



Volume 9, Number 2
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Contents

ARTICLES

#Congratulations but #SeeYouInCourt: Olympic Hashtag Restrictions
Raise Concerns Over Trademark Rights and Free Speech
John Grady & Stephen McKelvey 101

There's No Business Like Show Business: Abandoning Color-Blind Casting
and Embracing Color-Conscious Casting in American Theatre
Kristin Bria Hopkins 131

What if Kaepernick is Correct?: A Look at the Collusion Criteria in
Professional Sports
Darren A. Heitner & Jillian Postal 157

Evaluating the FTC Endorsement Guidelines Through the Career of a
Fashion Blogger
Ava Farsbidi 185

NOTE

The NFL-DirecTV Antitrust Controversy and Potential Parallels in
TIDAL's Approach to the Music Streaming Market
Wonnie Song 209

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Dear Readers,

I am Professor Peter Carfagna, the Harvard Law School Faculty Advisor to the Journal of Sports and Entertainment Law (JSEL). JSEL had another tremendous year and I am exceedingly proud to write the preface to Volume 9.

In our Fall Issue, JSEL published four articles. Theodore McDowell wrote *Changing the Game: How Minor League Players Can Escape the Economic Captivity of Baseball's Antitrust Exemption*, which explains the numerous ways in which baseball's sweeping antitrust exemption negatively affects minor league players. After detailing the minor league's failed attempts to challenge its subjugation at the hands of the MLB, McDowell proposes collaborating with the MLB to reform the minor league. Attorney Loren Shokes' article, *Life After Death: How to Protect Artists' Post-Mortem Rights*, examines the problematic effects of the lack of legislative reform on artists' post-mortem rights and proposes how the law ought to be modernized for an era of two-dimensional and holographic concert technology. James Schwabe wrote *The Pledge to Brand Loyalty: A Gold Medal Approach to Rule 40*, which argues that current Olympic Charter bylaws that govern sponsorship and marketing at the Olympic Games are outdated because they fail to recognize that the goal of marketers is no longer to prevent consumer confusion, but to build brand loyalty. The author proposes changes to align the existing law with this new business model in order to ensure that Olympic sponsorship remains a worthy investment and a major source of revenue for the Games. Our final article, *Thomas Dreams of Separability*, is an allegorical exploration of the philosophical underpinnings of the separability doctrine in copyright law and was authored by Professor Charles Colman.

In the Spring Issue, JSEL published five articles. Professors John Grady and Stephen McKelvey's wrote *#Congratulations but #SeeYouInCourt: Olympic Hashtag Restrictions Raise Concerns Over Trademark Rights and Free Speech*. Their article delves into and supports the grounds for Minnesota-based company Zerorez's First Amendment challenge the United States Olympic Committee's decision to prohibit corporate brands from posting about the Olympics on their social media accounts. Next, Kristin Bria Hopkins wrote *There's No Business Like Show Business: Abandoning Color-Blind Casting and Embracing Color-Conscious Casting in American Theatre*. She argues that current race-blind casting policy in American commercial theatre has failed to achieve the goal of employing more minority actors, and that race should be considered when casting in order to further the goal of achieving diversity. Darren A. Heitner and Jillian Postal's article, *What if Kaepernick is Correct?: A Look at the Collusion Criteria in Professional Sports*, analyzes the potential of Colin Kaepernick's collusion claim against the NFL. The article first touches

on how antitrust law is used to prove collusion in other contexts before exploring the process of proving it in the country's four major sports leagues using case studies. The article concludes by examining the hurdles that Mr. Kaepernick would have to cross in order to prevail against the NFL. *Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger*, authored by attorney Ava Farshidi, evaluates the FTC Endorsement Guidelines' effectiveness in preventing deceptive advertising practices in the social media and fashion blogging sphere, and the author looks to the United Kingdom's regulatory scheme to improve the American framework and increase compliance. Finally, Wonnie Song's note, *The NFL-DirecTV Antitrust Controversy and Potential Parallels in TIDAL's Approach to the Music Streaming Market*, presents a comparative case study between the NFL's deal with DirecTV for exclusive broadcasting rights of its content, and TIDAL's business model, which builds on offering exclusive releases via paid subscriptions. The note highlights antitrust issues that both the NFL and the streaming music space may encounter through offering such exclusive deals.

Moreover, the JSEL Online team worked throughout the year to publish weekly highlights and short articles with updates on the latest legal news in sports and entertainment, covering topics such as the AT&T/Time Warner Merger, the Harvey Weinstein scandal and ensuing #MeToo movement, and the Ezekiel Elliott NFL lawsuit.

I thank the students involved in JSEL, who worked tirelessly to ensure its success. Specifically, I would like to thank Nathan Abelman, for his dedication and excellence as Editor-in-Chief, and Wonnie Song, who did wonderful work as Managing Editor. We are excited for Wonnie to be the Editor-in-Chief of next year's 10th Anniversary Volume and congratulate her on winning the 2018 Paul C. Weiler Writing Prize this year. Finally, I would like to convey my thanks to other members of JSEL's Executive Board: Ben Hecht (Executive Editor of Submissions), Brooks Coe (Executive Editor of Production), and Libby Pica (Executive Editor of Online Content).

With another fantastic year in the books, I look forward to next year's volume!



#Congratulations but #SeeYouInCourt: Olympic Hashtag Restrictions Raise Concerns Over Trademark Rights and Free Speech

John Grady & Stephen McKelvey*

During the summer of 2016, in the lead up to the Rio 2016 Summer Olympic Games, the United States Olympic Committee (“USOC”) made headlines¹ with its not-so-subtle warning to brands who might be thinking about creating an association with the Olympic Games without becoming an official sponsor: Leave the hashtags behind! The USOC had published brand guidelines months earlier which specifically warned commercial entities (*i.e.*, competing brands to official sponsors) about prohibitions on posting about the Olympic Trials or Olympic Games on their corporate social media accounts.² The warning letter further stipulated that “a company whose primary mission is not media-related cannot reference any Olympic

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¹ See Darren Rovell, *USOC sends letter warning non-Olympic sponsor companies*, ESPN (July 21, 2016), http://www.espn.com/olympics/story/_/id/17120510/united-states-olympic-committee-battle-athletes-companies-sponsor-not-olympics, [<http://perma.cc/UGK5-GK4X>]; Eric Chemi and Nick Wells, *Olympic committee on the prowl — for misuse of hashtags*, CNBC (July 28, 2016), <https://www.cnbc.com/2016/07/28/olympic-committee-on-the-prowl—for-misuse-of-hashtags.html>, [<http://perma.cc/3HBL-EG27>]; Olivia Solon, *US Olympic Committee bullying unofficial sponsors who use hashtags*, THE GUARDIAN, July 22, 2016, <https://www.theguardian.com/sport/2016/jul/22/us-olympic-committee-bullying-unofficial-sponsors-hashtags>, [<http://perma.cc/EHY8-BTFR>].

² See Rovell, *supra* note 1.

results, cannot share or repost anything from the official Olympic account and cannot use any pictures taken at the Olympics.”³ While the announcement seemed consistent with aggressive “brand policing” efforts⁴ displayed at both the London 2012 and Sochi 2014 Olympic Games by the International Olympic Committee (“IOC”) and the USOC in order to protect official sponsors’ exclusive marketing rights as well as curb the ongoing problem of ambush marketing,⁵ what was legally distinct from past business practices was the USOC was now asserting legal rights in their protected word marks, specifically *when used as hashtags* in advertising messages related their event, most notably as it pertained to the #Rio2016 and #TeamUSA marks. By asserting “new” rights in these traditionally protected words (*i.e.*, the words that non-sponsors are prohibited from using in marketing during the Olympics), the USOC was upholding its notoriously strict brand policing efforts, a practice which can be described as hyper-protection of Olympic intellectual property.

The new USOC warning about not using protected hashtags is legally significant for two reasons. First, the legal status of registering hashtags as trademarks is still very much in flux, with few courts⁶ weighing whether hashtags perform the required trademark function of source identification (and even fewer concluding they do).⁷ Second, by threatening non-sponsor

³ *Id.*

⁴ See Esther Addley, *Olympics 2012: branding ‘police’ to protect sponsors’ exclusive rights*, THE GUARDIAN, April 13, 2012, <https://www.theguardian.com/sport/2012/apr/13/olympics-2012-branding-police-sponsors>, [http://perma.cc/BUQ3-SH7Q].

⁵ Dennis M. Sandler and David Shani were among the first scholars to define ambush marketing, which occurs when a non-sponsor of an event attempts to pass itself off as an official sponsor. See generally *Olympic Sponsorship vs “Ambush” Marketing: Who Gets the Gold?* 29 J. ADVER. RESEARCH (1989). Tony Meenaghan added to this definition, noting ambush marketing as “the practice whereby another company, often a competitor, intrudes upon public attention surrounding the event, thereby deflecting attention toward themselves and away from the sponsor.” *Point of View: Ambush Marketing: Immoral or Imaginative Practice?* 34 J. ADVER. RESEARCH 77, 79 (1994). More recent scholarship, focused on defining the practice in terms of sponsorship rights, described it as “the deliberate attempt, by a non-sponsor firm, to falsely suggest an association with an event . . . for the purpose of deriving a commercial benefit from that association, without incurring the costs of the acquisition of sponsorship rights in relation to that event . . .” Marc Mazodier, Pascale Quester & Jean Louis Chandon, *Unmasking the Ambushers: Conceptual Framework and Empirical Evidence*, 46 EUR. J. OF MKTG. 192, 194 (2012).

⁶ See generally *Elksouzian v. Albanese*, No. CV 13-00728-PSG-MAN, 2015 WL 4720478 (C.D. Cal. Aug. 7, 2015); *Fraternity Collection, LLC. v. Fargnoli*, No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375 (S.D. Miss. Mar. 31, 2015).

⁷ *Elksouzian v. Albanese* concluded that hashtags are merely descriptive devices, not trademarks. *Cf. Fraternity Collection, LLC. v. Fargnoli supra* note 6 (declining

companies that were intent on using these hashtags in their marketing and promotion of competing Olympic athletes and asserting trademark rights perhaps beyond what actually exist, the USOC opened itself to accusations of trademark bullying, loosely defined as exerting legal rights beyond what actually exist. Brands that were not official Olympic sponsors, but that had sponsorship deals with Rio 2016 Olympic athletes, immediately began to cry foul about the new hashtag restrictions imposed by the USOC for the Rio 2016 Games. A leading voice was Sally Bergen, CEO of women's athletic brand Oiselle⁸ and a vocal advocate for athletes' rights, who stated that "the heavy-handed brand policing was 'ridiculous,'" and that the rules "hurt athletes."⁹ "Companies like Oiselle can't afford to sponsor athletes if they can't leverage the relationship in their [social media] communications," she added.¹⁰ Ultimately, the USOC's restrictions would be challenged based on infringement of the commercial free speech right to comment on the Olympics or congratulate competing athletes by brands who were not official Olympic sponsors.

To understand the legal significance of the "no hashtags" policy in the evolution of Olympic brand protection, it is first necessary to appreciate the substantial level of financial support that sponsors contribute to the Olympic funding model, and why protecting those sponsors remains an increasing priority, especially as social media begins to expand the thematic space surrounding the Olympics. These sponsors are commonly referred to today as TOP sponsors, which stands for "The Olympic Partners," a semantic reinforcement of official sponsors' importance to the continued financial success of the Olympic movement. The TOP sponsorship model serves as the financial underpinning of staging the Olympic Games, having generated more than \$950 million for the IOC from 2009 to 2012.¹¹ Protecting sponsors, therefore, requires innovative brand protection strategies to close legal loopholes¹² as they pop up using all means necessary, such as with the evolu-

to dismiss a trademark infringement claim involving a hashtag). *See generally* Alexandra J. Roberts, *Hashtags are not Trademarks—Elksouzian v. Albanese*. TECH. & MARKETING L. BLOG (Aug. 26, 2015), <http://blog.ericgoldman.org/archives/2015/08/hashtags-are-not-trademarks-eksouzian-v-albanese-guest-blog-post-2.htm>, [http://perma.cc/Y72U-9FXZ].

⁸ Solon, *supra* note 1.

⁹ *Id.* *See also* E. Chemi and N. Wells, *supra* note 1.

¹⁰ Solon, *supra* note 1.

¹¹ INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC MARKETING FACT FILE 2016 EDITION (2016), https://stillmed.olympic.org/Documents/IOC_Marketing/olympic_marketing_fact_file_2016.pdf, [http://perma.cc/SSV4-938F].

¹² *See generally* Stephen McKelvey & John Grady, *Sponsorship program protection strategies for special sport events: Are event organizers outmaneuvering ambush marketers?* 22

tion of ambush marketing via social media.¹³ Thus, the hashtag warnings for Rio 2016 arguably provided the USOC with an additional layer of legal protection for their existing marks that have long been vigorously protected, when those marks are used as hashtags by non-official sponsor brands. While clearly serving as a deterrent to those companies who had planned marketing messages featuring athletes, could the hashtag policy survive legal scrutiny, as well as the natural marketing creativity of social media savvy domestic global brands that are typically rivals to the TOP sponsors and always jump at the chance to find ways around quirky Olympic marketing rules?

One such Minnesota-based company, Zerorez LLC, challenged the USOC's restrictions,¹⁴ arguing that the warnings stemming from the policy infringed upon the company's First Amendment rights to congratulate Olympic-bound athletes from Minnesota, as well as exceeded the authority provided to the USOC in the Ted Stevens Olympic and Amateur Sports Act¹⁵ ("OASA") to exclusively control marketing of the Olympic Games within the United States. The legal arguments scrutinizing the policy were still-unsettled law and the vagueness of the policy's directives and ultimate enforcement left many unanswered questions. Namely, can "event-related hashtags" be registered as trademarks, when used in the context of marketing messages and who, if anyone, besides official Olympic sponsors has the legal "right" to say "congratulations" using event-related hashtags when these athletes succeed on the world's biggest stage? The purpose of this paper, therefore, is to analyze the complex legal issues surrounding event-related hashtags in the context of Zerorez's challenge to USOC's hashtag policy.

In Part I, we examine in greater detail the USOC's proffered restrictions on social media activities by companies that are not official sponsors of the Olympic Games, and then provide the details and disposition of Zerorez's lawsuit. In Part II, we briefly examine the history of USOC lawsuits predicated primarily on First Amendment claims, as these cases provide pre-

J. SPORT MGMT., at 550, (2008). ("An often relied upon loophole by ambush marketers has been the commercial use of athletes with whom the companies have individual endorsement deals.") *Id.* at 570.

¹³ N. Chanavat & M. Desbordes, *Towards the regulation and restriction of ambush marketing? The first truly social and digital mega sport event: Olympic Games, London 2012*. 15 INT'L. J. OF SPORTS MKTG. & SPONSORSHIP 150, 151 (2014).

¹⁴ See Complaint, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 4, 2016).

¹⁵ Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 22051 et seq. (2012).

cedent and guidance for our further examination of *Zerorez*. In Part III, we analyze Zerorez’s First Amendment claim. After briefly discussing the evolution of relevant case law, we apply the current law to the Zerorez tweets to determine if they would rise to the level of commercial speech. In Part IV, we predict the likely outcome of the case based on analysis of the applicability of federal trademark law,¹⁶ considering the status of hashtags as trademarks by incorporating the United States Patent and Trademark Office (“USPTO”) current rules on hashtag mark registration. We then briefly discuss that the jury remains out as to whether hashtags even serve (or can serve) the traditional trademark function of source identification, especially in the context of Olympic sponsorship. We contend that hashtags cannot serve this function as currently used to generate online conversations on social media. However, assuming *arguendo* that the USOC has valid trademark rights, we next turn to assessing Zerorez’s proposed tweets using a likelihood of consumer confusion analysis. In Part V, we examine the Zerorez case from the applicability of the OASA.¹⁷ The application of the OASA, with its lower standard of “tending to cause confusion” and with legislative intent in broad support for the USOC, provides, in our view, the steepest hurdle for Zerorez. We conclude in Part VI with the overall results of our analysis, which legally supports Zerorez and other companies like it that may wish to congratulate Olympic athletes at future Olympics within the parameters of the law.

I. SETTING THE STAGE: *ZEROREZ V. USOC*

Prior to the start of the 2016 Summer Olympic Games, the USOC published its policy on social media activities by non-sponsors as part of its Olympic and Paralympic Brand Usage Guidelines for the Rio 2016 Games.¹⁸ The guidelines included, *inter alia*:

- a. “The USOC . . . owns many federal trademark registrations of word marks including, but not limited to: Olympic, Olympian, Team USA, Future Olympian, Gateway to Gold, Go For The

¹⁶ See Lanham Act, 15 USC § 1125 (2012).

¹⁷ See Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

¹⁸ See Complaint, *supra* note 14. The U.S. Olympic and Paralympic Brand Usage Guidelines were updated for the 2018 Games (<https://www.teamusa.org/brand-usage-guidelines>). For 2018, this includes the following directive: “The USOC has outlined guidance for those wishing to use USOC IP in social media, whether in hashtags or by posting images of the Games, etc.” This seems unchanged from the policy and guidelines in place for Rio 2016.

Gold, Going for the Gold, Let The Games Begin, . . . Road to Rio [and] . . . RIO 2016 . . .”

- c. “. . . commercial entities may not post about the Games on their corporate social media accounts. This includes the use of USOC trademarks in hashtags such as #RIO2016 or #TeamUSA . . .”
- d. “. . . any use of USOC trademarks on a non-media company’s website or social media site is viewed as commercial in nature and consequently is prohibited. . . .”
- e. Do not use any USOC trademarks in any form of advertising (e.g., on a website, in social media, etc)”
- f. “Do not create social media posts that are Olympic themed, that feature Olympic trademarks, that contain Games imagery or congratulate Olympic performance unless you are an official sponsor”
- g. “. . . companies must avoid using Olympic and Paralympic athletes in advertisements or even wishing them good luck on social media. . . .”¹⁹

Soon after the USOC began sending warning letters to non-sponsor brands in late July 2016²⁰ about what could and could not be posted during the Games, media outlets began reporting that brands that were not official sponsors began pushing back against the social media restrictions.²¹ In August 2016, Zerorez, a Minnesota-based carpet cleaning company, filed suit against the United States Olympic Committee, seeking a declaratory judgment that its planned congratulatory messages would not infringe the

¹⁹ Complaint, *supra* note 14 at 3–4. Given these restrictions, it is nearly impossible to envision any scenario in which a non-sponsor or non-media outlet could conduct any form of speech via its social media platforms. These restrictions also presume, as a matter of law, that any post on a corporate social media platform, regardless of content, is automatically commercial in nature.

²⁰ Rovell, *supra* note 1.

²¹ See Patrick Kulp, *The Olympic Committee wants to ban non-sponsors from tweeting about the games*, MASHABLE (July 28, 2016), <http://mashable.com/2016/07/28/ioc-bans-social-media-olympics-brands/#RMfafXHyPaqb>, [<http://perma.cc/KHS3-6YDK>]; Solon, *supra* note 1. Written communications to non-sponsor businesses included the following “advice” from the USOC’s Chief Marketing Officer: “[U]nless you are a news agency or an official USOC partner, I would ask that you refrain from posting about the U.S. Olympic Team Trials or the Rio 2016 Olympic Games from your corporate social media accounts. Instead, we encourage you to show your support for the U.S. Olympic and Paralympic Teams by following Team USA on social media and posting about the Team and the Games from your individual or personal social media accounts. Thank you in advance for your support.” Complaint, *supra* note 14 at 5 (alteration in original). The “requesting” versus demanding tone of these letters is interesting.

USOC's protected marks.²² In response to the USOC's announcement of its social media restrictions on non-sponsors, and its "clear threat to businesses,"²³ Zerorez sought to ascertain its rights with regard to its specific plan to post content on its Twitter and Facebook accounts. As stated in its complaint, Zerorez "contemplated the following social media posts:"²⁴

- a. Congrats to the 11 Minnesotans competing in 10 different sports at the Rio 2016 Olympics! #rioready;
- b. Are any Minnesotans heading to #Rio to watch the #Olympics? #RoadtoRio;
- c. There is no substitute for hard work. -Thomas Edison #TeamUSA is a great example of hard work paying off;
- d. Let the rumble in Rio begin! From badminton to BMX , Minnesotan Olympians are at the #Rio216 Olympics. Go #TeamUSA!;
- e. St. Cloud native Alise Post is an #Olympian competing in the #Olympic BMX events today. Follow here at @alisepost11; and
- f. Good luck to our 11 Minnesota Olympians competing in #RIO2016.²⁵

In its complaint, Zerorez argued that the "USOC's Actions, Policies, and threats violate the First and Fourteenth Amendments to the United States Constitution by preventing Zerorez from discussing the Olympics on social media."²⁶ This, in effect, results in chilling the First Amendment rights of sponsors and athletes who want to discuss the connection between the sponsors and athletes who are competing at the Olympic Games. In addition to its First Amendment claims, based on the premise that "[s]peech is not commercial in nature merely because it is on a business's social media account,"²⁷ Zerorez also challenged the USOC's trademark claims under both the Lanham Act²⁸ and the Ted Stevens Olympic and Amateur Sports Act,²⁹ asserting that (1) the USOC's trademark rights in hashtags such as #TeamUSA, #Olympics and #Rio2016 "do not categorically prohibit businesses from using those hashtags to accurately reference these Olympic topics,"³⁰ and (2) if the Ted Stevens Act "were interpreted so broadly as to prohibit all businesses from non-commercial speech regarding

²² Complaint, *supra* note 14.

²³ *Id.* at 3.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2-3.

²⁶ *Id.* at 5.

²⁷ *Id.* at 8.

²⁸ Lanham Act, *supra* note 16.

²⁹ Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

³⁰ Complaint, *supra* note 14 at 7.

the Olympics, the Act would be unconstitutional because it would restrict First Amendment rights.”³¹

In September 2016,³² the USOC filed a motion to dismiss the case, arguing, ultimately successfully, that there was no actual, concrete dispute between the parties,³³ and that Zerorez failed to seek “specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”³⁴ Although Zerorez made strong procedural arguments in opposition to the USOC’s motion to dismiss,³⁵ the case was ultimately dismissed on April 4, 2017.³⁶

³¹ *Id.* at 8.

³² See Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 26, 2016). The Rio Games had by this time concluded, making Zerorez’s desires moot. *Rio Olympics 2016: Spectacular closing ceremony as Olympic flag goes to Tokyo*, BRITISH BROADCASTING CORPORATION (August 22, 2016), <http://www.bbc.com/sport/olympics/37150572>, [http://perma.cc/JL9U-PTCB].

³³ See Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, *supra* note 32 at 2. This argument was premised on the fact that the plaintiff admittedly never made any of its proposed statements, nor was it ever threatened with litigation or sent a cease and desist order. Responding to the plaintiff’s statement in its complaint that the USOC “has a track record of commencing litigation,” HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee Complaint, *supra* note 14, at 5, defendants argued: “Courts are in general agreement . . . that the mere fact that a company (here, the USOC) regularly enforces its intellectual property rights in the marketplace is not, without more, sufficient to confer declaratory judgment jurisdiction on every party that wishes to obtain judicial guidance as to whether its proposed actions would infringe.” Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, *supra* note 32 at 3.

³⁴ Defendant’s Memorandum in Support of Motion to Dismiss at 4, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Sept. 6, 2016), (citing *Maytag Corp. v. International Union*, 687 F.3d 1076, 1081 (8th Cir. 2012) (quoting *Aetna Life Ins. Com. v. Haworth*, 300 U.S. 227, 241 (1937))).

³⁵ See Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM (D. Minn. Oct 21, 2016). In addition to jurisdiction-based arguments, the plaintiff contended, albeit unsuccessfully, that “the chilling of [its] First Amendment free speech rights is sufficient injury to support a finding of ‘controversy’” (at 1): “The Policies [of the USOC] include specific restrictions on businesses that do not apply to individuals. Written communications from the USOC, which appeared to be a template sent to many business owners and published in the media, repeatedly asserted the USOC’s ban on business speech while encouraging such posting on ‘individual or personal social media accounts.’ The law is unambiguous: businesses have First Amendment free speech rights” (citations

II. THE USOC AND FIRST AMENDMENT CASES

Courts have had several opportunities to examine the USOC's rights at the intersection of trademark law and the First Amendment. In the first case, *Stop the Olympic Prison v. United States Olympic Committee*,³⁷ plaintiff, after receiving a cease and desist order, sued the USOC seeking declaratory relief for the right to publish a poster (which included drawings of the Olympic rings) in public opposition to plans to convert the Olympic Village in Lake Placid, N.Y. into a prison. The plaintiff organization (S.T.O.P.) argued that the production and dissemination of a poster were within its First Amendment rights,³⁸ and that its use of the word "Olympic" and the interlocking rings did not violate the USOC's trademark rights under either the Lanham Act or the Amateur Sports Act of 1978.³⁹ The district court noted that the Amateur Sports Act (hereinafter AMA) was intended to provide strong protection for the Olympic symbols in order to ensure their market value. However, in strictly applying the language of the statute, the court held that the poster was not used "for the purpose of trade" or "to induce the sales of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" as required within the Act.⁴⁰

Turning to the Lanham Act and its touchstone "likelihood of confusion" requirement, the court noted that the USOC had offered no evidence of public confusion as to the source or origin of the poster, or as to sponsorship, endorsement or any other affiliation between S.T.O.P and the USOC. In granting judgment in favor of S.T.O.P, the court concluded: The defendant has proven no improper intent on the part of the plaintiff to 'palm off' its poster, to confuse or deceive anyone, to misappropriate the defendant's marks for its own profit, or even to impugn the defendant. Nor has the defendant shown an actual injury of any sort."⁴¹

The First Amendment was also at the heart of the issue in *United States Olympic Committee v. American Media, Inc.*,⁴² which relied heavily on the U.S.

omitted). *Id.* at 12 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 315 (2010)).

³⁶ See Order Granting Defendant's Motion to Dismiss and Granting Plaintiff's Motion for an Extension of Time, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. April 4, 2017).

³⁷ 489 F.Supp. 1112 (S.D.N.Y. 1980).

³⁸ The court's decision turned on trademark law analysis, rather than First Amendment analysis.

³⁹ See *Stop the Olympic Prison*, 489 F.Supp. at 1116.

⁴⁰ *Id.* at 1121.

⁴¹ *Id.* at 1123.

⁴² 156 F.Supp.2d 1200 (D. Colo. 2001).

Supreme Court's ruling in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.⁴³ While only a federal district court holding, and involving a media outlet, the court's analysis of what constitutes non-commercial speech in potential violation of the OASA sheds some legal light on how courts might view social media posts. In this case, the USOC sued a publishing company for its use of Olympics USA for the name of the magazine, and the defendants filed a motion to dismiss for failure to state a claim.⁴⁴ The USOC argued that the title of the magazine and its content was an attempt to "pass off Olympics USA as if it were authorized by the USOC, in a manner calculated to deceive the USOC's customers and members of the general public."⁴⁵

The court relied on the Supreme Court's ruling in *San Francisco Arts & Athletics* in noting, "[T]o the extent that [the Amateur Sports Act] applies to uses 'for the purpose of trade [or] to induce the sales of any goods or services,' . . . its application is to *commercial speech*."⁴⁶ Following a comprehensive analysis of the commercial speech doctrine, including the *Bolger* test, the court concluded:

[T]o characterize all or any part of OLYMPICS USA as commercial speech would go against nearly every attempt to define commercial speech.

⁴³ 483 U.S. 522 (1987). The Supreme Court, in affirming the lower court's grant of injunction, closely examined the OASA language and legislative intent designed to broadly promote the business interests of the USOC. It is important to emphasize that the Court's First Amendment analysis was based, given the language of the Act, on "uses for the purposes of trade . . . or to promote any theatrical exhibition, athletic performance, or competition . . ." which are *commercial* uses. *Id.* at 528 (quoting 36 U. S. C. § 380(a)). The Court held that the First Amendment did not prohibit Congress from granting exclusive use of the word "Olympic": ". . . [T]he Act's application to commercial speech is not broader than necessary to protect the legitimate congressional interests . . . The mere fact that [San Francisco Arts and Athletics] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate the value which the USOC's efforts have given to the word." *Id.* at 524 (internal citation omitted). The Court also confirmed that the USOC need not prove that a contested use of the word "Olympic" was likely to cause confusion, and that the normal statutory defenses under the Lanham Act (including fair use) did not apply. *See id.* at 531.

⁴⁴ FED. R. CIV. P. 12(b)(6).

⁴⁵ U.S. Olympic Comm., 156 F.Supp.2d at 1203. In its complaint the USOC characterized the defendant publisher's use of its marks as "ambush marketing." *Id.* (citation omitted). The USOC also acknowledged that the magazine contained a disclaimer denying any affiliation with or sanction by the USOC on its table of contents page (which the USOC argued was too small). *Id.*

⁴⁶ *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 535 (quoting 36 U. S. C. § 380(a))(emphasis added).

OLYMPICS USA does not ‘propose a commercial transaction,’ and its content goes beyond the ‘economic interests of the speaker and its audience.’ More importantly, though, to apply the commercial speech doctrine in this context would unduly broaden the limited definition of commercial speech, and would raise serious concerns about the status of news media organizations’ presumed First Amendment protection . . . Moreover, . . . [t]o extend the Act to give the USOC authority over speech that clearly is not commercial under established First Amendment doctrine would violate this principle.⁴⁷

III. ANALYSIS OF ZEROREZ’S FIRST AMENDMENT CLAIM

Before addressing the issue of how to distinguish between noncommercial and commercial speech, we need to dispense with the notion that any speech by a corporation regardless of the platform (including Twitter) amounts to commercial speech. In *First National Bank of Boston v. Bellotti*,⁴⁸ the U.S. Supreme Court’s first decision focusing on corporate political speech in the context of campaign finance reform, the Court found “no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.”⁴⁹ More recently, in 2010, the Court confirmed, in *Citizens United v. Federal Election Commission*, that corporations (like individuals) have First Amendment free speech rights.⁵⁰ These U.S. Supreme Court decisions support the proposition that speech by corporations is not automatically “commercial” speech.⁵¹ This legal proposition holds regardless of

⁴⁷ U.S. Olympic Comm., 156 F.Supp.2d at 1209.

⁴⁸ 435 U.S. 765, 784 (1978).

⁴⁹ *Id.* For a contrary view, see Tom Bennisson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?* 39 CONN. L. REV. 379 (2006). While acknowledging the current state of the law, Bennisson argues that all speech by commercial corporations, regardless of content, should be classified as commercial speech because 1) corporations do not speak as individuals and 2) all commercial corporations are inherently profit-motivated.

⁵⁰ See *Citizens United v. FEC*, 558 U.S. 310, 312–13 (2010).

⁵¹ Some legal scholars have argued that all commercial speech, including that intended to bolster corporate image, should receive full First Amendment protection. See Deberah J. LaFetra, *Nike v. Kasky and the Modern Commercial Speech Doctrine: Kick it Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004). “Corporate communications intended to reflect well on the company, highlighting either its internal functions or the way it interacts with the local, national and global communities of which it is a part, should be protected under the First Amendment. This type of communication does not propose a transaction, even though it can certainly be construed to set the stage for future transactions.” *Id.* at 1239.

the medium (including social media platforms) on which the speech is communicated.

While the Court has long held that commercial speech is entitled to some level of constitutional protection (albeit at a lower tier than political or religious speech),⁵² how to distinguish between non-commercial and commercial speech remains an ongoing source of confusion amongst the courts. The Supreme Court's first effort at delineating non-commercial from commercial speech came in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵³ In that case, the Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."⁵⁴

In 1983, the U.S. Supreme Court, in *Bolger v. Youngs Drug Corp.*,⁵⁵ provided further guidance for distinguishing between commercial and non-commercial speech. In *Bolger*, a manufacturer and distributor of contraceptives brought an action challenging a federal statute prohibiting unsolicited mailing of contraceptive advertisements.⁵⁶ The primary issue was whether the manufacturer's pamphlets contained commercial speech, i.e., "speech

⁵² See generally *Va. State Bd. Of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976). The U.S. Supreme Court first enunciated the concept of commercial speech in *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that even speech that appears as paid commercial advertisements "is not stripped of First Amendment protection merely because it appears in that form.").

⁵³ 447 U.S. 557 (1980) (holding held the defendant state's prohibition on the Public Service Commission's right to advertise its services, despite its "commercial speech" nature, was unconstitutional). Subsequent to its decision in *Central Hudson*, the Supreme Court has offered further interpretations of the commercial speech doctrine in *Edenfield v. Fane*, 507 U.S. 761 (1993) (holding that it was not sufficient for the government merely to point to a considerable governmental interest; additionally the government must demonstrate that the regulation advanced the interest in a direct and material way), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that there was even less reason to start from the strict scrutiny review that the First Amendment generally required when a state entirely banned the dissemination of truthful, non-misleading commercial messages for reasons not associated with the protection of a fair bargaining process).

⁵⁴ *Id.* at 561. After setting forth this definition, the court then created a four-part test to determine whether the commercial speech in question is protected by the First Amendment. The four-part test examines: (1) whether the expression is protected by the First Amendment, meaning that it concerns lawful activity that is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is more extensive than is necessary to serve that interest. *Id.* at 566.

⁵⁵ 463 U.S. 60 (1983).

⁵⁶ See *id.* at 61-64.

which does ‘no more than propose a commercial transaction.’”⁵⁷ The Court noted that the manufacturer’s informational pamphlets cannot be characterized merely as proposals to engage in commercial transactions, and that their proper classification as commercial or non-commercial speech presented a closer question.⁵⁸ The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.⁵⁹ Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech.⁶⁰ And finally, the fact that the manufacturer has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.⁶¹ Thus, the Court identified specific factors that have evolved, through subsequent interpretations and applications by lower courts, into the accepted test to assist in analyzing speech as commercial or noncommercial: 1) whether the communication is an advertisement, 2) whether the communication makes reference to a specific product or service, and 3) whether the speaker has an economic motivation for the communication.⁶²

In fashioning what has become the well-known and often-utilized *Bolger* test, the Court expressly cautioned that the presence of all three characteristics is neither necessary nor sufficient for a given instance of speech to be commercial.⁶³ This caveat only served to exacerbate the confusion over what constitutes commercial speech, particularly in circumstances in which the challenged communication contains elements of both commercial and noncommercial speech. One of the most high profile cases to address this issue was *Kasky v. Nike, Inc.*⁶⁴ Nike argued that advertisements placed in newspapers, the distribution of press releases, and the mailing of letters to athletic directors at major universities—all in response to a number of unfavorable media reports regarding labor conditions in its Asian operations—did not amount to commercial speech and hence were fully protected under the First Amendment free speech provisions of the U.S. and California constitutions.⁶⁵ Noting that the U.S. Supreme Court “has not adopted an all-purpose test to distinguish commercial from noncommercial speech under

⁵⁷ *Id.* at 66 (internal citation omitted).

⁵⁸ *See id.* at 66.

⁵⁹ *See id.*

⁶⁰ *See id.* at 67.

⁶¹ *See id.*

⁶² *See Id.* at 66–67.

⁶³ *See id.* at 67.

⁶⁴ 45 P.3d 243 (Cal. 2002), *cert. denied*, 123 S. Ct. 2554 (2003).

⁶⁵ A determination that Nike’s communications were noncommercial speech would bar the claims of unfair competition and false advertising brought by plaintiff Kasky, a private California citizen.

the First Amendment,”⁶⁶ the California Supreme Court likewise declined to do so. Instead, the California court created a limited-purpose test as to whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception; the test consisted of three elements: the speaker, the intended audience, and the content of the message.⁶⁷

In holding for the plaintiff, the court concluded that in situations where there is a commercial speaker, an intended commercial audience, and commercial content in the message, the speech should be deemed to be commercial in nature.⁶⁸ The court was also challenged with how to handle commercial speech that was intermingled with what would otherwise be constitutionally protected noncommercial speech.⁶⁹ Relying on *Bolger*, the court held that Nike could not immunize itself simply by including references to public issues, especially where the alleged false advertising and misleading statements all related to the commercial portions of the speech in question.⁷⁰ The court further held that, because modern public relations campaigns are often designed to increase sales and profits by enhancing the image of the speaker, the press release amounted to commercial speech. The court thus concluded that speech is not necessarily entitled to full First Amendment protection based solely on the fact that it incorporates elements of both commercial and noncommercial speech.⁷¹

⁶⁶ Kasky, 45 P.3d at 256. See generally, David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*. 54 CASE W. RES. L. REV. 1049 (2004).

⁶⁷ See Kasky, 45 P.3d at 256.

⁶⁸ *Id.* at 256–58. The court specifically held that Nike’s statements constituted commercial speech because: 1) Nike, being engaged in commerce, is a commercial speaker; 2) its statements were addressed directly to actual and potential purchasers of its products (a commercial audience), and 3) its representations of fact were of a commercial nature because it described its own labor policies and the practices and working conditions in factories where its products were made. *Id.* at 258.

⁶⁹ See *id.* at 253. Nike, relying on *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 474 (1989), argued that because its commercial speech was “inextricably intertwined” with the noncommercial communications, its communications should be deemed noncommercial in their entirety. Kasky, 45 P.3d at 260 (internal quotations omitted). The court stated that “[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization . . .” *Id.* at 260.

⁷⁰ See *id.* at 260.

⁷¹ See *id.* at 251. The Supreme Court’s decision to withdraw its writ of certiorari in *Kasky* spoiled an ideal opportunity to address a critical issue related to commercial speech: whether statements made by commercial enterprises which do not directly promote a product or service, but instead comment on social issues and general business practices, are commercial speech. See Robert M. O’Neil, *Nike v.*

While the three-part *Bolger* test remains the “law of the land,” in 2014 the Seventh Circuit expanded the scope of what constitutes commercial speech beyond *Bolger’s* product-specific messaging to also include “image advertising” in holding that drugstore chain Jewel-Osco’s congratulatory advertisement amounted to commercial speech.⁷² Albeit dealing with right of publicity (versus trademark rights) and with print advertising (versus social media posts), *Jordan v. Jewel-Osco, Inc.*⁷³ involved the type of speech contemplated by *Zerorez* (i.e., congratulatory messages), thus creating an interesting prism through which to analyze its proposed tweets.

The Seventh Circuit’s decision turned on two issues: 1) how to define the scope of commercial speech and 2) how to handle advertising that contains elements of both commercial and noncommercial speech. Regarding the first issue, the court first acknowledged the accepted definition of commercial speech: “speech that does *no more than* propose a commercial transaction fall[s] within the core notion of commercial speech.”⁷⁴ However, as the court continued, other communications may also represent commercial speech despite the fact that “they contain discussions of important public issues.”⁷⁵

The Seventh Circuit was specifically challenged with how to classify speech that contained both commercial and noncommercial elements.⁷⁶ The

Kasky—What Might Have Been, 54 CASE W. RES. L. REV. 1259, 1259–60 (2004) (contending that Kasky provided the Supreme Court an opportunity to clarify the “increasingly confusing” commercial speech doctrine).

⁷² See Stephen McKelvey, Jonathan Goins & Frederick Krauss, *The Air Jordan Rules: Image Advertising Adds New Dimension to Right of Publicity—First Amendment Tension*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 945, 978–79 (2016).

⁷³ 743 F.3d 509 (7th Cir. 2014). The Seventh Circuit acknowledged that the issue before it was simply whether the advertisement in question should be classified as commercial or noncommercial speech. The Seventh Circuit elaborated, however, that even if it is held the ad to be noncommercial speech, “it is far from clear that Jordan’s trademark and right-of-publicity claims fail without further ado.” *Id.* at 514. Citing to renowned trademark expert Thomas McCarthy and the fact that the Supreme Court has yet to address this issue, the Seventh Circuit added that “there is a no judicial consensus on how to resolve conflicts between intellectual-property rights and free-speech rights; instead the courts have offered ‘a buffet of various legal approaches to [choose] from[.]’” *Id.* at 514. (citing J. Thomas McCarty, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31.139 (6th ed. 2013)).

⁷⁴ *Id.* at 516.

⁷⁵ *Id.* (internal quotation marks omitted) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)).

⁷⁶ See *id.* The Seventh Circuit, citing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637 n.7 (1985), added that the Supreme Court has “made clear that advertising that links a product to a current public

court first turned to the 3-part test of *Bolger*.⁷⁷ As the court, however, elaborated, “This is just a general framework, however; no one factor is sufficient, and *Bolger* strongly implied that all are not necessary.”⁷⁸ However, the core of the court’s analysis focused on element two of the *Bolger* test. Although Jewel-Osco argued that its advertisement did not propose a commercial transaction because it did not promote a specific product or service, the Seventh Circuit took an entirely different view:

The notion that an advertisement counts as “commercial” only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less “commercial” because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the “core” definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.⁷⁹

The Seventh Circuit held that it was clear that the text of the advertisement was indeed “a congratulatory salute to Jordan.”⁸⁰ However, the court determined that the context of the advertisement, which included Jewel’s own graphic logo and slogan, served to promote Jewel-Osco’s retail stores: “[I]f the literal import of the words [in the ad] were all that mattered, this celebratory tribute would be noncommercial. But evaluating the text requires consideration of the context . . . Modern commercial advertising is enormously varied in form and style . . .”⁸¹ Thus, in adopting a broader

debate is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.*

⁷⁷ *Id.* The Seventh Circuit used the *Jordan* case as an opportunity to clarify the proper use of the “inextricably intertwined” doctrine, which the district court had relied upon in holding for Jewel-Osco. *Id.* at 520 (internal quotation and citation omitted). That doctrine holds that when commercial speech and noncommercial speech are inextricably intertwined, the speech is classified by reference to the whole; a higher degree of scrutiny may be applied if the relevant speech “taken as a whole” is properly deemed noncommercial. *Id.* at 520 (internal quotation and citation omitted). The court went on to suggest that it is nearly impossible to identify a scenario in which both commercial and noncommercial speech could be “inextricably intertwined”: “No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here.” *Id.* at 522.

⁷⁸ *Id.* at 517.

⁷⁹ *Id.* at 518.

⁸⁰ *Id.* at 517. The court rejected Jewel-Osco’s argument that this advertisement was similar to others that Jewel-Osco had released in the past which celebrated the work of local civic groups.

⁸¹ *Id.* at 518.

interpretation of the term “commercial,” the court held that, “an advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.”⁸²

The Seventh Circuit acknowledged that while proposing specific commercial transactions lies at the “core” of commercial speech, such propositions do not demarcate the outer limits of what is commercial speech. Rather, even if speech does something more than (or in addition to) proposing a commercial transaction, it can still be commercial. Jewel-Osco’s advertisement, the court stated, served two functions: (1) to congratulate Jordan, and (2) to enhance Jewel’s brand by associating itself with Jordan in the minds of basketball fans and Chicago consumers.⁸³ Given that a “commonsense distinction” between commercial and noncommercial speech was proper, in this context, one had to account for the varied, often subtle forms of modern advertising.⁸⁴ Thus, an ad’s failure to refer to a specific product was held to be relevant, but not dispositive, according to the Seventh Circuit. The court had no trouble answering the question, “What does [the ad] invite the readers to buy?” The answer: “Whatever they need from a grocery store.”⁸⁵ Hence, the Seventh Circuit ruled that this type of brand advertising is no less commercial than product advertising, since its “commercial nature is readily apparent” and it was “aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for Jordan.”⁸⁶ However sincere its congratulations, the court reasoned, Jewel still “had something to gain” from the ad:⁸⁷ “. . . considered in context, and without the rose-colored glasses, Jewel’s ad has an unmistakable commercial function: enhancing the Jewel-Osco brand in the minds of consumers. This commercial

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 519.

⁸⁷ *Id.* at 520. The court also noted the fact that the trade deal between Jewel-Osco and Sports Illustrated, in which the former received a free full-page advertisement in exchange for selling the magazine in its stores, provided clear economic benefit for Jewel-Osco. *See id.* The Seventh Circuit decision found particular significance in the characteristics and relevance of the logo and slogan as presented in the advertisement: “Jewel-Osco’s graphic logo and slogan appear just below the textual salute to Jordan. The bold red logo is prominently featured in the center of the ad and in a font size larger than any other on the page. Both the logo and the slogan are styled in their trademarked ways. Their style, size, and color set them off from the congratulatory text, drawing attention to Jewel-Osco’s sponsorship of the tribute.” *Id.* at 518.

message is implicit but easily inferred, and is the dominant one.”⁸⁸ Hence, the court remanded the case, providing Jordan the green light to resume pursuit of his right of publicity claim in which he sought \$5 million in damages,⁸⁹ and the parties eventually settled.⁹⁰

The Court’s holding in *Bolger* concerned the advertisement of specific products or services.⁹¹ Some legal scholars have argued (and the Seventh Circuit essentially confirmed) that this prong of the *Bolger* test has failed keep up with the modern advertising age that has expanded to encompass the notion of “brand image” advertising.⁹² The U.S. Supreme Court has yet to rule that any speech conveyed by a company on its social media accounts automatically constitutes commercial speech; nor has it ruled on whether speech that is purely “brand image building” automatically amounts to commercial speech.

Of course, one can argue on behalf of the USOC that Zerorez’s proposed tweets have a purpose that is more commercial than altruistic. Arguably, the messages posted on social media platforms are intended to promote the company brand, engender goodwill, and leverage the popularity of the Olympic Games. Furthermore, today’s savvy consumers can, as USOC would no doubt argue, connect the dots between Zerorez and “some association” with the Games. Supporting these arguments legally is, however, a slippery

⁸⁸ *Id.* In remanding the case back to the district court, the Seventh Circuit also clarified the district court’s misapplication of the “inextricably intertwined” doctrine. Jordan argued that the “inextricably intertwined” doctrine was not applicable to this case. Specifically, Jordan argued that the district court had erroneously concluded that *any* advertisement that has a combination of both commercial and non-commercial speech should be deemed noncommercial speech because they are “inextricably intertwined” and cannot be separated out. *Id.* at 520.

⁸⁹ See Darren Rovell, *Jordan Ruling Could Set Precedent*, ESPN (Feb. 20, 2014), http://www.espn.com/chicago/nba/story/_/id/10491664/michael-jordan-wins-appeal-endorsement-case-jewel-food-stores [https://perma.cc/V7NQ-2N7B].

⁹⁰ See Jon Seidel, *Michael Jordan Settles with Jewel, Dominick’s*, CHI. SUN TIMES, Nov. 22, 2014, <https://chicago.suntimes.com/news/michael-jordan-settles-with-jewel-dominicks/> [https://perma.cc/9U2W-RSUH].

⁹¹ *Bolger*, *supra* note 55.

⁹² For an article that discusses the challenges of classifying commercial speech within today’s modern marketing strategies and recent technological developments, see Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L. J. 127 (2007). Sprague proposes, in the context of blogs, a framework that separate commercial speech into three categories: 1) traditional advertising, 2) public relations, and 3) social commentary, the latter of which would automatically classify as noncommercial speech. *Id.* We view congratulatory messages and other statements of fact proposed by Zerorez as falling most accurately within the social commentary category.

slope necessitating, among other steps, a peek into the mind of the company to determine what its “real” motive is. We thus provide legal analysis of the parties’ arguments under the First Amendment claim, applying in turn the *Bolger* test and the Seventh Circuit’s rationale in *Jordan* that focuses on the content and context of the advertisement.⁹³ Our assessment of the case, should it have been litigated on the merits, is best illustrated through use of two tweets, the first being among Zerorez’s proposed tweets,⁹⁴ and the second being a hypothetical tweet:⁹⁵

- Tweet #1: Congrats to the 11 Minnesotans competing in 10 different sports at the Rio 2016 Olympics! #rioready;
- Tweet #2: From your clean-up experts, congrats to the 11 Minnesotans who’ll be looking to “clean up” in 10 different sports at the Rio 2016 Olympics! #rioready #cleanup!

We commence with the legal proposition, counter to the USOC’s claim, that neither Tweet #1 (“T1”) nor #2 (“T2”) is commercial speech simply because it is mentioned on Zerorez’s corporate social media account. Hence, the threshold inquiry is whether, under application of the *Bolger* 3-part test⁹⁶ or the Seventh Circuit rationale in *Jordan*, Zerorez’s proposed tweets rise to the level of commercial speech. If the proposed Zerorez speech is deemed noncommercial, then Zerorez would be a clear-cut victor on its First Amendment claim. If the proposed tweets are deemed commercial speech, we could then turn to whether the USOC’s trademark rights supersede Zerorez’s commercial speech rights.⁹⁷

⁹³ Given the limited jurisdictional authority of the *Kasky v. Nike, Inc.* decision, the authors have decided to forego applying the decision to this particular analysis of the *Zerorez v. U.S. Olympic Comm.* case.

⁹⁴ HSK LLC, d.b.a. Zerorez vs. United States Olympic Comm., *supra* note 14.

⁹⁵ We use the congratulatory message as a proxy for all of Zerorez’s proposed tweets, if only because it provides the closest analogy to the *Jordan* case. This legal analysis applies equally to each of Zerorez’s other proposed tweets, given that they either congratulate Minnesotans or provide other statements of pure fact, and do not propose a commercial transaction of any kind.

⁹⁶ *Bolger*, *supra* note 55.

⁹⁷ The authors save for another day the equally vexing analysis and debate over the balancing of First Amendment versus trademark rights. See generally Rebecca Tushnet, *Trademark Law as Commercial Speech Regulations*, 58 S.C. L. REV. 737 (2007). In challenging the current validity of San Francisco Arts & Athletics, Tushnet states that “[l]ower courts have consistently followed the same cursory analysis with respect to traditional trademark infringement: confusing uses are misleading and therefore may be enjoyed without consideration of First Amendment interests.” *Id.* at 747. In arguing that the current overprotection of trademark rights leads to a chilling effect on speech, Tushnet concludes: “When we decide to allow consumer protection to trump freedom of commercial speech, we must do more

The application of *Bolger* to Zerorez's proposed tweets would arguably appear a straightforward victory for Zerorez. T1 is not close to an advertisement in the traditional sense, it does not reference a specific product or service, and as such there is no clear-cut economic motivation on Zerorez's part.⁹⁸ Hypothetical T2 certainly adopts a more traditional advertising tone, and one can insinuate more of an economic motivation; however, it is tougher to ascertain how, even given its added level of verbal "creativity," it would be sufficient to trigger *Bolger's* second element: reference to a specific product or service.⁹⁹ Granted, the *Bolger* test does not require all three elements to be present in order to find commercial speech. However, given how the *Bolger* court explained these elements, it is highly unlikely that even T2 would be deemed commercial speech. If, indeed, commercial speech is "speech which does 'no more than propose a commercial transaction,'"¹⁰⁰ none of Zerorez's proposed tweets would appear to meet this threshold requirement.

As discussed above, the Seventh Circuit in *Jordan* expanded the manner in which commercial speech could be defined in the modern era of advertising. In sum, if a company too closely aligns its brand messaging with its alleged noncommercial messages, it can rise to the level of commercial speech. The increasing dominance of digital media as a platform for image advertising only portends, as suggested by Gervais and Holmes, escalating challenges.¹⁰¹

than simply declare 'false and misleading' commercial speech outside the boundaries of the First Amendment." *Id.* at 756.

⁹⁸ While some may espouse the view that any communication by a corporation is by its very nature economically motivated, the law suggests otherwise. As set forth in *Bolger*: ". . . the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech." *Bolger*, *supra* note 55, at 67. "The economic motivation of a speaker [should not] qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward" (Central Hudson, *supra* note 53, at 580 (Stevens, J. concurring in the judgment). See generally Sprague, *supra* note 92.

⁹⁹ Allowing for some latitude in creative messaging is at the core of ensuring that we do not chill free speech. Of course, as seen below, application of the Seventh Circuit's rationale in *Jordan* provides a more confounding result.

¹⁰⁰ *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, *supra* note 53 at 762.

¹⁰¹ See Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 *FORDAM INTELL. PROP., MEDIA, & ENT. L. J.* 181 (2014). Indeed, as is particularly germane to the Zerorez case, one wonders if the outcome in *Jordan* would have been different had Jewel-Osco's creative message been communicated on its Twitter or Facebook account as opposed to in the pages

Although the tension in the Zerorez scenario is primarily between the First Amendment and trademark law, we can draw analogies from the *Jordan* case that spotlighted the tension between the First Amendment and the right of publicity. The *Jordan* case involved a congratulations message, albeit in a print ad format. Although the Seventh Circuit's content-specific analysis of the Jewel-Osco's advertisement arguably creates many gray areas for such future messaging, *Jordan* proposed a roadmap to congratulatory messaging that would pass legal muster:

If Jewel and Supervalu merely wanted to congratulate Jordan as they claim, they easily could have done so. They could have privately congratulated Jordan. If they wanted to publicly congratulate Jordan, they could have done so without identifying themselves as speakers. And if they wanted to publicly congratulate Jordan and identify themselves as the speakers, they could have done so using their corporate names (Jewel Food Stores, Inc. and Supervalu).¹⁰²

In other words, if Jewel-Osco had not prominently featured its brand logo and company slogan larger than its congratulatory messaging, had not cleverly married its slogan with Michael Jordan as (“Good things. . .just around the corner”), and had not espoused their shared geography (“fellow Chicagoans”), arguably Jordan could have been publicly congratulated within the parameters of the law. One can argue, alternatively, that the guidance for future congratulatory advertising boils down to this: creativity may kill.¹⁰³

Our hypothetical T2 is created specifically to illustrate the application of the Seventh Circuit “brand/image advertising” rationale and guidance to our Zerorez scenario. To begin the analysis, both communications entail congratulatory messages.¹⁰⁴ One can immediately see how the hypothetical T2 is more analogous, content-wise, to the Jewel-Osco advertising copy; the multiple references to “clean up,” aligning with Zerorez’s core cleaning services business, is analogous to Jewel-Osco’s use of phrases such as “good things. . .just around the corner.” Although not referencing a specific prod-

of Sports Illustrated? Would the delivery vehicle, notably the ephemeral nature of social media posts, matter?

¹⁰² Plaintiff-Appellant Michael Jordan’s Opening Brief and Required Short Appendix. *Jordan v. Jewel Foods, Inc.*, No. 12-1992 (7th Cir., Jul. 9, 2012), at 30.

¹⁰³ Indeed, one can argue, from the corporate marketer’s standpoint, that the fatal flaw in the Jewel-Osco’s congratulatory ad was simply the advertising copywriters’ desire to be clever and creative.

¹⁰⁴ Again, granted one is communicated through a print ad, the other through a social media post. We begin with the premise that the former would be far more susceptible to rising to the level of commercial speech.

uct or service, the question asked by the Seventh Circuit—what is the communication asking the consumer to buy? – could be similarly answered in assessing T2 as: any cleaning services or supplies that Zerorez sells. It is clear that T2 was designed to more closely align Zerorez’s business interests with the congratulation of Minnesota athletes, as well as to bolster the company’s image.¹⁰⁵

It is with a purpose that, in applying the Seventh Circuit rationale, we assess the hypothetical T2 first to determine, in applying the Seventh Circuit’s roadmap, what *would* have been acceptable communication by Jewel-Osco. T1, by avoiding any intertwining of Zerorez business purpose, imagery or slogans, would precisely adhere to the manner that the Seventh Circuit suggested Jewel-Osco “easily could have”¹⁰⁶ congratulated Jordan. Hence, even were the Zerorez case to have been brought in the Seventh Circuit, and based upon its proposed social media messages, the Seventh Circuit’s roadmap on how to properly congratulate someone would suggest a clear victory for Zerorez.

IV. ANALYSIS OF ZEROREZ’S LANHAM ACT CLAIMS

Determining the legal status of hashtags as trademarks has proven challenging as the law often lags behind advances in technology.¹⁰⁷ “The current legal landscape [finds] the USPTO continues to register trademarks while the courts have yet to definitely hold that hashtags function as trademarks.”¹⁰⁸ More specifically, Section 43 of the Lanham Act,¹⁰⁹ the federal trademark law within the United States, requires a valid trademark to perform the trademark function of identifying the source of the goods they refer to, as well as distinguishing them from the goods and services of others. However, it is acknowledged within the legal scholarship and beginning to be acknowledged by courts tackling these emerging issues, that hashtags, especially when used by the average person or consumer, primarily serve as

¹⁰⁵ The authors do not concede that T2 *would* rise to the level of commercial speech other than, perhaps, in the Seventh Circuit. For an article that proposes that such “image advertising” should nonetheless receive full First Amendment protection, see Deborah J. La Fetra, *Kick It up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004). Clearly, as La Fetra argues, failure to protect speech merely intended to bolster a company’s image can have a chilling effect.

¹⁰⁶ See *Jordan v. Jewel-Osco, Inc.*, supra note 74

¹⁰⁷ See Stephen McKelvey & John Grady, #JoinTheConversation: *The Evolving Legal Landscape of Using Hashtags in Sport*. 27 J. LEGAL ASPECTS OF SPORT 90, 94 (2017).

¹⁰⁸ *Id.*

¹⁰⁹ 15 U.S.C § 1125 (2012).

“conversation starters” and to aggregate conversations around a particular topic.¹¹⁰ Thus, the “source identification” and “distinctiveness” requirements become more difficult for plaintiffs to articulate when considering marks that also contain hashtags.¹¹¹

The basis of a Lanham Act claim is (1) the trademark serves as a specific indicator of source and that (2) consumers are likely to be confused or deceived as to the origin or sponsorship of the goods or services.¹¹² Therefore, in analyzing the application of the Lanham Act to Zerorez’s proposed tweet (T1) as well as to the hypothetical tweet (T2), one must first consider whether these are valid marks, and then determine whether the Lanham Act’s requirement to show a likelihood of confusion can be met. The relevant regulatory guidance and case law provide some initial answers, while leaving some questions still unresolved.

In 2013, the USPTO¹¹³ amended its guide for examiners, known as the Trademark Manual for Examining Procedure (“TMEP”), to specify that the inclusion of a hashtag symbol in front of the mark does not render it more distinctive than it would be without it.¹¹⁴ However, the TMEP also cautioned for the first time that a mark preceded by the hash symbol “*only* may be registered as a trademark if it functions as an identifier of the source of the applicant’s goods or services.”¹¹⁵ Thus, considering the general purpose and context in which companies or brands who post congratulatory messages involving Olympic athletes utilize protected marks, the Olympics clearly has valid marks, *when used as hashtags*.¹¹⁶ But this does not end the legal analysis.

¹¹⁰ See Elizabeth A. Falconer, #*CanHashtagsBeTrademarked: Trademark law and the development of hashtags*, 17 N.C. J. OF L. & TECH. ONLINE 1 (2016); McKelvey & Grady, *supra* note 107, at 91. See also Carrie L. Kiedrowski & Charlotte K. Murphy, *Are Hashtags Capable of Trademark Protection Under U.S. Law?* INTABULLETIN (Feb 1, 2016), <https://www.inta.org/INTABulletin/Pages/AreHashtagsCapableofTMProtectionunderUSLaw-.aspx>, [https://perma.cc/N49B-2RBS].

¹¹¹ See Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599 (2017).

¹¹² See 15 U.S.C. § 1125(a)(1) (2012) (Any person who . . . uses in commerce any . . . name, symbol, or device . . . which—(A) is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable . . .).

¹¹³ The USPTO is empowered within the Lanham Act to oversee the registration process for trademarks within the United States.

¹¹⁴ TMEP § 1202.18 (2015).

¹¹⁵ Kiedrowski & Murphy, *supra* note 110.

¹¹⁶ This distinction is notable because the USOC never claimed to have registered #Rio2016 or #TeamUSA as marks (“tagmarks”) separate from the already well-established protected word marks Rio 2016 and Team USA. A search of the current trademarks registered under “Team USA” reveal none that also include

Turning to the likelihood of confusion, the allegedly infringing user (which would typically be a brand that is not a direct competitor to any TOP sponsor since direct competitors to official sponsor brands likely are not taking the legal risk by using Olympic intellectual property) is arguably not making any claim of (unauthorized) affiliation with the Olympic Games by using the hashtag mark (such as #Rio2016) or in order to induce consumers to buy goods or services. Thus, showing a likelihood of confusion (as to affiliation with or sponsorship of the Olympics) in the minds of consumers would be a high hurdle for plaintiffs to meet, which is the plaintiff's burden under the Lanham Act.¹¹⁷ According to McKelvey and Grady,¹¹⁸ it is more plausible that the uses of hashtags in these kinds of social media marketing messages (i.e., congratulatory tweets) surrounding a global sporting event, even when posted by companies on corporate social media accounts, are more focused on civic pride and starting conversations about the upcoming event,¹¹⁹ such as congratulating home-state athletes who are heading to compete at the Olympics. Moreover, given the nature of these types of messages, this would still arguably be protected speech under the First Amendment.

Turning to an analysis of our two tweets (T1, and hypothetical T2), it is clear now that Zerorez's planned Olympic-themed posts would stand a good chance of success in being found to not infringe the USOC's trademark rights. T1 makes no mention of any of Zerorez's products or services as part of its congratulations of Minnesota-based athletes heading to Rio. Furthermore, the #rioready hashtag it had planned is not one of the typically protected marks asserted by USOC (such as #Rio2016), making the legal determination of potential infringement somewhat more challenging. Yet, while the Rio 2016 Olympics is mentioned and is protected in the tweet, this could be considered a factual description about where the athletes are competing and therefore fair use, despite the USOC's explicit warnings to avoid referencing the Olympic Games in corporate social media posts by non-sponsors. In other words, just because the USOC says it has such rights and companies should avoid doing something does not mean the USOC

hashtags as the actual registered mark. The USOC warnings left this issue seemingly unresolved by asserting broad and all-encompassing rights when their existing marks were used as hashtags by non-sponsors. Official sponsors, on the other hand, are authorized to use *all* the protected word marks (and hashtags) in advertising and sponsorship messages as part of the official sponsorship rights agreement they enter into with the USOC.

¹¹⁷ 15 U.S.C. § 1125 (2012).

¹¹⁸ See McKelvey & Grady, *supra* note 108.

¹¹⁹ See *id.*

actually has the rights it has asserted. There is also a tenuous connection at best between the services offered by Zerorez and any perceived Olympic sponsorship that may or may not exist. Thus, Zerorez's proposed tweet would likely seem to not infringe the USOC's marks under a Lanham Act analysis.

Turning into the hypothetical tweet (T2), it is a closer call as to unauthorized affiliation or sponsorship with the Olympics, as there is a more direct sales proposition being made and allusion to the services offered by Zerorez. Furthermore, the connection between its cleaning services and athletes' "cleaning up" in Rio, alluding to a high medal count achieved by these athletes at Rio 2016 makes some Olympic connection more apparent for the consumer, yet still makes no assertion that it is an official sponsor of Team USA or the Olympics. In fact, the inclusion of additional hashtags like #cleanup probably weigh in Zerorez's favor as consumers would see this more related to its cleaning service business than the Olympics and athletes' performances there. The #rioready hashtag again provides some allusion to the Games, but seems focused on the athletes' performance and wishing them good luck, as opposed to trying to make a connection between Zerorez and any potential sponsorship with the USOC or Team USA that may exist. Moreover, T2 does not seem to suggest a motivation to "piggyback" off the Games, akin to an ambush marketing motive. Alternatively, if T2 also incorporated a #TeamUSA reference, such as "Congratulations to the 11 Minnesotans, part of #TeamUSA," one could make the argument that this creates a stronger likelihood of confusion amongst consumers. However, even then, such confusion would ultimately need to be sufficiently demonstrated through surveying of the relevant consumer base (a tactic that has in the majority of cases proven a high hurdle for trademark holders to overcome).

The Lanham Act analysis and the scant existing federal case law involving trademarks when used with hashtags demonstrates that marks containing hashtags (*i.e.*, tagmarks),¹²⁰ when used in the specific context of congratulatory messages, do not neatly "fit" within the traditional likelihood of confusion analysis needed to prove infringement and contain significant First Amendment issues that must be balanced against the rights of the trademark owner. It remains for future courts to provide not only a clearer roadmap for how to analyze trademark infringement claims involving hashtags but, more importantly, whether hashtags even function as trademarks.

¹²⁰ See Roberts, *supra* note 111. This term is used to refer to brands using hashtags as trademarks, such as KFC's use of #HowDoYouKFC.

V. ANALYSIS OF ZEROREZ'S OASA CLAIMS

In analyzing Zerorez's claims against the USOC under the Olympic and Amateur Sports Act,¹²¹ one has to recognize the exclusive jurisdiction and broad conferral of rights provided to the USOC within the framework of the OASA, and consider what this means for controlling (*i.e.*, restricting) marketing messages proposed by those who are not official sponsors of Team USA.¹²² Zerorez asserted two main claims with regard to the OASA through USOC's brand usage policies and warnings to businesses regarding potential marketing messages during the Rio 2016 Games. First, "The USOC has misrepresented and exaggerated the authority granted to it under the Ted Stevens Olympic and Amateur Sports Act," and second, "If the Ted Stevens Olympic and Amateur Sports Act were interpreted so broadly as to prohibit all businesses from non-commercial speech regarding the Olympics, the Act would be unconstitutional because it would restrict First Amendment rights."¹²³ There is legal support for both of these propositions, yet still some significant legal hurdles that Zerorez would face.

In *San Francisco Arts & Athletics*,¹²⁴ the Supreme Court recognized that the OASA's language and legislative intent were both broadly construed to promote the business interests of the USOC.¹²⁵ This not only gives the USOC rights in controlling how the word "Olympics" is used but also controls how the word Olympics and other "protected" words is used "for the purposes of trade . . . or to promote any theatrical exhibition, athletic performance, or competition . . ." ¹²⁶ The focus on describing commercial uses seems consistent with the congressional intent behind the OASA.¹²⁷ Consid-

¹²¹ Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

¹²² See *infra* note 126 for discussion about the broad language and legislative intent of the OASA.

¹²³ Complaint, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 4, 2016), *supra* note 14.

¹²⁴ *San Francisco Arts & Athletics, Inc. v. USOC*, *supra* note 43.

¹²⁵ "Section 110 [of the OASA] language and legislative history indicate that Congress intended to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion, and that § 110 does not incorporate defenses available under the Lanham Act." *Id.* at 528–30.

¹²⁶ 36 U.S.C. § 380(a) (2012).

¹²⁷ *San Francisco Arts & Athletics*, *supra* note 43 at 539. "[San Francisco Arts & Athletics] sought to sell T-shirts, buttons, bumper stickers, and other items, all emblazoned with the title 'Gay Olympic Games.' The possibility for confusion as to sponsorship is obvious. Moreover, it is clear that [San Francisco Arts & Athletics] sought to exploit the "commercial magnetism" of the word given value by the USOC. There is no question that this unauthorized use could undercut the USOC's efforts to use, and sell the right to use, the word in the future, since much of the

ering further the commercial free speech concerns in restricting the use of the word “Olympics” to certain uses by specific users (i.e. the athletes or official sponsors), the high Court found that “[e]ven though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the [OASA] to this commercial speech is not broader than necessary to protect the legitimate congressional interest, and therefore does not violate the First Amendment.”¹²⁸ This language strongly favoring the USOC would seem to foreclose many of Zerorez’s First Amendment claims.

Perhaps the context of how the marks were planned to be used on social media or the fact that the USOC was asserting legal rights beyond what it actually owned—a registered trademark in the actual “tagmarks” “#Rio2016” or “#TeamUSA”—would have some legal significance. Along these lines, Zerorez argued that the USOC, through its threats and warnings related to the brand use policies specific to social media, was essentially engaged in “trademark bullying.”¹²⁹

While the Supreme Court’s holding in *San Francisco Arts & Athletics* seems to grant the USOC the broad and over-arching rights to control *all* marketing activities surrounding the Olympic Games (with the ultimate goal being to preserve future sponsors’ investment in the Olympic movement within the United States), what are more prone to legal challenge perhaps are the nuances in the proposed planned tweets as well as how the hashtags were being used in the tweets (i.e., as conversation starters about the Rio 2016 Games), specifically whether these statements could be found to satisfy the OASA’s legal standard for violation: “tending to cause confusion, to cause mistake, to deceive, or to *falsely suggest a connection with the {USOC} or any Olympic activity.*”¹³⁰

While this is a lower standard than the Lanham Act’s well-enshrined likelihood of confusion test, it seems Zerorez’s planned congratulatory tweet (T1) could be found to be within the First Amendment protections for non-

word’s value comes from its limited use. Such an adverse effect on the USOC’s activities is directly contrary to Congress’ interest.” (internal citation omitted).

¹²⁸ *Id.* at 540.

¹²⁹ Timothy Geigner, *Dear US Olympic Committee: Tweeting About The Olympics Is Never Trademark Infringement*. TECH DIRT, (July 22, 2016), <https://www.techdirt.com/articles/20160722/07140335039/dear-us-olympic-committee-tweeting-about-olympics-is-never-trademark-infringement.shtml>, [https://perma.cc/N9YW-E9E4].

¹³⁰ *San Francisco Arts & Athletics*, *supra* note 43 at 529–30 (*emphasis added*). “This legislative history demonstrates that Congress intended to provide the USOC with exclusive control of the use of the word ‘Olympic’ without regard to whether an unauthorized use of the word tends to cause confusion.” *Id.* at 530.

commercial speech. The dissent by Justice Brennan, joined by Justice Marshall, is instructive regarding over-breadth concerns:

The [OASA] is overbroad on its face because it is susceptible of application to a substantial amount of noncommercial speech, and vests the USOC with unguided discretion to approve and disapprove others' noncommercial use of "Olympic." Moreover, by eliminating even noncommercial uses of a particular word, it unconstitutionally infringes on [San Francisco Arts & Athletics'] right to freedom of expression.¹³¹

A strong case can be made, based on prior First Amendment cases involving the USOC as discussed in Part II, that Zerorez *could* prevail under an analysis of the applicability of the OASA, based on the premise that corporate free speech rights should outweigh trademark rights claims absent blatant trademark infringement. With regard to the hypothetical tweet (T2) with a more direct connection to Zerorez's products and services, Zerorez would have a more difficult time arguing that the First Amendment allows it to refer to the Olympics "in connection with" its products and services, without being an official sponsor. The inclusion of a reference to "clean up" in terms of medals at the Olympics is likely sufficient to "tend to cause confusion" in the minds of consumers if, indeed, Zerorez has *some* connection to Team USA or its athletes, aside from sharing the geographical fact of being from Minnesota where several Olympians also resided. Thus, the OASA's burden for violation would be easier for the USOC to meet if the hypothetical tweet (T2) were at issue.

VI. CONCLUSION

The USOC, like other global sport properties, faces a confluence of shifting marketing and media factors that could greatly impact its current sponsorship model. While the USOC's efforts to restrict the use of hashtags during the Rio 2016 Olympic Games proved effective in a practical sense (by serving as a deterrent to non-sponsor brands who may have been considering creating Olympic-themed hashtags in marketing campaigns), it also emboldened some brands to become more creative with their tweets or Facebook posts, in order to skirt the existing rules and laws in order to make

¹³¹ *Id.* at 561. In further arguing that the terms of the Lanham Act should apply to infringement analysis, Justice Brennan added: ". . . while the USOC's trademark of 'Olympic' allows the USOC to regulate use of the word in the 'strictly business' context, the USOC's authority under [the Act] to regulate non-confusing and good-faith descriptive uses of the word 'Olympic' grants the USOC discretion to prohibit a substantial amount of noncommercial speech." *Id.* at 566.

a connection with Olympic fans. This ultimately enabled ambush marketers to thrive in the gray areas of the law¹³² and prompted brands like Zerorez to seek legal recourse for their proposed marketing plans.

Had the Zerorez case gone to trial and been fully litigated, we are highly skeptical as to whether the USOC's restrictive hashtag policies would have withstood judicial muster, especially under our analysis of T1 (which was one of the actual tweets proposed by Zerorez). Our application and analysis of current commercial versus noncommercial speech doctrine strongly suggests that the social media posts proposed by Zerorez would have been entitled to First Amendment free speech protections (this conclusion is only strengthened when one considers that even hypothetical T2 would most likely be deemed acceptable). Our analysis of the Lanham Act claim also portends an uphill battle for the USOC on two grounds. First, demonstrating evidence to meet the legal standard that Zerorez's proposed tweets are likely to confuse consumers as to the source or origin of its messaging, or to confuse consumers as to Zerorez's association, affiliation or sponsorship of the Olympic Games, is a high hurdle for the USOC; typically, these types of claims collapse under the weight of insufficient survey instruments and tactics. Second, the jury remains out regarding the issue of whether hashtags are even capable of serving in the trademark function as legislatively mandated by the Lanham Act, versus serving merely as aggregators of conversations, thus deserving of First Amendment protection; indeed, this is an issue that the courts will eventually need to resolve. Finally, although our analysis of the OASA claim would appear to provide the USOC's strongest legal footing, we argue that an enlightened court would view its hashtag policies as overly-broad, chilling otherwise protected freedom of expression and resulting in, as predicted by the dissent in *San Francisco Arts & Athletics*, a scenario whereby the USOC becomes the final arbiter of what corporations can and cannot say.

Why Zerorez's legal challenge is perhaps the best predictor of the forthcoming legal challenges facing the USOC and other sport organizations trying to regulate the social media space surrounding their events is there now exist multiple legal avenues by which to challenge the USOC's legal positions. As suggested throughout this article, individuals and brands now ubiquitously engage with and through social media in ways that do not communicate "endorsements" of the content or convey "sponsorship affilia-

¹³² See generally McKelvey and Grady, *supra* note 12 at 552. ("The complexity of rights issues within sponsorship contracts and the legal gray areas of ambush marketing, coupled with the creativity and ingenuity of ambush marketers, make it virtually impossible for event organizers to insure an ambush-marketing-free event").

tions” between a brand and a sport property. Using traditional trademark law analysis, therefore, might fall short of the legal impetus needed to establish infringement when used in an online context. Retweets have become so commonplace (indeed, expected) that one can barely imagine how a corporation’s retweet (even a retweet from the UOSC’s official twitter account) could be viewed as suggesting an endorsement of the athletes or event mentioned and therefore off limits. Instead, it is more likely for fans to expect to see corporations engaging with athletes and with events surrounding competition and congratulating them when they win without the chilling specter of a lawsuit hanging over them.

The guidance conferred by the Seventh Circuit regarding how congratulatory messages could legally be conveyed (albeit in the context of a print ad) is a solid predictor of how future legal challenges could be handled. First, it is clear that congratulatory messages and other fact-based statements that do not directly or even cleverly indirectly align the message with the brand should be protected under the First Amendment’s free speech provisions. Second, the legal and practical distinctions between traditional advertising and social media posts will continue to meld as consumers expect to see congratulatory messages related to athletes during the period of the Olympics; conversely, consumers would not (nor should they) expect such content and conversations to be reserved exclusively for a handful of elite global sponsor brands. By being more open to how their trademarks, when used as hashtags, can be utilized to spread the Olympic message to a wider and younger audience via social media, the USOC will begin to effect a legal position that can assure an adequate level of trademark protections for its sponsorship program while eliminating the chilling effect on the First Amendment rights of non-sponsors.

Ultimately, the USOC and its global counterparts should consider relying less on their legal arsenal in a punitive way, but instead develop policies on hashtag use that allow non-sponsors their full free expression and free speech rights (while also tacitly acknowledging the benefits of having their events ultimately “promoted” by non-sponsors). While this may seem anathema to the current brand use guidelines and would cause concern for the chief marketing officers at each TOP sponsors’ headquarters, it would signal a paradigm shift in a new social media era while also recognizing that future legal challenges could very well weaken the USOC’s existing legal position, both in the court of law and in the court of public opinion.



There's No Business Like Show Business: Abandoning Color-Blind Casting and Embracing Color-Conscious Casting in American Theatre

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ABSTRACT

The commercial theatre industry suffers from institutional racism that has yet to be remedied. Currently, the industry advocates for color-blind casting as the best method to give actors of all ethnicities an equal playing field in the casting process. Unfortunately, minority actors are still cast at significantly lower rates than White actors. Instead of encouraging color-blind casting, the theatre industry should implement color-conscious casting. Under a color-conscious casting policy, race and ethnicity would be a factor that directors, casting teams, and producers must consider during the casting process to encourage more actors of color to audition. Ignoring race in an appearance-based industry, where there is a history of discrimination, only furthers discrimination. Because much artistic deference is given to casting teams, this Note will address why a color-conscious temporary affirmative action policy is necessary to remedy the effects of past discrimination in the theatre industry.

INTRODUCTION

In March 2016, the production team of *Hamilton: An American Musical* (“*Hamilton*”) released a casting notice seeking “non-white” actors to audition for the show’s Broadway replacements and future regional productions.¹ *Hamilton* portrays the life of Alexander Hamilton in a new and innovative

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¹ David Matthews, *Lawyer alleges that a ‘Hamilton’ casting call for ‘non-white’ actors is illegal*, FUSION (Mar. 30, 2016, 4:56 PM), <http://fusion.net/story/286231/hamil->

way, featuring the characters of George Washington, Thomas Jefferson, and James Madison.² These men were White, but in *Hamilton* actors and actresses of color play the Founding Fathers.³ This bold casting decision by Lin-Manuel Miranda created fascination throughout the theatre community and beyond,⁴ even receiving a blessing from the Oval Office.⁵ While in office, President Barack Obama praised the casting of *Hamilton* as a “cast as diverse as America itself.”⁶

Due to the sudden popularity of *Hamilton*, the March 2016 casting notice garnered attention because the notice explicitly excluded White actors from the audition process.⁷ A lawyer in New York claimed the notice constituted employment discrimination in the hiring process because the

ton-casting-call-non-white-civil-rights-law-violation/ [https://perma.cc/2KNJ-PGBD].

² See Charlotte Runcie, *What Is Hamilton? A 12-Step Guide to Your New Musical Obsession*, DAILY TELEGRAPH, Dec. 21, 2017, <https://www.telegraph.co.uk/theatre/what-to-see/what-is-hamilton-a-12-step-guide-to-your-new-musical-obsession/> [https://perma.cc/7X8T-Q2P8].

³ See Matthews, *supra* note 1 (noting that the only character in *Hamilton* specifically written for a White actor is the role of King George III); Michael Paulson, *Hamilton Producers Will Change Job Posting, but Not Commitment to Diverse Casting*, N.Y. TIMES, Mar. 30, 2016, http://www.nytimes.com/2016/03/31/arts/union-criticizes-hamilton-casting-call-seeking-nonwhite-actors.html?_r=0&mtref=undefined&gwh=CB241B689831D0E1CE6276C0E1FA056F&gwt=pay [https://perma.cc/X4XZ-HL2C] [hereinafter *Hamilton Producers*] (explaining that the story of *Hamilton* was written to be told through a diverse viewpoint to include minorities in the narrative of America’s history). See also Mark Binelli, *‘Hamilton’ Creator Lin-Manuel Miranda: The Rolling Stone Interview*, ROLLING STONE (June 1, 2016), <http://www.rollingstone.com/music/features/hamilton-creator-lin-manuel-miranda-the-rolling-stone-interview-20160601> [https://perma.cc/6QLC-LLPQ] (noting that Lin-Manuel Miranda, the creator of the show, said that the purpose of his show was to use “inclusive language” and to have a cast that “look[s] the way America looks now.”).

⁴ See Binelli, *supra* note 3.

⁵ See Remarks by the President at “Hamilton at the White House” (Mar. 14, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/14/remarks-president-hamilton-white-house> [https://perma.cc/5H8A-S9MJ].

⁶ *Id.*

⁷ Matthews, *supra* note 1. See, e.g., *Hamilton Producers*, *supra* note 3 (noting that creator Lin-Manuel Miranda was surprised this particular casting notice sparked controversy, especially since the same language was used when casting the original Broadway production); Binelli, *supra* note 3 (noting the original casting notice featured character descriptions like, “Javert meets Mos Def,” “John Legend meets Mufasa,” and “The Michelle Williams of Destiny’s Child” for actors to consider when auditioning); L.V. Anderson, *Here Are the Original Casting Notices for Hamilton From Before It Was a Theater Legend*, SLATE (Mar. 1, 2016, 1:47 PM), <http://>

production team set out to only audition “non-white” actors.⁸ The *Hamilton* producers responded to these allegations by stating the musical tells “birth of our nation in a singular way” by using actors and actresses of color.⁹ The producers further stated that seeking only “non-white” actors did not violate employment law standards because their needs qualified as a bona fide occupational qualification (“BFOQ”) under Title VII of the Civil Rights Act of 1964.¹⁰ In an industry where actors and actresses of color are usually disenfranchised, this casting notice re-ignited debates across the theatre industry about the limited opportunities for minority actors in commercial theatre.¹¹

“Color-blind,”¹² or non-traditional, casting is generally regarded as the best method for casting diverse theatrical productions.¹³ Color-blind casting removes race from the casting process, and employs the best actor for the

www.slate.com/blogs/browbeat/2016/03/01/hamilton_s_original_casting_notices_sum_up_each_character_from_before_they.html [https://perma.cc/UJ9N-2VRC].

⁸ Matthews, *supra* note 1. The lawyer also alleged that the casting notice violated New York Human Rights Law.

⁹ *Id.* See also *Hamilton Producers*, *supra* note 3.

¹⁰ Matthews, *supra* note 1. The producers eventually amended the casting notice to remove the “non-white” language, but the intent to hire only people of color remained. See *id.* Although the producers used a BFOQ as a defense for seeking non-white actors, race or ethnicity can never be a valid BFOQ. The courts also have never ruled on a case where the BFOQ defense is applicable to theatre or the entertainment industry in general. Jennifer L. Shepard, *Theatrical Casting—Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267, 279 (1991). *Infra* Part I.

¹¹ See, e.g., Angelica Jade Bastién, *The Case Against Colorblind Casting*, THE ATLANTIC (Dec. 26, 2015), <http://www.theatlantic.com/entertainment/archive/2015/12/oscar-isaac-and-the-case-against-colorblind-casting/421668/> [https://perma.cc/87HQ-MUDZ].

¹² *Infra* Part I.A–B.

¹³ See Mabel Ng, Note, *Miss Saigon: Casting for Equality on an Unequal Stage*, 14 HASTINGS COMM. & ENT. L.J. 451, 460 (1992); Heekyung Ester Kim, Note, *Race as a Hiring/Casting Criterion: If Laurence Olivier was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim?*, 20 HASTINGS COMM. & ENT. L.J. 397, 415 (1998); Mervyn Rothstein, *Producer Cancels ‘Miss Saigon’; 140 Members Challenge Equity*, N. Y. TIMES, Aug. 9, 1990, <http://www.nytimes.com/1990/08/09/theater/producer-cancels-miss-saigon-140-members-challenge-equity.html?page-wanted=all> [https://perma.cc/8A7X-LWCD]. But see Andrea Guthmann, *‘Color-Conscious’ Casting: Putting Diversity in the Spotlight*, WTTW (Apr. 5, 2016, 5:08 PM), <http://chicagotonight.wttw.com/2016/04/05/color-conscious-casting-putting-diversity-spotlight> [https://perma.cc/AC5D-CGKQ] (quoting a playwright who believes in color-conscious casting, saying “we can’t pretend race isn’t there”).

role.¹⁴ Despite this legally sound framework, minorities are still cast at lower rates in commercial theatre productions than White actors.¹⁵ There are productions where race is integral to a show, but, apart from those few circumstances, minorities do not enjoy an equal playing field under the color-blind casting method.¹⁶ David Henry Hwang, an Asian-American playwright, commented that, “In most industries, [low minority hiring] would be considered a bad statistic, both politically and socially. . . . That’s not good for the future of theater.”¹⁷

Instead of color-blind casting, race should be a factor taken into consideration during the casting process. This is called “color-consciousness.”¹⁸ Color-conscious casting requires casting directors and producers to accept that the country is growing in diversity, and the stage should reflect the changing demographic make-up of the United States.¹⁹ The Actor’s Equity Association (“Equity”) is in a prime position to implement a temporary

¹⁴ See “*How Long, O Government?*,” ACTOR’S EQUITY ASSOCIATION, http://www.actorsequity.org/aboutequity/timeline/timeline_1980.html [https://perma.cc/H7HD-FB3Q] (last visited Oct. 31, 2016) [hereinafter *How Long*].

¹⁵ See AAPAC *Theatre Diversity Study: Spotlight on Broadway and New York’s 16 Most Prominent Theatres*, GROUND UP AND RISING, <http://www.groundupandrising.org/lack-of-diversity-in-theatre.html> [https://perma.cc/ASN9-SLQR] (last visited Nov. 28, 2016) (noting that in the 2012 New York theatre season 79 percent of roles were given to White actors). In the 2014–2015 New York theatre season, 30 percent of roles went to minority actors, and 70 percent went to White actors. Michael Paulson, *Study: Diversity in New York Theater Roles Rose in 2015-15 Season*, N.Y. TIMES, May 2, 2016, http://www.nytimes.com/2016/05/03/theater/study-diversity-in-new-york-theater-roles-rose-in-2014-15-season.html?_r=0 [https://perma.cc/W4W2-76YJ]. Seventeen percent were Black actors, seven percent were Asian, and three percent were Latino. *Id.* Sixty-eight percent of roles went to White actors during the 2015-2016 season, illustrating a two percent increase in minority casting over the course of one season. Kate Shindle, ‘*Hamilton*’ Casting Controversy Spotlights the Importance of Diversity (Guest Column), VARIETY (Apr. 5, 2016, 7:30 AM), <http://variety.com/2016/legit/opinion/hamilton-diversity-casting-actors-equity-guest-column-1201745244/> [https://perma.cc/L5X8-G7FP].

¹⁶ See Jessica Goldstein, *Race and casting’s recurring role*, WASHINGTON POST, Jan. 24, 2014, https://www.washingtonpost.com/entertainment/theater_dance/race-and-castings-recurring-role/2014/01/23/46286efe-82d0-11e3-9dd4-e7278db80d86_story.html [https://perma.cc/4F5L-7788] (arguing that low minority employment can have damaging effects for the future and progress of any business or industry). See also Michael R. Jackson, *Unpacking “Diversity” in Musical Theatre*, HOWLROUND (Sept. 30, 2015), <http://howlround.com/unpacking-diversity-in-musical-theatre> [https://perma.cc/QW6J-VLRA].

¹⁷ Goldstein, *supra* note 16.

¹⁸ See Guthmann, *supra* note 13; T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1064 (June 1991).

¹⁹ See Guthmann, *supra* note 13, Aleinikoff, *supra* note 18, at 1064.

affirmative action plan that addresses the underlying discrimination in Broadway Equity productions.²⁰ Abandoning the color-blind casting model and replacing it with a color-conscious casting model is better suited for the theatre industry, and will lead to increased minority employment opportunities.²¹

This Note explores theatrical hiring practices in Broadway and commercial regional New York theatres, and how an affirmative action plan is necessary for this industry.²² Part I explains the current color-blind casting model. Part I also discusses why the color-blind casting model is inappropriate for the theatre industry, and why this model hurts minority employment. Part II discusses the color-conscious casting model and why the theatre industry needs, and is ready for, this hiring model. Part III explains how a color-conscious policy should be enforced by a temporary affirmative action plan by Equity, because legal remedies for disenfranchised actors cannot correct this imbalance.

I. THE CASTING PROCESS

A. *The Color-Blind Casting Model*

The theatre industry is regarded as one of the most accepting communities in the entertainment world, but employment statistics say otherwise. Today, color-blind casting is the most commonly employed form of casting for theatre.²³ As is, the color-blind casting model also complies with current employment law rules by removing factors that foster discrimination in the

²⁰ See Shindle, *supra* note 15 (Shindle is the current president of the Actor's Equity Association).

²¹ See Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Teresa Eyring, *Standing Up for Playwrights and Against 'Colorblind' Casting*, AMERICAN THEATRE: THEATRE COMMUNICATIONS GROUP (Jan. 7, 2016), <http://www.americantheatre.org/2016/01/07/standing-up-for-playwrights-and-against-colorblind-casting/> [https://perma.cc/YCD5-KF7T]; Lisa Respers France, *The problem with color blind casting in 'Hamilton' and 'Harry Potter,'* CNN (June 14, 2016), <http://www.cnn.com/2016/06/13/entertainment/hamilton-potter-colorblind-casting/> [https://perma.cc/QA9L-HZE6].

²² See *About Equity*, ACTOR'S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/about/aboutequity_web.pdf [https://perma.cc/A5L2-GB47] (last visited Nov. 30, 2015) (noting that if a color-conscious policy was created, it would expand to all Agreements under Actor's Equity Association).

²³ See *Casting Call Notice Guidelines*, ACTOR'S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/auditions/Equity_JobNotice_Guidelines.pdf [https://perma.cc/X3AE-DPC9] (last visited Nov. 28, 2016).

hiring process.²⁴ Color-blind casting operates from the premise of ignoring an actor's race or sex, and casting the actor based solely on talent.²⁵ During the 2015-2016 Broadway season, 68 percent of all roles went to White actors, while 32 percent went to actors of color.²⁶ Of those 32 percent, Black, Latino, and Asian actors were only cast in 9.6 percent of the roles where race was not germane to the production, meaning that people of color are usually only hired to play roles specifically written for their race.²⁷

Equity is the labor union that regulates workers' rights in live theatre.²⁸ Most, if not all, Broadway and New York regional productions employ actors, stage managers, and other employees who are members of Equity.²⁹ Because of this, professional productions must comply with Equity guidelines from hiring to payment.³⁰ Equity is a proponent of color-blind casting and encourages all productions to follow its casting guidelines.³¹ Equity defines color-blind casting as "the casting of ethnic minority and female actors in roles where race, ethnicity, and sex are not germane."³² Theatre is an expressive art, and color-blind casting, on its face, should provide opportunities for actors to play any role that is available.³³ Looking

²⁴ See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 94 CAL. L.R. 1, 16 (2007); Alan Eisenberg, *Nontraditional Casting: When Race and Sex Don't Matter*, THE NEW YORK TIMES, Oct. 28, 1998, <http://www.nytimes.com/1988/10/23/theater/1-nontraditional-casting-when-race-and-sex-don-t-matter-486788.html> [https://perma.cc/NJ44-DFB]; France, *supra* note 21; *infra* Part III.

²⁵ Robinson, *supra* note 24 at 14–15; Zan Dubin, *A Demand for Nontraditional Casting*, LOS ANGELES TIMES, Oct. 13, 1988, http://articles.latimes.com/1988-10-13/entertainment/ca-4974_1_nontraditional-casting [https://perma.cc/GJA8-EGA3].

²⁶ Shindle, *supra* note 15.

²⁷ Robert Viagas, *Coalition Releases Report on Diversity in NY Theatre*, PLAYBILL (May 3, 2016), <http://www.playbill.com/article/coalition-releases-report-on-diversity-in-ny-theatre> [https://perma.cc/C3DL-RSMQ].

²⁸ *About Equity*, *supra* note 22.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Robinson, *supra* note 24, at 15. See also *How Long*, *supra* note 14. Color-blind casting is also referred to as non-traditional casting. *Id.*

³³ Some Broadway roles for minorities that have been attributed to color-blind casting include: Denzel Washington as Richard III in *Richard III*, Condola Rashad as Juliet in *Romeo and Juliet*, and Audra McDonald as Carrie Pipperidge in *Carousel*. Michael Kuchwara, *Denzel Washington Stars as 'Richard III' In Central Park*, ASSOCIATED PRESS (Aug. 16, 1990), <http://www.apnewsarchive.com/1990/Denzel-Washington-Stars-as-Richard-III-in-Central-Park/id-bfea5e77cca5f46de572d468650a3d29> [https://perma.cc/67V6-TDMH]; Marilyn Stasio, *Broadway Review: 'Romeo and Ju-*

beyond physical appearance gives actors a chance to grow artistically and portray a variety of characters to enhance their range and repertoire.³⁴ In an industry built on suspending belief, casting without regard to race “is consistent with the premise that the actor has accomplished the job by effectively portraying someone else.”³⁵ Like theatre, casting is also subjective, and conceptually removing racial divides in the casting process should ensure equality and fairness in the casting process.³⁶ Supporters of color-blind casting insist that this method provides more employment opportunities for minorities, and gives White actors opportunities to play roles they generally would not be considered for.³⁷

1. The Negative Effects of Color-Blind Casting

Since 1990, color-blind casting has been a widely-debated issue among the Broadway and New York theatre community. Color-blind casting came to the forefront in 1990 during the New York premiere of the musical *Miss Saigon*.³⁸ In 1989, *Miss Saigon* debuted in London starring Lea Salonga, a Filipino actress, and Jonathan Pryce, a Welsh actor making a transfer to the Broadway stage.³⁹ Pryce’s character, the Engineer, is French and Vietnamese, requiring the Welsh actor to put on yellow face.⁴⁰ Permitting yellow face on the Broadway stage was described as an “affront to the Asian American community.”⁴¹ Mere weeks before the Broadway opening, Equity met with Cameron Mackintosh, the producer of *Miss Saigon*, to address the casting

liet, VARIETY (Sept. 19, 2013), <http://variety.com/2013/legit/reviews/broadway-review-romeo-and-juliet-1200643078/> [<https://perma.cc/BWA5-F4YY>]; *Casting Beyond Color Lines*, NPR (Feb. 5, 2008), <http://www.npr.org/templates/story/story.php?storyId=18706620> [<https://perma.cc/4233-3RC3>].

³⁴ See Bonnie Chen, *Mixing Law & Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515, 521 (1999).

³⁵ *Id.* One thing is clear when it comes to color-blind casting: casting white actors donning black or yellow face in roles where the characters are meant for actors of color is generally inappropriate. *Id.* at 518. Putting on black face or yellow face to convey a different race is not acceptable given the extremely racial and prejudicial history that comes along with those methods of entertainment. *Id.*

³⁶ See Kim, *supra* note 13, at 415.

³⁷ Chen, *supra* note 34.

³⁸ See Alex Witchel, *Actors' Equity Attacks Casting of 'Miss Saigon'*, N.Y. TIMES, July 26, 1990, <http://www.nytimes.com/1990/07/26/theater/actors-equity-attacks-casting-of-miss-saigon.html> [<https://perma.cc/4ZBP-4JXF>].

³⁹ *Id.*

⁴⁰ Goldstein, *supra* note 16.

⁴¹ *Id.* See also Witchel, *supra* note 38.

issue.⁴² Equity expressed its concerns about the implications of casting a European actor in yellow face as the Engineer, instead of an Asian or Asian-American Equity member.⁴³ Mackintosh regarded Pryce's performance as the "artistic crux of this musical," and wanted to keep Pryce in the role.⁴⁴ He called Equity's position on this "hypocritical" given its definition of non-traditional casting.⁴⁵ Equity voted in favor of banning Pryce from the show, and as a result, Mackintosh cancelled the opening of *Miss Saigon*—which already garnered \$24 million in advance ticket sales—citing the stifling of artistic freedom as the cause.⁴⁶ *Miss Saigon* eventually opened on Broadway in April 1991, with Pryce starring as the Engineer.⁴⁷

As a blanket policy, color-blind casting should create a system of equality and fairness, but it has produced the opposite.⁴⁸ The *Miss Saigon* incident will forever be remembered as color-blind casting gone wrong. This moment illustrated that even though color-blind casting is a legal form of

⁴² *Producer of 'Miss Saigon' Will Meet With Equity*, DESERET NEWS (Aug. 25, 1990), <http://www.deseretnews.com/article/118961/PRODUCER-OF-MISS-SAI-GON-WILL-MEET-WITH-EQUITY.html?pg=all> [https://perma.cc/S62U-EYBW] [hereinafter *Producer of 'Miss Saigon'*].

⁴³ In 1990, there were over 400 Asian members of Equity. Tim Appelo, *Drama Over "Miss Saigon,"* ENTERTAINMENT WEEKLY (Sept. 7, 1990), <http://www.ew.com/article/1990/09/07/drama-over-miss-saigon> [https://perma.cc/V7H8-ZKAM]; *Producer of 'Miss Saigon,'* *supra* note 42.

⁴⁴ Frank Rich, *Jonathan Pryce, 'Miss Saigon' and Equity's Decision*, N.Y. TIMES, Aug. 10, 1990, <http://www.nytimes.com/1990/08/10/theater/jonathan-pryce-miss-saigon-and-equity-s-decision.html?pagewanted=all> [https://perma.cc/F76Z-LARW].

⁴⁵ Witchel, *supra* note 38; *How Long,* *supra* note 14.

⁴⁶ *Producer of 'Miss Saigon,'* *supra* note 42.

⁴⁷ *Miss Saigon*, PLAYBILL, <http://www.playbill.com/production/miss-saigon-broadway-theatre-vault-0000012256> [https://perma.cc/Z6XE-JKXK] (last visited Sept. 25, 2017). Jonathan Pryce won a Tony Award for his performance of the Engineer, and *Miss Saigon* is the 13th longest running Broadway show in American history. *Id.*

⁴⁸ See Michael R. Jackson, *Unpacking "Diversity" in Musical Theatre*, HOWLROUND (Sept. 30, 2015), <http://howlround.com/unpacking-diversity-in-musical-theatre> [http://perma.cc/L67U-J6Z6]. See also Mallika Roa, *'Aladdin' On Broadway Faces Backlash From Arab-Americans*, HUFFINGTON POST (Apr. 2, 2014), http://www.huffingtonpost.com/2014/04/02/disney-aladdin-broadway-racist_n_5001833.html [https://perma.cc/3C6D-HU5C] (discussing that even though *Aladdin* is a fictional story, the Disney Theatrical Productions colorblind casting policy made it so no members of Middle Eastern heritage were cast in the thirty-four member cast) (internal quotations omitted).

hiring, it has serious effects on minority employment.⁴⁹ With respect to color-blind casting, White actors regard color-blind casting as a vehicle to only benefit minorities, while minorities feel as if color-blind casting is not helping them at all.⁵⁰ This sentiment is best illustrated by Cameron Mackintosh's argument that Equity was suppressing his artistic decision by casting Pryce as the Engineer in *Miss Saigon*.⁵¹ He believed he cast the best person for the role, and legally, that is color-blind casting at its core.⁵² Nevertheless, Mackintosh's decision to cast a White actor over an Asian actor is a prime example that color-blind casting is not friendly to minority actors seeking to gain employment in theatre.⁵³

Since this incident, Equity, and other performer's rights organization took a stand on this issue, urging all members to "challenge traditional stereotypes" to keep the industry growing in a diverse country.⁵⁴ Nevertheless, this has not held true.⁵⁵ In 2016, a New York regional theatre in Sag

⁴⁹ See Goldstein, *supra* note 16 (director Natsu Onoda Power stating that color-blind casting is an unworkable method because "we cannot be blind to race because we are not in real life. . . . We can do race conscious casting, fully acknowledging the race of the person and making the most interesting choice.").

⁵⁰ See Neil LaBute, *Casting for the stage should be color-blind*, LOS ANGELES TIMES, May 6, 2007, <http://articles.latimes.com/2007/may/06/entertainment/la-ca-labute6may06> [<https://perma.cc/KS6Q-SQQU>].

⁵¹ See Rich, *supra* note 44.

⁵² Witchel, *supra* note 38.

⁵³ In a 2014 interview, Cameron Mackintosh said that it was his "biggest mistake" not casting an Asian or Asian-American in the role of the Engineer. Dominic Cavendish, *Cameron Mackintosh: 'I have been successful beyond anyone's wildest dreams'*, DAILY TELEGRAPH, May 21, 2014, <http://www.telegraph.co.uk/culture/theatre/10842020/Cameron-Mackintosh-I-have-been-successful-beyond-anyones-wildest-dreams.html> [<https://perma.cc/N6GX-2K9Y>]. He further stated, "I was actually being stupid." *Id.*

⁵⁴ *Documents of Principle*, ACTOR'S EQUITY ASSOCIATION, <http://www.actorsequity.org/Benefits/DocOfPrinciple.asp> [<https://perma.cc/4RCL-GSCQ>] (last visited Sept. 25, 2017).

⁵⁵ In July of 2017, the producers of *Natasba, Pierre, and the Great Comet of 1812* replaced Josh Groban with Okierete "Oak" Onoadowan in the title role of Pierre. Michael Paulson, *Diversity Concerns Prompt 'Great Comet' Casting Shakeup*, N.Y. TIMES, July 27, 2017, <https://www.nytimes.com/2017/07/27/theater/mandy-pantinkin-oak-onaodowan-great-comet.html?mcubz=1> [<https://perma.cc/292D-7AMF>]. Onoadowan, a Nigerian-American actor, was expected to draw in a big crowd because of his roles in *Hamilton* and *Rocky*. *Id.* To the producers' dismay, ticket sales sharply dropped despite Onoadowan's draw. *Id.* Just two weeks into Onoadowan's run, the producers announced that Broadway veteran and White actor, Mandy Patinkin, would be the next actor to play Pierre, cutting Onoadowan's run short prompting debates on "how Black actors are supported and valued within the Broadway." Jamara Wakefield, *Okierete "Oak" Onoadowan Departs The Great Comet*;

Harbor planned to debut a staged reading of *The Prince of Egypt*.⁵⁶ Based on the film, the reading featured a majority White cast about characters set in Egypt.⁵⁷ Cynthia Erivo, a Tony Award-winning Black actress and board member of the American Theatre Wing, tweeted her concerns. “[I]t saddens me that after such a wonderful multicultural season on Broadway a piece set in AFRICA has not one POC [Person of Color],”⁵⁸ she wrote. “[T]he piece is set in ancient EGYPT, i.e. AFRICA where people darker than I resided. That is my point.”⁵⁹ Many other theatre performers voiced their concerns, including Denée Benton, a Black actress starring in *Natasha, Pierre, and The Great Comet of 1812*.⁶⁰ *The Prince of Egypt*’s director Scott Schwartz called the actors and actresses who were concerned about the casting choices and listened to their opinions.⁶¹ In a statement, he noted that five out of the fifteen actors in the show are minorities, and that “having a diverse cast is a priority.”⁶² His statement further read, “We all care deeply about making theater and art that is reflective of the multicultural society in which we live.”⁶³ He ended by saying “All of us on the creative and producing team want to continue this conversation, not just about the ‘Prince of Egypt,’ but about diversity and authenticity in casting in all the art we create.”⁶⁴ The reading

Mandy Patinkin Will Replace, BROADWAY BLACK (July 26, 2017), <http://broadwayblack.com/okieriete-oak-onaodowan-departs-the-great-comet/> [<https://perma.cc/AQ2V-PXQW>]. This incident highlighted that initial hiring is not only a problem for actors of color, but also once they are cast they may be removed at any time, despite other factors they have no control over.

⁵⁶ Michael Paulson, ‘*Prince of Egypt*’ Musical Reading Canceled After Diversity Complaints, N.Y. TIMES, July 28, 2016, <https://www.nytimes.com/2016/07/29/theater/prince-of-egypt-musical-reading-canceled-after-diversity-complaints.html?mtrref=undefined&gwh=1B5024B1E5ACD79E432232A07D82661B&gwt=pay> [<https://perma.cc/P7TH-3B9P>].

⁵⁷ *Id.*

⁵⁸ Cynthia Erivo (@CynthiaEriVo), Twitter (July 23, 2016, 7:20 AM), https://twitter.com/CynthiaEriVo/status/756856580189093888?ref_src=twsrc%5Etfw [<http://perma.cc/QUP2-VZ5Z>].

⁵⁹ Cynthia Erivo (@CynthiaEriVo), Twitter (July 23, 2016, 7:39 AM), <https://twitter.com/CynthiaEriVo/status/756861180371664897> [<https://perma.cc/YGK2-V2R3>].

⁶⁰ Olivia Clement, *Prince of Egypt Casting Prompts Diversity Discussion; Director Responds*, PLAYBILL (July 26, 2016), <http://www.playbill.com/article/prince-of-egypt-casting-stirs-diversity-conversation> [<https://perma.cc/GMN7-GAJA>].

⁶¹ *To Members of the Online Community*, BAY STREET THEATER, <http://www.baystreet.org/letter/2016-07-25> [<https://perma.cc/N4UD-PNX7>] (last visited Feb. 24, 2017).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

was soon canceled, but the producers announced in 2017 plans to continue regional and international productions, featuring a multi-ethnic cast.⁶⁵

Another incident during the 2016 season revolved around the production *Noises Off*, produced by the Roundabout Theatre Company.⁶⁶ All nine roles in the show were given to White actors and actresses.⁶⁷ The lack of diversity in the show, about a theatre company putting on a play, “paints the picture that theatre is still only for and by only white people.”⁶⁸ The casting notice called for “All Ethnicities” for each character, but still ended up with an all-White cast.⁶⁹

These incidents illustrate that an employment casting model that ignores an actor’s race cannot achieve the goal of employing more minority actors.⁷⁰ Equity’s challenge to include more actors of color has not been realized, and legal action is needed to remedy these effects.⁷¹ Whites are still employed at higher numbers than Black or Asian actors, illustrating that the color-blind method that has been in place since the 1980s is not creating equality in the casting room.⁷²

B. *Why the Color-Blind Casting Model Is Inappropriate for Theatre*

The concept of color-blind casting operates from the premise that the United States is in a post-racial society.⁷³ Unfortunately, the United States is

⁶⁵ David Gordon, *Jason Gotay, Christina Sajous, Tom Nelis Set for The Prince of Egypt*, THEATERMANIA (Aug. 23, 2017), http://www.theatermania.com/san-francisco-theater/news/prince-of-egypt-casting_82169.html?utm_source=facebook&utm_medium=social&utm_campaign=23aug2017 [https://perma.cc/MFF8-KTTW].

⁶⁶ Mark Kennedy, *Broadway Embraces Diversity, But Have Things Really Changed?*, ASSOCIATED PRESS (June 8, 2016), <http://bigstory.ap.org/article/e09f4cdf62464188be698a6c05b81966/broadway-embraces-diversity-have-things-really-changed> [https://perma.cc/CU5U-UM2Z].

⁶⁷ *Id.*

⁶⁸ Peter J. Kuo, *Why the Roundabout Casting of Noises Off is Problematic* (Jul. 26, 2015), <http://www.peterjkuo.com/2015/07/why-roundabout-casting-of-noises-off-is.html> [https://perma.cc/6825-SBHX]. See also Kennedy, *supra* note 66.

⁶⁹ *Noises Off*, BACKSTAGE.COM, <https://www.backstage.com/casting/noises-off-63485/> [https://perma.cc/NLN9-RHKK] (last visited Feb. 24, 2017).

⁷⁰ See Bastián, *supra* note 11; Eyring, *supra* note 21.

⁷¹ See Kate Shindle, ‘Hamilton’ Casting Controversy Spotlights the Importance of Diversity (Guest Column), VARIETY (Apr. 5, 2016, 7:30 AM), <http://variety.com/2016/legit/opinion/hamilton-diversity-casting-actors-equity-guest-column-1201745244/>.

⁷² *Supra* notes 35–36.

⁷³ See Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL’Y 473, 493–94 (2011).

not post-racial.⁷⁴ Race is still a determining factor in American society, and it is “counterintuitive to argue that problems related to race can be fixed by ignoring race altogether.”⁷⁵ Taking race into account in the hiring process is not legally permitted, but, in theatre where appearance matters, race should be a factor that can legally be considered in the casting process.⁷⁶ Theatre is a unique business, where appearance is integral to the product, and, “[i]f the law forces a director to cast certain actors without regard to their race, it can be argued that the law is making artistic decisions.”⁷⁷ Color-blind casting is not a “sustainable strategy. . . [and does not] address[] the systematic problems that exist.”⁷⁸ The name color-blind, or non-traditional, casting also does not have a positive connotation. By ignoring an essential part of someone’s appearance in the casting process, it should be a novelty or regarded as non-traditional. Because color-blind casting favors the majority rather than any minority group, color-blind casting must end to ameliorate this institutional problem of discrimination against minority actors.⁷⁹

⁷⁴ Writing in for the dissent in *Schuette v. Coalition to Defend Affirmative Action*, Supreme Court Justice Sonia Sotomayor found it troubling that her colleagues “refus[ed] to accept the stark reality that race matters,” and the only “way to stop discrimination on the basis of race is to speak openly . . . [about] the racial inequality that exists in our society.” *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting). Even in his final presidential address, President Barack Obama noted, “after [his] election there was talk of a post-racial America. And such a vision . . . was never realistic.” Barack Obama, *President Obama’s Farewell Address: Full Video & Text*, N.Y. TIMES, Jan. 10, 2017, <https://www.nytimes.com/2017/01/10/us/politics/obama-farewell-address-speech.html> [https://perma.cc/EGV7-ZHEU]. President Obama called racial discrimination a “threat” and a “potent and often divisive force in our society”. *Id.*

⁷⁵ Bastián, *supra* note 11. *But see* *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (“Government action dividing us by race is inherently suspect because such classifications promote “notions of racial inferiority and lead to a politics of racial hostility.”) (internal quotations omitted). Chief Justice Roberts’s argument in *Parents Involved* surrounded school districts that had no history of discrimination. In the theatre industry, his argument of using race may not hold because of the detrimental discriminatory history.

⁷⁶ *See* Goldstein, *supra* note 16; Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Guthman, *supra* note 17.

⁷⁷ Chen, *supra* note 34.

⁷⁸ Bastián, *supra* note 11.

⁷⁹ *See* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL’Y 473, 474 (2011); *See* Harry Newman, *Casting a Doubt: The Legal Issues of Nontraditional Casting*, 19 J. OF ARTS MGMT. & L. 55, 61 (Summer 1989).

II. COLOR-CONSCIOUS CASTING IN COMMERCIAL THEATRE

A. *Defining Color-Consciousness*

Color-blind casting has not produced its intended result; therefore, the theatre industry should implement a color-conscious approach in the casting process. Although a color-conscious method “may be the most difficult to defend legally,” color-conscious policies permeate society in other ways and have proven to be an effective legal means of creating racial balance.⁸⁰

Affirmative action programs, for example, are inherently color-conscious.⁸¹ In *Grutter v. Bollinger*, the United States Supreme Court found that taking account of a person’s race in law school admissions as a “plus” factor does “not unduly harm members of any racial group.”⁸² The Court found importance in “individualized consideration” with regards to race-conscious policies.⁸³ The Court iterated that methods to increase diversity cannot thrive under a color-blind regime that treats everyone the same.⁸⁴ More recently, the Court held in *Fisher v. University of Texas at Austin, et al.*, that the University of Texas could continue its “race-conscious” admissions policy as long as it had clear diversity goals, the plan would be constantly under review, and there was no other way to achieve these objectives.⁸⁵ Before *Grutter* and *Fisher*, Justice Blackmun, writing a separate opinion in *Regents of California v. Bakke*, noted that considering race is the only way to include minorities into the majority process.⁸⁶ He said, “[I]t would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible.”⁸⁷ Operating under a color-blind regime cannot further the goals of ensuring minorities are properly represented, especially when ignoring race is impossible cognitively and socially.⁸⁸

⁸⁰ Newman, *supra* note 79.

⁸¹ *Id.*

⁸² *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

⁸³ *Id.* at 334.

⁸⁴ *See id.* at 337–38.

⁸⁵ *See Fisher v. University of Texas.*, 136 S. Ct. 2198, 2211–12 (2016).

⁸⁶ *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978).

⁸⁷ *Id.*

⁸⁸ Newman, *supra* note 79, at 60–61.

B. *Employment Law and Color-Consciousness*

An affirmative action policy is only necessary, and will be tolerated, if there is no other legal means of addressing the problem.⁸⁹ The lack of minority employment in commercial theatre highlights that legal action is needed to create an institutional change in the theatrical employment process.⁹⁰ Theatre operates in a world of artistic freedom, where no one has legally questioned artistic choices on casting and has yet to bring legal action in the courts about discriminatory casting practices.⁹¹ Therefore, it is unclear how a court would rule in a case of discriminatory casting.⁹² This Note will highlight the difficulties for an actor to bring a case to the courts for a remedy against discriminatory practices and why a color-conscious affirmative action policy is currently the only redress.

As it stands today, employment law operates under equal employment opportunity where employers cannot discriminate in the hiring process on the basis of race, ethnicity, gender, religion, or national origin.⁹³ The Civil Rights Act of 1964 prohibits discrimination on the basis of race, gender, national origin, or religion.⁹⁴ The Act, specifically Title VII, pertains to employers and their methods for hiring and employing based on the above listed traits.⁹⁵ Title VII makes it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.”⁹⁶ In addition, the Title VII provides that “it shall be unlawful . . . to print or

⁸⁹ See *infra* notes 102–08.

⁹⁰ See Morgan Greene, *A white actor is cast in ‘In the Heights,’ setting off complicated debate*, CHICAGO TRIBUNE, Aug. 14, 2016, <http://www.chicagotribune.com/entertainment/theater/ct-latino-casting-porchlight-in-the-heights-ent-0815-20160814-story.html> [https://perma.cc/6X56-3NZJ].

⁹¹ See Eriq Gardner, *‘The Bachelor’ Racial Discrimination Lawsuit Dismissed*, HOLLYWOOD REPORTER (Oct. 15, 2012), <http://www.hollywoodreporter.com/thresq/bachelor-racial-discrimination-lawsuit-dismissed-379100> [https://perma.cc/9WAV-7GPB] (illustrating that the court gave a high degree of artistic deference to the producers of *The Bachelor* in response to allegations of racial discrimination in casting).

⁹² Chen, *supra* note 34; Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 474 (2001).

⁹³ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2016). Title VII only applies to employers that employ 15 or more employees. *Id.*

⁹⁴ 42 U.S.C. § 2000e(a) (2012).

⁹⁵ 42 U.S.C. §§ 2000e-2000e-17 (2012).

⁹⁶ 42 U.S.C. § 2000e-2(a) (2012).

publish . . . any notice . . . indicating any preference . . . based on race, color, religion, sex . . .”⁹⁷ Title VII of the Civil Rights Act removes employers’ ability to use race as a factor in hiring or to say that they are looking for certain traits.⁹⁸ Despite this, there are many casting notices that already identify the age, race, and gender of certain characters “because it reflects authorial intent,” but those casting notices should not exclude anyone from the audition process.⁹⁹

Title VII also allows for an employer to hire a person based on a limited number of external traits.¹⁰⁰ Title VII states that it is not “an unlawful employment practice for an employer to hire employees . . . on this basis of [] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .”¹⁰¹ This is called a bona fide occupational qualification (“BFOQ”).¹⁰² With specificity from Congress, the only traits that are BFOQs are religion, sex, or national origin.¹⁰³ Race or ethnicity are not considered BFOQs, therefore employers are not allowed to claim an applicant’s race or ethnicity was the reason an applicant was or was not hired.¹⁰⁴ These narrow exceptions are “permissible” forms of hiring discrimination because in certain situations, it is necessary to the function of an employer’s business to have employees with certain traits.¹⁰⁵ Race was not included as a BFOQ to eradicate all instances

⁹⁷ 42 U.S.C. § 2000e-3(b) (2012).

⁹⁸ *See id.*

⁹⁹ The *Hamilton* casting notice was condemned by Equity because it blatantly excluded an entire group from the audition process. Equity President, Kate Shindle, found that notice to be inconsistent with Equity’s policies. Robert Viagas, *Actors Equity Issues Statement Regarding Hamilton Casting*, PLAYBILL (Mar. 31, 2016), <http://www.playbill.com/article/actors-equity-issues-statement-regarding-hamilton-casting> [<https://perma.cc/5M84-EH2B>]. She then went on to amend her statement calling for more roles and more opportunities for actors of color, due to the popularity of *Hamilton*, and that audiences want more diversity on the stage. Robert Viagas, *Equity President Weighs in On “Daunting” Issue of Casting Diversity*, PLAYBILL (Apr. 5, 2016), <http://www.playbill.com/article/equity-president-weighs-in-on-daunting-is-sue-of-casting-diversity> [<https://perma.cc/F7VN-VD5F>].

¹⁰⁰ 42 U.S.C. § 2000e-2(e) (2012).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* Race and ethnicity are expressly excluded from the bona fide occupational qualification. If an employer hires or excludes someone from the hiring process on the basis of race or ethnicity it would violate federal employment law. *Id.*

¹⁰⁵ In addition, some traits that have been accepted as valid BFOQs are authenticity or genuineness. Kim, *supra* note 13, at 409.

where employers could use race as a hiring criterion.¹⁰⁶ It is not difficult to see how employers could impermissibly use race to exclude minorities by claiming that it is a BFOQ to only hire people of a certain race due to customer population, or any other reason. Race is not listed as a BFOQ, so it is very difficult to use this as a vehicle for enacting a color-conscious casting policy to include race as a factor in the hiring process. Because of this, the only redress is a temporary affirmative action policy.

In other business industries, courts seem to be sympathetic in cases where there is clear evidence of a minority party being disadvantaged.¹⁰⁷ When there is evidence of past discriminatory practices, courts have allowed disenfranchised minorities to be promoted over Whites to counter discriminatory effects.¹⁰⁸ In *United States v. Paradise*, the District Court for the Middle District of Alabama ordered the state to promote a Black state trooper for every White one due to the lack of Black state troopers.¹⁰⁹ The United States Supreme Court affirmed the District Court's ruling, holding it was necessary to implement this race-conscious policy in order to remedy the effects of discrimination in Alabama.¹¹⁰ The Court stated that "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."¹¹¹ The Court acknowledged race-conscious policies are necessary "only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on blacks."¹¹² In *Johnson v. Transportation Agency of Santa Clara County*, the Court held that promoting a woman over a man did not violate Title VII of the Civil Rights Act of 1964, with a concurring opinion noting the woman's sex was only "used as a 'plus' factor."¹¹³ There is a "firm basis" for elevating qualified members of a disenfranchised class in order to create adequate representation within Title VII.¹¹⁴ Within these two cases, it is evident that in institutions where minorities are adversely impacted, race-conscious programs could be appropriate methods of increasing minority employment.

¹⁰⁶ Frank, *supra* note 92, at 508.

¹⁰⁷ *Id.* at 476.

¹⁰⁸ Newman, *supra* note 79, at 61.

¹⁰⁹ *United States v. Paradise*, 480 U.S. 149, 153–66 (1987).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 171.

¹¹² *Id.* at 185.

¹¹³ *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring).

¹¹⁴ *Id.*

In applying these cases to the theatre industry, an affirmative action policy is necessary. These cases, although not industry parallels, are demographically similar to the theatre industry, because the theatre industry still suffers from institutional discrimination that has not been remedied. Unlike these other industries, artistic freedom in the business of theatre is a challenge that would be very hard for a minority actor or actress to overcome if seeking a remedy in court.

1. The Inefficacy of Judicial Action in the Modern Era

If an actor or actress brought a case against a casting director for discrimination on the basis of race, he or she must show either disparate treatment during the hiring process or a disparate impact as a result of the employment process.¹¹⁵ Under the disparate treatment theory, an injured party must show that racial discrimination motivated the employer's hiring decision. Under this method, an actor would be able to get relief from a specific employer, and the legal recourse would apply to all other employers who engage in this practice if brought into court.¹¹⁶ In *McDonnell Douglas Corp. v. Green*, the Court created a framework to evaluate Title VII claims of disparate treatment.¹¹⁷ First, the Court held that the plaintiff must establish that the defendant employer was discriminatory by showing: (1) the plaintiff is a member of a racial minority, (2) the plaintiff applied for a position and was qualified for the sought after position, (3) the plaintiff was rejected despite being qualified, and (4) after being rejected, the employer still sought out applicants with the same qualifications to fill the position.¹¹⁸ Once the plaintiff establishes a prima facie case of discrimination, the defendant employer is now burdened with "articulat[ing] some legitimate, non-discriminatory reason for the employee's rejection."¹¹⁹ If the court finds that the process is a fair assessment, it is up to the defendant employer to rebut the prima facie claim by stating how their hiring practices were not discriminatory.¹²⁰ If the defendant cannot give a reason why the plaintiff was rejected during the hiring process, the inquiry stops there, and the plaintiff will receive a legal remedy.¹²¹ If the defendant employer gives a nondiscrim-

¹¹⁵ 42 U.S.C. § 2000e-2(k) (2012).

¹¹⁶ *Id.*

¹¹⁷ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹¹⁸ *Id.* at 792–93.

¹¹⁹ *Id.* at 802.

¹²⁰ *Id.* at 803.

¹²¹ *Id.*

inatory reason, the burden is shifted back to the plaintiff, and he or she must show that the discrimination was due to pretext.¹²²

The disparate treatment theory creates a very heavy burden on the plaintiff to prove that the defendant employer was discriminating.¹²³ In the theatre industry, artistic deference and the uniqueness of the business can create some difficulty for the plaintiff to move past the second prong of the *McDonnell Douglas* test.¹²⁴ Most actors and actresses do not know what the casting team specifically wants for each role, and if the casting team can articulate any reason that is not related to race for not hiring an actor or actress, that actor or actress has to still show racial motivations for not being hired.¹²⁵ With disparate treatment claims, it would be very difficult for an actor to receive an adequate remedy using this theory, especially if the defendant employer uses a BFOQ—that is not race—as the reason for not hiring the actor.¹²⁶

Under the disparate impact theory, there must be an adverse impact on a specific minority class seeking employment from a particular employer.¹²⁷ Even if the defendant employer does not have the intent to discriminate, they could still be found as discriminatory by creating a disparate impact on minority applicants.¹²⁸ In order for defendant employer to prevail the court must find “that an employer policy or practice causes an adverse or disproportionate impact on a certain protected minority class, absent a showing that the requirement is a result of a business necessity.”¹²⁹ A business necessity is a valid reason that justifies why the employer can discriminate in the hiring process due to the employer’s particular employment needs.¹³⁰ Once there is a showing that the practice creates a disparate impact, it is up to the defendant to show that the hiring agency’s practices are not discriminatory but are instead a business necessity.¹³¹ Even if a defendant employer can show his or her hiring practices serve a business necessity, the plaintiff can

¹²² *Id.* at 804. Evidence of pretext would be the defendant employer’s current lack of minority employment or their reaction to “civil rights activities.” *Id.* at 804–05.

¹²³ *Id.* at 804.

¹²⁴ See Kim, *supra* note 13, at 415.

¹²⁵ *Id.* at 405–06

¹²⁶ *Id.*

¹²⁷ *Id.* at 415.

¹²⁸ In *Griggs v. Duke Power Co.*, the Court held that in disparate impact cases, a remedy will be granted if the employer’s practice if the hiring practices are not a “reasonable measure of job performance.” 401 U.S. 424, 436 (1971).

¹²⁹ Kim, *supra* note 13, at 406; see also *Griggs*, 401 U.S. at 431.

¹³⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

¹³¹ *Id.*

rebut that showing by providing an alternative practice that could better serve the employer's needs without creating a disparate impact.¹³² If an actor wanted to bring a claim to court for a remedy, the disparate impact theory would have more success in theatre because there is less of a burden on the plaintiff.¹³³ The plaintiff would have to find more actors who have been discriminated against by the specific employer, as these are usually class actions suits.¹³⁴ Like disparate treatment, the business necessity defense allows employers to articulate any other reason other than race for an employee not getting hired, making it harder for an employee to overcome the burden.¹³⁵ As seen with both theories, it can be very difficult for a minority to make a showing of discrimination in the casting process, which is why Equity needs to step in to combat discriminatory casting.¹³⁶

III. DEVELOPING THE COLOR-CONSCIOUS CASTING MODEL

A. *Equity and Color-Consciousness*

Casting for professional commercial theatre is governed by Equity.¹³⁷ In turn, Equity, as a labor union, must comply with federal employment law.¹³⁸ In addition to federal law, Equity has developed its own guidelines that casting teams must adhere to throughout the hiring process.¹³⁹ Equity encourages artistic teams to be as descriptive as possible when listing the roles they are auditioning for.¹⁴⁰ Equity also states that “[c]asting policies [are] designed to expand employment opportunities for . . . actors of color” through non-traditional casting, and “[d]iscrimination on the basis of race, gender, age, national origin . . . is prohibited in all agreements.”¹⁴¹ Equity’s intentions to employ more actors of color are important, but as evidenced above, a policy of color-blind casting is not the best method to do so.¹⁴²

As it stands today, employment law operates under equal employment opportunity where employers cannot discriminate in the hiring process on

¹³² 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012).

¹³³ Kim, *supra* note 13, at 408.

¹³⁴ *Id.*

¹³⁵ *Id.* at 408–09.

¹³⁶ Frank, *supra* note 92, at 475; *see also* Greene, *supra* note 90.

¹³⁷ *About Equity*, *supra* note 22.

¹³⁸ *Id.*

¹³⁹ *Casting Call Notice Guidelines*, *supra* note 23.

¹⁴⁰ *See id.*

¹⁴¹ *About Equity*, *supra* note 22.

¹⁴² *See supra* Parts I, II.

the basis of race, ethnicity, gender, religion, or national origin, but where there is unbalance, instituting a temporary affirmative action policy is allowed.¹⁴³ Creating an affirmative action policy for commercial theatres to be color-conscious and to employ more minorities would not be discrimination against Whites, but would increase diversity and rectify past employment practices.¹⁴⁴

B. Evidence a Color-Conscious Policy is the Only Redress

Although not codified or represented in the law today, discussions about actors and casting in the entertainment industry came up extensively on the floors of the House of Representatives and Senate while legislators drafted the Civil Rights Act of 1964.¹⁴⁵ The congressmen discussed how the entertainment industry may have to take race into account when casting, and the difficulties that would arise with a race-neutral law.¹⁴⁶ In the House of Representatives, an amendment was offered to add race or color to the BFOQ defense.¹⁴⁷ Congressman George Huddleston, Jr.¹⁴⁸ of Alabama said:

I have in mind a situation where a theatrical group wants to put on Shakespeare's great tragedy "Othello." They need a particular type of individual to play the part of Othello. How could that be accomplished unless the gentleman's amendment is adopted? How could they possibly get the type of individual to play that part unless we incorporate the words "race or color" in this section?¹⁴⁹

Rep. John Williams noted that not including race or color in the BFOQ is "impracticable and unworkable" in the few situations where race does matter for employment reasons.¹⁵⁰ Adding to Huddleston's concern, Representative James O'Hara of Michigan also said:

[S]ome particular role may require a person whose skin is of a particular hue . . . the trouble with the amendment . . . is that it opens it up a good

¹⁴³ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, *supra* note 93.

¹⁴⁴ See Greene, *supra* note 90.

¹⁴⁵ 110 CONG. REC. 2550 (1964).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ It is worth noting that George Huddleston, Jr. had a reputation for being a racist, and was probably arguing this side for race to be considered in the process because he wanted to codify racism in the law. *Cf.* Brett J. Derbes, *George Huddleston, Jr.*, ENCYCLOPEDIA OF ALABAMA, <http://www.encyclopediaofalabama.org/article/h-3329> [https://perma.cc/27W3-RJAJ] (last visited Feb. 23, 2017).

¹⁴⁹ 110 Cong. Rec. 2550 (1964).

¹⁵⁰ *Id.*

deal more than the case of a casting director looking for actors to play certain roles in a dramatic production. If it was limited to that, it would be a lot more acceptable than it is.¹⁵¹

The Congressman's point illustrates the dichotomy between the theatre industry and other businesses, and how race and color cannot be avoided in the theatre industry.¹⁵² The unique process of the theatre industry distinguishes it from other industries.¹⁵³ These discussions show that in the theatre industry, in productions where race is germane, that appearance matters, and it would be difficult to not use appearance in the casting process. The same goes for where race is not germane because appearance still matters.

Despite these conversations on the floor of Congress, race was not added to the BFOQ defense, and no specific exceptions were created for entertainment industries throughout Title VII. Nevertheless, these discussions highlight the importance of appearance and race in the theatre industry and how it is integral to the theatre business in the hiring process. Understandably, Congress wants to keep "overt racial discrimination" from being codified in the law.¹⁵⁴ Casting teams use neutral practices that allow them to preference White actors over Black ones because the casting teams are not bound by anything to actually increase minority employment, besides Equity considerations, because any casting reason could be defended on grounds of artistic freedom.¹⁵⁵ For a business where only 32 percent of actors are minorities, a new method needs to be implemented in order to remedy past and ongoing discriminatory practices.¹⁵⁶ Due to the uniqueness of the theatre business, requiring that a casting director hire more minorities could be seen as overstepping boundaries, because the theatre business relies on a great degree of artistic freedom and deference.¹⁵⁷ Challenging that artistic freedom could be seen as a threat not only to personal artistic choice to but First Amendment rights.¹⁵⁸ Some people also find that because there is a lack of blatant discrimination in the theatre industry, there is no problem that needs to be remedied.¹⁵⁹ Arguments can also be made that the casting choices are just a reflection of what audiences really want and the casting

¹⁵¹ *Id.* at 2256

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ LEX K. LARSON, *LARSON'S EMPLOYMENT DISCRIMINATION* § 20.04 (2d ed. 1997).

¹⁵⁵ *See Kim, supra* note 13, at 414–15.

¹⁵⁶ *See Shindle, supra* note 15.

¹⁵⁷ *See Frank, supra* note 92, at 520; *Kim, supra* note 13, at 414–15.

¹⁵⁸ *See Frank supra* note 92, at 514–15.

¹⁵⁹ *See id.* at 513–14.

reflects the populations of those coming to the shows.¹⁶⁰ Most theatergoers are white females, therefore it could be said that shows are just reflecting the current audiences.¹⁶¹

C. *The New Affirmative Action Casting Model*

Using federal guidelines,¹⁶² Equity should create a temporary affirmative plan that allows for a color-conscious model to be in place for Broadway productions, since having a color-blind policy alone does not hold producers accountable.¹⁶³ In implementing this policy, Equity should be held responsible for enforcement; specifically, Equity's Equal Employment Opportunity committee ("EEO") should be responsible for oversight. EEO should decide the optimal balance of White actors and actors of color. This optimal balance should include the percentages across the board for White actors versus actors of color, as well as actors of color in roles where race is not germane to a production. Since this temporary plan would not be court mandated, Equity should follow the sample plans given by the Department of Labor to comply with federal law at every step of the process.¹⁶⁴

At the outset, several factors will affect how this plan will fluctuate from season to season. These factors include but are not limited to: the number of productions on Broadway in any given year, the number of production companies as a whole Equity will be dealing with in any given year, the uncertainty of a production closing prematurely, the number of roles available in each production, and the number of Equity actors. Nevertheless, using the federal affirmative action sample plan, Equity can construct a plan to increase the number of actors of color on the stage.

First, Equity should remove its policy of non-traditional casting, and institute a policy of color-conscious casting. To do this, Equity must create a new definition of color-conscious casting. This definition must use language stating that where race is not germane to a production, a person's color will not be ignored and will not be used in a negative way in the audition process, but will be used to affirm and give meaning to a person's identity as an

¹⁶⁰ Kim, *supra* note 13, at 410.

¹⁶¹ *The Demographics of the Broadway Audience 2014-2015 Season*, THE BROADWAY LEAGUE, <https://www.broadwayleague.com/research/research-reports/> [https://perma.cc/4RAR-YHMX] (last visited Nov. 28, 2016).

¹⁶² DEPT. OF LABOR, SAMPLE AFFIRMATIVE ACTION PROGRAM, https://www.dol.gov/ofccp/regs/compliance/AAPs/Sample_AAP_final_JRF_QA_508c.pdf [https://perma.cc/WM3G-7U6N] [hereinafter SAAP].

¹⁶³ See *supra* Part II.A.

¹⁶⁴ See SAAP, *supra* note 162.

acknowledgment of discrimination in the industry.¹⁶⁵ With dancer and chorus auditions, dancers can be “typed-out” based on body shape and weight, and since actors of color have different body types, this physical appearance criteria must also be considered when creating the new definition for color-conscious casting.¹⁶⁶

Once Equity has established a clear definition of color-conscious casting, it must monitor the casting process to ensure that actors of color are being included.¹⁶⁷ Equity must encourage and recruit more actors of color to become members of Equity to audition for all productions with the notion they will all seriously be considered for roles.

Before the casting process begins, Equity should require that all production companies seeking to cast through Equity sign a form stating that they will engage in color-conscious casting when race is not germane for certain roles, and they will not indicate a character’s race just to do an end run around color-conscious casting. The form should include check box for producers to agree they will use the phrase “Equal Opportunity/Affirmative Action Employer” on all casting notices. This will lead to a greater accountability for the producers to show that Equity truly is encouraging all productions to be aware of who is being cast.

Currently, when submitting casting notices to Equity, producers must give Equity the type of notice, dates, locations, type of performers (Equity or non-Equity) and a cast breakdown.¹⁶⁸ Under the color-conscious plan, the employee at Equity responsible for approving all casting notices should carefully review the notices to ensure they are color-conscious and welcoming to all.¹⁶⁹ This employee should also be responsible for ensuring producers are posting casting notices where people can find them. The notices in the cast breakdowns must give accurate descriptions, and where race is not germane state that all races will be considered, and that the producers will be operating under a color-conscious policy.

When the production has been fully cast, each production must furnish to Equity a breakdown of principal, supporting, and chorus roles by race. In addition to this casting reform, all running productions should provide data to Equity on a continual basis. Since the length of time a Broadway show runs is uncertain, this data should be furnished every six months, so that

¹⁶⁵ See *supra* Part II.A.

¹⁶⁶ *Equity Chorus Call Audition Procedures*, ACTOR’S EQUITY ASSOCIATION, http://www.actorsequity.org/docs/auditions/AEA_Chorus_Auditions.pdf [https://perma.cc/U8AA-RHX3] (last visited Sept. 29, 2017).

¹⁶⁷ See SAAP, *supra* note 162.

¹⁶⁸ *Casting Call Notice Guidelines*, *supra* note 23.

¹⁶⁹ See SAAP, *supra* note 162, at 18.

Equity can keep track of who is in a show. This data should include: the number of actors in a production, their race, how many of the members are Equity actors, and the production's process for recruiting new members to replace actors when necessary. This continual monitoring should give Equity the opportunity to assess this method, and then remove the policy when an optimal balance is reached.

Allowing casting directors to use race in their hiring decisions could present problems, especially if it is used impermissibly. This affirmative action policy created by Equity should not only state the purpose for the role, but the consequences of using this policy in an improper way. As seen with *Miss Saigon*, Equity has power.¹⁷⁰ With this power and knowledge, Equity must realize that color-blind casting has not fulfilled its promise. Increasing minority employment must be a priority, and including an actor's race as a factor during the audition process is the only way of doing so. We know the industry is susceptible to discrimination, that the existing disparate impact and treatment framework is particularly unable to address that discrimination through litigation, and that color-blind casting is not working. Because of this knowledge, Equity's temporary policy is the only way to ensure that minority actors are employed and represented on the stage.

With a new definition of color-conscious casting, and creating a temporary policy for Equity, the number of performers of color on the Broadway stage should increase. This process is not going to be easy. Individual businesses and organizations, not overarching unions, usually implement affirmative action programs, which may create a challenge for implementation.¹⁷¹ Equity will also have to determine how long this policy should be in place and will need to continuously be reevaluating this process.¹⁷² Broadway theatre is also different because shows can close at any time. Eventually this policy should span all theatres that hire Equity actors, but starting with companies putting productions on Broadway is a great place to start, because there are only a select number of Broadway shows, making it a controlled number of actors to deal with.

Having a color-conscious policy will not erase appearance, but includes it in the hiring process. Current employment law's purpose is to forbid employers from discriminating, specifically against minorities.¹⁷³ Yet, in the theatre industry, this is not helping minorities. Even courts have found that using race is acceptable when there is past evidence of discrimination.¹⁷⁴ For

¹⁷⁰ See *supra* Part II.B.1.

¹⁷¹ 41 C.F.R. § 60.

¹⁷² See Fisher, 136 S.Ct. at 2210.

¹⁷³ See generally Civil Rights Act of 1964, Title VII.

¹⁷⁴ Cf. SAAP, *supra* note 162.

the reasons stated above, Equity should work with producers and playwrights to create a color-conscious policy until optimal balance is achieved.¹⁷⁵ This temporary plan will allow employers to consider race in the casting process to combat discrimination and increase not only minority employment, but also minority attendance to the theatre.¹⁷⁶

CONCLUSION

Shows like *Hamilton*, *Miss Saigon*, *The Prince of Egypt*, and *Noises Off* illustrate that casting choices have grave ramifications to the theatre industry. Ignoring race in the hiring process is no longer the direction that members of the theatre community are advocating. Color-consciousness in theatrical casting is essential to ensure that minority performers are represented on the stage.¹⁷⁷ From a legal perspective, although ignoring race in terms of employment may seem like the best method for hiring without discrimination, it has the reverse outcome.¹⁷⁸ Color-blind casting creates negative effects on minority casting, therefore color-conscious casting should replace the color-blind casting model. A temporary affirmative action plan promulgated by Equity that allows casting directors to use race permissibly in the casting process to increase minority employment is essential for increasing the number of employed actors and actresses of color.¹⁷⁹ Having casts that reflects American society not only has important social implications, but it is also good business.¹⁸⁰ To further theatre as a business and an art, audiences that can see themselves in theatrical productions will surely continue to support commercial theatre as the demographics of America change.

¹⁷⁵ See Frank, *supra* note 92, at 475.

¹⁷⁶ See Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21

¹⁷⁷ See Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21.

¹⁷⁸ See Michael Paulson, *Study: Diversity in New York Theater Roles Rose in 2014-15 Season*, N. Y. TIMES, May 2, 2016, http://www.nytimes.com/2016/05/03/theater/study-diversity-in-new-york-theater-roles-rose-in-2014-15-season.html?_r=0 [https://perma.cc/435T-BSQN].

¹⁷⁹ See Aleinikoff, *supra* note 18; Bastián, *supra* note 11; Eyring, *supra* note 21; France, *supra* note 21.

¹⁸⁰ Goldstein, *supra* note 16.



What if Kaepernick is Correct?: A Look at the Collusion Criteria in Professional Sports

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I. INTRODUCTION

Winning isn't everything, it's the only thing. This adage is apropos for America's four major professional sports leagues today as team owners seem to increasingly care less about competition and more about cash flow, to the point that they appear willing to ostracize certain athletes from the game. That, at least, is the position of TIME 2017 Person of the Year Runner-Up and GQ 2017 Citizen of the Year, Colin Kaepernick.

In 2016, former San Francisco 49ers' ("49ers") quarterback Colin Kaepernick became a polarizing force not just in sports, but in society, when he knelt during the National Anthem in an effort to raise awareness about racial inequality and oppression.³ After he opted out of his contract with the 49ers, Kaepernick and his representatives believed that he had strong enough statistics to warrant a team signing him during the 2017 National

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³ See Demand for Arbitration, *Kaepernick v. Nat'l Football League* (2017) at 3 [hereinafter "Kaepernick Demand"].

Football League (“NFL”) off-season, but no one called. Kaepernick remained unsigned for the remainder of the 2017 NFL season and he claimed NFL owners colluded to blackball him from a professional roster.⁴ On October 15, 2017, Kaepernick filed a grievance with the NFL Players Association (“NFLPA”), alleging that the all thirty-two NFL teams and their owners colluded against him in retaliation for his demonstration during the national anthem the previous year.⁵

Collusion at its core is collective action that restricts competition.⁶ Under federal law, particularly the Sherman Anti-Trust Act (the “Sherman Act”), collusion is prohibited; however, because of labor exemptions, what constitutes collusive, prohibited behavior in specific sports leagues varies based on the league’s negotiated collective bargaining agreement (“CBA”).

This Article argues that the language in each of the major U.S. professional sports league’s CBAs should be amended, through negotiation and perhaps concessions made by players, to deter teams and their owners from restraining athletes from competing professionally if such misconduct is truly occurring. Part I uses the Federal Antitrust laws to illustrate how parties customarily prove collusion and demonstrates how the four major U.S. professional sports leagues have the authority to create their own rules and procedures through a collective bargaining effort. Part II analyzes and differentiates the procedure and criteria for proving collusion under each league’s CBA. Part III discusses the grievances players and players associations have filed alleging collusive behavior. Finally, Part IV describes the policy implications and issues with the current grievance structure in major U.S. professional sports.

II. FEDERAL ANTITRUST LAW’S CONCERN WITH COLLUSION

Antitrust law has been the primary mechanism for regulating collusion for almost four hundred years. It is premised on the ideas of consumer welfare and competition, but it was not until the late 1800s that Congress enacted the Sherman Act as a “blueprint for the way commerce ought to be conducted in the United States.”⁷ The Sherman Act prohibits unreasonable restraint on trade and monopolization.⁸ Specifically, Section 1 prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or

⁴ *Id.*

⁵ *Id.*

⁶ Daniel I. Booker, *Antitrust and Employment*, 1996 A.B.A. SEC. ANTITRUST 11.

⁷ Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 127 (2002).

⁸ *Id.*; *see also* 15 U.S.C. §§ 1–2 (2004).

commerce among the several states,” and applies only to concerted action that restrains trade.⁹ Section 2, on the other hand, affords three distinct claims: monopolization, attempted monopolization, and conspiring to monopolize.¹⁰ To establish a Section 1 violation of the Sherman Act, a party must prove two elements: (1) a conspiracy; and (2) an unreasonable restraint of trade.¹¹

The terms “contract, combination . . . or conspiracy,” can be used interchangeably to describe the elements in an agreement between two or more parties to restrain trade.¹² Wholly unilateral conduct is permissible under Section 1; therefore, to prove that an agreement between two or more parties exists, “a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful agreement.”¹³ Thus, the underlying question is whether the challenged conduct derives from independent decision or from an agreement.¹⁴

The Supreme Court has acknowledged that plaintiffs are oftentimes unable to establish an explicit agreement; hence, conspiracies can be proven by “inferences drawn from behavior of the alleged conspirators.”¹⁵ Addressing the question of the standard of proof required to find antitrust conspiracy, the Court has held:

⁹ See Anderson, *supra* note 7, at 125–27; see also Gabriel Feldman, *Antitrust versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1235 (“The role of Section 1 . . . is to act as a gatekeeper, ferreting out anticompetitive conduct.”).

¹⁰ See Anderson, *supra* note 7, at 125, 126 n.12.

¹¹ *Id.* While the judicial reach of the Sherman Act is broad, courts have held that it is only the unreasonable restraints that are prohibited under Section 1 of the Sherman Act. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). “Taken literally, the applicability of Section §1 . . . could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm’s chief executive telling her subordinate how to price their company’s product. But that it not what the statute means . . . Not every instance of cooperation between two people is a potential ‘contract, combination . . . , or conspiracy, in restraint of trade.’” *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 189–90 (2010); see also *Mackey v. Nat’l Football League*, 543 F.2d 606, 618 (8th Cir. 1976) (“The express language of the Sherman Act is broad enough to render illegal nearly every type of agreement between businessmen.”).

¹² See *Caldwell v. Am. Basketball Ass’n*, 825 F. Supp. 558, 566 (S.D.N.Y. 1993), *aff’d* 66 F. 3d 523 (2d Cir. 1995).

¹³ *Id.* (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

¹⁴ See *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 553 (2007).

¹⁵ *Id.* at 566; see also *United States v. Washington*, 586 F.2d 1147, 1153 (“By its nature conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available”).

The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [actors]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [conspirators] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.¹⁶

Once a conspiracy is established, the reasonableness is then scrutinized under either the *per se* rule or the Rule of Reason.¹⁷ There are some concerted activities that are so pernicious that they are illegal *per se*. The *per se* illegality rule categorically invalidates certain activities that are in their nature, character, and effect adverse to competition, and therefore illegal without any further inquiry.¹⁸ Such activities include group boycotts and horizontal price-fixing.¹⁹ Although businesses cannot evade analysis under the *per se* rule, in the context of professional sports, it is inappropriate to routinely apply *per se* illegality.²⁰ Therefore, the Rule of Reason is the general approach.²¹

Under the Rule of Reason, a court must determine a practice's anticompetitive and procompetitive purposes and effects using a totality of the circumstances approach.²² This requires courts to look at the history and nature of the restraint, its effect, and the reason for its imposition, within the context of the specific industry.²³ If the court determines that the anticompetitive features outweigh the procompetitive features, the practice will be deemed unreasonable.²⁴

¹⁶ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

¹⁷ *See Mariucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 374 (5th Cir. 2014).

¹⁸ *See Standard Oil Co. of New Jersey, v. United States*, 221 U.S. 1, 65 (1911); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”).

¹⁹ *See, e.g., Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

²⁰ *See Mackey*, 543 F.2d at 619.

²¹ *See e.g., id.; see also Laumann v. Nat'l Hockey League*, 56 F.Supp.3d 280 (S.D.N.Y. 2014) (applying the rule of reason test to alleged concerted activity by the NHL); *Nat'l Basketball Ass'n v. Williams*, 857 F.Supp. 1069 (S.D.N.Y. 1994), *aff'd* 45 F.3d 684 (2nd Cir. 1995); *see also John C. Weistart & Cym H. Lowell, The Law of Sports* 518 (1979).

²² *See Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

²³ *See id.*

²⁴ *See id.; see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

“Unions by their very nature are combinations of individuals that seek to restrain an employer’s ability to deal with its employees on an individual basis. Strikes and boycotts, the most obvious form of union collective action, restrict the ability of individual employees to negotiate or deal with the employer.”²⁵ Although the Sherman Act was intended to regulate commercial activity, the Act in its original form would have prohibited concerted action of unions.²⁶

Because the aim of antitrust law is to preserve competition, while the aim of labor law is to promote peace in labor management, there is an inherent conflict between antitrust and labor law.²⁷ In order to reconcile the tension among these two doctrines, the courts and Congress have promulgated two exemptions to antitrust law—the statutory labor exemption and the nonstatutory labor exemption.²⁸

A. *The Statutory Labor Exemption*

Read together, the Clayton Act and the Norris-LaGuardia Act create the statutory labor exemption. Enacted in 1914, the Clayton Act prescribes that individual labor is not interstate commerce and that labor unions are not in the purview of the Sherman Act.²⁹ It also restricts the courts’ injunctive powers in labor disputes.³⁰ The Supreme Court; however, has narrowly

²⁵ Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1048 (1994).

²⁶ *See id.*

²⁷ *See generally* Anderson, *supra* note 7, at 127; Feldman, *supra* note 9, at 1227; *see also* Wood v. Nat’l Basketball Ass’n, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (“The aim of federal labor policy is to promote peace in labor management relations, not chaos and turmoil . . .”).

²⁸ *See* Anderson, *supra* note 7, at 127.

²⁹ 15 U.S.C. § 17 (2012) (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operations of labor, agriculture, or horticulture organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”).

³⁰ 29 U.S.C. § 52 (2012) (prohibiting injunctions in any case between employees and employers unless necessary to prevent an irreparable injury to property or a property right for which there is no adequate remedy at law).

construed the statute,³¹ specifically restricting the Act's scope to trade union activities directed against employers by their own employees.³² As a result, Congress enacted additional legislation to effectuate the purpose of the Clayton Act.³³

In 1932, Congress enacted the Norris-LaGuardia Act, which further limits courts' jurisdiction in labor disputes.³⁴ The Norris-LaGuardia Act expanded a union's protections, but it was not until 1941 that the statutory labor exemption was established.³⁵ In *U.S. vs. Hutcheson*,³⁶ Justice Frankfurter construed the Norris-LaGuardia Act to give unions a broad exemption from the Sherman Act, thereby allowing unionized workers to exert economic pressure "so long as a union acts in its self-interest and does not combine with non-labor groups."³⁷ What was so important about *Hutcheson* was that it insulated unionized workers from antitrust scrutiny when they engaged in concerted activity—like pickets and boycotts—in order to obtain favorable working terms and conditions.³⁸ Ultimately, "the statutory exemption makes clear that 'labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the operation of the antitrust laws.'"³⁹

Courts were given more guidance beyond the original statutes when Congress passed the National Labor Relations Act ("NLRA")⁴⁰ and the Labor Management Relations Act ("LMRA")⁴¹ in 1947. Both Acts established a public policy that favors collective bargaining as the means to govern rela-

³¹ See, e.g., *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (holding that a union's boycott for organization purposes was a Sherman Act violation).

³² See *id.*

³³ See *United States v. Hutcheson*, 312 U.S. 219 (1941).

³⁴ 29 U.S.C. § 101 (2012) ("No court . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out a labor dispute[.]").

³⁵ See *id.*

³⁶ 312 U.S. at 219.

³⁷ The court in *Hutcheson* stated: "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any [judicial] judgment regarding the wisdom . . . the rightness . . . [or the] selfishness . . . of the end of which the particular union activities are the means." *Id.* at 232.

³⁸ See *Feldman*, *supra* note 9, at 1228.

³⁹ *Id.* at 1228–29 (quoting *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–22 (1975)).

⁴⁰ 29 U.S.C. §§ 151–69 (2012).

⁴¹ 29 U.S.C. §§ 141–44 (2012).

tionships between employers and unionized workers.⁴² The objective was to ensure that employers and their employees could work together to establish mutually satisfactory terms, thereby protecting the employees' freedom to associate and self-organize.⁴³ The Acts also delegated rulemaking and interpretive authority to the National Labor Relations Board ("NLRB").⁴⁴

Professional sports leagues do derive benefit from this exemption, but an ongoing issue is that the statutory labor exemption does not "immunize the collective bargaining process or collective bargaining agreements themselves from potential liability. Rather, the statutory exemption only protect[s] a labor organization's unilateral actions and not agreements between unions and nonunion parties."⁴⁵

B. The Non-Statutory Labor Exemption

Of the two antitrust exemptions, the nonstatutory labor exemption is the focal point for U.S. professional sports because of the "peculiar nature of the labor-management relations in the industry."⁴⁶ The Supreme Court first established the nonstatutory labor exemption in the cases *United Mine Workers of America v. Pennington*⁴⁷ and *Local Union No. 189 v. Jewel Tea Company, Inc.* ("Jewel Tea").⁴⁸ In *Jewel Tea*, an employer sought to invalidate the following term in its collective bargaining agreement with a butchers' union: "market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."⁴⁹ The employer was not a part of the original bargaining group, and thus alleged that the union conspired with part of the bargaining unit to impose certain terms on the rest of the

⁴² See Corcoran, *supra* note 25, at 1050.

⁴³ See *id.*

⁴⁴ 29 U.S.C. §§ 153–69 (2012).

⁴⁵ Feldman, *supra* note 9, at 1229 (internal citations omitted).

⁴⁶ Corcoran, *supra* note 25, at 1056. This is true for three out of four of the primary professional sports leagues in the United States as professional baseball has been shielded from antitrust scrutiny due to baseball's unique exemption from the antitrust laws. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). For a thorough analysis of professional baseball's antitrust exemption see Mitchell Nathanson, *Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption that Never Was*, 4 HARV. J. SPORTS & ENT. L. 1 (2013); Harvey Gilmore, *Major League Baseball and the Antitrust Rules: Where are we Now???*, 6 DEN. U. SPORTS & ENT. L.J. 3 (2009).

⁴⁷ 381 U.S. 657 (1965).

⁴⁸ 381 U.S. 676 (1965).

⁴⁹ See *id.* at 679–80.

unit, thereby proscribing the employer's right to use its property and restraining competition.⁵⁰ In balancing the interests of the union against the potential impact on competition, Justice White concluded that the term was exempt because it was "of immediate and direct" concern to the union employees.⁵¹ Hence, agreed-upon restraints concerning mandatory bargaining subjects are thus shielded by this nonstatutory labor exemption to the antitrust laws.⁵²

The Court used the rationale from *Jewel Tea* in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100* ("*Connell Construction*")⁵³ to subject a union's agreement with a contractor, which prohibited the use of non-union subcontractors, to antitrust liability.⁵⁴ In withholding the nonstatutory labor exemption, Justice Powell articulated the following:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business were held to be a violation of the antitrust laws.⁵⁵

From the language of *Jewel Tea* and *Connell Construction* opinions, it is clear that the Court limited the nonstatutory exemption to parties in a bargaining relationship and to matters of fundamental employee interest.⁵⁶ However, the Courts did not outline the "precise boundaries" of the exemption.⁵⁷ This was particularly troublesome given the unique nature of professional sports leagues, which are not completely independent economic competitors and ultimately depend on a degree of cooperation for economic survival.⁵⁸

In one of the first cases addressing the nonstatutory exemption in relation to professional sports, the Eighth Circuit in *Mackey v. National Football*

⁵⁰ See *id.* at 686.

⁵¹ *Id.* at 691.

⁵² See Corcoran, *supra* note 25, at 1051.

⁵³ 421 U.S. 616 (1975).

⁵⁴ See *id.*

⁵⁵ *Id.* at 622; see also *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("[T]he implicit exemption recognized that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.").

⁵⁶ See Corcoran, *supra* note 25, at 1052.

⁵⁷ *Clarett v. Nat'l Football League*, 369 F. 3d 124, 130 (2d Cir. 2004).

⁵⁸ See *Brown*, 518 U.S. at 248.

*League*⁵⁹ set forth a three-pronged test for application of the nonstatutory labor exemption. The athletes in *Mackey* brought a challenge against the infamous “Rozelle Rule” on the grounds that it restrained their right to freely contract for their services.⁶⁰ At the time, the NFL CBA enumerated the Rozelle Rule, but the owners unilaterally promulgated it prior to its inclusion in the CBA.⁶¹ The NFL argued that the Rozelle Rule was shielded from antitrust law by virtue of its inclusion in the CBA, but the Court found that argument unavailing.⁶² Indeed, it held that in order to fall within the non-statutory exemption, a restraint must: 1) primarily affect only the parties to the collective bargaining relationship; 2) concern a mandatory subject of collective bargaining; and 3) be the product of a bona-fide arm’s length bargaining.⁶³ The Rozelle Rule violated this third prong, as the Rule predated the CBA and the record lacked evidence showing that the NFLPA received some “quid pro quo” in exchange for the Rule’s inclusion.⁶⁴ For that reason, the Eighth Circuit held that the Rozelle Rule was not within the contours of the nonstatutory labor exemption and therefore was invalid on antitrust grounds.⁶⁵

The decision in *Mackey* influenced other courts’ treatment of antitrust challenges to labor restraints on professional athletes.⁶⁶ Particularly, courts started giving greater deference to the collective bargaining process.⁶⁷ The Supreme Court visited the nonstatutory exemption in *Brown v. National Football League*,⁶⁸ where a class of football players challenged the NFL’s unilateral creation of a substitute developmental squad whose players were paid

⁵⁹ See *Mackey*, 543 F.2d at 622.

⁶⁰ The Rozelle Rule provided that whenever a player whose contract with one club had expired signed a contract to play for a different club, the NFL commissioner could award the former team compensation in the form of money or players unless the two teams reached an alternative agreement. See *id.* at 609–11.

⁶¹ See *id.* at 610.

⁶² See *id.* at 613.

⁶³ See *id.* at 614.

⁶⁴ See *id.* at 616.

⁶⁵ See *id.*

⁶⁶ See Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1677 (1997).

⁶⁷ See Stephen R. McAllister, *The Nonstatutory Labor Exemption and Player Restraints in Professional Sports: The Promised Land or a Return to Bondage?*, 4 U. MIAMI ENT. & SPORTS L. REV. 283, 305 (1987); see, e.g., *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987); *Zimmerman v. Nat’l Football League*, 632 F.Supp. 398 (D.D.C. 1986) (holding that the NFL’s supplemental draft agreement satisfied all aspects of the *Mackey* test).

⁶⁸ 518 U.S. 231 (1996).

a fixed salary of \$1,000 a week.⁶⁹ On the surface, the developmental squad appeared to violate antitrust law, but following the principles of labor law, the Court, in an eight-to-one majority, held that the league could unilaterally fix salaries for a category of employees even after impasse.⁷⁰

The Court acknowledged how principles of antitrust and labor law were inconsistent and explained how the application of antitrust law would have put the owners in a “Catch-22.”⁷¹ The Court stated:

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from the offer, they invite an unfair labor practice charge.⁷²

The Catch-22 is clear: the owners would be prone to either labor or antitrust scrutiny regardless of their actions, and such notion is contrary to the purpose of both the nonstatutory and statutory labor exemptions.⁷³ As the Court held, “to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires.”⁷⁴ Nonetheless, through the nonstatutory labor exemption, the Court has ruled that an implied repeal of the antitrust law is warranted if necessary to protect federal labor policy and the labor process when labor law and antitrust law conflict.⁷⁵

III. ANTI-COLLUSION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

A. *Collusion and the NFL CBA*

The 2011 NFL CBA addresses collusion in Article 17. The Article, titled “Anti-Collusion,” prohibits clubs, its employees or agents from entering “into any agreement, express or implied, with the NFL or any other

⁶⁹ See *id.* at 234.

⁷⁰ See *id.*

⁷¹ See Feldman, *supra* note 9, at 1244.

⁷² *Brown*, 518 U.S. at 241–42.

⁷³ See *id.*

⁷⁴ *Id.* at 242.

⁷⁵ Feldman, *supra* note 9, at 1246.

Club . . . to restrict or limit individual Club decision-making,” with regard to the following conduct: 1) player negotiations, 2) submitting an Offer Sheet, 3) offering a Player Contract to any player, 4) exercising a Right of First Refusal, or 5) deciding the terms or conditions of employment.⁷⁶ Additionally, Clubs are prohibited from boycotting a player on the grounds of certain contractual circumstances such as restricted free agency and the right of first refusal.⁷⁷ Conspiring against individual players for the purposes of ostracizing them from the league fits entirely within Section 1 of the Anti-Collusion Provision. However, teams still have the discretion to negotiate or not to negotiate with any player for reasons not precluded by the Anti-Collusion provision.⁷⁸

If a player believes that he is the subject of collusive behavior, the player, or the NFLPA acting on the player’s behalf, may file a grievance with the System Arbitrator alleging a violation of Section 1.⁷⁹ The grievance must be brought within ninety (90) days of the time the player knew or reasonably should have known that he had a claim, or within ninety (90) days of the first regular season game in the season that the violation occurred, whichever is later. If not filed by these deadlines, the grievance is time-barred.⁸⁰

The parties to a grievance are entitled to reasonable and expedited discovery and the System Arbitrator⁸¹ is required to apply the Federal Rules of Evidence.⁸² This is unusual for a professional sports labor agreement, as such a requirement is more aligned with the court system.⁸³ The System Arbitrator will weigh the parties’ arguments to determine whether certain evidence is admissible. If the evidence is inadmissible, the party cannot use it in the proceedings.

The Anti-Collusion Provision then explains the requisite burden of proof a complaining party must meet. It states, “The complaining party

⁷⁶ National Football League Collective Bargaining Agreement, art. 17 §1 (2011), available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [https://perma.cc/MH6N-UXAX] [hereinafter “NFL CBA”].

⁷⁷ *Id.* at art. 17 § 2.

⁷⁸ *Id.* at art. 17 § 3.

⁷⁹ *Id.* at art. 17 § 5.

⁸⁰ *Id.* at art. 17 § 17.

⁸¹ Stephen B. Burbank has served as the System Arbitrator for the NFL for many years.

⁸² NFL CBA, *supra* note 76, at art. 17 § 5.

⁸³ See *id.*; see also Ken Belson, *Kaepernick v. the N.F.L.: A Primer on His Collusion Case*, N.Y. TIMES, December 8, 2017, <https://www.nytimes.com/2017/12/08/sports/kaepernick-collusion.html> [https://perma.cc/VM6V-R6NZ].

shall bear the burden of demonstrating by a *clear preponderance of the evidence* that (1) the challenged conduct was or is in violation of Section 1 of this Article and (2) caused any economic injury to such player(s).⁸⁴ The “clear preponderance of the evidence” standard is derived from the traditional standard of persuasion in civil litigation; however, it adds the word “clear” prior to “preponderance of the evidence,” which distinguishes the standard from most civil courts. A mere preponderance of the evidence standard customarily requires that the fact-finder “believe that existence of a fact is more probable than its nonexistence.”⁸⁵ It is the tipping of the scales in favor of one position over another. The standard promulgated by the NFL is not the traditional preponderance of the evidence standard as the inclusion of “clear” indicates a higher burden.⁸⁶ It suggests that the grievant needs to prove more than the preponderance of the evidence, but less than beyond a reasonable doubt, which is the adopted criminal standard in the U.S.⁸⁷

The Anti-Collusion provision further provides that the fact a player is not signed by any team in combination with only evidence regarding the player’s skills, does not meet the requisite burden of proof.⁸⁸ There needs to be some evidence, circumstantial or direct, that *clearly shows* that at least two teams entered into either an explicit or implicit agreement to deny a player an opportunity to play professional football.⁸⁹ Mere supposition or belief that a player is a victim of collusion is not enough under the circumstances.

If a player is able to meet the requisite burden of showing collusion, he can be awarded either compensatory or non-compensatory damages. Compensatory damages will allow the player to collect the monies he lost due to the collusion, while non-compensatory damages award the player treble damages if the violating club is a repeat offender.⁹⁰ When it is a Club’s first

⁸⁴ NFL CBA, *supra* note 76, at art. 17 § 5 (emphasis added).

⁸⁵ *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (internal citations omitted).

⁸⁶ The inclusion of clear may also allude to a standard similar to “clear and convincing evidence.” The clear and convincing standard has a higher burden than preponderance of evidence, but less than beyond a reasonable doubt. *See Colo. v. N.M.*, 467 U.S. 310, 316 (1984). Clear and convincing evidence is “evidence that produces in your mind a firm belief or conviction as to the matter at issue.” *Clear and Convincing Evidence*, 3 FED. JURY PRAC. & INSTR. § 104:02 (6th ed.).

⁸⁷ *See* Michael McCann, *Colin Kaepernick’s Collusion Claim: Does he Have a Case?*, SPORTS ILLUSTRATED (Oct. 15, 2017), <https://www.si.com/nfl/2017/10/15/colin-kaepernick-collusion-lawsuit-against-nfl> [<https://perma.cc/5JNH-995C>].

⁸⁸ *See* NFL CBA, *supra* note 76, at art. 17 § 6.

⁸⁹ *See* McCann, *supra* note 87; *see generally* NFL CBA, *supra* note 76, at art. 17 § 6.

⁹⁰ *See* NFL CBA, *supra* note 76, at art. 17 § 9.

offense, non-compensatory damages amount to twice the value of the athlete's compensatory damages.⁹¹ Any club found to have violated the Anti-Collusion provision for the first time is to be jointly and severally liable for two times the amount of compensatory damages.⁹²

In egregious situations, the NFLPA has the discretion to terminate the CBA.⁹³ Specifically, there are three situations where the CBA can be terminated: (1) when a total of five or more clubs injure at least twenty players in a single season; (2) when a total of seven or more clubs injure at least twenty-eight players collectively in two seasons; or (3) where a proceeding is brought by the NFLPA and it is shown by clear and convincing evidence that fourteen or more clubs have violated Article 17.⁹⁴ In the latter circumstance, the evidence must also show that the violation was willful.⁹⁵

If the player receives an unfavorable outcome in arbitration, then he can file a petition to vacate the arbitration order in a United States District Court.⁹⁶ Federal courts typically give deference to an arbitrator's decision; therefore, it is unlikely that the decision will be overturned absent a showing that the arbitration was fundamentally unfair.⁹⁷

B. Collusion and the NBA CBA

Article XIV of the 2017 National Basketball Association ("NBA") CBA sets forth the league's governing Anti-Collusion provisions. Section 1 expressly prohibits the following:

No NBA Team, its employees or agents, will enter into any contracts, combinations or conspiracies, express or implied, with the NBA or any other NBA Team, their employees or agents: (a) to negotiate or not to negotiate with any Veteran or Rookie; (b) to submit or not to submit an

⁹¹ See *id.* Non-compensatory damages would be paid to any NFL player pension fund. See *id.* at art. 17 § 11.

⁹² *Id.* at art. 17 § 9.

⁹³ *Id.* at art. 17 § 16.

⁹⁴ *Id.* When the NFLPA is trying to show that at least fourteen or more teams colluded in a single season, the opportunity to terminate the CBA is only granted if the NFLPA requests such damages at the outset and the Clubs engaged in "willful collusion with the intent of restraining competition among teams for players."

⁹⁵ See *id.*

⁹⁶ See McCann, *supra* note 87.

⁹⁷ See generally *Nat'l Football League Players Assoc. v. NFL*, 831 F.3d 985 (8th Cir. 2016) (upholding a fine the NFL Commissioner imposed); See also *Nat'l Football League Players Ass'n. v. NFL*, 874 F.3d 222 (5th Cir. 2017); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016) (upholding Tom Brady's suspension for his involvement in Deflategate).

Offer Sheet to any Restricted Free Agent; (c) to offer or not to offer a Player Contract to any Free Agent; (d) to exercise or not to exercise a Right of First Refusal; or (e) concerning the terms or conditions of employment offered to any Veteran or Rookie.⁹⁸

The language is directed toward collusive action between teams, or their employees, that would interfere with player trades and contract negotiations; yet, because the language mirrors that of the Sherman Act, unlawfully boycotting individual athletes should also be prohibited under the Anti-Collusion article.⁹⁹

The remainder of the NBA's Anti-Collusion provision is almost *in verbatim* to the Anti-Collusion Article in the NFL CBA, with the exception of the addition of the Contributions Section and the modified Discovery Section.¹⁰⁰ "Contributions" provides that teams found liable under Section 1 of the Anti-Collusion provisions have the right to seek contribution from any other team found liable of the same violation if the System Arbitrator deems such contribution fair and equitable.¹⁰¹ With regard to discovery, the parties are granted a reasonable and expedited discovery. However, the National Basketball Players Association ("NBPA") and the NBA are only granted the right to obtain discovery in three collusion grievances during the term of the CBA.¹⁰²

C. Collusion and the Major League Baseball Basic Agreement

The Major League Baseball ("MLB") Basic Agreement does not have an express anti-collusion clause, but since 1976 "The Individual Nature of Rights" clause has set forth the basic anti-collusion provisions that players

⁹⁸ National Basketball Association, Collective Bargaining Agreement, Art. XIV § 1 (January 19, 2017), <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [https://perma.cc/PA47-D5JQ] [hereinafter "NBA CBA"].

⁹⁹ See *id.*; see also Ryan M. Rodenberg and Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. 191, 215 (2013).

¹⁰⁰ See NBA CBA, *supra* note 98, art. XIV §§ 12–15. Like the NFL CBA, the NBA's grievance procedures establish a burden of proof in which the complaining party must meet a "clear preponderance of evidence" standard. *Id.* The Termination of Agreement provision is also modified to reflect the relatively smaller roster size of basketball teams as compared to football teams. For example, the NBPA has the right to terminate the CBA if there has been a finding or findings of one or more instances of violation with respect to any one season which, individually or in total, involved at least five teams, and injured at least five players. See *id.* at art. XIV § 15.

¹⁰¹ See *id.*

¹⁰² *Id.* at art. XIV § 16. The current NBA CBA will run through 2023–24.

and Clubs are mandated to follow.¹⁰³ Article XX(E) of the 2017–21 Basic Agreement (“Basic Agreement”) states as follows:

[t]he utilization or non-utilization of rights under [the Consent to Assignment and the Reserve System rules] is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other clubs [sic].¹⁰⁴

Article XX(E) prohibits concerted action from both Clubs and players, but the Basic Agreement fails to specify any redress if players violate the provision.¹⁰⁵ The remaining sections of Article XX(E) outline the damages players can collect if they show a violation of Section E(1). Sections E(2) and E(3) provide that in addition to awarding attorney’s fees and costs, an arbitrator can award an aggrieved player treble damages, calculated from lost baseball income if the injury was the product of two or more clubs.¹⁰⁶ Further, if five (5) or more clubs are shown to have violated Section E(1), the MLB Players Association (“MLBPA”) is entitled to reopen the Basic Agreement for renegotiation.¹⁰⁷

The Basic Agreement does not provide what burden needs to be met in order to prevail in this type of grievance. Baseball, unlike many other professional sports, has a well-documented history of collusion and, although an arbitrator is not required to follow precedent, the three proven instances of collusion can provide guidance on the threshold burden a grievant must meet.¹⁰⁸

After a decade in which there was a relatively active market for free-agents, the market suddenly cooled beginning in 1985.¹⁰⁹ Owners who were

¹⁰³ The limit on concerted action was first recognized in Article XVII, Section H of the 1976 Basic Agreement. See Marc Edelman, *Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Supply Would Violate Baseball’s “Collusion Clause”*, 24 LOY. L.A. ENT. L. REV. 159, 161 (2004).

¹⁰⁴ Major League Baseball, 2017–21 Basic Agreement, art. XX(E), <http://www.mlbplayers.com/pdf9/5450407.pdf> (last visited Jan. 24, 2018) [<https://perma.cc/BG2H-5P7Z>] [hereinafter “MLB Basic Agreement”].

¹⁰⁵ See Rodenberg & Lovich, *supra* note 99, at 219.

¹⁰⁶ See MLB Basic Agreement, *supra* note 104, at Art. XX(E).

¹⁰⁷ See *id.*

¹⁰⁸ See Roger D. Blair and Jessica S. Haynes, *Collusion in Major League Baseball’s Free Agent Market: The Barry Bonds Case*, 54 ANTITRUST BULL. 883, 886 (2009) (“[Arbitrators] have a general obligation not to render decisions that are wildly at variance with public policy, but they need not adhere strictly to the legal precedents in reaching their decisions.”).

¹⁰⁹ See Stephen L. Willis, *A Critical Perspective of Baseball’s Collusion Decisions*, 1 SETON HALL J. SPORT L. 109, 121 (1991).

notorious for spending vast amounts of money were “praising the merits of ‘fiscal responsibility’” and not spending on free-agents.¹¹⁰ Players had no real opportunity to move to new teams and, by New Year’s Day 1986, no free-agents had received an offer compelling enough to change teams.¹¹¹ Based on this bizarre behavior, on January 31, 1986, the MLBPA filed the first of its collusion grievances on behalf of the 139 MLB players who were purportedly injured by the owners’ collective boycott of the free-agent market.¹¹²

The Clubs contended that the “non-existent” free agent market was a product of “individually made rational independent decisions, [based on] the general economic condition of the industry,” but the arbitrator, Mr. Thomas Roberts, found the Clubs’ argument unpersuasive.¹¹³ In ruling in favor of the MLBPA, Arbitrator Roberts held that a “common scheme involving two or more clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit,” is prohibited.¹¹⁴ Despite the lack of a formal agreement between the Clubs, Roberts found that a common scheme prohibited by the Basic Agreement existed based on inferences drawn from the totality of the circumstances.¹¹⁵

In February 1987, even before Arbitrator Roberts rendered a decision in the first collusion case, the MLBPA filed a second collusion grievance claiming that the Clubs conspired against the players that became free-agents after the 1986 season.¹¹⁶ The Clubs tried to rebut accusations by proffering evidence of free-agent activity, but the arbitrator, Mr. George

¹¹⁰ Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 Wayne L. Rev. 601, 611 (2008) (quoting Glen Macnow, *Free Agency/The Big Money and the Big Offers are Disappearing as Major-League Owners Fashion the “Era of Good Sense,”* HOUSTON CHRON., Dec. 25, 1985); See also Jeffrey S. Moorad, *Major League Baseball’s Labor Turmoil: The Failure of Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 69 (1997).

¹¹¹ See Edelman, *supra* note 110, at 611–13.

¹¹² See *id.* at 613.

¹¹³ See Willis, *supra* note 109, at 121 (quoting *In re Arbitration Between Major League Baseball Players Ass’n & Twenty-Six Major League Baseball Clubs*, Grievance No. 86-2, Panel Decision No.76 (Sept. 21, 1987) [hereinafter “Collusion I”]).

¹¹⁴ Edelman, *supra* note 103, at 164 (quoting Collusion I).

¹¹⁵ See *id.*; see also Jerome Holtzman, *Arbitrator: Baseball Owners In Collusion*, CHICAGO TRIBUNE, Sept. 22, 1987, http://articles.chicagotribune.com/1987-09-22/sports/8703110920_1_messersmith-decision-arbitration-major-league-service [https://perma.cc/939H-AXJM] (“[General Counsel of the MLB’s Players Relations Committee Barry] Rona . . . told the owners Roberts, in his decision admitted he found no specific evidence of collusion but that because ‘we changed our way of doing business, there was the inference of collusion.’”).

¹¹⁶ See *id.*

Nicolau, found such activity to be “meager” and “simply insufficient to justify any other determination.”¹¹⁷ Arbitrator Nicolau took a similar approach to that of Arbitrator Roberts and concluded that the Basic Agreement was violated “when a plan or ‘common scheme for a common benefit’” is proven.¹¹⁸ The common scheme for a common benefit did not need to be written nor spoken as long as the circumstantial evidence of “‘sufficient clarity and force could be shown to demonstrate [the existence of an agreement.]’”¹¹⁹

The final grievance of the 1980s was decided in the same way as the two previous grievances—in favor of the players. Instead of a collective boycott, the Clubs were allegedly creating an “information bank” that allowed Clubs to see what others were offering certain players.¹²⁰ The collective use of the information bank was an anti-competitive practice because information that was generally only known by one Club became available to all.¹²¹ The three collusion cases were settled for a sum of \$280 million and chief counsel for the MLBPA at that time, Gene Orza, said “[a] smoking gun was not the basis of that decision. Instead it was simply the inference of collu-

¹¹⁷ See Willis, *supra* note 109, at 125. Willis, citing *Major League Baseball Players Ass’n v. The Twenty-Six Major League Baseball Clubs*, Grievance No. 87-3, Panel Dec. No. 79 (Aug. 31, 1988) [hereinafter “Collusion II”], illustrates how the Philadelphia Phillies signing catcher Lance Parrish was not an example of active competition even though he signed with a different club. *Id.* at 126. Rather, when the Phillies publicly expressed interest in signing Parrish, numerous owners requested that the Phillies not sign him. *Id.* In Arbitrator Nicolau’s Collusion II opinion, he also described several other instances of collusion including when the Chicago Cubs signed Andre Dawson to what amounted to a blank contract. *Id.*; see also Peter Gammons, *The Verdict Is In*, SPORTS ILLUSTRATED, (Sept. 12, 1988) at 60–61.

¹¹⁸ Willis, *supra* note 109, at 125; see also Edelman, *supra* note 110, at 619 (quoting Collusion II) (“It was ‘not one piece of evidence, but the evidence taken as a whole that tells us where a common understanding exists[.]’”).

¹¹⁹ Edelman, *supra* note 103, at 166 (quoting Collusion II).

¹²⁰ This meant that all bidding was essentially done openly, and clubs immediately knew what they would have to offer to get a player on their roster. See *id.* at 167.

¹²¹ See *id.*; see also *Major League Baseball Players Association and the Twenty-Six Major League Baseball Clubs*, Grievance 88-1 (July 18, 1990) (The “information bank converted the free agency process into a secret buyers’ auction, to which the sellers of services—the players—had not agreed and the existence of which of which they were not aware . . . and . . . it is evident that many used the bank to report offers to free agents and to track just how far they would have to go with particular players.”).

sion, that all of sudden not one player who was a free agent was getting an offer.”¹²²

Based on the foregoing, circumstantial evidence of “sufficient clarity and force” could imply the existence of a common scheme for a common benefit, and thus successfully show a party acted in violation of Article XX(E). The decisions implicitly acknowledge the rarity of direct evidence of collusion, yet also seem to establish a higher burden than just an incident of parallel behavior or independent action.

D. Collusion and the NHL CBA

The National Hockey League’s (“NHL”) 2012–22 CBA does not have precise language prohibiting Clubs or players from colluding, but Article 26, “No Circumvention,” acts as catch-all provision to penalize those who try to circumvent the terms of the Agreement.¹²³ In part, Article 26 states as follows:

No club or Club Actor, directly or indirectly, may: (i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kinds, whether express, implied, oral or written, . . . or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intention of the parties as reflected by the provisions of this Agreement . . .¹²⁴

Similar language also applies to the players.¹²⁵ It is apparent that Article 26 can be used to protect players from collusion, as Article 10 of the NHL CBA provides that players should be completely free of restraints to negotiate and sign a Standard Player Contract (“SPC”) with a club of his choosing.¹²⁶ Therefore, any agreement among the Clubs to restrain an individual’s ability

¹²² See Edelman, *supra* note 103, at 167; Chris Isidore, *How much could Colin Kaepernick win in his collusion case against the NFL?*, CNNMONEY (Oct. 17, 2017, 4:45 PM), <http://money.cnn.com/2017/10/17/news/colin-kaepernick-collusion/index.html> [https://perma.cc/5PVM-NLCU].

¹²³ “This Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention.” See *2012–22 Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association*, art. 26, http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf [https://perma.cc/HMC2-T2LN] [hereinafter “NHL CBA”].

¹²⁴ *Id.* at art. 26.3(a).

¹²⁵ See Rodenberg and Lovich, *supra* note 99, at 217–18.

¹²⁶ See NHL CBA, *supra* note 123, at art. 10.1(a)(i).

to play professional hockey should constitute a Circumvention prohibited by the NHL CBA. Article 26 delineates eleven instances where a Circumvention can be inferred, but the list is non-exhaustive.¹²⁷ If an athlete believed that Clubs were colluding against him, he would be required to inform the NHL Players' Association ("NHLPA") of such conduct because only the NHL and the NHLPA can initiate a System Grievance.¹²⁸

Prior to filing the System Grievance, the Executive Director of the NHLPA, who at this time is Donald Fehr,¹²⁹ can "commence an investigation regarding whether a Circumvention occurred."¹³⁰ As the "Investigator," he "may obtain the authority, upon good cause shown to the System Arbitrator, to require any Player, Player Actor, Club or Club Actor to produce any relevant books and records."¹³¹ Upon completion of the investigation, the parties must meet and confer before the Investigator determines whether to issue a written determination of his findings.¹³²

If the parties cannot resolve the matter, the Investigator will issue a report on his findings and, at his discretion, file an action with the System Arbitrator.¹³³ The System Arbitrator can find a Circumvention has occurred based on direct or circumstantial evidence and then impose any or all of the penalties set forth in the CBA including, but without limitation, a fine of up to \$5 million.¹³⁴ If a fine is imposed, the monies are not to be disbursed to the aggrieved player; rather, they are to be contributed to the Emergency Assistance Fund.¹³⁵ Unlike the NFL, NBA and MLB's anti-collusion provisions, the NHLPA has no ability to terminate or reopen the CBA if multiple Clubs are found to engage in collusive behavior. Hence, there is little redress that can be provided to a hockey player who is found to be the subject of a Circumvention.

¹²⁷ *Id.* at art. 26.3.

¹²⁸ *Id.* at art. 48.1–48.2; *see also id.* at art. 26.11.

¹²⁹ Fehr was the executive director of the MLBPA prior to joining the NHLPA and was instrumental to the MLBPA's three collusion grievances in the 1980's. *See Fehr leaving post after quarter-century*, ESPN (Jun. 23, 2009), <http://www.espn.com/mlb/news/story?id=4278728> [<https://perma.cc/6QG4-NR6M>].

¹³⁰ NHL CBA, *supra* note 123, art. 26.10.

¹³¹ *Id.* at art. 26.10(c).

¹³² *Id.* at art. 26.12.

¹³³ *Id.* at art. 26.13.

¹³⁴ *See id.* (inferring that circumstantial evidence that an SPC or any provision of an SPC cannot reasonably be explained in the absence of conduct prohibited Article 26 may be enough to meet the burden of proof needed to show a Circumvention).

¹³⁵ *Id.* at art. 26.14.

IV. ALLEGATIONS OF INDIVIDUAL PLAYER RESTRAINTS

A. Colin Kaepernick

In modern professional sports, a world of billion-dollar television revenues, salary caps and news cycles accelerated by social media, owners attempt to control costs using player restraints.¹³⁶ Restraints come in the form of salary caps, player drafts and squad size restrictions, but most of these restraints are justified by the need to maintain competitive balance in professional sports.¹³⁷ Ostracizing a player, on the other hand, could never serve such purpose.

In Kaepernick's seven-page long grievance, he accuses all thirty-two NFL team owners—who were provoked by President Donald Trump—of depriving him of the opportunity to play, practice or try out for an NFL team when he was “eminently qualified” for the position.¹³⁸ Kaepernick was drafted by the 49ers in the second round of the 2011 NFL Draft and quickly rose to the starting quarterback position.¹³⁹ In his first season as starting quarterback, he led the 49ers to the team's first Super Bowl in nearly two decades.¹⁴⁰ As such, when he opted out of his contract,¹⁴¹ he assumed that there would be a bidding war for his professional services.¹⁴²

¹³⁶ See generally Michael Jacobs, *Professional Sports Leagues, Antitrust, and the Single Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

¹³⁷ See, e.g., *Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984) (upholding the NBA's college draft and use of a salary cap); *Brown*, 518 U.S. at 231 (upholding the NFL's use of a “developmental squad”); *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 419 (1967) (“The basic ‘housekeeping’ arrangements of league sports such as scheduling, limits on team rosters, and uniform playing rules throughout the league are the deviations from a purely competitive model which are most clearly necessitated by the nature of the industry.”).

¹³⁸ *Kaepernick Demand*, *supra* note 3, at 2.

¹³⁹ See *id.* at 3.

¹⁴⁰ *Id.*

¹⁴¹ Kaepernick originally signed a six-year, \$114 million contract with the 49ers in 2014, but the contract was restructured down to a two-year deal in 2016. See AP, *Colin Kaepernick opts out of contract with San Francisco 49ers*, USA TODAY, Mar. 3, 2017, <https://www.usatoday.com/story/sports/nfl/2017/03/03/kaepernick-opts-out-of-contract-becomes-free-agent/98714304/> [<https://perma.cc/46JQ-HP3W>].

¹⁴² “During his free agency period, the purportedly ‘free market’—whose natural function should have resulted in a bidding war (or at least high-level interest) for a quarterback of Mr. Kaepernick's caliber—instead functioned as a peculiar institution with suspicious design and objective.” *Kaepernick Demand*, *supra* note 3 at 4.

The 2017 NFL season was plagued with quarterback injuries, yet no team signed Kaepernick.¹⁴³ Since he opted out his contract in March 2017, sixty-two other quarterbacks have been signed to NFL teams and only two of them posted a higher quarterback rating in 2017 than Kaepernick's 2016 season rating.¹⁴⁴ Kaepernick called the league's behavior unusual, bizarre and even mysterious, but his complaint lacked any explicit examples of how the owners acted in concert to keep him from playing in the NFL.¹⁴⁵ He claims that "multiple NFL head coaches and general managers stated that they wanted to sign [him], only to mysteriously go silent with no explanation and no contract offer made to [him]."¹⁴⁶ The Complaint stated, in part:

The mere suspicion of collusion against Mr. Kaepernick has risen to the level of concrete and actual collusion. It is no longer a statistical anomaly but instead a statistical impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period. NFL General Managers and team leaders have referred to directives from NFL owners to not let Mr. Kaepernick so much as practice with a team.¹⁴⁷

Kaepernick contends that the owners' retaliatory scheme to oppress his "peaceful protests" were the sole reason for his unemployment, but teams have proffered reasonable justifications for not extending an offer to Kaepernick.¹⁴⁸ Among those reasons include that Kaepernick is not compatible with teams' offensive schemes and that he hasn't played football "in a while."¹⁴⁹

B. Joseph Caldwell

The Plaintiff in *Caldwell v. American Basketball Ass'n*,¹⁵⁰ Joseph Caldwell, was a nationally recognized basketball player who, after being indefinitely suspended and unable to find subsequent employment, sued the

¹⁴³ See Andrew Beaton, *Why Your Team Didn't Sign Colin Kaepernick*, Wall Street Journal, Dec. 27, 2017, <https://www.wsj.com/articles/why-your-team-didnt-sign-colin-kaepernick-1514312820> [<https://perma.cc/DN5L-BL7X>].

¹⁴⁴ *Id.*

¹⁴⁵ See Kaepernick Demand, *supra* note 3, at 4.

¹⁴⁶ *Id.* at 5–6.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ See *id.*

¹⁴⁹ Beaton, *supra* note 143.

¹⁵⁰ See 825 F. Supp. 558, 566 (S.D.N.Y. 1993), *aff'd* 66 F. 3d 523 (2d Cir. 1995).

American Basketball Association (“ABA”)¹⁵¹ alleging that the league’s actions following his suspension constituted an impermissible group boycott.¹⁵² In 1970, Caldwell signed a contract with the now defunct Carolina Cougars incorporating only certain provisions of the ABA Uniform Player Contract, and intentionally omitting provisions that would bind him to the ABA’s constitution and by-laws.¹⁵³ The by-laws provided that a suspended player would be placed on a “reserve list” whereby no member teams could contract with a player on said list.¹⁵⁴ In order to remove a player from the reserve list, the suspending team needed to notify the ABA commissioner, and the commissioner was required to then notify the other teams.¹⁵⁵

In the four seasons Caldwell played for the Cougars, Caldwell played ably and was elected to the All-Star Team during two of those four years.¹⁵⁶ He was also elected President of the ABA Players Association.¹⁵⁷ Nevertheless, in late 1975, he was suspended indefinitely for helping a teammate allegedly breach his contract.¹⁵⁸ Caldwell contended that he automatically ended up on the reserve list “forever” and was ultimately blacklisted from playing professional basketball.¹⁵⁹ Following Caldwell’s suspension, no professional basketball team ever gave him a tryout or any opportunity to compete for a spot on a team despite the contention that he was ready, willing and fit to play professional basketball at all times.¹⁶⁰ The named defendants did, however, dispute Caldwell’s ability to play professional basketball at the time of his suspension, because his age made him an undesirable recruit and he sustained injuries in 1971 and 1975.¹⁶¹

After the case was stagnant for almost eighteen (18) years, the defendants moved for summary judgment on the grounds that Caldwell failed to come forth with sufficient evidence of the existence of a contract, combina-

¹⁵¹ The ABA was a professional basketball league that ceased to exist following the ABA-NBA merger in 1976, leading to several teams joining the NBA. *Id.* at 564.

¹⁵² *See id.* at 568.

¹⁵³ *See id.* at 560–61.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 562.

¹⁵⁹ *See id.* at 562–63.

¹⁶⁰ *See id.* at 564.

¹⁶¹ Defendants provided statistics showing that fewer than two percent (2%) of the NBA players between 1976 and 1981 were 34 years old or older. They also claimed a torn ligament, in 1971, and an automobile accident in 1975 interfered with his playing ability. *See id.* at 564.

tion or conspiracy that would allow a reasonable jury to rule in his favor.¹⁶² In ruling for the defendants, the court held that:

[T]he mere fact that Caldwell never again was offered a position to play professional basketball does not, in and of itself, give rise to the inference that the defendants conspired to blacklist Caldwell from professional basketball. This is especially true since the Defendants have proffered a great deal of evidence . . . that Caldwell's age and physical condition made him a less than appealing prospect to other ball clubs.¹⁶³

Although this case was not conducted pursuant to the NBA's grievance procedure, it is instructive of the evidence a player claiming collusion must offer in order to show that he has been blacklisted from his respective sport.¹⁶⁴

Caldwell's was not the only federal court case in which a basketball player alleged collusive behavior.¹⁶⁵ In *Hodges v. National Basketball Ass'n*,¹⁶⁶ Plaintiff Craig Hodges claimed that the owners of the twenty-nine NBA franchises had a gentleman's agreement to blackball him from the league "because of his outspoken political nature as an African American man."¹⁶⁷ Hodges' career came to a sudden halt following the 1991 season, after he visited the White House with the Chicago Bulls.¹⁶⁸ Hodges wore a dashiki and handed the press secretary a letter asking President George H.W. Bush to come up with a comprehensive plan to end the injustices toward the African-American community.¹⁶⁹ In 1992, Bulls representatives conveyed to

¹⁶² See *id.* at 570.

¹⁶³ *Id.*

¹⁶⁴ Caldwell appealed the District Court's grant of summary judgment, but the Second Circuit affirmed the decision on the grounds that Caldwell's claims were barred by the nonstatutory labor exemption. See Caldwell, 825 F.Supp. at 557. ("[A]llowing Caldwell to proceed with his action would 'subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act.')" (quoting Wood, 602 F. Supp. at 529).

¹⁶⁵ It is to the authors' belief, that at the time of this Article, there have been no NBA grievances where an individual player has alleged that the teams engaged in a group boycott to blackball them from playing professional basketball.

¹⁶⁶ See generally No. 96-CV-7530 JFG, 1998 WL 26183 (N.D. Ill. Jan. 8, 1998).

¹⁶⁷ Ira Berkow, *The Case of Hodges vs. the N.B.A.*, N.Y. TIMES, Dec. 25, 1996, <http://www.nytimes.com/1996/12/25/sports/the-case-of-hodges-vs-the-nba.html> [<https://perma.cc/EM85-AZL2>]; see also Evan F. Moore, *How Former NBA Player Craig Hodges Helped Create the Activist Athlete*, ROLLING STONE, (Mar. 23, 2017), <https://www.rollingstone.com/sports/features/craig-hodges-and-the-modern-activist-athlete-w472667> [<https://perma.cc/Z2JN-QJB4>].

¹⁶⁸ See Berkow, *supra* note 167.

¹⁶⁹ See *Hodges*, 1998 WL 26183, at *1.

Hodges that they were embarrassed by these actions and he was subsequently waived.¹⁷⁰ He called every team in the NBA and not one was willing to give him an opportunity to play.¹⁷¹ Consequently, he contended that the NBA conspired to keep him from playing on any NBA team, because his political activities were not welcome by the NBA.¹⁷² Hodges brought a claim under The Civil Rights Act of 1991, 42 U.S.C. § 1981, but the case was dismissed because it was time-barred.¹⁷³

C. Barry Bonds

In 2008, Barry Bonds was coming off a season with the San Francisco Giants in which he broke Hank Aaron's home run record.¹⁷⁴ Even at the age of forty-three, these statistics were not an anomaly for Bonds as he was awarded the MLB's Most Valuable Player Award seven times and played in fourteen All-Star Games.¹⁷⁵ All things considered, he still may have been the one of the "most dominant players of his generation."¹⁷⁶ However, by the time Bonds sought a new contract, he was at the center of a performance enhancement drugs ("PEDs") scandal and had been indicted on four counts of perjury as well as one count of obstruction of justice.¹⁷⁷ Despite the PED allegations and the indictments, many believed that Bonds should have been offered an MLB team contract.¹⁷⁸

Come opening day of the 2008 season, Bonds remained unsigned, effectively ending his career in MLB.¹⁷⁹ He was willing to be compensated at the league minimum salary despite receiving nearly \$19.3 million the pre-

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See* Marc Edelman, *Sports and the Law: Are Baseball Teams Colluding Against Barry Bonds*, ABOVE THE LAW, (Mar. 24, 2008, 1:00PM) <https://abovethelaw.com/2008/03/sports-and-the-law-are-baseball-teams-colluding-against-barry-bonds/?rf=1> [<https://perma.cc/8X6A-4RGX>].

¹⁷⁵ Anthony Torrente, *The Dark Side of Professional Baseball: The Fall of Barry Bonds*, 5 ALB. GOV'T. L. REV. 352, 354 (2012).

¹⁷⁶ Edelman, *supra* note 110, at 629.

¹⁷⁷ *See* Torrente, *supra* note 175, at 359–60.

¹⁷⁸ Bonds was also described as "surly and a poor clubhouse fit." Torrente, *supra* note 175. However, none of the "purported blemishes to Bond's resume seems to fully explain why not a single team has made the slugger an offer at any price." *Id.*

¹⁷⁹ *Id.*

ceding season.¹⁸⁰ Because fans would flock to the seats to watch Bonds as he approached the 3,000-hit milestone, there were certainly financial benefits to signing him.¹⁸¹ Despite his strong statistics, players of a lesser caliber received playing contracts over Bonds.¹⁸² Whispers of blacklisting Bonds predated the 2007 season when *Philadelphia Daily News* reporter John Smallwood reported that “Commissioner Bud Selig should get together on a conference call . . . with the owners and convince every one of them that Bonds is off limits,” but there was no direct evidence to support that such a call ever occurred.¹⁸³ Lower-level team employees expressed interest in signing the veteran; nevertheless, teams refused the requests.¹⁸⁴ When asked why teams were so uninterested in signing Bonds, reporters received answers like “[Do you] expect me to answer this on record?”¹⁸⁵

Without a single team outwardly expressing a desire to sign Bonds, in October 2008, the MLBPA announced that it uncovered evidence showing that Bonds was the “victim of collusion.”¹⁸⁶ Rather than taking the traditional approach and filing a grievance against the MLB and the club-owners, the MLBPA sought to engage in private negotiations.¹⁸⁷ It was not until approximately May 2015¹⁸⁸ when Bonds, with the assistance of the MLBPA, filed a grievance alleging that his early retirement from MLB was the prod-

¹⁸⁰ See Michael McCann, *Unsigned and unwanted: Is Barry Bonds building a case for collusion?*, SPORTS ILLUSTRATED, (Mar. 16, 2009), <https://www.si.com/more-sports/2009/03/16/bonds-collusion> [<https://perma.cc/JBZ-BVZG>].

¹⁸¹ See Edelman, *supra* note 110, at 631.

¹⁸² *Id.*

¹⁸³ *Id.* at 630 (quoting John Smallwood, *Unemployment Remedy for Dealing with Bonds*, PHILA. DAILY NEWS, Sept. 1, 2006, at 112).

¹⁸⁴ Specifically, St. Louis Cardinals manager Tony LaRussa wanted to sign Bonds to a contract, but the Cardinals’ front office refused the request without providing any explanation. See *id.* at 631.

¹⁸⁵ *Id.* (internal citations omitted).

¹⁸⁶ See McCann, *supra* note 181; see also Associated Press, *Union Finds Collusion on Bonds*, N. Y. TIMES Oct. 16, 2008, at B14.

¹⁸⁷ See Michael McCann, *MLB Agents Want Union to Take More Active Stance Against Collusion*, SPORTS LAW BLOG (July 15, 2009), <http://sports-law.blogspot.com/2009/07/> [<https://perma.cc/ZNE6-LYPK>].

¹⁸⁸ Bonds and the MLBPA waited until 2015 to file the grievance to allow Bonds to resolve his longstanding steroid trial. See SI WIRE, *Report: Barry Bonds is suing Major League Baseball for Collusion*, SPORTS ILLUSTRATED (May 12, 2015), <https://www.si.com/mlb/2015/05/12/barry-bonds-mlb-collusion-lawsuit> [<https://perma.cc/QSP2-38JB>]. In 2011, Bonds was charged with obstruction of justice relating to testimony in a case in 2003, but the Ninth Circuit reversed the conviction in April 2015. See *United States v. Bonds*, 784 F.2d 582 (9th Cir. 2015).

uct of a covert, collusive process, that violated Section XX(E) of the Basic Agreement.¹⁸⁹ His “best evidence” came in the form of statistics.¹⁹⁰

Shortly thereafter, Arbitrator Frederic Horowitz ruled in favor of the MLB.¹⁹¹ “[T]here was no smoking gun in the case, and the arbitrator apparently did not find the case compelling enough.”¹⁹² While the three MLB collusion grievances discussed herein were also based on circumstantial evidence, Bonds presumably did not present circumstantial evidence of “sufficient clarity and force” to show the existence of a common scheme.¹⁹³ Rather, the totality of the circumstances may have made it reasonable to conclude that each club decided independently to not pursue Bonds and thereby did not violate the Basic Agreement. What also separated Bonds’ grievance from the three proven grievances of the past was not just the lack of a smoking gun, but the fact that he was a single player alleging that teams agreed to keep him out of the league. The three aforementioned collusion grievances directly harmed at least sixteen players.¹⁹⁴ Bonds was a sole player alleging that every MLB team at least had an understanding to not sign him to a contract. Professor Michael McCann—an Associate Dean for Academic Affairs at the University of New Hampshire School of Law and a legal analyst for *Sports Illustrated*—made the following observation:

Therein rests a key point about collusion: There must be actual evidence of conspiracy. In the 1980s, some baseball owners and team executives took notes during meetings that later became evidence of collusion. If no such notes exist—emails, texts, . . . admissions of witnesses, whatever it is—there must be evidence that corroborates a player’s contention that he has been blackballed. A player merely pointing out that he has been treated worse than players of similar abilities doesn’t prove collusion. Teams are not obligated to sign anyone.¹⁹⁵

¹⁸⁹ See Torrente, *supra* note 175, at 359.

¹⁹⁰ See Jon Heyman, *MLB prevails over Barry Bonds in collusion case over his career ending*, CBS SPORTS (Aug. 27, 2015), <https://www.cbssports.com/mlb/news/mlb-prevails-over-barry-bonds-in-collusion-case-over-his-career-ending/> [https://perma.cc/7JKE-4QAG].

¹⁹¹ *Id.*

¹⁹² *Id.* Horowitz’s reason for the decision is unknown as the decision was not made public.

¹⁹³ See Edelman, *supra* note 103, at 165 (quoting Collusion II); see also Michael McCann, *Some Colin Kaepernick supporters are crying collusion, but what does that really mean?*, SPORTS ILLUSTRATED (Mar. 24, 2017) <https://www.si.com/nfl/2017/03/24/colin-kaepernick-protest-nfl-collusion-free-agency> [https://perma.cc/J3RZ-DEDD] (“[A]n arbitrator ruled against Bonds, reasoning that even if Bonds’ *theory* of collusion was logical, he lacked evidence of teams conspiring against him.”).

¹⁹⁴ See Edelman, *supra* note 110, at 622.

¹⁹⁵ McCann, *supra* note 193 (emphasis added).

V. THE CASE FOR KAEPERNICK

Assuming that Kaepernick can conclusively prove his case in front of the System Arbitrator, such a “win” for Kaepernick and the NFLPA would not be enough to deter owners and leagues from colluding against individual players in the future. Each respective professional sports league maintains multiple revenue streams and, when those streams are threatened, the costs of collusion may be worth it.¹⁹⁶ In 2016, the NFL endured roughly an eight percent decrease in viewership.¹⁹⁷ Some suggest that the existence of National Anthem protests was an important factor in this decline.¹⁹⁸ This could further implicate television revenues and overall viewership. If an athlete is able to show that teams colluded against him, the player, and the NFLPA, will carry the heavy burden of showing that the CBA should be reopened or terminated. For the NFL, when an individual player is claiming collusion, it is not only the “clear preponderance of evidence,” that must be shown, but there also has to be a showing of a willful violation.¹⁹⁹ With such a high standard, it is unlikely that the NFL or any other league should

¹⁹⁶ In 2016, the NFL distributed up to \$7.8 billion to its thirty-two teams with each team receiving approximately \$244 million, up from \$222.6 million each team received the prior season. Eben Novy-Williams, *NFL Teams Split Record \$7.8 Billion in 2016, Up 10 Percent*, BLOOMBERG (July 12, 2017), <https://www.bloomberg.com/news/articles/2017-07-12/nfl-teams-split-record-7-8-billion-in-2016-up-10-percent> [https://perma.cc/A32B-QLPC]. The average NFL, MLB, NBA, and NHL franchise is valued at \$2.5 billion, \$1.54 billion, \$1.36 billion and \$594 million, respectively. See Kurt Badenhausen, *The Dallas Cowboys Head the NFL's Most Valuable Teams at \$4.8 Billion*, FORBES (Sept. 18, 2017) <https://www.forbes.com/sites/kurtbadenhausen/2017/09/18/the-dallas-cowboys-head-the-nfls-most-valuable-teams-at-4-8-billion/#325cf08e243f> [https://perma.cc/SBG5-RK3C]; Mike Ozanian, *Baseball Team Values 2017*, FORBES (Apr. 11, 2017) <https://www.forbes.com/sites/mikeozanian/2017/04/11/baseball-team-values-2017/#31b4133b2451> [https://perma.cc/ZT27-YDKH]; Kurt Badenhausen, *The Knicks and Lakers Top the NBA's Most Valuable Teams 2017*, FORBES (Feb. 15, 2017), <https://www.forbes.com/sites/kurtbadenhausen/2017/02/15/the-knicks-and-lakers-head-the-nbas-most-valuable-teams-2017/#44d3062c7966> [https://perma.cc/29WL-MEAK]; Mike Ozanian, *The NHL's Most Valuable Teams 2017*, FORBES (Dec. 5, 2017), <https://www.forbes.com/sites/mikeozanian/2017/12/05/the-nhls-most-valuable-teams-4/#26f0f4ef17c7> [https://perma.cc/SSK3-3P2R].

¹⁹⁷ See Phillip Bump, *What that Study about the Decline in Football Viewership Actually Says*, WASHINGTON POST, July 27, 2017, https://www.washingtonpost.com/news/politics/wp/2017/07/27/what-that-study-about-the-decline-in-football-viewership-actually-says/?utm_term=.4599bfd70cfc [https://perma.cc/E54U-8A9D].

¹⁹⁸ *Id.*

¹⁹⁹ See NFL CBA, *supra* note 76, art. 17 § 6.

reasonably fear the termination of the CBA unless there is direct evidence of collusive behavior among and between many teams.

If Kaepernick were to prevail in his case, he “stand[s] to win millions in lost wages and damages.”²⁰⁰ However, pursuant to the NFL’s Anti-Collusion Provision, the violating Clubs are “jointly and severally liable,” meaning that the player may collect the amount from any one, several, or all the liable parties. Thus, the parties may proportion the damages among them.²⁰¹ Therefore, if collusion is found, the amount of damages each team could be required to pay would likely be miniscule compared to the money each team earns through ticket sales, jersey sales and media rights fees. Again, the most potent weapon for the NFLPA is the threat of terminating the CBA but, in Kaepernick’s and many other athletes’ cases, terminating a CBA altogether is not a realistic option.²⁰² Athletes have attempted to prove such misconduct by the leagues and team owners, but they have ultimately lacked sufficient evidence to sustain their burden of proof. Thus, there is little-to-no penalty that would deter the teams from colluding against an individual player given that the potential damages pale in comparison to their revenues.

VI. CONCLUSION

Through the labor exemptions that render the major U.S. professional sports leagues’ respective CBAs the controlling documents, it is clear that prohibiting an individual from playing his respective sport is impermissible. Although each league does impose punishments on such behavior, these punishments are insufficient to deter clubs from conducting business in such a manner when a player hinders the league’s pursuit of money. Indeed, the MLBPA, NFLPA and NBPA all have the right to terminate or reopen the CBA in some circumstances, but situations in which an impartial arbitrator will award such relief are rare. A unique set of facts and evidence must exist for a professional sports league to truly feel threatened with such an oppressive penalty. Accordingly, come the next round of negotiations for new CBAs, players associations should attempt to include stronger language and punishments for those that collude against a player’s interest if there is a serious concern that players may be prevented from participating professionally based on collective action by ownership.

²⁰⁰ Isidore, *supra* note 122.

²⁰¹ NFL CBA, *supra* note 76, art. 17 § 11.

²⁰² See Michael McCann, *Why Colin Kaepernick’s Grievance is Unlikely to Lead to the Termination of the CBA*, SPORTS ILLUSTRATED (Oct. 16, 2017), <https://www.si.com/nfl/2017/10/16/colin-kaepernick-nfl-grievance-collusion-cba-lawsuit> [https://perma.cc/LJ3P-9WBQ].



Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger

Ava Farshidi¹

I. INTRODUCTION

Fashion influencer Chiara Ferragni brings in at least \$8 million a year as a full-time fashion blogger documenting her every move on social media and her personal blog.² Her income comes from a personal shoe line, advertising and brand partnerships, and collaborations.³ To date she has 12.8 million Instagram followers and has worked with fashion companies such as Louis Vuitton, Nike, Calvin Klein, and Cartier.⁴ Harvard Business School has used her at the center of a case study for its luxury marketing course.⁵ She may be one of the most successful fashion bloggers, but she is certainly not the only one who has been able to monetize her style. Fashion companies

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² See Meghan Blalock, *You Won't Believe How Much Money The Blonde Salad Will Make This Year*, WHO WHAT WEAR, (Sept. 9, 2014), <http://www.whowhatwear.com/the-blonde-salad-millions>, [https://perma.cc/AA7Q-9ASG].

³ See Rachel Strugatz, *The Blonde Salad's Chiara Ferragni Talks Fifth Anniversary and Footwear Launch*, WOMEN'S WEAR DAILY, (Sept. 9, 2014), <http://www.wwd.com/media-news/digital/the-blonde-salads-chiara-ferragni-talks-fifth-anniversary-and-footwear-launch-7888047>, [https://perma.cc/JD8P-K3L9].

⁴ See Chiara Ferragni (@chiaraferragni), INSTAGRAM, <https://instagram.com/chiaraferragni/>, [https://perma.cc/B7DG-RAQU] (last visited Mar. 26, 2018).

⁵ Rachel Strugatz, *The Blonde Salad at Harvard*, WOMEN'S WEAR DAILY, (Feb. 12, 2015), <http://www.wwd.com/media-news/digital/the-blonde-salad-at-harvard-8172610>, [https://perma.cc/AH3R-DPDQ] (“It’s the first case study that Harvard has done on a blogger and explores nearly every aspect of Ferragni’s growing and global business.”).

have noticed the impact of fashion bloggers for marketing and advertising and are willing to pay up to \$50,000 for a sponsored post.⁶ Unlike traditional forms of advertising, fashion bloggers have a unique relationship with followers who respect the bloggers and believe that the bloggers are being authentic to their personal style and beliefs.⁷ In their capacity as spokespeople for certain brands, bloggers are considered endorsers by the Federal Trade Commission (“FTC”) and must be transparent about the financial relationship they have with companies.⁸ However, whether or not fashion bloggers have been complying with the FTC’s rules, the FTC has yet to take enforcement action against a fashion blogger.

This paper will look at the shift in advertising in the fashion industry and suggest a modification of the current regulatory scheme with respect to fashion blogger accountability. Part II will provide a background to the current United States regulation of blogging and enforcement actions that have been taken with respect to bloggers. Part III will look at the United Kingdom’s approach to regulating bloggers. Finally, Part IV will provide a recommendation to revise the current United States rules, to hold bloggers liable for non-compliance, and to consider creative means to comply with the FTC’s rules.

II. THE CURRENT UNITED STATES REGULATION OF ENDORSEMENTS HAS FAILED TO ENFORCE ANY SANCTIONS AGAINST FASHION BLOGGERS

A. *Fashion Bloggers are a Recent Phenomenon That Have Used Social Media to Supplement Their Ability to Serve as Advertising Channels for the Retail Industry*

Using public figures to promote products is not a new phenomenon. Dan Marino and Janet Jackson have endorsed a weight loss system, Nutrisystem. Jessica Simpson and Vanessa Williams promised flawless skin if you, too, used Proactive acne products. George Foreman even slapped his name on his grill. What all of these individuals have in common is that their fame as athletes, singers, or actors is what led these companies to pay

⁶ See Milena Veselinovic, *Cash a la mode: How style bloggers are turning social savvy into six-figure salaries*, CNN, (Oct. 5, 2014), <http://www.cnn.com/2014/10/01/world/europe/bloggers-six-figure-salaries/>, [https://perma.cc/5893-7VH9].

⁷ See *id.*

⁸ See 16 C.F.R. § 255, Example 5 (2009), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>, [https://perma.cc/8UBX-XQBN].

these individuals to support their products. Today companies continue to use celebrities on their personal social media platforms to provide endorsements for brands and their products. Celebrities using social media to promote products are also identified as social media influencers—mainly, they use social media as a way to reach a large audience.⁹ Influencers can range in size from micro to major. Celebrities such as Shay Mitchell, Kim Kardashian, and Kayla Itsines are considered social media influencers, even though they have celebrity that originated outside of their popularity on social media.

Separately, fashion bloggers are individuals who are known for their blogs, which are generally photo-based and often include images of the blogger in fashion outfits.¹⁰ Fashion bloggers first emerged over a decade ago, and they use their blog, a form of social media, to demonstrate a point of view.¹¹ The rise of Instagram has moved many of these fashion bloggers to focus on producing content for social media rather than their personal blogs, which has converted them to social media influencers. Simply put, a fashion blogger is a social media influencer, but a social media influencer is not always a fashion blogger. For the avoidance of doubt, any use of social media influencer throughout this paper shall be used to exclude fashion bloggers, which will be referenced as such. This paper will focus on this new phenomenon of endorsements through fashion bloggers, rather than social media influencers as a whole. Part II.C. of this paper will discuss recent actions taken by the FTC against a group of social media influencers, none of which is a fashion blogger.

B. The Lanham Act Is Used by Competitors to Prevent False Endorsement or Unfair Competition in Advertising

To promote healthy competition, companies in the United States are able to use the Lanham Act to protect themselves against false or misleading advertising from their competition.¹² Under the Lanham Act, it is also

⁹ See Laura Forer, *The Lowdown on Social Media Influencers (Infographic)*, *MARKETINGPROFS*, (Feb. 22, 2017), <https://www.marketingprofs.com/chirp/2017/31547/the-lowdown-on-social-media-influencers-infographic> [https://perma.cc/4DMR-GYF7].

¹⁰ See Ella Alexander, *What Is the Difference Between a Fashion Influencer and Blogger?*, *HARPER'S BAZAAR*, (Jun. 6, 2017), <http://www.harpersbazaar.com.au/fashion/fashion-influencer-blogger-definition-13357> [https://perma.cc/YV7C-2GU3].

¹¹ See *id.*

¹² See Lanham Act, 15 U.S.C. § 1125 (2012). (“Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false desig-

against the law for a person to falsely endorse any goods or services that are likely to cause confusion as to the relationship between the person and the goods.¹³ This is a form of false advertising and generally individuals who are falsely associated with a company in advertising bring these claims. There is not an established uniform test for false endorsement under the Lanham Act and different circuits have applied different factor tests.¹⁴

The Second Circuit looks to see if the defendant “(1) made a false or misleading representation of fact; (2) in commerce; (3) in connection with goods or services; (4) that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services.”¹⁵ The Ninth Circuit has reworded the likelihood of confusion factors as “(1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant’s product is intended; (2) the relatedness of the fame or success of the plaintiff to the defendant’s product; (3) the similarity of the likeness used by the defendant to the actual plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent on selecting the plaintiff; and (8) likelihood of expansion of the product lines.”¹⁶ In the Third Circuit, to prove false endorsement there needs to be proof that a false message is being conveyed.¹⁷ However, competitors are not the ones bringing claims against other fashion companies for using endorsers; rather, the FTC has been investigating potential instances of unfair competition related to bloggers.

nation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is 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 . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”)

¹³ See *id.*

¹⁴ See *Beastie Boys v. Monster Energy Co.*, 66 F.Supp.3d 424, 448–49 (S.D.N.Y. 2014).

¹⁵ *Id.* at 448 (citing *Burck v. Mars, Inc.*, 571 F.Supp.2d 446, 455 (S.D.N.Y. 2008)).

¹⁶ *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 109 Cal.Rptr.3d 143, 169 (Cal. Ct. App. 2010) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001)).

¹⁷ See Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADE-MARK REP. 1202 (2004).

C. *Consumers Are Protected Against Unfair or Deceptive Business Methods and False Advertisement by the FTC*

The Federal Trade Commission Act (“FTCA”) gives the FTC the authority to protect consumers against injurious conduct based on unfair methods of competition by conducting investigations and providing recommendations to Congress.¹⁸ Competitors may make complaints to the FTC, but that is unlikely because they risk having their own practices scrutinized.¹⁹ More often, the FTC begins its own investigations as part of its regulatory power.²⁰ Additionally, the FTC has enforcement authority if it has “reason to believe” that the law is being violated.²¹ In 2009 the FTCA was amended to include the updated Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guidelines”) as a direct response to changes in advertising, particularly the advent of social media.²² The Endorsement Guidelines were subsequently updated most recently in September 2017 as a response to the shift in advertising through social media.²³ Under the Endorsement Guidelines, any advertising message that seems to reflect the honest opinions or experiences of a party other than the advertiser itself is considered an endorsement.²⁴ Advertisers can be found in violation of the Endorsement Guidelines for any false statements made by their endorsers, or if the material connection between the advertiser and the endorser is not made clear; however, endorsers may also be found in violation for their false statements.²⁵ If there is a material connection, the en-

¹⁸ See *Federal Trade Commission Act*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/enforcement/statutes/federal-trade-commission-act> [https://perma.cc/M2ZR-WHCC] (“Under this Act . . . the Commission is empowered, among other things, to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.”).

¹⁹ See 1 REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS* 102–03 (2d ed. 2014).

²⁰ See *id.*

²¹ 15 U.S.C. § 45(b) (2012).

²² See 16 C.F.R., *supra* note 7, at § 255.

²³ See *The Federal Trade Commission Answers Common Influencer-Specific Questions*, THE FASHION LAW, (Sept. 20, 2017), <http://www.thefashionlaw.com/home/the-ftc-answers-common-influencer-specific-questions> [https://perma.cc/QE8M-92GF].

²⁴ See 16 C.F.R., *supra* note 7, at §§ 255.0(b), 255.1(a).

²⁵ See *id.* at § 255.1(d).

dorser must clearly and conspicuously disclose the payment or intent to receive payment from the advertiser in exchange for the endorsement.²⁶ The FTC also places responsibility on advertisers to monitor their bloggers who are paid to promote their products and services to be sure that they are not engaging in deceptive practices.²⁷ Until more recently, the FTC held the position that it was not monitoring bloggers and their compliance.²⁸ However, in 2017 the FTC began sending letters to individuals reminding them of the Endorsement Guidelines, and even took its first enforcement action against a social media influencer.²⁹ The standard of deceptiveness is if an advertisement misleads a “significant minority” of consumers.³⁰ Any relationship between a blogger and advertiser where the blogger receives payment with the intention that they will promote the advertiser’s products is considered an endorsement.³¹ If it is commonly understood by the consumer that there is an endorser that has such a role, they are not required to disclose this in every post or promotion.³²

In April 2017, the FTC sent ninety letters to influencers, including Jennifer Lopez, Allen Iverson, and Kourtney Kardashian, and marketers such as Chanel and Adidas.³³ The FTC reminded influencers that if they have a material connection to a company, they must disclose their relationship clearly and conspicuously.³⁴ However, an exception is that if a celebrity posts about something that they purchased on their own without getting compensated in any way, a disclosure is not necessary.³⁵ The letters further

²⁶ See *id.* at § 255.5.

²⁷ See *id.* at § 255.1(d), Example 5.

²⁸ See *The FTC’s Revised Endorsement Guides: What People are Asking*, LAW PUBLISH, (June 2010), <http://www.lawpublish.com/ftc-endorsement-guides-information.html> [<https://perma.cc/CCR5-SZL5>] (“We’re not monitoring bloggers and we have no plans to. If concerns about possible violations of the FTC Act come to our attention, we’ll evaluate them case by case. If law enforcement becomes necessary, our focus will be advertisers, not endorsers – just as it’s always been.”).

²⁹ See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FEDERAL TRADE COMMISSION, (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/P7LY-E9WH>].

³⁰ LAW PUBLISH, *supra* note 27.

³¹ See *id.*

³² See *id.*

³³ See FEDERAL TRADE COMMISSION, *supra* note 28; Alexandra Steigrad, *FTC Issued Warnings to 45 Celebrities Over Unclear Instagram Posts*, WOMEN’S WEAR DAILY, (May 8, 2017), <http://wwd.com/business-news/media/ftc-issued-warnings-to-45-celebrities-over-unclear-instagram-posts-10883342/> [<https://perma.cc/3ZVV-83LT>].

³⁴ See *id.*

³⁵ See *id.*

clarified that a disclosure should be featured in the first three lines of the caption and not hidden underneath the “more” link.³⁶ Additionally, they discourage using multiple hashtags, which muddle the connection between endorser and advertiser, and vague hashtags such as “#sp,” “Thanks [Brand],” and “#partner.”³⁷ In September 2017, the FTC sent another twenty-one warning letters to individuals that were contacted in April including Lindsay Lohan and Naomi Campbell, which required influencers to show how they will abide by the Endorsement Guidelines in the future.³⁸ Additionally, these letters came in conjunction with the first enforcement action against an individual influencer, and a new version of the Endorsement Guidelines was released.³⁹ The FTC had previously focused its attention on advertisers, but the updated Endorsement Guidelines indicate that action might be taken “if the endorser has continued to fail to make required disclosures despite warnings.”⁴⁰ Further, social media posts only need to be marked with a disclosure if they are promoting a blogger’s opinion.⁴¹ However, getting a paid trip and accommodations does prompt a disclosure.⁴² Further, the Endorsement Guidelines now clarify that one must disclose on Snapchat or Instastory just as on any other platform.⁴³ The FTC continues to hold that #ad or #sponsored are appropriate disclosures with no room for creativity in indicating a financial relationship with an advertiser.⁴⁴

³⁶ See *id.*

³⁷ *Id.*

³⁸ See *New Instagram Influencer Warning Letters*, PUBLIC CITIZEN COMMERCIAL ALERT, (2017), <http://commercialalert.org/federal-trade-commission-sends-warning-letters-to-21-instagram-influencers/>, [https://perma.cc/A7T9-NZAA]; Franklin Graves, *FTC Releases Names of 21 Instagram Warning Letter Recipients*, FRANKLIN GRAVES, (Sept. 18, 2017), <http://franklingraves.com/2017/09/ftc-releases-names-of-21-instagram-warning-letter-recipients/>, [https://perma.cc/32MP-SAVA] ; see generally *The FTC’s Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftc-endorsement-guides-what-people-are-asking>, [https://perma.cc/N8U5-T8PK].

³⁹ See FEDERAL TRADE COMMISSION, *supra* note 37; *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FEDERAL TRADE COMMISSION, (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [https://perma.cc/YX57-WPL3].

⁴⁰ FEDERAL TRADE COMMISSION, *supra* note 37.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

D. *Fashion Related Investigations That Have Led to Limited Enforcement Actions*

1. Ann Taylor LOFT

In 2010 the FTC launched its first investigation under the Endorsement Guides against Ann Taylor LOFT for providing gifts to bloggers that attended a preview of its summer collection but failed to disclose the material connection between the bloggers and LOFT.⁴⁵ Bloggers who attended the event and covered it in a blog post were awarded gift cards ranging between \$50 to \$500.⁴⁶ Even though the LOFT had included a sign at the event that the bloggers should disclose the gifts they were given in their respective blog posts, the FTC noted that it was not clear that bloggers were made aware of the sign.⁴⁷ Despite the investigation the FTC did not take enforcement action and merely issued a closing letter to LOFT.⁴⁸ While closing letters are publicly available on the FTC's website and generally receive press, they are merely a warning with an explanation of the FTC's investigation and decision to close the investigation.⁴⁹ In the LOFT letter the FTC reasoned that the violation had occurred at only one event, the event was attended by a small number of bloggers, and LOFT had since adopted a policy about disclosing material connections between bloggers and the LOFT with respect to gifts.⁵⁰

⁴⁵ See *AnnTaylor Stores Corp., FTC File No. 102-3127*, FEDERAL TRADE COMMISSION, (Apr. 20, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf [https://perma.cc/SGW8-B3GY].

⁴⁶ See Sarah L. Bruno & Anthony V. Lupo, *The FTC closes its first investigation against Ann Taylor under the endorsement guides*, LEXOLOGY, (June 9, 2010), [http://www.lexology.com/library/detail.aspx?g=609d8d8d-e168-428e-9f09-b0e297b5bbd0 [https://perma.cc/LUG2-YYGT].

⁴⁷ See FEDERAL TRADE COMMISSION, *supra* note 44.

⁴⁸ See *id.*

⁴⁹ See *Consumer Protection Law Developments*, A.B.A. SEC. OF ANTITRUST L. 306 (2009).

⁵⁰ See FEDERAL TRADE COMMISSION, *supra* note 44.

2. Nordstrom Rack Boise Store Opening

In 2012 the FTC launched an investigation against Nordstrom Rack for its promotional event at its Boise, Idaho store opening.⁵¹ The event entitled “TweetUp” gave social media influencers gifts including a \$50 gift card for attending the event.⁵² However, Nordstrom failed to tell the attendees that they had to disclose that they had been given gifts for attending when they wrote about the event.⁵³ Because of the lack of disclosure of the material connection between the parties, the FTC found this to be a violation. However, much like in the LOFT investigation, the FTC issued a closing letter to Nordstrom Rack for this lack of disclosure because Nordstrom had limited the event’s occurrence, some influencers had posted about their gifts, and Nordstrom had revised its social media policies.⁵⁴

3. Cole Haan Wandering Sole Pinterest

In 2014, the FTC launched an investigation against Cole Haan for its Pinterest “Wandering Sole” contest.⁵⁵ The contest rules required entrants to make a pin board entitled “Wandering Sole” with five shoe images from Cole Haan’s Pinterest board, include five photos of the entrant’s favorite “places to wander,” and use the “#wanderingsole” hashtag in relation to each pin for a chance to win a \$1000 shopping spree for the most creative entry.⁵⁶ Entrants were not instructed to mention the contest or the potential prize associated with the Pinterest activities. The FTC found that this type of marketing was an endorsement, and the hashtag had not “adequately communicate[d] the financial incentive—a material connection—between contestants and Cole Haan.”⁵⁷ Since this was the first time the FTC had encountered an issue like this, the contest only involved a small group of people with a limited duration, and Cole Haan had updated its social media

⁵¹ See *Nordstrom Rack*, FTC File No. 122-3167, FEDERAL TRADE COMMISSION, (Feb. 22, 2013), http://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf [<https://perma.cc/GGV4-62QX>].

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *Cole Haan*, FTC File No. 142-3041, FEDERAL TRADE COMMISSION, (Mar. 20, 2014), http://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf [<https://perma.cc/G3FE-HBPW>].

⁵⁶ See *id.*

⁵⁷ *Id.*

policies, the FTC did not pursue enforcement action against the leather goods company.⁵⁸

4. Lord & Taylor's Design Lab Collection

In 2016, the FTC opened an investigation against Lord & Taylor for its Design Lab Instagram Campaign.⁵⁹ Lord & Taylor gifted fifty fashion influencers the Paisley Asymmetrical Dress and paid the influencers to post on Instagram one photo of themselves in the dress during the weekend of March 27–28, 2015.⁶⁰ The influencers could style the dress to their liking, but they were required to use specific hashtag and handles, none of which disclosed their financial relationship with Lord & Taylor nor were required to by Lord & Taylor in their contractual arrangement.⁶¹ Accordingly, following the FTC's investigation, Lord & Taylor's advertisements were found to be deceptive.⁶² The FTC finalized a twenty year consent order against Lord & Taylor prohibiting it from misrepresenting endorsements in the future and requiring it to adequately disclose any material relationship between it and its endorsers.⁶³ This is the only action to date taken against a fashion company.

III. THE UNITED KINGDOM, WHOSE APPROACH IS SIMILAR TO THE UNITED STATES' REGULATORY SETUP, HAS BEEN MORE WILLING TO TAKE A STRONG STANCE AGAINST DECEPTIVE PRACTICES BETWEEN SOCIAL MEDIA INFLUENCERS AND ADVERTISERS

A. *Consumer Protection from Unfair Trading Regulations 2008*

In the United Kingdom ("UK"), the Consumer Protection from Unfair Trading Regulations ("CPUTR") prohibit unfair commercial practices that

⁵⁸ See *id.*

⁵⁹ See Complaint, Lord & Taylor, LLC, No. 152 3181 (F.T.C. Mar. 15, 2016), available at https://www.ftc.gov/system/files/documents/cases/160315lordandtaylor_mpt.pdf [<https://perma.cc/K4VD-9YR2>].

⁶⁰ See *id.*

⁶¹ See *id.* at 2.

⁶² See Decision and Order, Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), available at https://www.ftc.gov/system/files/documents/cases/160523lord_taylor_do.pdf [<https://perma.cc/73NF-3RWC>].

⁶³ See *id.* at 4.

may materially affect the purchasing decision of a consumer.⁶⁴ The law went into effect in 2008 to help consolidate the UK's approach to unfair practices based on the European Union's standard.⁶⁵ The CPUTR also prohibits using advertorials, which are editorial content that do not make it clear that the person promoting the product or service was paid for the promotion.⁶⁶ Up until April 2014 the Office of Fair Trading ("OFT") was responsible for enforcing the CPUTR and protecting consumers in the marketplace.⁶⁷ Since its close, OFT's responsibilities to enforce the law have been transferred to various other bodies including the Competition and Markets Authority as the Financial Conduct Authority.⁶⁸

B. Advertising Standards Authority

The UK advertising regulatory system has two components: self-regulation for non-broadcast advertising and co-regulation for broadcast advertising.⁶⁹ The Committee of Advertising Practice ("CAP") has written the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing ("CAP Code"), and the Broadcast Committee Practice has written the UK Code of Broadcast Advertising.⁷⁰ The Advertising Standards Authority ("ASA") is a self-regulating body that has set the industry standard for advertising in the UK and enforces the two codes.⁷¹ The ASA allows consumers to make complaints that will be investigated,⁷² as can other advertisers.⁷³ Competitors who wish to make a complaint must first show that they have

⁶⁴ See The Consumer Protection from Unfair Trading Regulations 2008, No. 1277, <https://www.legislation.gov.uk/uksi/2008/1277/contents/made> [<https://perma.cc/YA8F-4A4F>].

⁶⁵ See *Consumer Protection from Unfair Trading Regulations*, OUT-LAW.COM, (Dec. 2010), <http://www.out-law.com/page-9050> [<https://perma.cc/XDM4-YLW5>].

⁶⁶ See *id.*

⁶⁷ See *OFT's Work and Responsibilities After 31 March 2014*, OFFICE OF FAIR TRADING, (Mar. 31, 2014), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/about-the-ofg/work-and-responsibilities> [<https://perma.cc/WTW5-4DK8>].

⁶⁸ See *id.*

⁶⁹ See *About Regulation*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/About-ASA/About-regulation.aspx> [<https://perma.cc/DCS4-V2KG>] (last visited Mar. 26, 2018).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *Make a Complaint*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/Consumers/How-to-complain.aspx> [<https://perma.cc/HTJ4-GZH6>] (last visited Mar. 26, 2018).

⁷³ See *id.*

made reasonable efforts to resolve their complaints with their competitor before the ASA will review it.⁷⁴ If the ASA believes that there has been a potential violation of the CAP Code, an investigation by the CAP or ASA may be initiated.⁷⁵ Informal investigations have little negative impact on the advertiser and are often resolved when the advertiser agrees to remove the advertising, but formal investigations are taken on by the ASA and reports are published on the ASA's website.⁷⁶

The CAP Code requires that endorsers only provide testimonies that are true and provide full disclosure as to who is making the endorsement.⁷⁷ Additionally, endorsements should be interpreted as fact and not be likely to mislead the consumer.⁷⁸ For a disclosure to be required in an endorsement, two factors must be present: the endorser needs to be in agreement to be compensated for their service and the advertiser needs to be in control of the endorsement.⁷⁹ Payment and control require a disclosure, but lacking one factor does not require the disclosure. Payment can be in the form of monetary compensation, a free gift, or another perk included in an advertisement style post. Control is found when the advertiser has control over timing of messages and requires the blogger to publish a key message or for a particular purpose. The ASA does not require formal labeling of disclosures, and they can match the blogger's style so long as they are clear. These guidelines have been developed to ensure that there is a clear message that these people have been compensated for their opinions and support.⁸⁰

⁷⁴ See *id.*

⁷⁵ See *Non-broadcast Complaint Handling Procedures*, ADVERT. STANDARDS AUTHORITY, (Jan. 2017), <https://www.asa.org.uk/asset/171EB506-B4EF-4FEC-BDCEC62DC49E0BE2.1759E419-AD92-452B-865FC913C62CE312/>, [<https://perma.cc/9Q6W-S35Y>].

⁷⁶ See *id.*

⁷⁷ See *The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, Rule 3.45*, ADVERT. STANDARDS AUTHORITY, (Sept. 1, 2010), <https://www.asa.org.uk/uploads/assets/uploaded/e75b867d-3872-4370-aec955b80a83f45e.pdf> [<https://perma.cc/Y5NT-CHBG>].

⁷⁸ See *id.* at 3.47.

⁷⁹ See *New Words on the Blog*, ADVERT. STANDARDS AUTHORITY, (Mar. 19, 2014), <https://www.asa.org.uk/news/new-words-on-the-blog.html#.VSIW4yg4FU0> [<https://perma.cc/M8BL-THAU>] (“ASA requires bloggers who are paid (directly or in kind) by a third party to write reviews or comments about a product or service and who cede editorial control of the blog to that third party to be up-front with their followers by making clear that it’s advertising.”).

⁸⁰ See *IAB – ISBA Guidelines on the Payment for Editorial Content to Promote Brands within Social Media*, INTERNET ADVERTISING BUREAU UK, (July 2012), <http://www.iabuk.net/sites/default/files/IAB%20ISBA%20Guidelines%20on%20the%20>

While these rules set a clear standard for disclosure, there is still gray area with many scenarios that fashion bloggers participate in. For example, companies will often provide an all-expense paid trip for bloggers in exchange for the blogger's coverage on social media and their website. In scenarios like this there is no fee paid for the blogger's services, but they are getting some sort of benefit. Additionally, the advertiser does not control the content that the blogger posts. In fact, these types of appearances are the ones that separate the most successful bloggers from the mediocre ones and are the key to marketing during fashion weeks, music festivals, and art events. Stretching the definition of control will be explored further in Part IV.

C. Enforcement Actions Taken for Violating These Restrictions

1. Handpicked Media

In 2008 the OFT launched an investigation against Handpicked Media for its engagement of bloggers and lack of disclosures.⁸¹ Handpicked Media owns a portfolio of websites and blogs that allows its clients to pay to have promotional blogs on Handpicked Media's site. The OFT took action when it noticed Handpicked Media was using bloggers to promote its client's activities, but there was no indication that these bloggers were being paid to make these statements. Statements were included on both the website blogs and social media. The OFT found Handpicked Media to be liable under Unfair Trading Regulations 2008 for a potential misleading omission by not disclosing the financial relationship underlying the endorsement strategy, which constituted unfair commercial practices.⁸² As a result of the violation, Handpicked Media was required to stop this type of conduct in the future prohibiting "any future promotion that does not clearly identify, in a manner prominently displayed with the editorial content such that it would be unavoidable to the average consumer, that the promotion has been paid for

Payment%20for%20Editorial%20Content%20-%20July%202012.pdf [https://perma.cc/QSZ8-GN4Q].

⁸¹ See *Investigation into inadequate disclosures in respect of commercial blogging activity*, OFFICE OF FAIR TRADING, (Dec. 13, 2010), http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/handpicked_media/ [https://perma.cc/E6TX-KEZJ].

⁸² See David Flint & Valerie Surgenor, *OFT- office of fair tweeting?*, LEXOLOGY, (Jan. 28, 2011), <http://www.lexology.com/library/detail.aspx?g=10e54ceb-b5cb-42be-8caf-12f1848a4598> [https://perma.cc/Y7EB-DDZ3].

or otherwise remunerated.”⁸³ While the body and rules that govern this type of advertising has now changed, this enforcement action is significant because it was the first of its kind to involve bloggers and to take a real enforcement action against a company. Additionally, it made advertisers aware that disclosure rules apply to the online space including social media; these forums had never been discussed or determined before.

2. Nike and Wayne Rooney

The ASA acted against a Twitter campaign for the first time in 2012 when Manchester United player Wayne Rooney and Arsenal player Jack Wilshere posted tweets with links related to Nike.⁸⁴ Rooney tweeted, “My resolution- to start the year as a champion, and finish it as a champion. . #makeitcount gonike.me/makeitcount,” while Jack Wilshere tweeted, “In 2012, I will come back for my club- and be ready for my country gonike.me/Makeitcount.”⁸⁵ The ASA found that because Nike sponsored the two footballers, they had a duty to disclose their relationship with the sports brand. Nike tried to defend itself stating that the link in the tweet was sufficient to show that there was a connection between Nike and the tweeters. However, the ASA did not find this to be persuasive given the context of how quickly people go through social media; followers would not likely look at the tweet long enough to make it “obviously identifiable” as a sponsored post.⁸⁶ Nike’s failure to ensure that the tweeters had included a disclaimer such as “#ad” in the tweet was a violation of the CAP Code because the footballers were paid for their social media posts and the content to be tweeted was determined by the advertiser. The Nike campaign was banned as a result.

Later in 2013, Rooney found himself in trouble again with the ASA when he tweeted, “The pitches change. The killer instinct doesn’t. Own the turn, anywhere @NikeFootball #myground.”⁸⁷ Again Rooney had failed to include a disclaimer in the tweet indicating his advertising relationship with Nike. However, in this instance the ASA felt that even if all viewers were

⁸³ OFFICE OF FAIR TRADING, *supra* note 80.

⁸⁴ See *Nike’s Twitter football advertising campaign banned*, BBC, (June 20, 2012), <http://www.bbc.com/news/technology-18517668> [<https://perma.cc/9F8Y-X8E3>].

⁸⁵ *Id.*

⁸⁶ Nike (UK) Ltd., ASA Complaint Ref. A12-183257 (2012), *available at* [http://asa.org.uk/Rulings/Adjudications/2012/6/Nike-\(UK\)-Ltd/SHP_ADJ_183247.aspx#.VSrUkSg4FU0](http://asa.org.uk/Rulings/Adjudications/2012/6/Nike-(UK)-Ltd/SHP_ADJ_183247.aspx#.VSrUkSg4FU0) [<https://perma.cc/TX5E-4W55>].

⁸⁷ *Wayne Rooney @NikeFootball tweet escapes ban*, CAMPAIGN (Sept. 4, 2013), <https://www.campaignlive.co.uk/article/wayne-rooney-nikefootball-tweet-escapes-ban/1210270> [<https://perma.cc/893J-KWM9>].

not aware of the sponsorship Nike was clearly identified in the tweet, which in its overall context could indicate there was a marketing relationship. Additionally, this particular tweet was different than any of Rooney's other tweets, which further suggested that it was not a typical personal tweet but one with a different context.⁸⁸ Based on this repeated incident, it is evident that advertisers should make it very clear to their spokespeople how the message should be displayed precisely. As will be discussed in Part IV, this also supports the need to hold spokespeople liable for their neglect particularly in a situation such as Rooney's where he repeated his mistake.

3. Oreo Lick Race

In late 2014 Mondelez, the parent company of Oreo, was under investigation by the ASA for an "Oreo Lick Race" promotion on YouTube. The campaign featured famous British YouTube stars who included statements such as "Thanks to Oreo for making this video possible."⁸⁹ However, the ASA found that this was not transparent enough and the commercial relationship had not been disclosed.⁹⁰ While the "thank-you" message to Oreo may have implied it was a marketing campaign, it did not meet the "obviously identifiable" standard. The ads were to be removed from YouTube and any future ads were required to have clear disclosures about prior decided arrangements. This decision made other video bloggers aware that the ASA would be monitoring them, and they should reconsider how to make disclaimers clearer despite pushback from advertisers to make the videos feel less "overtly commercial."⁹¹

⁸⁸ See Adam Sherwin, *Style over substance: Wayne Rooney cleared of Nike Twitter plug*, THE INDEPENDENT, (Sept. 3, 2013), <http://www.independent.co.uk/news/media/advertising/style-over-substance-wayne-rooney-cleared-of-nike-twitter-plug-8797109.html> [https://perma.cc/9KRR-JNE7] (comparing Rooney's typical tweets with those under his Nike campaign).

⁸⁹ Mark Sweney, *YouTubers ads for Oreo banned for not making clear purpose of videos*, THE GUARDIAN, Nov. 26, 2014, <http://www.theguardian.com/media/2014/nov/26/youtube-ad-oreo-banned-advertising-lick-race> [https://perma.cc/YP9X-WFQ2].

⁹⁰ See Mondelez UK Ltd., ASA Complaint Ref. A14-275018 (2014), available at http://asa.org.uk/Rulings/Adjudications/2014/11/Mondelez-UK-Ltd/SHP_ADJ_275018.aspx#.VsrZ_Sg4FU0 [https://perma.cc/JL4S-T4M6].

⁹¹ Alison Lynch, *ASA rules top vloggers like Zoella must tell fans when they're being paid to advertise*, METRO, (Nov. 26, 2014), <http://metro.co.uk/2014/11/26/asa-rules-top-vloggers-like-zoella-must-tell-fans-when-theyre-being-paid-to-advertise-4963669/> [https://perma.cc/8GKB-4WAJ].

4. Flat Tummy Tea

In 2017 the ASA cracked down on makeup blogger Sheikhbeauty's promotion of Flat Tummy Tea on Instagram with a post stating "@flattummytea 20% off guys!!!! If you've been following me you'll know i used this and I genuinely feel less bloated and a flatter tummy . . . oh yesssss."⁹² There was a financial arrangement for Sheikhbeauty's post and Flat Tummy Tea had control over the content.⁹³ By not disclosing with the hashtag #ad or a similar disclosure, there was a violation of CAP Code rule 2.1 because the Instagram post amounted to marketing communication.⁹⁴ In this case Flat Tummy Tea did not indicate to Sheikhbeauty what should be in her post nor is there reason to believe that the post was approved by the advertiser before it went live; however, the beauty blogger was required to post a key message regarding the advertiser's discount and had to upload the post on certain dates and times.⁹⁵

IV. NON-COMPLIANCE WITH THE GUIDELINES MEANS THAT TRANSPARENCY SHOULD BE A PRIORITY, WHICH CAN BE ACCOMPLISHED THROUGH CLEAR RULES, ACCOUNTABILITY, AND CREATIVITY

A. *The Current Endorsement Guidelines Should Be Interpreted to Address Social Norms in Conjunction with Transparency*

On March 11, 2015, the ASA's Chief Executive, Guy Parker, addressed the growing concern of advertising regulators working with bloggers to promote transparency with the bloggers' engagements.⁹⁶ Parker highlighted that bloggers want to comply with the rules but have difficulty knowing where to draw the line and how broad the transparency rule reaches.⁹⁷ These comments allude to certain situations where there is no monetary compensa-

⁹² Nomad Choice Pty Ltd t/a Flat Tummy Tea, ASA Complaint Ref. A16-366862 (2017), available at <https://www.asa.org.uk/rulings/nomad-choice-pty-ltd-a16-366862.html> [<https://perma.cc/XNZ6-FN3Z>].

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *ASA Chief Exec's speech to ISBA conference*, ADVERT. STANDARDS AUTHORITY, (Mar. 11, 2015), <http://asa.org.uk/News-resources/Media-Centre/2015/ASA-Chief-Exec-speech-to-ISBA-conference.aspx#.VSiN6Sg4FU0> [<https://perma.cc/J8J7-HBB4>].

⁹⁷ See *id.* ("This is not an easy line to draw. PRs have long sent freebies to journalists in the hope of positive coverage . . . But the internet, and especially social media, has cranked it up a level.").

tion but an endorser has been given something of value in exchange for their support.⁹⁸

The Endorsement Guidelines have generally held that celebrity endorsers do not need to disclose their paid relationship with a company because it is usually obvious to the consumer that celebrities are paid to engage in these types of advertisements.⁹⁹ For example, when Tiger Woods was signed on to endorse Nike products, his consistent support of Nike made it clear to consumers that he was endorsed by Nike without having to disclose this every time he put on a Nike cap. This type of “obvious” standard can be used to analyze certain circumstances where bloggers are not required to disclose payment because it is common within the industry. The simplest example is New York Fashion Week, where it is well-known within the fashion industry that bloggers and celebrities are paid to attend designers’ shows and are given their clothes to wear to the show in the hopes that they will use social media to promote the show or get photographed in the designer’s clothing.¹⁰⁰ In such situations disclosures should not be required. Fashion bloggers may be provided a seat and outfit to attend a show with no requirements to post on social media; however, the posting becomes organic because it is in the nature of the fashion blogger to document every moment in their lives particularly at a fashion-based event. When applying the CAP Code, the fashion brand’s lack of control over the endorser shows that this type of financial arrangement still does not warrant a disclosure.

B. The UK’s Enforcement Mechanism Can Serve as a Model to Update the Endorsement Guidelines

While the Endorsement Guidelines were more recently updated since their inception in 2009, technology and the world of fashion blogging continue to change at a rapid pace. As a result, the rules do not adequately address the many scenarios involving fashion bloggers and would benefit from a more recent review such as the UK has been actively doing for the past few years. For example, many fashion bloggers are invited to attend fashion shows for a fee and are often given an outfit from the designer’s

⁹⁸ See *id.*

⁹⁹ See LAW PUBLISH, *supra* note 27 (“If they know he’s a paid endorser, no disclosure is needed. But if a significant number of his readers don’t know that, a disclosure would be needed.”).

¹⁰⁰ See Meghan Blalock, *How Much People REALLY Get Paid to Go to Fashion Shows: A Ranked Guide*, WHO WHAT WEAR, (Feb. 24, 2015), <http://www.whowhatwear.com/how-much-celebrities-get-paid-to-go-to-fashion-shows> [https://perma.cc/ER7C-4Y8C].

collection to wear. However, they are not always required to post on social media; rather they organically end up posting because their business is documenting their every move. In a case like this, the fashion blogger should not have to disclose the compensation in a social media post. However, the Endorsement Guidelines indicate that a trip that is paid for by an advertiser should be revealed to consumers.¹⁰¹ Further, it's common knowledge that fashion editors and celebrities have always received free products and gifts from fashion and beauty companies in hopes that the celebrity would be caught by the paparazzi wearing a handbag or an editor would write about a new anti-aging cream in an article.¹⁰² These days fashion bloggers are gifted endless things even without a financial arrangement to post. Sometimes they will include a mention to the brand, likely to maintain their positive relationship with the brand. This is often done in a Snapchat or Instastory, both of which last at most for ten seconds.¹⁰³ In these instances, under the CAP Code, fashion bloggers would not be required to post anything; however, the Endorsement Guidelines put the same level of disclosure on the blogger. Further, the format of a Snapchat or Instastory makes the post non-permanent and is so quick that it is unlikely that a consumer would spend enough time looking at a post to be confused or deceived by the contents.¹⁰⁴

However, the CAP Code could use some clarification with the control component. In the situation of Sheikhbeauty and Flat Tummy Tea, Flat Tummy Tea controlled the timing and key component of the message. However, there are situations where a blogger is given something and paid to post about it without specific timing guidelines or message requirements. Is there control in these situations? To further flesh out the definition of control, we can look at a fiduciary. A fiduciary is one who undertakes to act on behalf of and primarily for the benefit of another.¹⁰⁵ If a fashion blogger is a fiduciary acting for the primary benefit of a fashion company, there is an exercise of control. The ecommerce company, Revolve, can best display this. Revolve has put together several all-expense paid trips for groups of fashion

¹⁰¹ See FEDERAL TRADE COMMISSION, *supra* note 37.

¹⁰² See Liza Darwin, *The Shockingly Small Amount Fashion Editors Really Pay For Their Clothes*, REFINERY29, (Dec. 25, 2014), <http://www.refinery29.com/fashion-editors-pay-for-clothes> [https://perma.cc/SUL6-YR7S].

¹⁰³ See Christopher Heine, *Instagram Just Debuted Snapchat-Like 'Stories' That Disappear After 24 Hours*, ADWEEK, (Aug. 2, 2016), <http://www.adweek.com/digital/instagram-just-debuted-snapchat-stories-disappear-after-24-hours-172767/> [https://perma.cc/2XBY-NC66].

¹⁰⁴ See *id.*

¹⁰⁵ See RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

bloggers to places like Mexico, the Hamptons, and Italy.¹⁰⁶ Beyond any potential contractual obligations that may exist between the fashion bloggers and Revolve to post on their social media, which would require a disclosure, there are many instances where the fashion bloggers are posting images such as a scenic view of the Italian landscape that is not required by Revolve. This post cannot be seen as producing a primary benefit for Revolve because it is in fact in the blogger's benefit to be traveling around the world and producing new content for their audience. In those instances, without the primary benefit being for the advertiser, there is not enough control to warrant a disclosure.

C. Endorsers, Not Just Advertisers, Should Be Held Liable for Their Violations

Often fashion bloggers carelessly do not comply with certain clauses in their agreements with advertisers knowing there will be no major repercussions for their behavior. Rooney's first Twitter offense was a result of Nike's lack of compliance with the CAP Code because Nike had control over the content that was posted. However, it remains unclear if the second violation was again because of Nike's lack of disclosure or if Rooney himself was to blame. In other instances, bloggers purposely fail to include disclaimers to promote a certain image about their content. Bloggers understand that readers may lose respect for the blogger, or that the blogger's opinion may depreciate in value if readers eventually realize that most items worn, photographers used, and shooting locations chosen have been paid for by a third party.¹⁰⁷ Fashion blogger, Bryan Grey Yambao, one of the original fashion bloggers behind the fashion blog, BryanBoy, has been very vocal about the FTC disclosures. In April 2017 he tweeted, "The resort shows are coming up next month. Who's disclosing what? I'm disclosing that Prada,

¹⁰⁶ See Chrissy Rutherford, *I Lived Like a Fashion Blogger For a Week*, HARPER'S BAZAAR, (July 11, 2017), <http://www.harpersbazaar.com/culture/travel-dining/a10268172/fwr-d-ibiza-influencer-trip/>, [<https://perma.cc/2TE3-SNZL>]; see also Molly Creeden, *When Did Revolve Become a Thing?*, RACKED, (Nov. 22, 2016), <https://www.racked.com/2016/11/22/13575110/revolve-explainer-kardashian-social>, [<https://perma.cc/Z32X-XEJB>].

¹⁰⁷ See Rachel Strugatz & Karen Robinovitz, *To Pay or Not to Pay: A Closer Look at the Business of Blogging*, WOMEN'S WEAR DAILY, (June 5, 2012), <http://wwd.com/fashion-news/digital/a-closer-look-at-the-business-of-blogging-5942163/> [<https://perma.cc/WH7G-KYHF>] ("On the one hand, bloggers want to be considered journalists but forging partners with leading brands and designers creates what some believe to be a conflict of interest.").

Vuitton and Gucci will subsidize my travel.”¹⁰⁸ Yambao has also said that the disclosures have not hurt his business or lost him followers; rather, he finds that his followers appreciate the transparency,¹⁰⁹ even in a world where following the FTC’s rules are an exception. It shows that fashion bloggers are aware of the Endorsement Guidelines, and do not feel that following the rules hurts their personal brands. Interestingly, to date the FTC has chosen not to go after fashion bloggers. Not one fashion blogger was included in the ninety letters the FTC sent out in 2017; rather, the letters were sent to other types of celebrities that already have notoriety and fame outside of their social media accounts and lifestyle blogs.¹¹⁰

Fashion companies and bloggers do not have corresponding employer and employee roles but have more like an independent contractor relationship. However, under the Endorsement Guidelines, holding the businesses that are paying the bloggers liable is similar to the legal theory of *respondeat superior*. Common law *respondeat superior* is based on the theory that the “master” should be held liable for the torts committed by its “servant.” If simplified it holds the superior person in the relationship, often between employers and employees, liable for the conduct of the inferior person.¹¹¹ Policy reasons behind the rule are that the employer is profiting from the employee’s work and should bear the responsibility of negative implications of the employee’s work in the course of the employment because the employer has a better ability to absorb the costs associated with the harm.¹¹² The difference in financial compensation between companies and bloggers in endorsements is not similar to typical *respondeat superior* relationships. Blog-

¹⁰⁸ Julie Zerbo, *Fashion’s Full Disclosure – or Not*, THE NEW YORK TIMES, July 6, 2017, <https://www.nytimes.com/2017/07/06/fashion/federal-trade-commission-sponsored-travel.html> [<https://perma.cc/4DZ5-GXWM>]; see also Kali Hays, *Influencers Still Can’t Get Behind Disclosing Paid Posts*, WOMEN’S WEAR DAILY, (Oct. 12, 2017), <http://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/> [<https://perma.cc/YR7L-WZ59>].

¹⁰⁹ See Zerbo, *supra* note 107.

¹¹⁰ See C. Ryan Barber, *Who Got Those Social ‘Influencer’ Letters From the FTC? Read the Full List*, THE NATIONAL LAW JOURNAL, (May 5, 2017), <http://www.national-lawjournal.com/id=1202785302263/Who-Got-Those-Social-Influencer-Letters-From-the-FTC-Read-the-Full-List> [<https://perma.cc/U5UQ-BKLZ>].

¹¹¹ See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. d (AM. LAW INST. 1958); see also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984).

¹¹² See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (3d ed. 1964) (“The losses caused by the torts of employees . . . are placed upon that enterprise itself, as a required cost of doing business.”).

gers are paid immense amounts of money for their services.¹¹³ The profit that companies receive is comparable to the compensation that the blogger is receiving from their blog or social media post. The blogger will obtain profit beyond the one-time fee the company pays the blogger because of affiliate programs that can help boost how much a blogger makes for a particular post. Affiliate programs give bloggers commissions between 3 to 20% on sales to clothing that they link to online retail stores.¹¹⁴ Any visitor to the blogger's site or social media who shops from the links provided to the clothing, provided by the company, featured in the post will be putting even more money into the blogger's pockets. Considering the high value of some of the clothing bloggers wear, the commission could make a big difference in the blogger's annual earnings.¹¹⁵ The blogger's financial gains should be considered in the FTC's decision to pursue action against companies exclusively.

At this time, the only repercussion that endorsers may face for violation is a reputational harm from the fashion companies that they may be putting in danger of a violation. Fashion companies will continue using bloggers and social media influencers because of their persuasive position in the industry. Accordingly, endorsers should too be held liable for their actions whether it is through means of a fine for their violation or a discontinued relationship with the advertiser. Holding both the advertiser and the endorser liable will help both components in the relationship work together to comply with the Endorsement Guidelines.

D. Fashion Companies Should Use Creativity When Creating Disclaimers

While bloggers can be blamed for failing to properly disclose their endorser status, communications departments of advertisers often worry about the aesthetic appeal of including disclaimers in social media. Hashtags

¹¹³ See Veselinovic, *supra* note 5, ("On the high end, people are charging \$50,000 for a sponsored post.").

¹¹⁴ See generally Elizabeth Holmes, *How Style Bloggers Earn Sales Commissions, One Click at a Time*, WALL STREET JOURNAL, Feb. 11, 2015, <http://www.wsj.com/articles/how-style-bloggers-earn-sales-commissions-one-click-at-a-time-1423693911> [<https://perma.cc/EX3R-ZVDC>].

¹¹⁵ See Meghan Blalock, *Find Out Which Fashion Bloggers are Making Millions*, WHO WHAT WEAR, (Oct. 9, 2016), <http://www.whowhatwear.com/how-do-bloggers-make-money> [<https://perma.cc/6Q4K-PLXE>] (reporting that blogger Rachel Parcell made \$1 million through her relationship with Nordstrom); see also *Affiliate Marketing Is Making All Fashion Blogs Look the Same*, INDEPENDENT FASHION BLOGGERS, (Sept. 15, 2014), <http://heartifb.com/2014/09/15/affiliate-marketing-is-making-all-fashion-blogs-look-the-same/> [<https://perma.cc/4LWV-S7DB>].

such as “#ad” and “#sponsored” have been promoted by the FTC as well as ASA because of the limited number of characters taken to include the disclaimer and because the disclaimer is very clear. However, if companies were able to be creative with their disclaimers they could still be compliant without sacrificing the content or message. In fact, the ASA has been clear that disclosures do not have to be formal and can be in line with the blogger’s voice.

Before the FTC had clarified its Endorsement Guidelines requiring posts to be disclosed with #ad or #sponsored and indicating that ambassador mentions or thanking a brand are not appropriate, many brands used creative hashtags to disclose a relationship with a fashion blogger. For example, Michael Kors used the hashtag “#ThanksMK” with its posts. Additionally, Stuart Weitzman uses “InOurShoes” and Sam Edelman uses “SamsGirls.” Michael Kors seems to be the most explicit message by expressing gratitude implying possible payment or remuneration. The Stuart Weitzman and Sam Edelman hashtags have an inclusive feel indicating those images with the hashtag are part of the same campaign. It is not clear if these hashtags would be clear enough based on the criticism in the Oreo decision that found the thank you message to not be explicit enough.

However, creating a uniform industry standard that is not as strict but implicit enough could be the solution to convincing advertisers to comply with the rules. In late March 2015 the UK’s Financial Conduct Authority (“FCA”) revised its previous stance on social media posts using “#ad” to identify promotional content.¹¹⁶ The FCA noted the consumer confusion that could occur when the hashtag was clicked on because other communications with a different purpose may be using that hashtag.¹¹⁷ The key must be consistency. Companies can make it clear that certain posts are sponsored if they maintain the same hashtag for all those posts and only those posts. Uniformity is necessary to provide transparency to the consumer and prevent the consumer confusion that is suggested by the FCA with the use of “#ad.” Contrary to the FTC’s position that #thanks[brand] is not sufficient, if a brand used a unique hashtag indicating relationship with bloggers for all social media posts that require a discloser and closely monitored and enforced this hashtag, consumers would grow to realize what the hashtag meant.

¹¹⁶ See FINANCIAL CONDUCT AUTHORITY, FG15/4, SOCIAL MEDIA AND CUSTOMER COMMUNICATIONS: THE FCA’S SUPERVISORY APPROACH TO FINANCIAL PROMOTIONS IN SOCIAL MEDIA, 4.2 (2015), available at <https://www.fca.org/your-fca/documents/finalised-guidance/fg15-04> [<https://perma.cc/8NG8-RAHQ>].

¹¹⁷ See *id.* at 4.3.

V. CONCLUSION

The changes in the fashion blogging industry necessitate a change in the FTC's standards in monitoring fashion blogger behavior. Following some of the changes the UK has made in its policies on the matter, holding bloggers and advertisers both accountable for their actions, and using creative means to help disclaim endorsement relationships are key to facilitating transparency as this form of advertising continues to expand in the coming years.



The NFL-DirecTV Antitrust Controversy and Potential Parallels in TIDAL's Approach to the Music Streaming Market

Wonnie Song

I. INTRODUCTION

2016 was a landmark year for music streaming in the United States. For the first time, streaming represented the majority of US music revenues.¹ This was particularly notable in a year where estimated retail revenues from recorded music saw 11.4% year-over-year growth despite declines in both digital downloads and physical record sales.² The momentum continued into 2017.³ By mid-2017, streaming represented 62% of US music industry revenues⁴ and, by year-end, Nielsen reported a 59% year-over-year increase in on-demand audio streams.⁵ As in 2016, dramatic growth in the streaming category fueled overall growth in the industry—recording a 12.5% increase in consumption over 2016, despite decreases in sales of nearly all other formats.⁶ Goldman Sachs predicts that this growth will con-

¹ RECORDING INDUS. ASS'N. OF AM., *News and Notes on 2016 RIAA Shipment and Revenue Statistics* 1 (2017).

² *Id.* at 2–3.

³ See Peter Kafka, *The Music Business is Growing Again—Really Growing—and it's Because of Streaming*, RECODE.COM (Sept. 20, 2017, 1:00 PM), <https://www.recode.net/2017/9/20/16339484/music-streaming-riaa-spotify-apple-music-youtube-2017-revenue-subscription> [<https://perma.cc/4PMU-TMAM>].

⁴ RECORDING INDUS. ASS'N. OF AM., *News and Notes on 2017 Mid-Year RIAA Revenue Statistics*, 1 (2017). Full 2017 report was not yet released, as of March 2018.

⁵ 2017 U.S. Music Year-End Report, NIELSEN (Jan. 3, 2018), <http://www.nielsen.com/us/en/insights/reports/2018/2017-music-us-year-end-report.html> [<https://perma.cc/Q3LG-7GM5>].

⁶ *Id.*

tinue: its recent “Music in the Air” report predicts that the global recorded music industry will be worth nearly \$41 billion by 2030.⁷

Though it must be ceded that not all actors in the business are benefiting equally,⁸ streaming’s ascent is still welcome news to an industry that has been in overall decline since the late 1990s.⁹ 2016 marked the first time that the industry recorded two consecutive years of growth since 1999.¹⁰

In particular, subscription-based streaming services have seen exponential growth. Although 2017 year-end numbers are yet to be released, the Recording Industry Association of America (“RIAA”) 2017 mid-year report shows that paid subscriptions revenue grew 61% year-over-year to \$1.7 billion at estimated retail value.¹¹ Paid subscription revenue thus jumped from representing an already substantial one third of total US recorded music industry revenue in 2016, to 43% through Q2 of 2017.¹² With nearly 1 million new subscriptions per month, the number of paid subscribers reached a record 30.4 million in the first half of 2017.¹³

Indeed, competition in the paid subscription service category is increasingly fierce and questions of antitrust loom ever larger.¹⁴ By means of

⁷ Ed Christman, *Music Industry Will Hit \$41 Billion by 2030 According to New Goldman Sachs Report*, BILLBOARD (Aug. 29, 2017), <https://www.billboard.com/articles/business/7949040/music-industry-will-hit-41-billion-by-2030-according-to-new-goldman-sachs>, [https://perma.cc/8CFR-VPMV]. *But see* Bobby Owsinski, *Goldman Sachs Predicts \$28 Billion Streaming Music Market, But Should Anyone Care?*, FORBES (Sept. 2, 2017, 1:54 PM), <https://www.forbes.com/sites/bobbyowsinski/2017/09/02/goldman-sachs-predicts-28-billion-streaming-music-market-but-should-anyone-care/#5b7142223150> [https://perma.cc/8FNU-LJ44].

⁸ *See, e.g., ASCAP and BMI Join Forces to Fight the Department of Justice’s Interpretation of Their Consent Decrees*, AMERICAN SOC’Y OF COMPOSERS, AUTHORS & PUBLISHERS (Aug. 4, 2016), <https://www.ascap.com/press/2016/08-04-ascap-bmi-join-forces-to-fight-doj> [https://perma.cc/4DC8-MRLC].

⁹ Lucas Shaw, *The Music Industry is Finally Making Money on Streaming*, BLOOMBERG (Sept. 19, 2016, 9:16 PM), <https://www.bloomberg.com/news/articles/2016-09-20/spotify-apple-drive-u-s-music-industry-s-8-first-half-growth> [https://perma.cc/U9XS-AZD3].

¹⁰ *Id.*

¹¹ RECORDING INDUS. ASS’N. OF AM., *supra* note 4, at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ For example, in 2015, the Federal Trade Commission conducted an antitrust investigation around Apple Inc.’s dual role in the music streaming market. Apple is proprietor of both the streaming service Apple Music and the iTunes App store, which serves as one of the primary retail channels for Apple Music’s competitors. *See* Cecilia Kang, *Everything to Know About the FTC’s Antitrust Review of Apple’s Music Business*, WASHINGTON POST, July 16, 2015, <https://www.washingtonpost.com/news/the-switch/wp/2015/07/16/everything-with-know-about-the-ftcs-antitrust-re>

comparative case study, this article considers one particular issue that may emerge in the paid subscription space: namely, the legality of using exclusive release deals in the race to grow streaming service user bases. Given that most music streaming services offer largely overlapping catalogs,¹⁵ customers are likely to subscribe to only one service at a time. One service's success in driving user acquisition—by offering exclusive content or otherwise—is likely to come at the expense of other services' shares of wallet. In view of the rising popularity of exclusive release deals, it behooves the industry to examine any antitrust implications such deals may invoke.¹⁶

This paper first examines the structure and approach of TIDAL, a streaming service that signed several high-profile deals for exclusive release rights in 2016 and continues to rely on this exclusive release model.¹⁷ The paper then takes a critical look at the possible antitrust issues that TIDAL might encounter, should it successfully achieve market dominance by continuing its current business model. The study considers possible parallels between antitrust problems that may arise from TIDAL's quest for growth and the recent antitrust litigation surrounding the National Football League's deal with DirecTV for exclusive television broadcasting rights.¹⁸

view-of-apples-music-business/?utm_term=.3fc75775b8b9 [https://perma.cc/7JM6-ZGST].

¹⁵ Christopher Breen, *Which Music Subscription Service Should You Use?*, PC WORLD (May 2, 2012 6:00 AM), <https://www.pcworld.com/article/2000051/which-music-subscription-service-should-you-use.html> [https://perma.cc/733H-L9GR].

¹⁶ See Steve Knopper, *How Apple Music, Tidal Exclusives Are Reshaping the Music Industry*, ROLLING STONE (Oct. 5, 2016), <http://www.rollingstone.com/music/news/inside-the-war-over-album-exclusives-w443385> [https://perma.cc/QVG8-TZ77].

¹⁷ *Id.* See also Jem Aswad, *Jay-Z's New Album, '4:44,' Has Dropped — But Sources Say Tidal's Exclusive Will Only Last a Week*, VARIETY (June 29, 2017, 9:09 PM), <http://variety.com/2017/digital/news/jay-z-new-album-444-tidal-exclusive-1202483883/> [https://perma.cc/EFV6-8BUC].

¹⁸ Eriq Gardner, *NFL's \$12 Billion Deal with DirecTV Faces Major Antitrust Lawsuit*, HOLLYWOOD REPORTER (July 14, 2015, 10:34 AM), <http://www.hollywoodreporter.com/thr-esq/nfls-12-billion-deal-directv-808544> [https://perma.cc/5YQ2-48Y9].

II. TIDAL'S STRATEGY IN THE FAST-EVOLVING MUSIC STREAMING MARKET

A. *The Market Shift Toward Exclusive Releases*

2016 saw a marked increase in exclusive streaming deals.¹⁹ In the battle for dominance of the subscription-based music streaming market, streaming services are seeking to differentiate themselves not only on the basis of price or better product features, such as smart playlist algorithms driven by user data or social media connectivity, but also on content.²⁰ Digital streaming platforms such as Apple Music and TIDAL are investing heavily in exclusive release deals that give them timed or “windowed” exclusives on new album releases. For example, TIDAL signed agreements with star artists Beyoncé and Kanye West to release their respective latest albums as windowed exclusives on TIDAL's subscription service, and Apple Music struck similar deals with artists Drake and Frank Ocean.²¹ Combined, these four exclusive release deals generated approximately 2.06 million units in first-week sales.²² The successful release of Beyoncé's album *Lemonade* best explains the rationale behind investing in the exclusive release model: TIDAL gained 1.2 million new users within the first week of *Lemonade*'s release—a 40% increase over its self-reported user base of 3 million the month prior—and the TIDAL app briefly rose to the top of the iTunes App Store rankings that week.²³

Perhaps most indicative of the trend is the recent about-face from two of the industry's biggest holdouts. A handful of major industry stakeholders warned against the lure of exclusive release deals. For example, Spotify, the world's largest on-demand music-streaming service (by paying users), and artists such as Lady Gaga declared that exclusives were bad for artists and fans alike.²⁴ Similarly, in August 2016, Universal Music Group announced a

¹⁹ See Knopper, *supra* note 16.

²⁰ Seth Fiegerman, *The Streaming Music War is Getting Ugly*, CNN (Aug. 31, 2016, 8:50 AM), <http://money.cnn.com/2016/08/31/technology/streaming-music-wars/> [<https://perma.cc/2ZZK-863Y>].

²¹ See Knopper, *supra* note 16.

²² See *id.* (calculating first-week sales based on track-equivalent units, including streaming and download numbers).

²³ See *id.*; see also Joe Coscarelli, *Measuring How Tidal Fared with Beyoncé's 'Lemonade'*, N.Y. TIMES, May 12, 2016, https://www.nytimes.com/2016/05/13/arts/music/beyonce-lemonade-tidal-streams.html?_r=0 [<https://perma.cc/YG2Z-RL5U>].

²⁴ Knopper, *supra* note 16. See also John Paul Titlow, *Frank Ocean, Apple Music, and the Headache of Streaming Exclusives*, FAST COMPANY (Aug. 25, 2016, 6:37 PM),

“strategic commitment” to avoiding exclusive deals. The label painted such deals as myopic decisions that seduced artists with short-term money at the cost of limiting audiences and, ultimately, revenue in the long run.²⁵ However, less than twelve months later, Universal issued a new joint statement with Spotify that stood in almost diametric opposition to its previous “commitment.” On April 4, 2017, the two companies announced a new, multi-year license agreement that, amongst other provisions, allows Universal artists to release new albums on Spotify’s paid service only for two weeks.²⁶

B. *TIDAL’s Structure and Business Model*

TIDAL is a subscription-only music streaming service that does not offer an ad-based freemium option.²⁷ The monthly price of its basic product, TIDAL Premium, is \$9.99, matching the subscription prices of similar services from competitors such as Apple Music and Spotify.²⁸ Its higher-tier product, TIDAL HiFi, offers access to the same catalog but in the form of lossless high-fidelity sound files for \$19.99 per month.²⁹

When the service launched in its current incarnation, it sought to differentiate itself from competitors on three fronts. First, it proclaimed that it was “an artist-owned coalition”—a platform created by artists, for artists.³⁰ Though Sprint recently acquired a 33% stake in the company, TIDAL still counts twenty high-profile recording artists amongst its shareholders and offers a stock appreciation rights program to artists that join.³¹ It promises

<https://www.fastcompany.com/3063108/frank-ocean-apple-music-and-the-head-ache-of-streaming-exclusives> [<https://perma.cc/3VTQ-GA2R>].

²⁵ See Knopper, *supra* note 16.

²⁶ *Spotify and Universal Music Group Announce Global, Multi-Year License Agreement*, SPOTIFY (Apr. 4, 2017), <https://press.spotify.com/us/2017/04/04/spotify-and-universal-music-group-announce-global-multi-year-license-agreement/> [<https://perma.cc/R5EG-U62Z>].

²⁷ See *Try Now*, TIDAL, <http://tidal.com/us/try-now> [<https://perma.cc/Q4Z8-EZKN>] (last visited Apr. 21, 2017).

²⁸ See *Subscription Types*, TIDAL, <https://support.tidal.com/hc/en-us/articles/115003662825-Subscription-Types> [<https://perma.cc/XYW8-B3FN>], (last visited Mar. 10, 2018); *Membership*, APPLE, <https://www.apple.com/apple-music/membership/> [<https://perma.cc/DPV8-NP2R>], (last visited Apr. 21, 2017); *Premium*, SPOTIFY, <https://www.spotify.com/us/premium/> [<https://perma.cc/SVV2-PG3U>], (last visited Apr. 21, 2017).

²⁹ See *Subscription Types*, *supra* note 28.

³⁰ See *Who Owns TIDAL?*, TIDAL, <http://tidal.com/us/try-now> [<https://perma.cc/K43Q-MKGG>], (last visited Apr. 21, 2017).

³¹ See Ben Sisario, *Tidal, Jay Z’s Streaming Service, Sells a Stake to Sprint*, N.Y. TIMES, Jan. 23, 2017, <https://www.nytimes.com/2017/01/23/business/media/tidal->

artists a greater portion of streaming revenue and, relative to its peers, TIDAL does indeed pay the highest royalty percentage to artists—75% of revenue compared to Spotify’s 70%, for example.³²

Second, TIDAL promised quality. It promised higher quality audio files than its peers, as well as playlists and new talent curated by industry experts.³³ Finally, and relatedly, TIDAL offered an aura of exclusivity. Notwithstanding its folksy “by artists, for artists” messaging, TIDAL leveraged the star power of its founding artist-owners—including marquee names such as Jay Z, Chris Martin, and Madonna—to generate hype. At launch, TIDAL’s founding artists represented a combined 213.3 million total album sales in the US, and approximately 428.7 million digital song sales.³⁴ In conjunction with the promise of sound quality that could only really matter to audiophiles who had the urbanity (and equipment) to appreciate it, the marketing around TIDAL’s star-studded launch campaign seemed to offer a niche, quasi-luxury product only for fans who understand the value of music as art.

Perhaps on account of this conflicting picture of an “art-for-art’s-sake” artists’ commune, swaddled in the glamor of celebrities whose combined net worth is estimated to be approximately \$2.5 billion, TIDAL was quickly labeled a tone-deaf vanity project.³⁵ Struggling to win over subscribers on brand message alone, the service soon decided to utilize its owners’ commer-

streaming-music-jayz-sprint.html?_r=0 [https://perma.cc/56FS-NNQJ]; Meskin Fekadu, *Tidal Executive Says Streaming Service Seeks More Artists to Join Jay Z, Rihanna ad Co-Owners*, U.S. NEWS (Apr. 1, 2015) <https://www.usnews.com/news/business/articles/2015/04/01/tidal-streaming-service-seeks-more-artists-to-join-as-owners> [https://perma.cc/G95G-QTW8]. *But see Kanye West Quits Tidal, Claiming Service Owes Him \$3m – Report*, MUSIC BUSINESS WORLDWIDE (July 2, 2017), <https://www.musicbusinessworldwide.com/kanye-west-quits-tidal-claiming-service-owes-3m-report/> [https://perma.cc/X3Q7-355S].

³² Devin Leonard, *That’s Business, Man: Why Jay Z’s Tidal is a Complete Disaster*, BLOOMBERG BUSINESSWEEK (May 28, 2015), <https://www.bloomberg.com/news/features/2015-05-28/why-jay-z-s-tidal-streaming-music-service-has-been-a-disaster> [https://perma.cc/ULE2-XNHE].

³³ See *Try Now*, *supra* note 27.

³⁴ Marc Schneider, *Jay Z’s Superstar Tidal Backers Have How Many Twitter Followers?*, BILLBOARD (Mar. 30, 2015), <http://www.billboard.com/articles/business/6516951/tidal-backers-twitter-followers> [https://perma.cc/2GSY-H36G].

³⁵ See Leonard, *supra* note 32; see also Sam Sanders, *Jay Z’s Music Service, Tidal, Arrives with a Splash, and Questions Follow*, GEORGIA PUBLIC BROADCASTING (Apr. 1, 2015), <http://www.gpb.org/news/2015/04/01/jay-zs-music-service-tidal-arrives-splash-and-questions-follow> [https://perma.cc/AC5G-P9MT].

cial viability and converted its aura of exclusivity into actual exclusives.³⁶ Several artist-owners chose to release their music as windowed exclusives on TIDAL and, over the course of 2016, 32 albums were available exclusively on the service.³⁷ Each exclusive release saw TIDAL's user base grow dramatically.³⁸ In December 2016, the company released a video entitled *TIDAL 2016: A Year of Exclusives*, embracing and celebrating its status as a destination for exclusive access to "anything that [matters]" in the music industry."³⁹

TIDAL seems committed to this business model: in April 2017, Jay Z, TIDAL's lead investor, removed all of his albums from Apple Music and Spotify and the service continues to tout the exclusivity of its offerings.⁴⁰ Reportedly, the \$200m Sprint investment included a \$75m fund for exclusive content.⁴¹

However, it should be noted that TIDAL has a long way to go before it achieves meaningful market share. TIDAL is notoriously evasive about its subscription data, but in December 2016, paying TIDAL subscribers were reported to represent less than 1% of the global subscription-based streaming market.⁴²

³⁶ See Matt Miller, *How Can Tidal Bounce Back From This One?*, ESQUIRE (Sept. 14, 2016), <http://www.esquire.com/entertainment/music/news/a48590/tidal-is-fcked-lost-millions/> [https://perma.cc/RA6C-PMD5].

³⁷ See *2016 Exclusives*, TIDAL, <http://tidal.com/us/2016exclusives> [https://perma.cc/64M7-CCNK] (last visited Apr. 22, 2017).

³⁸ Cf. Glenn People, *After Beyoncé, Tidal's Exclusive Strategy Remains Its Best (Perhaps Only) Weapon*, BILLBOARD.COM (Apr. 25, 2016), <http://www.billboard.com/articles/business/7341864/tidal-exclusive-content-strategy-beyonce-lemonade> [https://perma.cc/LT6N-9SDX].

³⁹ *2016 Exclusives*, *supra* note 37.

⁴⁰ Jay Z has, however, restored some of his catalog to Apple Music. See David Z. Morris, *Tidal Owner Jay-Z Pulls Every Album from Spotify, Apple Music*, FORTUNE (Apr. 8, 2017), <http://fortune.com/2017/04/08/tidal-jay-z-spotify-apple/> [https://perma.cc/7S49-U5RV]. See also TIDAL, <http://tidal.com/us> [https://perma.cc/S5XG-ZUZV] (last visited Jan. 24, 2018).

⁴¹ Saqib Shah, *Tidal May Only Have Enough Cash Left to Last Six Months*, ENGADGET (Dec. 13, 2017), <https://www.engadget.com/2017/12/13/tidal-jay-z-financial-trouble/>, [https://perma.cc/4MDZ-9ZB8].

⁴² See Tim Ingham, *Smashed by Spotify, can Tidal Find a Future Which Doesn't End Badly?*, MUSIC BUSINESS WORLDWIDE (Jan. 22, 2017), <https://www.musicbusinessworldwide.com/smashed-by-spotify-can-tidal-find-a-future-which-doesnt-end-badly/> [https://perma.cc/73Q7-L9VT].

III. ANTITRUST ISSUES SURROUNDING EXCLUSIVE NFL BROADCASTING RIGHTS

A. Historical Background

1. The Sherman Antitrust Act's Statutory Protections

Section 1 of the Sherman Antitrust Act prohibits contracts or conspiracies in restraint of interstate trade or commerce.⁴³ In *Standard Oil Co. of New Jersey v. United States*, the Supreme Court of the United States applied the common law's "rule of reason" approach to extend the statute's reach beyond inherently, or *per se*, anticompetitive practices.⁴⁴ A plaintiff must be able to show that there is an agreement between two or more persons, that the agreement is intended to harm competition, and that there was actual harm.⁴⁵

Section 2 more specifically targets "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" trade.⁴⁶ A plaintiff must be able to show that there is a defined market in which the defendant is alleged to have monopoly power, that the defendant intended to acquire and maintain that power through illegal means (as distinguished from market dominance as a consequence of a superior product, business acumen, or historic accident), and that the defendant, does in fact, have monopoly power.⁴⁷

2. The Evolution of the Sports Broadcasting Act of 1961

In *United States v. National Football League* ("NFL I"), the United States Department of Justice brought suit against the NFL and its member teams, alleging that certain by-laws in the NFL Constitution illegally restrained the broadcasts of the league's games.⁴⁸ Article X of the NFL Constitution prohibited individual teams from selling broadcast rights in any market other than their own on days that the target market's local NFL team was

⁴³ Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

⁴⁴ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 67–68 (1911).

⁴⁵ See *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

⁴⁶ Sherman Antitrust Act, 15 U.S.C. § 2 (2012).

⁴⁷ See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1368 (2d Cir. 1988).

⁴⁸ See *United States v. Nat'l Football League*, 116 F.Supp. 319, 321 (E.D. Pa. 1953).

playing at home or was broadcasting its away game.⁴⁹ The DOJ alleged this was a classic example of unreasonably restricting competition by allocating marketing territories amongst competitors.⁵⁰

However, the *NFL I* court held that the allocation of marketing territories was not a *per se* violation of antitrust law. In a narrow ruling, the court determined that only the restriction on sale of rights when a local team was *broadcasting its own away game* was a violation.⁵¹ Applying the rule of reason standard, the *NFL I* court held that the restriction on broadcasting when a target market's local team was physically playing at home did *not* violate Section 1 of the Sherman Act, because it did not *unreasonably* restrict competition.⁵² Rather, the court reasoned, restricting the projection of games into the home territories of other teams actually *promoted* competition, by protecting weaker teams from stronger ones and ultimately keeping its teams at approximately equal strength.⁵³ Accordingly, the *NFL I* court ruled that such restrictions were not anticompetitive.

Years later, in *United States v. National Football League* ("*NFL II*"), the NFL sought an interpretation of the final judgment in *NFL I* that would affirmatively uphold the legality of the NFL's recently negotiated broadcasting agreement with CBS.⁵⁴ The agreement granted to CBS the sole and exclusive right to televise substantially all NFL games.⁵⁵ However, the *NFL II* court construed *NFL I* to mean that the NFL-CBS agreement did indeed constitute an unreasonable restraint of trade because it required member teams to eliminate competition amongst themselves, by means of horizontal agreement, in the sale of their television rights.⁵⁶

In direct response to the *NFL II* decision, Congress passed the Sports Broadcasting Act of 1961 ("*SBA*").⁵⁷ The Act affords any professional football, baseball, basketball or hockey league an explicit statutory exemption from the Sherman Act.⁵⁸ The exemption precludes from antitrust review any

⁴⁹ Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 531–32 (2014).

⁵⁰ Nat'l Football League, 116 F.Supp. at 322.

⁵¹ *Id.* at 330.

⁵² *Id.*

⁵³ *Id.* at 325.

⁵⁴ Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sport Leagues*, 54 DEPAUL L. REV. 1237, 1245 (2005).

⁵⁵ *United States v. Nat'l Football League*, 196 F.Supp. 445, 446 (E.D. Pa. 1961).

⁵⁶ The NFL-CBS deal required all NFL teams to pool their television rights to be sold as a packaged bundle. *Id.* at 447.

⁵⁷ Kaiser, *supra* note 54, at 1245.

⁵⁸ Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

agreements such leagues may enter into in order to sell the pooled rights of their member teams in the “sponsored telecasting” of their games.⁵⁹ The SBA legislatively overruled *NFL II* and allowed the NFL-CBS agreement to bypass antitrust review.⁶⁰

3. The Limited Scope of the Sports Broadcasting Act of 1961

The Third Circuit has held that the SBA applies only to sponsored telecasts of professional sports games.⁶¹ In *Shaw v. Dallas Cowboys Football Club, Ltd.*, plaintiffs alleged that the NFL member teams’ agreement to jointly sell broadcast rights to DirecTV violated the Sherman Act.⁶² Denying the NFL’s motion to dismiss, the *Shaw* court held that the term “sponsored telecasting” as used in the SBA refers only to free commercial television, not to paid subscription-based satellite television, and ruled that the SBA does not exempt the NFL-DirecTV deal from antitrust review.⁶³

The SBA’s limited scope was again confirmed in *Kingray, Inc. v. National Basketball Association*.⁶⁴ In a complaint similar to the one recently brought against the NFL and DirecTV for their “NFL Sunday Ticket” agreement,⁶⁵ plaintiffs alleged that the National Basketball Association and DirecTV violated state and federal antitrust law by exclusively granting DirecTV the rights to broadcast out-of-market NBA basketball games.⁶⁶ Though the *Kingray* court ultimately rejected the plaintiffs’ theories under the Sherman Act, it explicitly declared that the SBA did not shield the case from antitrust review because “sponsored telecasting” under the SBA does not include cable, pay-per-view, or satellite television.⁶⁷

⁵⁹ See *id.*

⁶⁰ Kaiser, *supra* note 54, at 1245–46.

⁶¹ See *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999).

⁶² *Id.* at 299–300.

⁶³ On interlocutory review, the court did not reach the question of whether the NFL-DirecTV agreement actually violates antitrust law and the case was later settled without resolving the question. *Id.* at 302–03. See also *Chicago Pro. Sports Ltd. P’Ship v. Nat’l Basketball Assoc.*, 808 F. Supp. 646, 649–50 (N.D. Ill. 1992).

⁶⁴ *Kingray, Inc. v. Nat’l Basketball Assoc.*, 188 F.Supp.2d 1177, 1183 (S.D. Cal. 2002).

⁶⁵ See generally Ashley Cullins, *NFL, DirecTV Defeat “Sunday Ticket” Lawsuit*, THE HOLLYWOOD REPORTER (June 30, 2017, 3:10 PM), <https://www.hollywoodreporter.com/thr-esq/nfl-directv-defeat-sunday-ticket-lawsuit-1018317> [https://perma.cc/9832-HVM9].

⁶⁶ *Kingray*, 188 F.Supp.2d at 1182.

⁶⁷ *Id.* at 1183.

B. *The Recent “NFL Sunday Ticket” Controversy*

1. The NFL-DirecTV Agreement

In 2014, DirecTV signed an eight-year extension to its agreement with the NFL for exclusive rights to broadcast out-of-market games in the US.⁶⁸ The deal allows DirecTV to continue offering “NFL Sunday Ticket,” one of its key products, through the 2022–23 NFL season. NFL Sunday Ticket is a premium subscription-based package that provides customers with access to all Sunday afternoon games broadcast on Fox and CBS, regardless of their location in the US. Residential DirecTV subscribers pay a fixed charge either for satellite TV service that includes the Sunday Ticket package or for a live streaming service accessible via connected devices such as computers, tablets and game consoles.⁶⁹ Commercial subscribers, such as bars and restaurants, pay fees based on the maximum occupancy of their premises.⁷⁰ In 2015, the least expensive commercial package was \$1,458 per season and the most expensive exceeded \$120,000.⁷¹

The \$12 billion deal means that DirecTV will pay the NFL an average of \$1.5 billion per year through 2023.⁷² Though DirecTV only recoups a portion of this cost through subscription fees, Sunday Ticket’s value as a loss leader in DirecTV’s overall offerings was confirmed when AT&T acquired DirecTV for \$49 billion in 2015.⁷³ AT&T conditioned its acquisition offer on the extension of DirecTV’s exclusive agreement with the NFL.⁷⁴ It reserved the right to terminate the merger if DirecTV failed to secure the exclusive distribution rights needed to maintain the Sunday Ticket service.⁷⁵

⁶⁸ Great Speculations, *DirecTV Extends its Deal with NFL for \$12 Billion*, FORBES (Oct. 8, 2014, 8:42 AM), <https://www.forbes.com/sites/greatspeculations/2014/10/08/directv-extends-its-deal-with-nfl-for-12-billion/#401cc4d6639b> [https://perma.cc/87BC-6T4N].

⁶⁹ *Id.* See also John Breech, *NFL Sunday Ticket Available to More Viewers without DirecTV Subscription*, CBS SPORTS (Aug. 10, 2015), <http://www.cbssports.com/nfl/news/nfl-sunday-ticket-available-to-more-viewers-without-directv-subscription/> [https://perma.cc/SC3P-35BH], (standalone streaming service offered by AT&T, which acquired DirecTV in 2015).

⁷⁰ Complaint at 10, *Jammers, Inc. v. Nat’l Football League*, No. 2:15-CV-06959 (C.D. Cal. Sept. 3, 2015).

⁷¹ *Id.* at 11.

⁷² Great Speculations, *supra* note 68.

⁷³ Thomas Gryta, *AT&T Closes \$49 Billion DirecTV Buy*, WALL STREET JOURNAL, July 24, 2015, <https://www.wsj.com/articles/at-t-closes-49-billion-directv-acquisition-1437766932> [https://perma.cc/WLX2-45BU].

⁷⁴ *Jammers* complaint, *supra* note 70, at 12.

⁷⁵ *Jammers* complaint, *supra* note 70, at 9.

2. Plaintiffs' Class Action Complaint

In December 2015, the United States Judicial Panel On Multidistrict Litigation centralized 26 pending lawsuits related to DirecTV's "NFL Sunday Ticket" package.⁷⁶ Per the holding in *Shaw*, the NFL-DirecTV agreement was subject to antitrust review.⁷⁷ Accordingly, the Central District of California ("CDCA") was appointed to review the plaintiffs' allegations that the NFL-DirecTV agreement constitutes anticompetitive conduct.⁷⁸

The putative class members were customers who had purchased a subscription to DirecTV's NFL Sunday Ticket package.⁷⁹ Citing the United States Supreme Court decision in *National Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Oklahoma*, plaintiffs asserted that the NFL-DirecTV agreement unreasonably restrains trade because it "raises prices, lowers output, or renders output unresponsive to consumer preference."⁸⁰

Plaintiffs' first claim was a charge of vertical collusion under Section 1 of the Sherman Act: they alleged that defendants—the NFL, its member teams and DirecTV—entered into an agreement with the intent and effect of restraining horizontal competition amongst DirecTV and its peer multichannel video programming distributors ("MVPDs").⁸¹ Plaintiffs argued that this allowed DirecTV to charge supra-competitive prices and reduce overall market output.⁸²

The complaint also claimed that defendants were in violation of Section 2 of the Sherman Act because DirecTV had willfully acquired and maintained monopoly power in the market for live distribution of NFL games, and the NFL had acted with the intent to do so.⁸³

⁷⁶ See DirecTV's Opposition to Plaintiff Lippincott's Motion to Remand at 4, *In re Nat'l Football League's "Sunday Ticket" Antitrust Litig.*, No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Mar. 15, 2016).

⁷⁷ See *Shaw*, 172 F.3d at 303.

⁷⁸ See DirecTV's Opposition to Plaintiff Lippincott's Motion to Remand at 7, *In re Nat'l Football League's "Sunday Ticket" Antitrust Litig.*, No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Mar. 15, 2016).

⁷⁹ See *id.* at 3–4.

⁸⁰ Jammers complaint, *supra* note 70, at 7.

⁸¹ See *id.* at 36.

⁸² *Id.* at 28, 37.

⁸³ *Id.* at 38.

3. Defendant NFL's Motion to Dismiss

The NFL moved to dismiss this class action for failure to state a claim.⁸⁴ It rested its motion to dismiss on four primary justifications. First, the NFL contended that plaintiffs' claims under Section 1 of the Sherman Act failed because exclusive distribution agreements such as the NFL-DirecTV contract do not violate antitrust law *per se* and the NFL-DirecTV agreement, in particular, could not be shown to have anticompetitive effect.⁸⁵ The NFL cited both binding and persuasive authority to establish that exclusive vertical agreements like the NFL-DirecTV contract are "presumptively legal" under antitrust law because they can have pro-competitive and pro-consumer effects.⁸⁶ The league went on to assert that its DirecTV agreement actually benefits competition by incentivizing MVPDs like DirecTV to differentiate their content offerings and by increasing output of NFL broadcasts overall (as measured by viewership) because DirecTV is incentivized to invest in Sunday Ticket marketing.⁸⁷

Second, the NFL argued that plaintiffs failed to allege a relevant market to support their antitrust claims.⁸⁸ The league rejected the plaintiffs' assertion that the DirecTV agreement disrupted the "market for 'the live video presentation of regular season NFL games'" or any "sub-market" for out-of-market games.⁸⁹ The NFL argued that such "gerrymandered, made-for-litigation" markets are too narrow to be considered legitimate markets over which either the NFL or DirecTV could be said to exercise illegal restraint.⁹⁰

Third, the NFL argued that the plaintiffs—Sunday Ticket subscribers—lack antitrust standing because they are not participants in the market in

⁸⁴ See Reply in Support of the NFL Defendants' Motion to Dismiss at 5, *In re Nat'l Football League's "Sunday Ticket" Antitrust Litig.*, No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Dec. 12, 2016).

⁸⁵ See Memorandum in Support of the NFL Defendants' Motion to Dismiss at 4, *In re Nat'l Football League's "Sunday Ticket" Antitrust Litig.*, No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Aug. 8, 2016).

⁸⁶ *Id.* at 6; *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (rejecting "exclusive distributorship theory" as basis for antitrust claims). See also *Kingray, Inc. v. NBA, Inc.*, 188 F.Supp.2d 1177, 1188 (S.D. Cal. 2002); *Spinelli v. Nat'l Football League*, 96 F.Supp.3d 81, 116 (S.D.N.Y. 2015).

⁸⁷ See Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 84, at 3, 6.

⁸⁸ Memorandum in Support of the NFL Defendants' Motion to Dismiss, *supra* note 85, at 14.

⁸⁹ *Id.*

⁹⁰ See *id.* at 17–19.

which they allege antitrust injury.⁹¹ The league distinguished the market for broadcast rights and the market for live video presentations.⁹² It compared prices in the NFL broadcast rights market against the prices of the live video presentation market plaintiffs participate in (to purchase products like Sunday Ticket) by highlighting the stark difference between the 10-figure offers for NFL broadcast rights and Sunday Ticket subscription fees that typically range from \$250 for individual consumers and \$2,300 for commercial enterprises.⁹³

Finally, the NFL asserted that any claims under Section 2 of the Sherman Act must fail because plaintiffs cannot establish the necessary elements for actual monopolization.⁹⁴ According to the league, plaintiffs not only failed to show standing or a relevant market but also failed to show specific intent to acquire illegal monopoly power (as distinguished from natural and reasonable merit-driven growth) or any actual antitrust injury in the broadcast rights market.⁹⁵

4. Central District of California Decision to Dismiss Plaintiffs' Claims

In June 2017, in *In re Nat'l Football League's Sunday Ticket Antitrust Litigation* ("*In re Sunday Ticket*") Judge O'Connell granted the NFL's motion to dismiss and dismissed both claims in the plaintiffs' class action—under Sections 1 and 2 of the Sherman Act, respectively—with prejudice.⁹⁶

The *In re Sunday Ticket* court first examined the plaintiffs' claim of vertical collusion between the NFL, its member teams, and DirecTV, brought under Section 1 of the Sherman Act. Before beginning its analysis, the court bifurcated the plaintiffs' claim to look separately at the vertical agreement between the NFL and DirecTV, on the one hand, and the horizontal agreement between the NFL and its member teams, on the other.⁹⁷

In evaluating the former, the court first established that plaintiffs did, indeed have standing to challenge the vertical agreement.⁹⁸ It rejected the NFL's argument that the market for broadcast rights and the market for live video presentations were distinct and, rather, asserted that they are "two

⁹¹ See *id.* at 19–20.

⁹² See *id.*

⁹³ See *id.* at 20.

⁹⁴ See *id.* at 24–25.

⁹⁵ See *id.*

⁹⁶ See *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, No. ML15-02668-BRO (JEMX), 2017 WL 3084276, at *21 (C.D. Cal. June 30, 2017).

⁹⁷ See *id.* at *8.

⁹⁸ See *id.* at *9.

sides of the same coin.”⁹⁹ The court held that the plaintiffs had standing because they were, like DirecTV, participants in the market for “broadcast rights for live video presentations”: DirecTV participates in the market at the distributorship level and plaintiffs participate at the consumer level.¹⁰⁰

Having found the plaintiffs’ first claim justiciable, the court sided with the NFL on its substantive arguments. The court held that plaintiffs failed to establish the anticompetitive effect of the vertical agreement because they showed neither its limitation on output nor artificial price inflation.¹⁰¹ Further, the court accepted the defendants’ arguments that the agreement may have other *procompetitive* effects and accordingly dismissed the plaintiffs’ Section 1 claim to the extent that it was based on the NFL-DirecTV agreement.¹⁰²

Turning to the horizontal agreement between the NFL and its member teams, the CDCA court again found the collaboration was not anticompetitive and dismissed the plaintiffs’ remaining Section 1 claim.¹⁰³ Although the court denied that the statutory protections of the SBA applied, it held that the agreement was necessary to produce the game broadcasts and affirmed the defendants’ argument that plaintiffs did not have standing to challenge it regardless.¹⁰⁴

The court took a similarly nuanced view about whether plaintiffs had pleaded a viable market. Although it found that the “live presentation of professional football games” was a viable market, as plaintiffs claimed, the court held that plaintiffs did not adequately show that defendants had or could have restrained trade within it.¹⁰⁵ Further siding with the defendants, it held that the submarket of “out-of-market football broadcasts” was too narrow to support a claim under Section 1 of the Sherman Act.¹⁰⁶

Finally, the CDCA court also dismissed the plaintiffs’ claims under Section 2 of the Sherman Act, finding that—per the defendants’ rebuttal—

⁹⁹ *Id.* See also Memorandum in Support of the NFL Defendants’ Motion to Dismiss at 19–20, *supra* note 85.

¹⁰⁰ See *In re Nat’l Football League’s Sunday Ticket Antitrust Litig*, *supra* note 96, at *9.

¹⁰¹ See *id.* at *10–12.

¹⁰² *Id.* at *12–13.

¹⁰³ See *id.* at *17.

¹⁰⁴ See *id.* at *16 (“Plaintiffs do not directly purchase Sunday Ticket from the NFL Defendants. . . Accordingly, Plaintiffs do not have standing to sue. . . with respect to the horizontal agreements.”).

¹⁰⁵ *Id.* at *18.

¹⁰⁶ *Id.* at *19.

plaintiffs had failed to adequately plead specific intent to monopolize or actual antitrust injury.¹⁰⁷

Stating that the plaintiffs' claims fail as a matter of law and that the claims' deficiencies could not be cured by additional facts, Judge O'Connell dismissed the suit with prejudice.¹⁰⁸

IV. COMPARING "NFL SUNDAY TICKET" AND TIDAL'S EXCLUSIVE RELEASE STRATEGY

A. *Potential Claims Against TIDAL Under Section 1 of the Sherman Act*

As highlighted in the above survey of antitrust issues in sports broadcasting, challenges under Section 1 of the Sherman Act can be brought against parties to both "horizontal agreements" (agreements made between competitors, such as the 32 member teams of the NFL) and "vertical agreements" (made up and down a supply chain, such as the one between the NFL and DirecTV).¹⁰⁹

It may be possible to establish a Section 1 claim against TIDAL's exclusive release agreements by alleging horizontal collusion—either amongst TIDAL's artist-owners or amongst the record labels the artists are signed to. TIDAL's artist-owners may be incentivized to release their music exclusively on TIDAL because, as equity shareholders, they will necessarily benefit from the platform's success.¹¹⁰ If two or more of the artist-owners explicitly agree to release their music exclusively on TIDAL in order to increase user subscriptions, the agreement may be considered a concerted refusal to deal and, thus, a *per se* violation of Section 1.¹¹¹ Once the existence of such an agreement is established, no further inquiry into its actual effect on the market or the parties' intentions is necessary to establish a Section 1 violation.¹¹²

Such horizontal agreements between TIDAL's artist-owners can be distinguished from the protected horizontal agreements referenced in the NFL-DirecTV controversy. While some forms of cooperation between NFL member teams is shielded from antitrust review by the SBA, agreements between

¹⁰⁷ See *id.* at *20.

¹⁰⁸ See *id.*

¹⁰⁹ See *In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015).

¹¹⁰ Sisario, *supra* note 31.

¹¹¹ See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293–94 (1985).

¹¹² *Musical Instruments*, 798 F.3d at 1191.

TIDAL's artist-owners would have no comparable statutory protection.¹¹³ Further, although the NFL argued—and the CDCA court agreed—that any broadcast of NFL games necessarily requires horizontal cooperation because it features intellectual property owned by three parties (two NFL member teams and the league itself), artist-owners could not extend this argument because they could certainly release music without cooperating with other artists.¹¹⁴

On the other hand, Section 1 claims based on vertical collusion would necessarily fail due to TIDAL's limited market penetration at this time.¹¹⁵ The rule of reason analysis would be applied to agreements between TIDAL and an individual artist or record label and such analysis would require proof of actual anticompetitive effect.¹¹⁶ This is in order to account for the fact that some vertical agreements (including exclusive distribution contracts) can promote competition and benefit consumers, as asserted by the NFL with regards to its DirecTV agreement.¹¹⁷ Even if TIDAL did have dominant market share, it could be argued that TIDAL's vertical agreements are presumptively legal and that they actually incentivize TIDAL and its competitors to innovate and invest in their respective music streaming products.

Further, the rule of reason analysis would likely be affected by whether TIDAL chooses to continue investing only in timed exclusives or begins investing more heavily in permanent exclusives that would prevent other streaming services from licensing certain tracks at all. This choice would probably affect a plaintiffs' ability to show actual anticompetitive effect because it would impact the degree to which other streaming services' user bases might suffer as a result of TIDAL's conduct.¹¹⁸

Finally, even if TIDAL did acquire greater market share and plaintiffs could show the anticompetitive effect of its conduct, plaintiffs would also

¹¹³ Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

¹¹⁴ See generally *Washington v. Nat'l Football League*, 880 F.Supp.2d 1004, 1007 (D. Minn. 2012); *Spinelli v. Nat'l Football League*, 96 F.Supp.3d 81, 114 (S.D.N.Y. 2015).

¹¹⁵ Ingham, *supra* note 42. Note, however, that TIDAL's ownership structure makes it difficult to determine whether agreements made to facilitate exclusive releases would be considered horizontal or vertical. For instance, potential parties to a Section 1 claim regarding an exclusive release deal between Madonna and TIDAL could not only include the record label supplying the rights to stream the recordings and TIDAL as a corporate entity, but could also include Madonna as a TIDAL shareholder and Madonna as the singer-songwriter signed to her record label.

¹¹⁶ See *Musical Instruments*, 798 F.3d at 1191–92.

¹¹⁷ *Id.* and Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 84, at 3, 6.

¹¹⁸ See Breen, *supra* note 15.

need to establish antitrust standing by showing they are participants in the market that they allege has been directly restrained. The recent NFL-DirecTV decision indicates this is a delicate matter.¹¹⁹

On the one hand, the *In re Sunday Ticket* court held that the plaintiffs in the NFL-DirecTV suit did not have standing to challenge the horizontal agreement between the NFL and its member teams.¹²⁰ In a hypothetical challenge about horizontal agreements amongst TIDAL's artist-owners, it could similarly be argued that a class action from subscribers should fail because they are indirect purchasers, who do not purchase directly from the artists.¹²¹

On the other hand, Judge O'Connell held that the *In re Sunday Ticket* plaintiffs *did* have standing to challenge the vertical agreement between the NFL and DirecTV.¹²² She rejected the distinction that the NFL drew in its motion to dismiss between the market for exclusive distribution rights (in TIDAL's case, a platform's exclusive right to release certain tracks) and the market for media consumption (in TIDAL's case, subscription-based access to music).¹²³ Thus, in the event of a challenge to the vertical agreements underlying TIDAL's structure, a court may be persuaded that not only other streaming services, but downstream, end-users of the services (i.e., TIDAL's subscribers) would have standing to bring claims under the Sherman Act too.

B. Potential Claims Against TIDAL Under Section 2 of the Sherman Act

Like Section 1 claims based on vertical collusion, Section 2 claims against TIDAL's exclusive release approach would necessarily fail due to its current market share.¹²⁴ However, even in the event that TIDAL achieves greater market penetration and it could be shown that TIDAL or its artist-owners wield monopolistic power in the music streaming market (in either the end-users' market for music streams or the platforms' market for exclusivity rights), plaintiffs would still need to prove TIDAL's specific intent to acquire and maintain that power through illegal means, as distinguished

¹¹⁹ *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, No. ML15-02668-BRO (JEMX), 2017 WL 3084276, at *20 (C.D. Cal. June 30, 2017).

¹²⁰ *Id.* at *16.

¹²¹ See Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 74, at 9.

¹²² *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, No. ML15-02668-BRO (JEMX), 2017 WL 3084276 at *9 (C.D. Cal. June 30, 2017).

¹²³ *Id.* See also Memorandum in Support of the NFL Defendants' Motion to Dismiss, *supra* note 75, at 19–20.

¹²⁴ Ingham, *supra* note 42.

from dominance as a consequence of a superior product or business acumen.¹²⁵

In this hypothetical, it would be interesting to see if TIDAL could argue that its success was not a result of illegal, monopolistic strategy but rather, the result of business acumen. If TIDAL were able to ascend to market dominance by securing scores of exclusive release agreements with top-grossing artists, could TIDAL argue that it was the natural result of its ownership structure and that its decision to attract top-selling artists as investors was a result of its own business acumen? Further, could it argue that its market power was simply driven by consumer preference for a superior product—a platform created “by artists, for artists” that better understands consumer tastes and consumption?

V. CONCLUSION

Against a backdrop of ever-improving technology, such as increased internet bandwidths and faster, smarter devices, as well as rising disposable incomes and increased spending on digital entertainment, industry pundits are bullish on music streaming.¹²⁶ The Goldman Sachs prediction about the state of the music industry in 2030 assumes that streaming will represent \$34 billion—over 80%—of a \$41 billion industry.¹²⁷ In the race to capture this growing lucrative market and in the “content wars” along the way, important questions of competition law will inevitably arise. Though TIDAL’s minimal market share currently shields it from antitrust litigation, both TIDAL and its competitors should proceed with caution as they leverage exclusive content deals to distinguish themselves in the marketplace.

¹²⁵ Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

¹²⁶ See GLOB. INDUS. ANALYSTS, INC., *Music Streaming: A Global Strategic Business Report*, Abstract (2016).

¹²⁷ Ed Christman, *Music Industry Will Hit \$41 Billion by 2030 According to New Goldman Sachs Report*, BILLBOARD.COM (Aug. 29, 2017), <https://www.billboard.com/articles/business/7949040/music-industry-will-hit-41-billion-by-2030-according-to-new-goldman-sachs>, [https://perma.cc/888N-YX2F].

