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## Changing the Game: Remediating the Deficiencies of Baseball's Antitrust Exemption in the Minor Leagues

Theodore McDowell\*

**Abstract:** Minor league baseball players are the invisible men of the sport. As labor reform and increased payrolls sweep across the major leagues, minor leaguers have fallen even further behind, casualties of baseball's broad antitrust exemption. The results have been troublesome—minor leaguers are forced into exploitative adhesion contracts that offer salaries significantly below the federal poverty line. Pushes for legal and political reform have been largely unsuccessful, stymied by judicial inertia, a disinterested legislature, and collusive collective bargaining. Clearly, the time has come for minor league players to change strategies. Instead of pursuing futile contests against ownership, minor leaguers should recruit major league owners to the reformative cause. By illustrating the competitive advantages major league teams could reap by deploying more capital into minor league salaries and player development, minor leaguers can reshape the current zero-sum game against owners into a new, mutual collaboration that will produce systemic reform.

### I. INTRODUCTION

Major League Baseball (“MLB”) is a staple of American history. Baseball has a colorful lore, which has been romanticized by fans reminiscing

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about Bobby Thomson's "Shot Heard 'Round the World" or Babe Ruth predicting his home run in the 1932 World Series. More recently, the sport's commercialization has given it a more sensational bent, as superstars like Alex Rodriguez and Clayton Kershaw have captured our imagination with their incredible play and lucrative contracts.

But baseball has a dirty secret. Minor League Baseball ("MiLB"), which employs approximately 6,000 players a year, is the underside of the sport.<sup>1</sup> Athletes play for peanuts, earning less than \$10,000 a year despite working 50 to 70 hours per week during the five-month season.<sup>2</sup> They also do not receive overtime pay for their participation in promotional events, spring training, instructional winter leagues, and other player development programs they are contractually obligated to attend.<sup>3</sup> When factoring in taxes and clubhouse dues, most minor league players' net income is between \$3,000 and \$7,500 a year,<sup>4</sup> placing them significantly below the 2017 federal poverty line.<sup>5</sup> Pursuing professional baseball consequently becomes an unsustainable "pay-to-play" system for many players.<sup>6</sup> Salaries are so low

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<sup>1</sup> See Garrett R. Broshius, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 Harv. J. Sports & Ent. L. 51, 62 (2013); Complaint at 16, *Miranda v. Selig*, No. 14-cv-05349-HSG (N.D. Cal. Sept. 14, 2015), 2015 WL5357854 [hereinafter *Miranda Complaint*]; Complaint at 32, *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981 (N.D. Cal. 2015) [hereinafter *Senne Complaint*].

<sup>2</sup> See *Miranda Complaint*, *supra* note 1, at 4–6; *Senne Complaint*, *supra* note 1, at 3–4; Lily Rothman, *Emancipation of the Minors; Hundreds of Pro Baseball Players Make Just \$1,100 per Month. Where is their César Chávez?*, SLATE (Apr. 3, 2012), [http://www.slate.com/articles/sports/sports\\_nut/2012/04/minor\\_league\\_union\\_thousands\\_of\\_pro\\_baseball\\_players\\_make\\_just\\_1\\_100\\_per\\_month\\_where\\_is\\_their\\_c\\_sar\\_ch\\_vez\\_.html](http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_c_sar_ch_vez_.html), [https://perma.cc/PR5E-U4H3].

<sup>3</sup> See *Miranda Complaint*, *supra* note 1, at 5; *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 991–992 (N.D. Cal. 2015); *The Official Professional Baseball Rules Book*, MAJOR LEAGUE BASEBALL, Attachment 3, Article VI, <https://registration.mlba.org/pdf/MajorLeagueRules.pdf>, [https://perma.cc/GDM3-5JMZ] (last visited October 28, 2017).

<sup>4</sup> See *Miranda Complaint*, *supra* note 1, at 5.

<sup>5</sup> *Poverty Guidelines*, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, <https://aspe.hhs.gov/poverty-guidelines>, [https://perma.cc/RU7S-X2JA], (last visited Jan. 29, 2017) (In 2017, the federal poverty line for households of one is \$12,060).

<sup>6</sup> See Jeff Snider, *Are Healthy, Educated Minor Leaguers the Next Market Inefficiency?*, BASEBALL ESSENTIAL (June 17, 2015), <https://www.baseballessential.com/news/2015/06/17/healthy-educated-minor-leaguers-market-inefficiency/>, [https://perma.cc/4XPK-QTUW].



that dozens of players and their families pile into putrid apartments, subsisting off peanut butter and sharing mattresses on grime-covered floors.<sup>7</sup>

This meager pay is more striking when considering the comparative histories of MLB and MiLB players. Since 1976, major leaguers' average salaries have increased by more than 2,000 percent, while the average salary for minor leagues has only increased by 75 percent.<sup>8</sup> Dollar inflation has increased by more than 400 percent over this same period.<sup>9</sup> In more concrete terms, the minimum salary for an MLB player in 2017 was \$535,000 a year,<sup>10</sup> whereas the standard salary for entry-level minor leaguers in 2017 was approximately \$1,100 per month.<sup>11</sup> And while some of the top minor league draftees receive multi-million dollar signing bonuses, the majority of players selected in the 40-round draft receive significantly less, with some players drafted in the 10th round receiving as little as a \$1,000 signing bonus.<sup>12</sup>

In light of these striking numbers, it is astonishing that many Americans (and baseball fans) remain unaware of the economic perils MiLB players face. Even on the rare occasions when there has been prominent media coverage of minor leaguers' poverty, the stories failed to gain traction.<sup>13</sup> Baseball

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<sup>7</sup> See Kent Babb & Jorge Castillo, *Baseball's Minor Leaguers Pursue Their Dreams Below the Poverty Line*, WASHINGTON POST (Aug. 26, 2016), [https://www.washingtonpost.com/sports/nationals/the-minor-leagues-life-in-pro-baseballs-shadowy-corner/2016/08/26/96ab542e-6a07-11e6-ba32-5a4bf5aad4fa\\_story.html?utm\\_term=.49279fa72249](https://www.washingtonpost.com/sports/nationals/the-minor-leagues-life-in-pro-baseballs-shadowy-corner/2016/08/26/96ab542e-6a07-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.49279fa72249), [https://perma.cc/96V5-AJAE].

<sup>8</sup> See Miranda Complaint, *supra* note 1, at 5.

<sup>9</sup> See *id.*

<sup>10</sup> See Maury Brown, *Breaking Down MLB's New 2017–21 Collective Bargaining Agreement*, FORBES (Nov. 30, 2016), <http://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#47b7464f42a1>.

<sup>11</sup> See Broshius, *supra* note 1, at 63; Snider, *supra* note 6; *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 533 (N.D. Cal. 2016); Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July/Aug. 2014), <http://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income>, [https://perma.cc/F9NN-5YCA].

<sup>12</sup> E.g., Babb & Castillo, *supra* note 7; Tony Blengino, *MLB Teams Should Pay Minor League Players What They're Worth*, ESPN (Jan. 21, 2016), [http://www.espn.com/mlb/story/\\_/id/14604302/reimagining-baseball-increase-wage-scale-minor-league-players](http://www.espn.com/mlb/story/_/id/14604302/reimagining-baseball-increase-wage-scale-minor-league-players), [https://perma.cc/FK84-BSGS]; Russell Carleton, *Why Are We Playing Hunger Games with Minor Leaguers?*, FOX SPORTS (July 17, 2014), <http://www.foxsports.com/mlb/just-a-bit-outside/story/why-don-t-minor-leaguers-get-paid-enough-071714>, [https://perma.cc/VRZ4-7ZEL].

<sup>13</sup> See Joseph, Coblitz, *Thousands Now or Millions Later: The Choice an MLB Draft Pick Must Make*, THE OUTSIDE CORNER (June 2, 2015), <http://thecomeback.com/theoutsidecorner/2015-articles/thousands-now-millions-later-choice-mlb-draft->

insiders theorize that this lack of public outcry is caused by a combination of public misperception about player salaries, players' own fear of jeopardizing their major league careers by "rocking the boat," and a widespread indoctrination that the minor league "grind" is part of the sweat equity players must invest to reach the majors.<sup>14</sup> Even more surprising, however, is that judges and legislators have ignored the economic plight of minor league players, despite the fact that MLB's federal antitrust exemption enables this exploitation.<sup>15</sup>

## II. AN OVERVIEW OF MINOR LEAGUE BASEBALL

Baseball has enjoyed a longstanding history as America's national pastime. Fortunately, the annals of the sport have been nearly as meticulously recorded as the statistics at the heart of the game. As the chronicles of baseball show, the development of MiLB has been largely conjoined with the growth of MLB, and the two have been inextricably linked as far back as the late 19th century.

### A. *The Early Years and The Player Development Plan*

The concept behind modern MiLB originated in the late 19th century, at a time when professional baseball was still fragmented across several leagues. Owners began acquiring multiple teams across professional leagues

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pick-must-make.html, [https://perma.cc/8VKX-HT9R]; Joshua Kusnick, *An Agent's Take: How the Unseen Post-Draft Process Works*, BASEBALL PROSPECTUS (July 10, 2014), <http://www.baseballprospectus.com/article.php?articleid=24118>, [https://perma.cc/Z467-P2CK].

<sup>14</sup> E.g., Rothman, *supra* note 2; Broshius, *supra* note 1, at 100; Kusnick, *supra* note 13; *A Bill to Require the General Application of the Antitrust Laws to Major League Baseball, And for Other Purposes: Hearing on S.53 Before the Comm. on the Judiciary*, 105th Cong. 1 (June 17, 1997) (statement of Dan Peltier); DIRK HAYHURST, OUT OF MY LEAGUE: A ROOKIE'S SURVIVAL IN THE BIGS 302 (2012); Dirk Hayhurst, *An Inside Look Into The Harsh Conditions Of Minor League Baseball*, BLEACHER REPORT (May 14, 2014), <http://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball>, [https://perma.cc/6A55-S2NY]; Zachary Zagger, *Minor Leaguers Face Uphill Battle In MLB Pay Suits*, LAW360 (Sept. 15, 2015), <https://www.law360.com/articles/708792/minor-leaguers-face-uphill-battle-in-mlb-pay-suits>, [https://perma.cc/CTW2-7DYC].

<sup>15</sup> E.g., *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981, 991 (N.D. Cal. 2015); Broshius, *supra* note 1, at 51–52; George Gmelch, *Minor League Pay: Baseball's Antitrust Exemption Allows for Poverty Wages*, MERCURY NEWS (July 15, 2014), <http://www.mercurynews.com/2014/07/15/minor-league-pay-baseballs-antitrust-exemption-allows-for-poverty-wages/>, [https://perma.cc/6S56-KABM].

and using their umbrella of control to “farm” players.<sup>16</sup> After its inception in 1876, the National League of Professional Baseball Clubs (“National League”) began to consolidate power and ultimately achieved premier status as the “major” baseball league, with owners intensifying their farming and inter-league raiding of players.<sup>17</sup> Dissatisfied with the National League’s assumption of control, the presidents of seven other baseball leagues joined together in 1901 and formed the National Association of Professional Baseball Leagues, which is now known as MiLB.<sup>18</sup>

MiLB struggled mightily with financial shortfalls and a lack of profitability over the subsequent decades, which was exacerbated when MLB General Managers such as Branch Rickey began acquiring dozens of minor league teams and treating them as bargain bin repositories for amateur players.<sup>19</sup> As this farm system proliferated, the financial status of MiLB teams became so precarious that MLB teams owning minor league affiliates began to suffer substantial operating losses.<sup>20</sup> Fiscal reform of MiLB was sorely needed, and MLB executives ultimately decided to assume direct financial control over the minor leagues when they agreed to the Player Development Plan (“PDP”).<sup>21</sup>

The PDP formally recognized the hierarchical classifications of the minor leagues based on player skill levels and required each MLB team to operate at least five minor league teams.<sup>22</sup> MLB owners then memorialized their legal relationships with individual minor league teams by executing player development contracts (“PDCs”).<sup>23</sup> The PDCs stated that the MLB team would cover the expenses for the baseball operations of its affiliated

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<sup>16</sup> Broshius, *supra* note 1, at 57–58.

<sup>17</sup> *See id.* at 58.

<sup>18</sup> *Minor League Baseball Timeline: 1901-2001*, MILB.COM, <http://www.milb.com/milb/history/timeline.jsp>, [https://perma.cc/P4EJ-8EAX] (last visited Oct. 31, 2017); *The History & Function of Minor League Baseball*, MILB.COM, [http://www.milb.com/milb/history/general\\_history.jsp](http://www.milb.com/milb/history/general_history.jsp), [https://perma.cc/8F3Q-BK23] (last visited Oct. 31, 2017).

<sup>19</sup> Broshius, *supra* note 1, at 59.

<sup>20</sup> *See* Broshius, *supra* note 1, at 61; NEIL J. SULLIVAN, *THE MINORS: THE STRUGGLES AND THE TRIUMPH OF BASEBALL’S POOR RELATION FROM 1876 TO THE PRESENT* 235 (1990).

<sup>21</sup> *See* Senne Complaint, *supra* note 1, at 37.

<sup>22</sup> *See* Broshius, *supra* note 1 at 59–61; BOB GOLON, *NO MINOR ACCOMPLISHMENT: THE REVIVAL OF NEW JERSEY PROFESSIONAL BASEBALL* 28 (2008); John Cronin, *Truth in the Minor League Class Structure: The Case for the Reclassification of the Minors*, SOCIETY FOR AMERICAN BASEBALL RESEARCH (2013), <http://sabr.org/research/truth-minor-league-class-structure-case-reclassification-minors>, [https://perma.cc/X7CA-LQNG] (last visited Oct. 31, 2017).

<sup>23</sup> *See* Golon, *supra* note 22.

minor league teams and would also be responsible for paying the salaries of the minor league players, managers, coaches, scouts, and medical staff.<sup>24</sup> Consequently, minor league owners were only responsible for marketing, staffing their front office, procuring local broadcasting rights and sponsorships, and maintaining their stadiums.<sup>25</sup>

### B. *Modern Times: An Expansive and Profitable Enterprise*

The current minor league system has broadened alongside the expansion of MLB. Each MLB team retains a comprehensive MiLB network, with every team exceeding their minimum requirements by executing PDCs with at least seven minor league teams across Triple-A, Double-A, A-Advanced, A, Short-Season A, and Rookie classifications.<sup>26</sup> Accordingly, each of MLB's 30 teams generally has over 200 minor league players under contract.<sup>27</sup>

Yet the delineation of operating costs between MLB and MiLB owners has remained fairly constant over the last half-century. MLB organizations continue to pay the salary and *per diem* for the managers, coaches, and players,<sup>28</sup> and they remain responsible for "all decisions related to player development."<sup>29</sup> Moreover, MiLB franchises still "assembl[e] a front office and staff to manage all business aspects. . . [such as] ticket sales, promotions, and broadcasting."<sup>30</sup> This arrangement has removed significant expenses for minor league owners and has resulted in an overall boon for MiLB.<sup>31</sup> Minor league franchise values continue to appreciate, having risen steadily even during the recent economic recessions.<sup>32</sup> In fact, minor league clubs are now valued as high as \$49 million.<sup>33</sup> It is surprising, then, that despite the cur-

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See Broshius, *supra* note 1, at 61–62; Cronin, *supra* note 22; *Teams by Classification*, MILB.com, <http://www.milb.com/milb/info/classifications.jsp>, [https://perma.cc/8V5D-FFSF] (last visited Oct. 28, 2017).

<sup>27</sup> See Broshius, *supra* note 1, at 62.

<sup>28</sup> See *id.*; *The Official Professional Baseball Rules Book*, *supra* note 3, Rule 56(g).

<sup>29</sup> *MiLB.com Frequently Asked Questions*, MILB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business#9>, [https://perma.cc/5LXA-Q28B] (last visited Jan. 28, 2017).

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

<sup>31</sup> See Michael Ozanian, *Minor Leagues, Major Profits*, FORBES (Aug. 6, 2008), [http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz\\_mo\\_0806minors.html](http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz_mo_0806minors.html).

<sup>32</sup> See Broshius, *supra* note 1, at 62.

<sup>33</sup> Sergei Klebnikov, *Minor League Baseball's Most Valuable Teams*, FORBES (July 8, 2016, 11:11 AM), <http://www.forbes.com/sites/sergeiklebnikov/2016/07/08/minor-league-baseballs-most-valuable-teams/#5cfe4c4750a1>.

rent profitability of MiLB, the salaries of minor league players have languished since the 1960s.<sup>34</sup>

### III. BASEBALL'S ANTITRUST EXEMPTION AND THE SUBJUGATION OF MINOR LEAGUE PLAYERS

As MLB ownership gained financial control over MiLB, a number of distortions in the minor league business model became increasingly apparent. These aberrations have largely been to the detriment of minor league players, whose economic and legal positions have been increasingly imperiled over the decades.

#### A. *The Perverse Business Incentives in Minor League Baseball*

As previously discussed, minor leaguers' monetary interests have been compressed even as MiLB has continued to flourish. This financial stagnation for current minor league players is largely a result of the deficient business relationships enshrined in PDCs. The contractual provision that MLB owners shall pay the salaries of MiLB players has created a perverse business incentive: MLB owners are enticed to keep the salaries of MiLB players low because these players are not directly contributing to the owners' main commercial product.<sup>35</sup>

MLB owners have clearly capitalized on this distorted inducement, as evidenced by the deplorable working conditions and low wages of minor league players.<sup>36</sup> Most notably, MLB owners have exercised their monopoly power over the sport by colluding to force minor league baseball players to sign adhesive Uniform Player Contracts ("UPCs"), which effectively strip players of any freedom of contract and negotiating power within organized baseball.<sup>37</sup> Minor league owners, in turn, have no incentive to curtail this exploitation, as they currently enjoy the economic windfall of not paying their own players' salaries.

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<sup>34</sup> *Miranda Complaint*, *supra* note 1, at 5.

<sup>35</sup> See Broshius, *supra* note 1, at 62.

<sup>36</sup> See *An Inside Look Into the Harsh Conditions Of Minor League Baseball*, *supra* note 14 (contrasting the major leagues, where players travel in chartered planes and are given over \$1,000 in *per diems* each week, with the minor leagues, where players spend hundreds of hours travelling in buses to games and are given \$120 in weekly allowance).

<sup>37</sup> See Broshius, *supra* note 1, at 51–52; *Miranda Complaint*, *supra* note 1, at 4–5.

B. *Major League Baseball's Antitrust Exemption: A License to Collude*

The troubling reality about the exploitation of MiLB players is that it is legally authorized under the broad scope of baseball's federal antitrust exemption, which was crafted by the Supreme Court across three cases in the 20th century. The first case in this judicial trilogy was decided in 1922, when *Federal Baseball Club v. National League* reached the Supreme Court. In that decision, Justice Holmes held that the business of baseball was not interstate commerce and therefore did not implicate federal antitrust law.<sup>38</sup> The Court affirmed this position three decades later in *Toolson v. New York Yankees*, though the Court notably did not "re-examin[e] the underlying issues."<sup>39</sup> Instead, the Court based its decision on the principles of *stare decisis* and reliance, noting that the antitrust exemption of *Federal Baseball* had developed and been relied upon for over thirty years and Congress, despite having "the ruling under consideration, ha[d] not seen fit to bring [baseball] under [antitrust] laws."<sup>40</sup> The Court concluded by placing the impetus for change on Congress, stating that the application of antitrust laws to baseball "should be by legislation."<sup>41</sup>

The concluding case in this trio, *Flood v. Kuhn*, made it expressly clear that the Supreme Court believed it was the final responsibility of Congress to bring MLB under the purview of federal antitrust law.<sup>42</sup> The Court conceded that professional baseball was a business engaged in interstate commerce and MLB's federal antitrust exemption was an "aberration" not enjoyed by other professional sports.<sup>43</sup> Nevertheless, the Court reaffirmed that its hands were tied by the "positive inaction" of the congressional decision not to overrule *Federal Baseball* and *Toolson*.<sup>44</sup> The Court ultimately concluded that "the remedy. . . is for congressional, and not judicial, action."<sup>45</sup> In effect, the Court confirmed MLB owners' ability to exercise monopoly power and conspire against all professional baseball players until Congress said otherwise.

Nearly three more decades passed before Congress finally interceded by passing the Curt Flood Act of 1998 ("Curt Flood Act").<sup>46</sup> The statute was

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<sup>38</sup> See *Federal Baseball Club v. National League*, 259 U.S. 200, 208 (1922).

<sup>39</sup> *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953).

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

<sup>41</sup> *Id.*

<sup>42</sup> *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

<sup>43</sup> *Id.* at 282–83.

<sup>44</sup> *Id.* at 284–85.

<sup>45</sup> *Id.* at 285.

<sup>46</sup> 15 U.S.C. § 26b (2012).

seen as a victory for professional baseball players, as it stated that federal antitrust laws *did* apply to labor issues “directly relating to or affecting employment of major league baseball players.”<sup>47</sup> Nevertheless, minor leaguers did not share in this legislative bounty, as baseball lobbyists were able to narrow the operative effect of the law.<sup>48</sup> With shocking specificity, Subsection B of the statute states that it does not apply to:

Any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of . . . baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players. . . or any other matter relating to professional baseball’s minor leagues.<sup>49</sup>

Thus, the statute makes it expressly clear that the Curt Flood Act does *not* apply to minor league players.<sup>50</sup>

### C. *Uniform Player Contracts: Major League Baseball’s Weapon of Choice*

Armed with judicial authorization and benefitting from legislative indifference towards MiLB, MLB owners have spent the last two decades crafting a system that pushes minor league players inexorably towards adhesive UPCs. First, MLB confines all new United States and Canadian players’ entry into the league to the “Rule 4 Draft.”<sup>51</sup> The Major League Rules (“MLRs”) then require all Rule 4 draftees to sign minor league UPCs with “reserve clauses” that tether the player to the team for seven seasons.<sup>52</sup> Moreover, any first-year player who avoided the Rule 4 draft requirements because of his foreign nationality is still required to sign a similar UPC.<sup>53</sup> A player’s refusal to sign the UPC “shall disqualify the player from playing with the contracting Club or entering the service of any Major or Minor League Club unless the player is released or assigned.”<sup>54</sup> Because the UPCs are used by all MLB organizations, they strip these minor league players of all negotiating power and freedom of contract within organized baseball.<sup>55</sup>

<sup>47</sup> *Id.*

<sup>48</sup> See Broshius, *supra* note 1, at 97; See also John T. Wolohan, *Symposium: The Curt Flood Act: The Curt Flood Act of 1998 and Major League Baseball’s Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 367–70 (1998-1999).

<sup>49</sup> 15 U.S.C. §26b(b)(1)–(2).

<sup>50</sup> See Wolohan, *supra* note 48, at 370.

<sup>51</sup> *The Official Professional Baseball Rules Book*, *supra* note 3, at Rule 4.

<sup>52</sup> See *id.* at Rule 3(b)(2).

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at Rule 3(d).

<sup>55</sup> See Broshius, *supra* note 1, at 51–52, 63–64.

The terms of the UPCs also unconscionably favor MLB. In addition to “reserving” the minor league player for seven seasons, the UPCs stipulate that the players are “obligate[d]. . .to perform professional services on a calendar year basis, regardless of the fact that salary payments are to be made only during the actual [five-month] championship playing season.”<sup>56</sup> Accordingly, players are required to participate in the team’s promotional activities, training seasons, exhibition games, and instructional leagues without any salary compensation.<sup>57</sup> And while a baseball club may trade, promote, demote, or assign a player at will, the UPCs restrict the mobility of minor league players.<sup>58</sup> Specifically, though a MiLB player may voluntarily retire at any time, he cannot sign with any other domestic, Canadian, or Mexican team for the remaining term of his contract without the written consent of the MLB Commissioner and the baseball club for which he is under contract.<sup>59</sup> In essence, “the players are free to go, just not free to play elsewhere in organized baseball.”<sup>60</sup>

Major league clubs also collude in constraining the salaries of minor league players. MLB owners collectively set the minimum salary for all MiLB players,<sup>61</sup> and the MLRs require teams to pay all first-year minor league players the same wages.<sup>62</sup> The MLRs also limit signing bonuses for Rule 4 draftees through a “Signing Bonus Pool.”<sup>63</sup> Teams that exceed the signing pool cap are assessed tax penalties and are stripped of future draft picks.<sup>64</sup> The organization also has no legal obligation to increase the minor league players’ salaries each year. In fact, the UPCs legally entitle MLB owners to *reduce* player salaries by as much as 20% each year:

If the player and club do not reach [a salary] agreement, the player’s monthly salary rate for the next championship playing season shall be set by the club, but shall not be less than eighty percent (80%) of the

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<sup>56</sup> *The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article VI.

<sup>57</sup> *See id.* at 192, 197; *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981, 991–992 (N.D. Cal. 2015).

<sup>58</sup> *See The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article XVII.

<sup>59</sup> *See id.* at Rule 14(b), 88.

<sup>60</sup> JOHN D. KELLY, *THE AMERICAN GAME: CAPITALISM, DECOLONIZATION, WORLD DOMINATION, AND BASEBALL* 92 (Matthew Engelke ed., 2006).

<sup>61</sup> *See The Official Professional Baseball Rules Book*, *supra* note 3, at Rule 3(b)(2).

<sup>62</sup> *See id.* at Rule 3(c)(2)(B).

<sup>63</sup> *See id.* at Rule 3(c)(4)(A).

<sup>64</sup> *See id.* at Rule 3(c)(4)(B).



monthly salary rate set out in the most recently executed [salary agreement].<sup>65</sup>

It is evident, then, that the UPCs have created a league where “thousands of minor leaguers[,] most of whom have no freedom of contract, are stuck where they are, do not receive large signing bonuses, [and] work for modest seasonal salaries.”<sup>66</sup>

#### IV. CONVENTIONAL CHALLENGES AGAINST MAJOR LEAGUE BASEBALL ARE INEFFECTIVE

Despite the widespread neglect of MiLB players by external actors, several baseball insiders have advocated for remedial action. Numerous legal stratagems have been pursued to change the current minor league system, but all have proven unsuccessful thus far.

##### A. *Class Action Lawsuits Against Major League Baseball*

A common refrain among baseball insiders and journalists is that minor league baseball players should file a class action lawsuit against MLB alleging unfair labor practices and a violation of federal antitrust law.<sup>67</sup> The practicality of such a suit has been questioned, however, as commentators have asserted that the lawsuit would threaten the economic stability of MiLB.<sup>68</sup> Most minor leaguers would also be too afraid to attach themselves to a class action suit for fear of retribution by MLB ownership.<sup>69</sup>

In spite of this skepticism, attorney (and former minor league player) Garrett Broshius has recently filed two putative class action lawsuits against MLB on behalf of minor league players. Both suits were filed in the Northern District of California and alleged that MLB illegally suppresses minor league compensation and does not pay MiLB players fair wages.<sup>70</sup> Each suit

<sup>65</sup> *Id.* at Attachment 3, Article VII.

<sup>66</sup> DON WOLLETT, GETTING ON BASE: UNIONISM IN BASEBALL xv (2008).

<sup>67</sup> See Snider, *supra* note 6.

<sup>68</sup> See Stanley M. Brand & Andrew J. Giorgione, *Symposium 6-4-3 (Double Play)! Two Teams Out: Contraction in Baseball The Effect of Baseball's Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L.J. 49, 51–52 (2003).

<sup>69</sup> *Cf. id.*

<sup>70</sup> See *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d. 981, 991–92 (N.D. Cal. 2015); *Miranda v. Selig*, No. 14–cv–05349–HSG, 2015 WL5357854 at \*1 (N.D. Cal. Sept. 14, 2015).

advances a different legal argument, though both face tremendous legal hardships and are unlikely to succeed.<sup>71</sup>

In *Miranda v. Selig*, Broshius revisits baseball's antitrust exemption by challenging the "reserve clause" of the UPC as an unreasonable restraint of trade.<sup>72</sup> Unsurprisingly, the District Court swiftly dismissed the case, determining that judicial precedent and congressional exclusion of minor leaguers from the Curt Flood Act resolved the matter in favor of MLB.<sup>73</sup> An appeal was filed in the Ninth Circuit, which promptly affirmed the lower court's ruling and similarly determined that the federal antitrust exemption precluded the class action.<sup>74</sup> In reality, the chances of success under *Miranda* have always appeared bleak considering the Ninth Circuit recently upheld baseball's antitrust exemption in a case involving franchise relocation.<sup>75</sup> Of course, MiLB players may still appeal the Ninth Circuit decision to the Supreme Court, but even if the case were granted certiorari, it is unlikely that the Court would deviate from its pattern of judicial restraint on the issue.<sup>76</sup>

*Senne v. Kansas City Royals Baseball Corp.* is a more promising case for minor leaguers, since it attacks MLB from a labor law angle.<sup>77</sup> The plaintiffs argue that MLB collusion denies minor league players a minimum wage and overtime pay in violation of the Fair Labor Standards Act ("FLSA") and analogous state wage laws.<sup>78</sup> This tactic artfully avoids baseball's seemingly unassailable antitrust exemption, but it still faces a myriad of legal obstacles. From a procedural standpoint, the lawsuit has faced difficulties establishing jurisdiction over MLB teams that are not based in California.<sup>79</sup> As a consequence, the Northern District of California recently dismissed without prejudice eight of the MLB franchises from the lawsuit for lack of personal jurisdiction.<sup>80</sup>

A more substantive issue in *Senne* is the assertion by MLB that the FLSA and state wage laws do not apply because of the seasonal amusement

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<sup>71</sup> See Zagger, *supra* note 14.

<sup>72</sup> See generally *Miranda Complaint*, *supra* note 1.

<sup>73</sup> See *Miranda v. Selig*, 860 F.3d 1237, 1239 (9th Cir. 2017).

<sup>74</sup> See *id.* at 1239–40.

<sup>75</sup> See *City of San Jose v. Office of the Comm'r of Baseball*, 766 F.3d 686, 691 (9th Cir. 2015).

<sup>76</sup> See Zagger, *supra* note 14.

<sup>77</sup> See *Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981, 990–92 (N.D. Cal. 2015).

<sup>78</sup> See Zagger, *supra* note 14.

<sup>79</sup> See *Senne v. Kan. City Royals*, 105 F.Supp.3d at 1061.

<sup>80</sup> See *id.* at 1045; see also Zagger, *supra* note 14.

and recreational establishment defense (“Amusement Defense”).<sup>81</sup> The defense contends that because minor leaguers are only paid during the five months of the “championship season,”<sup>82</sup> they fall under the statutory language of the Amusement Defense, which states:

[The FLSA does not apply to] any employee employed by an establishment which is an amusement or recreational establishment. . .if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year. . .<sup>83</sup>

MLB similarly argues that it has an affirmative defense under the FLSA’s creative professional exemption (“Creative Professional Exemption”).<sup>84</sup> Pursuant to this exemption, the minimum wage and overtime pay requirements of the FLSA do not apply to “creative professionals. . .whose primary duty [is] the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”<sup>85</sup> To qualify for the exemption, the employee “must be [c]ompensated on a fee or basis at a rate of not less than \$455 per week.”<sup>86</sup> MLB has asserted that this exemption applies to minor leaguers, claiming that time spent in MiLB “is not a career but a short-term seasonal apprenticeship in which the player either advances to the Major Leagues or pursues another career.”<sup>87</sup>

The court has yet to rule on the merits of the *Senne* case, and judicial treatment of the issues has been mercurial thus far. The case initially ap-

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<sup>81</sup> See *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 579–80 (N.D. Cal. 2016).

<sup>82</sup> *The Official Professional Baseball Rules Book*, *supra* note 3, at Attachment 3, Article VI; Miranda Complaint, *supra* note 1; *Senne* Complaint, *supra* note 1.

<sup>83</sup> 29 U.S.C. § 213(a)(3) (2012).

<sup>84</sup> *Senne v. Kan. City Royals*, 315 F.R.D. at 580; Kevin Trahan, *Baseball Would Rather Pretend Minor Leaguers Don’t Have Real Jobs Than Pay Them A Living Wage*, VICE SPORTS (July 12, 2016), [https://sports.vice.com/en\\_us/article/baseball-would-rather-pretend-minor-leaguers-dont-have-real-jobs-than-pay-them-a-living-wage](https://sports.vice.com/en_us/article/baseball-would-rather-pretend-minor-leaguers-dont-have-real-jobs-than-pay-them-a-living-wage), [https://perma.cc/BHG9-8ZCG]; Patrick Redford, *MLB Argues That Minor Leaguers Are Creatives, Like Artists And Musicians*, DEADSPIN (June 30, 2016), <http://deadspin.com/mlb-argues-that-minor-leaguers-are-creatives-like-artist-1782927981>, [https://perma.cc/4S4E-TKZB].

<sup>85</sup> 29 C.F.R. § 541.302 (2004).

<sup>86</sup> 29 C.F.R. § 541.300 (2004).

<sup>87</sup> Chris Isidore, *Battle to Keep Minor League Baseball Players’ Pay Below Minimum Wage*, CNN (July 1, 2016, 1:32 PM), <http://money.cnn.com/2016/07/01/news/companies/minor-league-baseball-pay/>, [https://perma.cc/3ZCR-SQ2U]; Trahan, *supra* note 84; Redford, *supra* note 84.

peared promising, as nearly 2,000 current and former minor league players signed onto the lawsuit after it was conditionally certified as a class action in October of 2015.<sup>88</sup> The case was dealt a seemingly fatal blow, however, when the court later decertified the class action in July of 2016 by finding that the circumstances of the plaintiffs were too individualized to warrant class-wide treatment.<sup>89</sup> This ruling created substantial procedural difficulties for the case, as it meant that each of the 2,000 plaintiffs had to file individual lawsuits.<sup>90</sup> An appeal on the issue of decertification was subsequently granted,<sup>91</sup> and the court backtracked yet again by recertifying the class action in March of 2017 after the plaintiffs provided a narrower class definition that excluded offseason winter conditioning.<sup>92</sup>

There is some optimism that this recertification will lead MLB owners to settle the lawsuit, though most remained convinced that MLB will litigate the issue fully based on its larger economic ramifications for organized baseball.<sup>93</sup> MLB owners have already been granted an immediate appeal of the recertification ruling, and the totality of the early judicial decisions still seems to forecast another defeat for minor league players.<sup>94</sup> In particular, the district court has already revealed its favorable disposition towards the Amusement Defense and Creative Professional Exemption, as it referenced

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<sup>88</sup> Zach Spedden, *Plaintiffs Granted Appeal in MiLB Wages Lawsuit*, BALLPARK DIGEST (Sept. 7, 2016), <http://ballparkdigest.com/2016/09/07/plaintiffs-granted-appeal-in-milb-wages-lawsuit/>, [https://perma.cc/KMY2-H5CJ].

<sup>89</sup> *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 531 (N.D. Cal. 2016).

<sup>90</sup> See Spedden, *supra* note 88.

<sup>91</sup> See Spedden, *supra* note 88.

<sup>92</sup> *Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 WL 897338, at \*38–39 (N.D. Cal. Mar. 7, 2017); Kat Greene, *Calif. Minor Leaguers Granted Cert. in Wage Row*, LAW360 (Mar. 8, 2017, 6:26 PM), <https://www.law360.com/articles/899704/calif-minor-league-players-granted-cert-in-wage-row>, [https://perma.cc/G7CF-86P7].

<sup>93</sup> Mark Stanton, *JUUUUSST A Bit Outside: A Look At Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating The Fair Labor Standards Act*, 22 JEFFREY S. MOORAD SPORTS L.J. 727, 749–50 (2015); Zachary Zagger, *Judge Breathes New Life Into Minor Leaguers' Wage Suit*, LAW360 (Apr. 3, 2017, 6:49 PM), <https://www.law360.com/articles/908546/judge-breathes-new-life-into-minor-leaguers-wage-suit>, [https://perma.cc/EXQ9-SDNR]; Zagger *supra* note 14.

<sup>94</sup> Zachary Zagger, *MLB Looks to Appeal Minor Leaguer Class Certification in Wage Row*, LAW360 (Mar. 22, 2017, 5:23 PM), <https://www.law360.com/articles/904871/mlb-looks-to-appeal-minor-leaguer-class-cert-in-wage-row>, [https://perma.cc/4K2L-EZMN]; Adam Rhodes, *9th Circ. OKs MLB Appeal in Minor Leaguer Wage Action*, LAW360 (June 14 2017), <https://www.law360.com/articles/934647/9th-circ-oks-mlb-appeal-in-minor-leaguer-wage-action>, [https://perma.cc/9WKD-XQW8].

and relied upon these doctrines in the reasoning behind its initial class decertification.<sup>95</sup> A sliver of hope still remains for MiLB players following the class action recertification, but the predilection of the court indicates that *Senne* will likely meet the same fate as *Federal Baseball*, *Toolson*, *Flood*, and *Miranda*.<sup>96</sup>

### B. Congressional Protection of Minor League Baseball Players

Another proposed solution is to lobby Congress to completely overrule the *Federal Baseball*, *Toolson*, and *Flood* cases and specify that *all* of baseball, including MiLB, is subject to federal antitrust law. This would allow the Rule 4 Draft and the UPC reserve clause to be challenged as “illegal restraints of trade” under Section 1 of the Sherman Antitrust Act, which prohibits “[e]very contract, combination. . . or conspiracy, in restraint of trade or commerce.”<sup>97</sup> Based on the prior judicial treatment of the Sherman Antitrust Act, it is likely that such a challenge would prevail.<sup>98</sup>

But while this would be the most seamless resolution, it is also the most unlikely—Congress chose to expressly exclude MiLB from the legislative protection of the Curt Flood Act.<sup>99</sup> Since then, Congress has shown an unwillingness to amend the statute in any way that would extend federal antitrust coverage to MiLB.<sup>100</sup> In fact, recent congressional action has been taken to try and *reduce* the legislative protection afforded to minor leaguers. A new bill, the “Save America’s Pastime Act,” seeks to amend the FLSA to specifically exclude MiLB players from the statute’s minimum wage and

<sup>95</sup> See *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 579–80 (N.D. Cal. 2016).

<sup>96</sup> See Zaggar, *supra* note 14; Stanton, *supra* note 93.

<sup>97</sup> 15 U.S.C. § 1 (2012); Brand & Giorgione, *supra* note 69 (discussing how minor league baseball’s Rule 4 Draft and reserve clause could be challenged if major league baseball’s federal antitrust exemption were removed). See also *Smith v. Pro Football, Inc.* 593 F.2d 1173, 1183 (D.C. Cir. 1978) (holding that the National Football League draft was an illegal restraint on trade).

<sup>98</sup> Broshius, *supra* note 1, at 96 (discussing the Supreme Court’s “rule of reason” analysis in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)); see also Claudia G. Catalano, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. FED. 2D.1, 118–21 (2013).

<sup>99</sup> 15 U.S.C. § 26(b) (2012).

<sup>100</sup> See Broshius, *supra* note 1, at 98 (describing how a 2001 bill introduced by Senator Paul Wellstone of Minnesota ultimately failed due to the fear that it “could be read to shed doubt on the [antitrust] exemption’s applicability to . . . Minor League players.”).

overtime compensation requirements.<sup>101</sup> The bill was introduced into the House of Representatives in direct response to the *Senne* case,<sup>102</sup> further cementing the reality that Congress is unlikely to take any action to provide statutory relief to MiLB players.

### C. Forming a Minor League Baseball Players Union

Unionizing minor league baseball players has also been suggested as a pushback against MLB, in large part because of the success of unionization in other sporting contexts. Most notably, unionization has proven to be a powerful tool for major league baseball players, who were similarly beholden to contractual “reserve clauses” for much of the 20th century.<sup>103</sup> After unsuccessfully challenging the reserve clause before the Supreme Court, MLB players put their hope for reform in the hands of the Major League Baseball Players Association (“MLBPA”) and the head of the union, Marvin Miller.<sup>104</sup> Miller became the head of the MLBPA in 1966, and he formidably shifted the balance of power to major league players by procuring them pension plans, collective bargaining agreements (“CBAs”), an arbitration process for salary grievances, and free agency.<sup>105</sup>

Umpires in MiLB have also successfully unionized and have consequently been compensated much more fairly than minor league players.<sup>106</sup> In fact, contrary to MLB where umpires are compensated substantially less than major league players,<sup>107</sup> minor league umpires are actually paid *more* than MiLB players.<sup>108</sup> MiLB umpires also do not have to finance their own

<sup>101</sup> See Save America’s Pastime Act, H.R. 5580, 114th Cong. (2015-2016); Ted Berg, *The ‘Save America’s Pastime Act’ in Congress Will Do Nothing of the Sort*, USA TODAY (June 30, 2016), <http://ftw.usatoday.com/2016/06/save-americas-pastime-act-minor-league-minimum-wage-lawsuit-mlb-salaries>, [https://perma.cc/Y7EH-R6L2].

<sup>102</sup> See Trahan, *supra* note 84.

<sup>103</sup> See generally BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (2006).

<sup>104</sup> See Broshius, *supra* note 1, at 70–71.

<sup>105</sup> See *id.*

<sup>106</sup> See See Broshius, *supra* note 1, at 101.

<sup>107</sup> Compare Brown, *supra* note 10 (listing the 2017 minimum salary of MLB players as being \$535,000), with Jack O’Connor, *Much Required to Become MLB Umpire*, MLB.com (Aug. 28, 2007), <http://m.mlb.com/news/article/2173765/>, [https://perma.cc/L7CX-SPAL] (listing the salary range of MLB umpires as being from \$120,000 for junior umpires to \$350,000 for senior umpires).

<sup>108</sup> Compare Broshius, *supra* note 1, at 101, and Justin Frazee, *Mind the Gap: The Great Disparity in Minor League Salaries*, PIRATES BREAKDOWN (Mar. 3, 2016), <http://piratesbreakdown.com/2016/03/03/minor-league-baseball-salaries-mind-the>

lodging and accommodations during the season, whereas the minor league players receive no such subsidization.<sup>109</sup>

Minor league athletes in other, less financially successful sports leagues have also successfully unionized. Hockey players in the American Hockey League (“AHL”), which is the equivalent of the MiLB for the National Hockey League (“NHL”), have a union,<sup>110</sup> despite the fact that the NHL brings in almost six billion dollars less in annual revenue than MLB.<sup>111</sup> As a result of their union, AHL players are compensated substantially more than MiLB players. Under the 2015-2019 CBA for the AHL, hockey players have a minimum salary of \$42,375 a year and receive a \$65 *per diem*.<sup>112</sup> By meager comparison, Triple-A MiLB players are paid approximately \$10,750 per year and only receive a \$25 *per diem*.<sup>113</sup> Considering the greater value and profitability of MLB relative to the NHL, it is likely that a MiLB players union could surpass these AHL benchmarks.

Notwithstanding these other successes, unionizing minor league baseball players currently does not seem to be a viable option. Foremost, incorporating minor league players into the MLBPA is implausible. Ironically, the MLBPA has proven to be one of the chief impediments to the economic gains of MiLB players. The MLBPA, which does not actually represent minor league players, has consistently bargained away the rights of minor leaguers in CBA negotiations with MLB.<sup>114</sup> Increasing contractual restrictions on draftees, limiting MiLB signing bonuses, and curtailing the negotiating power of minor league players are just some of the impositions that

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gap/, [https://perma.cc/2QGH-4H8Y] (describing the salary range of AA players as \$1,700 per month) *with Umpire Salaries*, MiLB.com, [http://www.milb.com/milb/info/umpires.jsp?mc=\\_ump\\_salaries](http://www.milb.com/milb/info/umpires.jsp?mc=_ump_salaries), [https://perma.cc/EL49-75P8] (last visited Feb. 2, 2017) (“The regular-season salary ranges for each [umpire] classification are as follows. . . Double-A: \$2,500 – \$3,100 per month.”).

<sup>109</sup> See Broshius, *supra* note 1, at 101–02; 2014–2017 *Minor League Umpires*, STEVE THE UMP, [http://www.stevetheump.com/minor\\_league\\_umpires.htm](http://www.stevetheump.com/minor_league_umpires.htm), [https://perma.cc/4T48-DQLP] (last visited Oct. 30, 2017). (“Hotel lodging is provided free through the league offices for each umpire while on assignment within the league.”).

<sup>110</sup> Broshius, *supra* note 1, at 101.

<sup>111</sup> See Steven Kutz, *NFL took in \$13 billion in revenue last season – see how it stacks up against other pro sports leagues*, MARKETWATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01>, [https://perma.cc/6XXA-8VHB].

<sup>112</sup> Brian MacPherson, *Minor league hockey players benefit from NHL relationship*, PROVIDENCE JOURNAL (Feb. 21, 2015), <http://www.providencejournal.com/article/20150221/NEWS/150229777>, [https://perma.cc/8CF8-4XFJ].

<sup>113</sup> Broshius, *supra* note 1, at 101.

<sup>114</sup> See e.g., Broshius, *supra* note 1, at 72–94.

MLBPA concessions have placed on MiLB players.<sup>115</sup> Donald Fehr, the former executive director of the MLBPA, epitomized this systematic disregard for MiLB players when he stated that “[t]oo much money is being wasted in the minor leagues.”<sup>116</sup> Thus, rather than harboring feelings of empathy and commiseration for their minor league counterparts, most major league players appear to view MiLB players with callous aloofness.<sup>117</sup> The unfortunate reality, then, is that the MLBPA would be wholly unwilling to welcome MiLB players into its ranks.

Nevertheless, minor leaguers face no external obstructions to forming their own union. Yet unionization is unlikely to occur based on an equally potent impediment: the players’ own fear. Minor leaguers are in a unique position in that they view themselves as a transient group—every minor leaguer intends to climb the ranks of MiLB until they reach the majors. Players are therefore afraid that their activism in the minors will incense MLB ownership and threaten their ascent through MiLB.<sup>118</sup> Accordingly, the few times that a push for MiLB unionization has begun to materialize, it has been stymied by a collective paralysis of fear among active players.<sup>119</sup> Until minor league players can overcome this apprehension and inertia, unionization is unlikely to occur.

## V. AN UNCONVENTIONAL SOLUTION: COLLABORATION WITH MAJOR LEAGUE OWNERS

The irony of the ongoing contest between minor league players and major league owners is that both parties would actually benefit from an increase in MiLB salaries. Accordingly, the most viable way for minor leaguers to change their current situation is not to challenge owners directly, but to recruit them to the reformative cause.

### A. *A Brief Overview of Major League Baseball Economics*

To understand how baseball ownership would benefit by increasing MiLB salaries, it is important to first understand the basic economics of

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<sup>115</sup> See Broshius, *supra* note 1, at 72–94.

<sup>116</sup> Josh Leventhal, MEET STAN BRAND: BASEBALL’S POWER BROKER ON THE HILL, *BASEBALL AMERICA* (Apr. 10, 2015), <http://www.baseballamerica.com/minors/meet-stan-brand-baseballs-anonymous-power-broker/#tsfb1wgYYDPemJo0.97>, [https://perma.cc/EB2P-7B2F].

<sup>117</sup> See HAYHURST OUT OF MY LEAGUE, *supra* note 14.

<sup>118</sup> See Broshius, *supra* note 1, at 100.

<sup>119</sup> See Rothman, *supra* note 2.



MLB teams. Modern perspectives on baseball finance were shaped largely by Doug Pappas, a Manhattan lawyer who created an economic measure of how much MLB teams spend for each win. His method first calculates the minimum amount that can be spent on a major league roster, which equals approximately \$7 million.<sup>120</sup> Based on statistical analysis, it is then projected that this minimum-wage team would win approximately 49 games over the course of the 162-game season.<sup>121</sup> The Pappas measure then compares the amount each MLB team pays in excess of \$7 million against the number of wins that team accrues over the season.<sup>122</sup> This comparison ultimately determines how much an MLB team pays for each win above the 49-win threshold.<sup>123</sup>

Data shows that the average major league team pays roughly \$1.5 million for each marginal win after its 49th victory.<sup>124</sup> However, this number is even higher when considering the costs teams must pay to acquire *new* talent for their rosters. The conventional wisdom of baseball analytics states that, when dealing with new player acquisitions, each marginal win costs approximately \$5 million.<sup>125</sup> More recent studies have found that the marketplace has further inflated, with a win on the free agent market now costing around \$7 million.<sup>126</sup> Clearly, MLB teams are paying an exorbitant premium for talent acquisition at the major league level.

### B. *Identifying Pervasive Market Inefficiencies*

The enormous price inflation for MLB free agents and the continual undervaluation of MiLB players produce several market inefficiencies throughout professional baseball. Perhaps the most glaring is that the minor league pay structure makes little sense when considering that MiLB's larger

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<sup>120</sup> MICHAEL LEWIS, *MONEYBALL* xiii (2004).

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> Cork Gains, *Every Dodgers win this season will cost more than \$3 million in player salaries alone*, BUSINESS INSIDER (Sept. 4, 2015), <http://www.businessinsider.com/chart-2015-mlb-payroll-cost-per-win-2015-9>, [https://perma.cc/PCD9-Y349]; Cory DiBenedetto, *2015 MLB Cost Per Win*, GAMMONS DAILY (Jan. 11, 2016), <http://www.gammondsdaily.com/2015-mlb-cost-per-win/>, [https://perma.cc/NE5H-EXQQ].

<sup>125</sup> Lewie Pollis, *How Much Does a Win Really Cost?*, BEYOND THE BOX SCORE (Oct. 15, 2013, 9:00 PM), <http://www.beyondtheboxscore.com/2013/10/15/4818740/how-much-does-a-win-really-cost>, [https://perma.cc/T5PS-VWUX].

<sup>126</sup> *See id.*

purpose is to develop and produce high caliber players for MLB franchises.<sup>127</sup> It is therefore counterproductive to owners' interests to promote business policies that curtail the development of MiLB players. Yet this is precisely what occurs under the current business model.

The modern MiLB system repudiates the basic principles of human development, clinging instead to the false hope that talent will shine through, irrespective of the circumstances.<sup>128</sup> In contrast, general medical research shows that human development is best achieved when two basic needs are fulfilled: sleep and sustenance.<sup>129</sup> Yet most minor league players, because they are paid severely low wages, are placed in economic situations where their food and housing are insecure.<sup>130</sup> To survive on their meager pay, players usually resort to living in excessively overcrowded apartments and eating cheap and unhealthy fast food.<sup>131</sup>

This unhealthy lifestyle has several negative physiological ramifications. Foremost, research shows that poor-nutrition diets cause systemic and cellular inflammation throughout the body that exacerbates the risk of severe baseball injuries, such as elbow ligament damage requiring "Tommy John surgery."<sup>132</sup> The disquieting home front for players also denies them the ability to sleep properly. Poor sleep derails the development of the prefrontal cortex, which is critical for high-level thinking and learning for young men, and thereby stunts players' capacity for athletic and cognitive improvement.<sup>133</sup> Finally, constant worry builds high levels of corticoid chemicals in the bloodstream, which triggers anxiety and fatigue, and stunts physical recovery.<sup>134</sup> In essence, MLB teams are poisoning the same pools of talent they are trying to develop.

This lack of proper player development leads to another major market inefficiency in professional baseball—talented prospects are forced out of the game prematurely. A common sentiment among MiLB players is that the individuals best suited to endure the "grind" of the minor leagues are not the most talented players, but those with preexisting financial infrastruc-

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<sup>127</sup> See Carleton, *supra* note 12.

<sup>128</sup> See *id.*

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

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

<sup>131</sup> Babb & Castillo, *supra* note 7; Russell Carleton, *Baseball Therapy: The Proper Care and Feeding of Minor Leaguers*, BASEBALL PROSPECTUS (Oct. 29, 2012), <http://www.baseballprospectus.com/article.php?articleid=18777>, [https://perma.cc/XKU9-G5D4].

<sup>132</sup> See Snider, *supra* note 6.

<sup>133</sup> See Carleton, *supra* note 12.

<sup>134</sup> See *id.*

tures that can endure years of poverty.<sup>135</sup> This financial foundation generally comes in two forms: a wealthy family that can subsidize the player, or a substantial signing bonus.<sup>136</sup> Aggregate data on the socio-economic status of minor leaguers' families is lacking, but there is data categorizing MiLB players according to the amount of their signing bonuses, whether they appeared in an MLB game, and how successful they are as measured by wins above replacement ("WAR").<sup>137</sup> The following chart summarizes this data:<sup>138</sup>

Signing Bonus (USD)	Percentage of Players Appearing in MLB	One Career WAR	Five or More Career WAR
\$1,000 – \$99,999	15.0%	5.4%	2.4%
\$100,000 – \$249,999	26.1%	7.5%	3.2%
\$250,000 – \$499,999	43.2%	15.4%	7.9%
\$500,000 – \$999,999	53.1%	21.7%	12.0%
\$1,000,000 +	72.0%	42.5%	24.3%

This data supports the supposition that more financially secure MiLB players have a greater chance of reaching MLB. Of course, such a result also appears to be self-evident, since the more lucrative signing bonuses are given to the highest-valued prospects that are considered more likely to reach the major leagues. But when considering newer medical data on the stunted athletic development of most MiLB players, there is now room to question these conventional understandings. Indeed, there is reasonable doubt as to whether the higher paid players truly succeed solely on the basis of their talent, or whether they can merely outlast more talented peers in a financial war of attrition.

This latter point is admittedly speculative, but it reinforces the confounding nature of MLB owners' business practices. If these owners are pouring millions of dollars into scouting and drafting players, why are they then squandering their assets by not deploying capital into the proper development of these players? By failing to equip the majority of their minor league

<sup>135</sup> See, e.g., Snider, *supra* note 6.

<sup>136</sup> See *id.*

<sup>137</sup> See Carleton, *supra* note 12. "Wins above replacement" is a statistical measure that charts how many additional wins per season a player generates for his team.

<sup>138</sup> See *id.* (data represents draftees selected between the years 2003 and 2008).

players with the means of even *possibly* succeeding, MLB franchises transform most of their investments into junk bonds.

C. *An Opportunity for Competitive Advantage*

The pervasiveness of these market inefficiencies presents a unique opportunity for major league franchises. For owners willing to deviate from conventional MiLB practices, there are ways to mitigate these inefficiencies and gain a competitive advantage. One practical and cost-effective approach would be for an MLB owner to directly subsidize his minor league players' food and lodging.<sup>139</sup> According to one research study, it would cost an MLB franchise approximately \$1.3 million a year to provide full catering services for lunch and dinner across its seven affiliated minor league teams.<sup>140</sup> Another study projects that, based on the average accommodation costs across minor league market cities, it would cost an MLB franchise \$2.5 million a year to provide each of its minor league teams with furnished apartments for the players.<sup>141</sup> Based on these estimates, an MLB owner could forecast annual spending of roughly \$4 million on food and accommodations for its minor league players.<sup>142</sup> When compared against the free agent acquisition cost of "\$7 million per win," this sum actually represents a discount purchase. MLB owners would be paying nearly half the cost of a win on the open market in exchange for developing a vast, internal roster of major league talent.

A second possibility is for MLB owners to discard the widespread "race to the bottom" mentality towards minor league pay and raise their players' minimum salaries. Providing a livable wage of around \$50,000 a year, which approximates the median household income in the United States,<sup>143</sup> would provide minor league players with the means to adequately meet their basic living and nutritional needs and thus enable them to better develop their baseball skill-sets.<sup>144</sup> If we assume that each major league franchise has 200 active players across its seven minor league affiliates,<sup>145</sup> this elevated base salary would represent a new annual outlay of \$10 mil-

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<sup>139</sup> *See id.*

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

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *Median Household Income in the United States: 2015*, UNITED STATES CENSUS BUREAU (Sept. 15, 2016), [https://www.census.gov/library/visualizations/2016/comm/cb16-158\\_median\\_hh\\_income\\_map.html](https://www.census.gov/library/visualizations/2016/comm/cb16-158_median_hh_income_map.html), [<https://perma.cc/X5DN-W57T>].

<sup>144</sup> *See* Carleton, *supra* note 12.

<sup>145</sup> *See* Broshius, *supra* note 1, at 62.

lion.<sup>146</sup> While this is a substantial amount, a point-of-reference to the \$7 million free agency market standard once more demonstrates that this is a comparatively reasonable sum. Essentially, the franchise would hedge the near monetary equivalent of one-and-a-half wins on the bet that increased development costs will produce new prospects who will yield a greater number of wins over time. Across a 200-player roster, the statistical odds are significant that several such prospects would emerge.<sup>147</sup>

The critical issue, however, is convincing a major league owner that deploying his capital in either of these new ways would yield positive returns. For “rich teams” with surplus cash to spend in free agency, this new market model would likely be unappealing. Success in the current system is still largely determined by who has the fattest wallet and spends the most cash, and wealthy teams already possess the market dominance to pull coveted free agents away from cash-strained, smaller-market clubs.<sup>148</sup> The past several decades substantiate this point, demonstrating that postseason success in MLB is usually elusive unless a team has one of the top ten payrolls in the league.<sup>149</sup> Accordingly, the payrolls for two-thirds of major league teams generally amount to nothing more than wasted capital for the owners.<sup>150</sup>

Yet this financial reality provides an incentive for middle and small market franchises to pursue these new competitive advantages.<sup>151</sup> Many of these franchises are either priced out of the free agency marketplace altogether, or—because of their lack of sustained success in the league—are forced to overpay free agents to compensate for their diminished cachet.<sup>152</sup>

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<sup>146</sup> Cf. Carleton, *supra* note 12. This figure does not account for the uniform salary requirements for all first-year minor league players as required by Major League Rule 3(c)(2)(B). However, because of the increased base salary outlay, MLB ownership would have a reasonable negotiating position to reapportion some of its aggregate signing bonus pool to first-year players so that they reach the \$50,000 threshold during their first year.

<sup>147</sup> See generally Carleton, *supra* note 12.

<sup>148</sup> See BOB COSTAS, *FAIR BALL* 16, 56–57 (2000); Cf. LEWIS, *supra* note 120, at 22–23.

<sup>149</sup> Cf. COSTAS, *supra* note 148 at 56–57; Noah Davis & Michael Lopez, *Don't Be Fooled by Baseball's Small-Budget Success: MLB Payrolls Matter More than Ever*, FIVETHIRTYEIGHT (July 8, 2015, 7:55 AM), <https://fivethirtyeight.com/features/dont-be-fooled-by-baseballs-small-budget-success-stories/>, [https://perma.cc/JAY7-DSX4]; *MLB Team Payrolls: 1998–2017*, STEVE THE UMP, [http://www.stevetheump.com/Payrolls.htm#salary\\_stats](http://www.stevetheump.com/Payrolls.htm#salary_stats), [https://perma.cc/KDL5-GCMB] (last visited Oct. 31, 2017).

<sup>150</sup> See COSTAS, *supra* note 148, at 100.

<sup>151</sup> See *id.*

<sup>152</sup> See LEWIS, *supra* note 120, at 22–23; cf. COSTAS, *supra* note 148, at 56–57.

These franchises are prisoners of the current system, yet they refuse to contemplate a jailbreak.

Fortunately, the recent successes of cash-strapped franchises such as the Oakland Athletics have demonstrated that the *efficient* use of limited capital can be a potent weapon.<sup>153</sup> For many MLB franchises, deploying more capital at the minor league level would be the *most efficient* way for them to use their resources. Rather than overpaying to participate in a system that will see them mired in mediocrity, these teams would reallocate their costs towards the development of players that are already under contract. By avoiding the premiums of free agency, organizations would reduce their balance sheet expenses while expediting and improving the development of their minor league players. Owners would then receive a new multi-purpose asset: an expanded pool of players that are viable at the major league level and that could also be leveraged as trade pieces for transactions with other teams. Moreover, because these players remain under their initial seven-year contract, the risk of their imminent departure is also mitigated.

The addition of new and valuable prospects to the teams' rosters would also elevate the teams' competitiveness in MLB, which has been shown to correspond with an increase in fan attendance and media coverage.<sup>154</sup> This, in turn, increases the stadium and broadcasting revenue streams generated by the team, meaning owners would effectively be able to spend less to earn more.<sup>155</sup> Ownership would consequently see a substantial boost in net earnings, and portions of the new capital could be retained in the franchise to enhance other operational elements.

Finally, the minor league players themselves would substantially benefit under this new business model.<sup>156</sup> While their legal position under UPCs would remain unchanged, the unconscionability of that position would be largely ameliorated. In particular, the quality of life would be substantially improved across MiLB, as subsidizing food and board or increasing minor leaguers' base salary would elevate players well above the poverty line and the minimum standards required by the FLSA.<sup>157</sup> This would also enhance psychological wellbeing among the athletes—newfound economic stability

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<sup>153</sup> Despite consistently placing among the five lowest payrolls in the major leagues, the Athletics have made the postseason eight times since 2000 through their "Moneyball" strategy of signing cheap players that possess unique statistical value.

<sup>154</sup> *MLB Attendance Reports: 2001–2017*, ESPN, <http://www.espn.com/mlb/attendance>, [https://perma.cc/7VSX-Y25H] (last visited October 31, 2017).

<sup>155</sup> See COSTAS, *supra* note 148, at 54, 63–78.

<sup>156</sup> *Cf.* COSTAS, *supra* note 148, at 100.

<sup>157</sup> See Carleton, *supra* note 12.

would provide assurances that players' successes were produced by a meritocratic system rather than financial attrition. For minor leaguers, then, the most tenable path to reform is not to try and effect change from within, but to incentivize a mutually conducive collaboration with MLB ownership.

#### D. *Psychological Roadblocks*

Even with these forecasted benefits, it is still likely that psychological inertia and fear will prevent most owners from pursuing this new business model.<sup>158</sup> Yet past successes by pioneering MLB owners have shown that innovation is the lynchpin for success. For example, in 1975 the New York Yankees were mired in a decade-long postseason slump when they signed James "Catfish" Hunter, baseball's first free agent, to a five-year, \$3.5 million deal.<sup>159</sup> George Steinbrenner, the Yankees owner, was heavily criticized for this new cash-laden approach to management, as Hunter's pay dwarfed the average salary of \$44,676 at the time.<sup>160</sup> Yet George Steinbrenner was rewarded for his risk-taking with three trips to the World Series over the next four years and the Yankees winning two championships in 1977 and 1978.

In another instance in the early 2000s, Ken Hofmann and Stephen Schott, the former co-owners of the Oakland Athletics, were maligned after endorsing the novel "sabermetric" strategy of their General Manager, Billy Beane, to sign disregarded players with unique statistical value.<sup>161</sup> However, even with a payroll consistently in the bottom rungs of the league, Hofmann and Schott were rewarded with the sustained success of the Athletics, which reached the postseason five times in six years. More recently, John Henry, as the principal owner of the Boston Red Sox, was rewarded for his own extensive endorsement of sabermetrics when he led the Red Sox in ending an 86-year World Series Championship drought in 2004.

In each of these cases, a maverick owner adopted an unorthodox approach to baseball management that ushered in a new era of success for his franchise. Ironically, these innovations ultimately catalyzed paradigm shifts throughout the league, as other teams began to embrace the same novelties

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<sup>158</sup> Cf. RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 33–35 (Updated ed. 2009).

<sup>159</sup> See Snyder, *supra* note 103, at 317.

<sup>160</sup> *Average Salaries in Major League Baseball: 1967–2009*, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, [http://hosted.ap.org/specials/interactives/\\_sports/baseball08/documents/bbo\\_average\\_salary2009.pdf](http://hosted.ap.org/specials/interactives/_sports/baseball08/documents/bbo_average_salary2009.pdf), [https://perma.cc/XZZ2-CZA2] (last visited October 31, 2017).

<sup>161</sup> See LEWIS, *supra* note 120, at 14–42, 127–28.

they previously repudiated. The current baseball landscape reflects this reality, as other MLB owners have raced to match increased payrolls, and sabermetrics now constitute the prevailing approach within baseball operations.<sup>162</sup> The challenge for minor league players, then, is to find an owner who is willing to champion this novel business model. If the new approach proves successful, history shows that it will very likely herald a systemic change for MiLB.

## VI. CONCLUSION

MiLB players are the invisible men of professional baseball. They have been overlooked by the Supreme Court and callously disregarded by Congress and their major league counterparts. They play for poverty wages and have been unconscionably indentured to MLB. Their legal rights are few, and pushes for reform have been unsuccessful. All conventional solutions have failed decidedly.

It is therefore time for minor league players to alter their strategy. Major league owners wield too much power to be overtly dethroned. Thus, instead of revisiting fruitless political and litigious challenges against MLB, players would be better served to collaborate with ownership. By demonstrating to one or more maverick owners the competitive advantages that would be reaped by deploying more capital into proper player development, minor leaguers could initiate a cascade of systemic reform across baseball. By transforming their captors into confederates, minor league players would finally cast off their shackles and reshape the business of organized baseball.

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<sup>162</sup> *MLB Payrolls: 1998–2017*, *supra* note 149; David Schoenfield, *Sabermetrics' Impact Grows As Baseball Delves Deeper Into The Numbers*, ESPN (Mar. 18, 2016), [http://www.espn.com/blog/sweetspot/post/\\_id/68862/impact-of-sabermetrics-grows-as-new-technology-expands-whats-possible](http://www.espn.com/blog/sweetspot/post/_id/68862/impact-of-sabermetrics-grows-as-new-technology-expands-whats-possible), [https://perma.cc/BMC5-TQZQ].





## Life After Death: How to Protect Artists’ Post-Mortem Rights

Loren Cheri Shokes\*

After dusk settled on the final night of the 2012 Coachella Valley Music and Arts Festival, Dr. Dre and Snoop Dogg introduced an unexpected guest during their headline performance. On stage with his hallmark “Thug Life” stomach tattoo, signature Timberland boots, and characteristic gold cross necklace, emerged Tupac Shakur.<sup>1</sup> Beaming in exaltation and utter disbelief, the roaring crowd of over 75,000<sup>2</sup> heard Tupac greet them as only Tupac could: “What the f\*ck is up, Coachella?”<sup>3</sup> He then proceeded to perform his classic single “Hail Mary” and was subsequently joined by Dr. Dre and Snoop Dogg for a rousing rendition of “2 of Amerikaz Most Wanted.”<sup>4</sup> While this performance would have left an indelible impression

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<sup>1</sup> Westfesttv, *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YOUTUBE (Apr. 17, 2012), <https://perma.cc/JM5S-T2LF>.

<sup>2</sup> Sarah Fitzmaurice & Donna McConnell, *Tupac. . .Lives! Snoop Dogg Joined On Stage By Slain Rapper As He’s ‘Resurrected’ To Perform With Dr Dre At Coachella*, DAILYMAIL.COM, <https://perma.cc/TLF5-3GNM> (last updated Apr. 17, 2012, 3:29 PM).

<sup>3</sup> Westfesttv, *supra* note 1.

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

on festivalgoers for simply uniting three of history's greatest rap artists on one stage, what happened that night in the blistering California desert heat was not possible just a few years earlier.<sup>5</sup> Tupac was shot and killed sixteen years prior to this groundbreaking performance;<sup>6</sup> "Hail Mary" was a posthumous release that Tupac never performed live;<sup>7</sup> and Tupac never uttered the word "Coachella," let alone greeted a Coachella crowd—the music festival was launched three years *after* his death.<sup>8</sup> The life size image that rapped and interacted with Dr. Dre and Snoop Dogg was simply that—a two-dimensional image that had been painstakingly perfected by James Cameron's Academy Award-winning visual effects and digital production company Digital Domain along with two hologram-imaging companies, U.K.-based Musion Systems and AV Concepts, to look, sound, act, and mimic even the most subtle and intimate idiosyncrasies that iconized the legendary artist.<sup>9</sup>

Two-dimensional and holographic concert technology's expeditious evolution has left in its wake a host of novel and significant legal questions pertaining to artists' post-mortem rights. The law has remained immutable in many critical areas on this topic and such stagnation has forced artists and their estates to operate under a miscellany of antiquated statutes and regulations that either provide no assistance or offer severely outdated forms of recourse.<sup>10</sup> This article will explore the problematic effects of the lack of legislative reform and propose how the law ought to be modernized for the digital era.

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<sup>5</sup> See Anthony McCartney, *Holograms Present Celebs With New Afterlife Issues*, MPR NEWS (Aug. 21, 2012), <https://perma.cc/KCN7-45R5> (explaining that the idea of using holograms in concerts had been entertained for years but the technology was not yet advanced enough).

<sup>6</sup> Lisa R. France, *Tupac Shakur: 20 Years After His Death*, CNN <https://perma.cc/X7RW-ZG8V> (last updated Sept. 13, 2016) (noting that Tupac was fatally shot on September 7, 1996 and passed away six days later).

<sup>7</sup> "Hail Mary" was a featured single on Tupac's final studio album, which was released less than a month after his death. See TUPAC, *THE DON KILLUMINATI: THE 7 DAY THEORY* (Death Row Records 1996).

<sup>8</sup> See Festival History, COACHELLA VALLEY MUSIC AND ARTS FESTIVAL, <https://perma.cc/FMC2-RDEZ> (last visited Sept. 19, 2016).

<sup>9</sup> Claire Suddath, *How Tupac Became A Hologram (Is Elvis Next?)*, BLOOMBERG NEWS (Apr. 16, 2012, 5:35 PM), <https://perma.cc/EZ4K-CF4G>.

<sup>10</sup> The Supreme Court has stated that there may be a need to curb the progress of certain forms of technology due to the law's inability to progress as quickly as technology. See *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring).

*Life Goes On*<sup>11</sup>

In response to technology's permeation into "the sacred precincts of private and domestic life,"<sup>12</sup> Samuel Warren and Supreme Court Justice Louis Brandeis, in their groundbreaking 1890 *Harvard Law Review* article, established the notion that the right to privacy and the right to life inherently encompass the right to be left alone. Courts were initially unwilling to recognize that celebrities and others who actively projected themselves into the public eye could suffer reputational and emotional harm and were thus excluded from asserting this privilege.<sup>13</sup> However, in the ensuing decades courts increasingly expressed perturbation regarding how to establish and enforce a legal regime to equipose individuals' right to be left alone<sup>14</sup> with the First Amendment's freedom of speech that also simultaneously did not stifle innovation.<sup>15</sup> As a result, the right of publicity was established as a distinct privilege independent of the right to privacy.<sup>16</sup> Although the right of publicity is widely regarded as the right "to control the commercial use of [one's] identity,"<sup>17</sup> which includes a person's name, image, likeness, and identifying characteristics,<sup>18</sup> recognition of a person's right of publicity

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<sup>11</sup> TUPAC, *Life Goes On*, on ALL EYEZ ON ME (Death Row Records 1996).

<sup>12</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>13</sup> See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 981 (1964).

<sup>14</sup> An individual's right to be left alone emerges from a variety of sources, including the Fourth Amendment. *E.g.* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1101 (2002).

<sup>15</sup> See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 218 (1954) (discussing how, prior to the judicial recognition of the right of publicity, multiple courts had expressed a willingness to protect certain forms of publicity that were outside the scope of traditional intellectual property theories); see generally Ross D. Petty & Denver D'Rozario, *The Use of Dead Celebrities in Advertising and Marketing: Balancing Interests in the Right of Publicity*, 38 J. OF ADVERT. 37, 39 (2009) (showing the history of the right of publicity in various jurisdictions).

<sup>16</sup> See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996) ("While the right [of publicity] was originally intertwined with the right of privacy, courts soon came to recognize a distinction between the personal right to be left alone and the business right to control use of one's identity in commerce.").

<sup>17</sup> *Cardtoons*, 95 F.3d at 967.

<sup>18</sup> See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1589 (1979).

is exclusively a state law matter,<sup>19</sup> and some states have yet to address the issue.<sup>20</sup> The lack of a uniform rule has created a multistate hodgepodge of divergent and antithetical state laws, spurring a “race to the bottom” where a handful of states have enacted overarching rights of publicity laws that attract forum shopping and curtail First Amendment protections and public domain interests.<sup>21</sup>

### *What's Going On*<sup>22</sup>

Whether or not an individual's right of publicity may be passed to their heirs and assigns upon their death, known as a post-mortem right of publicity, is entirely dependent upon the theory that individual states use as the foundation for their right of publicity laws.<sup>23</sup> Of the thirty-one states that currently recognize a right of publicity,<sup>24</sup> twenty-two regard it as a property right,<sup>25</sup> meaning that it may be assigned either via inter vivos or testamentary transfer, it persists for a finite period after a person's death, and it may be exercised posthumously regardless of whether the individual exploited their image or name during life.<sup>26</sup> The remaining states that recognize a right of publicity view it as an outgrowth of the right to privacy and, just as an individual's right of privacy is inherently personal and terminates at death,<sup>27</sup> the right of publicity is innately tethered to the individual and is not devisable. Whether the right of publicity may be posthumously enforced is contingent upon the law of the state where the deceased was domiciled<sup>28</sup> at death.<sup>29</sup> This means that persons domiciled in California at death,

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<sup>19</sup> Congress has never enacted a federal right of publicity statute and the only Supreme Court decision regarding the right of publicity is *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

<sup>20</sup> See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:3 (2d ed. 2016).

<sup>21</sup> See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW.14, 16 (2011).

<sup>22</sup> MARVIN GAYE, *What's Going On*, on WHAT'S GOING ON (Tamla Records 1971).

<sup>23</sup> Vick & Jassy, *supra* note 21, at 14.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> See 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:17 (2d ed. 2016).

<sup>26</sup> Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 172 (2010).

<sup>27</sup> Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980).

<sup>28</sup> “Domicile” is established by physical presence in a place in connection with intent to remain there. One acquires a “domicile of origin” at birth that persists

like Natalie Cole, have a post-mortem right of publicity because California subscribes to the idea that the right of publicity is a property right.<sup>30</sup> Contrarily, as with Marilyn Monroe,<sup>31</sup> anyone domiciled in New York, which views the right of publicity exclusively as a statutory, non-descendible, privacy right,<sup>32</sup> has no grounds to assert such a right. Additionally, not all states have a statute or common law right of publicity.<sup>33</sup> For instance, despite being domiciled in California throughout his entire life, if Tupac permanently moved to Montana immediately prior to his death, a state that lacks either a statutory or common law right of publicity,<sup>34</sup> California's right of publicity laws would be inapplicable. Consequently, Tupac's estate would be at a Montana judge's mercy deciding a case of first impression.

Nevertheless, impugning the validity and sagacity of strictly relying on a person's domicile to determine if their estate may to control the commercial use of their identity upon their death, some states have enacted statutes that circumvent this practice, creating uncertainty as to which law controls.<sup>35</sup> Indiana's right of publicity statute is one such example.<sup>36</sup> It explic-

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until a new one (a "domicile of choice") is acquired. "Domicile" is not always commensurate with one's "residence;" an individual may reside in one place but be domiciled in another. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

<sup>29</sup> *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 1000 (9th Cir. 2012); *Hebrew Univ. of Jerusalem v. GM LLC*, 903 F. Supp. 2d 932, 935 (C.D. Cal. 2012) (explaining that California's post-mortem right of publicity did not apply to Albert Einstein because he was domiciled in New Jersey at his time of death, and therefore only New Jersey's post-mortem right of publicity, if available, applied).

<sup>30</sup> The California Celebrities Rights Act, Cal. Civ. Code § 3344.1 (West 2009), was passed after California's Supreme Court held that Bela Lugosi's right of publicity terminated upon his death and could not pass to his heirs in *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979).

<sup>31</sup> *Milton*, 692 F.3d at 1000 (estopping Monroe's beneficiaries from asserting California's posthumous right of publicity because she was domiciled in New York at her time of death).

<sup>32</sup> See *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990).

<sup>33</sup> See *McCarthy*, *supra* note 19, at § 6:1.

<sup>34</sup> See *id.* at §§ 6:3, 6:8 (listing the states that have a common law and/or a statutory right of publicity).

<sup>35</sup> Anthony R. Masiello, *California's Right of Publicity—Bestowing Property Upon the Dead?*, HOLLAND & KNIGHT (Jan. 8, 2008), <https://perma.cc/HVE5-NG5W> (explaining that California's Right of Publicity Statute, codified in Cal. Civ. Code § 3344.1 (2012), was significantly expanded after the Screen Actors Guild sponsored legislation to eliminate the list of uses exempt from requiring the deceased celebrity's heirs' consent); *Tenn. ex rel. Elvis Presley Int'l Mem. Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987) (creating the colloquially termed "Elvis

itly rejects the domicile requirement by asserting that it “applies to an act or event that occurs within Indiana, regardless of a person[’s] domicile, residence, or citizenship”<sup>37</sup> and provides that a person who engages in prohibited conduct within Indiana, transports or causes infringing materials to be transported, publishes, disseminates, or exhibits in Indiana submits to Indiana’s jurisdiction.<sup>38</sup> Under a textualist view, it seems that “heirs of a celebrity who dies in a state not recognizing a postmortem right of publicity could sue a non-Indiana defendant in Indiana as long as the allegedly infringing materials were disseminated” in Indiana.<sup>39</sup> Nonetheless, courts have unhesitatingly struck down plaintiffs who assert the right to invoke Indiana’s statute as a means to evade their domiciliary’s right of publicity law when they are not domiciled in Indiana.<sup>40</sup> Moreover, other courts have explicitly rejected such reasoning and have steadfastly held that it is a person’s domicile at death that governs what, if any, right of publicity they have after death.<sup>41</sup>

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Law” that expanded Tennessee’s right of publicity statute to provide a post-mortem right of publicity).

<sup>36</sup> Indiana has the most extensive right of publicity statute in the nation. Due in large part to the lobbying efforts of Indiana-based CMG Management company, which represents the estates of some of the most iconic American celebrities including James Dean, Ingrid Bergman, Duke Ellington, Jesse Owens, Frank Lloyd Wright, Amelia Earhart, and Malcolm X (Neal Conan, “*Rights of Publicity*” *Extended Beyond the Grave*, NATIONAL PUBLIC RADIO (NPR) <https://perma.cc/YHT3-XYGQ> (Sept. 4, 2012 at 1:00 ET)), Indiana’s right of publicity encompasses a person’s “personality,” a fluid label that encapsulates virtually every attribute any U.S. court has found to fall within the auspices of the right of publicity including their name, photograph, image, likeness, distinctive appearance, voice, signature, gesture, and mannerisms. Indiana not only recognizes a post-mortem right of publicity but also retroactively grants a right of publicity to the estate and heirs of people who died within the last century. The remedies available if one’s right of publicity is violated include treble and punitive damages, injunctions, attorney’s fees, as well as the impoundment and destruction of infringing goods. Vick & Jassy, *supra* note 20, at 15-16.

<sup>37</sup> Ind. Code Ann. § 32-36-1-1(a) (West 2012).

<sup>38</sup> *Id.* at § 32-36-1-9.

<sup>39</sup> Vick & Jassy, *supra* note 21, at 15.

<sup>40</sup> *E.g.*, *Shaw Family Archives, LTD. v. CMG Worldwide, Inc.*, 589 F. Supp. 2d 331 (S.D.N.Y. 2008).

<sup>41</sup> Choice of law questions were the critical issues in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981). *Factors Etc.* purchased the copyright to a photo of Elvis Presley and began to sell it as a poster after the King of Rock and Roll’s death. Presley’s estate brought a right of publicity claim against *Factors Etc.*, arguing that, although Tennessee was where Presley was domiciled at his death, New York’s right of publicity law should control because that was where the infringe-

Rather than continue to passively condone a legal system that entices states to use broad, sweeping language to create loopholes that not only usurp other jurisdictions that have a more narrowly defined right of publicity, but also interferes with First Amendment and public domain interests, something needs to change.

*Thieves in the Temple*<sup>42</sup>

Tupac is not the first entertainer to have been digitally reproduced posthumously; numerous celebrities have been “raised from the dead,” appearing in advertisements, films, and television shows long after their deaths.<sup>43</sup> Moreover, the technology utilized for Tupac’s Coachella display has existed since the 1500’s.<sup>44</sup> Nevertheless, Tupac’s “death-defying” feat was nothing less than revolutionary—the projection was “not based on archival footage,” but was rather “a completely original, exclusive performance only for Coachella and that audience,”<sup>45</sup> making it the first time a performance was showcased that was not rendered during the artist’s lifetime.<sup>46</sup> As the Twittersphere was set ablaze by Tupac’s “resurrection,” reservations regarding artists’ autonomy and consent to their image being

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ment occurred. The Second Circuit Court of Appeals rejected this tort theory choice of law assertion and instead adhered to the domiciliary rule, meaning that Tennessee’s law would apply. Because Tennessee did not recognize a post-mortem right of publicity, Presley’s estate had no right of publicity to his name or likeness and therefore could not sue Factors Etc. for infringing his right of publicity.

<sup>42</sup> PRINCE, *Thieves in the Temple, on GRAFFITI BRIDGE* (Warner Bros. 1990).

<sup>43</sup> See Suddath, *supra* note 9 (explaining that a digital hologram of Frank Sinatra performed at former American Idol judge’s Simon Cowell’s fiftieth birthday celebration); Degen Pene, *Charlize Theron Stars With Grace Kelly, Marilyn Monroe and Marlene Dietrich in New Dior Ad (Video)*, THE HOLLYWOOD REPORTER (Sept. 6, 2011, 2:38 PM), <https://perma.cc/4FUY-AGNS> (observing that deceased actresses Marilyn Monroe, Grace Kelly, and Marlene Dietrich were digitally recreated for a 2011 Dior fragrance commercial); Harley Brown, *5 Other Awesome Holograms: Tupac, Janelle Monae and M.I.A., More*, BILLBOARD (May 19, 2014), <https://perma.cc/TV7X-568X> (listing five other instances of celebrities, both alive and deceased, performing virtually as two-dimensional images).

<sup>44</sup> Cyrus Farivar, *Tupac “Hologram” Merely Pretty Cool Optical Illusion*, ARS TECHNICA (Apr. 16, 2012, 6:45 PM), <http://perma.cc/TT7J-ZQ22> (explaining that the Tupac image was not a hologram but rather an optical illusion technique colloquially referred to as a “Pepper Ghost” that was first described in the 16th century and is often utilized by magicians).

<sup>45</sup> See Suddath, *supra* note 9.

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

reimagined were raised, drawing parallels to the ongoing ethical and moral debate over the virtues of genetic engineering.<sup>47</sup>

One of the most hotly debated aspects of digitally recreating Tupac for Coachella is that, in addition to interpolating words into the performance that the actual Tupac never uttered, the masterminds that erected the show purposefully expurgated Tupac's more controversial lyrics.<sup>48</sup> What made Tupac both a polarizing and revered figure was his unapologetic fearlessness addressing topics previously considered taboo through his lyrics, including, *inter alia*, racial profiling, police brutality, and drug use;<sup>49</sup> this indomitable attitude transmogrified Lesane Parish Crooks into Tupac Amaru Shakur.<sup>50</sup> Censoring Tupac's lyrics without explanation intentionally distorts and extinguishes the very aspects of his identity that made him a household name. Some claimed that this was the digital equivalent of genetic modification<sup>51</sup>—excluding aspects of Tupac that the programmers deemed unsavory or inconsistent with their artistic creation is synonymous to scientists modifying traits they deem unworthy of being passed down to future generations through genetic manipulation. In both instances, the person is stripped of their autonomy and an outside party is given complete dominion to affirmatively select the traits they judge worthy of being preserved for future generations. However, a stark contrast between artists' digital re-creation and genetic modification is that there are federal statutes in place that, in no uncertain terms, elucidate what is and is not permissible with respect to

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<sup>47</sup> “Genetic engineering is a process in which recombinant DNA (rDNA) technology is used to introduce desirable traits into organisms. A genetically engineered (GE) animal is one that contains a recombinant DNA (rDNA) construct producing a new trait. While conventional breeding methods have long been used to produce more desirable traits in animals, genetic engineering is a much more targeted and powerful method of introducing desirable traits into animals.” *Genetic Engineering*, U.S. FOOD AND DRUG ADMINISTRATION, <https://perma.cc/S8XK-FAVX> (last updated Sept. 16, 2016).

<sup>48</sup> The lyrics “Killuminati, all through your body; The blow's like a twelve gauge shotty” were omitted from Tupac's Coachella performance. *2Pac Lyrics “Hail Mary,”* AZ LYRICS, <http://www.azlyrics.com/lyrics/2pac/hailmary.html> (last visited Oct. 10, 2016); see Westfesttv, *supra* note 1.

<sup>49</sup> E.g., TUPAC, *Violent*, on 2PACALYPSE NOW (Interscope Records 1991); TUPAC, *Words of Wisdom*, on 2PACALYPSE NOW (Interscope Records 1991); TUPAC, *Changes*, on GREATEST HITS (Interscope Records 1998); TUPAC, *Me Against the World*, on ME AGAINST THE WORLD (Interscope Records 1995).

<sup>50</sup> See *Tupac Shakur Biography*, IMBD.COM, <https://perma.cc/33DY-L3P6> (last visited Oct. 10, 2016) (stating that Tupac's birth name is Lesane Parish Crooks).

<sup>51</sup> See generally Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 8 High Tech. L.J. 101, 108–09 (1993).



gene manipulation,<sup>52</sup> whereas there is no such counterpart to prevent computer scientists from gerrymandering specific aspects of artists' physical and personal traits to fit their artistic vision.

Justice Brandeis and Samuel Warren warned that when technology is utilized to misrepresent or re-engineer what a person says or does without observers knowing of its falsity, “[i]t both belittles and perverts,”<sup>53</sup> and such is true with respect to computer programmers punctiliously orchestrating avatars to conform to their creative vision, irrespective of what the actual artists would have wanted. By manipulating, injecting, and omitting specific aspects of artists' physical and personal traits, programmers beget a fictitious reality, where they re-introduce artists that, unbeknownst to the public, are imbued with new, hand-picked “genetics.”

*Mo Money Mo Problems*<sup>54</sup>

Jay-Z famously rapped, “I’m not a businessman. I’m a business, man!”<sup>55</sup> With the increasing demand for two-dimensional and holographic performances,<sup>56</sup> this subtle yet profound distinction has never rung truer, both for deceased and living artists.

Michael Jackson’s estate experienced a “commercial rebirth” after his death, moving from reportedly being half-a-billion dollars in the red<sup>57</sup> to

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<sup>52</sup> Steven Reinberg, *FDA Issues Final Regulations for Genetically Engineered Animals*, U.S. NEWS AND WORLD REPORT (Jan. 15, 2009, 4:00 PM), <https://perma.cc/S8XK-FAVX> (explaining that the Food and Drug Administration must pre-approve genetically engineered animals before they may be sold and people that produce such animals must adhere to the rules and regulations set forth by the National Environmental Policy Act).

<sup>53</sup> Warren & Brandeis, *supra* note 12, at 196.

<sup>54</sup> NOTORIOUS B.I.G., *Mo Money Mo Problems*, on LIFE AFTER DEATH (Bad Boy Records 1997).

<sup>55</sup> See Lola Ogunnaike, *Jay-Z, From Superstar to Suit*, N.Y. TIMES (Aug. 28, 2005), <https://perma.cc/WJ4C-XQ97> (observing that these are Jay-Z’s lyrics on the remix version of Kanye West’s song “Diamonds From Sierra Leone”).

<sup>56</sup> Patricia Garcia, *Would You Pay to Watch A Hologram Sing?*, VOGUE (May 20, 2016, 5:56 PM), <https://perma.cc/L29C-EE2M> (hoping to capitalize on the success of previous holographic-type performances, the estates of Billie Holiday, Elvis Presley, the Notorious B.I.G., and others have independently discussed creating digitalized versions of the artists for touring and other promotional purposes).

<sup>57</sup> Gil Kaufman, *The Michael Jackson Estate’s Billion-Dollar Turnaround: From \$500 Million in Debt to \$500 Million in Cash*, BILLBOARD (Mar. 15, 2016), <https://perma.cc/7PGT-X46R> (stating that, plagued by costly high profile criminal and civil legal battles and having last released an album in 2001, Michael Jackson’s estate was rumored to be \$500 million in debt).

having over \$500 million in cash.<sup>58</sup> This billion-dollar turn-around is largely due to the partnership between Jackson's estate and Cirque du Soleil to create the tremendously prosperous extravaganza utilizing the same technology to reimagine the King of Pop that reincarnated Tupac for Coachella.<sup>59</sup> Other deceased musicians' estates have also established multi-million dollar posthumous entertainment empires through album sales, memorabilia, and advertisements,<sup>60</sup> but are now beginning to recognize the potential to further capitalize on fans' nostalgia through virtual, posthumous touring. Despite the positive aspects this modern frontier brings, the financial temptation to capitalize on the demand for an artist after their death is ripe for abuse.

Tupac was fortunate that Dr. Dre and Snoop Dogg, his close friends during his life, only began actively pursuing the idea of bringing him back for their headlining performance after receiving permission from Tupac's mother, remained deeply committed to ensuring their friend was respectfully replicated, and donated to the Tupac Amaru Shakur Foundation.<sup>61</sup> The issue is that other celebrities may not have their legacies so well preserved and honored.

Babe Ruth's avaricious estate illustrates the quandary of allocating total control over a celebrity's image to their estate and the renunciation of the artist's wishes in pursuit of financial gain. At the height of his career, the Bambino was enjoined from naming his line of candy bars "Babe Ruth" due to possible confusion with Curtiss Candy's "Baby Ruth" candy bars.<sup>62</sup> However, fifty years after his death, his estate permitted Curtiss Candy to use his name, persona, and likeness to promote its Baby Ruth line of candy bars, which undoubtedly would have made the Sultan of Swat "choke[ ]."<sup>63</sup> Disregarding Ruth's detest of Curtiss Candy and coveting money over his

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<sup>58</sup> Zack O'Malley Greenburg, *Infographic: Michael Jackson's Multibillion Dollar Career Earnings, Listed Year by Year*, FORBES (May 28, 2014, 9:01 AM), <https://perma.cc/4Q87-2SR2>.

<sup>59</sup> See Zack O'Malley Greenburg, *Michael Jackson and the Economics of Touring After Death*, FORBES (Oct. 25, 2011, 10:35 AM), <https://perma.cc/ZJ6C-TNTL>; see also Arion McNicoll & Nick Glass, *The Technology Bringing Sinatra, Tupac Back to Life*, CNN, <https://perma.cc/SYF4-NPFC> (last updated Jan. 8, 2014, 3:45 PM).

<sup>60</sup> See *Michael Jackson, Elvis Presley Are Top-Earning Dead Musicians*, ROLLING STONE MAGAZINE (Nov. 1, 2012), <https://perma.cc/834M-8XKW>.

<sup>61</sup> Fitzmaurice & McConnell, *supra* note 2.

<sup>62</sup> *George H. Ruth Candy Co. v. Curtiss Candy Co.*, 49 F.2d 1033 (C.C.P.A. 1931).

<sup>63</sup> See Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209, 232 (1998).

desires encapsulates the dangers of permitting those who never knew the celebrity to decide how to preserve their image.

*We Need A Resolution*<sup>64</sup>

Unnerved by the sharp dichotomy between technology's meteoric rate of progression and the legal system's lethargic state of development, Warren and Brandeis clarified that it was Congress' and the courts' duty to define the law anew to best accommodate the ever-changing political, social, and economic ecosystem.<sup>65</sup> Post-mortem live concerts represent a "fundamental shift in the monetization of fame"<sup>66</sup> and current intellectual property,<sup>67</sup> privacy, and publicity laws are unequipped to address the unconventional legal, ethical, and moral questions posed by this new technology form. To ameliorate the lack of uniformity brought about by this deficient patchwork of conflicting laws and regulations, a federal opt-in right of publicity statute grounded in the Commerce Clause that preempts state right of publicity laws is the ideal solution.<sup>68</sup>

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<sup>64</sup> AALIYAH, *We Need A Resolution*, on AALIYAH (Blackground Records 2001).

<sup>65</sup> See Warren & Brandeis, *supra* note 12, at 195.

<sup>66</sup> See Greenburg, *supra* note 58.

<sup>67</sup> An action for trademark infringement under the Lanham Act requires the involvement of goods and services, an effect on interstate commerce, false designation of origin or description, and a false or misleading factual representation (*see* 15 U.S.C. § 1125(a) (2012)). Only permitting trademark infringement cases to advance if they satisfy each of these requirements excludes a host of potential identity misappropriation cases. Therefore, the limited scope of cases that the Lanham Act protects means that the right of publicity cannot be based upon current trademark law. With respect to copyrights, "[t]here is no copyright claim if the image is not actually copied, but rather recreated and manipulated in cyberspace" (Usha Rodrigues, Note, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1202 (2001); *see* 17 U.S.C. § 102 (2012)). This excludes holographic and other three-dimensional concert images from copyright protection. Lastly, federal law states that for an invention to be eligible to be patented, it must be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof," and adhere to a host of other restrictions (*see* 35 U.S.C. § 101 (2012)). The projected images used in post-mortem shows do not meet this criterion and are therefore ineligible to be patented.

<sup>68</sup> An artist's descendants or intestate heirs may be blinded by the potential profits of leasing out their legacy to the highest bidder with little to no regard for what the artist would have wanted. Without revealing the exact cost of creating the Tupac illusion, Nick Smith, president of AV Concepts, the San Diego company that projected and staged the Tupac optical illusion, explained that a comparable display would cost between \$100,000 and \$400,000 (Gil Kaufman, *Exclusive: Tupac*

One concern may be that a federal right of publicity statute would unconstitutionally infringe on state sovereignty.<sup>69</sup> However, this is unwarranted. Through the Commerce Clause, the Constitution is solicitous of Congress' right to regulate interstate commerce.<sup>70</sup> Expounding on the depth of this right, the Supreme Court explained that Congress' power "over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."<sup>71</sup> As countless people across various states will purchase tickets, posters, apparel, and other merchandise from such concerts,<sup>72</sup> the right of publicity undoubtedly affects interstate commerce, thereby falling squarely under the Commerce Clause's auspices.<sup>73</sup> Therefore, it is within Congress' constitutionally guaranteed right to regulate the right of publicity. Moreover, the Commerce Clause is a necessary safeguard as the Copyright Clause fails to protect matters not considered "[w]ritings."<sup>74</sup>

Limiting the right of publicity to preserve celebrities' interest in the commercial use of their identities, and not biographies or other factual, newsworthy stories about them,<sup>75</sup> ensures that the First Amendment's pro-

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*Coachella Hologram Source Explains How Rapper Resurrected*, MTV (Apr. 16, 2012), <https://perma.cc/BZ6J-34CG>). When factoring in the prodigious expense of producing post-mortem virtual tours, artist's estates would undoubtedly be tempted to sacrifice part of the performance quality in exchange for higher revenues, much to the artist's chagrin if they were still living. This begs the question, even if all states defined rights of publicity as fully devisable property rights that automatically create post-mortem rights of publicity, is it advisable for the celebrity's estate and afterlife animator to automatically have the right to exert total control over their legacy upon death?

<sup>69</sup> Rodrigues, *supra* note 67, at 1226–27.

<sup>70</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>71</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

<sup>72</sup> *Nine Ways Musicians Actually Make Money Today*, ROLLING STONE (Aug. 28, 2012), <https://perma.cc/2ZXZ-7BP4> (explaining that a large percentage of artists' concert revenue comes from selling concert merchandise).

<sup>73</sup> See, e.g., *NLRB v. Fainblatt*, 306 U.S. 601, 605–09 (1939) (concluding that it is immaterial that the employers themselves were not engaged in interstate commerce, and the only matter of significance was the fact that the company's materials were transmitted to them and the final product was transported from them through channels of interstate commerce, thus triggering the Commerce Clause); see also *United States v. Moghadam*, 175 F.3d 1269, 1276–77 (11th Cir. 1999) (finding that making and selling unauthorized recordings of live concerts has a substantial impact on interstate commerce and thus falls within the scope of the Commerce Clause).

<sup>74</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>75</sup> See *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (N.Y. Sup. Ct. 1973).

tection of free speech is preserved.<sup>76</sup> Part of freedom of speech is freedom *from* speech, and courts have held that the right of publicity takes precedence over freedom of speech<sup>77</sup> when entities use others' names, personas, and likeness for their own commercial enterprise and not to share news or otherwise educate the public.<sup>78</sup> Even when the "commodity or article sold is closely identifiable with the major events" in a celebrity's life, if it is used for commercial purposes, the celebrity's rights of publicity outweighs First Amendment interests.<sup>79</sup> Lastly, the Supreme Court has found where "the invasion of [privacy] is mental rather than physical, it [is] possible to protect a right of privacy without doing serious damage to First Amendment interests."<sup>80</sup>

The *mélange* of inconsistent rulings within the Ninth Circuit alone regarding the precise scope of artists' estates' power to protect the commercial use of their identity further evidences the vitality of federalizing the right of publicity. In *Experience Hendrix I*,<sup>81</sup> Jimi Hendrix's estate rigorously contested a third party's use of the late rockstar's image. The U.S. District Court for the Western District of Washington was tasked with determining the constitutionality of Washington's Personality Rights Act ("WPRA"), which extended the state's liberal right of publicity statute to all individuals, regardless of their domicile at death.<sup>82</sup> The court held the statute unconstitutional for violating the Due Process Clause,<sup>83</sup> Full Faith and Credit

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<sup>76</sup> William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 Ark. L. Rev. 43, 89 (2005) ("[T]he First Amendment protects publications made for the primary purpose of parody or reporting items of general interest. However, when the primary purpose is promoting trade—as in the case of merchandise—a right of publicity claim can survive the assertion of a First Amendment defense. Many of the right of publicity statutes incorporate these First Amendment defenses (and even if not stated in the statute, the First Amendment defenses would be available.); see *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (1995).

<sup>77</sup> See Felcher & Rubin, *supra* note 18 at 1589.

<sup>78</sup> *Rosemont*, 340 N.Y.S.2d at 146; *Abdul-Jabbar v. GMC*, 75 F.3d 1391, 1400 (9th Cir. 1996).

<sup>79</sup> *Rosemont*, 340 N.Y.S.2d at 146.

<sup>80</sup> Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 204 (discussing *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)).

<sup>81</sup> *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011).

<sup>82</sup> See *id.* at 1133.

<sup>83</sup> *Id.* at 1135 (explaining that, because the WPRA pertains to substantive matters, it must have sufficient contacts to people outside the State of Washington).

Clause,<sup>84</sup> and Commerce Clause.<sup>85</sup> However, on appeal in *Experience Hendrix II*,<sup>86</sup> the Ninth Circuit shockingly reversed. Finding the WPRA constitutional, the court held that when the statute was applied to the current dispute, which involved selling goods within Washington's borders, the WPRA neither violated the Due Process, Commerce, nor the Full Faith and Credit Clauses because this particular dispute only involved transactions within Washington.<sup>87</sup> Notably, the court failed to decide the statute's constitutionality when implicated in transactions occurring outside Washington.<sup>88</sup>

This marked the first time a court upheld and enforced a statute granting post-mortem rights to an individual who was not its domiciliary. The ruling's peculiarity is exacerbated by the fact that it directly contradicts the Ninth Circuit's own holding in *Milton H. Greene*,<sup>89</sup> where the court declined to even entertain the idea of applying California's right of publicity statute to any economic transactions pertaining to Marilyn Monroe because she was a New York domiciliary at her death. And yet, in *Experience Hendrix II*, the court embraced this very line of reasoning in upholding WPRA's legality.<sup>90</sup> The bifurcation of logic within the Ninth Circuit alone leaves artists' and their estates in a state of uncertainty and further explicates the need to federalize this area of law.

Furthermore, this type of regulation is not unprecedented. In 1984, Congress enacted the Semiconductor Chip Protection Act,<sup>91</sup> filling a void for a field<sup>92</sup> left inadequately protected by existing intellectual property law.

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<sup>84</sup> *Id.* (finding that the WPRA violated the Full Faith and Credit Clause, codified in Article 4, Section 1 of the U.S. Constitution, because the state Hendrix was domiciled, which was not Washington, had a greater interest in regulating whether he had a post-mortem right of publicity).

<sup>85</sup> *Id.* at 1140–43 (observing that because the WPRA attempted to govern transactions that occurred entirely outside the State of Washington's borders, it violated the Commerce Clause's restraint on "states from engaging in extraterritorial regulation.").

<sup>86</sup> *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829 (9th Cir. 2014).

<sup>87</sup> *See id.* at 836–37.

<sup>88</sup> *Id.* at 837.

<sup>89</sup> 692 F.3d at 1000.

<sup>90</sup> *See* 762 F.3d at 836.

<sup>91</sup> 17 U.S.C. § 901–14 (2012).

<sup>92</sup> The Semiconductor Chip Protection Act legally protects integrated circuits' layouts upon registration, making it illegal to copy without permission. *See Federal Statutory Protection for Mask Works*, U.S. COPYRIGHT OFFICE 100, 1–2 (Sept. 2012), <https://www.copyright.gov/circs/circ100.pdf>; Steven P. Kasch, *The Semiconductor Chip Protection Act: Past, Present, and Future*, 7 Berkeley Tech. L.J. 71, 73–74 (1992),

This *sui generis* law<sup>93</sup> was adopted after Congress recognized the pressing need for such regulation and tailored it with specific safeguards and provisions so as not to infringe on other areas of intellectual property law.<sup>94</sup> The right of publicity is analogous to the need to protect semiconductor chips—both are generally outside intellectual property and privacy laws protection—and, as it did with the Semiconductor Chip Protection Act, Congress has the authority to affirmatively protect this field.

*“So Tell Me What You Want, What You Really Really Want”*<sup>95</sup>

Immanent in the inexorable evolution of technology are boundless possibilities for third parties to manipulate artists’ legacies. In addition to “boilerplate” estate planning considerations for entertainers and musicians, such as future royalty earnings as well as posthumously released albums and singles, celebrities must plan for their “digital afterlife.” An opt-in federalized right of publicity scheme does just this—it protects artists’ autonomy to assiduously set and buttress the contours of their post-mortem legacy. If artists opt-in, they would be able to prescribe the exact amount of liberty, if any, re-animators would be allotted, ensuring that it is the artist’s creative vision, and not their estate’s or re-animator’s, being espoused.

There are manifold mechanisms artists may avail themselves of to secure their eternalized post-mortem reputation in the manner that they want well after their death. For instance, just as artists sign the rights to their master recordings to their record labels, the right to create post-mortem concerts could also be incorporated in their label deals. Moreover, artists domiciled in a state that recognizes a post-mortem right of publicity at the time of their death could propound in their will<sup>96</sup> or through a trust the

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<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1100&context=btlj>.

<sup>93</sup> U.S. COPYRIGHT OFFICE, *supra* note 92 (“The legal requirements for [semiconductor chips] protection differ from those for copyright protection in terms of eligibility for protection, ownership rights, registration procedures, term of protection, and remedies for rights violations.”).

<sup>94</sup> While the Semiconductor Chip Protection Act covers certain types of memory chip topographies, the protection does not extend to the information stored on those chips as that information is explicitly within copyright’s auspices. *See id.* The Semiconductor Chip Protection Act purposefully does not protect the functional aspect of chip designs, as that is specifically reserved for patent law. *See H.R. REP.* 98–781, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5752.

<sup>95</sup> SPICE GIRLS, *Wannabe*, on SPICE (Virgin Records 1996).

<sup>96</sup> A person’s assets are categorized as either probate or non-probate and a will can only govern the distribution of probate assets. While each individual state de-

person(s) or entity they want to serve as executor of their estate upon their death.

A will is a bastion of the fundamental tenant in U.S. law of the freedom of disposition. Any adult of sound mind has the right to execute a will apportioning who shall receive their assets upon death, which includes their publicity rights in states that regard the right of publicity as a descendible property right.<sup>97</sup> Either in a residuary clause or an explicit provision of their will, artists can appoint a person or entity the rights over their right of publicity, dictate the terms under which such a person or entity may expropriate their image for commercial gain, and create any other restrictions they desire. So long as such conditions are neither illegal nor run afoul of public policy, the testator's intent will control the disposition of their assets. If a person dies without a will, the distribution of their estate falls under the aegis of the pre-determined intestacy laws of the state in which the decedent is domiciled at death and passes to the heirs of the deceased according to the degree of relationship they have with the decedent.<sup>98</sup> A mere oral statement about how one wants their assets distributed upon death is insufficient; to be valid a will must be in writing.<sup>99</sup> This means that if an artist simply avers how they want their assets managed after their death but fails to reduce their intent to writing, a court will not honor their request and their assets will pass via intestacy, even if that results in the appanage of their

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finances what encompasses probate and non-probate property in its jurisdictional code, most states adhere to the Uniform Probate Code's ("UPC") definitions. Under the UPC, non-probate property includes will substitutes (e.g., life insurance policies), employee benefit plans, annuities, mortgages, bonds, promissory notes, and pension plans. *See* Unif. Probate Code § 6-101 (UNIF. LAW COMM'N amended 2010). Probate assets, on the other hand, include assets solely owned by the decedent during life and title was vested in their name. *See also* Frederick M. Sembler and Michael J. Feinfeld, *What Is Subject To Probate?*, *Planning an Estate: A Guidebook of Prin. & Tech.* § 6:2 (4th ed. 2016). Accordingly, unless a person has contractually granted another entity the rights to any copyright or trademark in their name, likeness, image, and/or persona, such items constitute probate assets and thus can validly be given to a person's heirs and assigned through a will.

<sup>97</sup> Unif. Probate Code § 2-501 (UNIF. LAW COMM'N amended 2010).

<sup>98</sup> *See e.g.*, Unif. Probate Code § 2-103 (UNIF. LAW COMM'N amended 2010) (explaining how a person who dies without having validly executed a will during their lifetime first has their assets distributed to their living descendants, to their parents if they are not survived by descendants, to their siblings that survive them if they have no living descendants or parents, to their grandparents heirs if they have no descendants, parents, or siblings, and, in the event that there is not a legitimate living taker the decedent's assets, escheat to the state).

<sup>99</sup> Unif. Probate Code § 2-502 (UNIF. LAW COMM'N amended 2010).



estate to those the artist orally declared should not take from or exercise control over their estate.

Despite the sapient advantages of creating a valid will, the vast majority of Americans, including some of the most venerated and illustrious public figures,<sup>100</sup> die intestate.<sup>101</sup> Abraham Lincoln, lawyer and sixteenth president of the United States, died without executing a will, leaving his widow and young children racing in the immediate aftermath of the national tragedy to entreat an Illinois County Court judge to appoint a trusted family friend as administrator of his estate.<sup>102</sup> Civil rights leader Martin Luther King Jr. died without a will and his surviving children have remained embroiled in a series of acrid disputes over how to best manage his estate, including his Nobel Peace Prize and Bible, nearly fifty years after his death.<sup>103</sup> In the absence of a will, billionaire entrepreneur Howard Hughes' estate was not settled until 2010, more than thirty-four years after his death, after an egregiously expensive succession of court battles.<sup>104</sup> Famed Spanish artist Pablo Picasso's billion dollar estate passed via intestacy and was initially ordered by a French court to be overseen by his illegitimate son who elected to not exhibit hundreds of his late father's works because it does not "befit[ ] his discreet style of living."<sup>105</sup> Only after six years of browbeat

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<sup>100</sup> Some of the most well-known people who died without a will are guitar legend Jimi Hendrix, Jamaican musician Bob Marley, Nirvana frontman Kurt Cobain, rapper Tupac Shakur, entertainer-turned-Congressman Salvatore Phillip "Sonny" Bono, soul singer Barry White, former NFL quarterback Steve McNair, rapper Nate Dogg, and British soul singer Amy Winehouse. See Kelly Phillips Erb, *17 Famous People Who Died Without a Will*, FORBES (Apr. 27, 2016), <https://perma.cc/KA9G-D42L>.

<sup>101</sup> *Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies*, ROCKET LAWYER (Apr. 21, 2015), <https://perma.cc/N6FG-VJXW> (finding that sixty-four percent of all Americans do not have a will, seventy percent of Americans between the ages of 45 and 54 do not have a will, and fifty-four percent of Americans between the ages 55 and 64 do not have a will).

<sup>102</sup> Danielle Mayoras & Andy Mayoras, *Are You Better Prepared Than Abraham Lincoln Was?*, FORBES (Dec. 4, 2012), <https://perma.cc/P9F6-R4F6>.

<sup>103</sup> See Jenny Jarvie, *Legal Battles of Martin Luther King Jr.'s Children Threaten His Legacy*, L.A. TIMES (Jan. 19, 2015), <https://perma.cc/3QUG-VEZX> (describing how Martin Luther King Jr.'s children have been embattled in a bitter dispute over possession of the civil rights leader's Bible and Nobel Peace Prize award); *10 Famous People Who Died Without A Will - and the Problems It Caused*, THE TELEGRAPH (May 25, 2016), <https://perma.cc/CL7M-C52D>.

<sup>104</sup> Kris Hudson, *GGP, Howard Hughes Heirs Settle Las Vegas Payment*, WALL ST. J. (Sept. 20, 2010), <https://perma.cc/XZ7A-Z8GF>.

<sup>105</sup> Pamela Andriotakis, *The Son Picasso Shut Out of His Life Helps Mount a Giant New York Tribute to His Father*, PEOPLE (May 26, 1980), <https://perma.cc/F58Q-K3WV>.

negotiations, and a cost of \$30 million, was Picasso's estate finally divided amongst his sundry legitimate and illegitimate children.<sup>106</sup> In the acrimonious saga appropriately coined "The Girl in the £20 Million Inheritance Battle," Swedish author Stieg Larsson, best known for writing the internationally acclaimed *Girl with the Dragon Tattoo* crime trilogy, died with an invalid will.<sup>107</sup> As a result, rather than have his estate go to his intended charities and devoted partner of thirty-two years, whom he never married, his entire estate, including all future royalties to his novels and profits from all feature films, solely went to his father and brother, his closest living blood relatives. When asked how the late author would surmise the way his estate was meted out, Larsson's partner lamented, "[i]t would have been beyond Stieg's worst nightmares to know that someone other than me was handling the rights to his books and to know that the money we planned to invest is gone."<sup>108</sup>

Perhaps the most unexpected artist who died without having executed a valid will is Prince Rogers Nelson, the artist most commonly known as Prince. During his life, Prince amassed a reputation of being a shrewd businessman who was fiercely protective of the rights to his music. In his pursuit of universal ascendancy over his body of work, Prince filed a \$22 million copyright infringement suit against twenty-two of his fans who posted links to footage of his concerts on social media websites, severely curtailed access to videos of his music and performances on YouTube, removed his entire body of work from all music streaming services except Jay-Z's notoriously artists friendly platform Tidal, and infamously cut all ties

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<sup>106</sup> Milton Esterow, *The Battle for Picasso's Multi-Billion-Dollar Empire*, VANITY FAIR (Mar. 7, 2016), <https://perma.cc/A96Q-QGZW>.

<sup>107</sup> To be valid, a will must satisfy all of the attestation requirements of the jurisdiction, which typically entails that the will is in writing, signed by the testator, and either signed by two disinterested witnesses or a notary public within a reasonable time after witnessing the testator sign. See Unif. Probate Code § 2-502 (UNIF. LAW COMM'N amended 2010). Alternatively, if the jurisdiction recognizes holographic wills, to be valid a will must simply be signed by the testator and the will's contents must be in the testator's handwriting. See *id.* A will that fails to meet all of the requirements for attested or holographic wills cannot be probated and the testator's property will pass as though they never created a will. With respect to author Stieg Larsson, although he created a will in 1977 before his passing that stated that he wanted the proceeds from his *Girl with the Dragon Tattoo* series to go to anti-fascist and domestic violence charities, because it was not witnessed and the jurisdiction did not recognize holographic wills, his estate passed to his father and brother. See Esther Addley, *The Girl in the £20m Inheritance Battle – Partner of Late Novelist Stieg Larsson Fights for Share of Fortune*, THE GUARDIAN (Nov. 2, 2009), <https://perma.cc/4NYR-LXMQ>.

<sup>108</sup> See Addley, *supra* note 107.

with his record label Warner Bros. and changed his name to an unpronounceable symbol until Warner Bros. granted him ownership over his music catalogue.<sup>109</sup> Notwithstanding the ubiquitous control he exerted over his intellectual property during his life, without a will or trust naming a particular individual or entity to continue the vigilant policing of his collection of works, the entirety of Prince's \$300 million estate passed via Minnesota intestacy laws to his sister,<sup>110</sup> a former crack cocaine addict and prostitute,<sup>111</sup> and five half-siblings.<sup>112</sup> The implications of his failure to postulate a management scheme for his posthumous estate created a host of pertinent and yet unanswered questions: how did he want the alleged vault of his unreleased songs handled?; did he want any of his works sampled by other artists for a licensing fee?; did he want independent computer animators to re-envision him as a hologram for commercial purposes without any restraint on what they could have the holographic image say or do? Even if Prince orally avouched the answers to these and other questions during his lifetime, that alone is exiguous. Prince's failure to exercise the same percipient judgment over the management of his posthumous estate that he did during his life resulted in the forfeiture of his right to actively provide for the future governance of his assets. Without a written will or other estate plan in place at the time of his death, the entirety of everything Prince stood for in life could fall into disarray.

Either as an alternative to or in conjunction with a will, a trust is another commonly used tool of succession that artists can contrive during their lifetime to plan for the handling of their estate upon their death. A trust is a fiduciary arrangement<sup>113</sup> whereby the trust creator ("settlor") appoints a trustee to hold assets on behalf of a beneficiary or manifold beneficiaries selected by the settlor.<sup>114</sup> Trusts can be organized in numerous ways depending on the settlor's needs and may specify precisely when and how

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<sup>109</sup> Ryan Faughnder, *Prince Took a Protective Stance on Music Copyrights*, L.A. TIMES (Apr. 21, 2016), <https://perma.cc/B2XN-JBNP>.

<sup>110</sup> Jethro Nededog, *Inside the Potentially "Messy" Future of Prince's \$300 Million Estate*, BUSINESS INSIDER (Apr. 23, 2016), <https://perma.cc/5JU9-3JZ3>.

<sup>111</sup> Rose Minutaglio, *Prince and Sister Tyka Made "Pact Not to Bother Each Other When it Came Their Careers," Publicist Says*, PEOPLE MAGAZINE (Apr. 26, 2016), <https://perma.cc/LXC7-5RXD>.

<sup>112</sup> Daniel Kreps, *Prince Estate: Sister, Five Half-Siblings Named Heirs*, ROLLING STONE (May 19, 2017), <https://perma.cc/US57-QLXY>.

<sup>113</sup> Regardless of the type of trust the settlor creates, trustees are legally obligated to administer the trust in good faith, in accordance with the trust's terms for the beneficiaries' interest, impartially, and prudently. See Unif. Trust Code §§ 801–804 (UNIF. LAW COMM'N 2000).

<sup>114</sup> *What is a Trust?*, FIDELITY, <https://perma.cc/8PBR-AJT2>.

the trust's assets pass to which beneficiaries.<sup>115</sup> For a myriad of reasons, individuals with large, wealthy estates may prefer to have the disposition of their worldly possessions and other descendible assets controlled by a trust rather than a will. For instance, unlike a will, the terms of a trust can remain private indefinitely, trusts typically do not have to go through the probate process so the beneficiaries may gain assets to the trust's assets prior to the settlor's death, and trusts also provide multitudinous income, gift, and estate tax saving benefits.<sup>116</sup>

Robin Williams' trust, created two years before the actor and comedian's death, has been widely praised for its exemplary prudent and innovative craftsmanship. While many entertainers who create a trust or will conventionally provide that a certain brand or company cannot use their image for a time period after they pass away, Williams' trust with respect to his publicity rights was all-encompassing. Specifically, it bequeathed his publicity rights to the charitable Windfall Foundation and established an outright ban on the use of the Academy Award winner's name, signature, photograph, likeness, three-dimensional or holographic impressions, and digital imprints into various media forms for the first twenty-five years after his death. The astute assignment of Williams' publicity rights to a charitable organization as well as the inclusion of a quarter century long interdict on postmortem usage of his image were in part prompted in reaction to the vitriolic dispute between Michael Jackson's estate and the Internal Revenue Service ("IRS") regarding the monetary value of the late pop-superstar's name and image for estate tax purposes.<sup>117</sup> By enjoining the commercial use of his persona, Williams' trust renders the value of the his publicity rights nil and ipso facto untaxable.<sup>118</sup> Additionally, Williams ensured that his publicity rights would be left to a charitable organization as defined by the

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

<sup>116</sup> See Robert S. Barnett & Elizabeth Forspan, *Avoiding the Squeeze: Trusts, Estates, and the New ATRA Tax Regime*, JOURNAL OF ACCOUNTANCY (Mar. 31, 2014), <https://perma.cc/73K9-3XZ3>.

<sup>117</sup> As previously explained, Michael Jackson's estate experienced a flush of income in the years succeeding his death, particularly due to the successful documentary *This Is It* that grossed approximately \$261 million, a profitable *Cirque du Soleil* tribute show, as well as posthumous albums, video games, and other commercial exploitations. As a result, the IRS claimed that Jackson's name and image at the time of his death was valued at over \$430 million while Jackson's estate valued his legacy at a meager \$2,105. Eriq Gardner, *Michael Jackson Estate Faces Billion-Dollar Tax Court Battle*, THE HOLLYWOOD REPORTER (Apr. 20, 2016), <https://perma.cc/QN3T-LDKS>.

<sup>118</sup> Eriq Gardner, *Michael Jackson Estate Faces Billion-Dollar Tax Court Battle*, THE HOLLYWOOD REPORTER (Apr. 20, 2016), <https://perma.cc/QN3T-LDKS>.

Internal Revenue Code so that his family would be able to apply the one hundred percent charitable deduction with respect to his publicity rights against any estate tax.<sup>119</sup> Cognizant that federal tax laws are subject to dramatic changes depending on the political climate, Williams' trust contained a "catch-all" provision mandating that, in the event that the initially appointed Windfall Foundation loses its status as a charitable organization for tax purposes,<sup>120</sup> his publicity rights would be given to another organization with a focus on humanitarian efforts<sup>121</sup> that qualified for the IRS's charitable deductions.<sup>122</sup> Granting the rights to Williams' image to a charitable foundation and placing restrictions on when and under what circumstances his image may be used in the future not only obviated a costly and lengthy tax dispute concerning the exact value of Williams' public image, but also proved to be an exceptionally adroit and felicitous legal maneuver that preserved Williams' ability to retain control over his personal reputation from beyond the grave.<sup>123</sup>

Notwithstanding the tremendous salutary consequences of having a valid will or trust that provide for how an artist's estate will be governed after their death, the versatility of such devices is limited. Although the

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<sup>119</sup> See Allyson Versprille, *Michael Jackson Estate-Tax Woes Provide Lesson for Celebrities*, BLOOMBERG BNA (Feb. 28, 2017), <https://perma.cc/N64S-RQS3>.

<sup>120</sup> See IRC § 501(e) (defining what qualifies as a charity for purposes of the Internal Revenue Code).

<sup>121</sup> Eric Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (Mar. 30, 2015), <https://perma.cc/4FUY-AGNS>.

<sup>122</sup> A contingent gift from one charity to another is not subject to the Rule Against Perpetuities. Robert G. Wolfe, *Rules Against Perpetuities and Gifts to Charity*, 17 INDIANA L.J. 205, 214 (1942), <https://perma.cc/LN77-Y8MR> (citing *Christ's Hospital v. Grainger*, 1 Macn. & G. 460 (1848)).

<sup>123</sup> Heeding the precautionary tale of Michael Jackson's estate tax woes and Williams' gainful tax avoidance techniques, in his will, the late Beastie Boy member Adam Yauch provided that "in no event may my image or name or any music or any artistic property created by me be used for advertising purposes." See Deborah L. Jacobs, *Part Of Beastie Boy Adam Yauch's Will, Banning Use Of Music In Ads, May Not Be Valid*, FORBES (Aug. 13, 2012), (emphasis added) <https://perma.cc/FF73-9ZMV>. Unfortunately for Yauch, this provision does not have the same forceful effect on his intellectual property as Williams' trust prohibition. The issue is that part of Yauch's artistic property was created when he was a member of the Beastie Boys and is owned by all members of the band. Yauch can only dispose of what he owned in his will. This means that if all band members jointly own the Beastie Boy's copyrights, each member can do what they want with the music with the only restriction being that they would have to pay Yauch's estate a portion of the profits. See Deborah L. Jacobs, *Part Of Beastie Boy Adam Yauch's Will, Banning Use Of Music In Ads, May Not Be Valid*, FORBES (Aug. 13, 2012), <https://perma.cc/FF73-9ZMV>.

growing trend is to recognize the right of publicity as a property right descendible upon death, if an artist is domiciled in a state that lacks either a statutory or common law right of publicity or only views the right of publicity as a privacy right, any provision in an artist's will or trust for how their image, name, or likeness would be governed after their death would be rendered void and entirely disregarded. However, in the event that states or the federal government enact a right of publicity that contains a post-mortem provision, the legislature has the ability to retroactively apply such a law to artists who predeceased its passage. This means that any provision in an artist's valid will, trust, or other testamentary document providing for the governance of their right of publicity after death would be binding. The concept of a retrospective right of publicity is not novel; California and Indiana's<sup>124</sup> post-mortem right of publicity statutes already provide the two most sweeping retroactive clauses. Regardless of whether the deceased died before the statute's enactment, California's Civil Code permits a cause of action within seventy years after the deceased's death<sup>125</sup> while Indiana's Code, in addition to containing an unparalleled extra-territorial effect,<sup>126</sup>

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<sup>124</sup> See *Indiana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://perma.cc/7XKR-EFDH> (explaining how Indiana's right of publicity statute was amended eighteen years after it was initially passed to apply retroactively to persons who died before the statute's enactment. Furthermore, although courts have yet to directly decide the issue, Indiana's common law tort of misappropriation may also survive death).

<sup>125</sup> "An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality." Cal. Civ. Code § 3344.1(g) (2012) (West 2012).

<sup>126</sup> It has been argued that extending one state's post-mortem right of publicity statute to those not domiciled in a particular state at their time of death is unconstitutional as it does not satisfy the Supreme Court's "aggregation of contacts" test as set forth in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). In *Allstate Insurance*, the Supreme Court clarified that although multiple jurisdictions' laws may be applied in a single case, each jurisdiction must have sufficient contact or a sufficient aggregation of contacts to create a legitimate state interest with the parties and the transaction or occurrence at hand in order for its laws to be validly applied. In the event that a state does not satisfy this test, it has insufficient contacts with the parties and/or transaction or occurrence and application of its laws to the matter would be unconstitutional. Expatiating on what amounts to sufficient contact and aggregation of sufficient contact, the Court elaborated on its past rulings in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), explaining that, standing alone, neither nominal residence nor a post-occurrence residence change would be adequate to amount to sufficient contacts. With respect to Indiana's post-mortem right of publicity statute, the issue is that the plain language of the statute disregards the *Allstate Insurance* aggregation of

grants an artist's estate the right to bring a cause of action for a violation of the deceased's right of publicity for up to a century after death.<sup>127</sup>

If a federal right of publicity were enacted, Congress would have discretion to determine if it wanted to follow California and Indiana's lead and extend the law to artists who died prior to its passage<sup>128</sup> and how long after artists' death their estate could enforce their right of publicity.<sup>129</sup> This type

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contacts analysis and readily grants non-Indiana domiciliaries the right to use its broad, sweeping post-mortem right of publicity statute. As of the publication of this Article, very few plaintiffs domiciled outside Indiana have attempted to use this clause and the Supreme Court has yet to directly rule on the constitutionality of this provision.

<sup>127</sup> Indiana Code § 32-36-1-1 (2012) states that, regardless of one's domicile, residency, or citizenship at death, so long as the use of the person's identity occurs within Indiana, that person and/or their estate is entitled to bring a cause of action under Indiana law.

<sup>128</sup> "[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 316 (2001)).

<sup>129</sup> Just as Robin Williams's trust explicitly stated that any ban on the use of his name, image, or likeness was only enforceable for a specified number of years, a federal post-mortem right of publicity ought to place a time constraint on any moratorium period restricting the use of a person's name, image, likeness, and persona. Even though a fundamental policy of trusts and estates law is to ensure that the settlor or testator's intent is carried out, the decedent's freedom to exercise "dead-hand" control over their assets is not unfettered—courts will not enforce a condition that is illegal or contrary to public policy. Inherent in the public policy limitation on the ability of the decedent to curtail their heirs "quick hand" control over their property is the notion that restrictions the decedent places on their property are disfavored. In the event that a challenge is brought regarding a restriction the decedent placed on how their property may be used and technical rules of construction cannot nullify the limitation in question, courts will use a four-part balancing test to determine if such a limit is reasonable. The four factors are: (i) the nature of the property; (ii) the type of use restriction imposed; (iii) the testator's purpose in imposing the restriction; and (iv) the likely impact of the restriction on the heirs and society in general. However, when reasonable time periods are placed on the usage of the decedent's property, courts are more likely to uphold and honor such provisions.

Enforcing a statute of limitations period for how long a person's estate may bring a cause of action to enforce their right of publicity is akin to the Copyright and Patent Acts limitation on the moratorium period for which the holder of a copyright or patent can bring a cause of action to enforce their rights. The statute of limitations period for copyrights has been greatly extended in the past decades and is currently set at the life of the author plus seventy years for any copyrighted works published after 1977 and between 95 and 120 years depending on the publication date if the work was done for hire or published under a pseudonym or anonymously. After the copyright term expires, the copyrighted work "falls into" the

of statute would constitute an ex post facto law because it would have the retroactive effect of enabling the estates of artists who passed away prior to the law's enactment to actively and affirmatively use the law to underpin the deceased artists' right of publicity. Based upon the maxim *nulla poena sine lege*, meaning "there can be no punishment without law,"<sup>130</sup> an ex post facto law is a law that alters the legal consequences of acts committed prior to the law's enactment, such as criminally punishing conduct that was lawful when done or increasing punishment for crimes after they were committed.<sup>131</sup> The Founding Fathers of the U.S. Constitution were prodigiously wary of usurping a person's right to due process of law and viewed ex post facto laws as an assault on the natural process of justice by law and trial.<sup>132</sup> Accordingly, they invoked a federal prohibition on ex post facto laws in the federal Constitution. Nevertheless, in 1798 the Supreme Court in *Calder v. Bull*<sup>133</sup> held that the proscription of ex post facto laws is not universal; rather, it

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public domain. *Copyright Basic FAQ*, STANFORD UNIVERSITY LIBRARIES, <https://perma.cc/7396-QX2W> (last accessed Aug. 15, 2017). Like copyrights, the holder of a patent can only enforce it for the statutorily defined limitations period in 15 U.S.C. § 154(a)(2), which currently states that patents are only enforceable from the date the patent is issued to twenty years after the date the patent application was filed.

Lastly, with respect to imposing a time restriction as to how long such rights ought to be enforceable, the right of publicity is more akin to copyrights and patents than trademarks. Unlike copyrights and patents, the mark's holder can renew their registration for an indefinite number of successive ten-year periods (15 U.S.C. § 1059). To take advantage of this ability, the trademark holder must show that the trademark is being used in commerce or that it qualifies for special circumstances excusing non-use (15 U.S.C. § 1058). On the other hand, copyrights and patents do not have to be used in commerce for the holder of the copyright or patent to enforce their intellectual property rights during the statute of limitations period. If a person prohibits or severely curtails how their name, image, persona, or likeness can be used, they are effectively removing their publicity rights from commerce and yet courts will enforce such restrictions for the time period set forth by law or in the artist's will, trust, or other testamentary document in a state recognizing a descendible right of publicity. Under this rationale, the right of publicity is more like copyrights and patents than trademarks and thus a statute of limitations for how long use of such right can be restricted should be imposed.

<sup>130</sup> Daniel Troy, *Ex Post Facto*, THE HERITAGE GUIDE TO THE CONSTITUTION, <https://perma.cc/RP5Q-76WL> (last accessed Aug. 9, 2017).

<sup>131</sup> See *United States v. VanHoose*, 437 F.3d 497 (6th Cir. 2006); *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005).

<sup>132</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>133</sup> 3 U.S. 386 (1798).



only applies to criminal,<sup>134</sup> not civil,<sup>135</sup> cases. Justice Chase's ruling in *Calder* has withstood numerous constitutional challenges over the last two centuries and the Supreme Court has upheld both state and federal laws with retroactive effects as constitutional.<sup>136</sup> Although ex post facto laws are still generally disfavored,<sup>137</sup> statutes with retrospective force have been lauded when enacted in apposite circumstances.<sup>138</sup> A post-mortem right of public-

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<sup>134</sup> Article 1, Section 9, Clause 3 and Article 1, Section 10, Clause 1 of the U.S. Constitution prohibit federal and state criminal ex post facto laws, respectively. U.S. CONST. art. 1, §9, cl. 3, §10, cl. 1.

<sup>135</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512 (1952) (stating that the ex post facto provision of this clause forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities.); *United States v. Johnson*, 845 F. Supp. 864 (M.D. Fla. 1994) (saying that the ex post facto clause of United States Constitution applies only to criminal laws; however, ex post facto prohibition cannot simply be circumvented by Congress with enactment of a civil law that is primarily criminal in nature).

<sup>136</sup> See e.g., *Smith v. Doe*, 538 U.S. 84 (2003); *Kan. v. Hendricks*, 521 U.S. 346 (1997).

<sup>137</sup> Troy, *supra* note 130, at 21. ("In The Federalist No. 78, Alexander Hamilton noted that 'the subjecting of men to punishment for things which, when they were done, were breaches of no law' is among 'the favorite and most formidable instruments of tyranny.' Thomas Jefferson noted in an 1813 letter to Isaac McPherson 'the sentiment that ex post facto laws are against natural right.'").

<sup>138</sup> As explained by the Supreme Court in *Republic of Austria v. Altmann*, 541 U.S. 677, 692–93 (2004), "the antiretroactivity presumption is just that—a presumption, rather than a constitutional command." Furthermore, the Court articulated that the Constitution's prohibition on ex post facto laws (see *infra* note 130), both at the state and federal level, is limited in scope. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 267 (1994). As long as the proposed legislation does not violate a specific provision in the Federal Constitution concerning ex post facto laws, the potential unfairness of retroactive civil legislation does not amount to a manifest miscarriage of justice and thus in an insufficient ground for courts to not give the statute its full and intended scope. See *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 267 (1994). In fact, the courts have acknowledged that there are a multitude of public policy reasons to favor the passage of retroactive legislation. The first, and arguably least controversial, justification for passing legislation with retroactive effects was advocated by Chief Justice Oliver Wendell Holmes in *Danforth v. Groton Water Co.*, 178 Mass. 472, 477 (1901). In that case he explained that Congress has the inherent power and authority "to make small repairs which a Legislature naturally would possess," meaning that Congress has the right to "repair" patent drafting errors that were initially undiscovered or arose after the statute's enactment. Retroactive legislation that has curative effects typically is more controversial but courts are more inclined to honor and uphold its provisions if intended "to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a

ity statute that grandfathers in predeceased celebrities is akin to the type of statutes with retroactive effects that have withstood Constitutional scrutiny.<sup>139</sup>

Although ex post facto laws with civil effects are not unconstitutional per se,<sup>140</sup> they are not presumed to be valid; rather, to pass constitutional muster, they must meet certain requirements. First, Congress has to explicitly provide, as an unambiguous directive or express command within the language of the statute itself,<sup>141</sup> that the estates of artists who predeceased the statute's enactment would be able to take advantage of the new law.<sup>142</sup> Such candidness is necessary because a post-mortem right of publicity statute constitutes a substantive, rather than merely remedial, law.<sup>143</sup> Second,

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new law Congress considers salutary." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 268 (1994).

<sup>139</sup> In *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942), the court stated that "if [a] statute is a bona fide regulation of conduct which the legislature has power to regulate, it is not bad as an ex post facto law even though the right to engage in the conduct is made to depend upon past behaviour, even behaviour before the passage of the regulatory act." As explained *supra*, through the Commerce Clause, Congress irrefutably has the authority to govern interstate commerce and all instrumentalities that affect interstate commerce, including the right of publicity. Therefore, a retrospective post-mortem right of publicity law is not automatically bad as an ex post facto law.

<sup>140</sup> See e.g., *Smith v. Doe*, 538 U.S. 84 (2003); *Kan. v. Hendricks*, 521 U.S. 346 (1997); *Norfolk, Baltimore & Carolina Lines, Inc. v. Dir., Office of Workers' Comp. Programs, U. S. Dep't of Labor*, 539 F.2d 378, 380 (4th Cir. 1976); *U.S. v. Oakwood Downriver Med. Ctr.*, 687 F. Supp. 302, 308 (E.D. Mich. 1988) (stating that retroactively applying a law that was amended to increase civil damages did not violate the Federal Constitution's ex post factor clause).

<sup>141</sup> See *Martin v. Hadix*, 527 U.S. 343, 354 (1999).

<sup>142</sup> See *Rivers v. Roadway Express, Inc.* 511 U.S. 298, 310 (1994) (noting that the Supreme Court's prior decisions concerning retroactive statutes and legislation do not support the proposition that the Court has espoused a "presumption" in favor of retroactive application of restorative statutes); *U.S. v. Ettrick Wood Prods., Inc.*, 774 F. Supp. 544, 553 (W.D. Wis. 1988) (explaining how a cornerstone, venerable rule of statutory interpretation is that statutes affecting a person's substantive rights and/or liabilities are presumed to only have a prospective effect absent definite and explicit statements by Congress to the contrary) (citing *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir. 1986)).

<sup>143</sup> As the court in *State ex rel. Holdridge v. Indus. Com.*, 11 Ohio St. 2d 175, 178 (1967) explained, "[i]t is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be formulated. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." Despite the lack of a definitive definition, for a statute

any party with appropriate standing<sup>144</sup> that opposed the new law would bear the burden to show that the new law is not rationally related to a legitimate government interest.<sup>145</sup> Any such challenger will likely fail in their quest<sup>146</sup>—“as an empirical matter, the [Supreme] Court has consistently upheld retroactive legislation against claims by those it affects that it violates the rule of law.”<sup>147</sup> Regardless of whether the law is being challenged under

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to be regarded as simply remedial and not substantive, it can neither enhance nor diminish a person’s substantive rights; rather it must only pertain to the procedures for enforcing those rights. *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir. 1986). A retroactive federalized postmortem right of publicity law would exceed the scope of what may constitute a simple remedial law and thus is a substantive law.

<sup>144</sup> A precondition for a court to have the power to render a binding decision on the merits in a case or controversy, the plaintiff must have met the requirements of Article III of the federal Constitution to have standing. *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). The burden is on the plaintiff to establish the three minimum and irreducible constitutional elements of standing. The first requirement is that the plaintiff has suffered, or is at risk of imminently suffering, an injury. The second requirement is that there is a causal connection between the injury and the alleged actions or omissions by the defendant. The third and final requirement is that the injury suffered can be redressed by a decision in the plaintiff’s favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>145</sup> 2 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: Substance and Procedure § 15.9(a)(iv) (Mar. 2017) (explaining that “[t]he Supreme Court, in a series of cases that spanned two-thirds of the twentieth century, established the principle that retroactive legislation will violate due process only if the legislation does not have a rational relationship to a legitimate government interest.”).

<sup>146</sup> Challengers would also be unsuccessful in bringing a cause of action against a federal post-mortem right of publicity with retroactive effects under the Contracts Clause or the Takings Clause of the federal Constitution. The Contracts Clause (U.S. Const. Art. 1, § 10) provides a prohibition on any law that impairs contractual obligations but only applies to state, not federal, laws. 1 William J. Rich, MODERN CONSTITUTIONAL LAW § 17:26 (3rd ed.) (Dec. 2016).

The Fifth Amendment’s Takings Clause prevents the legislature from depriving private people of their vested property rights unless they have been paid just compensation and the taking is for public use. See *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). Although Justice Chase in *Calder v. Bull* suggested that the Fifth Amendment’s Takings Clause provided a similar safeguard as the ex post facto clause against retrospective legislation with respect to property rights (see *E. Enterprises v. Apfel*, 524 U.S. 498, 534 (1998) (citing *Calder v. Bull*, 3 U.S. 386, 394 (1798)), the Takings Clause only applies to “redistribution of property from private individuals to the government,” (1 William J. Rich, MODERN CONSTITUTIONAL LAW § 17:26 (3rd ed.) (Dec. 2016)) not from a private individual to another private individual or corporation.

<sup>147</sup> Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1571 (2011).

the Due Process Clause of the Fifth or Fourteenth Amendment,<sup>148</sup> the rational basis review is the test utilized “even when the legislation ‘upsets otherwise settled expectations . . . [or] impose[s] a new duty or liability based on past acts.’”<sup>149</sup>

*The Next Episode*<sup>150</sup>

Shouting “come with me” during the historic and mind-blowing performance at 2012’s Coachella,<sup>151</sup> the digital Tupac was not simply calling out to the thousands of bellowing festivalgoers, but seemingly to other artists to follow. The popularization of this new entertainment frontier is inevitable—as the architects that engineered the lifelike Tupac image explained, “[we] think we’ve scratched the surface.”<sup>152</sup> Digital Domain’s Chief Creative Officer also cautioned that, “a whole new universe of legal questions” is opened as technology progresses to give artists life after death.<sup>153</sup> Thus, it is quintessential that the law is equipped to handle the resulting onslaught of legal questions. A federalized right of publicity statute would resolve the inconsistent rulings both between and within individual circuits and explicitly delineate the precise contours of such a right.

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<sup>148</sup> The Fifth Amendment applies to the federal government and the Fourteenth Amendment’s Due Process Clause applies the to states.

<sup>149</sup> Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1571 (2011) (quoting *Usery v. Turner Elhorn Mining Co.*, 428 U.S. 1, 16 (1976)).

<sup>150</sup> DR. DRE, SNOOP DOGG, KURUPT, AND NATE DOGG, *The Next Episode*, on 2001 (Interscope Records 1999).

<sup>151</sup> Westfesttv, *supra* note 1.

<sup>152</sup> McCartney, *supra* note 5.

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



## The Pledge to Brand Loyalty: A Gold Medal Approach to Rule 40

James Schwabe\*

“[A]dvertising can in itself create prestige, differentiation, or association that may change the utility a consumer obtains from consuming a product.”<sup>1</sup>

“I pledge allegiance to [the] Swoosh of the United States of Nike, and to the Republic for which it stands, one Nation under Phil Knight, indivisible, with liberty and justice for Michael Jordan, FuelBrands, and cute running shorts.”<sup>2</sup>

### INTRODUCTION

Every four years, elite athletes from around the world come together to compete in a tradition that started over one hundred and fifty years ago. Over that time period, competition in the arenas has spurred furious battles

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<sup>1</sup> Kevin YC Chung, Timothy P Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods' Impact on Sales of Nike Golf Balls*, 1, 3 (Apr. 25, 2012), <http://www.econ.ucla.edu/workshops/papers/io/celebrityendorsements.pdf>, [https://perma.cc/EDG7-348Y] (quoting Daniel A Ackerberg, *Empirically Distinguishing Informative and Prestige Effects of Advertising*, 32 RAND J. OF ECON. 32 (2001)).

<sup>2</sup> Jill K. Ingels, *Do Not Pass Go and Do Not Collect \$200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes From Living at Park Place*, 27 MARQ. SPORTS L. REV. 171, 171 (2016) (citing *United States of Nike: USATF Sponsorship Has Failed Our Athletes, and Our Support, An Athlete's Body* (Aug. 13, 2015), <http://anathletesbody.com/2015/08/13/united-states-of-nike-usatf-sponsorship-has-failed-our-athletes-and-our-sport/>, [https://perma.cc/YT9M-ZKSM]).

in the boardrooms. The opportunity to capitalize off of the goodwill and prestige associated with the Olympic Games is a goal worth chasing. Unfortunately, such competition has also produced a winning-at-all-costs attitude. Ambush marketing has diluted the Olympics Games' intellectual property and has hindered the official sponsors' ability to benefit from their investments. Due to the changing marketing model that emphasizes brand loyalty over consumer confusion, companies are having trouble working around the constraints of the out-of-touch law. It is time the Olympic community takes a stronger stance on this issue by revamping how it addresses the balancing act between a corporation's freedom of speech against free-riders' dilution of the Olympic Games. The revisions to Rule 40 have not done enough.

Rule 40 has provided a competitive arena for sponsorship dollars and the top athletes. Rule 40, a by-law of the official Olympic charter, states, "Except as permitted by the [International Olympic Committee] Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games."<sup>3</sup> "Rule 40 was established to preserve the unique nature of the Olympic games by preventing over-commercialization."<sup>4</sup> Although the rule has good intentions, its purpose has not been achieved. The Games are no longer just about the goodwill of the athletes, creating peace and celebrating countries coming together. Nowadays, it is all about the money and money talks.

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<sup>3</sup> Daniel Roberts, *Why the Biggest Story of the Rio Olympics is the Marketing Change*, Yahoo Finance (Aug. 3, 2016), <http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html>, [https://perma.cc/AE9E-B9GJ]; see generally AP, *Olympians Tiptoe Around Sponsorship Ban*, FOXNEWS.COM (Feb. 18, 2014), <http://www.foxnews.com/sports/2014/02/18/in-sochi-athletes-tiptoe-around-olympics-sponsorship-ban-ioc-says-open-to.html>, [https://perma.cc/257J-J8WQ] ("For Sochi, the rule applied from nine days before the opening ceremony until three days after closing – Jan. 30 to Feb. 26"); see also John Grady & Steve McKelvey, *The IOC's Rule 40 Changes and the Forecast for Rio 2016*, SPORTSBUSINESS DAILY (May 18, 2015), [www.sportsbusinessdaily.com/journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx](http://www.sportsbusinessdaily.com/journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx), [https://perma.cc/5M7B-Y395].

<sup>4</sup> Chris Chavez, *What is Rule 40? The IOC's Rule on Non-Olympic Sponsors, Explained*, SI.COM (July 25, 2016), <http://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy>, [https://perma.cc/66VF-HDSG]; see generally Team USA, *Policy Guidelines Updated USOC Rio Games Participant Advertising Guidance*, TEAMUSA (Oct. 1, 2015), <http://www.teamusa.org/Athlete-Resources/Athlete-Marketing/Rule-40-Guidance>, [https://perma.cc/N7YT-6JN7].

Following protests by athletes and sponsors,<sup>5</sup> Rule 40 was relaxed to allow non-Olympic “generic” advertising during the Rio Games and to allow athletes to post on social media about non-official sponsors as long as they did not make any reference to the Games.<sup>6</sup> This modification prevents non-official sponsors from using specific marketing phrases, including: “2016 Rio; Rio de Janeiro; Gold; Silver; Bronze; Medal; Effort; Performance; Challenge; Summer; Games; Sponsors; Victory; Olympia; Olympic; Olympics; Olympic Games; Olympiad; Olympiads, and the Olympic motto ‘Citius – Altius – Fortius.’”<sup>7</sup> Athletes face serious consequences, possibly even being stripped of their medals, if they violate Rule 40.<sup>8</sup>

These changes illustrate the growing impact of celebrity endorsements. According to a 2008 study, 14% to 19% of United States advertisements featured celebrity endorsements and in 2016, as many as 38 celebrities filled the screens during Super Bowl commercials.<sup>9</sup> An even more astounding figure that illuminates the power of endorsements is that the top 100 highest-paid athlete endorsers in 2016 reportedly made \$924 million in 2016, while Roger Federer, LeBron James and Phil Mickelson raked in \$60 million, \$54 million and \$50 million respectively.<sup>10</sup> The play off the field has become just as important as the play on the field.

The commercialization of sports, namely basketball, arguably emerged when Sonny Vaccaro found a way to use Nike to promote the sport of bas-

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<sup>5</sup> See Megan Ormond, #WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games, 5 CASE W. RESERVE J.L. TECH & INTERNET 179 (2014) (citing Ken Belson, *Olympians Take to Twitter to Protest Endorsement Rule*, N.Y. TIMES (July 31, 2012), <http://www.nytimes.com/2012/07/31/sports/olympics/athletes-at-olympics-protest-sponsorship-rule-on-twitter.html> [<http://perma.cc/75ZK-NLQM>] (Describing the movement started by Olympic gold medalist Sanya Richards-Ross against the constraints of Rule 40)).

<sup>6</sup> See Chavez, *supra* note 4.

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

<sup>8</sup> See *id.*

<sup>9</sup> See Anita Elberse & Jeron Verleun, *The Economic Value of Celebrity Endorsements*, J. OF ADVERT. RES. (June 2012) (quoting Julie Creswell, *Nothing Sells Like a Celebrity*, N.Y. TIMES (June 22, 2008), <http://www.nytimes.com/2008/06/22/business/world-business/22iht-22celeb.13876488.html>, [<https://perma.cc/8BYW-HW9L>]); see Charisse Jones, *Super Bowl Ads Loaded with Celebrity Star Power*, USATODAY (Feb. 8, 2016), <https://www.usatoday.com/story/money/2016/02/08/super-bowl-ads-loaded-celebrity-star-power/79757632/>.

<sup>10</sup> See Sam Weber, *Top 100 Highest-Paid Athlete Endorsers of 2016*, OPENDORSE (Jun 29, 2016), <http://opendorse.com/blog/2016-highest-paid-athlete-endorsers/>, [<https://perma.cc/QP3R-QXGN>].

ketball to kids.<sup>11</sup> On September 12, 1984, Michael Jordan signed his first professional basketball contract with the Chicago Bulls for six million dollars over five years.<sup>12</sup> With the help of Vaccaro, Nike signed Jordan to a five-year deal that was worth seven million dollars after factoring in stock options and other benefits.<sup>13</sup> The deal allowed Nike to build its brand in the basketball industry and one month after the “Air Jordan Is” shoe hit the market at \$65 a pair in March 1985, Nike had sold \$70 million of the shoe.<sup>14</sup> In 2012, “the Jordan brand sold \$2.5 billion worth of shoes at retail. Air Jordans made up 58 percent of all basketball shoes bought in the U.S. and 77 percent of all kids’ basketball shoes.”<sup>15</sup> The Jordan effect led to a marketing phenomenon that is now forcing apparel companies into *lifetime* deals with elite athletes. Within the last five years, Nike signed NBA star LeBron James to a lifetime deal and adidas added NBA point guard Derrick Rose and soccer superstar David Beckham to its lifetime payroll.<sup>16</sup>

This movement has had a major impact on the commercialization of the Olympics. Levels of sponsorship range from Worldwide Olympic Partner to Official Supplier. Each comes with different terms dictating how Olympic-related logos, names, images and other intellectual property can be used in advertising, on uniforms, in apps and on social media.<sup>17</sup> The real question is, what is at stake? Adidas America, Inc. bought its title as the “Official Sportswear Partner” of the London 2012 Olympic Games and the London 2012 Paralympic Games for a price between \$127 million and \$156

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<sup>11</sup> See generally ESPN Films, *Sole Man*, ESPN.COM (last visited Oct.13, 2017), <http://www.espn.com/30for30/film?page=soleman>, [https://perma.cc/ST3L-WG3T].

<sup>12</sup> See *The 1984 NBA Draft: Drafting Jordan-Not a Done Deal*, THE HISTORY RAT (last visited Oct. 13, 2017), <https://historyrat.wordpress.com/2013/01/19/the-1984-nba-draft-drafting-jordan-not-a-done-deal/>, [https://perma.cc/37AC-NEGF].

<sup>13</sup> See Darren Rovell, *How Nike Landed Michael Jordan*, ESPN.COM (Feb. 15, 2013), [http://www.espn.com/blog/playbook/dollars/post/\\_id/2918/how-nike-landed-michael-jordan](http://www.espn.com/blog/playbook/dollars/post/_id/2918/how-nike-landed-michael-jordan), [https://perma.cc/ED4U-4M9U] (“[T]he previous highest contract was James Worthy’s deal with New Balance, an eight-year deal worth \$150,000 a year.”).

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

<sup>15</sup> *Id.*

<sup>16</sup> See SI Wire, *Report: LeBron James Signs Lifetime Contract With Nike*, SI.COM (Dec. 7, 2015), <https://www.si.com/nba/2015/12/07/nike-lebron-james-signs-lifetime-contract> [https://perma.cc/5P5D-LT93] (on file with the Harvard Law School Library) (James’ deal is reportedly worth more than \$1 billion).

<sup>17</sup> See Denise Lee Yohn, *Olympics Advertisers Are Wasting Their Sponsorship Dollars*, FORBES (Aug. 3, 2016), <http://www.forbes.com/sites/deniseleeyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#7d246dbf2070> (on file with the Harvard Law School Library).



million.<sup>18</sup> The Olympic Partners (TOP) program, the highest level of Olympic sponsorship, can cost over \$200 million and has not always produced commercially successful campaigns.<sup>19</sup> Although these companies are investing millions of dollars into strategic plans to capitalize on the goodwill that comes from a sponsorship with the Olympic Games, the new marketing model and the failed state of the law has diminished the sponsors' success.

Although the International Olympic Committee ("IOC") meant well by taking action on Rule 40, its brand security measures did not achieve the goal of preventing unauthorized sponsors from reaping the benefits of the Olympic Games' goodwill and, furthermore, have created more confusion for companies that are attempting to utilize their athletes prior to and during the Olympics. In addition, the changes to Rule 40 have not been able to close the gap on what current intellectual property law is trying to achieve. As this paper will discuss, the current law focused on consumer confusion is lagging behind how consumers in the athletic apparel industry are interacting with the current business model: brand loyalty. It is no longer about preventing companies from trading off of the goodwill of one another and confusing consumers into thinking a company is different from what they say they are. Instead, the new game is making a consumer infatuated with the brand at a young age and building that loyalty throughout their lifetime. A study on Nike golf balls indicated that "not only does celebrity endorsement take customers away from [Nike's] competitors, but also attracts customers from the outside who would have otherwise not purchased the product in the absence of celebrity endorsements."<sup>20</sup> This is the marketing model that companies are working with and until Rule 40 can establish itself within this model, it will not be able to achieve its goals.

This paper will analyze the need for an updated legal framework that is more aligned with the brand loyalty business model and will use the changes to Olympic Rule 40 to parse out what more can be done. Part I of this paper will detail the history of trademark law protection and introduce the theories relevant to the IOC's brand protection. Part II will describe the governing structure that is unique to the Olympics and will analyze the former sponsorship rules before the Rule 40 modifications. Part II will also detail the changes that modified Rule 40 and the failed state of the law in relation to current business models. Part III will highlight literature that analyzes the impact an endorser can have on a marketing platform and how

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> Chung, *supra* note 1, at 5.

brand loyalty has taken the place of consumer confusion in business strategies. Part III will also provide a case study of the impact Tiger Woods had on the Nike brand before and after his scandal. Finally, Part IV will use the 2016 Rio Games to form a basis for the analysis of whether Rule 40 is successful or needs to be changed.

## I. HISTORY OF TRADEMARK PROTECTION

Trademark law was developed for the purpose of preventing consumer confusion regarding the source of a good and also to encourage manufacturers to produce quality goods.<sup>21</sup> Trademark scholars identify common principles of fraud and deceit as the motivations for creating a subset of the law to protect consumers from these torts.<sup>22</sup> The Lanham Act of 1946 was implemented to allow individuals and corporations to raise a claim against infringers. The Lanham Act protects “any word, name, symbol, or device” that is used by a producer to “identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”<sup>23</sup> With this goal in mind, courts have used various theories of trademark law to prevent infringement from becoming more widespread.

Trademark law is governed by the “likelihood of confusion” test.<sup>24</sup> Traditional trademark protection was meant to police producers’ attempts to steal away customers in competitive markets.<sup>25</sup> In short, trademark law attempted to prevent manufacturers from passing off their goods as those of another or trading on the goodwill of a company that had established itself

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<sup>21</sup> See 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 5:2 (2d ed. 1984) (discussing the history of trademark law in Anglo-American common law and the expansion of trademark law into the twentieth century); see generally Landes & Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987) (discussing how the value of a trademark consists of consumers’ ability to recognize the source of a product or service without a high search cost and commonly deemed to bring a specific quality).

<sup>22</sup> See MCCARTHY, *supra* note 21, at 134.

<sup>23</sup> 15 U.S.C. § 1127 (2012).

<sup>24</sup> See MCCARTHY, *supra* note 21.

<sup>25</sup> See Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1845 (2007) (“Trademark law. . . aims to promote more competitive markets by improving the quality of information in those markets.”) (quoting Stacy L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 467 (2005)).

with a clientele in the marketplace.<sup>26</sup> Trademark law seeks to minimize trademarks that deceive consumers into purchasing goods that they believe are associated with another brand.<sup>27</sup> Therefore, plaintiffs must show that the use of an allegedly infringing mark was likely to cause confusion, mistake, or deceit.<sup>28</sup>

In addition to traditional theories of consumer confusion, courts have relied on two theories of trademark law that allow a plaintiff to recover damages or force an injunction even when no consumer confusion is likely. For example, one theory of protecting trademarks is the theory of dilution. Dilution occurs when a trademark could be devalued by use of similar marks that impact the package of information associated with a product.<sup>29</sup> The Ninth Circuit characterized dilution as very similar to creating rights in gross in a trademark.<sup>30</sup> The two traditional types of dilution are blurring and tarnishment. Blurring is the use of a mark in any manner likely to cause an unintended association, which would reduce the famous mark's distinctiveness.<sup>31</sup> Tarnishment is often described as an association that is likely to disparage a mark owner's goods or services or tarnish the image or reputation associated with another's mark.<sup>32</sup> The Fifth Circuit enjoined a manufacturer of insecticide floor wax from using the slogan "Where There's Life

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<sup>26</sup> See *id* at 1861. (quoting JAMES LOVE HOPKING, *THE LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION* § 1 (2d ed. 1905) ("Unfair competition consists of passing off one's goods as the goods of another, or in otherwise securing patronage that should go to another, by false representations that lead the patron to believe that his is patronizing the other person").

<sup>27</sup> See Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 135 (1989) (citing Robert Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 162–63 (1982)).

<sup>28</sup> 15 U.S.C. § 1114(1) (2005); see, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1307 (2015) (likelihood of confusion standards were ruled the same in trademark registration and infringement suits).

<sup>29</sup> See generally Karen Loudon & Tiffany Fonseca, *Does the Federal Trademark Dilution Act Provide a Right Without a Remedy? The Supreme Court's First Foray Into Trademark Dilution: Moseley v. V Secret Catalogue*, 7 DEL. L. REV. 31, 34 (2004).

<sup>30</sup> See Jeremy M. Roe, *The Current State of Antidilution Law: The Trademark Dilution Revision Act and the Identical Mark Presumption*, 57 DEPAUL L. REV. 571, 572 (2008) (citing *Avery Dennison Corp. v. Sumption*, 189 F.3d 868, 875 (9th Cir. 1999); accord *TCPIP Holding Co. v. Haar Commc'ns*, 244 F.3d 88, 95 (2d Cir. 2001)).

<sup>31</sup> See Roe *supra* note 30 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(a) (1995)).

<sup>32</sup> *Id.* (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(b) (1995); see, e.g. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189–90 (E.D.N.Y. 1972) (concluding that a poster associating the word "Cocaine" substi-

. . . There's Bugs" because it mimicked "Where's There's Life . . . There's Bud" and was likely to negatively influence consumers impression of Budweiser.<sup>33</sup>

Another theory that courts have relied on to prevent consumer confusion that is applicable to the Olympics' sponsorship issues is the theory of misappropriation. Misappropriation is often described as free-riding on the commercial value or reputation of another.<sup>34</sup> One rationale for this theory is that a "trademark owner is entitled to exploit all possible uses of the mark; since the owner's labor created the mark's 'commercial magnetism,'" and it is wrong to allow others to profit off of the hard work of another.<sup>35</sup> It is of no relevance "whether consumers are confused or even whether the defendant's use diverts business from the plaintiff. Nor does it matter whether the plaintiff's goodwill is impaired or diminished in any way."<sup>36</sup> Trademark law is a very powerful force to incentivize creative designs and to protect the hard work associated with brand integrity.

These theories of trademark law protection have set the stage for how individuals and corporations protect their intellectual property, but they are also the foundation by which the IOC has policed its sponsors. The question of whether trademark law infringes one's freedom of speech is a lively debate and will impact how Rule 40 will be used in the future.

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tuted for Coca-Cola was likely to injure Coca-Cola's business reputation and impact customer choices).

<sup>33</sup> See *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963).

<sup>34</sup> See Tim W. Dornis, *Trademarks, Comparative Advertising, and Product Imitations: An Untold Story of Law and Economics*, 121 PENN ST. L. REV. 421, 429 (2016) (citing David J. Franklyn, *DeBunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117, 137-43 (2004) (describing *Times Mirror Magazines, Inc. v. Las Vegas Sports News*, 212 F.3d 157 (3d Cir. 2000), which found that the defendant, a publisher of a gambling magazine in Las Vegas, traded on a sufficiently famous mark in a niche market to gain superior notoriety and a good reputation of quality).

<sup>35</sup> See Kravitz, *supra* note 27, at 138-39 (citing "Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresage Co.", 316 U.S. 203, 205 (1942) (holding that to recover lost profits under the Trade-Mark Act of 1905, plaintiff need not prove that infringer's mark actually induced or deceived consumers into buying infringer's product. . . "[T]he wrongdoer who makes profits from the sales of goods bearing a mark belonging to another was enabled to do so because he was drawing upon the good will generated by that mark. And one who makes profits derived from the unlawful appropriation of a mark belonging to another [must therefore] restore the profits to their rightful owner").

<sup>36</sup> Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 550-51 (2006).

## II. THE OLYMPIC MOVEMENT

The 2016 Olympic Games in Rio were a fantastic demonstration of athletic ability and national pride as 11,178 athletes from 205 countries descended upon Rio to compete in a great event.<sup>37</sup> The competition off the field turned up a notch after the changes to Rule 40 redefined what it meant to advertise during the Olympic Games.

Sponsors of the 2016 Olympic Games in Rio included Coca-Cola, McDonalds, Visa, Bridgestone, Samsung, Panasonic, Omega, Procter & Gamble (P&G), General Electric (GE), Dow, and Atos.<sup>38</sup> Each of these companies paid an estimated 100 million euros to the IOC to advertise directly with the games from 2013 to 2016.<sup>39</sup> What is concerning is that these sponsors that have paid for the exclusive right to market their goods and services in association with the Olympic Games are expecting a monetary benefit. However, if consumers are being confused as to what exactly the corporation's role is in the international market, these marketing campaigns dilute the Olympic Games' intellectual property and allow others to trade off of their goodwill. How has this happened over the last several decades amidst a strong presence of regulation?

### A. *Governing Structure*

Unlike in traditional American sports, Olympic athletes must be aware of rules set forth by several governing bodies. The Olympic movement was founded on the principle of amateurism and the sponsorship restrictions imposed on athletes are meant to ensure that the Olympics stay true to that tradition. These governing bodies include: The International Olympic Committee ("IOC"), the United States Olympic Committee ("USOC"), and National Governing Bodies ("NGBs").<sup>40</sup> In 1974, the word *amateur* was

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<sup>37</sup> See generally 2016 Summer Olympic Participating Countries, MAPS OF WORLD, Sept. 6, 2016, <http://www.mapsofworld.com/sports/olympics/summer-olympics/participating-nations.html> (on file with the Harvard Law School Library).

<sup>38</sup> See Lars Becker, *Sponsors at the Olympics: The Multi-Billion Dollar Business of the IOC*, ISPO (July 29, 2016), [http://www.ispo.com/en/markets/id\\_7844462/tid\\_pdf\\_0/2-billion-what-the-sponsors-at-the-2016-olympics.html](http://www.ispo.com/en/markets/id_7844462/tid_pdf_0/2-billion-what-the-sponsors-at-the-2016-olympics.html) [<https://perma.cc/KKZ5-FZDD>].

<sup>39</sup> See *id.*

<sup>40</sup> See Leigh Augustine-Schlossinger, *Legal Considerations for Sponsorship Contract of Olympic Athletes*, 10 VILL. SPORTS & ENT. L.J. 281, 282–84 (2003) (citing Int'l Olympic Comm. Charter R. 1, 3 (2001) [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf), [<https://perma.cc/LX94-VNNS>]) (IOC is the supreme au-

removed from the Olympic Charter.<sup>41</sup> Fifteen years later, the Olympic amateur movement took another turn when the International Basketball Federation opened the door for National Basketball Association players to participate in the 1992 Olympics.<sup>42</sup> This movement along with the introduction of elite athletes across numerous sports has prompted apparel companies in particular to fight for ways to market themselves in connection with the Olympic Games.<sup>43</sup> Has the desire for a spirit of amateurism been destroyed?

On the other hand, the USOC has attempted to stay true to the Olympics' amateur principles by keeping the word "amateur" in its charter.<sup>44</sup> An amateur athlete was defined as "any athlete who meets the eligibility standards established by the NGB or Paralympic Sports Organization for the sport in which the athletes competes."<sup>45</sup> This concept is often controversial when athletes such as LeBron James, who gets paid millions of dollars to

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thority); *U.S. Olympic Comm. Constitution art III § 1* (USOC recognizes eligible sports organizations as national governing bodies).

<sup>41</sup> See *id.* at 283 (The only mention of the word amateur was linked to the International Boxing Association).

<sup>42</sup> See Phil Hersh, *NBA Players Eligible to Play in The Olympics*, CHI. TRIB. (Apr. 08, 1989), available at [http://articles.chicagotribune.com/1989-04-08/sports/8904020812\\_1\\_granik-nba-finals-nba-owners](http://articles.chicagotribune.com/1989-04-08/sports/8904020812_1_granik-nba-finals-nba-owners) [<https://perma.cc/758D-57DU>].

<sup>43</sup> See Ken Roberts, *Nike vs. Under Armour: Olympics Advertising Edition*, PATHMATICS (July 27, 2016), <https://blog.pathmatics.com/nike-vs-under-armour-olympics-advertising-edition>, [<https://perma.cc/6S3Y-59MT>] (analyzing Nike and Under Armour's digital advertising, consumer targeting strategies and Olympic sponsorship deals to gain a competitive advantage in the marketing race) (on file with the Harvard Law School Library).

<sup>44</sup> See Augustine, *supra* note 40, at 284 (citing USOC Constitution art 1 § 2(A)-(C) (using language such as: amateur athlete, amateur athletic competition, and amateur sports organization)).

<sup>45</sup> See Augustine, *supra* note 40, at 284 (citing USOC Constitution, art 1 § 2(A)) (The USOC recognizes the following thirty-nine national governing bodies: National Archery Association, U.S.A. Badminton, U.S.A. Baseball, U.S.A. Basketball, U.S. Biathlon Association, U.S. Bobsled and Skeleton Federation, U.S.A. Boxing, U.S.A. Canoe/Kayak, U.S.A. Curling, U.S.A. Cycling, Inc., United States Diving, Inc., U.S.A. Equestrian, U.S. Fencing Association, U.S. Field Hockey Association, U.S. Figure Skating Association, U.S.A. Gymnastics, U.S.A. Hockey, Inc., U.S.A. Judo, U.S. Luge Association U.S. Modern Pentathlon Association, United States Rowing Association, United States Sailing Association, U.S.A. Shooting, U.S. Ski and Snowboard Association, U.S. Soccer Federation, Amateur Softball Association, U.S. Speed Skating, U.S.A. Swimming, U.S. Synchronized Swimming Inc., U.S.A. Table Tennis, U.S. Taekwondo Union, U.S. Team Handball Federation, U.S. Tennis Association, U.S.A. Track & Field, U.S.A. Triathlon, U.S.A. Volleyball, United States Water Polo, U.S.A. Weightlifting, and U.S.A. Wrestling).

play in the National Basketball Association, are competing in the Olympic Games. Although controversial, that topic has been discussed in numerous other articles and will not be explored further in this paper.<sup>46</sup>

### B. *The Rise of Sponsorships*

The Olympic Games provide an opportunity to compensate successful athletes. U.S. athletes that win Gold medals receive payment through “Operation Gold” which is often paid for through corporate sponsorships that the USOC signs.<sup>47</sup> Sponsorships are a lucrative enterprise, depending on how well a sponsor can market itself in connection with an athlete and the Olympic movement and how well it can draft its sponsorship agreement. Generally, a USOC corporate sponsor receives the license to use the USOC logo (five colored Olympic rings) on its products and advertising.<sup>48</sup> In addition to USOC guidelines, each NGB is empowered to create its own guidelines to regulate its athletes and sponsors.<sup>49</sup> Within these parameters, how do sponsors effectively market their athletes and ultimately their products?

The world of Olympic sponsorships is quite different from the typical marketing associated with sporting events.<sup>50</sup> The Games prohibit market-

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<sup>46</sup> See Chris Chase, *The Olympics Would Be Better Off Without NBA Players*, FOX SPORTS (June 8, 2016), available at <http://www.foxsports.com/olympics/story/no-more-nba-players-in-olympics-team-usa-lebron-curry-dream-team-060816>, [https://perma.cc/U57L-2BVE]; cf. Scott Davis, *Shaquille O’Neal Explains Why NBA Players Shouldn’t Skip Rio Olympics*, BUSINESS INSIDER (June 7, 2016), <http://www.businessinsider.com/shaquille-oneal-nba-players-shouldnt-skip-olympics-2016-6>, [https://perma.cc/AED3-DLNS] (on file with the Harvard Law School Library (featuring Shaquille O’Neal explaining how sports are one of the few things that bring people together and “settle people down”).

<sup>47</sup> See Braden Keith, *USOC Increases ‘Operation Gold’ Payouts by 25% Beginning in 2017*, SWIMSWAM (Dec. 13, 2016) (Players that win Gold medals for the Olympics will be paid \$37,500 and will be paid \$6,250 for the first and second years of non-Olympic years and \$7,500 for the third year), <https://swimswam.com/usoc-increases-operation-gold-payouts-by-25-beginning-in-2017/>, [https://perma.cc/X6P8-2J3J]; see also Rachel Axon, *Breaking Down What Some Countries Pay Olympians for Earning Medals*, USATODAY (Aug. 21, 2016), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/21/gold-medal-team-usa-simone-biles-michael-phelps-katie-ledecky/89055568/>, [https://perma.cc/2PNY-DC8B].

<sup>48</sup> See *Salt Lake 2002 OPUS Sponsorship Programme*, [https://web.archive.org/web/20030608005937/http://multimedia.olympic.org/pdf/en\\_report\\_103.pdf](https://web.archive.org/web/20030608005937/http://multimedia.olympic.org/pdf/en_report_103.pdf) (last visited Nov. 7, 2013) (stating over \$840 million was raised for 2002 Olympic Games).

<sup>49</sup> See *id.*

<sup>50</sup> See generally Lori Shontz, *Olympic Rule Leaves Non-Sponsors With Few Words*, RUNNER’S WORLD (July 27, 2016), <http://www.runnersworld.com/olympics/olympic-rule-leaves-non-sponsors-with-few-words>, [https://perma.cc/2SGX-97A8].

ing traditionally seen within athletic event venues, yet more than forty percent of Olympic revenues come from corporate sponsors.<sup>51</sup> The tug and pull between marketers and individual athletes has become a center-stage discussion.

I understand and I am empathetic to athletes and their individual deals and what they're trying to do. . . But it is not a minor piece of this to protect the value of IOC rights. That money flows back to IOC member nations. That money flows back to local organizing committees so that they can build the venues. It's an important revenue stream for the entire ecosystem.<sup>52</sup>

In 1896 the Olympic Games began allowing companies to advertise.<sup>53</sup> Originally sponsorship opportunities were open to all companies, but after 1984, the competition moved from the tracks to the board rooms. For example, the 1988 Olympics produced \$338 million in sponsorships, and by 1992 that figure had jumped to \$700 million.<sup>54</sup> These numbers became exciting for the parties involved, but with the increase in revenue came a need for an increase in trademark protection that would regulate this new "business."

Within the governing structure discussed above, Congress gave the USOC the power to regulate the Games and the sports within its control to ensure that the USOC was responsible for protecting its brand from commercial exploitation. At the same time, the Lanham Act generally governs trademark infringement related to the Olympic Games. Under the Lanham Act, the standard for infringement changed from "likely to confuse consumer" to "tends to cause confusion or mistake."<sup>55</sup> The Lanham Act gives

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

<sup>52</sup> *Id.* (comment by Director of Oregon's Warsaw Sports Marketing Center, Whitney Wagoner).

<sup>53</sup> *100 Years of Olympic Marketing*, OLYMPIC.ORG, <https://www.olympic.org/sponsors/100-years-of-olympic-marketing>, [https://perma.cc/4D7K-HK4M] (last visited Nov. 7, 2017) (on file with the Harvard Law School Library).

<sup>54</sup> See Russell H. Falconer, *Ambush Marketing and How to Avoid It*, BAKER BOTTS LLC, Jan. 1996, <http://www.bakerbotts.com/ideas/publications/1996/01/ambush-marketing-and-how-to-avoid-it>, [https://perma.cc/74US-F4NT] (on file with the Harvard Law School Library).

<sup>55</sup> Katelynn Hill, *Ambush Marketing: Is it Deceitful or a Probable Strategic Tactic in the Olympic Games?*, 27 MARQ. SPORTS L. REV. 197, 199 (2016) (first quoting David Muradyan, *Likelihood of Confusion Analysis Under the Lanham Act*, THE IP L. BLOG, Aug. 15, 2012, <http://www.theiplawblog.com/2012/08/articles/trademark-law/likelihood-of-confusion-analysis-under-the-lanham-act/>, [https://perma.cc/6H3R-W6WX] (on file with the Harvard Law School Library); then quoting Po Yi, Jessica S. Borowick & Kristin Adams, *Golden Rules: Lowering the Uneven Bars on Likelihood of*



the USOC support to prevent infringement by providing a legal cause of action when the use of its trademark is likely to cause confusion or may deceive consumers into mistaking the affiliation, connection, or association of a sponsorship.<sup>56</sup> In addition to the USOC regulations, there are federal statutes that protect against any word or symbol that suggests an association with the USOC, the Olympics Games or the United States Olympic teams.<sup>57</sup> These regulations are meant to deter unauthorized corporate sponsors from using the Olympic Games' intellectual property and likeness. However, these rules and regulations are specific to the Olympic Games generally, not for the trademarks and other intellectual property connected to the NGBs of each specific sport at the international level.

The Amateur Sports Act also provides protection against infringement of the Olympics' intellectual property.<sup>58</sup> The Act, often nicknamed the Ted Stevens Olympic and Amateur Sports Act, gave the USOC authority in defining its principles and its concept of amateurism.<sup>59</sup> It also protects the five-ring symbol and the word "Olympic" and supports the exclusive rights granted by the USOC. The Act provides in relevant part, "the corporation has the exclusive right to use (1) the name 'United States Olympic Committee,' (2) the symbol of the International Olympics Committee, consisting of the 5 interlocking rings. . . (3) the emblem of the corporation. . . and (4) the words 'Olympic', 'Olympiad',. . . or any combination of those words."<sup>60</sup> The

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*Confusion*, ALL ABOUT ADVERT. L., July 12, 2016, <https://www.allaboutadvertisinglaw.com/2016/07/lowering-the-bar-on-likelihood-of-confusion-another-reason-for-brands-to-beware-of-using-olympic-trademarks.html>, [https://perma.cc/2DUR-5AAT] (on file with the Harvard Law School Library)).

<sup>56</sup> See Lanham Act, 15 U.S.C. § 1125 (2012) ("likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or [ ] in commercial advertising promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action").

<sup>57</sup> See *U.S. Olympic and Paralympic Brand Usage Guidelines*, TEAMUSA.ORG, <http://www.teamusa.org/brand-usage-guidelines>, [https://perma.cc/ZWZ3-NW6J] (last visited Nov. 1, 2017) (on file with the Harvard Law School Library).

<sup>58</sup> See Amateur Sports Act, 36 U.S.C. § 220506 (2012).

<sup>59</sup> See Nicholas Gary Schlereth & Evan Frederick, *Going for Gold: Social Media and the USOC*, 27 J. LEGAL ASPECTS SPORT 19, 21 (2017).

<sup>60</sup> Amateur Sports Act, 36 U.S.C. § 220506(a) (2012).

USOC and all NGBs must comply with the Act to serve the purpose of protecting the athlete and to govern the Olympic system.<sup>61</sup>

This legal support gave the USOC and IOC the opportunity to further extend its protection, but creative marketing has begun to cut against these protections.

### C. *The Impact of Ambush Marketing*

One of the biggest loopholes that has hurt the integrity of the Olympic Games' sponsorships comes in the form of ambush marketing. Ambush marketing in this context is defined as "all intentional and unintentional attempts to create a false or authorized commercial association" to capitalize on the Olympics.<sup>62</sup> Given the goals of the Olympic Games and the policies put in place to protect the integrity of its brand, why has ambush marketing become so effective?

Ambush marketing has become so prevalent that a marketing report from the 2014 Sochi Olympics found that two of the top four finishers from a marketing standpoint at the Sochi Olympics were in-fact non-sponsor companies.<sup>63</sup> In 2012, adidas fell victim to this tactic. In a stream of commercial advertisements, adidas attempted to capitalize on its role as an official Olympic sponsor of the 2012 Games through a series of "Take the Stage" advertisements that focused on elite British athletes.<sup>64</sup> However, it was Nike's "Find Your Greatness" campaign featuring a teenager persevering on a tough run that resonated more strongly with consumers and ultimately led consumers to believe that Nike was an Olympic sponsor.<sup>65</sup> When polled, 37% of consumers incorrectly said that Nike was an Olympic

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<sup>61</sup> See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 92-93 (2008).

<sup>62</sup> See Hill, *supra* note 55 (quoting Andre M. Louw, *AMBUSH MARKETING & THE MEGA-EVENT MONOPOLY: HOW LAWS ARE ABUSED TO PROTECT COMMERCIAL RIGHTS TO MAJOR SPORTING EVENTS* 96 (2012)).

<sup>63</sup> See Emily Goddard, *Exclusive: Red Bull Wins Sochi 2014 "Ambush Marketing" Gold, Says Report*, INSIDE THE GAMES, Mar. 5, 2014, <https://www.insidethegames.biz/articles/1018733/exclusive-red-bull-wins-sochi-2014-ambush-marketing-gold-says-report>, [<https://perma.cc/U62B-DVP8>] (on file with the Harvard Law School Library).

<sup>64</sup> See Laurel Wentz, *Consumers Don't Really Know Who Sponsors the Olympics*, AD-AGE, July 27, 2012, <http://adage.com/article/global-news/consumers-sponsors-olympics/236367/>, [<https://perma.cc/72NN-25WT>] (on file with the Harvard Law School Library).

<sup>65</sup> See *id.*

sponsor while only 24% correctly stated that adidas was an Olympic sponsor; meanwhile, Coca-Cola was cited by 47% of respondents as an Olympic sponsor, but 28% incorrectly selected Coca-Cola's rival, Pepsi, as a sponsor as well.<sup>66</sup> This evidence indicates that consumers are being tricked by creative marketing strategies that find loopholes in the current regulations meant to protect the Olympic Games and their sponsors.

Ambush marketing threatens the exclusivity the USOC offers sponsors, which jeopardizes the sponsorship revenues the USOC receives to fund the Olympic Games.<sup>67</sup> Others see this practice as a necessary advertising tool that rewards creative marketing strategies. Are companies profiting from Olympic trademarks and diluting the work those with "proper" sponsorship agreements have produced? Should the USOC or IOC stop companies from marketing strategies that connect to the Olympics, even if they do not use the "unauthorized wording" or the Olympics' intellectual property? Is this illegal or simply an exercise of First Amendment rights and creating marketing strategies? These questions have shaped the protections and policies currently in place.

#### *D. Shaping the Protection of Olympic Marks*

Federal regulations and Olympic governing body rules are in place to prevent unauthorized sponsors from using the Olympics' intellectual property. However, it is over the last several decades that the prevention of unauthorized sponsors has been extended too far.

One of the most alarming examples of the Olympics overreaching its trademark protection occurred in *San Francisco Arts & Athletes, Inc. v. USOC*.<sup>68</sup> That case pitted a nonprofit California corporation against the USOC and the IOC. The San Francisco Arts & Athletes, Inc. ("SFAA") promoted an event entitled the "Gay Olympic Games" using the words on marketing materials.<sup>69</sup> The SFAA claimed that it was making a political statement and should be protected from an infringement claim under the First Amendment.<sup>70</sup> The Court's reasoning rested not on an outright refusal

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<sup>66</sup> See *id.* (Noting that 16,020 tweets associated the word "Nike" with the Olympics while just 9,300 tweets associated adidas with the Olympics.)

<sup>67</sup> See *U.S. Olympic and Paralympic Brand Usage Guidelines*, TEAMUSA.ORG, <http://www.teamusa.org/brand-usage-guidelines>, [https://perma.cc/ZWZ3-NW6J] (last visited Nov. 1, 2017) (on file with the Harvard Law School Library).

<sup>68</sup> 483 U.S. 522 (1987).

<sup>69</sup> *Id.* at 525.

<sup>70</sup> See *id.* at 535 ("[T]he SFAA claims that its use in the word 'Olympic' was intended to convey a political statement about the status of homosexuals in society. Thus, the SFAA claims that in this case § 110 suppresses political speech.").

of freedom of speech rights, but rather focused on the consumer confusion that could have been caused and how such confusion could have adverse effects on the USOC's interest and reputation with the Olympic Games. Against a vigorous dissent,<sup>71</sup> the Court found that the "SFAA sought to sell T-Shirts, buttons, bumper stickers, and other items, all emblazoned with the title 'Gay Olympic Games.' The possibility for consumer confusion as to the sponsorship is obvious. Moreover, it is clear that the SFAA sought to exploit the 'commercial magnetism' of the word given value by the USOC."<sup>72</sup>

The reason this case is so important is because it puts other corporations on notice as to how ambush marketing is viewed by the courts. The Court chose to protect the USOC's reputation and desire to prevent its name from being associated with words, symbols, organizations or events that it does not believe aligns with its mission and would ultimately harm its reputation. On the other hand, although the USOC has the right to bring a civil claim against a person or corporation that is infringing its intellectual property, it may not be beneficial to do so from a professional relations standpoint or from a legal standpoint. For example, what if a circuit court distinguishes the *San Francisco Arts* case on different grounds or based on different facts? This could hinder the USOC's position in preventing trademark infringement and ultimately could diminish its negotiating power when working with corporations on sponsorship agreements. There are many "attack" advertisements that may air during an Olympics that do not imply that a company is an official sponsor of the Olympics, but may confuse consumers as to its relationship to the Games. This occurred during the 1992 Barcelona Olympic Games when American Express ran a commercial that countered Visa's advertisement, an official sponsor of the Olympic Games.<sup>73</sup> What is significant about this example is that Visa did not have a cause of action that could prevent American Express from running such advertisements during the Olympic Games and ultimately gave notice to other

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<sup>71</sup> See *id.* at 571-72 (Brennan, J. and Marshall, J., dissenting) ("In the absence of § 110(a)(4), the USOC would have authority under the Lanham Act to enforce its "Olympic" trademark against commercial uses of the word that might cause consumer confusion and a loss of the mark's distinctiveness. There is no evidence in the record that this authority is insufficient to protect the USOC from economic harm. The record and the legislative history are barren of proof or conclusion that noncommercial, nonconfusing, and nontrademark use of 'Olympic' in any way dilutes or weakens the USOC's trademark.")

<sup>72</sup> *Id.* at 539.

<sup>73</sup> See Robert Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 425 (1996).

companies that ambush marketing, if structured creatively, could effectively counter an official sponsor's position in the marketplace.

The way the Court handled these situations should prompt companies to rethink their marketing campaigns and how they are going to promote their goods and services. Creativity counts, but under the new business model, the law has fallen behind.

### III. THE BRAND LOYALTY BUSINESS MODEL

Academic literature and business studies have furiously debated the impact a celebrity endorsement can have on a company. Thus far, this paper has emphasized the current state of the law, but what the law fails to do at this point, is truly work within the new business model that will be explained in this section. Nowadays, companies pay athletes millions of dollars to use their likenesses in advertisements with the goal of generating *brand loyalty* among consumers. According to CNN Money, Nike spent a staggering total of \$8 billion from 2002 to 2015 on sports sponsorships to grow their brand awareness.<sup>74</sup> The thought is, "if my favorite player wears a particular brand, I will want to wear the same brand to be like him or her." What companies are factoring in when determining the effect of a celebrity endorsement is not clear. For example, some judge the success of an endorsement off of the visibility and exposure the endorser gives the company and its product while others believe it is possible to determine the success of the endorsement by the increase in total sales or stock price.<sup>75</sup>

This section will detail current studies that illustrate the impact a celebrity endorsement can have on a company. Existing literature is divided into three streams of study: "some measure the contemporaneous effect of endorsement announcements on stock returns; others examine how changes in an endorser's status, performance, or reputation affect stock returns over time"<sup>76</sup> and others solely focus on the number of products sold. Is it possible to quantify the goodwill an endorser brings a company?

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<sup>74</sup> See Chris Isidore, *How Nike Became King of Endorsements*, CNN MONEY, June 5, 2015, <http://money.cnn.com/2015/06/05/news/companies/nike-endorsement-dollars/>, [https://perma.cc/WC2Q-UP3N] (on file with the Harvard Law School Library).

<sup>75</sup> See generally Chung, *supra* note 1.

<sup>76</sup> Elberse, *supra* note 9, at 150 (highlighting Figure 1: A Typology of Existing Research on the Economic Value of Endorsements).

A. *How Valuable Are Endorsers?*

Harvard Business School Professor Anita Elberse and Barclays Capital Analyst Jeron Verleun's study on the economic value of celebrity endorsements claims there is a positive pay-off to a firm's decision to sign an endorser, and that endorsements are associated with increasing sales in an absolute sense and relative to competing brands.<sup>77</sup> In making this claim, these authors structured their approach on three basic strategies: (a) assessing the impact of endorsement announcements and endorser achievements on sales, (b) the impact of both events on stock returns, and (c) the association between both metrics and their respective drivers.<sup>78</sup>

Many studies work to analyze the impact an endorser's achievements can have on the sales and stock returns of a company. According to Professor Elberse's study, a firm's decision to hire an endorser generally has a positive impact on the firm's focal brands sales.<sup>79</sup> As the athlete continues to succeed by securing championships and awards, weekly sales are expected to increase with an additional \$70,000 per week.<sup>80</sup> Furthermore, the study reveals that competitors' sales are not noticeably affected by the endorsement of another company. This claim will be distinguished later in the case study of Nike golf balls. Other studies focus on the fluctuation of stock prices during the life of the endorsement.<sup>81</sup>

In addition to an increase in sales, many companies seek endorsers with the goal of driving up stock returns in two ways: on the announcement day

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<sup>77</sup> See *id.* at 163.

<sup>78</sup> See *id.* at 152–54.

<sup>79</sup> See *id.* at 157 (references Model I in Table 2 detailing the equation used to make this claim. For example, the Table details that the “estimates average value, .20, indicates that weekly sales increases with just over \$200,000 over the course of the duration of the endorsement (not that sales are measured in millions of dollars) as compared with what was to be expected based on historical sales, even after controlling for any changes in advertising and pricing strategies. That corresponds with over \$10 million in added sales annually. The increase reflects around 4% of the average weekly sales for the brands in [their] sample.”).

<sup>80</sup> See *id.* at 159.

<sup>81</sup> See Chung, *supra* note 1, at 2 (“Specifically, Agrawal and Kamakura (1995) study 110 celebrity endorsement contracts and find that, on average, the market reacts positively on the announcement of celebrity endorsement contracts . . . More recently, Knittel and Stango (2009) study the negative impact of Tiger Woods' scandal. By looking at the stock prices of the firm that Tiger Woods endorses, they estimate that, after the event in November 2009, shareholders of Tiger Woods' sponsors lost \$5-12 billion relative to those firms that Woods did not endorse. Furthermore, they find that sports related sponsors suffered more than his other sponsors.”).

and throughout the duration of the endorsement. Professor Elberse's study showed across 341 endorsements that an event is quickly incorporated into the stock price with an average abnormal return (AR) of .23% on the announcement day.<sup>82</sup> The studies claim that if a company can sign the "right endorser," there is a potential to generate on average a 4% increase in sales—which corresponded to around \$10 million in additional annual sales.<sup>83</sup> Furthermore, this study indicates that the impact of endorsers' athletic achievements "significantly and positively impact" the endorsed firms' stock prices throughout the duration of the endorsement.<sup>84</sup> For example, in 2015 Under Armour's stock price surged 26.31% off the success of golfer Jordan Spieth. On April 2nd, 2015, one week before Spieth won his first major championship at The Masters, the Under Armour (UAA) stock was trading at \$41.55 on the New York Stock Exchange.<sup>85</sup> Nearly four months later, the stock jumped up to \$52.48 after Spieth won The Masters and the 2015 U.S. Open,<sup>86</sup> became the number one ranked golfer in the world, and was heading into The Open Championship. This staggering example shows that one major success story can alter the course of a company. What if that success is tainted? What if that endorser falls from greatness? Tiger Woods and Nike recently worked through that question.

### B. Case Study on Tiger Woods and Nike Golf Balls

In order to gain a deeper appreciation for how a celebrity endorsement can positively impact a company's bottom line, this section will detail the study put forth by Kevin YC Chung, Timothy P. Derdenger and Kannan Srinivasan.<sup>87</sup> Their chief finding was that the "celebrity endorsement effect on consumers can create product differentiation and generate shifts in market share."<sup>88</sup> In order to make this claim, these authors studied the effect Tiger Woods had on Nike's golf ball sales and brand integrity as a whole.

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<sup>82</sup> See Elberse, *supra* note 9, at 159.

<sup>83</sup> See *id.* at 157.

<sup>84</sup> *Id.* at 159.

<sup>85</sup> See *UAA Historical Stock Prices*, NASDAQ.COM, <http://www.nasdaq.com/symbol/uaa/historical> (last visited Nov. 2, 2017).

<sup>86</sup> Spieth became only the sixth player ever to win The Masters and the U.S. Open back to back, and the first since Tiger Woods in 2002. The other four golfers include Hall of Fame members: Craig Wood, Ben Hogan, Arnold Palmer, and Jack Nicklaus.

<sup>87</sup> See Chung, *supra* note 1, at 1–5 (analyzing monthly golf ball sales and professional golfer (celebrity) quality levels, specifically detailing the impact Tiger Woods had on the sales of Nike golf balls).

<sup>88</sup> *Id.* at 4.

There was an approximate increase of 1,416,000 Nike golf balls sold each month when Tiger Woods was under a Nike endorsement contract and Nike profited \$103 million off of 9.9 million new customers from 2000-2010.<sup>89</sup> One great athlete can truly make a difference. However, companies cannot overlook the fact that some athletes, no matter how great they are, can fall from greatness and negatively impact a history of goodwill.

The golf ball industry is a very complex market with seasonality issues that keep some companies from wanting to engage in the marketplace. Amongst roughly 1,051 models of golf balls listed on the United States Golf Association list, golf balls are estimated to generate nearly \$500 million in annual sales.<sup>90</sup> Toward the end of the twentieth century, Titleist and Spalding were battling over which golf ball was the most effective for its players. Titleist insisted that “golfers agree no other ball comes close to the Titleist 384 DT for distance, feel and control.”<sup>91</sup> In 2000, Titleist, Top Flite, Pinnacle, and Precept led the industry as having the top golf ball as indicated by their market share.<sup>92</sup> Titleist and Top-Flite owned 23.51 and 22.74 percent of the market share respectively in 2000 while Nike was ranked thirtieth with only 1.59 percent of the market.<sup>93</sup> Ten years later, the Woods impact on Nike was realized as Nike climbed to the number four rank and claimed ten percent of the market.<sup>94</sup> Another major factor that illustrates the impact Woods had on Nike golf balls can be tracked by the shift in the share of Nike golf balls after Tiger Woods switched to using the Nike golf ball in June of 2000. Before the switch, Nike’s share was roughly 1.5%, but that figure jumped to a staggering 6.6%<sup>95</sup> in only 18 months.<sup>96</sup>

On the other hand, although there are many positives to signing an endorser to help increase market share, stock price and total sales, companies

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<sup>89</sup> See *id.*

<sup>90</sup> See *id.* at 5 (quoting Davide Dukceovich, *Nike Golf: Off the Ball?*, FORBES.COM, Mar. 5, 2002, <https://www.forbes.com/2002/03/05/0305nike.html>, [<https://perma.cc/6EVY-YA78>] (on file with the Harvard Law School Library)).

<sup>91</sup> N.R. Kleinfeld, *In Pursuit of the Perfect Golf Ball*, NYTIMES, Feb. 16, 1986, available at <http://www.nytimes.com/1986/02/16/business/in-pursuit-of-the-perfect-golf-ball.html?pagewanted=all>, [<https://perma.cc/MKM2-PHTP>].

<sup>92</sup> See Chung, *supra* note 1, at 10 (comparing various golf ball brands based on (1) market share, (2) average price, (3) max price, (4) min price and (5) number of products).

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

<sup>94</sup> See *id.* at 10 (showing that the top four companies by market share in 2010 were: Titleist (23.08%), Callway (11.75%), Bridgestone (10.57%) and Nike (10.00%)).

<sup>95</sup> And decreased Titleist’s share from 24.9% to 21.8%.

<sup>96</sup> See Chung, *supra* note 1, at 12.



must be aware of the negative effects that can come from signing a premier athlete that subsequently suffers reputational harm. For example, after NFL superstar Michael Vick revealed he “bankrolled gambling on dogfighting and helped kill some dogs,” Nike suspended Vick’s deal without pay and stopped marketing the products associated with Vick.<sup>97</sup> Nike suffered similar adverse effects following Tiger Woods’ marital infidelities scandal in 2009 in which he reportedly confessed to having sexual relations with 120 women.<sup>98</sup> It is estimated that the negative effect of his actions resulted in a loss of approximately \$1.4 million in profit and 136,000 customers switching away from Nike.<sup>99</sup> Chung and his partners engaged in an interesting study that analyzed the counterfactual where Nike elected to terminate its ties with Woods to assess the effect the decision to stay with Woods following the scandal had on the company. Their finding was that Nike would have lost even more had it ended its relationship with the golfer immediately the way Accenture, AT&T and Gatorade did.<sup>100</sup> This will not always be the case, and it is not an easy decision that can be made without proper due diligence.

One of the most effective ways to neutralize the reputational harm an endorser can bring a brand is to implement a morals clause. A morals clause<sup>101</sup> provides advertisers the opportunity to suspend or terminate an agreement if the athlete’s conduct falls within the purview of the clause—commonly defined as behavior that is criminal, scandalous or otherwise pub-

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<sup>97</sup> *Cut Loose: Nike Formally Drops Vick From Endorsement Roster*, SPORTSBUSINESS-DAILY, Aug. 27, 2007, <http://www.sportsbusinessdaily.com/Daily/Issues/2007/08/Issue-232/Sponsorships-Advertising-Marketing/Cut-Loose-Nike-Formally-Drops-Vick-From-Endorsement-Roster.aspx>, [https://perma.cc/KB3M-4Y9K] (on file with the Harvard Law School Library).

<sup>98</sup> See Maureen Callahan, *The Night Tiger Woods Was Exposed as a Cheater*, N.Y. POST, Nov. 24, 2013, available at <http://nypost.com/2013/11/24/the-night-tiger-woods-was-exposed-as-a-serial-cheater/>, [https://perma.cc/F2XQ-7AW7].

<sup>99</sup> See Chung, *supra* note 1, at 4.

<sup>100</sup> See *id.* at 33.

<sup>101</sup> See generally Lauren Rosenbaum, *140 Characters or Less: A Look at Morals Clauses in Athlete Endorsement Agreements*, 11 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 129 (2015) (giving an example of Reebok’s morals clause, which reads, “[t]he commercial value of the Endorsement is impaired by Athlete’s commission of any act or involvement in any occurrence which violates widely-held principles of public morality or decency, is a felony or crime of moral turpitude in the jurisdiction in which it is committed or reflects unfavorably on Athlete, Reebok or Reebok Products”) (citing Sarah D. Katz, *Reputations. . . A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT’L & CONTEMP. L. 185, 210 (2011)).

licly reprehensible.<sup>102</sup> In some cases, depending on how the language of the clause is structured, endorsements may be terminated on “allegations” or “suspicion of misconduct.”<sup>103</sup> These provisions provide companies with a roadmap on how to handle complex situations when an endorser of their products engages in a manner that is contrary to the beliefs or values of the company. Endorsement contracts are inherently a high-risk, high-reward business venture. Although there is no way to eliminate risk, these clauses are crucial to companies engaging in endorsement deals.

This small example shows the impact a premier athlete can have on a brand. Furthermore, this example shows the importance of structuring an endorsement contract in a way that attempts to limit the negative effects a company will face in the event their endorser suffers reputational harm.<sup>104</sup> At the end of the day, it appears that a successful athlete is an extremely valuable resource to a company even if there are issues that arise at a later date or if that athlete cannot sustain success during that latter part of the endorsement. Therefore, the end game is to focus advertising dollars on the “right athlete” or celebrity that will fit the goals and the needs of the company. With this current business model in place, it is no surprise that Olympic athletes are being paid top dollar for their likenesses. Unfortunately, the law is lagging behind this new business model and both the company and the athlete are suffering from the stagnant nature of the law.

#### IV. DID RULE 40 ACCOMPLISH ITS GOALS?

The Olympic Games allow athletes from around the world an opportunity to compete at the highest level. The Games also provide athletes a global platform to market themselves. As stated throughout this paper, companies are trying to work within the parameters of the law and their current business models to achieve commercial success and to build a brand loyalty relationship with their customers. Rule 40 was implemented to ensure that sponsors have a better opportunity to benefit off of the goodwill of

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<sup>102</sup> See Christopher R. Chase, *A Moral Dilemma: Morals Clauses in Endorsement Contracts*, FRANKFURT KURNIT KLEIN + SELZ PC, Apr. 10, 2009, <http://fkks.com/news/a-moral-dilemma-morals-clauses-in-endorsement-contracts>, [<https://perma.cc/2M2K-CAX2>] (on file with the Harvard Law School Library).

<sup>103</sup> Rosenbaum, *supra* note 101, at 133 (citing Fernando M. Pinguelo & Timothy D. Cendrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009)).

<sup>104</sup> See Chase, *supra* note 102 (citing *Nader v. ABC Television, Inc.*, 150 Fed.Appx. 54, 56 (2d Cir. 2005) (stating that morals clauses have long been held valid and enforceable, specifically in the context of criminal activity)).

the Games. Unfortunately, after examining the 2016 Rio Olympics, it is apparent that the changes were not enough.

A. *Rule 40 and the Failed State of the Law*

In brief, Rule 40, a by-law of the official Olympic charter states “No competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games” without the express consent of the IOC.<sup>105</sup> The original rule prohibited non-sponsors from using any advertisement involving their athletes during the official blackout period (this year was from July 27 to August 24) even if the advertisement allegedly had nothing to do with the Olympics.<sup>106</sup> The goal of this rule was to prohibit non-sponsors from reaping the benefits of the goodwill of the Olympics Games and to protect the reputation and monetary value of being an “official sponsor” of the Games.

The issue with the former Rule 40 regime was that non-sponsors, who had invested a great deal of time and money in the likeness of premier Olympic athletes, lost a seat at the table and an opportunity to commercialize their partnerships. The blackout period would force sponsors to lose out on opportunities that would greatly benefit their brands and build further brand loyalty relationships with customers. In addition, athletes were not afforded the proper opportunity to use social media to thank their sponsors and abide by certain contractual obligations. First, many athletes want the opportunity to recognize their sponsors for all of their hard work prior to the event, especially because many of them cannot wear their sponsors’ apparel at the Games.<sup>107</sup> Second, some athletes may have contractual obligations to promote the sponsor on social media a specific amount of times throughout the year. For example, skeleton racer Noelle Pikus-Pace had deals with

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<sup>105</sup> Daniel Roberts, *Why the Biggest Story of the Rio Olympics is this Marketing Rule Change*, YAHOO FINANCE, Aug. 3, 2016, <http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html>, [https://perma.cc/JYC9-WYPX] (on file with the Harvard Law School Library).

<sup>106</sup> See *id.*

<sup>107</sup> See generally Eric Strout, *Judge Dismisses Run Gum Lawsuit*, RUNNER’S WORLD, May 12, 2016, <http://www.runnersworld.com/elite-runners/judge-dismisses-run-gum-lawsuit>, [https://perma.cc/YS6F-UNAC] (“A U.S. District Court judge in Oregon dismissed an antitrust lawsuit . . . brought by Nick Symmonds’s company Gun Gum against USA Track & Field and the U.S. Olympic Committee.”) (on file with the Harvard Law School Library).

sponsors such as Deloitte, Kellogg's, TD Ameritrade, and Under Armour.<sup>108</sup> Several of her sponsorship agreements required her to mention the brand a "minimum of 25 times on Twitter and six times on Facebook before the 2014 Games." Under the old Rule 40, these contractual obligations were much harder to fulfill.

However, in February 2015, Rule 40 was relaxed to allow non-Olympic advertising during the Rio Games and to allow athletes to post on social media about non-official sponsors as long as they did not make any references to the Games.<sup>109</sup> This change allowed two strategies to emerge. First, smaller companies, such as Seattle-based women's apparel company Oiselle, began implementing strategies that played on words, such as "Big Event in the Southern Hemisphere" to achieve their goal.<sup>110</sup> Second, larger companies, such as Under Armour, had the resources to try a more strategic approach. In March of 2016, they began showing advertisements of Olympic swimming superstar, Michael Phelps, training in the pool with the caption "Rule Yourself."<sup>111</sup> Although there was no direct connection to the Olympics, all viewers knew what Phelps was training for.

On the other hand, it can be argued that Rule 40 opened the floodgates to creative marketing teams. As mentioned previously, Under Armour's "Rule Yourself" advertisement featuring Michael Phelps was not an "Olympic advertisement" nor was Under Armour an official sponsor of the 2016 Rio Games. However, "data from Unruly shows that Phelps' Under Armour spot [was] the second most shared Olympics ad for 2016—behind Channel 4's incredible Paralympics sport 'We're The Superhumans,'—and the fifth most shared Olympics spot of all time."<sup>112</sup> For the IOC, this statistic could be alarming or could point to a flaw in the purpose and structure of the current rule. If Under Armour's advertisement is truly ranked among the greatest "Olympic advertisements," what goal did the changes to Rule 40 achieve? One could argue that Rule 40 is creating bigger headaches for

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<sup>108</sup> See Tripp Mickle, *Athletes See Rising Social Media Demands*, SPORTSBUSINESS-DAILY, Oct. 21, 2013, <http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/21/Olympics/Endorsements.aspx>, [https://perma.cc/7PQL-56LE] (on file with the Harvard Law School Library).

<sup>109</sup> See Chavez, *supra* note 4.

<sup>110</sup> *Id.* (Owner of Oiselle, Sally Bergesen is also known to have used the phrase "city that rhymes with Neo Bee Sin Arrow" to make the connection to the games).

<sup>111</sup> *Id.*

<sup>112</sup> Katie Richards, *Why Under Armour Michael Phelps Ad is One of the Most Shared Olympics Spots Ever*, ADWEEK, Aug. 11, 2016, <http://www.adweek.com/brand-marketing/why-under-armours-michael-phelps-ad-one-most-shared-olympics-spots-ever-172931/>, [https://perma.cc/QG82-LTUA] (on file with the Harvard Law School Library).

companies that have established strong brand loyalty with their customers while others could argue that Rule 40 is not doing enough to protect official sponsors. Should Rule 40 protect official sponsors, or simply police unauthorized advertisements? Where is the line drawn between stifling creativity and enforcing rules? How can Rule 40 be altered to recognize that brand loyalty is the foundation by which companies are advertising rather than attempting to appear as an official sponsor?

Furthermore, Rule 40 is not structured in a way that is relevant to today's industry and thereby causes more confusion for sponsors. What are they truly paying for and what is Rule 40 achieving? The blackout period makes sense because it tries to emphasize the relationship the Games have with its official sponsors. However, Rule 40, much like current trademark law, seems to be focused on consumer confusion rather than what the current business model on consumers emphasizes: brand loyalty. As the studies have shown throughout this paper, consumers are attached to their favorite athletes and they will be drawn to the brands that their favorite player endorses. Under Armour tapped into a loyalty base regardless of whether it is an official sponsor. Consumers are not always worried about who the official sponsor of the Olympics are; they often care more about what brand their favorite Olympic athlete endorses. Sponsorship can aid in targeting consumers on the fringe or without loyalty to a company. If Rule 40 is going to have a real effect on the current business model, more needs to be done to revamp how the Olympic governing body views its partnerships and the goodwill of the Games.

#### *B. Where Do Companies Go From Here?*

With the current state of the law in flux and the new changes to Rule 40 failing to tap into the current business model, companies are left with the question: what do we do now? How are companies supposed to act when they do not know how the Olympics will respond, and whether it is worth the investment to purchase rights to be an official sponsor of the Olympic Games? Companies with powerful marketing teams have learned how to work within Rule 40 to make indirect connections to the Games and others have succeeded with ambush marketing techniques. Given this success, creative marketing seems to be the most effective way to exploit a successful endorsement relationship. On the other hand, there is no guarantee that these "indirect advertisements" will be successful or connect with the consumers. Is it worth the headache or is it better to have the opportunity to use the goodwill and intellectual property associated with the Games? There is no simple way to answer this question and companies

must continue to conduct individual research to determine what is best for their company and their consumer base. Furthermore, companies must remain flexible to future changes as the IOC and USOC conclude their review of the most recent Summer Games.

Finally, if companies decide to move forward with an endorsement opportunity, it is important to be mindful of how to select the “right athlete.” There are some that believe there are only two major factors to consider when selecting an endorser: “1) the attractiveness of the celebrity—a more attractive/prominent endorser leads to a greater impact on sales— and 2) the credibility of the celebrity—expertise and trustworthiness must be credible.”<sup>113</sup> In considering that checklist, companies should be aware of previous findings that state: 1) the help of celebrity endorsers pays off, 2) endorsement strategies fit a marketing campaign aimed at increasing market share, 3) paying a premium for top athletes appears worthwhile in terms of both sales and stock returns, 4) positive but decreasing returns to sales should impact how companies structure contract, and 5) there were will trade-offs in maximizing sales and stock-return performance.<sup>114</sup> Given the current state of the law and the blueprint advertising strategy put forth by Under Armour’s Rule Yourself advertisement, the smart play seems to be: (1) find the best and most popular athlete in the Games, (2) find an athlete that is durable enough to participate in several Olympic Games, (3) pay that athlete a premium to endorse your products, and (4) provide a marketing team with the resources to make “generic” advertisements with the hope of creating a valuable relationship with the consumer.

## V. CONCLUSION

The state of Olympic regulation appears to be in flux as companies try to adapt to the changes of Rule 40. New marketing strategies have pushed more competition into the boardrooms as companies fight over the top athletes. Unfortunately, the policies put forth by the Olympic governing bodies are lagging behind the new brand loyalty business model. This has forced companies to use creative solutions, oftentimes being accused of “ambush marketing” to promote their sponsored athletes. It is imperative that new regulations are proposed to ensure that the goodwill associated with the Olympic Games is utilized in a way that best serves this new marketing model. In the meantime, it appears advisable that companies follow the Under Armour blueprint of creating a “generic” marketing campaign that

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<sup>113</sup> Chung, *supra* note 1, at 7.

<sup>114</sup> See Elberse, *supra* note 9, at 163–64.

provides them a seat at the Olympic table. After all, consumers are ready to pledge their allegiance to the “Swoosh” or to “Protect This House.” It all depends on who gets there first.







## Thomas Dreams of Separability

Charles E. Colman\*

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This short story is — or, at least, occupies the place of — the fourth installment in a five-article series for the Harvard Journal of Sports & Entertainment Law. The series, originally entitled ‘The History and Principles of American Copyright Protection for Fashion Design,’ began as a sort of mini-treatise on the idiosyncrasies of the federal courts’ fashion-related copyright decisions. Readers of this piece will see that, whatever it is, it is not that.

Allow me to explain. Just before the third installment of the JSEL series went to press, the Supreme Court granted certiorari in a case, *Star Athletica, LLC v. Varsity Brands, Inc.*, 136 S.Ct. 1823 (2016), that had the potential to clarify, harmonize, and/or transform the law governing the copyrightability of fashion design (and other works of “applied art.”) This series was immediately put on hold pending the Court’s ruling in *Star Athletica*, which the author and editors hoped would prove to be a rich resource for further elucidation of the doctrines and themes to which the series was dedicated.

The decision handed down in March 2017 was emphatically not such a resource. The author of this series found himself flummoxed. Indeed, the “content” of Justice Thomas’s majority opinion was such that the fourth (let alone fifth) article of the planned series simply “wouldn’t write.” Eventually, the author — perhaps misguidedly and hubristically inspired by Michel Foucault’s unapologetic change of direction between the first and second books in the five-volume series, *The History of Sexuality* (which remained uncompleted at the time of his tragically premature death) — found it necessary to alter course. (The editors of JSEL were kind enough to indulge him.)

The fourth installment, the author decided, would look radically different from the first three. No mere change of title, theme, or method would enable him to engage with the *Star Athletica* decision, and all that it represented; a change of \*genre\* was necessary. The result was a fictional work, the first half of which is included here as (or instead of) the fourth installment of the JSEL series. The author will conclude the narrative, and the series, in a piece slated for the Spring 2018 issue of JSEL, to be published under the title “The Longest Transference.”

“Courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function.”

*Masquerade Novelty, Inc. v. Unique Indus., Inc.*,  
912 F.2d 663, 670 (3d Cir. 1990)

“[A]pplication of this language [of the Copyright Act of 1976] has presented the courts with significant difficulty. Indeed, one scholar has noted: ‘Of the many fine lines that run through the Copyright Act, none is more troublesome than the line between protectible pictorial, graphic and sculptural works and unprotectible utilitarian elements of industrial design.’ PAUL GOLDSTEIN, 1 COPYRIGHT § 2.5.3, at 2:56 (2d ed. 2004).”

*Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*,  
372 F.3d 913, 921 (7th Cir. 2004)

“[A] clothing design that is intended to be used on clothing is copyrightable only to the extent that its artistic qualities can be separated from the utilitarian nature of the garment. How to conduct the conceptual separation is, in turn, what continues to flummox federal courts . . . . There are at least six distinct variations of that test.”

*Galiano v. Harrab’s Operating Co., Inc.*,  
416 F.3d 411, 419, 417 (5th Cir. 2005)

“We turn now to a more vexing question in this case: whether [the allegedly infringed] designs are conceptually separable from the utilitarian aspects of such furniture. We must approach this inquiry mindful of the nebulous standard with which the [district] court was obliged to grapple.”

*Universal Furniture Intern., Inc. v. Collezione Europa USA, Inc.*, 618 F.3d  
417, 431 (4th Cir. 2010)

“Courts have struggled mightily to formulate a test to determine whether “the pictorial, graphic, or sculptural features” incorporated into the design of a useful article “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the [useful] article” when those features cannot be removed physically from the useful article . . . . Through the years, courts and scholars have proposed or used [at least eight] approaches to conceptual separability.”

*Varsity Brands, Inc. v. Star Athletica, LLC*,  
799 F.3d 468, 484 (6th Cir. 2015)

“The questions of whether or how to protect the aesthetically pleasing appearance of useful articles have yet to be resolved, despite over a century of debate. In no other area of U.S. copyright law is there a more extensive history.”

2 PATRY ON COPYRIGHT § 3:124 (2016)

“[A] feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.

Applying this test to the surface decorations on the [plaintiff’s] cheerleading uniforms is straightforward.”

*Star Athletica, LLC, v. Varsity Brands, Inc.*,  
137 S.Ct. 1002, 1012 (2017) (Thomas, J.)

. . . .

Your name is Thomas. You work at a company that creates and sells games—board games, puzzles, and the like. The company was founded many years ago by a man whose real name is unknown by all but a few employees, and whom no one has seen in many years. Most call him “the Founder,” usually with reverence. You revere him more than most; as far as you’re concerned, his word is gospel. You wish you could meet him (you have so many questions!), but you’re not even sure whether he’s still alive. That doesn’t change the nature of your obligations to him—it’s his company, after all . . . or, at least, his heirs’ company (who are they? where are they?)—but his *in absentia* status makes things difficult at times.

For one thing, the Founder didn’t always leave detailed records about the way the company is supposed to operate. But it’s not just that: no matter how detailed his records, current employees seem to disagree about the way they should be interpreted. Sometimes, it even seems like the more detailed the records are, the greater the range of views on what they mean! You’re not sure if some of these employees are reading the records selectively or if their disagreements are genuine. Fortunately, you usually understand what the Founder meant, or what he would have wanted, so it’s a good thing your view counts for more than most. No, that sounds bad, haughty (you can’t stand snobs!) What you mean is that it’s a good thing that someone who cares so much about fidelity to the Founder is the company’s Director of Testing and Guidance.

Which is not to say that T&G is the most important department at the company. There wouldn’t be any games to “test” without Development and Revision, and there wouldn’t be any customers to “guide” without Branding and Logistics. D&R is—well, it’s different things to different people, but you’ve always thought of it as the laboratory of the company, where the games are designed. Of course, D&R sometimes develops games based on ideas that a T&G guy proposed, and sometimes B&L forces an idea for a new game down D&R’s throat, saying it’s necessary for the company’s “contin-

ued success,” or something like that. But left to its own devices, D&R is basically there to come up with games that people will enjoy. Or, at least, that they think people will buy. Or games that people *should* buy.

Yes, it gets a bit hazy there, in part because the Founder’s records mention a variety of things that the company’s games are supposed to accomplish. And—this much, you can’t deny—there are *some* inconsistencies (no, that’s too strong a word . . . it would be more accurate to call them “differences of emphasis”) in the Founder’s goals for the company and its games across his records. Early on, as in the ‘40s and ‘50s, the Founder mainly talked, or rather, wrote—one can only rely with certainty on what he wrote down (and maybe what he said, *if* there is a contemporaneous written record of it, produced by a reliable source)—about the survival of the company. His records from the ‘60s and ‘70s are less . . . deliberate, which you find entirely understandable, since he wasn’t coming into the office as much by then. You’re not sure if you believe the company lore, but some say that by the ‘70s, the Founder had grown withdrawn and eccentric—not your word—creating games with odd names that he supposedly insisted were “good for customers,” whether they “knew it or not.”

You can’t ignore these “late games,” as people call them, but there are days when you wish the Founder hadn’t gotten so, well, ambitious. It’s tough for your team to answer questions about a game that can be understood—or, rather, *mis*understood—in a lot of different ways. The key is to stick to the words of instruction manuals that the Founder approved. . . or, at least, would have approved. They usually tell your employees and the customers everything they need to know. It’s not your place—not T&G’s place—to start changing them willy-nilly.

Not everyone appreciates this, probably because they don’t see that it comes down to *humility*. That’s something you strive for yourself and always try to cultivate in your employees. Of course, you can’t force them to change—that’s why hiring the right people is so important—but you can continue to nudge them in the right direction. . . . Hence the framed poster with the “Litany of Humility” hanging on the wall of your office. Its wisdom, you figure, is bound to rub off on frequent visitors—and some of the employees who come to you most often (suggesting this, complaining about that) would do well to read it. You look over at the “Litany” and savor its familiar words:

That others may be esteemed more than I . . .  
 That, in the opinion of the world, others may increase and I may decrease . . .  
 That others may be chosen and I set aside . . .  
 That others may be praised and I unnoticed . . .  
 That others may be preferred to me in everything . . .  
 That others may become holier than I, provided that I may become as holy as I should . . .

You notice, mid-line, that some T&G employees are hovering just outside your open office door. Encouraged by your smile (you're proud to be such an approachable boss), the three team members shuffle in and arrange themselves in front of your desk. You're not annoyed by this visit, not at all. You always have time to spare for young people (at least, for young people who are enthusiastic and hardworking, and who understand what this job is about—though you note with dismay that the recent grad is carrying a pile of papers, which probably means they're not here for a friendly chat).

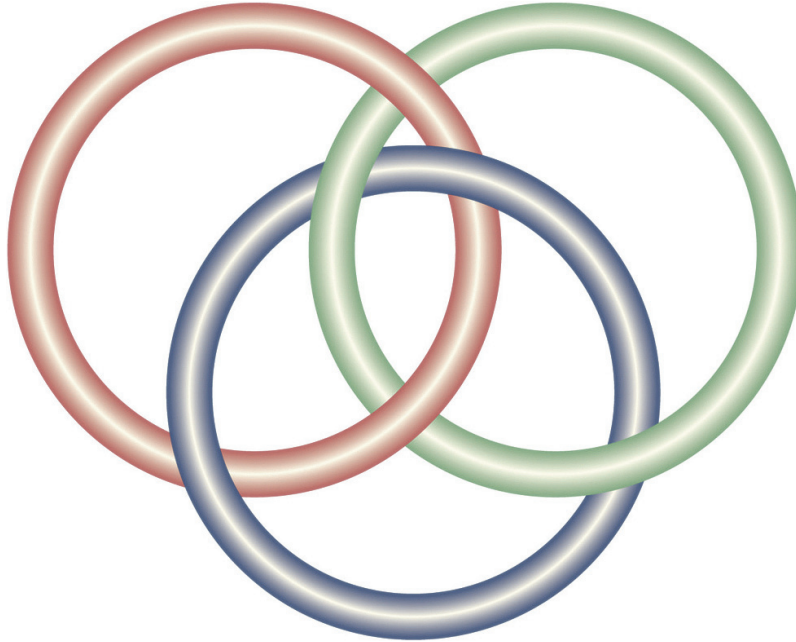
What's on their mind? A recent spike in customer complaints, you learn. Relating to one of the late games, *Separability*? (So odd that the Founder put a question mark in the name of the game, you think. Should one always say the word like a question?) But wasn't that game retired a while back? Yes, but it was relaunched when D&R cut back on new-game development, you're told. Since then, the company has been flooded with—the employee telling you this adopts a bizarre tone of voice that you gather is supposed to sound like an irritated customer—'Is the game missing pieces?' 'Did I get a defective version?' 'What's the point of this game?' and the like. You get the point. Have the team members . . . . Yes, they've consulted those records, scrutinized every word that might shed light on the Founder's intentions . . . . Some employees—not these three, a member of the delegation adds eagerly—even started to do outside research, which has led in some pretty strange directions. Since then, there have been some pretty heated disagreements among team members about what the game's instruction—one can't really say "instructions," as it's just a single sentence—means, and how to win, or even how to *play* the game . . . . Not only that (another team member jumps in), but some people don't think it's a *game* at all—you know, the Founder's experiments in the late games and all . . . . (Of course it's a *game*, you think. And every game is ultimately about the same thing.) The conversation stalls, and you find yourself lost in thought, until an employee, silent until now, pipes in (with a hint of impatience, if not impertinence, that annoys you) to say that all they really need to know is what you want them to tell unhappy customers.

You consider pointing out that it's not a question of what *you* want, but of what the Founder and the instructions already make clear, but you decide against it. If the team member hasn't gotten that by now . . . . You look at the pile of documents. You don't want to send the wrong message: your people shouldn't think of you as some oracle with privileged access to the Founder's intentions. If they're doing their jobs, they can and should reach the same conclusions as you, whatever the game might be. On the other hand, you've been at this for a lot longer than they have; you're more familiar with the way the Founder thinks than almost anyone. And if you agree to take a look at the game, you might notice something that your team members didn't realize was important, something that you'll see—and, more importantly, that you'll be able to teach them—is the key to the whole thing.

You've convinced yourself. You tell them you'll look over the documents and the game, which is tucked away somewhere in your office. They're pleased. They hand over the pile of papers and express their gratitude. They leave.

You get up and walk over to a cabinet you haven't opened in years. You remove one box after another, stacking them on a small sofa. (You inherited the sofa from your predecessor, but you rarely use it, and never to lie down. How would that look, for a department head to lie down at work?) As the stack of boxes grows to a precarious height, you spot what you're looking for. You dig the game out of its hiding place at the back of the cabinet, carry it over to your desk, and examine the faded cover:

# SEPARABILITY?



You open the box and look for instructions. Alas, it's true: the only text explaining how the game is to be played is a single sentence printed directly on the unfinished-cardboard interior. You read the words slowly, deliberately:

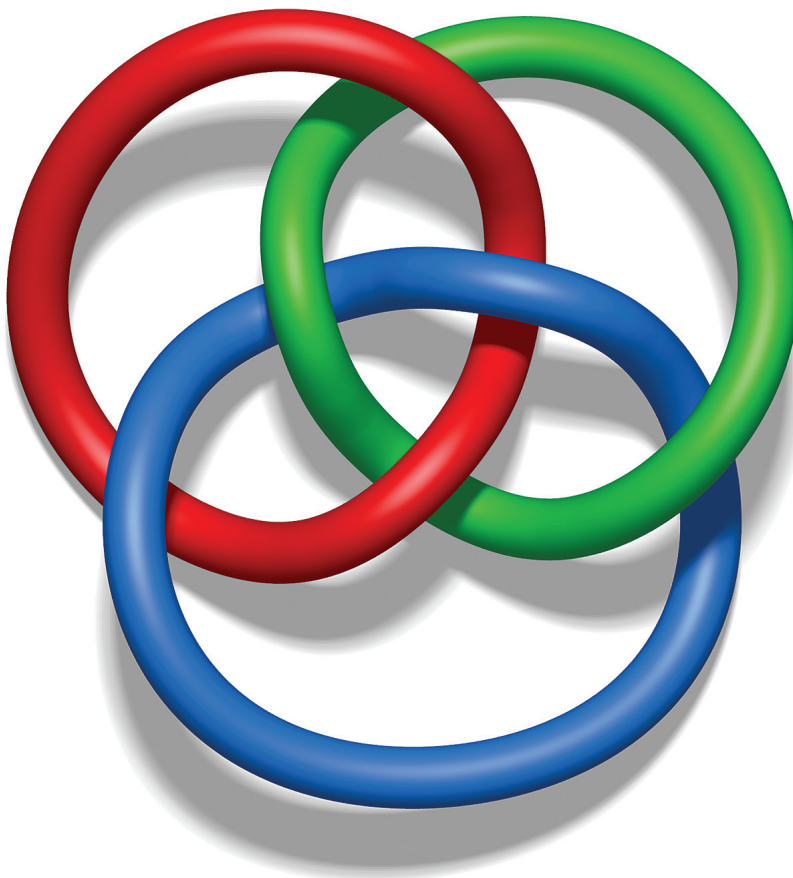
A player is made "(w)hole" if, and only to the extent that, s/he secedes in naming a feature of the enclosed article that can be identified separately from, and is capable of existing independently of, the ~~other~~ aspects of that article.

At first, you're not even able to engage with the meaning of the sentence; you're too disturbed—distressed—by the sloppiness of the text. How could this company, this venerable company, release a game containing a typo—"secedes"?!—in the *single sentence* making up its instructions? How could a game have gone to press with the word "other" marked for deletion, but never actually removed? And what the heck is "(w)hole" supposed to mean? The parentheses, the scare quotes . . . Is this supposed to be clever?

There's no way the Founder drafted this language himself, you think. You're certain that he shared your view that people should say what they mean—cleanly, plainly, decisively. The purpose of language is, of course, to

*communicate information* from one person to another. If you're not going to give that your best shot, why bother saying anything at all? No, this instruction was almost certainly drafted after the Founder stopped coming into the office in the mid-70s. If the guy who approved this text was still at the company, today would be his *last* day.

Trying to shake off your disgust, you turn to the remaining contents of the box, a rubber knot:



Okay, at least there are no surprises here: you've got a three-dimensional version of the image on the front of the box. You grudgingly reread the text, cringing at each typo and gimmick:

A player is made "(w)hole" if, and only to the extent that, s/he secedes in naming a feature of the enclosed article that can be identified separately from, and is capable of existing independently of, the ~~other~~ aspects of that article.



Obviously, you think, there are multiple “features” of the article that one can imagine existing independently of the other “aspects”: you’ve got three rings, any one of which could exist on its own. You’ve got three different colors, any one of which could be applied to countless other things besides rubber rings. You’ve got the notion of a circle—same deal. The game is so incredibly straightforward that you find yourself getting angry at your employees. But you try to calm yourself down: they must have had their reasons for bringing this to you. Most likely, this was meant to be played by children—you scan the sides of the box and lift it up to see if the packaging notes a recommended age range (it doesn’t)—but your team members proceeded on the assumption that it was for adults, figuring that there had to be more to it than meets the eye. Yes, this was probably just another instance of overthinking, a disconcertingly common problem among your employees.

To confirm your suspicion, you turn to your employees’ reports. You pick a random document and start reading:

The only possible answer to the question “Separability?” would seem to be “no.”

Suppose that a player “names” the “blue ring.” Has she “seceded” [*sic*] in highlighting a “feature” of the article that “can be identified separately from” the knot? One could, of course, physically clip the blue ring, causing it to “exist[ ] independently” of the other two rings (which would, perhaps significantly, become unlinked in the process.) But as soon as the ring is clipped, it is no longer a “ring” at all. Something now “exist[s] independently,” but it is not the same “feature” previously identified: the former is a blue string, the latter a blue ring.

It is true that the instruction says only that a feature must be “capable” of “existing independently,” not that a player must effectuate that existence. Simply naming the “blue ring” as a feature that can be *imagined* as “existing independently,” one might argue, is enough for a player to be made “(w)hole” [*sic*]. But it is not clear that an imagined blue ring, existing apart from a green and red ring that binds together, is in fact the same “feature” as a blue ring that is bound up with, and binds together, the other two. One can imagine a *second* blue ring, one that was never linked to a green and red ring, but that would seem to be a different object than *a blue ring that was previously linked to two other rings, which it kept linked together*.

In Jacques Lacan’s *Seminar XXIII* on the “sinthome” . . .

You stop reading. The employee has, as you suspected, overcomplicated matters. But there’s something else about this report that bothers you,

something you can't quite pinpoint. It's not just that it challenges your initial theory (you're always open to the possibility that you're mistaken about this point or that; that sort of openness is an important part of humility.) No, it's something bigger than that. But what? You close your eyes and try to follow the employee's reasoning to its logical endpoint. Let's see: if a part of something can *never* be separated—even *mentally*, even *hypothetically*—from the other parts of that thing without instantly becoming something different than it was a moment before, then . . . then . . . wouldn't that mean that one could never generalize about *anything*? Every object, every body, would (despite evident commonalities) have to be treated as singular, unique. *Maybe* that's true of God, you think, but not of people, and certainly not of inanimate objects. A ring is a ring is a ring . . . isn't it?

You want to know if this employee's thinking is an anomaly, so you skip to the next report and start reading at a random point in the middle of the page:

From my perspective, the question mark punctuating "*Separability?*" concerns not so much the specific three-dimensional object enclosed in the box, but rather the generally shared (but questionable and, by astute players of the game, newly questioned) understandings of "part" and "whole." This is suggested both by the curious spelling of "(w)hole" and the use of the strikethrough function on the word "other," which evokes the Heideggerian technique of placing terms and concepts "under erasure." This typographical allusion to a philosopher perpetually preoccupied with the under-theorized and often-undisclosed predicates of traditional Western ontology would seem to indicate that the game is designed to warn players of the epistemological errors and potential consequences of treating any object as "whole"—at least, once (purportedly) isolated from its context, or its *ground*.

The game's instruction suggests that any attempt to isolate any entity as freestanding—as "capable of existing independently"—from its context, to force it to "secede" from its background (even if, or maybe *especially where*, the animating impulse of that attempted secession is the desire to become "whole" oneself) is problematically ideological, in that it attempts to (however unsuccessfully) obscure the genealogy of that entity. Consider, for example, the irregular contours of the blue ring, which are required for the "impossible" two-dimensional image on the box cover to be rendered in three-dimensional space. One can try to imagine the oddly shaped blue ring "existing independently" of the other two rings, each of which has also been twisted to accommodate the others, but the effects of that accommodation persist—if only as a suggestion of a history, a broader embeddedness, an absent cause.

To one who managed to willfully forget these (or other/analogous) genealogical circumstances, of bringing about a sort of self-imposed amnesia, it

might seem that the “freestanding” ring was in fact a “whole.” But of course, no such technique exists: the closest approximation of deliberate amnesia in which people can engage is *repression*. The latter technique, however, does not eliminate traces of genealogical information, but rather conceals it—and incompletely, at that, because such repression often yields *affects* that signal that a concealing operation has occurred. Through this seepage of affect, one who has “secede[d]” in this way, through the repression of genealogy and the reality of interdependence, might actually feel a metaphorical “hole” with an intensity that increases in proportion to the vigor with which he aims to feel independent, untethered, and thus “whole.”

In my view, then, *Separability?* warns against taking for granted conventional distinctions between “self” and “other,” “free” and “dependent,” and similarly pernicious dualities passed down through the ages.

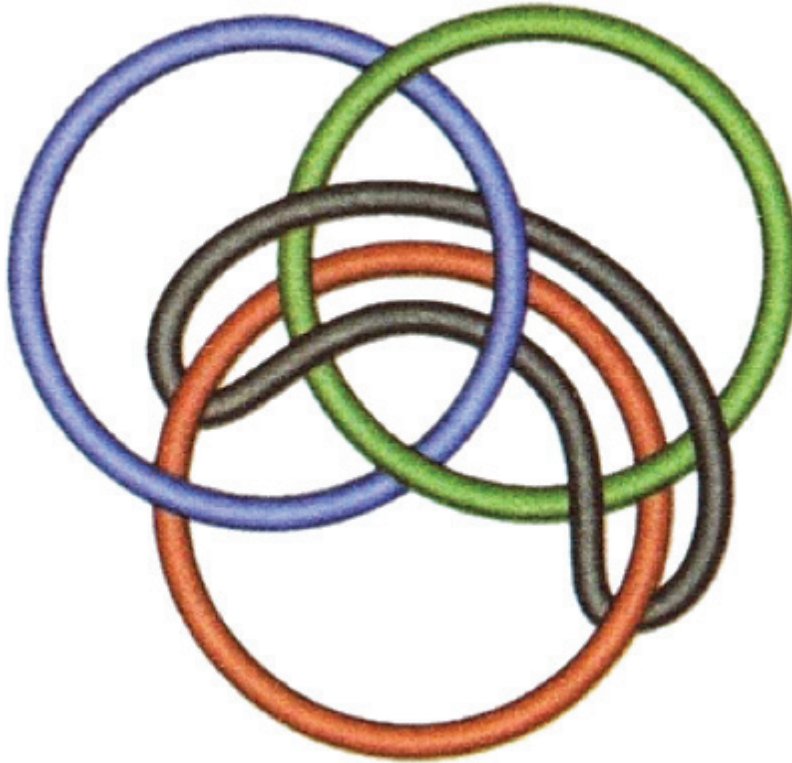
Unbelievable. . . This is even worse than the first one! Heidegger? Repression? (Wasn't the first discredited as a Nazi and the second debunked along with the rest of psychoanalysis?) Never in your (what, twenty-five?) twenty-some years as the head of T&G have you seen employee reports spouting so much pretentious, pseudo-intellectual nonsense. You are bewildered. There could be no possible justification for looking at this stuff in order to make sense of *Separability?* It's not as if the Founder was thinking about some imaginary problems with “traditional Western ontology” or reading the “Seminar XXIII” of “Jacques Lacan” when he created this game.

But, you think, your employees were obviously reading and thinking about this nonsense when they drafted these reports—and if you don't put a stop to that right now, God knows how that might affect the rest of their work. Unfortunately, you decide, you'll have to get a sense of what they've been reading; it's the only way to determine the nature and extent of the corruption. You have to know your enemy, so to speak; you'll have to acquaint yourself with the quacks and their “theories” that have caused the damage it now falls to you to undo.

You quickly discover that there are seemingly limitless resources about this “Lacan,” and the figures that influenced him—including the Nazi (of course)—on countless websites. You find transcripts of his “seminars,” in which he goes on at length about his bizarre and largely incomprehensible theories. When you finish reading—or just lose your patience for—one document, you find another one. You start to see the way this guy worked: everything he said seems to raise questions that the next installment promises to answer . . . but never does. This man used curiosity to create his own cult! And the members of that cult have, judging by the volume of

material they've produced, wasted years of their lives trying to decipher every nuance of "the Master's" wording—even when he unashamedly contradicts himself, even when he essentially admits (on rare but telling occasions) that he doesn't know what he's talking about! It almost seems as if his most zealous followers loved him *because* he was so obscure, which is just . . . sick.

These misguided souls seem to be fond a particular image—a drawing from one of Lacan's "seminars" in the mid-70s—which you are certain represents ground zero of the epidemic of overthinking among your team members:



This discovery, unfortunately, makes you no less alarmed. In fact, you're even more concerned to learn that your employees took as their starting point for their little flights of fancy an image in which the rings aren't even connected in the same way as the ones in *Separability*? It's inexcusable. It's an insult to the Founder.

Is there still time to speak to your employees today, you wonder? You check the clock, then do a double-take: it's after midnight. You've been

reading about this Lacan for, what, eight hours? You see how his acolytes could have fallen prey to his “teachings.” But not you—and not your people. You’ll set them straight first thing tomorrow morning.

You send out a notification of a department-wide meeting at 9 A.M. The problem can’t wait any longer than that, but this means that sometime in the next nine hours, you’ll have to think very carefully about what to say, what sort of cure should be prescribed here. Not tonight, though. You’re too tired. You head home and go straight to bed. In no time, you are asleep.

At some point during the night, you realize that you are not alone in your bedroom. You sit up and turn on the light. As a blurry figure comes into focus, you ask (with an odd lack of concern) “Who are you?”

“Who do you think?” is the only response—given in a strong French accent. By now, your vision has cleared up, and you see that the figure is . . . you. That is, it appears to be you. Yet somehow, that you is also Jacques Lacan. You’re both the familiar you, sitting up in bed, wearing boxer shorts and a white t-shirt, and the unfamiliar you, standing across the room in a colorful suit straight out of 1976.

“I don’t understand. Am I Lacan, too, or am I just Thomas?” you ask the figure.

“Are you not *précisément* Thomas, who is, among other things, a Thomas who is also a Lacan?”

This irks you. The gibberish, the heavy—almost theatrical—French accent, the unnecessary addition of French words (do you even know French? you can’t recall). . . It’s absurd. And the visitor’s manner suggests that he’s just getting started.

You, as Lacan, continue: “You might say that each of us is a mode of Thomas—or, should I say, Thomas *à la mode*?” You pause for a laugh from the you in the bed, but you refuse yourself even a courtesy chuckle. You look slightly hurt. “Surely,” you gently protest, as Lacan, “a man can assume that his interlocutors know Spinoza. . .?”

“You know very well that this ‘interlocutor’ does not . . . that *neither* of us does,” you insist, pointing back and forth between your identical faces.

“But *Saint Thom*, you must return to Spinoza,” you add, “if you wish to understand effect and cause.”

“Return?” you mumble, trying to recall whether Spinoza is one of the good guys. Wasn’t he a heretic? Wait, was he even a Christian? . . . No matter. “In English, we say ‘cause and effect,’” you say, hoping to knock the Lacanian you off his high horse. It feels good. You keep going: “And I won’t be reading Spinoza, or anything else you recommend. I know all about your ‘theories’ and your mind games; I’ve seen first-hand the damage they can do. Which reminds me . . . I have an important meeting in the morn-

ing—a meeting that I scheduled to fix the problems *you* caused—and I need to get a good night’s sleep. So I will *politely* ask that you leave my home.” You wait a few seconds, then add: “Go—you’re not wanted here!”

You, as Lacan, reflect for a moment, then respond: “*Mon Dieu, Saint Thom*, what a ‘Litany of Complaints!’” He pauses again, briefly, then adds: “And yet, in those complaints, one begins to hear echoes of your *sin, Thom. . . .*”

“What do *you* know about my ‘sin?’” you demand, only to realize in that this you—being yourself—might know quite a bit, perhaps everything, about you. That makes you deeply uncomfortable.

As if to egg you on, you, as Lacan, start to recite what sounds like a nursery rhyme: “The good *Saint Thom*, a *saint* among *hommes*. . . . So very *proud* of his ‘humble’ *sinthome!*”

“Stop calling me ‘Saint Thom!’” you shout, cutting yourself off.

You, as Lacan, pause to ponder the request, then declare: “*Non*, I will call you Saint Thomas—if only for the sake of clarity. . . or should I say *claritas?*”

Do you get the joke? You’re not sure. It has to do with Saint Thomas Aquinas—“*integritas, consonantia, and claritas*”? (was that it?) “*Unde quae habent colorem nitidum, pulchra esse dicuntur*” (was that it?). . . . Wait, you’ve just reminded yourself of something—something else, something about ‘vegetables’. . . . Your mind wanders, again. Then you catch yourself: this is exactly what he—what you?—wants, you realize, and you won’t give him—give you?—the satisfaction. You won’t let yourself fall into the trap of questioning what you know. Or what you don’t know you know, or what you know you don’t know. . . or what you don’t know you don’t know. . . . No, that way madness lies. (*Lear?* Yes, that’s it: “Your old, kind father, whose frank heart gave all— O, that way madness lies; let me shun that. . . .” Amazing, what the mind retains!) Shun, indeed: “As far as I can tell,” you reply, belatedly, “clarity is decidedly low on your list of priorities.”

“Priorities,” you, as Lacan, repeat back to yourself. You let the word linger in the air for a moment, then say: “*Parfois*, clarity is *prior* to truth, but this does not mean one must remain in its priory. Indeed, not to stray from the priority is never to know the name of one’s prior. And that name, lying at the root of transference, is for many *analysands* the very stuff of which the *sinthome* is made. The stuff of which *Saint Thom* is made. . . .”

You know what you’re aiming at, and you’ll have none of it. “Listen, I’m not your *analysand*; I’m not a patient of yours. I don’t need—don’t want—whatever *cure* you’re peddling.”

You, as Lacan, shake your head in protest. “*Mon cher Saint Thom*, I offer no ‘cure.’ *En fait*, I am no less an *analysand* than those who come to me for

their *petites visites*. I too am a captive of *un grand discours* not of my own choosing, not of my own creation; I too am a prisoner in the *oubliette* of language. And yet I have something to offer: *practice*. For I have met many fellow prisoners while doing my time, and they have taught me a great deal about the hidden passageways, the locations of tiny windows, through which one can—while never escaping the *oubliette*, not in life—move about with fewer constraints, enjoy a breath of fresh air *de temps en temps*. But, of course, one cannot provide any form of assistance to a prisoner who refuses to acknowledge that he is not free. . . .”

“In that case, please consider me a free man.” You pause to consider the strangeness of the sentence you’ve just uttered. What does it mean? Do you just *consider* yourself a ‘free man,’ or *are* you a free man? And what are you—or aren’t you—free *from*? Free *of*? If you thought this man—this other you, that is—could impart to you freedom from, say, doubt, then you might try harder to hear what he has to say. But, it occurs to you (and this makes you angry), doubt is exactly what he—what you . . . are selling. In fact, it’s the only thing you’re selling. You’re trying to sell yourself a lose-lose game. Not only are you not offering a cure, you’re peddling a disease!

As if reading your mind (which, you suppose, is unavoidable in this situation), you, as Lacan, say: “The wish to be free . . . to be free of doubt, to be free of desire, to be free of others—to be ‘sovereign’—is, it seems to me, a very dangerous thing. Am I ‘peddling’ doubt? Am I ‘peddling’ an insatiable desire? Am I peddling something both necessary and impossible? *Peut-être*. . . . But what is the alternative, *Saint Thom*?”

“To be normal,” you answer, perhaps too quickly. You know the Lacanian you will have a field day with this unless you keep talking, so you add: “I don’t know exactly what you’re selling, and I don’t especially want to know, either. Because it’s clear to me that, whatever it is, whatever you call it, it’s very bad news.” (Wait—those words sound familiar. . . . Again, you know you’ve quoted something, but you can’t remember what. . . .) You need to keep talking, to distract him—to distract yourself?—from the word “normal.” You continue: “The last thing anyone needs is more bad news. . . especially from someone, from something, that isn’t even *real*.” You stop talking, yet there is only silence. Which, somehow feels worse than being interrogated about “normality.” You try to fill the void: “I don’t mean to be rude; I’m just telling it like it is.”

You, as Lacan, contemplate this response, as if to decide what warrants your immediate attention. After what seems to you, the familiar you, like an eternity—of feeling that you are being held in precarious suspension over a bottomless chasm—the Lacanian you speaks: “The impossibility of ‘telling it like it is,’” you say, “is only truth of which one can be certain. Telling it

like it is, *mon cher* Thomas, is *exactement* what neither you nor anyone else can ever do. For the ‘*real*’—in your extremely apt choice of words—is, by definition, more than one can possibly say. The *real* eludes creatures that dwell in language. One who dwells *on* language might catch a glimpse of the real from time to time, but rarely when he expects it. . . . Indeed, expectations are anathema to the real. Only when expectations are upset will it come into focus, if only fleetingly.”

“Look, ‘*Docteur,*’” you say, in a measured tone that you hope will sound academic and authoritative: “It is very late. You have entered my home without an invitation. You are disturbing my rest. You insist on calling me by a name that is offensive to my faith. And as far as I can tell, your ‘*analyse*’ consists primarily of repeating my own words back to me and making abstract and unsupported—indeed, unsupportable—assertions, which you seem to favor *not* for the sake of clarity but precisely because they violate the conventions of communication. I do not know by what bizarre trajectory you came to enjoy such games, and frankly, I do not care to know. I cannot speak more plainly than this: I have no interest in your theories, and I have no interest in you. So I ask you for the last time: kindly leave me in peace.”

You, the Lacanian you, know that you cannot do as you are asked. You wish to shout at this *américain*, this man who prizes his unshakable certainty and yet claims that he is guided by ‘humility,’ who boasts of ‘working for a living’ but tries desperately to avoid the work of living: “*Thomas, we must try to find where your truth lies! It is a question of ethics! You can never say what you mean, certainement not as long as you insist that you can, en avance, mean precisely what you say! You have pronounced the truth inter-dit; it is only between your words, in the banlieue of the interpretations that you have always already made on the order of l’Autre, that you can locate your lack. Only then can you mourn it! You refuse to speak the Nom du Père, because you are terrified by the Non-du-Père. Yet it is in your version du père that your père-version lies! You believe you are free because you and le discours that speaks you remain complètement inseparable!*” Yes, *inseparable*—of course! You have stumbled upon an idea (are not all ideas worthy of the name the result of stumbling, of *errance*?) You will try a different approach: you will tell Thomas a story.

“Let us make a deal, eh? I will tell you a *petite histoire*. An *espèce de* ‘fable.’ All I ask is that you listen until the end—which is also, in a sense, the beginning—and then I will leave, as you request, without posing even a single question about my *histoire* means to you, or for you, or—here you pause slightly, to ensure the carrot does not drop unseen— “for your troubles with this game you call *Separability*?”

You, the half-dressed Thomas, are surprised to find your ears, and your spirits, perking up. You had forgotten that, even after you tackle the general



problem of intellectual promiscuity among your employees, you'll still have to answer their questions about that inscrutable game. There's no harm, you decide, in sitting through a short story—especially if, once it's over, you will leave yourself alone. You nod in agreement.

You, as Lacan, begin: "Once upon a time, in the City of Athens, there lived a troubled young man named Plato. . . ."

. . . .

[As explained in the star footnote, above, the conclusion of this piece will appear in the Spring 2018 issue of *JSEL*, under the title *The Longest Transference*.]

