3. However, the argument that the FAC could qualify as a 501(c)(3) organization might be stronger. Instead of collecting funds to be transferred to a player, FACs would be aggregating donations to be given to a charitable organization. Thus, they might have a stronger claim that they have a charitable purpose and that there is no private inurement or benefit.[64] They might also have a stronger claim to conduit status.[65]

If the FAC is somehow deemed to have income, it would need to find a deduction provision that covers the payment to the charity. Unlike the analysis above in Part II.A.3, which focused on business and related deduction provisions, here Code Section 170 might permit a deduction. However, if the transfer is deemed a payment to the athlete, with a corresponding transfer to the charity, as discussed above in Part II.B.1, the athlete, not the FAC, would be entitled to the charitable deduction. If the donation is viewed as a donation to charity, but one involving an impermissible quid pro quo, as discussed below in Part II.B.4, no charitable deduction would be allowed. However, the FAC might be allowed a deduction under Code Section 183, to the extent of any income.

4. Donor Deductions

The case for a deduction for contributors to a FAC is more complicated when the money goes to a charity. While no business-like deduction would be available, donors might be able to claim a deduction under Code Section 170. As before, the answer depends on a variety of factors, including how the FAC is organized, whether the player is deemed to have income, and whether the donation is made with an impermissible quid pro quo in mind.

If the FAC is organized as a 501(c)(3) organization, then donations would likely be deductible under Code Section 170. If the FAC is not a

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[64] The key issue would be whether the desire to induce the player to sign with the team is a substantial non-exempt purpose, which would defeat tax exemption. *See* Better Business Bureau of Washington D.C. v. United States, 326 U.S. 279 (1945).

[65] *See, e.g.*, Rev. Rul. 77-121, 1977-1 C.B. 17, in which the IRS held that a racetrack that acted as an agent for a charity in hosting a charity day at the track did not need to include the amounts donated to charity in income.

501(c)(3) organization, as will almost certainly be the case, it gets more difficult. A charitable deduction might be appropriate if the FAC were seen as a mere conduit, such that the donation to the FAC were understood to be a direct donation to the charity.[66] However, this option would be possible only if the player were deemed not to have income. If the player is deemed to have income, the player would be deemed to be making the donation, precluding a deduction by any FAC contributors.

At the heart of the deduction for charitable donations is the notion of donative intent, coupled with the related idea that deductions are appropriate when donors do not receive anything back, i.e., when there is no quid pro quo.[67] The easy case is where I purchase a $50 jacket from the American Red Cross, paying $50. Clearly, I have not made a deductible contribution. I received equal value back and cannot deduct the payment. At the other end of the spectrum, and equally easy, is where I simply give the American Red Cross $50 and receive nothing in return. While I may get a warm glow from giving, that glow does not rise to the level of a quid pro quo that defeats a charitable deduction.[68]

The more difficult case is where the donor receives something more substantial back. Where the donor receives goods and services, the contribution is deductible to the extent that it exceeds the market value of what is received in return. However, the donor must intend that the amounts paid in excess of the goods and services received be a donation.[69]

The receipt of intangible items poses more difficulties, both because they are hard to value and, as Markel and his co-authors note, not all intangibles received are considered to constitute a quid pro quo.[70] The most notorious example is naming rights. For instance, in return for a donation of $50 million, Drexel University recently agreed to name its law school after Thomas R. Kline.[71] By all rational accounts, this is a quid pro quo,[72] but it is not treated as such for tax purposes, though many think it should

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[66] Plumbing the depths of the conduit theory is beyond the scope of this article.

[67] United States v. American Bar Endowment, 477 US 105 (1986).

[68] For a discussion of warm glow, *see* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009).

[69] *Id*.

[70] Markel et al., *supra* note 5, at 11, n.26.

[71] Jeff Blumenthal, *Drexel Law gets $50M gift, the largest ever for the university*, PHILA. BUS. J. (Sep. 18, 2014, 6:00 PM), http://www.bizjournals.com/philadelphia/news/2014/09/17/drexel-law-gets-50m-gift-the-largest-ever-for-the.html?page=all, *archived at* http://perma.cc/FZ89-QQDT.

[72] In commercial settings, businesses pay significant sums for signage and naming rights for buildings. *See, e.g.* Ryan Sharrow, *Ripken Stadium naming rights up for sale in Aberdeen*, BALT. BUS. J. (Aug 4, 2014, 7:40 AM), http://www.bizjournals.

be.[73] However, other examples exist, including acknowledgement of sponsors on public TV and radio and access to facilities or events unavailable to non-donors.

In the case of donations to FACs that are subsequently transferred to a charity, the issue is whether an agreement to give conditioned on a player's signing rises to the level of a quid pro quo that would defeat a deduction, either to a tax-exempt FAC or the ultimate charitable recipient. The quid pro quo need not come from the charity directly. Under *Singer v. U.S*, the question is whether the purported donor received something of value for his donation, above and beyond the benefits that inure to the public generally.[74]

As a practical matter, it is seldom the case that promises to donate if someone else performs some act defeat a charitable deduction. For instance, if I promise to donate $100 to KJZZ, my local public radio station, if you shave your head, I am really paying you to shave your head. Theoretically, you should have income of $100, along with a $100 deduction. However, it seems highly unlikely that the IRS would attempt to re-characterize the transaction in this manner. Instead, I would be seen as making the donation and allowed to deduct it.

A player signing with a team in return for a donation is arguably a difference in degree as opposed to kind, but, as Stalin is rumored to have said in response to criticism of Russia's plentiful but low-quality airplanes, quantity has a certain quality of its own. When the amount at issue is counted in the millions, the IRS may not be willing to overlook the exchange. However, it might be a difference in kind, regardless of the size. Shaving your head is not a commercial activity. In contrast, a player signing with my team is engaged in a regular commercial transaction and arguably

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com/baltimore/news/2014/08/04/ripken-stadium-naming-rights-for-sale-aberdeen.html?page=all, *archived at* http://perma.cc/7DYK-XH8W.

[73] *See, e.g.*, John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction*, 36 WAKE FOREST L. REV. 657 (2001) (arguing that donations in return for naming rights should not lead to charitable deductions). Interestingly, the special status for naming rights tracks that found in Jewish law, which sets forth a hierarchy of charitable giving. *See* Adam Chodorow, *Maaser Kesafim and the Development of Tax Law*, 8 FL. TAX REV. 153, n.25 (2007); SHIMON TAUB, THE LAWS OF TZEDAKAH AND MAASER: A COMPREHENSIVE GUIDE 39-43 (Mesorah Publications, Ltd. 2001). Ideally, one is supposed to do charity anonymously. The one major exception is for donating money to a yeshiva or schul. In such cases, one is permitted to attach one's name to the gift in the hopes that others will be inspired to do the same. *Id*. at 47-48. While this information may seem somewhat off the point, Dan was religiously committed and deeply interested in Jewish law. I'm sure he would have appreciated it.

[74] Singer Co. v. United States, 449 F.2d 413, 423 (1971).

provides a more concrete benefit to me. Nonetheless, these benefits accrue to all and likely do not qualify as a quid pro quo under the rule in *Singer*.

The intersection of the income and charitable deduction analyses provides one final quid pro quo consideration. To claim a deduction, donors would have to clear two hurdles, both of which seem to use a quid pro quo standard. First, the donation must not be deemed a payment to the player for signing. Second, the contributors would have to establish that they gave without an expectation of a quid pro quo and did not, in fact, receive one. This suggests that a failure to find player income guarantees a finding that the donation is deductible. After all, if there is no quid pro quo between the player and the donor for determining income, it seems there should be no quid pro quo between the player and the donor for determining whether a charitable deduction is appropriate. However, these two standards may not be the same. The former arises from the assignment of income jurisprudence and focuses on the reputed earner's contractual rights to income and control over its disposition. The latter arises from the law of gifts, charitable and otherwise, and looks to the donor's intent and whether he expected and received something in return for the donation.

Insofar as the critical fact under each standard is the athlete's signing, a rule that required consistent results would seem appropriate. However, one can easily imagine a scenario where the signing does not create contractual rights (whether because the athlete was unware of or disavowed the offer), thus defeating income for the athlete, but where that same signing, and the donor's conditioning the donation on it, is an impermissible quid pro quo, thus defeating a charitable deduction. However, the lack of a specific benefit that accrues primarily to the donor likely precludes this result in this case.

Should FACs become a reality, IRS guidance on these issues would be quite helpful.

III. Conclusion

Dan Markel will be remembered in the legal academy for a variety of contributions. While his primary focus was criminal law, his interests were far broader, as is clear from this article on FACs. Catalyzing fans to get involved in decisions about which talent to go after or retain is a fascinating idea that raises a host of interesting tax questions. Dan and his co-authors (probably wisely) decided to identify a couple of those issues and then set them aside for further thought and analysis. I am honored and grateful to have had the opportunity here to expand on these issues and perhaps bring Fan Action Committees one step closer to reality.

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The Law and Economics of Catalyzing Fans

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In the past decade new technologies have enabled large groups of people, separated by geographical distance and sometimes even national boundaries, to join together for pursuit of social good or economic gains. For example, we have seen thousands of participants engage in the editing of Wikipedia, contributing their expertise to build a base of knowledge on the web.[1] Charities, artists, and now even for-profit businesses are able to use crowdfunding to raise financial support for their endeavors.[2] Prediction markets allow participants to forecast outcomes of future events, creating incentives for accuracy either through monetary rewards or reputational advantage.[3] Crowdsourcing websites have allowed thousands of workers to complete small tasks which in the aggregate tackle large-scale problems,

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[1] WIKIPEDIA, www.wikipedia.org (last visited Mar. 15, 2015). The development of Wikipedia as a type of collective knowledge base is detailed in YOCHAI BENKLER, THE WEALTH OF NETWORKS 9 (2006).

[2] Many artists, musicians, and filmmakers will put their projects up for funding on Kickstarter. Those who donate enough money will not receive any sort of return, but they may receive a print of artwork, a CD, a DVD copy of the film or perhaps other perks, such as a personalized gift from the artist or filmmaker. Note that some websites like "Go Fund Me" are non-profit only in the sense that users band together to help other participants, but the individuals who solicit donations through posting on the website are not representatives of 501(c)(3) non-profits and those who make donations through the website do not receive a tax deduction.

[3] *See generally* MICHAEL ABRAMOWICZ, PREDICTOCRACY (2008) (describing the benefits of prediction markets). For the author's discussion of the legal issues surrounding prediction markets, *see* Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008); Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions,* 100 NW. U. L. REV. 1141 (2006); Miriam A. Cherry & Robert L. Rogers, *Markets for Markets: Origins and Subjects of Information Markets*, 58 RUTGERS L. REV. 339 (2006).

whether those are for altruistic purposes (e.g., performing search and rescue for the downed Malaysian jetliner in 2014 by having many volunteers scan satellite footage of large areas of water)[4] or for-profit businesses on Amazon Mechanical Turk.[5] Through gamification certain types of mundane computer work can be made fun, rendering it far more enjoyable.[6]

The common link between these diverse ideas and models is that they use technology to facilitate what author James Surowiecki has termed "the wisdom of crowds."[7] I have long been fascinated with collaborative technologies on the Internet and indeed, have written on many of these issues over the years. In previous writing I have examined why some of these collaborative technologies have become commodified while others remain non-profit and largely appeal to the altruism of participants.[8] I am also intrigued with how new collaborative technologies and endeavors interact – or fail to interact - with existing laws and regulatory regimes.

Coming from this perspective, when I first read "*Catalyzing Fans*"[9] in draft last year, I responded by emailing my friend Dan Markel comments. As I let the authors know, I found their proposal for Fan Action Committees (FACs) to be intriguing, and fitting within the developing area of online collaborative tools that I have been studying and thinking about. As the authors explain in extensive detail in their article, FACs allow fans to join together to express their appreciation. That appreciation could be for a favorite television show or movie, a beloved actor or actress, support for a talented sports figure or a home team more generally, or perhaps even a favorite professor. FACs could step in to provide the proper incentives to influence producer, talent, or corporate behavior in a way that is consistent with the collective wishes of the fan base.[10] As the authors note, FACs could

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[4] Charlie Campbell, *Missing Jet Sparks "World's Largest Crowd-Sourcing Project,"* TIME, March 18, 2014, *available at* http://time.com/28332/missing-jet-crowd-sourcing-project/.

[5] Crowdfunding, 78 Fed. Reg. 66 (proposed Oct. 23, 2013) (to be codified at 17 C.F.R. pts 200, 227, 232, 239, 240, and 249) *available at* http://www.sec.gov/rules/proposed/2013/33-9470.pdf (proposed SEC rules creating limited crowdfunding exemption to registration under the JOBS Act); On the development of crowdfunding, *see* KEVIN LAWTON & DAN MAROM, THE CROWDFUNDING REVOLUTION 1-2 (2010); Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 961 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875584.

[6] Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2012).

[7] JAMES SUROWIECKI, THE WISDOM OF CROWDS xiv, 3-4 (2004).

[8] *See, e.g.* Miriam A. Cherry, *Cyber Commodification,* 72 MD. L. REV. 381 (2013).

[9] Dan Markel, et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

[10] *Id*.

manifest their wishes in many ways, e.g., retaining a popular athlete on a home team (either through direct transfer payments or to a charity foundation), backing the creation of more episodes of a favorite television show, or creating a sequel for a favorite movie.[11] To summarize by restating it in law and economic terms, FACs would allow fans to fill in the gaps when markets typically fail and fan preferences are not reflected.

This response to *Catalyzing Fans* examines two topics. First, I note that the paper is overly humble, thus understating its contributions. While humility is generally a virtue, the paper seems to understate its own implications and the potential impact of the proposal. The proposed FACs could eliminate massive transaction and agency costs in any number of sports and entertainment contexts, and thus it deserves serious consideration and analysis. To this end I provide a justification of FACs from a law and economics perspective. Law and economics has long recognized the importance of transaction and agency costs in analysis of legal and regulatory proposals. Second, I believe that the "rich get richer" objection to FACs raised and rebutted by the authors is a genuine concern. This potential objection, however, could be addressed through a thoughtful design process that could improve the structure of FACs. The "rich get richer" objection is an important enough concern that it might be best – at least to begin - by implementing a charity-based FAC. With these two goals in mind, I will start by advocating for the importance of the authors' contribution.

FACs Solve Agency Problems and Reduce Transaction Costs

At various points in their paper, the authors downplay the importance of their contribution. For example, at the start of their paper, the authors characterize the FAC proposal as a solution in search of a problem.[12] At another point in the article they provide this summary of FACs: "Given the various ways people spend their money foolishly, crowdfunding mechanisms to benefit talent or their charities) constitute a relatively *harmless perversion*." (emphasis added).[13] Casting the FAC proposal this way unfortunately does the authors' ideas a disservice.

As I noted in the introduction, FACs are yet another way for people with a common interest to band together on the Internet to express themselves in a collective fashion. As such, FACs are part and parcel of the use of

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[11] *Id.*
[12] *Id.* at 24.
[13] *Id.*

collaborative tools and technologies, like crowdsourcing, Wikipedia, and prediction markets. As Professor Yochai Benkler has put it:

> As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them."[14]

Applying Professor Benkler's words to this context, enhanced communications technologies are helping us to connect with each other, and we have just begun to explore these technologies. Interest-based FACs would further both individual and group expression.

Further, fans themselves are important. It is almost axiomatic that without an audience, even the best performance is irrelevant. In writing, the creative endeavor I am most familiar with, addressing and engaging one's audience is critical. The same could be said of many other creative fields. Whether in an argument before a judge or an interview on television, the speaker's success depends on the ability to connect with an audience. Of course this is well-trodden territory. While a rather extreme example, in ancient Rome, gladiators would live or die based on the reactions of the crowd. Of course the crowd might have been too powerful, but the overall point here is that the question of audience is an important one.

In modern times, fans do have some limited power in what happens in sports and entertainment, but it is diluted and diffuse. In the sports context, fans have a limited say in a team's success by supporting the team financially through the purchase of tickets and merchandise. But aside from being asked for attendance and financial support, fans are generally not consulted about strategic decisions. Television shows can be cancelled despite a robust audience and even vigorous fan-led campaigns to save them. Sometimes this is because of a disconnect with advertisers, other times because of conflict with talent, and sometimes because network executives are not listening to their audiences.

FACs provide a way for fans to be heard collectively, just as prediction markets allow large numbers of people to express their predictions online. Further, FACs could be a resource that producers or talent could draw on in negotiations with networks or advertisers. And sometimes, just like in a

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[14] *See, e.g.* YOCHAI BENKLER, THE WEALTH OF NETWORKS 9 (2006). *See also* Steven A. Hetcher, *Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963 (2009).

Kickstarter or Indiegogo campaign, fans could either guarantee an audience or provide the financing for continuing on with their favorite show or movies. Most recently Amazon sent out a call on email to its "Prime" subscription members asking for votes on pilot shows. Prime members got to vote on which pilots they wanted to see developed into full series. By all account this increased audience engagement and also pulled in new viewers for these shows.

In the terminology of law and economics, the proposed FACs would similarly lower the transaction costs associated with audience involvement. Reducing transaction costs in this context would be utility maximizing. While network executives and team managers would still obviously have a say in filtering and interpreting information, FACs would provide a wealth of information about fan preferences. Reducing agency costs and improving utility is a worthy goal, and thus the authors deserve credit for a worthy idea.

IMPROVING THE DESIGN OF FACS: CHARITABLE PURPOSES

The authors flag several counter-arguments against FACs within their article, rebutting them in turn. In general, the authors do excellent work explaining their idea and then defending it from potential objections. One of the most important objections (the "inequality" or "rich get richer" objection) is, however, a legitimate concern. The "rich get richer" objection is that the fans – many of whom are not wealthy, some of whom are children – will be making payments that they can ill-afford to sports superstars or celebrity actors who make a great deal of money already. As the authors vividly describe, "there is something facially unseemly about little Timmy breaking open his piggybank to enrich already-wealthy stars."[15] When coupled with rising social inequality, the authors are rightly troubled with the idea of providing more compensation to talent that is already well-compensated.

While "the rich get richer" is a legitimate concern, with proper design and planning, FACs can address and prevent it. The authors themselves advocate that when it comes to the idea of compensation for already well-paid talent, a charitable or non-profit model would be the best choice for the FAC. *Design* is a crucial topic in thinking about human-computer interaction, because the way that the *"rules"* or the structure of a technology are set up may in fact nudge or even dictate particular results or outcomes. Not all collaborative design is equal.

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[15] Markel, et al. *supra* note 9 at 20.

For example, crowdsourcing websites like Amazon's Mechanical Turk match workers with those who need services.[16] At present, few of these crowdsourcing labor markets contain safeguards to establish that workers receive minimum wage, and at least one start-up company has been sued as a result.[17] Many crowdworkers have become frustrated because pay is low and the tasks are not transparent – it is difficult to estimate how long a job might take from the descriptions. Because crowdsourcing websites make money from the listings, but do not pay workers themselves, they argue that the posters, and not the website, should be responsible for any minimum wage violations. In essence, the *design* of current crowdsourcing websites contributes to lack of transparency and shifting of legal responsibility. Imagine, however, what a worker-friendly or even a worker-run crowdsourcing website would look like.

Design can therefore have a dramatic effect on user experience – in both subtle and obvious ways. If a straight money-transfer scheme to well-compensated talent, then FACs indeed might help the rich get richer. The authors defend monetary compensation in FACs by stating that, after all, people are free to spend their money in any way they deem fit.[18] In addition, the authors note, giving money to an individual entertainer or athlete is no different (really) than giving money to a sports team.[19] The transfer payment just happens to be more direct. Despite these arguments in defense of the purely monetary payment from fans to talent directly, the authors ultimately seem to prefer and favor the version of FACs that provide money to charity.

This preference is also utility and social welfare maximizing. Rather than creating a climate of "boosters," a charitable goal would not only help retain talent, it would also increase donation to worthy causes. Since the authors seem to be hinting that this is the best option anyway, why not use a default rule? The default rule would be that, above a certain level of pre-existing income, FAC payments would be converted to donations. Would donations still influence behavior in the same way as transfer payments? We have no answers now, but behavior economics would lead to the idea that altruistic goals may also motivate players or performers. The charitable donations that would be generated would let talent know that they are appreciated and valued. In other words, we may abandon the "rich getting

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[16] *See* Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1087-89 (2009).

[17] *See* Otey v. Crowdflower, Inc., No. 3:12-cv-05524-JST, 2013 WL 1915680 (N.D. Cal. May 8, 2013).

[18] Markel, et al. *supra* note 9 at 21.

[19] *Id.*

richer" concern if the design of the website incorporates charitable contributions as its default.

Conclusion

This response stresses the importance of the authors' proposal and situates it within the larger context of collaborative technology. The proposed FACs would reduce agency and transaction costs, and fans would no longer find themselves getting the short end of the stick. Treating certain FAC contributions and charitable giving would allow fans to express themselves while simultaneously creating positive action in the world. FACs have found a fan.

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Money in Sports: A Critique of Fan Appreciation Contributions

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In "Catalyzing Fans," Dan Markel, Michael McCann, and Howard M. Wasserman ("the authors") propose a solution to make the market for talent in sports more efficient through Fan Action Committees ("FACs"). FACs are analogous to Political Action Committees ("PACs"). PACs allow constituents to pool resources in support of or against political candidates, parties, positions, or causes.[1] The authors, of course, note that PACs are regulated to various degrees because of the several ways in which money corrupts the integrity of the political process.[2] FACs are crowdfunding mechanisms by which fans can express their preferences through coordinated fundraising to achieve specific goals.

The authors point to the following predicament: "On the one hand, "teams" or, the organizations that employ talent, try to anticipate the preferences of fans in order to capture their dollars. On the other hand, fans are largely shut out of the conversations between talent and team."[3] Fans are powerless because they are unable to tangibly influence the direction of funds in the market for talent. The authors propose that fans should overcome powerlessness through FACs, whereby fans, as a third party, can influence bilateral contracts between athletes and organizations.[4] Indeed, this trilateral relationship is one of the key distinctions between FACs and other

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[1] Dan Markel, Michael McCann & Howard M. Wasserman, Catalyzing Fans, 6 Harv. J. Sports & Ent. L. 1, 31 (2015).

[2] See Lawrence Lessig, Republic, Lost: How Money Corrupts Congress and a Plan to Stop It (2011).

[3] Markel et al., *supra* note 1, at 4.

[4] *Id.* at 4.

more traditional crowdfunding mechanisms, which rely on a bilateral relationship between the fund and the talent.[5]

This paper will focus on three flaws in the authors' argument for FACs. These flaws reflect critiques from the left (concerns for corrosiveness in public culture), and the right (skepticism about the distortionary effects of public subsidies in private corporate markets). First, the comparison between FACs and PACs itself is misguided. Second, injecting capital into the market for talent in sports would exacerbate an already existing trend to overfund some segments of our culture (politics, universities, research institutions). This injection of capital often creates an arms race for funds without creating real value. Third, FACs would likely create dysfunction for businesses, [players], and consumers.

1. The Comparison Between PACs and FACs is Flawed

PACs and FACs are both vehicles by which groups can raise money for a specific purpose. The authors point to specific concerns with coordinated fundraising in the political sphere, and determine that these same concerns are not problematic in the sports and entertainment industry. The authors acknowledge that politics should be relatively immune from the influence of money.[6] Candidates, they note, should not win elections because they have the funds to flood the airwaves with political ads.[7] Professional sports, by contrast, are a form of commercial entertainment, and thus should embrace capital as a form of expression.[8] Relatedly, the authors indicate that the concern in the political sphere is that money will corrupt a political actor's ability to make decisions without being influenced by those to whom they are indebted.[9] The authors correctly identify this as inapplicable to FACs.[10] There are, however, more compelling distinctions between PACs and FACs that indicate that the analogy is flawed.

PACs exist because campaigns have *only* voluntary contribution, no earned revenue. Campaign finance and *Citizens United*[11] made room for PACs, to many people's displeasure, but at least there is economic substance to their basis: candidates do not sell goods or services to consumers. Rather, they rely solely on voluntary political contribution.

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[5] *Id.* at 4.
[6] *Id.* at 31.
[7] *Id.* at 31-32.
[8] *Id.* at 32.
[9] *Id.*
[10] *Id.*
[11] Citizens United v. FEC, 130 S. Ct. 876 (2010).

Sports, by contrast, are a mass-market commercial business just as are movies, TV programming and other mass-market performances. Sports leagues and teams have multiple revenue streams: they sell tickets, TV rights, and merchandise. Further, they are often able to do so at enormous profits.[12] Sports franchises are not financially dependent on fundraising the way politicians are.

The authors suggest that fans' preferences for talent in are not adequately reflected through existing modes of consumer activity. Rather, the authors use FACs as a gap-filler, a way to express preferences for talent with their wallets. Presumably fan's preferences, generally, are recorded through their purchase (or non-purchase) of goods and services. Ticket sales, TV ratings, and merchandise sales are all perfectly adequate measures of appreciation and enthusiasm. It is also possible that these metrics also measure enthusiasm for talent, specifically. Jersey sales, for example, serve as a proxy for popularity. All-Star voting is another metric through which fans can convey enthusiasm (or displeasure) for talent. Jersey sales and all-star voting are undoubtedly imperfect proxies for measuring fan enthusiasm for talent. First, it is possible that a player is nationally popular but regionally unpopular. Currently jersey sales and all-star voting are reported using national statistics, though it would certainly be feasible to record regional data as well. Second, FACs provide fans with financial leverage, while jersey sales and all-star voting are mere indicators of preference. I will discuss in section 3, indicators should be sufficient, and FACs will lead to market dysfunction.

2. The Corrosive Arms Race

The authors note that some might object to FACs on the basis that they have the potential to hurt players by *lowering* their salaries.[13] Teams could potentially leverage FAC pledges to reduce what they must pay for talent.[14] This, as the authors suggest, is similar to the practice of tipping, whereby restaurants can pay an employee lower salaries with the expectation

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[12] *See Stern Estimates NBA Revenue Up 20 Percent to $5B NBA* http://www.nba.com/2012/news/11/13/stern-nba-revenue.ap/ (last visited March. 3, 2015). *See also, Major League Baseball Sees Record Revenues Exceed $8 Billion for 2013* Forbes http://www.forbes.com/sites/maurybrown/2013/12/17/major-league-baseball-sees-record-revenues-exceed-8-billion-for-2013/ (last visited, March 3, 2015). *See also, How the National Football League Can Reach $25 Billion In Annual Revenues* Forbes http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/ (last visited, March 3, 2015).

[13] Markel, et al., *supra* note 1, at 32.

[14] *Id.*

that workers will make-up the difference in tips.[15] The authors overcome this argument by comparing FAC funds to other "outside" income that athletes receive through endorsements.[16] They are right to say that LeBron James does not make less money, and no team would have made a lower offer, because the team was able to use his endorsement deal as leverage against him in contract negotiations.[17] Teams compete feverishly for talent.[18] Indeed, some teams are able to convince players that on top of a maximum contract offer, the player has the highest earning potential through endorsements in their city.[19] The fear, then, should not be whether players will be undercompensated, but whether they will be overcompensated.

The authors ignore the problem of upward pressure on salaries. To the extent FACs succeed, they may likely create an arms race to fund talent. We have seen arms race market characteristics in University fundraising and in the political sphere. In education, schools have had to spend, sometimes to their detriment, in order to attract better students.[20] Big capital infrastructure projects, particularly in college sports, are one well-known example of

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[15] *Id.*

[16] *Id.* at 32-33.

[17] *Id.* at 33.

[18] *See e.g., Knicks Would Use Phil Jackson to Recruit Free Agents as Reports Suggest He's Leaning toward Joining Team*, NY DAILY NEWS http://www.nydailynews.com/sports/basketball/knicks/lord-rings-knicks-plan-phil-hardware-recruit-free-agents-article-1.1715376 (last visited March 3, 2015). *See e.g., Details of Houston Rockets' Free Agent Pitch to Carmelo Anthony Emerge*, YAHOO http://sports.yahoo.com/blogs/nba-ball-dont-lie/details-of-houston-rockets—free-agent-pitch-to-carmelo-anthony-emerge-031450837.html (last visited March 3, 2015).

[19] *See e.g., Carmelo Anthony Means Business*, ESPN http://espn.go.com/espn/feature/story/_/id/11904296/new-york-knicks-forward-carmelo-anthony-wants-bulletproof-reputation (last visited March 3, 2015) (In determining where to sign his next contract, Carmelo Anthony articulates that not only entertained basketball considerations, but also considered where he might be able to maximize alternative sources of income. Anthony signed a maximum contract with the New York Knicks, and began an investment company based out of New York).

[20] *See An unexpected B-school arms race for top students*, FORTUNE, http://fortune.com/2011/12/12/an-unexpected-b-school-arms-race-for-top-students/ (last visited, Dec. 23, 2014) ("Among the top 20 MBA programs in the U.S., at least four schools — Yale, Harvard, Northwestern, and UCLA — have increased their average scholarship payouts to students by more than 100% since the 2004-2005 academic year. Yale upped its average scholarship by 150% to $25,000 last year from $10,000 in 2005, while Harvard increased its average scholarships to MBA candidates by 146% to $28,410 from $11,543 five years ago").

the University arms race.[21] In the political sphere, politicians have had to develop deep war chests to fight off opponents.[22] 2014 was the most expensive midterm to date.[23] As the volume of capital injected into campaigns, has expanded, candidates have become increasingly dependent on PACs.[24] This is the arms race problem that has increased costs for politics and education (often with uncertain or dubious vale add) just as it would for sports, assuming the FAC offer is embraced by the public. FAC money is an additional source of income that organizations can exploit to lure talent. The problem is that in an arms race environment, expenditures cease to be productive and instead become detrimental to the participants, yet necessary to stay competitive. The result is that the capital expenditures are wasteful.

The more likely scenario, however, is a feeble arms race because consumers will recognize the FAC as an artifice to benefit owners and players more than fans. Here, the authors ignore the problem that sports are a mass-market commercial business, not generally a valid specialty cultural performance in need of nonprofit support and certainly not a public policy engine. Fans know this. Opera enthusiasts, for example, understand that the opera requires donations. But sports fans know that sports constitute a large profitable business. In this context, the greatest risk to FACs is not the arms race, but the feeble arms race.

Whether an arms race or a feeble arms race ensues, FACs pose a deeper and more troubling cultural problem. The increasing influence of money in American public life is a subject of sharpening concern. In the political sphere, *Citizens United* opened floodgates of capital to the great consternation even of capitalists.[25] This concern is not new. Decades before *Citizens*

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[21] *See Arms Race Proves Recession-Proof*, ESPN, http://espn.go.com/college-football/story/_/id/8047787/college-football-facilities-arms-race-proves-recession-proof (last vistited, Dec. 23, 2014) ("The college sports arms race remains one of the few recession-proof industries. According to the U.S. Census Bureau, nonresidential public construction decreased 10.3 percent from 2009 to 2011, despite the influx of federal stimulus money. Yet universities keep breaking ground on expensive athletic complexes, like Tennessee's soon-to-open $45 million practice center (complete with a 22,000-square foot weight room and MMA cage) or California's $321 million stadium overhaul").

[22] *See Election Spending is Changing, as Well as Expanding*, NY TIMES, http://www.nytimes.com/2014/11/05/upshot/election-spending-is-changing-not-just-getting-bigger.html?abt=0002&abg=1 (last visited, Dec. 23, 2014).

[23] *Id.*

[24] *Id.*

[25] *See You Can't Spend Your Way Out of a Prisoner's Dilemma*, THE ECONOMIST http://www.economist.com/blogs/democracyinamerica/2013/06/polarisation (last visited March 3, 2015) (The Economist argues that *Citizens United* has not created a healthy contest of ideas).

United, mainstream political scientists had noted the increasing ossification of public policy around monied interests as a problem in the latter stages of democracy.[26] Similarly, political economists have questioned the legitimacy of financial arms race driven educational costs pursuant to the Higher Education Price Index ("HEPI"), which has consistently exceeded the Consumer Price Index ("CPI"), to the detriment of educational consumers and institutions.[27] To extend the problem of undue monied influence that has bedeviled politics and education to a profitable mass-market business like sports seems a questionable social and economic project. Indeed, even conservative political economists have questioned drivers of undue inflation in markets for goods and services.[28]

3. FACs Would Create Dysfunction for Businesses and Consumers

Even leaving aside the inaptness of the analogy to PACS and the corrosiveness of undue monied influence in markets, FACs would be bad business. First, FACs are likely to elicit at best resistance and at worst resentment from customers precisely because they will be seen for what they are – a shell game of something for nothing. Wealthy patrons would expect investment value in the form of loan or equity participation for their money, just as actual team financiers receive. FACs would give them, unlike true investors, no financial return on their investment. Similarly, more modest FAC participants might expect tangible personal value for their money in the form of better seats, improved accommodations, or sports memorabilia, but FACs would provide no such value. For all of these reasons, the FAC proposal is likely to be resisted or resented by most fans whether wealthy or less wealthy. History has not been kind to business that petition customers with hollow economic proposals.[29]

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[26] *See e.g.* Mancur Olson, The Rise And Decline of Nations: Economic Growth, Stagflation, And Social rigidities (1984).

[27] *See* Center For College Affordability And Productivity http://centerforcollegeaffordability.org/2011/09/22/chart-of-the-week-hepi-vs-cpi/ (last visited March 3, 2015).

[28] *See generally*, Richard A. Posner, A Failure Of Capitalism: The Crisis Of '08 And The Decent Into Depression (2011).

[29] *See e.g.*, *Netflix says a $1 Price Increase Crushed Its Subscriber Growth* Slate http://www.slate.com/blogs/moneybox/2014/10/15/netflix_earnings_the_company_says_price_hikes_crushed_its_subscriber_growth.html (last visited March 3, 2015) (Netflix's stock declined by 25 percent after the company raised subscription prices by $1 per month).

Second, even if, *arguendo*, enough fans participated in FACs to provide meaningful value to subsidize owners' ability to pay talent, such subsidies would pose their own distortions for business. What looks at first blush like free money could actually become expensive capital. This is because of the twin problems of arms race market dynamics, and uncertain or volatile availability of FAC contributions.

The arms race problem, as previously noted, is that since all teams in theory have some access to FACs, the price of talent will often increase for all teams. Teams, thus, could become dependent on FAC capital just as politicians, universities, and cultural institutions grow dependent on patronage.

Patronage, however, is a fickle and therefore expensive form of capital. It swells in good times, contracts in bad times, and is everywhere and always unpredictable. Unpredictability increases the cost of capital.[30] Team owners would need to participate in auctions for talent not knowing a) how much FAC money competing teams may have; or b) how much FAC money they themselves will be able to attract at the time of the bid. That uncertainty is an expense precisely because it is a distortion, as are all subsidies.[31]

Finally, FACs present thorny legal problems. Unlike contributions to cultural institutions, contributions to FACs provide no tax deductions since they go to commercial entities. Nor can sports franchises provide comfort to contributors that their money will achieve any desired results since in a business organization money is fungible and can be siphoned off to owners in the form of dividends. Indeed, if one took seriously the idea of FACs at all, one would have to equally take seriously the idea of disclosure, which would include the risk that FAC money may merely line the pockets of wealthy team owners. This disclosure would likely be yet another nail in the FAC coffin. Here we return to the first observation, that FACs are not like PACs precisely because they fund business organizations, which are profit seeking, rather than commonwealth organizations. Thus, the argument for FACs presents a far better thought experiment than a valid form of business capital.

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[30] *See e.g.*, RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE (2010) (discussing the capital asset pricing model including the role of *beta*, or volatility in capital markets, as a driver of increased capital cost).

[31] *See e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS (2004) (arguing that public subsidies distort markets).