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A Proposal for Group Licensing of College Athlete NILs

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ABSTRACT

Recent litigation has clarified rules governing the right to publicity and in some cases has expanded opportunities for NCAA college athletes to commercialize their NILs. Those opportunities will likely increase as state and federal legislation allows compensation for NIL-related activities. Drawing from the experience of patent pools and performing rights organizations, this article discusses the economic efficiencies of group licensing and advances a proposal for future licensing of college athlete NILs. A group licensing entity for NILs would serve the dual purposes of enabling college athlete compensation for NIL-related activities while complying with NCAA rules related to competition in college athletics. The NIL licensing

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entity would be created by Congress as a non-profit, quasi-governmental membership organization operating on behalf of college athletes and perform many pro-competitive functions.

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I. INTRODUCTION

Staring down the barrel of a mostly canceled football season, colleges faced an apocalyptic threat to their athletic programs. Even prior to the cancellation of the Big Ten football season, legendary University of Wisconsin Badger football coach Barry Alvarez estimated a loss of $60-$70 million would accrue if football was played with no fans.[5] The losses could have surpassed $100 million if the games were canceled in their entirety. It is not hyperbolic to predict many collegiate sports are in danger of cancellation with the loss of any significant portion of football revenue, the oxygen that powers major athletic programs. Colleges will need to make devastating cuts under even the best-case scenario. The National Collegiate Athletic Association (NCAA) at the same time remains mired in a long and, many would say, damaging legal battle over the rights of college athletes to exploit and profit from their names, images, and likenesses (NIL).

State legislatures and Congress are busy trying to find ways to solve the long-running dispute by mandating often conflicting mechanisms for athletes to be compensated while maintaining their NCAA amateur status. The NCAA has offered preliminary recommendations attempting to draw boundaries around the newly formed NIL playing field. Under these recommendations, however, hundreds of millions of dollars of revenue – which could go to athletes and to colleges facing financial ruin in their athletic departments – will go unearned. Acknowledging that Congress will likely be the final arbiter of conflicting state laws and NCAA guidelines, this article proposes a federally established framework wherein the NCAA could earn substantially more revenue in a dire economic crisis, athletes could earn increased funds from commercializing their NILs, and consumers could obtain the products they want (such as NCAA video games and jerseys of their favorite college players).

The NCAA reacted to the changing legal environment with a series of proposals regarding the commercial use of college athlete NILs. In April 2020 it released the final report of its working group (the "NCAA Report"), which recommends changes that could allow college athletes to receive NIL-related compensation from third-party endorsements and from college athlete work product or business activities.[6] The NCAA Report em-

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[5] *See* Mark Schlabach, *Barry Alvarez Warns Wisconsin Athletics 'At Risk' If Football Season Canceled*, ESPN (July 23, 2020), https://www.espn.com/college-football/story/_/id/29526443/barry-alvarez-warns-wisconsin-athletics-risk-football-season-canceled [https://perma.cc/65UN-2QDX].

[6] *See* Nat'l Collegiate Athletic Ass'n, NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommenda-

phasizes that any activities should maintain distinctions between collegiate and professional athletics and between the business activities of college athletes and those of NCAA-affiliated institutions. For example, the NCAA Report states that "[o]utside the context of providing financial aid up to cost of attendance as allowed by prevailing law, schools, conferences and the NCAA should play no role" in college athletes' NIL activities, and forbids college athletes from using their facilities, uniforms, trademarks or other intellectual property.[7] The report also emphasizes the need to regulate NIL activities by college athletes in the following areas:

- "The compensation earned by student-athletes for NIL activities should represent genuine payments for use of their NIL independent of, rather than payment for, athletics participation or performance."[8]

- "NIL activities must not be contingent on a prospective student-athlete's enrollment at a particular school or group of schools, nor otherwise used as an inducement by a school or booster."[9] The report also recommends safeguards to ensure that "newly permitted activities are not utilized by boosters in a manner that circumvents the divisions' amateurism rules. This should include consideration of the disclosure and enforcement mechanisms that may be necessary to monitor the new NIL activities and payments."[10]

- "The use of agents, advisors and professional services by student-athletes in connection with the NIL activities must be regulated."[11]

- "NIL activities must not interfere with NCAA member institutions' efforts in the areas of diversity, inclusion or gender equity."[12]

The NCAA Report makes a related distinction between commerce involving individual athlete NILs and team-based products that rely on group licenses to the NILs of many players. The NCAA Report recommends no change to its prohibition on activities involving group licensing, based on

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TIONS 22-23 (Apr. 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [https://perma.cc/7CSB-XNJG] [hereinafter NCAA REPORT].

[7] *See id.* at 20.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 25.

[11] *Id.* at 20.

[12] *Id.*

its position that 1) athlete NILs are not legally required in those settings; and 2) group licensing could be difficult because college athletes currently lack a legal structure (e.g., a player's association) similar to those used to negotiate group licenses in professional sports leagues. The NCAA Report also recommends that the NCAA continue to explore whether those legal hurdles can be overcome so that the group licensing issue can be revisited in 2021 or later.[13]

This article responds to the NCAA Report's recommendation by proposing the creation of the College Athlete Licensing Authority (CALA) – a congressionally established, quasi-governmental entity responsible for facilitating the group licensing of college athlete NILs. Following the executive summary, Section III summarizes recent litigation concerning college athlete compensation and the state of related legislation at the state and federal levels. Section IV describes the economic efficiencies of group licensing, drawing from the experience of patent pools and performing rights organizations (PROs) responsible for group licensing of copyrighted music. Those entities have faced significant antitrust scrutiny, like the NCAA has, and have evolved to generate significant benefits for their members and for consumers. Section V discusses specific characteristics of CALA, the proposed group licensing entity.

II. EXECUTIVE SUMMARY

Athletes and other celebrities often assert a right of publicity to use their NILs in a variety of commercial activities. Their right to publicity is governed by state law, which typically prevents unauthorized use of the relevant NILs by third parties. The protection of NIL rights factors heavily in the recent debate over compensation for collegiate athletes. With limited exceptions, the NCAA currently prohibits college athletes from commercializing their NILs via promotions or product endorsements.

Recent litigation has clarified rules governing the right to publicity and in some cases has expanded opportunities for college athletes to commercialize their NILs. For example, in *O'Bannon v. National Collegiate Athletic Association*, the Ninth Circuit ruled against NCAA restrictions on college athlete compensation for their NILs beyond grants-in-aid (tuition, fees, required books, etc.) and ordered the NCAA to allow colleges to offer athletic scholarships to athletes up to the full cost of their attendance (grants-in-aid plus travel expenses, supplies, etc.).[14] *O'Bannon* and other cases

[13] *See id.* at 24.
[14] *See* 802 F.3d 1049, 1074–76 (9th Cir. 2015).

increased public attention to college athlete compensation for NIL-related activities, and soon resulted in state-level reform. The first change occurred in September 2019 with California's SB 206 (The Fair Pay to Play Act, taking effect in 2023), which prohibits universities from preventing college athletes from earning compensation from their NILs.[15] Similar provisions appear in laws passed in Florida, Colorado, and New Jersey, and in bills under consideration in many other states and in Congress.[16]

Group licensing is one of many ways in which college athletes could commercialize their NILs to create team-based products. Two notable examples of group licensing entities – patent pools and performing rights organizations (PROs) – each illustrate the potential economic efficiencies of a group licensing solution for college athlete NILs. Patent pools encourage market adoption by making it easier to license patented technologies. By aggregating patents into a portfolio, a pro-competitive pool combines complementary inputs, negotiates fair and reasonable royalties, and lowers transaction costs by reducing the need for individual licensing agreements. Patent pools also enable the creation of new products and promote innovation.

PROs generate similar efficiencies via group licensing of copyrighted music. Without a PRO, individual musicians would need to locate each music consumer, negotiate a licensing agreement, and administer royalty payments. PROs reduce the musicians' burden by aggregating music copyrights into a portfolio, negotiating a portfolio license, collecting royalties from licensees, and distributing royalties to musicians. PROs also play an enforcement role by monitoring consumer use of copyrighted music and resolving disputes via negotiation or litigation.

The history and experience of patent pools and PROs can inform the structure and operations of a group licensing entity for college athlete NILs. As an independent, non-profit NIL licensing entity, CALA could serve the dual purposes of enabling college athlete compensation for NIL activities while complying with NCAA rules related to: payments by NCAA members, employee status, the role of boosters and agents, and other concerns described above. The NCAA and Congress should consider the likely pro-

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[15] *See* S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019).

[16] *See* Michael McCann, *Latest NIL Bill Overrides States but Leaves Tax and Labor Questions Behind*, SPORTICO (Sept. 29, 2020), https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/ [https://perma.cc/K3Z4-BDXL]; *see also* Demetrius Harvey, *Signed into Law, Florida to Allow College Athletes to Make Money for NIL*, ESPN (June 12, 2020), https://www.si.com/college/florida/football/florida-governor-signs-law-allow-college-athletes-compensation-nil [https://perma.cc/PJM5-7PUF].

competitive benefits of CALA as an alternative to the antitrust exemptions discussed in the NCAA Report and in some legislative proposals. It would have the following roles and responsibilities:

- LEGAL STRUCTURE AND SAFEGUARDS. CALA would be created by Congress as a non-profit, quasi-governmental membership organization operating on behalf of college athletes. Joining would be optional except in the case of team group licensing opportunities for which an entire team was necessary for the licensing. CALA would not be a union nor would it serve as a generalized negotiating body for college athletes other than in the context of NIL activities. In the context of NILs, however, CALA would seek to expand the market for licensed products and introduce antitrust safeguards to prevent anticompetitive conduct.
- LICENSING AND ROYALTY ADMINISTRATION. CALA would negotiate licenses via market-based transactions, determine royalties based on factors other than athletic success, and distribute royalties to college athletes with no administrative support from the NCAA or its members. This layer of removal from the NCAA would allow the NCAA to focus on the rules around competition among amateur athletes.
- COMPLIANCE AND DISPUTE RESOLUTION. CALA would monitor NIL activities for compliance with NCAA rules and applicable laws. It would seek to resolve disputes among college athletes, licensees, the NCAA, and other interested parties through private litigation, arbitration, or an alternative dispute resolution forum created by Congress. Placing this regulatory power in the hands of the current NCAA compliance regime would likely create an adversarial and potentially more litigious relationship between athletes and the NCAA.
- INFORMATION COLLECTION AND REPORTING. CALA would create and maintain a database of college athletes, NIL activities, licensing agreements, royalties, and other relevant information. As a central clearinghouse, it could help identify disguised recruitment efforts and predatory deals.

III. RELEVANT LEGISLATION AND LITIGATION

A. O'Bannon, Keller*, and the Modern Birth of College Athlete NIL Rights*

The beginnings of sea change in college athlete compensation started with a slow ripple on July 21, 2009 when Ed O'Bannon sued the NCAA

and Electronic Arts (EA) in the Northern District of California.[17] Change would not come quickly. The first wave came when Judge Claudia Wilken denied the defendants' motion to dismiss, opening up discovery.[18] The case was combined with another suit brought by former college quarterback Sam Keller, and expanded to include (at-the-time) current players.[19] Discovery revealed several key facts. First, an Electronic Arts deponent revealed that the avatars in its NCAA video game were tied to specific players and their biographical information.[20] Second, plaintiffs obtained the terms of the NCAA's broadcast agreements showing the Pac-12 receiving $185 million in fees in 2013, with expected increases pushing the totals to over $300 million by 2024.[21]

In 2014, EA settled the case against it for $40 million.[22] The case against the NCAA proceeded to a bench trial, with O'Bannon seeking an injunction to enjoin the NCAA from enforcing regulations that prevent Division I football and men's basketball college athletes from receiving compensation for use of their NILs.[23] O'Bannon prevailed. Judge Wilken ruled that the NCAA's restrictions on college athlete compensation violated Section 1 of the Sherman Act.[24] Specifically, she ordered that NCAA must allow colleges to offer full cost-of-attendance scholarships and that colleges must hold up to $5,000 per year in trust for the college athlete upon graduation. On appeal, the Ninth Circuit upheld Wilken's ruling that the NCAA violated the Sherman Act by limiting compensation to college athletes and suggested that "[a]bsent the NCAA's compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs."[25] The Ninth Circuit also agreed that schools must allow for compensation for the full cost of attendance, but, in a win for the NCAA, it rejected the creation of trusts for the athletes.[26] The *O'Bannon* decision focused increasing attention on college athlete compensation, including payments for rights to college athlete NILs. Finally, in 2014, the NCAA settled the *Keller* litiga-

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[17] *See O'Bannon*, 802 F.3d at 1055.

[18] *See* O'Bannon v. National College Athletic Association, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *see also* Jon Solomon, *Timeline: Ed O'Bannon vs. NCAA*, CBS SPORTS (June 6, 2014, 5:58AM), https://www.cbssports.com/college-basketball/news/timeline-ed-obannon-vs-ncaa/ [https://perma.cc/F93F-JVWW].

[19] *See id.*; *see also O'Bannon*, 802 F.3d at 1055.

[20] *See* Solomon, *supra* note 18.

[21] *See id.*

[22] *See id.*; *see also O'Bannon*, 802 F.3d at 1056.

[23] *See* Solomon, *supra* note 18; *see also O'Bannon*, 802 F.3d at 1055-56.

[24] *See O'Bannon*, 802 F.3d at 1056-57.

[25] *Id.* at 1067.

[26] *See id.* at 1079.

tion.[27] The settlement awarded $20 million to Division I men's basketball and Division I Football Bowl Subdivision college athletes who attended certain institutions during the years the video games were sold.[28]

B. Unionization and Employee Status

The NCAA faced a new legal challenge in 2014 when football players at Northwestern attempted to unionize. After an early win for the players at the regional level of the National Labor Relations Board (NLRB), the full NLRB reversed, declining to assert jurisdiction over the matter and stating that a ruling was not likely to further "stability in labor relations."[29] Notably, the NLRB limited the precedential effect of the ruling to only the Northwestern case.[30] While unsuccessful, the Northwestern unionization attempt raised a concern for the NCAA that persists today – that payment of athletes could result in those athletes being classified as employees.

The seminal case relied upon by the NCAA in opposing the recognition of athletes as employees is *Vanskike v. Peters*.[31] *Vanskike* involved a challenge by a prisoner to denial of minimum wage for prison employment. In *Vanskike*, the Seventh Circuit determined that the "economic reality" of a prisoner's work for the state's Department of Corrections for penological purposes was that he was not an "employee" under the Fair Labor Standards Act.[32] With the NLRB demurring on the opportunity in 2015 to examine the "economic reality" of the NCAA athlete in the Northwestern case, the question of whether the athletes constitute employees remains open. Since the Northwestern decision, there have been at least two more challenges seeking a ruling that NCAA athletes constitute employees. In 2019, the Ninth Circuit rejected a purported claim by former USC football player Lamar Dawson who asserted that the NCAA and Pac-12 qualified as his employer under the Fair Labor Standards Act and state law.[33] In November 2019, Trey Johnson, a former Villanova football player, sued the NCAA for

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[27] *See* Press Release, Donald Remy, NCAA Reaches Settlement in EA Video Game Lawsuit, NAT'L COLLEGIATE ATHLETIC ASS'N (June 9, 2014), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit [https://perma.cc/F9FC-RFJL].

[28] *See id.*

[29] Nw. Univ. & C. Athletes Players Ass'n, 362 NLRB 1350, 1350 (2015).

[30] *See id.*

[31] 974 F.2d 806 (7th Cir. 1992).

[32] *See id.* at 808.

[33] *See generally* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (2019); *see also* Dan Eaton, *9th Circuit: College Football Players Not NCAA Employees,* SAN DIEGO UNION TRIBUNE, Sep. 2, 2019, https://www.sandiegouniontribune.com/busi

violation of minimum wage laws based on the failure to pay football players.[34] The complaint contrasts the players with the other student employees who work the football games in various capacities such as ticket-takers and receive compensation while the players receive no direct compensation.[35]

C. Alston v. NCAA *and Direct Consideration of "Pay for Play"*

In *Alston v. NCAA* (filed in 2014), the athlete plaintiffs sued the NCAA and eleven conferences challenging the core amateurism rules of the NCAA as violative of the antitrust laws.[36] The suit sought nothing less than to "dismantle the NCAA's entire compensation framework."[37] Part of the case settled prior to trial when the NCAA agreed to pay more than $200 million to a group of 40,000 former football, men's basketball, and women's basketball players who did not receive compensation for the full cost of attendance before NCAA rules changed in 2015.[38] After a ten day bench trial in 2019, Judge Wilken determined that the NCAA's limits on non-cash educational aid violated Section 1 of the Sherman Act.[39] She enjoined further application of those limits. In a critical victory for the NCAA, however, Judge Wilken found that the NCAA's limits on compensation (not tied to education) did not violate Section 1. The ruling, which was stayed on appeal, allows colleges to grant additional educational aid (such as computers or musical instruments), but rejects attempts to create an open market compensation system for the athletes. The district court significantly credited the NCAA's core argument that consumers value amateurism and this provides a pro-competitive justification for the limits on non-education related cash benefits. In May 2020, the Ninth Circuit upheld Judge Wilken's rul-

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ness/story/2019-08-30/9th-circuit-college-football-players-not-ncaa-employees [https://perma.cc/75B5-XTZ9].

[34] *See generally* Complaint, Johnson v. Nat'l Collegiate Athletic Ass'n, 2019 WL 5847321 (E.D. Pa. Nov. 6, 2019) (No. 2:19-cv-05230).

[35] The Johnson case follows a similar case brought in the same court by a Villanova teammate that was voluntarily dismissed. *See generally* Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Nov. 9, 2018).

[36] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061-62 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020).

[37] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1247 (9th Cir. 2020).

[38] *See* Alex Kirshner, *The NCAA's Scholarship Rules Are Now Illegal, But Players Still Won't Get Paid*, SB NATION (Mar. 9, 2019), https://www.sbnation.com/2018/9/18/17872150/ncaa-case-verdict-ruling-explained.

[39] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap, 375 F. Supp. 3d at 1109.

ing opening up expanded education related benefits and preserving the NCAA's caps on non-education related payment.[40] The Supreme Court recently granted certiorari in *Alston* on an appeal by the NCAA.[41]

D. State and Federal Legislation

While the *O'Bannon, Keller* and *Alston* cases fundamentally broke barriers for college athlete compensation, the moderate pace of change accelerated to a sprint as states began to take up the athletes' cause. California was first with a law that, as of January 2023, will allow college athletes to hire agents and be paid for endorsements.[42] The law makes it illegal for California colleges to deny compensation to college athletes for the use of their NILs. Specifically, the law permits college athletes to negotiate an endorsement deal with a clothing manufacturer, work a camp, or appear as an avatar in a video game. The law also prohibits retaliation against college athletes for NIL-related activities. The legislation fundamentally accomplished what the *O'Bannon* suit sought to achieve in 2009 in allowing athletes to commercialize their NILs while in college.

Colorado, Florida, and New Jersey recently passed similar laws allowing college athlete compensation for NIL activities. Florida's law goes into effect in July 2021,[43] Colorado's in 2023,[44] and New Jersey's in 2025.[45] These and other state efforts have heightened NCAA concerns that a fragmented set of state laws will undermine competition in college athletics by steering college athletes towards states offering the most lucrative NIL opportunities. Commissioners of the five largest conferences in college sports echoed those concerns, and called on Congress to establish a "single, national standard for NIL."[46] The NCAA report discussed in Section I recom-

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[40] *See* In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap, 958 F.3d at 1265–66.

[41] Nat'l Collegiate Athletic Ass'n v. Alston, 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 592 U.S. ___ (U.S. Dec. 16, 2020) (No. 20-512).

[42] *See* S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019).

[43] *See* S.B. 646, 122nd Reg. Sess. (Fl. 2020).

[44] *See* S.B. 123, 72nd Gen. Assemb., 2nd Reg. Sess. (Col. 2020).

[45] Suzette Parmley, *Murphy Signs Bill Paying NJ College Athletes and Allowing Them to Hire Attorneys/Agents*, LAW.COM (September 14, 2020, 9:03 PM), https://www.law.com/njlawjournal/2020/09/14/murphy-signs-bill-paying-nj-college-athletes-and-allowing-them-to-hire-attorneysagents/ [https://perma.cc/XQV6-DG47].

[46] Ryan Kartje, *Power Five Conferences Reportedly Ask Congress to Enact Name, Image and Likeness Policy*, LA TIMES (May 29, 2020, 1:25PM), https://www.latimes.com/sports/story/2020-05-29/power-5-conferences-ask-congress-policy-name-image-likeness-nil.

mends that the NCAA engage Congress to ensure federal preemption over state NIL laws; establish an antitrust exemption for the Association; safeguard the nonemployment status of college athletes; maintain the distinction between student-athletes and professional athletes; and uphold the NCAA's values including diversity, inclusion, and gender equity.[47]

Congress is currently considering at least three proposals related to college athlete NILs that seek to balance commercialization of NILs with appropriate compliance. Senators Cory Booker (D-NJ) and Richard Blumenthal (D-CT) recently proposed an athlete "Bill of Rights," which would allow college athletes to: monetize their NIL rights "both individually and on a group basis," negotiate revenue-sharing agreements, and have a voice in the regulation of NIL deals.[48] The Bill of Rights proposal includes requirements that schools provide "essential health and safety measures with real enforcement mechanisms."[49] Senator Marco Rubio (R-FL) in June 2020 introduced the "Fairness in Collegiate Athletics Act" (S. 4004).[50] Sen. Rubio's proposal sets out "[t]o ensure that college athletes, and not institutions of higher education, are able to profit from their name, image, and likeness . . . ."[51] If the bill were to become law, the NCAA would have until June 30, 2021 to establish a policy permitting college athletes to receive compensation for their NILs from people or entities outside of their own universities while ensuring "appropriate recruitment." Any such policy must "preserve the amateur status of college athletes" and require college athletes to report any compensation from their NILs to their universities.[52] Moreover, the Act would shield the NCAA and universities from private lawsuits based on their adoption or enforcement of a compliant NIL policy and preempt state laws on the matter.[53] The NCAA "commend[ed] Senator Rubio for introducing this critical piece of federal legislation to support amateur athletes."[54]

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[47] *See* NCAA Report, *supra* note 6, at 27.

[48] Zachary Zaggar, *Sens. Call for NCAA Athlete 'Bill of Rights' Amid Pay Debate*, Law360 (July 23, 2020), https://www.law360.com/articles/1294117/sens-call-for-ncaa-athlete-bill-of-rights-amid-pay-debate [https://perma.cc/TH9T-23WZ].

[49] *Id.*

[50] *See* Fairness in College Athletics Act, S.B. 4004, 116th Cong., 2nd Sess. (2019-2020).

[51] *Id.*

[52] *Id.* at § 3.

[53] *See id.* at §§ 4–5.

[54] NCAA, *NCAA Statement on Sen. Marco Rubio Bill,* Nat'l Collegiate Athletic Ass'n (June 18, 2020, 2:33 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-sen-marco-rubio-bill [https://perma.cc/6MUV-D6C8].

Representative Anthony Gonzalez (R-OH) and Representative Emanuel Cleaver (D-MO) introduced a third bill in September 2020.[55] The Student Athlete Level Playing Field Act is the only one of these three proposals with bipartisan support.[56] It would preempt state law and restrict athletes from reaching endorsement deals with certain businesses (alcohol, marijuana, etc.), but it would permit them to enter agreements that would conflict with their institution's partnerships.[57] The Act would be enforced by the FTC.[58] Each of the three legislative proposals seek to expand moderated opportunities for both the NCAA and the athletes.

IV. ECONOMIC EFFICIENCIES OF GROUP LICENSING

Analyzing the competitive effects of group licensing raises several issues at the intersection of IP and antitrust. Group (or package) licensing involves bundling of individual IP rights to realize several economic efficiencies. According to the latest DOJ Antitrust Guidelines for Licensing IP, pooling arrangements "may provide pro-competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation."[59] The guidelines also warn against potential anticompetitive effects of group licensing – e.g., "collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions . . . if they do not contribute to an efficiency-enhancing integration of economic activity . . ."[60]

Group licensing leads to efficient royalties by addressing two well-known economic problems. First, it solves the complements problem arising when two (or more) holders of complementary IP set royalties independently; in that case, a single royalty for the IP bundle is less than the com-

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[55] Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).

[56] Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress,* SPORTS ILLUSTRATED (Sep. 24, 2020), https://www.si.com/college/2020/09/24/name-image-likeness-bill-congress-endorsements [https://perma.cc/ZMB5-C79A]

[57] *Id.*

[58] Michael McCann, *Latest NIL Bill Overrides States But Leaves Tax And Labor Questions Behind,* Sportico (Sep. 29, 2020), https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/ [https://perma.cc/92TS-LXCK]

[59] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 30 (2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/Q57Z-2CCA].

[60] *Id.*

bined royalties that would be set by the individual IP holders.[61] Second, group licensing reduces the potential for individual IP holders to exploit bargaining power advantages in licensing negotiations. If licensing negotiations for necessary IP rights occur long after manufacturers have developed an infringing product, then the licensor gains a negotiating advantage arising from its ability to shut down production via an injunction. In that case, royalties may exceed the amounts that would have been negotiated earlier, when licensors had a choice of which IP to adopt. Group licensing reduces such "hold up" opportunities by bundling and negotiating IP rights with licensors before production begins.[62] By combining complementary inputs with efficient royalties, group licensing may also enable creation of new products and encourage innovation.[63]

Group licensing may also generate substantial efficiencies derived from scale economies in which a single entity performs administrative services for group members. Regardless of whether individual IP right are complements or substitutes, group licensing enables efficiencies in activities such as 1) licensing and royalty administration; 2) compliance and dispute resolution; and 3) information collection and reporting.

This section considers the economic efficiencies of group licensing in two specific settings – patent licensing by patent pools and copyright licensing by PROs. Neither patent pools nor PROs provide a perfect template for group licensing of NILs, especially in light of evolving legislation and NCAA rules. However, the lessons learned from the patent and copyright settings provide useful guidelines for CALA proposed in Section V.

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[61] *See* CARL SHAPIRO, NAT'L BUREAU ECON. RES., NAVIGATING THE PATENT THICKET: CROSS LICENSES, PATENT POOLS, AND STANDARD SETTING 121 (Jan. 2001).

[62] *Id.* at 124–26.

[63] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N: ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 60 (2007).

A. Group Patent Licensing – Patent Pools

Patent pools operate as a group licensing entity for licensors of patents related to a given technology.[64] In many cases, the pool forms around a technology standard, or set of procedures defining a solution to a given technological problem. For example, MPEG-LA operates a patent pool related to the technologies used for charging electric vehicles (EV). According to MPEG-LA: "[w]ithout easy, affordable access to these important technologies, EV charging suppliers face risk, uncertainty and potential for conflict that will delay market adoption."[65]

Patent pools encourage market adoption by making it easier to license patented technologies. Licensors hold patents required to implement the standard, and typically license their patents to the pool (and often to each other via cross-licenses) on a non-exclusive basis. The pool collects those patents into a portfolio license offered to manufacturers of standard-compliant products. By aggregating patents into a portfolio, the pool combines complementary inputs and lowers transactions costs by reducing the need for individual licensing agreements. Transaction cost savings can be significant, especially in situations with large numbers of licensors when the pool can negotiate on their behalf. Prior studies suggest a cost of $50,000 to negotiate a single patent license, and estimated transaction cost savings of approximately $400 million for the MPEG patent pool and $600 million for the HVEC patent pool.[66] Patent pools also enable efficiencies in royalty collection from portfolio licensees and in royalty distribution to pool members.

Coordinated activities by patent pools naturally raise concerns about competitive effects. In the late 1990s the DOJ evaluated those concerns in

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[64] *See* ROBERT P. MERGES, INSTITUTIONS FOR INTELLECTUAL PROPERTY TRANSACTIONS: THE CASE OF PATENT POOLS IN EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 10-11 (1999), https://www.researchgate.net/publication/246482548_Institutions_for_Intellectual_Property_Transactions_The_Case_of_Patent_Pools [https://perma.cc/G6JC-G73R]; Shapiro, *supra* note 61, at 127; Josh Lerner & Jean Tirole, *Efficient Patent Pool*s, 94 AM. ECON. REV. 691, 691–711 (2004); U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION: ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 64 (2007) [hereinafter ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS].

[65] *EV Charging Patent Portfolio License Briefing*, MPEGLA (Sept. 25, 2020), https://www.mpegla.com/wp-content/uploads/EVCHARGINGWEB.pdf [https://perma.cc/G3KW-84UJ].

[66] Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1507 (2001); Robert P. Merges & Michael Mattioli, *Measuring the Costs and Benefits of Patent Pools*, 77 OHIO ST. L.J. 281, 324 (2017).

Business Review Letters to the MPEG-2 patent pool and to two patent pools for DVD technology.[67] The DOJ concluded that each pool would "create substantial integrative efficiencies" and warned against potential restraints on competition within the pool itself or among downstream products practicing the pooled patents.[68] The FTC found evidence of such restraints in its investigation of the Summit-VISX pool, which was disbanded following a consent decree.[69]

In 2007, the DOJ and FTC published a joint report concerning antitrust enforcement and IP rights. That report indicated the agencies would analyze patent pools under the rule of reason and apply the following guidelines[70]:

- Combining complementary patents within a pool is generally pro-competitive, while including substitute patents in a pool does not make the pool presumptively anticompetitive.
- The agencies will not generally assess the reasonableness of royalties set by a pool. The focus of the agencies' analysis is on the pool's formation and whether its structure would likely enable pool participants to impair competition.
- Pool licensing provisions that require the licensing of all (not just some) of the pool's intellectual property do not generally raise competitive concerns if the licensors retain the ability to license their patents individually and the pool's design is otherwise pro-competitive.

Patent pools are typically responsible for negotiating license agreements, as well as collecting royalties from licensees and distributing them to patent holders. In many cases, those activities are performed by a licensing administrator acting on behalf of pool members. For example, the MPEG-2 patent pool licensors "will combine their Essential Patents into a single portfolio in the hands of a common licensing administrator that would grant

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[67] Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Division, Dep't of Justice, to Carey R. Ramos (Jun. 10, 1999) [hereinafter DVD2 Business Review Letter], https://www.justice.gov/atr/response-hitachi-ltds-matsushita-electric-industrial-co-ltds-mitsubishi-electric-corporations [https://perma.cc/WC7B-8HA8]; Letter from Joel I. Klein, Assistant Att'y Gen. Antitrust Division, Dep't of Justice, to Garrard R. Beeney (Dec. 16, 1998) [hereinafter DVD1 Business Review Letter], https://www.justice.gov/atr/response-koninklijke-philips-electronics-nvs-sony-corporation-japans-and-pioneer-electronic [https://perma.cc/4XRV-4UKQ].

[68] ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS, *supra* note 64, at 71.

[69] *Id.* at 73–74.

[70] *See id.* at 9, 85.

licenses under the portfolio on a non-discriminatory basis, collect royalties, and distribute them among the licensors" based on each licensor's proportionate share of patents in each country where licensed products are sold.[71] The terms of licensing agreement must follow guidelines set by the relevant standard-setting organization (SSO). Notably, many SSOs require licensors to offer fair, reasonable, and non-discriminatory (FRAND) royalties. Patent pools often adopt various forms of the FRAND commitment – e.g., the DVD pool administered by Phillips requires licensors to license on reasonable terms and conditions.[72]

Royalty distribution by patent pools depends on rules governing the royalty share of each licensed patent. A recent study of nine patent pools suggests that the pro rata approach used by the MPEG-2 pool is the most common framework; six of the nine pools assign an equal share of royalties to each patent.[73] The authors also find that among firms that join a pool, those with relatively symmetric patent contributions appear more likely to agree to divide royalties in proportion to the number of patents. By comparison, the two patent pools formed around DVD technology divide royalties according to the perceived value of the patents. The DVD pool administered by Toshiba estimates patent value based on 1) how often the patents are infringed by licensed products; 2) the age of the patents; and 3) in the case of patents for DVD disc standards, whether the patents cover optional or mandatory features of the standard.[74] The DVD patent pools are also notable for their disclosure of aggregate royalty rates. The pool administered by Phillips charges 3.5% of the net selling price for each DVD player (and $0.05 per disc), while the pool administered by Toshiba charges 4% of the net selling price of DVD players (and $0.075 per disc).[75] The patent pools administered by MPEG-LA express royalties as a fixed amount per licensed device, with protections such as MFN provisions and caps on royalty increases when licensing agreements are renewed.[76]

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[71] Letter from Joel I. Klein, Assistant Att'y Gen. Antitrust Division, Dep't of Justice, to Garrard R. Beeney (Jun. 26, 1997) [hereinafter MPEG-LA Business Review Letter], https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent [https://perma.cc/UC2P-UAHW].

[72] DVD1 Business Review Letter, *supra* note 67.

[73] Anne Layne-Farrar & Josh Lerner, *To Join or Not to Join: Examining Patent Pool Participation and Rent Sharing Rules*, 29 INT'L. J. INDUSTRIAL ORG. 294, 296–297 (2011).

[74] *See* DVD2 Business Review Letter, *supra* note 67.

[75] *See* DVD1 Business Review Letter, *supra* note 67.

[76] *See* MPEGLA, https://www.mpegla.com/ [https://perma.cc/2LZ2-DG3E] (last visited July 31, 2020).

Patent pools also provide compliance and dispute resolution services to their members. For example, the two DVD patent pools both retain an independent expert to review the designated patents and determine whether they are essential to practice the relevant standard. The patent pools administered by MPEG-LA define a similar role for an independent expert to determine patent essentiality.[77] The DVD pools also manage royalty disputes with an independent auditor, who reviews information submitted by licensees for compliance with royalty obligations. The DVD pools rely on private litigation to resolve infringement disputes. Licensors in the pools have the option to litigate against potential infringers, with provisions to disclose the litigation to other licensors and provide for sharing of joint litigation expenses.[78]

Patent pools often collect and report information regarding the pool's operations and royalties for the pool's patent portfolio. For example, the HEVC Advance patent pool for video codec technologies discloses its patents, licensors, licensees, and royalty terms on its website.[79] The patent pools administered by MPEG-LA follow many of the same reporting guidelines as HEVC Advance – each pool publicly reports lists of its patents, licensors, licensees, and royalties.[80]

B. Group Copyright Licensing – Performing Rights Organizations

PROs operate as group licensing entities for copyright holders in the music industry.[81] The most prominent PROs for public performance of musical works include the American Society of Composers, Authors and Publishers (ASCAP, organized in 1915), the Society of European Stage Authors

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[77] *See id.*

[78] *See* DVD2 Business Review Letter, *supra* note 67; DVD1 Business Review Letter, *supra* note 67.

[79] *See HEVC Advance Licensing Information*, ACCESS ADVANCE, https://accessadvance.com/licensing/#licensing-information [https://perma.cc/G4JN-H75R] (last visited October 21, 2020).

[80] *See* DVD1 Business Review Letter, *supra* note 67; *see also* MPEGLA, *EV Charging Patent List*, https://www.mpegla.com/programs/ev-charging/patent-list/ [https://perma.cc/D55Y-QUCW] (last visited July 30, 2020).

[81] *See, e.g.*, Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 383-411 (1992); Robert Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1293–1393 (1996); U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/TBR6-F9E6]; DANA A. SCHERER, CONGRESSIONAL RESEARCH SERVICE, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY (June 7, 2018), https://fas.org/sgp/crs/misc/R43984.pdf [https://perma.cc/ZGZ8-KFZ7].

and Composers (SESAC, organized in 1930 to help European musicians collect royalties from U.S. licensees) and Broadcast Music Inc. (BMI, organized in 1939). ASCAP is a non-profit organization with 750,000 members, with equal representation of songwriters and music publishers; ASCAP members elect 12 songwriters and 12 publishers to the ASCAP Board of Directors.[82] BMI is also a non-profit entity, with over 1,000,000 members as of 2019.[83] Unlike ASCAP, BMI includes representatives of music broadcasters on its Board of Directors.[84] Global Music Rights (GMR) entered as a for-profit PRO in 2013, and currently licenses over 50,000 musical works.

Group licensing also occurs for copyrights for the public performance of sound recordings. In 2000, the Recording Industry Association of America (RIAA) created SoundExchange to collect and distribute royalties to record labels. SoundExchange became an independent entity in 2003, and in 2006 was designated as the entity for administering statutory licenses determined by the Copyright Royalty Board (CRB) for sound recordings. The CRB renewed that designation in 2016, and SoundExchange currently operates as "the sole collective for purposes of collecting, monitoring, managing, and distributing sound recording royalties . . . ."[85] In 2018 SoundExchange distributed $953 million in royalties to over 200,000 members.

The economic efficiencies of PROs arise from the difficulty of monitoring the use of copyrighted music and administering royalty payments to copyright holders. Without a PRO, individual musicians would need to locate each music consumer, negotiate a licensing agreement, and administer royalty payments. PROs reduce the musicians' burden by aggregating music copyrights into a portfolio, negotiating a portfolio (or "blanket") license, collecting royalties from licensees, and distributing royalties to musicians. PROs also play an enforcement role, in terms of monitoring consumer use of copyrighted music and resolving disputes via negotiation or litigation. The

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[82] *See* ABOUT Us, ASCAP, https://www.ascap.com/about-us [https://perma.cc/37NY-7A36] (last visited July 22, 2020).

[83] *See* ABOUT, BMI, https://www.bmi.com/about [https://perma.cc/NHA2-GNNN] {last visited December 31, 2020); Broadcast Music Group, Inc, *BMI Sets Revenue Records With $1.283 Billion,* PR NEWSWIRE (Sept. 9, 2019), https://www.prnewswire.com/news-releases/bmi-sets-revenue-records-with-1-283-billion-300914136.html [https://perma.cc/692G-5WVQ].

[84] *See BMI Re-Elects Six Members to Board of Directors*, BMI (Sept. 26, 2018), https://www.bmi.com/news/entry/bmi-re-elects-six-members-to-board-of-directors [https://perma.cc/73HK-6TGC].

[85] Copyright Royalty Board, Library of Congress, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 80 Fed. Reg. 26316, 26400 (May 2, 2016).

DOJ recently stated that ASCAP and BMI "fill important and pro-competitive roles in the music industry" and "provide a valuable service to both music users and PRO members."[86] The CRB reached a similar conclusion regarding SoundExchange, citing the sole collective entity as "the most economically and administratively efficient system for collecting royalties under the statutory licenses' blanket licensing framework."[87]

As with patent pools, the collective action and joint pricing of IP by PROs raises concerns about competitive effects. In 1940, the DOJ sued ASCAP for collusive conduct, alleging that ASCAP and its members had coordinated efforts to 1) license performance rights exclusively through ASCAP and thereby eliminate competition among members; 2) require music users to take a blanket license covering all of the compositions in ASCAP's repertory; 3) refuse to grant licenses to music users that had protested the fees demanded by ASCAP; and 4) allow large publisher members to control the Society and the distribution of its revenues to the detriment of ASCAP's other members.[88] The DOJ settled the ASCAP case (and a similar one against BMI) with consent decrees issued in 1941. The ASCAP consent decree contains the following key provisions:

- NON-EXCLUSIVITY. ASCAP must not interfere with members' ability to grant non-exclusive licenses to music users.[89] By allowing members the option to negotiate direct licenses outside the PRO, this provision is viewed as important for preventing anticompetitive effects from blanket licenses.
- NON-DISCRIMINATION. ASCAP must use its best efforts to avoid discrimination among the various types of licenses offered to any group of similarly situated music users.[90]

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[86] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, STATEMENT OF THE DEP'T OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIV.'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 10 (Aug. 2016) [hereinafter STATEMENT OF THE DEP'T OF JUSTICE], https://www.justice.gov/atr/file/882101/download [https://perma.cc/CV7F-7R9M].

[87] *See* SCHERER, *supra* note 81, at 26.

[88] *See* Memorandum from the U.S. Dep't of Justice in Support of the Joint Motion to Enter Second Amended Final Judgment (Sept. 5, 2000), at 10, https://www.justice.gov/atr/case-document /file/485996/download [https://perma.cc/XA77-TXKB].

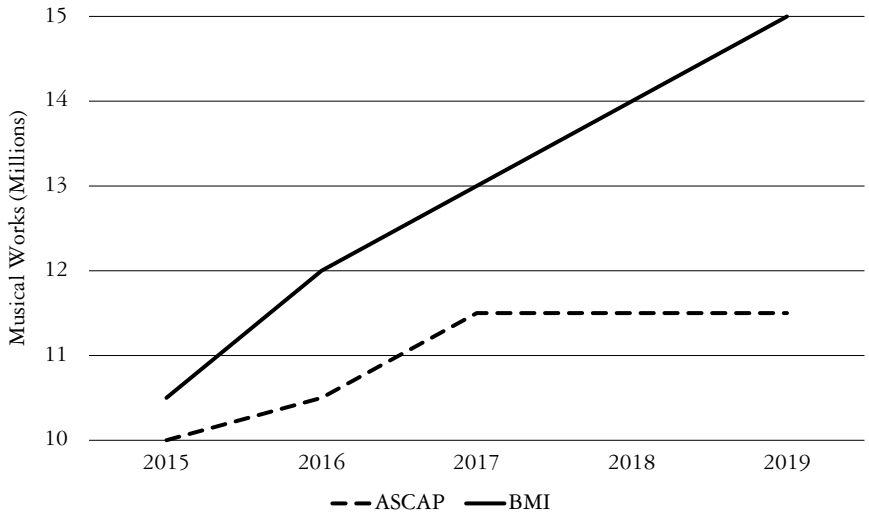
[89] *See* United States v. Am. Soc'y Composers, Authors, Publishers, No. 41-1395 (WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

[90] *See id.* at *5.

- REASONABLE ROYALTIES. ASCAP shall advise the music user of the fee that it deems reasonable for the license.[91] If the parties are unable to reach agreement within 60 days, the music user may apply to the Court for a determination of a reasonable fee.

In 2014 DOJ investigated the operation and effectiveness of its consent decrees with ASCAP (last amended in 2001) and BMI (last amended in 1994).[92] In 2016 DOJ announced it would not seek further modifications to either agreement, citing the benefits industry participants have received from access to the musical works the PROs make available.[93] Since that announcement, ASCAP and BMI have managed a growing repertory of musical works. ASCAP and BMI currently license over 11.5 million and 15 million musical works, respectively (see Figure 1).

FIGURE 1. NUMBER OF MUSICAL WORKS LICENSED BY ASCAP AND BMI, 2015-2019



Sources: ASCAP and BMI annual reports[94]

[91] *See id.* at *6.

[92] In 2019, DOJ announced another review of the consent decrees. *See* Press Release, Dep't of Justice, *Dep't of Justice Opens Review of ASCAP and BMI Consent Decrees* (Jun. 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees [https://perma.cc/ZBU9-MXNB].

[93] *See* STATEMENT OF THE DEP'T OF JUSTICE, *supra* note 86, at 3.

[94] *See* MUSIC UNITES US, ASCAP 2019 ANNUAL REPORT 5-6 (2020), https://www.ascap.com/~/media/files/pdf/about/annual-reports/2019-annual-report.pdf

PROs negotiate royalties with music users in a complex system involving market-based transactions for musical works and a statutory licensing framework for sound recordings. For musical works, ASCAP and BMI negotiate licenses with a wide variety of businesses, including restaurants, concert venues, hotels, and universities. ASCAP offers dozens of different licenses, each with a different rate schedule.[95] Royalties depend on factors such as how the music is performed and the size of the establishment or potential audience for the music. For example, royalties for restaurants vary according to whether the music is live or recorded, and royalties for concert venues depend on ticket revenue and the capacity of the facility. ASCAP and BMI negotiate licenses subject to the DOJ consent decrees. Similar to the FRAND requirement for standard-essential patents, the consent decrees specify that royalties must be reasonable and not discriminate among similarly situated licensees.

PROs are also responsible for royalty collection and distribution. ASCAP and BMI both monitor use of musical works via sampling and census-based methods and use that information to determine royalty obligations from licensees. For each musical work, ASCAP and BMI distribute 50% of royalties to publishers and 50% to song-writers.[96]

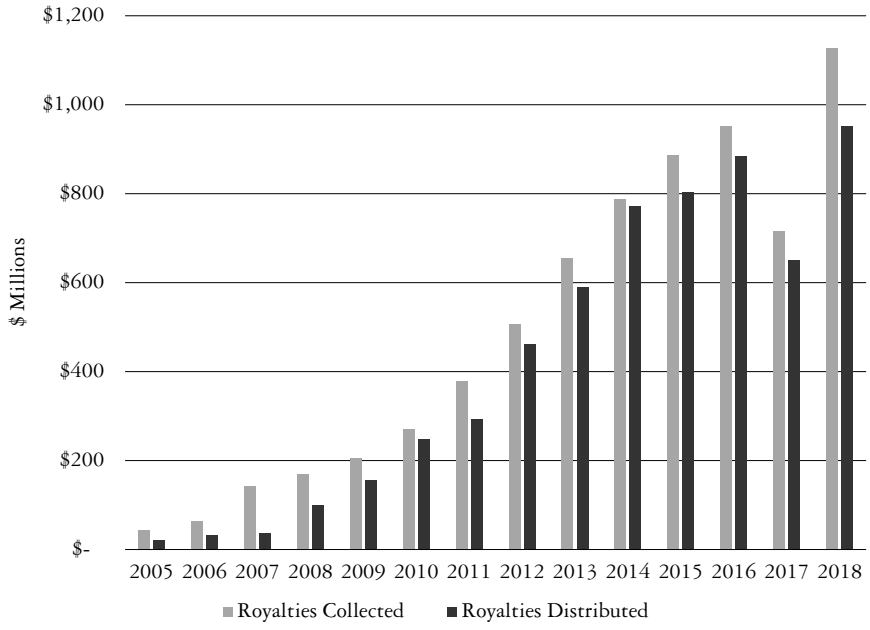
[https://perma.cc/49JD-LBFL]; *see* ASCAP 2018 ANNUAL REPORT 5-6 (2018), https://www.ascap.com/~/media/files/pdf/about/annual-reports/2018-annual-report.pdf [https://perma.cc/X85H-RRGK]; *see* ASCAP 2017 ANNUAL REPORT 5-6 (2017) https://www.ascap.com/~/media/files/pdf/about/annual-reports/2017-annual-report.pdf [https://perma.cc/F5DQ-RCB6]; *see* ASCAP 2016 ANNUAL REPORT 5-6 (2016), https://www.ascap.com/~/media/files/pdf/about/annual-reports/2016-annual-report.pdf [https://perma.cc/25G2-4WZ3]; *see* ASCAP 2015 ANNUAL REPORT 5-6 (2015) https://www.ascap.com/~/media/files/pdf/about/annual-reports/2015-annual-report.pdf [https://perma.cc/3QR4-QTD3]; *see* ASCAP 2018 ANNUAL REPORT 5-6 (2018), https://www.bmi.com/pdfs/publications/2019/BMI_Annual_Review_2019.pdf [https://perma.cc/U3WV-6X25]; *see* ASCAP 2018 ANNUAL REPORT 5-6 (2018); *see* BMI MUSIC MOVES OUR WORLD, 2018 -2019 ANNUAL REVIEW 4-5 (2018), https://www.bmi.com/pdfs/publications/2018/BMI_Annual_Review_2018.pdf [https://perma.cc/GQX4-THLM]; *see* BMI 2017 -2018 ANNUAL REVIEW 3 (2017), https://www.bmi.com/pdfs/publications/2017/BMI_Annual_Review_2017.pdf [https://perma.cc/9FW7-VYPY]; *see* BMI ANNUAL REVIEW FY 2016 3 (2016), https://www.bmi.com/pdfs/publications/2016/BMI_Annual_Review_2016.pdf [https://perma.cc/C8ZG-KFQJ]; *see* BMI 2014-2015 Annual Review 13 (2015), https://www.bmi.com/pdfs/publications/2015/BMI_Annual_Review_2015.pdf [https://perma.cc/9QF6-A7RS].

[95] *See ASCAP Licensing*, ASCAP, https://www.ascap.com/music-users/licensefinder [https://perma.cc/B67C-RWL7] (last visited December 31, 2020).

[96] *See* Scherer, *supra* note 81, at 6.

The CRB establishes statutory licenses for sound recordings and determines royalty rates and other terms "that would have been negotiated in the marketplace between a willing buyer and a willing seller."[97] The CRB's rate-setting role means that in most cases SoundExchange does not negotiate directly with licensees.[98] However, SoundExchange does perform many of the same royalty collection and distribution services as ASCAP and BMI. The CRB requires statutory licensees to submit usage reports, which contain information regarding the performance and audience details of each sound recording. SoundExchange uses those reports to determine royalty obligations. For each sound recording, SoundExchange distributes 50% of the collected royalties to the copyright owner, 45% to the performing artist, and 2.5% each to the agents of non-featured musicians and vocalists.[99] Since its founding in 2003, SoundExchange has collected and distributed an increasing volume of royalties (see Figure 2).

FIGURE 2. ROYALTIES COLLECTED AND DISTRIBUTED BY SOUNDEXCHANGE 2005-2018



[97] 17 U.S.C. § 114(f)(1)(B) (2011).

[98] *See Licensing 101*, SOUND EXCHANGE, https://www.soundexchange.com/service-provider/licensing-101/, [https://perma.cc/H6PW-QZ5M] (last visited July 20, 2020) (noting an exception for negotiating royalties).

[99] *See* Scherer, *supra* note 81, at 21.

Sources: SoundExchange annual reports[100]

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[100] *See* SOUNDEXCHANGE ANNUAL REPORT FOR 2005 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2005), https://www.soundexchange.com/wp-content/uploads/2013/05/2005-Annual-Report.pdf [https://perma.cc/X8XC-4K3D]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2006 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2006), https://www.soundexchange.com/wp-content/uploads/2013/05/2006-Annual-Report-03-02-10.pdf [https://perma.cc/7HM2-E653]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2007 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2007), https://www.soundexchange.com/wp-content/uploads/2013/04/2007-Annual-Report-03-02-10.pdf [https://perma.cc/BU7D-YMNC]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2008 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2008), https://www.soundexchange.com/wp-content/uploads/2013/05/2008-Annual-Report-03-29-10.pdf [https://perma.cc/KMF7-LHGJ]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2009 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 7 (2009), https://www.soundexchange.com/wp-content/uploads/2013/05/2008-Annual-Report-03-29-10.pdf [https://perma.cc/NK45-TBSL]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2010 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2010), https://www.soundexchange.com/wp-content/uploads/2013/04/2010-Annual-Report-06-25-12.pdf [https://perma.cc/VV5T-HEUN]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2011 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2011), https://www.soundexchange.com/wp-content/uploads/2013/04/2011-Annual-Report.pdf [https://perma.cc/Z6DZ-S5N2]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2012 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 8 (2012), https://www.soundexchange.com/wp-content/uploads/2013/06/2012-Annual-Report-06-13-13.pdf [https://perma.cc/FBV2-VBW9]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2013 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 4 (2013), https://www.soundexchange.com/wp-content/uploads/2014/06/2013-SoundExchange-Fiscal-Report.pdf [https://perma.cc/9UJP-DLPY]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2014 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 4 (2014), https://www.soundexchange.com/wp-content/uploads/2015/03/2014-SoundExchange-Fiscal-Report-_FINAL-REPORT_ISSUED_3-31-2015.pdf [https://perma.cc/7SY2-GWU7]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2015 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(c) 4 (2015), https://www.soundexchange.com/wp-content/uploads/2016/03/2015-SoundExchange-Fiscal-Report-Final.pdf [https://perma.cc/7M63-NSV5]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2016 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(c) 4 (2016), https://www.soundexchange.com/wp-content/uploads/2016/09/2016-SoundExchange-Fiscal-Report-FINAL.pdf [https://perma.cc/DKH2-AQXL]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2017 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(c) (2017), https://www.soundexchange.com/wp-content/uploads/2016/09/2017-SoundExchange-Fiscal-Report-FINAL-Post-Audit-SXI-Only.pdf [https://perma.cc/FG89-247A]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2018 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(C) 4 (2018), https://www.soundexchange.com/wp-content/uploads/2016/09/2018-SoundExchange-Fiscal-Report-FINAL-Audited-Financials.pdf [https://perma.cc/3NBN-VYM6]; *see* SOUNDEXCHANGE ANNUAL REPORT FOR 2019 PROVIDED PURSUANT TO 37 C.F.R. § 270.5(c) 4 (2019), https://www.soundexchange.com/wp-content/uploads/2016/09/2019-Sound

ASCAP and BMI are also responsible for enforcing compliance with copyright law and resolving disputes under the terms of their DOJ consent decrees. A recent case study arises from political campaigns, which may be required to have a license from the appropriate PRO for music played at campaign events. Once the campaign obtains a license from ASCAP, for example, ASCAP members may ask to have specific songs excluded from the license; in that case, ASCAP will notify the campaign of the excluded works. Disputes between PROs and licensees are heard by federal district judges in the Southern District of New York. In these "rate court" proceedings, the PRO has the burden of proving that its rates are reasonable, and if the court finds otherwise it may establish a rate itself. When the rate court determines a reasonable fee, ASCAP must offer a license at a comparable fee to all similarly situated music users.[101]

SoundExchange operates under similar compliance and enforcement provisions governed by the statutory licensing framework for sound recordings. For example, SoundExchange is responsible for monitoring use of sound recordings and collecting the usage reports from licensees. Its monitoring activities can be challenging, judging from evidence of frequent noncompliance with licensing requirements.[102] Licensing disputes are resolved by the CRB, which encourages settlements via a three-month negotiation period at the start of each proceeding. The CRB may adopt the settlements as a basis for the terms and rates offered to all parties under the statutory license.

The information collected and reported by PROs helps to monitor and enforce compliance with licensing agreements. A 2015 report by the Copyright Office emphasized the value of publicly available information for increasing the efficiency and transparency of licensing in the music industry.[103] ASCAP and BMI include searchable databases of licensed musical works on their websites, and are required by the DOJ consent decrees to maintain an updated system for tracking music use.[104] In 2017, ASCAP and BMI announced a joint effort to create a comprehensive musical works

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Exchange-Fiscal-Report-Audited-Financials-FINAL.pdf [https://perma.cc/N63B-J972].

[101] *See* United States v. Am. Soc'y Composers, Authors, Publishers, No. 41-1395 (WCC), 2001 WL 1589999, at *7 (S.D.N.Y. June 11, 2001).

[102] According to SoundExchange, in 2013 "approximately a quarter of royalty payments were not made on time; two-thirds of licensees required to deliver reports of the recordings they used have not delivered at least one required report; and at least one quarter of such licensees have not delivered any such reports." COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 81, at 181.

[103] *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 81, at 8-9.

[104] *See* Am. Soc'y of Composers, Authors, Publishers, No. 41-1395 (WCC) at *6.

database to increase ownership transparency.[105] SoundExchange also maintains a searchable database of sound recordings, which includes information identifying the corresponding recording artists and record labels.[106]

V. CHARACTERISTICS OF A GROUP LICENSING ENTITY FOR COLLEGE ATHLETE NILS

The experience of patent pools and PROs described above has many implications for the design and operation of a group licensing entity for NILs. This section discusses the proposed structure and specific characteristics of CALA.

A. Legal Structure and Safeguards

Among many possible governing structures, we propose CALA, an NIL licensing entity, to be created by Congress as a non-profit membership organization operating on behalf of college athletes. CALA would play an active role in negotiating NIL agreements with third-party licensees on a per-deal basis, thus overcoming the collective action problem and avoiding the pay-for-play concerns of private negotiation. CALA would not be a union nor would it serve as a generalized negotiating body for college athletes other than in the context of NIL activities. CALA would serve to expand the business opportunities and licensing revenue for the NCAA and college athletes. The NCAA already has a well-developed licensing program. In 2005 NCAA members in the FBS category reported $202.7 million in revenue from corporate sponsorships, advertising, and licensing, which increased to $761 million in 2018.[107] However, that revenue is limited by NCAA rules preventing commerce in products combining college athlete NILs with trademarks and other IP held by the NCAA and its members. If those rules were relaxed, CALA would play an important role to increase output of

[105] *See* ASCAP & BMI Announce Creation of a New Comprehensive Musical Works Database To Increase Ownership Transparency in Performing Rights Licensing, ASCAP (July 26, 2017), https://www.ascap.com/press/2017/07-26-ascap-bmi-database [https://perma.cc/4AXS-GAE3].

[106] *See* Press Release, SoundExchange Launches Public Search Website with Access to Industry's Best ISRC Data (Mar. 8, 2016), https://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data/ [https://perma.cc/6HFJ-FR7L].

[107] *See Football Bowl Subdivision*, College Athletics Financial Information (CAFI) Database, Knight Comm'n on Intercollegiate Athletics, http://cafidatabase.knightcommission.org/fbs#!quicktabs-tab-wherethemoney-1 [https://perma.cc/8MS8-GG9P] (last visited July 22, 2020).

licensed goods and services, thereby providing the NCAA with additional revenue opportunities.[108] Similar to the market-enhancing role of patent pools, CALA would bundle college athlete NIL rights and negotiate licenses for products and endorsement activities currently prohibited by the NCAA.

Licensing could occur at the desired level of aggregation – for individual college athletes, teams, conferences, or divisions – and negotiations could be conducted separately from those for other IP (e.g., trademarks for the NCAA and its members) the product(s) may require. Group licensing to video game manufacturers provides the most notable example. Electronic Arts ("EA") once developed and sold popular video games simulating NCAA basketball and NCAA football contests. EA discontinued its NCAA Basketball video game in 2010 and its NCAA Football game in 2013, citing legal uncertainties arising from the use of college athlete NILs.[109] If those legal uncertainties can be resolved, then CALA could bring those (and perhaps other) video game products back to the market and provide incremental licensing revenue to the NCAA and to college athletes.[110]

CALA could also negotiate licenses with manufacturers of products such as jerseys, sports equipment, and trading cards. Many of those products already feature the NILs of professional athletes, along with league trademarks and team logos. For example, the group licensing entities for the NFL and NBA report numerous agreements with consumer product manufacturers (see Figure 3) who may also be interested in developing products based on college athlete NILs. Such products may require licenses to the NILs of individual college athletes, which could be also be negotiated and managed by CALA. Alternatively, the college athlete herself, or her representative, could negotiate those licenses independently.

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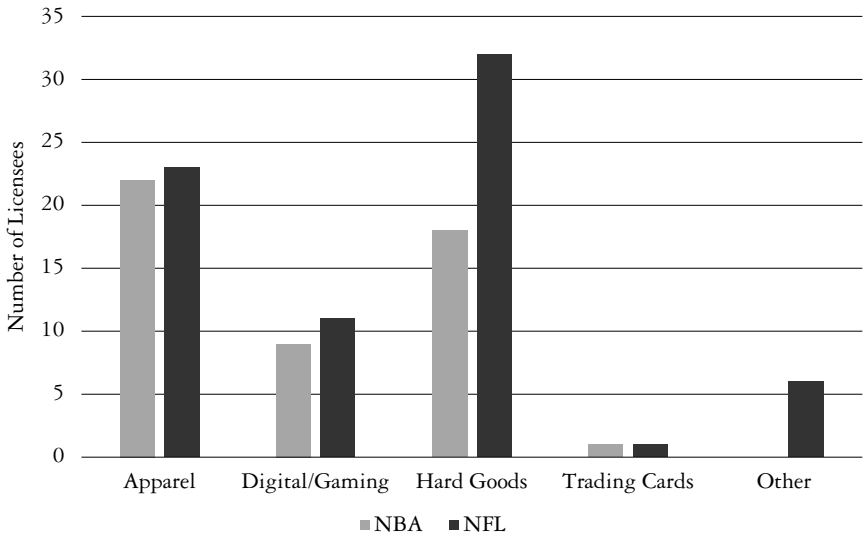
[108] For example, CALA could license university trademarks for use in products or promotions where NILs and trademarks are complementary. Certain restrictions on the use of university trademarks may be appropriate if NIL-related activities conflict with the university's existing trademark licenses.

[109] *See* Tony Manfred, *EA Sports Cancels Its College Football Video Game Amid a Wave of Lawsuits,* BUS. INSIDER (Sept. 26, 2013), https://www.businessinsider.com/ea-sports-cancels-ncaa-football-videogame-2013-9 [https://perma.cc/NW4F-M533].

[110] *See* Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games – So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing [https://perma.cc/AE7H-STBK].

FIGURE 3. LICENSEES REPORTED BY NBA AND NFL GROUP LICENSING ENTITIES[111]



Licenses to individual athlete NILs may also be important for product endorsements and marketing via social media. For example, the NCAA report recommends that "in appropriate circumstances," athletes should be allowed to be compensated for social media "influencer" activities, in which athletes promote products on social media platforms such as Instagram or YouTube. Recent studies suggest that social media opportunities would be valuable especially for popular college athletes with large followings, and that many of the most popular female athletes "would likely be able to generate as much – if not more – endorsement revenue than their male counterparts based on social reach."[112]

The structure of CALA would be compatible with many of the legislative reforms recommended by the NCAA and included in congressional proposals. First, it would be straightforward for CALA to operate under a single national standard for NIL activities instead of the growing list of competing

[111] *See Licensing,* NFLPA, https://nflpa.com/partners/licensing [https://perma.cc/6AQE-7PM3] (last visited December 31, 2020); *see also Licensing,* THINK450, https://think450.com/licensing [https://perma.cc/KL9A-C8YL] (last visited December 31, 2020).

[112] *See* AJ Maestas and Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETIC DIRECTOR U, https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes/ [https://perma.cc/DFA3-87SC] (last visited Nov. 4, 2020).

state laws. Relative to a system of state-level rules, a single standard would likely simplify the administrative and compliance-related demands of group licensing. Second, Congress could legislate that college athletes do not qualify as employees of the NCAA or its members under any federal or state law, and preempt any law to the contrary.[113] Third, Congress could legislate that college athletes are not entitled to "pay-for-play" outside of their statutorily endorsed NIL rights. Congress could also address the question of whether college athlete NIL rights extend to their participation in live athletic competitions, and if so whether college athletes should receive a fraction of revenue from television broadcasting or from tickets sales.[114] Allowing athletes robust avenues for NIL commercialization while settling questions of unionization, pay-for-play, and TV broadcasting could be a reasonable compromise to the decade-long legal battle that continues in courts around the country. If Congress can forge such a legislative compromise, the federal antitrust exemption recommended by the NCAA may not be necessary given the pro-competitive and output-expanding benefits of the newly created NIL licensing entity.

Antitrust exemptions for the NCAA may also be unnecessary if CALA adopts safeguards similar to those governing patent pools and PROs. As discussed in Section IV, the competitive effects of group licensing often depend on whether the licensed bundle includes complementary or substitutable IP. For team-based products, such as video games, NILs would likely be seen as complements and group licensing would enhance team-based competition by combining team member NILs and lowering transaction costs. In those cases, DOJ guidelines for patent pools suggest that group licensing of NILs would be pro-competitive, especially if individual college athletes retained the option of licensing outside of the group entity. That option would likely be important to the most prominent college athletes in team sports, who may have valuable endorsement opportunities as individuals (and could hire a separate agent to negotiate them) in addition to their value as a team member. While the top athletes may opt for individually negotiated deals outside the entity, CALA nevertheless would provide a regulated structure in which these transactions could be monitored. For the less high-profile athletes, CALA would provide a turn-key framework for NIL commercialization.

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[113] *See, e.g.*, 5 U.S.C. § 5541 (defining "employee" in Title V); 29 U.S.C. § 203 (defining "employee" in Fair Labor Standards Act); 42 U.S.C. § 2000 (defining "employee" in Title VII of the Civil Rights Act of 1964).

[114] For example, California's right of publicity statute exempts TV broadcasting from activities in which publicity rights are protected. *See* Cal. Civ. § 3344(d) (1984).

Drawing from the experience of PROs, CALA could draw antitrust scrutiny if it coordinated licensing by college athletes who would otherwise compete for endorsements. For example, royalty competition could be suppressed if college athletes used CALA to collude or if a single entity monopolized the market for college athlete NILs. The PRO practice of blanket licensing could also be a concern if CALA refused to offer subsets of NILs to potential licensees. CALA could likely avoid future consent decrees and rate-setting regulation by obtaining college athlete NILs on a non-exclusive basis (thereby preserving their ability to license independently) and allowing licensing of NIL sub-groups (e.g., by team, university, or conference).

B. Licensing and Royalty Administration

CALA would be responsible for negotiation, collection, and distribution of royalties. Its negotiating role would be similar to that of a patent pool, with a focus on conducting market-based transactions with NIL licensees. The terms of license agreements would include language regarding compliance with NCAA regulations and enforcement provisions (see Section V.C), and perhaps language (similar to the FRAND commitment for patents or the terms of the ASCAP and BMI consent decrees) in which CALA agrees to offer licenses according to a fair value standard for royalties. The experience of the Collegiate Licensing Company (CLC) provides a relevant comparison. CLC is a licensing agency used by numerous colleges, universities, athletic conferences, and the NCAA to negotiate and enforce trademark licenses.[115] Royalties in those licenses are typically expressed as a percentage of licensed product sales, and range from 3 to 12 percent.[116] For product endorsements via social media, royalties could be based on the number of followers or similar metrics correlated with the value of college athlete NILs.

Similar to most licensing relationships, royalty collection by CALA would require coordination with licensees. As in the patent pool and PRO examples, licensees would report sales of licensed products along with their royalty payments, which could then be subject to periodic audits. Audits by CALA could also involve monitoring of licensees for compliance with NCAA rules.

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[115] *About*, COLLEGIATE LICENSING COMPANY, https://clc.com/institution-search/ [https://perma.cc/6R76-JCD2] (last visited July 23, 2020).

[116] Kevin R. Casey, *University Trademarks: Let's Get Down to Business!*, STRADLEY RONON EDUCATION PRACTICE GROUP, Apr. 8, 2019, at 5, https://www.stradley.com/-/media/files/publications/2019/04/education_alert_april_2019.pdf [https://perma.cc/6R76-JCD2].

Royalty distribution would be straightforward when the licensed product involves the NIL of a single college athlete. In those cases, CALA would deduct its fee from the royalties it collects and distribute the net payment to the college athlete. CALA faces a greater challenge when dividing royalties among many college athletes in group settings. In principle, aligning royalties with the contribution of individual IP rights can be difficult, especially when IP rights are highly complementary.[117] That situation poses a practical problem for CALA, because the contributions of individual college athletes or teams to a group-based product like a video game are both complementary and difficult to measure; any royalty-sharing metric could be challenged as unfair to certain college athletes or teams. CALA would be responsible for determining a mutually acceptable royalty-sharing framework. The framework could be as simple as equal weighting of all college athlete NILs (similar to the numeric proportion rule used by the MPEG-2 patent pool[118] and to the equal-weighting framework recommended by the Knight Commission[119]) or as complex as the value-based formulas used by PROs. In light of NCAA recommendations against pay-for-performance, the metric for distributing royalties should not be explicitly based on athletic success.

Regardless of the royalty-sharing framework, CALA should account for NCAA rules limiting payments by its members to the cost of attendance and its recommendation that NCAA members play no part in NIL activities by college athletes. To satisfy those constraints, CALA should distribute royalties directly to college athletes, with no administrative support from the NCAA or its members.

C. Compliance and Dispute Resolution

CALA would also be responsible for monitoring compliance with NCAA rules regarding NIL activities. Judging from the recommendations in the NCAA report, CALA would be especially concerned with enforcing rules in three main categories. First, royalty distributions to college athletes should reflect payment for NILs only, and not a disguised payment for athletic participation or for recruiting purposes. As discussed above, CALA

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[117] *See* Shapiro, *supra* note 61.

[118] *See* Letter from Garrard R. Beeney, Sullivan & Cromwell, to Joel I. Klein, Dep't of Justice, *Request for Business Review Letter Regarding the Licensing of Essential Patents for MPEG-2 Technology* (Apr. 28, 1997), https://www.justice.gov/sites/default/files/atr/legacy/2014/02/18/302637.pdf [https://perma.cc/24EH-J8PU].

[119] *See NIL FAQs: Group Licensing,* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, https://www.knightcommission.org/nil-faqs-group-licensing/ [https://perma.cc/JQL8-TZ6N] (last visited July 22, 2020).

would be involved in negotiating college athlete NILs, and thus in a good position to refuse payment for considerations other than NIL rights. Second, CALA could monitor the relationship between NCAA members and the NIL activities of college athletes, both in terms of operations (the NCAA currently recommends that its members play no part in NIL activities and forbids college athletes from using their trademarks) and of financing (NCAA rules currently limit payment by its members to student–athletes to their cost of attendance). Here, CALA could serve as a liaison between college athletes and the compliance office at each NCAA member institution, thus preserving the recommended separation between NCAA member activities and NIL activities by college athletes. The NCAA envisions that role in its working group report, which mentions the "assistance of third-party entities . . . in part to help relieve the burden that campus compliance personnel may face attempting to monitor the newly permitted activities."[120]

CALA could also satisfy NCAA regulations involving the participation of third parties in NIL activities by college athletes. The NCAA appears most concerned with the role of boosters, who may disguise payments for recruiting or athletic performance as NIL royalties. A similar concern arises with the role of agents, who historically have represented professional athletes and may steer NIL negotiations towards payments for athletic performance or as advances against future professional salaries. The NCAA already has explicit rules and a history of enforcement regarding boosters[121] and agents,[122] and thus CALA could provide complementary enforcement and conduct independent investigations similar to those performed by the MPEG and DVD patent pools.

CALA would help to resolve disputes in many of the same ways as patent pools and PROs. Royalty disputes could involve the use of independent auditors, who would have access to relevant information collected by the entity (see Section V.D). CALA could also participate in contractual and/or compliance disputes among college athletes, licensees, the NCAA, and other interested parties. Those disputes could be adjudicated via private litigation or arbitration (often used by patent pools), or Congress could create a

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[120] NCAA REPORT, *supra* note 6, at 25.

[121] *See Role of Boosters*, NCAA, http://www.ncaa.org/enforcement/role-boosters [https://perma.cc/QAN4-WE5D] (last visited July 21, 2020).

[122] *See Agents and Amateurism*, NCAA, http://www.ncaa.org/enforcement/agents-and-amateurism [https://perma.cc/PXP5-B6RR] (last visited July 21, 2020). For example, in 2018 the NCAA launched a certification program for agents representing college basketball players considering whether to enter the NBA draft. The NCAA reports a list of certified agents at https://web3.ncaa.org/AgentCertification/#/AgentDirectory [https://perma.cc/42ZS-ZYS3] (last visited Oct. 21, 2020).

more centralized venue similar to the SDNY rate court or the CRB.[123] For example, Congress could designate an alternative dispute resolution regime wherein disputes are mediated in the first instance and then assigned to a designated team of arbitrators. That regime would enable designated arbitrators to develop expertise on issues such as determining fair market value for NILs, complying with NCAA rules, and enforcing federal laws.[124] Arbitration may also encourage confidential resolution of disputes. Regardless of whether disputes are heard in a private or public venue, CALA would participate and provide relevant information.

D. Information Collection and Reporting

CALA would be responsible for creating and maintaining a database of NIL activities, license agreements, and royalties. Similar to the databases maintained by PROs, the NIL database would serve several purposes. The information could be shared with the NCAA and its members to facilitate disclosure and enforcement of NCAA rules. The information in an NIL database would also be useful for resolving disputes (see Section V.C). For example, royalties contained in an NIL royalty database could be available to courts and arbitrators to determine a fair value for NIL rights or to settle payment disputes between college athletes and licensees. From an administrative perspective, the NIL database would also contain the information necessary for the college athlete financial reporting (including taxes) and for the accounting requirements of CALA.

CONCLUSION

Today, we are witnessing a collision of (1) over a decade of hard-fought antitrust litigation; (2) the evolution of NCAA and public opinion on the propriety of college athlete compensation; (3) conflicting state legislation

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[123] For example, the Drake Group recently asked Congress to create an independent, non-governmental agency responsible for setting policies and standards governing NIL agreements and for resolving related disputes. *See Drake Group Position Statement – College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the Fairness in Collegiate Athletics Act*, THE DRAKE GROUP (June 24, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/Drake-Position-on-Rubio-NIL-Bill-FINAL.pdf [https://perma.cc/ZL3T-EX34].

[124] For example, the arbitrators could participate in the system envisioned in comments to the NCAA Report, "in which payments from third parties to student-athletes were compared, and perhaps limited, to a fair market value standard, while noting the difficulty in creating and maintaining such a system." NCAA REPORT, *supra* note 6, at 7.

allowing athlete compensation for NIL activities; and (4) congressional legislation to unify the new rules. That collision is happening in the midst of a global pandemic that poses existential threats to college athletic departments (and to some colleges themselves). With any crisis comes opportunity.

The opportunity here is for Congress to create a nonprofit, quasi-governmental entity that would serve as a mechanism wherein athletes receive compensation for NIL activities connected with their athletic participation, schools can increase their licensing revenue, and consumers can access products that have been kept from the marketplace as a result of the legal disputes. A group licensing entity that functions in a similar way to performing rights organizations or patent pools potentially solves this problem. With Congress currently drafting the next set of rules for college athletics and compensation, the roadblocks that previously existed (such as employee status, antitrust liability, or slippery slope concerns of threats to broadcast and ticket revenue) can be removed through a national legislative solution.

From an economic perspective, the likely reform will increase licensing opportunities for a property right – NILs – that college athletes have not yet been allowed to commercialize. Current NCAA recommendations focus on opportunities for individual college athletes to receive compensation for use of their NIL in third-party endorsements, promotions on social media, and other business activities. But additional athlete, college, and consumer economic benefits remain untapped under the current NCAA proposal. Creation of a group licensing entity like CALA, informed by the efficiencies generated by patent pools and PROs, seems to have little economic downside if properly created under the imminent congressional legislation. Procompetitive patent pools bundle complementary inputs and set royalties that encourage adoption of new products. PROs administer complex royalty systems, enforce compliance with licensing agreements, and maintain databases of relevant information. Patent pools and PROs both operate in regulated environments similar to the one that may emerge for college athlete NILs.

Congressional legislation that does not solve the group licensing problem ultimately will deny all the major stakeholders substantial benefits. With the precedents identified herein, Congress has the roadmap to bring athletes, colleges, and the consumer to a solution that has proven elusive to date.

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One, Two, Sort the Shoe; Three, Four, Win Some More: The Rhyme and Reason of Phil Ivey's Advantage Play at the Borgata

Nanci K. Carr*

ABSTRACT

In the 1940's film, "My Little Chickadee," when a novice gambler asks if poker is a game of chance, W.C. Fields, a well-known comedic actor, playing Cuthbert J. Twillie, responded "Not the way I play it, no."[1] That familiar quote represented crooked card games played by Fields' many characters in a variety of movies.[2] But there is a difference between cheating and playing with an advantage. For example, one who has a large vocabulary has an advantage playing Scrabble®, but that advantage is not cheating. The Borgata Hotel Casino & Spa in Atlantic City, New Jersey and Phil Ivey, a famous poker player, debated in federal court whether having an advantage is illegal after Ivey won almost $10 million using an advantage that the Borgata, like a younger sibling who just lost a board game to an older sibling, cried was unfair. But what about the Borgata's advantage? All casinos have a house advantage, among others, so it seems only fair that players are entitled to use an advantage too.

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[1] Martin Harris, *Poker & Pop Culture: Always Be Wary When W.C. Fields is Dealing*, POKERNEWS (Dec. 13, 2016), https://www.pokernews.com/news/2016/12/poker-pop-culture-033-wc-fields-26577.htm [https://perma.cc/TA9P-7DSW].

[2] *See id.*

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I. INTRODUCTION

"Cheater, cheater, pumpkin eater!"[3] Children have been shouting that on playgrounds for decades, and after a four-day winning spree in 2012 by Phil Ivey, the "Tiger Woods of Poker,"[4] the Borgata Hotel Casino & Spa in Atlantic City shouted the same, as Ivey used an advantage[5] while playing baccarat to win almost $10 million.[6] The Borgata argued that use of the advantage, known as edge sorting,[7] was cheating and therefore, the Borgata wanted its money back. The Borgata was successful in the U.S. District Court,[8] but Ivey appealed, and a settlement was reached in July 2020. This article will explore what "advantage play" is; whether it is legal, for both players and casinos; and what implications the Borgata/Ivey settlement may have on the future of such advantage play.

II. BACKGROUND

To understand the legal issues in the gambling industry, it is valuable to work through some vocabulary and a description of the parties involved in the litigation. At issue were the rules of conduct when gambling, which can be defined as "any betting or wagering, for self or others, whether for money or not, no matter how slight or insignificant, where the outcome is

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[3] Based on the children's rhyme "Peter Peter Pumpkin Eater," the phrase has been used in television, books, and newspapers. *See* Barry Popik, *Cheater, Cheater, Pumpkin Eater*, BARRYPOPIK.COM (Nov. 2, 2019), https://www.barrypopik.com/index.php/new_york_city/entry/cheater_cheater_pumpkin_eater/ [https://perma.cc/ET4G-U4UF].

[4] *See Phil Ivey*, POKERNEWS, https://www.pokernews.com/poker-players/phil-ivey/ [https://perma.cc/S7P4-A2FT] (last visited Mar. 25, 2020).

[5] Advantage play is "a situation in which a player through some method of play can acquire an advantage over the casino in the context of a gambling contract." David W. Schnell-Davis, *High-Tech Casino Advantage Play: Legislative Approaches to the Threat of Predictive Devices*, 3 UNLV GAMING L.J. 299, 303 (2012).

[6] *See* Victor Fiorillo, *Borgata: Poker Star Phil Ivey Is Stiffing Us Out of $10 Million*, PHILLYMAG.COM (Feb. 7, 2019, 12:34 PM), https://www.phillymag.com/news/2019/02/07/phil-ivey-borgata-lawsuit/ [https://perma.cc/RV72-V7AM].

[7] " 'Edge sorting' exploits manufacturing defects in playing cards in order to 'mark' cards without the player actually touching, defacing, or placing a physical mark on the cards." Amended Complaint at 14, Marina Dist. Dev. Co., LLC v. Ivey, No. 1:14-cv-02283 (D.N.J. Apr. 23, 2014).

[8] *See* Marina Dist. Dev. Co., LLC v. Ivey, 223 F. Supp. 3d 216 (D.N.J. 2016) (holding that Ivey had breached the contract and his winnings would be returned to the Borgata).

uncertain or depends upon chance or 'skill.'"[9] As with any game, players rely on the ethical conduct of opposing players to play a fair game, but unfortunately, players do not always conduct themselves in accordance with the rules of the game or societal norms. When someone tries to win by breaking the rules, that person is cheating and there are consequences. If it happens in a family game of Monopoly, also based on Atlantic City,[10] feelings are hurt, but if it happens during legalized gambling, it often is a state crime.[11]

> Cheating at gambling is defined as manipulating the play of a game in a way not allowed by the game's rules. The three primary categories of cheating include: altering the selection of outcome; acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game; and, increasing or decreasing the amount of one's wager after learning the result of the random event.[12]

Where the issues start to blur is when one considers whether advantage play is cheating.[13] For example, one who has a large vocabulary has an advantage playing Scrabble®,[14] but that advantage is not cheating. However, if a player snuck good letter tiles into his pocket before the game commenced

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[9] *Definition of Gambling*, GAMBLERS ANONYMOUS AREA 12-NORTH AND CENTRAL NJ, https://area12ga.com/definition-of-gambling/ [https://perma.cc/H8SC-B2PE] (last visited June 19, 2020).

[10] Monopoly is Hasbro's "fast-dealing property trading game" and is proclaimed the "world's favorite family board game." *Monopoly Game*, MONOPOLY, https://monopoly.hasbro.com/en-us/toys-games [https://perma.cc/JG3T-B6ZN] (last visited June 19, 2020). Manufactured in 1935 by Parker Brothers, the original board game has been expanded by Hasbro into a large product line, including Monopoly Cheaters Edition where the "rules encourage players to express their inner cheater." *80 Enterprising Facts You May Not Know about Monopoly*, MASHABLE.COM, https://mashable.com/2015/01/21/monopoly-facts/ [https://perma.cc/PLQ9-FL39]; *Monopoly Game: Cheaters Edition*, MONOPOLY, https://monopoly.hasbro.com/en-us/product/monopoly-game-cheaters-edition:020C27CB-55DA-442A-B73B-B5C3CED8FCDA [https://perma.cc/5PJ2-3GYE] (last visited June 19, 2020).

[11] *See, e.g.*, NEV. REV. STAT. § 465 (2019) (covering crimes and liabilities concerning gaming).

[12] Schnell-Davis, *supra* note 5, at 303.

[13] *See* Eliot Jacobson, *Phil Ivey and Yellow Journalism*, 888CASINO.COM (May 20, 2013), https://www.888casino.com/blog/commentaries/phil-ivey-and-yellow-journalism [https://perma.cc/X2AD-3JY7] ("The blurred distinction between advantage play and cheating can lead to significant legal issues for casinos as well as potential harm to law-abiding customers.").

[14] Owned by Mattel, Scrabble® is a board game invented by an architect in 1933. Players use tile square with letters on them to form words that connect like a crossword puzzle. *See* Erin McCarthy, *14 Shrewd 'Scrabble' Facts*, MENTAL FLOSS (Apr. 13,

in order to play them when needed, that would be cheating. In casino games, advantage play is "a situation in which a player through some method of play can acquire an advantage over the casino in the context of a gambling contract."[15] This is the nature of the Marina District Development Co., LLC d/b/a Borgata Hotel Casino & Spa's (the "Borgata") suit against Phillip D. Ivey, Jr. ("Ivey"), Gemaco Inc. ("Gemaco"), and Cheng Yin Sun ("Sun").

A. The Parties

1. Phil Ivey – The Tiger Woods of Poker

Phil Ivey is one of the best poker players in the world, often referred to as the "Tiger Woods of Poker."[16] Initially taught the game by his grandfather,[17] he started playing in casinos at age eighteen using a fake I.D. until he turned twenty-one,[18] and by age twenty-three, he was winning major World Series of Poker events.[19] By age twenty-nine he was playing and winning on the European Poker Tour,[20] and progressed to Australia and Asia, particularly Macau.[21] He earned himself the rightful reputation of "a player to be treated with respect and reverence."[22] In addition to playing poker, he founded two companies, Ivey Poker and Ivey League, and engages in several charitable activities.[23] Ivey even had a poker room named after him at the Aria Resort and Casino in Las Vegas, Nevada.[24] He values that reputation,

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2017), https://www.mentalfloss.com/article/58236/14-shrewd-scrabble-facts [https://perma.cc/EL3P-JZ64].

[15] Anthony Cabot & Robert Hannum, *Advantage Play and Commercial Casinos*, 74 MISS. L.J. 681, 681 (2005).

[16] *See Phil Ivey, supra* note 4 (noting that he not only resembles Tiger Woods, but also plays golf). Ivey, age 42, has over $26 million in tournament cashes plus millions won in high stakes cash games throughout the world. Mo Nuwwarah, *Report: Borgata Seeking Phil Ivey's WSOP Winnings Plus $214K Interest*, POKERNEWS (July 23, 2019), https://www.pokernews.com/news/2019/07/borgata-seeking-phil-ivey-wsop-winnings-interest-34936.htm [https://perma.cc/8FLT-Z6TM].

[17] *See Phil Ivey Net Worth*, CASINOCHECKING, https://casinochecking.com/blog/phil-ivey-net-worth/ [https://perma.cc/RL8Y-NGMG] (last visited Mar. 26, 2020).

[18] *See Phil Ivey, supra* note 4.

[19] *See Phil Ivey Net Worth, supra* note 17.

[20] *See id.*

[21] *See See Phil Ivey, supra* note 4.

[22] *See Phil Ivey Net Worth, supra* note 17.

[23] *See id.*

[24] On February 13, 2019, after nine years of display, the Aria removed "The Ivey Room" sign and replaced it with "Table 1." Card Player News Team, *Aria's 'The*

and was therefore devastated by the accusation that he cheated, explaining that "[o]nce you get cheater next to your name especially in my business which is a business of gambling it's—it's really bad. That's the worst thing that you could be labeled as."[25]

2. Cheung Yin "Kelly" Sun

By age fifteen, Cheung Yin "Kelly" Sun was using a fake ID to play on gambling cruises leaving from Hong Kong.[26] She then studied French and fashion design at the Sorbonne[27] before losing twenty million dollars of her Hong Kong factory owner father's money while gambling in her twenties.[28] Now in her forties, she is a very successful gambler, but a key loss of $93,000 at an MGM property in 2007 changed her life.[29] She was playing with a friend at the MGM Grand in Las Vegas.[30] The friend ran out of money and asked Kelly to get a $100,000 marker, which she did.[31] Sun then went to Paris for six months, during which time her friend did not repay the debt to the casino, so when Sun reentered the United States in Philadelphia, six police officers boarded the plane, handcuffed her, and took her to jail.[32] She had lost millions of dollars to MGM casinos, but they sent her to jail for

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Ivey Room' Officially Renamed 'Table 1,' CARD PLAYER (Feb. 20, 2019), https://www.cardplayer.com/poker-news/23657-aria-s-the-ivey-room-renamed-amidst-the-poker-pro-s-legal-battles [https://perma.cc/D9PP-JGFN] (noting that Aria did not link the name change to the Baccarat troubles, stating "[o]bviously Phil is still an incredible player and still very much relevant in the poker world, but we thought it was time for a rebrand").

[25] Jody Avirgan, *A Queen of Sorts*, 30FOR30PODCASTS, https://30for30podcasts.com/episodes/a-queen-of-sorts/#transcript [https://perma.cc/TE3Y-453D] (incorporating *CBS's 60 Minutes Sports: Phil Ivey* (CBS television broadcast Oct. 7, 2014)).

[26] *See* Michael Kaplan, *The Baccarat Machine*, CIGAR AFICIONADO (Jan./Feb. 2017), https://www.cigaraficionado.com/article/the-baccarat-machine-19176 [https://perma.cc/8VAF-JX5C].

[27] *See id.*

[28] *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, CASINO.ORG (Dec. 22, 2016), https://www.casino.org/news/kelly-cheung-yin-sun-targeted-borgata-revenge/ [https://perma.cc/NTQ9-ZJNU].

[29] *See id.*

[30] *See* Avirgan, *supra* note 25.

[31] *See id.*

[32] *See* Kaplan, *supra* note 26 (noting that Sun spent twenty-one days in Las Vegas' Clark County Detention Center, waiting for her father to arrive in Las Vegas to pay the debt).

$100,000.[33] She revealed to Michael Kaplan, a reporter for the *New York Times*,

> I was in jail for three weeks. Women attacked me, and the guards wouldn't let me wear my own underwear. I lost 25 pounds in jail and didn't get out until a relative flew here with $100,000 for the casino. I decided that one day I would get back the money by playing at MGM properties.[34]

When Sun left prison, she spent four years studying decks of playing cards, learning the patterns on the back, and identifying tiny asymmetries, typically 1/32 of an inch or less, and earning her nickname, "The Queen of Sorts,"[35] which gave her an advantage when she would place her bets. Using "social engineering techniques," Sun convinced the dealers to turn the cards, based on those tiny asymmetries, "for good luck."[36] Sun's goal was to be able to recognize the key cards in baccarat, which are the sixes, sevens, eights, and nines,[37] before she would place her bet. The technique was working, but to win serious money, she would need big stakes, so she went after a "whale," a gambler who wagers a lot of money.[38] She connected with a number of whales willing to finance her play, and consistent with her goal of revenge against MGM, she played and won at many MGM properties, including the Aria, Treasure Island, Paris, Caesars Palace, and MGM Grand.[39]

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[33] *See id.*

[34] Michael Kaplan, *How 'Advantage Players' Game the Casinos*, N.Y. TIMES MAG. (June 29, 2016), https://www.nytimes.com/2016/07/03/magazine/how-advantage-players-game-the-casinos.html [https://perma.cc/KNW7-KJKW].

[35] *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, *supra* note 28. Sun is also known as "The Baccarat Machine," a name that seems well suited when she explains that her baccarat play is "work and I am a professional. It's what I have trained myself to do. I do not feel bad if I lose and I do not feel emotions if I win." Kaplan, *supra* note 26.

[36] Kaplan, *supra* note 26.

[37] *See id.*

[38] *See* Avirgan, *supra* note 25; Kate Taylor, *Inside the Dark, Fantasy World of Millionaire 'Whales' at Casinos, Who Receive Ridiculous Perks and Are Under Harsh Scrutiny Since the Las Vegas Shooting,* BUSINESS INSIDER (Oct. 19, 2017, 10:19 AM), https://www.businessinsider.com/casinos-perks-for-high-rollers-tied-to-las-vegas-shooting-2017-10 [https://perma.cc/3WN2-9CYK] ("The most high-profile high rollers in the world of gambling are called 'whales,' people who regularly wager thousands or millions of dollars in a single night.").

[39] *See* Avirgan, *supra* note 25. At the time of the Borgata games in 2012, MGM owned 50% of the Borgata, a stake that has since increased to 100%. *Kelly Cheung Yin Sun Targeted Borgata for Revenge*, *supra* note 28.

Casino surveillance teams started taking notice of Sun and her technique, and it was written about in surveillance industry newsletters.[40] Sun was not mentioned by name, but the description was enough for Steven Black, an ex-boyfriend/mentor to recognize her.[41] Wanting a piece of the action, he called her and offered to introduce her to a new, bigger whale: Phil Ivey.[42] In exchange for the introduction, Steven wanted ten percent of Ivey's and Sun's winnings.[43] They had a rocky start to their relationship, losing millions at first, but Sun quickly won over Ivey when together they won three million dollars from a casino in Melbourne.[44] Sun, Ivey, and Steven traveled to Montreal, Singapore, Macau, and Monte Carlo, using the edge sorting advantage. Together, Ivy and Sun made thirty million dollars as a baccarat team.[45]

3. The Borgata

The Borgata[46] is a hotel and casino in Atlantic City, New Jersey, licensed and operating under the New Jersey Casino Control Act.[47] With 2,000 guest rooms,[48] 161,000 square feet of casino space, two spas, five

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[40] *See* Avirgan, *supra* note 25.

[41] *See id.* (going by the name Steven Black). He has been characterized by a well-known sports bettor as "the sharpest of the sharp." Kaplan, *supra* note 26.

[42] *See* Avirgan, *supra* note 25.

[43] *See* Kaplan, *supra* note 26.

[44] *See id.*

[45] *See id.*

[46] At the time the complaint was filed, Marina District Development Co., LLC was the holding company for the Borgata. *See* Amended Complaint, *supra* note 7, at 1; Katie Chang, *Borgata is Atlantic City's Ultimate Culinary Destination*, FORBES (Feb. 29, 2020), https://www.forbes.com/sites/katiechang/2020/02/29/why-borgata-is-atlantic-citys-ultimate-culinary-destination/#520209d790d3 [https://perma.cc/WE7S-FY6Q]; *MGM to Acquire Last 50 Percent of Atlantic City's Borgata for $900 Million*, MEETINGS AND CONVENTIONS (June 2, 2016), http://www.meetings-conventions.com/News/Gaming/Borgata-Atlantic-City-MGM-acquisition/ [https://perma.cc/XZ57-69ZU] (noting that after a ten-year relationship, MGM was buying the fifty percent interest of Boyd Gaming Corp).

[47] *See* N.J. STAT. ANN. § 5:12-1 (West 2012).

[48] *See MGM Resorts International Hits Royal Flush with East Coast Poker Tour*, BORGATA (Dec. 19, 2019), https://www.theborgata.com/press/press-releases/current/mgm-ecpt [https://perma.cc/HN94-9A6W] (noting that in addition to live casino gaming, the Borgata offers online gaming within New Jersey through several websites).

pools, and twenty restaurants, it is one of the Atlantic City's premier properties.[49]

4. Gemaco

Founded in 1929 in Kansas City, Missouri, Gemaco created the Gemaco® brand of playing cards, and supplies them to casinos, including the Borgata.[50] With six facilities in Las Vegas, Missouri, France, Mexico, and China, Gemaco became one of the gaming industry's largest playing card suppliers.[51] Gemaco asserts its cards are "perfectly symmetrical so that the back of one card is indistinguishable from the backs of all other cards, and the edges of each card are indistinguishable from one another."[52] Further, it claims its cards are "tamper proof, sealed and certified by individual and intensive inspection."[53] An image of the playing cards is attached hereto as Appendix A, which illustrates the description of the cards as stated in the Amended Complaint:

> The playing cards purchased from Gemaco by Borgata have a custom-designed back consisting of a dominant background color, on top of which appear edge-to-edge rows of small white circles that are designed to look like the top of a round cut diamond. The illusion of the diamond facets is created by shading inside the circle with a lighter shade of the dominant background color. The background color fills the empty spaces between the circles. Two Borgata Hotel Casino & Spa logos on each card back are placed symmetrically and facing in opposite directions.[54]

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[49] *See* Chang, *supra* note 46; BORGATA, https://www.theborgata.com [https://perma.cc/K7WA-DX85] (last visited Mar. 26, 2020).

[50] *See* Amended Complaint, *supra* note 7 at 3. The Gemaco brand comes from the founder's, George C. Matteson, Jr.'s, name, taking the GE from George, "MA" from Matteson, and adding "CO" for company. *See History*, GAMING PARTNERS INT'L, http://www.gpigaming.com/company/history [https://perma.cc/5NRN-JC4H] (last visited Mar. 26, 2020). The District Court found that the Borgata could recover from Gemaco just $27, the cost of the playing cards used in the games played by Ivey. Fiorillo, *supra* note 6.

[51] *See GPI Acquires Table Games Company Gemaco*, GGB NEWS (Aug. 10, 2014), https://ggbnews.com/article/gpi-acquires-table-games-company-gemaco/ [https://perma.cc/MJ3T-SS96] (noting that GemGroup, the parent company of Gemaco, Inc. was acquired by Gaming Partners International in August, 2014).

[52] Amended Complaint, *supra* note 7 at 4.

[53] *Id.*

[54] *Id.* at 3.

B. The Borgata Play

In April 2012, Ivey arranged a visit to the Borgata to play baccarat,[55] a game familiar to fans of James Bond movies.[56] As is typical of high stakes gamblers, he was able to negotiate the terms of his play that included wiring $1 million in advance, a maximum bid of $50,000 per hand, a private area in which he would play accompanied by a guest, a dealer who spoke Mandarin Chinese, one eight-deck shoe of purple Gemaco Borgata playing cards, and an automatic card-shuffling machine.[57] On April 11, 2012, Ivey played for sixteen hours, winning $2,416,000 on an average bet of $25,000.[58] His guest, Sun, spoke to the dealer in Mandarin, giving instructions on how to flip and lay the cards on the table, a common practice based on individual player superstitions.[59] He returned to the Borgata in May 2012, winning $1,597,400 on an average bet of $36,000, with the same terms he had previously negotiated.[60] A July trip followed, when he increased his deposit to $3 million and raised the maximum bet to $100,000.[61] He played for seventeen hours, winning $4,787,700 on an average bet of $89,000.[62] He made a final trip in October, playing for eighteen hours, winning $824,900 on an average bet of $93,800.[63]

C. How Baccarat is Played

While baccarat is not familiar to everyone in the United States, its worldwide popularity makes it the "world's most popular gambling

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[55] Ivey was actually playing mini baccarat due to the number of players at the table, 7, instead of 14 at regular baccarat. *The Difference Between Baccarat and Mini Baccarat*, CASINOFREAK.COM (Mar. 11, 2020), https://www.casinofreak.com/guides/the-difference-between-baccarat-and-mini-baccarat [https://perma.cc/M7KW-ES8P].

[56] James Bond plays Baccarat Chemin de Fer, a variation of baccarat described herein, in *Dr. No*, *Thunderball*, *On Her Majesty's Secret Service*, and *GoldenEye*. While the Bond character plays baccarat in the *Casino Royale* novel, in the film version of that book, Bond played no-limit Texas Hold'em poker. *Bond Lifestyle*, JAMES BOND LIFESTYLE, https://www.jamesbondlifestyle.com/product/baccarat-chemin-de-fer [https://perma.cc/C8DG-UQK9] (last visited Mar. 22, 2020).

[57] *See* Amended Complaint, *supra* note 7 at 6.

[58] *See id.* at 7.

[59] *See id.*

[60] *See id.* at 8.

[61] *See id.* at 9.

[62] *See id.* at 10.

[63] Ivey's total winnings for April through October were $9,626,000. *See id.* at 14.

game."[64] It is a game of chance in which the players bet, before cards are dealt, on which of two hands will have the higher value. Once the bet is placed, the player makes no further decisions and exercises no skill.[65] "[W]hether the patron wins or loses any individual hand of Baccarat is as random as flipping a coin."[66]

Players bet on the hand they think will have a total value closest to nine.[67] Typically, casinos use six or eight decks of cards at a time that are shuffled and placed in a long rectangular box called the "shoe" that is used for dealing the cards.[68] Before the cards are dealt, the players bet on either the "banker" or "player" to win, terms that do not refer to the casino or the person placing the bet.[69] Players can also bet that the "banker" and "player" will tie.[70] Once all bets are on the table, there is nothing further for the players to do. The dealer takes the first card from the shoe and places it on the spot marked for "player" hand.[71] A total of two cards are dealt to each of "player" and "banker."[72] Based on the scores of those hands and the rules of the game, a third card may be dealt to either or both hands.[73] However, the gamblers do not place any additional bets at this time. As in any game, if the gambler knows the cards in advance, that would give him an advantage, and in the case of baccarat, "[t]he player with this 'first card knowledge' has an overall advantage of approximately 6.765% over the house. The advantage is up to 21.5% for 'player' bets and up to 5.5% for 'banker' bets."[74]

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[64] Fiorillo, *supra* note 6.

[65] *See* Amended Complaint, *supra* note 7, at 4 (stating "[o]ne hand is referred to as the "player's" hand, the other is known as the "banker's" hand. The "banker" is not the [casino], and the "player" does not refer to those playing the game. Players are free to bet on either hand").

[66] John Brennan, *Borgata Blunt on Bond's Baccarat: The Latest in the Phil Ivey Saga*, USBETS (May 28, 2019), https://www.usbets.com/borgata-attorneys-blunt-baccarat-statement-against-ivey/ [https://perma.cc/MXJ9-Y8Z2].

[67] *See* Amended Complaint, *supra* note 7, at 4 ("Tens, face cards, and any cards that total ten are counted as zero. All other cards are counted at face value. The scores of hands range from 0 to 9.").

[68] *See id.*

[69] *See* Giovanni Angioni, *How to Play Baccarat and Win (Beginners Edition)*, POKER NEWS (Aug. 8, 2018), https://www.pokernews.com/casino/how-to-play-baccarat.htm [https://perma.cc/NXW2-T6W5].

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] Amended Complaint, *supra* note 7, at 5.

D. Edge Sorting

The edge sorting technique used by Ivey and Sun relies upon playing cards that are not cut symmetrically when manufactured.[75] As visible in the samples on Appendix A and B, the long sides of the cards do not match. Ivey asked the Borgata to provide the Gemaco cards, likely knowing that they are not symmetrical.[76] Once at the baccarat table, during the initial play of a shoe, after the wagers were placed, Sun would ask the Borgata dealer to let her peek at the card before it was revealed, and then would instruct the dealer, in Mandarin (and thus the reason for Ivey's request for a Mandarin dealer), to turn the card one way if it was "hao," a good card, or turn it a different way if it was "buhao," a bad card.[77] After the hand was played, when the cards were cleared and put into the used card holder, the edges of the good cards could be distinguished by Sun from the bad cards.[78] When the cards were taken from the used card holder and placed in the automatic shuffling machine requested by Ivey (and provided by the Borgata), the edges would stay aligned.[79] Then in the next round of play, Sun would see the first card in the shoe before Ivey would place his bet, giving Ivey the advantage of first card knowledge.[80]

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[75] According to gaming expert Dr. Eliot Jacobson, "Cards that can be edge-sorted are in wide use." Eliot Jacobson, *What is Edge Sorting?*, 888CASINO (June 28, 2012), https://www.888casino.com/blog/edge-sorting/what-is-edge-sorting [https://perma.cc/Q2A7-F9KF] (noting that in Jacobson's collection of 50 casino decks, over two-thirds can be edge-sorted). Jacobson has a Ph.D. in mathematics from the University of Arizona, and after being a professor of mathematics and computer science, retired from academia in 2009. He is an advantage player, and founded Jacobson Gaming, LLC in 2006, which specializes in casino table game design, advantage play analysis, game development, and mathematical certification. He is an author of the book ADVANCED ADVANTAGE PLAY, a consultant to casinos around the world, a speaker, and trainer. Eliot Jacobson, *Casino Blog*, 888CASINO, https://www.888casino.com/blog/writers/eliot-jacobson [https://perma.cc/8QYN-PHXN] (last visited Oct. 17, 2020).

[76] *See* Amended Complaint, *supra* note 7, at 6.

[77] *See id.* at 14-15.

[78] *See id.* at 15.

[79] Note that the casino could have refused to use the shuffling machine, or could have simply turned the cards before placing them in the machine, defeating the edge sorting technique. Prior to June of 2012, Dr. Eliot Jacobson asked a pit supervisor why the blackjack cards were turned before they were shuffled and he replied "so the cards can't be identified by some pattern on their backs." Jacobson, *supra* note 75.

[80] The Borgata later noticed that during the first playing session when Sun was sorting the cards, Ivey would bet below the maximum allowed. Thereafter, his bets

E. Other Advantage Play

The types of advantage play fall into three categories. The first category is not based on any skill or improper action by the player; instead the player simply takes advantage of a casino mistake, like when a slot machine malfunctions and pays out too much, or when a dealer overpays on a bet. Superstitions would fall into this category as well as they do not require the player to have superior skill or knowledge.

A superstition, believing that a favorite object or a ritual of wearing the same socks will bring good luck, or that certain things, like a black cat, are bad luck, are familiar, and some people rely heavily upon them. We believe, whether factually true or not, that our performance will be altered if we do not follow the superstitions in which we believe. This has long been the case in gambling, and casinos tend to respect Chinese superstitions in baccarat in particular, because baccarat revenues account for a major percentage of gaming revenues.[81] The number eight is considered lucky by Chinese people, so the number eight seat at a baccarat table is often the first to be filled.[82] Following that superstition gives the player an advantage. Granted, many might argue that it is not a real advantage, but the player's belief. However, confidence is a well-known key to success.[83] If players believe that they will play well, they often will.[84] If advantage play is not to be allowed, then Chinese players might be forced to sit in the number four chair (considered bad luck) and be prohibited from blowing on their cards or dice, a sign of good luck.[85] That would likely lead to a reduction in baccarat players, and therefore, revenues—something no casino wants.

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increased to the maximum amount on every hand. Amended Complaint, *supra* note 7, at 16.

[81] *See Chinese Superstitions in Baccarat,* BACCARAT RULES, https://www.baccaratrules.net/chinese-superstitions/ [https://perma.cc/4LKM-3LM6] (last visited June 27, 2020).

[82] *See id.*

[83] *See generally* Jack Kelly, *Self-Confidence Leads to Success in your Job Search and Career—Here's How You Can Start*, FORBES (Aug. 24, 2020, 10:50 AM), https://www.forbes.com/sites/jackkelly/2020/08/24/self-confidence-leads-to-success-in-your-job-search-and-career-heres-how-you-can-start/#28f44ddddcdf [https://perma.cc/F54M-RPH3].

[84] *See generally id.*

[85] *See Chinese Superstitions in Baccarat, supra* note 81. While it is beyond the scope of this paper, given the coronavirus restrictions throughout the world, touching and blowing on cards, dice, and other gaming devices will certainly be restricted or banned until the virus is contained. It would be an interesting study to determine whether the prohibition of those superstitious practices reduces gaming revenues. *See generally Considerations for Casinos & Gaming Operations*, CDC, https://

The second category involves the advantage player's superior analytical skill. A player analyzes game data that is available to all players, and that data is part of the game, such as in card counting.[86] Often used in blackjack, card counting is a strategy by which a player keeps track of how many of a type of card have been played in order to predict the chances of it appearing again.[87] While casinos do not appreciate card counting, it is not illegal.[88] Interestingly, New Jersey and Missouri casinos are not allowed to remove gamblers for card counting alone.[89] These states' legislatures have recognized that advantage play based on skill, using the tools of the game, is not illegal and therefore should not be prohibited. Maryland agrees that "[c]ard counting that is done using intellectual capacity to keep track of cards is not prohibited by state law or regulation."[90] However, marking or crimping cards is illegal and considered cheating.[91] Other forms of legal advantage

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www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/casinos-gaming-operations.html [https://perma.cc/BJF7-HYJM] (last visited June 27, 2020) ("When possible, dealers should instruct customers not to touch cards or deal cards face up.").

[86] Cabot & Hannum, *supra* note 15, at 686.

[87] *See Blackjack Card Counting – The Ultimate Guide*, CASINO TOP 10, https://www.casinotop10.net/card-counting-guide [https://perma.cc/N6KA-4HAY] (last visited June 25, 2020).

[88] *See e.g.*, Campione v. Adamar of New Jersey, Inc., 155 N.J. 245, 250 (N.J. 1998) ("Neither the Casino Control Act, N.J.S.A. 5:12–1 to 142 (Act), nor the [Casino Control Commission] prohibits card counting."); Chen v. Nevada State Gaming Control Bd., 994 P.2d 1151, 1153 (Nev. 2000) ("neither card counting nor the use of a legal subterfuge . . . is illegal under Nevada law.") (Maupin, J., dissenting); Cashio v. Alpha Gulf Coast, Inc., 77 F.3d 477, 477 (5th Cir. 1995) ("While playing blackjack, casino personnel determined that Cashio was using a technique of "card-counting" which, while neither illegal nor cheating, in their opinion gave him an unfair advantage.").

[89] *See* Jeff Barker, *Card Counters, Casinos Battle to Tilt the Odds*, BALT. SUN (Mar. 29, 2015), https://www.baltimoresun.com/business/bs-bz-counting-cards-20150328-story.html [https://perma.cc/PJ5C-QV3E].

[90] *Id.* (quoting Stephen Martino, former head of the Maryland Lottery and Gaming Control Agency).

[91] To mark a card, a player defaces it with marks or scratches that only that player understands. Crimping is making a small indent in the card. *See* Howard Collier, *The Gambler's Crimp, Shading Decks, and Other Methods for Marking Cards*, BLACKJACK FORUM ONLINE (Dec. 1993), http://www.blackjackforumonline.com/content/crimp.htm [https://perma.cc/5NS6-W427]; Basil Nestor, *What Is Cheating? Drawing the Line Between Aggressive and Illegal*, CASINOCENTER, https://www.casinocenter.com/what-is-cheating/ [https://perma.cc/PQ5S-XQPE]. See also, *e.g.*, N.J. REV. STAT. § 5:12-115(b)(2013) ("It shall be unlawful knowingly to use or possess any marked cards."); N.J. REV. STAT. § 5:12-115(a)(2)(2013) (providing

play include shuffle tracking[92] and hole-carding.[93] Another type of analytical skill advantage is when players analyze information available to all other players, but that information is not part of the basic rules of the game.[94] In other words, in card-counting, there are only four aces in a deck. Once those aces have been played, a blackjack is no longer possible. However, in shuffle tracking, a player remembers the order of cards in a discard pile, studies how the dealer shuffles the deck, and then predicts the order of the cards to be dealt, trying to reduce the random[95] nature of the deal.[96]

The third category is when a player creates his advantage, not through analytical skill, but rather through knowledge that is not available to all players. An example would be hole-carding, in which a player is able to learn the dealer's hole card before placing a bet.[97] Another example would be when a player alters a random event in their favor, such as dice sliding in craps, in which instead of randomly tossing the dice across the table, a player slides them, trying to keep the dice in a certain position.

The first category, while not illegal, in some cases may be unethical. For example, keeping extra change received after making a purchase will not result in an arrest, but would likely fail most ethical decision-making guidelines.[98] However, a superstition would be neither illegal nor unethical. The second category, including card counting, is also not illegal, but some casinos do ban patrons who use it.[99] Card counters try to gain an advantage by

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that to "carry on" with or "expose for play" cards that are marked "in any manner" is expressly prohibited).

[92] Richard Marcus, *Blackjack Shuffle Tracking for Beginners*, BLACKJACK GALA (Apr. 26, 2016), https://www.blackjackgala.com/blog/blackjack-shuffle-tracking-for-beginners/ [https://perma.cc/4YRD-H2MM].

[93] *See Gambling with an Edge*, LAS VEGAS ADVISOR, https://www.lasvegasadvisor.com/gambling-with-an-edge/blackjack/blackjack-hole-carding/ [https://perma.cc/XC8F-N26T] (last visited Mar. 23, 2020).

[94] *See* Cabot & Hannum, *supra* note 15, at 687.

[95] "The concept of random is elusive and its precise meaning has long been debated among experts in probability, statistics and the philosophy of science." *Id.* at 728 (citing DEBORAH J. BENNETT, RANDOMNESS 168-73 (1998)).

[96] *See* Marcus, *supra* note 92.

[97] *See Gambling with an Edge, supra* note 93.

[98] For example, known as the front page test, one likely would not want the decision to keep extra change to be the lead story on page one of the local newspaper. *See, e.g.*, *The "Front Page" Test: An Easy Ethics Standard*, WESTERN CITY (Feb. 1, 2012), https://www.westerncity.com/article/front-page-test-easy-ethics-standard [https://perma.cc/5DLR-R3H6].

[99] *See* Barker, *supra* note 89; Adam Mace, *Can Casinos Ban You for Winning? Here's Why People Get Kicked Out*, GAMBLING NEWS MAG. (Sept. 14, 2020), https://gamblingnewsmagazine.com/casino-ban/ [https://perma.cc/QXU3-LNA9].

keeping track of how many aces have been played. Casinos try to complicate that by using multiple decks. The casino is trying to win, as are the gamblers. That's why it's called "gaming" — it's a game. "For every terrific card counter, there are probably ten guys who think they are good counters and they're not," said Alan Woinski of Gaming USA Corp, an industry newsletter publisher.[100] He suggested that casinos "probably want people who think they know how to count cards but don't have the concentration."[101] Imagine the laughter in the dealer breakroom as a dealer regales his co-workers with stories of how much a gambler lost in his failed attempt to count cards. Even actor/director Ben Affleck, who admits to counting cards, agrees that casinos do not want him to use his skill as an advantage.[102] "Once I became decent, the casinos asked me not to play."[103]

The third category, including edge sorting, is more perplexing, and its legality has yet to be determined.[104] One could argue it is like card counting because it requires superior skill and the players do not touch the cards. Others suggest that the use of the imperfections in the cards is like using a prohibited device and therefore should be illegal.[105]

III. THE DISPUTE

The Borgata sued Ivey and Sun in a U.S. District Court on twelve counts, ranging from breach of contract to participation in a RICO enterprise in violation of 18 U.S.C. §§ 1961 and 1982.[106] The Borgata's argu-

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[100] Barker, *supra* note 89.

[101] *Id.*

[102] *See id.*

[103] *Id.*

[104] *See* Sun v. Mashantucket Pequot Gaming Enter., 309 F.R.D. 157 (D. Conn. 2015). While the Mashantucket Pequot Tribal Nation Gaming Commission found that edge sorting "violated rules and regulations governing gaming," the court lacked subject matter and personal jurisdiction and could not decide the question of legality of edge sorting.

[105] "It was not simply taking advantage of error on her part or an anomaly practiced by the casino for which he was not responsible. He was doing it in circumstances where he knew that she and her superiors did not know the consequences of what she had done at his instigation. This is, in my view, cheating for the purpose of civil law." Jacobson, *supra* note 75.

[106] Amended Complaint, *supra* note 7 (listing the causes of action as: breach of contract, breach of implied contract, breach of implied covenant of good faith and fair dealing, fraudulent inducement, declaratory judgment for rescission based on unilateral mistake, fraud, declaratory judgment for rescission based on illegality of purpose, unjust enrichment, conversion, civil conspiracy, participation in a RICO enterprise in violation of 18 USC §§ 1961 and 1982, and participation in a RICO

ments are inconsistent, as it argued that Ivey's actions were illegal gambling.[107] However, the statute of limitations for an illegal gambling claim is six months,[108] and the Borgata took two years to file.[109] Therefore, the Borgata focused its claims on breach of contract, misrepresentation, and unfairness.

A. Breach of Contract

In order to overcome the statute of limitations problem, the Borgata argued not that the advantage was illegal, but rather that the contract with Ivey was unfair, making the statute of limitations six years.[110] Ivey argued that the Borgata relied on the New Jersey Casino Control Act, but that Act does not provide a private right of action for a breach of contract claim.[111] The Borgata claims that Ivey misrepresented his reasons for his special requests.[112] Raffi Melkonian, an appellate attorney with Wright, Close & Barger LLP in Houston, asserted that the Borgata's argument that Ivey committed fraud when he said that the reason he wanted the accommodations

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enterprise in violation of N.J.S.A. 2C:41-1 *et seq*.). "Claims for fraud in the inducement, breach of contract, and breach of the implied covenant of good faith and fair dealing all strike as particularly far-fetched; the suggestion that a casino can be fraudulently induced into dealing a card game with its own cards, equipment, and personnel, is seemingly fantastical; the theory that a contract – express or implied - underlies games of baccarat is similarly perplexing; and the hypothecation that the covenant of good faith and fair dealing – something normally invoked in arm's length business transactions – covers the mercenary-rich environment of a casino floor, where both the player and the house are unapologetically out to win the other's money, is likewise baffling." VerStandig, *infra* note 145.

[107] "Because of Ivey and Sun's misconduct, unfair play and deception, the Baccarat games at issue did not present the legally required "fair odds" or those assumed attendant circumstances dictated by New Jersey law and regulations that would assure the fairness, integrity and vitality of the casino operation in process pursuant to N.J.S.A. § 5:12-100(e)." Amended Complaint, *supra* note 7, at 19.

[108] *See* N.J. STAT. ANN. § 2A:40-5 (West 2011).

[109] "New Jersey law requires that an action for restitution because of the conduct of an illegal game be filed in the Superior Court within six months of payment. The acts alleged buy plaintiff in its complaint all occurred . . . approximately two years ago." Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6) at 13, Marina District Development Co., LLC v. Ivey, No. 1:14-cv-02283 (D.N.J. July 2, 2014).

[110] *See* N.J. STAT. ANN. § 2A:14-1 (West 2011).

[111] *See* Jeannie O'Sullivan, *Gamblers Fight NJ Casino's $10M Contract Win at 3rd Circ.*, LAW360 (Sept. 17, 2019, 4:08 PM), https://www.law360.com/articles/1199735 [https://perma.cc/R9EG-7DSJ].

[112] *See* Amended Complaint, *supra* note 7, at 9.

was to satisfy his superstitions is flawed because fraud requires "an expectation that the other side believes you. A casino shouldn't be believing what gamblers are telling them. It's silly to say they were tricked."[113]

Further, edge sorting is not listed in New Jersey's gaming statutes as illegal, and Ivey did not know that the Borgata prohibited it.[114] There is no assertion in the complaint that the Borgata had notified Ivey or any other gambler of such a policy.[115] Ivey and Sun never touched the cards, shoe, or shuffling machine, all of which were provided by the Borgata and were exclusively handled by the Borgata's employees.[116]

The Borgata suggested that it did not know of Ivey's intent to edge sort, feigning some sort of lack of knowledge of the technique.[117] However, edge sorting is not a new technique and was not invented by Sun. As mentioned earlier, she had already achieved some success with the technique and it had been written about in industry publications.[118] For example, in 2011, Sun was involved in an incident at the Aria in Las Vegas dubbed the "Million Dollar Shoe."[119] Sun tried out her edge sorting technique for forty minutes and was ahead by $1.1 million when she decided to cash out.[120] According to a surveillance officer who watched her play, it took Aria security two days to figure out what she had done.[121] "It was great to see something like that. I'll probably never see it again, and that education cost Aria only a million dollars."[122] One can assume that stories like that would circulate throughout the casino business and among security employees.

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[113] Brian Pempus, *Phil Ivey has 50-60% {Chance} of Winning $10 Million Third Circuit Appeal, Appellate Lawyer Says*, NJ ONLINE GAMBLING (Mar. 7, 2019), https://www.njonlinegambling.com/phil-ivey-borgata-baccarat-gambling-case/ [https://perma.cc/L3KE-T2TA].

[114] *See* O'Sullivan, *supra* note 111.

[115] *See* Amended Complaint, *supra* note 7.

[116] *See* Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 4. However, casino attorneys would argue "[y]ou can be convicted of battery even if you never touch the victim – such as by deceiving them into drinking a poisoned beverage, for instance." John Brennan, *Borgata Blunt on Bond's Baccarat: The Latest in the Phil Ivey Saga*, USBETS (May 28, 2019), https://www.usbets.com/borgata-attorneys-blunt-baccarat-statement-against-ivey/ [https://perma.cc/66BJ-MWSP].

[117] *See* Cabot & Hannum, *supra* note 15.

[118] *See* Avirgan, *supra* note 25.

[119] *See* Kaplan, *supra* note 34.

[120] *See id.*

[121] *See id.*

[122] *Id.* While Ted Whiting, vice president of corporate surveillance at MGM Resorts International, that owns Aria, would not comment on Sun's practices, he did admit that edge sorting at mini-baccarat "is not against the law in Nevada, and

How could a successful, industry-leading casino not have known? The Borgata has been in business for seventeen years.[123] Not only are there industry publications that share information,[124] but casinos talk to each other.[125] There is also software available to casinos to make various advantage plays more difficult to implement.[126] There was no other reason for Ivey to make those requests other than to have an advantage. Ivey effectively said, "I'm going to use an advantage," and the Borgata responded, "We're going to let you." The Borgata entered into an implied contract with Ivey and should not be permitted to refute it later.

The Borgata argued that "as a condition of their wagering, Ivey and Sun explicitly agreed to abide and be bound by the rules set forth by New Jersey's Division of Gaming Enforcement (DGE) pursuant to the authority granted to it by the New Jersey legislature."[127] The Borgata argued that Ivey used his high roller status to get concessions that gave him an advantage, taking away the element of chance on which the game relies.[128] For example, they claimed that Ivey and Sun used the automatic card shuffler as a "cheating device," a violation of N.J.S.A. §§ 5:12-113.1,[129] because if the cards had been manually shuffled, the cards would not have stayed in the same direction after shuffling, making the sorting ineffective.[130]

I do not consider it cheating. But whether you're a cheater or an advantage player, you can take money from us, and I don't want that to happen. I view it all as preventable loss." *Id.*

[123] *See MGM to Acquire Last 50 Percent of Atlantic City's Borgata for $900 Million*, MEETINGS & CONVENTIONS (June 2, 2016), http://www.meetings-conventions.com/News/Gaming/Borgata-Atlantic-City-MGM-acquisition/ [https://perma.cc/P5Z6-773K].

[124] *See generally*, GAMING TODAY, https://www.gamingtoday.com/industry/articles [https://perma.cc/ZB3V-HG3V] (last visited June 24, 2020); *Latest Casino and Gaming Industry News*, CASINO, https://www.casino.org/news/ [https://perma.cc/KYT7-U6YZ] (last visited June 24, 2020); GAMBLINGINSIDER, https://www.gamblinginsider.com [https://perma.cc/9Z9X-XRRQ] (last visited June 24, 2020).

[125] *See* Barker, *supra* note 89 (quoting Matthew Heiskell, general manager of the Hollywood Casino Perryville) ("We share information with other casinos.").

[126] *See* Kaplan, *supra* note 34.

[127] Amended Complaint, *supra* note 7, at 19.

[128] *See id.*

[129] It is a crime to "[use or assist] another in the use of, a computerized, electronic, electrical or mechanical device which is designed, constructed, or programmed specifically for use in obtaining an advantage at playing any game in a licensed casino or simulcasting facility." N.J. STAT. ANN. § 5:12-113.1 (West 2011).

[130] "Although the automatic card shuffler is not originally designed, constructed, or programmed specifically for use in obtaining an advantage (it is intended to ensure the randomness of the shuffle), Ivey and Sun used the automatic

In order to understand the Borgata's claim that Ivey breached a contract, an understanding of the unique contract between a casino and gambler may be helpful. While a contract is an exchange of promises that the law will enforce,[131] in the context of gambling, the relationship between the parties is "take-it-or-leave-it," or non-negotiable, as is the case in an adhesion contract.[132] The casino has set the odds, and the gambler either bets on those odds or walks away. Gaming contracts are unique in that a condition to the obligation of the parties is based upon chance.[133] In addition, the contract will likely favor the casino over time.[134] The Borgata's argument is that chance is the very foundation of a gambling contract, and that anything that is done to shake that foundation, such as advantage play, undermines that contract.

All contracts, including gaming contracts, incorporate a covenant of good faith and fair dealing.[135] In a gaming contract, the parties' covenant includes an agreement to follow the game's rules and an acknowledgment that the game is based on chance. Like other contracts, it also means that there was no fraud or deceit when entering into the contract.[136] The argument, then, is that if an advantage player cheats, that would be a breach of contract, and therefore the casino would not need to pay any winnings. But what if the advantage player does not cheat, but rather has an advantage of exceptional skill? Arguably, that would not be a breach of contract.

In general, the law of contracts favors a party in a lesser bargaining position. For example, if a party lacks capacity to contract, he may disaffirm the contract.[137] In addition, the Uniform Commercial Code protects non-

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card shuffler as an integral part of their "edge sorting" scheme, thus converting its use to that of a cheating device." Amended Complaint, *supra* note 7, at 20.

[131] *See Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/contract [https://perma.cc/R572-AEHD] (last visited Mar. 29, 2020).

[132] *See Adhesion Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) [https://perma.cc/ECZ7-JHUD] (last visited June 8, 2020).

[133] *See* Cabot & Hannum, *supra* note 15. These random events include the roll of the dice in craps or the spin of the wheel in roulette.

[134] *See id.*

[135] *See* Okmyansky v. Herbalife Int'l of Am., Inc., 415 F.3d 154,161 (1st Cir. 2005).

[136] *See* Cabot & Hannum, *supra* note 15, at 749 ("The elements of fraudulent inducement are: (1) material misrepresentation made by a party and known to be false; (2) with the intent to cause inducement/reliance; (3) actual inducement causing another party to enter an agreement; (4) justifiable reliance on the misrepresentation; and (5) resulting damages proximately caused by the reliance.").

[137] *See*, *e.g.*, Dodson v. Shrader, Jr., 824 S.W.2d 545 (Tenn. 1992) (holding that minor plaintiff can disaffirm an agreement for the purchase of a vehicle); Hauer v.

merchants from being taken advantage of by merchants due to the imbalance of negotiating power; this position is backed up by some case law as well, albeit with some level of disagreement.[138] In the case of a casino and a gambler, certainly the gambler—here, Ivey—has a lesser bargaining position. However, he did bargain for certain arrangements, and the Borgata agreed. Phil Ivey wondered, "If I make a request and the house grants it, then how can that be cheating[?] . . . [T]hat's me making a request to give myself an advantage you granting it . . . saying it's OK."[139] After a similar incident in 2012 at the Crockfords,[140] Ivey said, "At the time I played at Crockfords, I believed that edge-sorting was a legitimate Advantage Play technique and I believe that more passionately than ever today."[141] Ivey contended that the edge sorting is legitimate gamesmanship and not cheating because it did not involve dishonesty.[142] After all, he used the tools provided by the casino, never touched the cards, and his requests were open and met by the casino. The casino could have refused the requests or stopped

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Union State Bank of Wautoma, 532 N.W.2d 456 (Wis. Ct. App. 1995) (holding that bank must void a loan extended to a customer who had suffered brain damage).

[138] Commonly known as the "battle of the forms," additional terms proposed by a merchant become a part of a contract absent objection by the other party (or pursuant to two other exceptions), but when that other party is a non-merchant, there must be affirmative consent. U.C.C § 2-207(2)(a)-(c); *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) ("Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them.").

[139] Avirgan, *supra* note 25 (incorporating *CBS's 60 Minutes Sports: Phil Ivey* (CBS television broadcast Oct. 7, 2014)).

[140] In August 2012, Ivey and Sun played punto banco, a variation of baccarat, at Crockfords. They requested a brand of playing cards that had a white circle pattern on the back. In the first round of play, Sun asked the dealer to rotate all of the sevens, eights, and nines. He made progressively larger bets and after two days, had won more than $10 million. He had requested that the same cards be used throughout. Finally, Crockfords insisted that the cards be changed and Ivey left the casino. Upon review of the surveillance footage, Crockfords discovered the edge sorting play. "Nobody at Crockfords had heard of edge-sorting before" according to the court. The court noted that Ivey took deliberate steps to fix the deck. Derek Hawkins, *What is 'Edge-Sorting' and Why Did it Cost a Poker Star $10 million in Winnings?*, WASHINGTON POST (Oct. 26, 2017, 6:02 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/26/what-is-edge-sorting-and-why-did-it-cost-a-poker-star-10-million-in-winnings/ [https://perma.cc/5D8L-7TS6].

[141] *Id.*

[142] *See id.*

the play at any time.[143] The *Crockfords* court even acknowledged that Ivey "believed that he wasn't cheating, and thanked him for his 'factually frank and truthful evidence.'"[144]

By filing a lawsuit, the Borgata tried to go back later and unwind its bargain with Ivey, in which the Borgata had the upper hand, because the gaming did not have the results that the Borgata expected and, it claimed, Ivey was unjustly enriched. However,

> [t]he Borgata is in the business of unjustly enriching itself, just as is every other gaming hall in the county. Flashy signs meant to induce gamblers into sucker bets, deceptively simple games with well-masked house advantages and the whole façade of the casino itself—from maze-like infrastructures, to free drinks, to playing chips that exist in large part to help people forget real money is being gambled—are textbook examples of one party (the house) enriching itself at the expense of another party (the player), in circumstances that are far from equitable.[145]

This contract was about allocation of risk. The Borgata agreed to Ivey's requests, as it does with requests related to superstition, because it determined that the risk of complying is worth the profits the casino expected to make.[146] After all, no player, including Ivey, wins every hand that they play. If those lost hands had been the larger bets, the Borgata would not be crying breach. As noted by experts, "casinos alter their protocols to accommodate high rollers at their own risk."[147] The Borgata allowed Ivey's requests "only to get Ivey's business during a time of prolonged stagnation for the Atlantic

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[143] As Maryland Live, a Maryland casino stated, "As a private facility, we reserve the right to refuse service or limit play of any casino customer." *See* Barker, *supra* note 89.

[144] Hawkins, *supra* note 140.

[145] Maurice "Mac" VerStandig, *Sorting Out the Law Behind Phil Ivey's Edge Sorting Debacle at Borgata*, POKER NEWS (Apr. 18, 2014), https://www.pokernews.com/news/2014/04/sorting-out-the-law-behind-phil-ivey-s-edge-sorting-debacle-18054.htm [https://perma.cc/SQ96-XQQM].

[146] "[The Borgata] voluntarily chose to grant every single request because it wagered defendant Ivey would lose his multi-million dollar deposits and hopefully more. [The Borgata] only now alleges that *its own game* was illegal because it lost that wager." Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 17.

[147] Maurice "Mac" VerStandig, *Breaking Down the Legality of Cheung Yin Sun's Edge-Sorting Lawsuit Against Foxwoods*, POKERNEWS (Aug. 18, 2014), https://www.pokernews.com/news/2014/08/breaking-down-the-legality-of-cheung-yin-sun-s-edge-sorting-19051.htm [https://perma.cc/QE9N-B222].

City gaming market."[148] It should not be allowed to later ask the court to save it from its misassessment of the risk.[149]

B. Misrepresentation

The Borgata claimed that Ivey lied about his reasons for asking for his concessions, asserting that the purpose was to satisfy his superstitions rather than to use an advantage.[150] However, "Ivey and Sun were under . . . no legal duty imposed by the Casino Control Act to explain the true purpose for their requests."[151] In addition, the Borgata argued that "[e]ach of Ivey and Sun's actions constitutes 'swindling and cheating' under N.J.S.A. § 5:12-115(a), which provided that 'a person is guilty of swindling and cheating if the person purposely or knowingly by any trick . . . or by a fraud or fraudulent scheme . . . wins or attempts to win money or property . . . in connection to casino gambling.'"[152]

After oral arguments, the Third Circuit asked for additional briefing from both sides regarding Section 5:12-115.a. of the New Jersey Revised Statutes (N.J.S.A.) Title 5 – Amusements, Public Exhibitions and Meetings.[153] That statute reads as follows:

> 115. Cheating Games and Devices in a Licensed Casino; Penalty.
> a. It shall be unlawful:

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[148] Pempus, *supra* note 113.

[149] "[T]he characteristic and traditional response of our legal system to cases of mistaken and frustrated contracts is neither to relive the disadvantaged party nor to assign the loss to the superior risk bearer, but to leave things alone." Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 5 (1991).

[150] "Ivey misrepresented his motive, intention and purpose and did not communicate the true reason for his requests to Borgata at any relevant time. Ivey's true motive, intention, and purpose in negotiating these playing arrangements was to create a situation in which he could surreptitiously manipulate what he knew to be a defect in the playing cards in order to gain an unfair advantage over Borgata." Amended Complaint, *supra* note 7, at 6.

[151] Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 18.

[152] Amended Complaint, *supra* note 7, at 21.

[153] *See* Valerie Cross, *Ivey's Attorney Throws Court a Curve in the Borgata Edge-Sorting Appeal*, POKERNEWS.COM (Oct. 1, 2019), https://www.pokernews.com/news/2019/10/iveys-attorney-throws-court-a-curve-borgata-appeal-35564.htm [https://perma.cc/T64F-V3WG].

> (1) Knowingly to conduct, carry on, operate, deal or allow to be conducted, carried on, operated or dealt any cheating or thieving game or device; or
>
> (2) Knowingly to deal, conduct, carry on, operate or expose for play any game or games played with cards, dice or any mechanical device, or any combination of games or devices, which have in any manner been marked or tampered with, or placed in a condition, or operated in a manner, the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.[154]

C. Unfairness

The Borgata asserted that it had every expectation that the games played at its casino would be fair, arguing that it had followed New Jersey law and DGE rules and regulations to provide fair odds to its patrons.[155] However, "[b]ecause of Ivey and Sun's misconduct, unfair play and the use of their influence as "high rollers" to deceive Borgata, Ivey and Sun succeeded in manipulating the Baccarat game to deprive the game of its essential element of chance."[156] The Borgata showed its cards, though, when it admitted that it was not really concerned about fair odds for players, but rather that Ivey and Sun's "misconduct, unfair play and deception" interfered with "the fairness, integrity and vitality of the casino operation in process pursuant to N.J.S.A. §5:12-100(e)."[157]

The Borgata further argued that Section 5:12-115.a.(2) applies to Sun's manipulation of the cards, which altered "the normal chance of the game."[158] For support, the Borgata points to *Houck v. Ferrari*,[159] where the court cited the same statute to hold that hole-carding[160] altered the normal chance of the game.[161] Ivey argued that *Doug Grant, Inc. v. Greate Bay Casino Corp.*[162] supported his position that since "the rules of the game are being followed, then the 'normal chance and randomness of the game cannot be

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[154] N.J. STAT. ANN. §5:12-115(a) (West 2011).
[155] Amended Complaint, *supra* note 7, at 19.
[156] *Id.*
[157] *Id.*
[158] Cross, *supra* note 153; N.J. STAT. ANN. §5:12-115(a)(2) (West 2011).
[159] 57 F. Supp. 3d 377 (D.N.J. 2014).
[160] *See* Jacobson, supra note 75.
[161] *See Houck*, 57 F. Supp. 3d at 384.
[162] 3 F. Supp. 2d 518 (D.N.J. 1998)

manipulated.'"[163] He followed the rules of baccarat and had agreed in advance with the casino about the specific procedures. Ivey further argued that the Borgata's employees followed Sun's requests regarding the turning and arranging of the cards and were therefore complicit in any modification of the odds to Ivey's advantage. Ivey argued that he played under the supervision of the casino employees, according to the casino rules, and therefore could not be liable for manipulating the odds.[164]

Mac VerStandig, an expert gaming attorney, wondered "how a casino's own automatic shuffler can be deemed a 'cheating device' without making a mockery of either the gaming industry, the legal profession, or both."[165] In addition, if asking for an automatic shuffler is a "trick," then the casino's efforts to confuse patrons with lights and sound should also be considered a "trick" and therefore in violation of the act.

The Third Circuit asked the DGE and the Casino Control Commission (the "CCC") to provide amicus briefs about the case to the court, however, the CCC declined to do so and the DGE submitted an insubstantial four-page response.[166] The DGE often serves as both mediator and arbitrator in disputes between gamblers and casinos but it steered clear of this dispute.

Signaling some hope to Ivey, presiding Third Circuit Judge Marjorie Rendell noted during the appellate court arguments that the Borgata agreed to the terms of play in advance, stating, "Nothing was hidden from you [the Borgata]. These cards weren't marked—here you had equal access."[167] In other words, the Borgata did not assert any unfairness before the games were played, but instead only after it lost. The court ordered the parties to mediation with the Third Circuit mediator, in which they participated for four months and resolved their disputes.[168] Of course the terms of the settlement are confidential, however, rumors circulated that the settlement did not favor the Borgata.[169] "It has been assumed that Borgata had agreed to the

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[163] Cross, *supra* note 153.

[164] *See id.*

[165] VerStandig, *supra* note 145.

[166] *See* Mo Nuwwarah, *Ivey Versus Borgata Continues with Legal Proceedings*, POKER NEWS (Sept. 24, 2019), https://www.pokernews.com/news/2019/09/ivey-borgata-continues-legal-proceedings-35507.htm [https://perma.cc/Z42F-GM9A].

[167] *Id.*

[168] *See* Defendants' Brief in Support of Motion for Relief from Judgments, Orders and Opinions Pursuant to F.R.C.P. 60(b)(5) and (6) at 2, Marina District Development Co., LLC v. Ivey, No. 1:14-cv-02283 (D.N.J. July 16, 2020).

[169] *See* Adrian Sterne, *Borgata Finally Settles $10M Edge-Sorting Case with Phil Ivey*, TOP 10 POKER SITES (July 10, 2020), https://www.top10pokersites.net/news/borgata-casino-finally-settles-10m-edge-sorting-case-with-phil-ivey [https://perma.cc/LTA5-AGYX]; *Phil Ivey Settles Edge Sorting Lawsuit with the Borgata*, CASINO NEWS

settlement because if they lost the appeal, it could set a dangerous precedent for future cheating or advantage casino cases involving parent company MGM Resorts."[170] Given Judge Rendell's remarks, the Borgata likely lost confidence in its case.

D. The Borgata's Advantage

Before the Borgata cried about unfairness due to an advantage, it should have considered its own advantage and the unfairness to the players. Part of a casino's assessment of its risk is based upon its own advantage. Casinos make money based on a formula of total wagers multiplied by the house edge.[171] If a player is betting $100,000 on each hand, and a casino has even a 1% edge, it is making $1,000 on every hand. Having an edge is an advantage, just like excessive noise and alcohol is an advantage to the casinos. If edge sorting is banned, will alcohol be next?

Casinos have access to equipment to track gameplay and make adjustments when play favors the player.[172] While dealers can also be taught to count cards and, when the deck favors the player, to shuffle the cards,[173] a system such as the MP21 by MindPlay "maintains a level of vigilance that no human can match."[174] It provides information to the casino about which players are doing well and when the house may benefit from a card shuffle, as well as those who are losing and should be offered more drinks and comps to keep them happy.[175] "Allowing a casino to use superior technology, par-

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DAILY (July 9, 2020, 9:57 AM), https://www.casinonewsdaily.com/2020/07/09/phil-ivey-settles-edge-sorting-lawsuit-with-the-borgata/ [https://perma.cc/Y8NY-G8Q3] ("According to legal experts, the settlement is not a surprising outcome, particularly after a prominent appellate attorney said that Ivey was a slight favorite to prevail in the appeal.").

[170] Sterne, *supra* note 169.

[171] *See* Avirgan, *supra* note 25.

[172] *See* Joshua Tompkins, *For the Pit Boss, Some Extra Electronic Eyes*, N.Y. TIMES (Mar. 25, 2004) https://www.nytimes.com/2004/03/25/technology/for-the-pit-boss-some-extra-electronic-eyes.html [https://perma.cc/PM3Y-EZ8E] ("[The MP21 by MindPlay] uses an array of 14 concealed cameras as well as image-recognition software to capture and count all wagers. A special shuffling shoe records the cards dealt. Each player's statistics are recorded through a casino-issued identity card that a dealer swipes at the table."). TableLink, by Mikohn Gaming, uses RFID tags embedded in casino betting chips to track wagers. *See id.*

[173] *See* Cabot & Hannum, *supra* note 15, at 752.

[174] Tompkins, *supra* note 172.

[175] In addition, the MP21 system can monitor the dealers, noting their accuracy as well as occupancy (players acquired or lost during a table shift). *See id.*; *see also* Arnold Snyder, *Bye Bye Boss: The MindPlay Table Games Management System and Ca-*

ticularly where the player is prohibited from using a computer to assist in his play, can raise fundamental issues regarding the honesty and fairness of the games."[176] Again, if players are not entitled to use advantage play, why are the casinos?[177] Some have "suggested the sensible compromise that preferential shuffling might be allowed, but only if casinos post signs alerting players to the policy."[178] In other words, the casino would need to notify players of its advantage. Is that not just what Ivey did with the Borgata? He asked for specific concessions in advance, the only reason for which would be an advantage. The Borgata knew he would have an advantage and agreed to it in advance.

It appears that the legislature, at least in New Jersey, is on the side of the taxpaying casino, as the court noted that "the clearly expressed intention of the New Jersey Legislature to ensure the financial viability of the casino industry provides ample justification for the CCC regulations and practices" that permit casinos to shuffle-at-will, selectively set betting limits, count cards to determine when the cards should be reshuffled, and share information about identified card counters with other casinos.[179]

Ivey argued that the Borgata utilizes its own advantages by employing attractive cocktail waitresses and offering free cocktails during play.[180] "Everyone knows that alcohol impairs your judgment, and they offer that and

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sino Surveillance, BLACKJACK FORUM (Spring 2003), available at http://www.blackjackforumonline.com/content/Mindplay.htm [https://perma.cc/S676-SQHE].

[176] Cabot & Hannum, *supra* note 15, at 752.

[177] Computers and programs that can predict blackjack strategies can be as small as a pack of cigarettes and strapped to a player's leg. While initially legal because gambling laws did not anticipate the invention of such devices, regulators rushed to outlaw them — for gamblers. *See* Schnell-Davis, *supra* note 5, at 301; *see also*, N.J. Admin. Code § 19:47-8.1 (1983) (repealed 2012). On the other hand, casinos have been permitted to use such devices. When they detect that the odds are shifting in favor of the players, the casino orders a shuffle. *See* PETER A. GRIFFIN, THE THEORY OF BLACKJACK 135-38 (6th ed. 1999); *see generally* BILL ZENDER, HOW TO DETECT CASINO CHEATING AT BLACKJACK 131-44 (1999).

[178] Schnell-Davis, *supra* note 5, at 332.

[179] Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518, 539 (D.N.J. 1998). "[T]he manner in which the casinos discriminately employed the 'shuffling-at-will' countermeasure is not outlawed by the Casino Control Act." Brief of Defendants Ivey and Sun in Support of their Motion to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6), *supra* note 109, at 14.

[180] *See* Chad Holloway, *Highlights from Ivey/Borgata Deposition: Booze, Pretty Cocktail Waitresses and More*, POKER NEWS (Aug. 27, 2015), https://www.pokernews.com/news/2015/08/highlights-from-phil-ivey-borgata-depostion-22634.htm [https://perma.cc/T6UG-FGEQ] (quoting from Ivey's deposition).

they have the pretty cocktail waitresses and they're all very flirty. They're talking to you, you know. I got quite a few of their numbers."[181] One player went so far as to sue the Downtown Grand casino in Las Vegas after he lost $500,000 playing while he was "blackout intoxicated," arguing that the casino should not have continued to serve him drinks and loan him money to increase his losses.[182]

When Ivey's motion to dismiss was denied, the judge recognized that:

> Ivey and Sun argue that Borgata willingly agreed to all of their requests and provide all the implements of gambling, and that all of those requests, along with their observation of the patterns on the playing cards, were lawful. Ivey and Sun also note that even though Borgata wishes to cast itself as a victim of deceptive intentions, the 'essential mission of Borgata's casino operation is to encourage patrons to lose money by orchestrating a plethora of deceptive practices, such as loud noises and flashing lights on slot machines, hiding the clocks, making exit signs almost impossible to find, having cocktail waitresses wear revealing clothing, and comping copious amounts of alcohol to 'loosen up' their patrons'. There is no doubt that much of the defendants' characterization of the casino milieu is accurate, as tangential a defense as it may be.[183]

IV. IMPLICATIONS

"In terms of public sentiment, Ivey has long been the clear winner in the case."[184] One of the foundations of the heavily regulated gambling industry is to "assure that players are paid if they win,"[185] so casinos should not be able to pull back those winnings on a hypocritical claim of unfair advantage. The settlement may offer confidence to gamblers that their casino contracts will be enforced. In other words, when they place a bet, they can rely on the casino to pay them if they win. However, gamblers can also expect that the casinos will put tighter monitoring procedures in place to

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[181] *Id.*

[182] *See* Laura Stampler, *Man Sues Casino for Letting him Lose $500K When he was 'Blackout' Drunk*, TIME (Mar. 6, 2014, 11:29 AM), https://time.com/14033/man-sues-casino-for-letting-him-lose-500k-when-he-was-blackout-drunk/ [https://perma.cc/G4MD-W4CS].

[183] Brian Pempus, *Judge Denies Poker Pro Phil Ivey's Request to Dismiss $9.6 Million Borgata Lawsuit*, CARD PLAYER (Mar. 23, 2015), https://www.cardplayer.com/poker-news/18578-judge-denies-poker-pro-phil-ivey-s-request-to-dismiss-9-6-million-borgata-lawsuit [https://perma.cc/X3LJ-FYDE].

[184] Pempus, *supra* note 113.

[185] Cabot & Hannum, *supra* note 15 (citing ROBERT C. HANNUM & ANTHONY N. CABOT, PRACTICAL CASINO MATH 206 (2d ed. 2005)).

ensure that winnings are short-lived. Technology like MindPlay will likely be more widespread.[186] Casinos without technology can use old-fashioned methods of interfering with winnings, like ordering shuffles after five wins, for example.[187]

In addition, for the whales, their ability to negotiate personal terms may decrease given the lessons learned by the Borgata and other casinos. Casinos will likely no longer permit whales to choose their cards or dealers, nor control the manner in which the cards are shuffled. Even if an automatic shuffler is used, the casino will likely insist upon the right to add random manual shuffles as it sees fit. It will be interesting to see the degree to which the casinos develop a list of gambling policies and procedures to be provided to players, particularly whales, in order for the casinos to not only reduce advantage play, but also decrease a player's ability to argue, as Ivey did, that the player was unaware that advantage play was not permitted.[188]

However, the settlement is not all good news for players. Casinos will continue to have the power to use their own advantages to prevent players from winning[189] and prohibit players from using advantages.[190] They will continue to argue that, as private establishments, they are free to create their own rules.[191] In addition, New Jersey casinos will have six years to bring a claim against a gambler, rather than the six months provided under the gaming statute.[192] That is far too long a period of time for casinos to have to nurse their wounds from a major loss, repeatedly study security video of game play, and create an argument to go after the winning gambler.

As for card manufacturers like Gemaco, they probably will be held to a higher standard of symmetry in their cards, likely limiting designs on the card backs. After all, the designs on the cards attached in Appendices A and B do not add value and could easily be changed. For example, cards could have the casino logo centered on a plain background to prevent edge sorting. It would be an easy resolution to protect both the casinos and the card manufacturers.

It is important to note, though, that it is not good for the gaming industry to continue to have these disputes. They are expensive for everyone, draw bad publicity for the casino, and damage the player's image. To prevent that, clarity is needed. Since advantage play is often governed by the

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[186] *See* Tompkins, *supra* note 172.
[187] *See* Cabot & Hannum, *supra* note 15, at 710-11.
[188] *See* O'Sullivan, *supra* note 111.
[189] *See supra* Section III.C.
[190] *See supra* Section II.E.
[191] *See* Barker, *supra* note 89.
[192] *See* N.J. STAT. ANN. § 2A:14-1.

policies of the casino rather than gaming statutes,[193] those policies should be clearly stated and readily accessible by the players. In the case of a whale, those policies could easily be delivered to the whale upon arrival at the casino. It might be more challenging with the average gambler. For example, the policies could be on display in the room of the casino hotel for the guest to peruse, but many gamblers do not stay at the hotel where they gamble. How would those policies be conveyed to those gamblers? A sign at the entrance would not likely be successful, as there are multiple entrances at most casinos, as well as crowds who might block the signs. From a marketing perspective, it certainly would not be welcoming to have a list of prohibitions at the entrance. However, this might be a case where technology would be helpful. Most casinos have moved to some sort of players' club, utilizing club cards to track gaming at slot machines as well as tables.[194] Those cards are often connected to an app where a player can track his statistics as well as his account. The policies and procedures of the casino, including those regarding advantage play, could be contained there, and require acceptance by the player before the card would be activated.[195]

Ultimately, though, it would be best for both players and casinos if gaming laws were revised to specifically address advantage play. This idea that the casino has the right to set its own policies is no longer manageable. For example, in Las Vegas, there are 136 casinos as of the writing of this

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[193] *See* Cabot & Hannum, *supra* note 15.

[194] For example, MGM Resorts, the parent of the Borgata, offers M life Rewards, allowing members to earn benefits and rewards while gaming. *See M life Rewards Tier Benefits*, MGM Resorts, https://www.mgmresorts.com/en/mlife-rewards-program/tiers.html [https://perma.cc/Z82C-JV6H] (last visited July 9, 2020); *see also* Mark Legg, *The Future of the Gaming Industry: Challenges the Next Decade Holds for Casinos*, Boston Hospitality Review (Feb. 13, 2020), https://www.bu.edu/bhr/2020/02/13/the-future-of-the-gaming-industry-challenges-the-next-decade-holds-for-casinos [https://perma.cc/5B9T-XGTC] ("Casinos now collect more information on their patrons than almost any other industry.")

[195] Note that in order for courts to find that a binding agreement is created by clicking on "I agree," reasonable notice and opportunity to review will be considered. Best practices suggest that a so-called clickwrap agreement should "1. Conspicuously present the [terms of service "TOS"] to the user *prior* to any payment. . .; 2. Allow the user to easily read and navigate *all* of the terms. . .; 3. Provide an opportunity to print, and/or save a copy of, the terms; 4. Offer the user the option to decline as prominently and by the same method as the option to agree; and 5. Ensure the TOS is easy to locate online *after* the user agrees." Ed Bayley, *The Clicks that Bind: Ways Users "Agree" to Online Terms of Service*, EFF (Nov. 16, 2009), https://www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service [https://perma.cc/NQU7-NW2W].

article.[196] How is one player expected to know not only the Nevada gaming statutes but also the policies of 136 casinos? And, in most cases, company policies include a savings clause, stating that the policies are subject to change at any time. So even if a gambler did research a casino's policies in advance, the casino could change it that day, most likely driven by the winning streak of a player.

In order to revise gaming statutes, decisions would first need to be made regarding which forms of advantage gaming are illegal, and that if a method is not prohibited by statute, then a casino must permit it. That is impractical, and even if it were possible in one state, gamblers would still face the challenge of knowing the statute of each state, and for that matter, international gaming statutes.[197]

Given the timing of this article, there must at least be a mention of the uncertainty of the future of the gambling industry in general, given the coronavirus.[198] The worldwide travel shutdown has impacted the hospitality and gambling industry, both in terms of revenue[199] and in the manner in which it operates. Once casinos are able to reopen, they will likely be conflicted by the urge to attract gamblers, particularly whales, yet guard against losses.

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[196] *See* Steve Beauregard, *How Many Casinos are in Las Vegas?*, GAMBOOOL, https://gamboool.com/how-many-casinos-are-in-las-vegas [https://perma.cc/M9AS-WMZ9] (noting that as of January 1, 2020, according to the Nevada State Gaming Control Board, there are 222 casinos in Clark County, where Las Vegas, Primm, Mesquite, and Laughlin, all gambling destinations, are located) (last visited Oct. 18, 2020). "57% of the state's gambling money comes from the Las Vegas Strip." *Id.*

[197] Recall that Ivey and Sun used the edge sorting technique in both the New Jersey and London. *See* Hawkins, *supra* note 140.

[198] The coronavirus is named SARS-CoV-2, nicknamed COVID-19. *See Coronavirus Disease 2019 (COVID-19) Situation Summary*, CDC (Mar. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/summary.html [https://perma.cc/5SHR-NBAE].

[199] *See* Travis Hoium, *3 Top Gambling Stocks to Watch in July*, MOTLEY FOOL (July 9, 2020, 9:15 AM), https://www.fool.com/investing/2020/07/09/3-top-gambling-stocks-to-watch-in-july.aspx [https://perma.cc/92EY-N4NK] ("Macau was the biggest gambling market in the world by a wide margin before COVID-19 hit, but it's seen gambling revenue decline over 93% year over year each of the last three months.").

V. CONCLUSION

After the 2016 ruling[200] against Ivey, the Borgata searched for Ivey's assets in New Jersey to seize to satisfy the $10 million judgment.[201] Finding none there, the Borgata looked to Las Vegas.[202] The Borgata garnished Ivey's winnings, directing the World Series of Poker to withhold any winnings from the final table of the $50,000 Poker Players Championship.[203] Ivey won $124,410, which the WSOP paid to the U.S. Marshals to be held until the matter is resolved.[204] On August 30, 2019, Illya Trincher and Dan Cates filed an objection to the Writ of Execution, requesting the return of $87,205 owned by them, as they backed Ivey's entry into the tournament and those funds belong to them.[205] Ivey claims that the Borgata's lawyer, Jeremy Klausner, did not follow protocol with respect to the writ of execution that led to Ivey's frozen winnings as he is not licensed in Nevada and did not partner with local licensed counsel as required.[206] Since the settlement is confidential, we have no way of knowing whether seized winnings were returned to Ivey.

Ivey and Sun no longer play together, although Sun successfully won at a casino in Macau after the Borgata incident.[207] She continues to play in Asia

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[200] *See* Marina Dist. Dev. Co., LLC v. Ivey, 223 F. Supp. 3d 216 (D.N.J. 2016) (holding that Ivey had breached the contract and his winnings would be returned to the Borgata).

[201] *See* Fiorillo, *supra* note 6.

[202] *See id.*

[203] *See* Mo Nuwwarah, *Report: Borgata Seeking Phil Ivey's WSOP Winnings Plus $214K Interest*, POKER NEWS (July 23, 2019), https://www.pokernews.com/news/2019/07/borgata-seeking-phil-ivey-wsop-winnings-interest-34936.htm [https://perma.cc/N62N-LL5M].

[204] *See* Matthew Pitt, *Ivey Borgata Case Takes Another Turn as Cates and Trincher File Objection*, POKER NEWS (Sept. 10, 2019), https://www.pokernews.com/news/2019/09/ivey-borgata-case-cates-trincher-35370.htm [https://perma.cc/2MH4-HCUX].

[205] *See More Headwinds for Borgata in Phil Ivey Nevada Garnishment*, FLUSHDRAW (Sept. 18, 2019), https://www.flushdraw.net/news/more-headwinds-for-borgata-in-phil-ivey-nevada-garnishment/ [https://perma.cc/8Z47-JALD]; *see also* Pitt, *supra* note 204 (noting that according to the staking agreement with Ivey, Trincher and Cates were entitled to recoup the $50,000 buy in that they fronted plus receive 50% of Ivey's winnings. Ivey won $124,410, less the $50,000 buy-in, equals $74,410, divided by 2 equals $37,205; add that back to the buy-in, and Trincher and Cates are entitled to $87,205).

[206] *See* Mo Nuwwarah, *Ivey Versus Borgata Continues with Legal Proceedings*, POKER NEWS (Sept. 24, 2019), https://www.pokernews.com/news/2019/09/ivey-borgata-continues-legal-proceedings-35507.htm [https://perma.cc/Z42F-GM9A].

[207] *See* Kaplan, *supra* note 26.

and is even teaching her winning techniques to others.[208] She plans to change her look so that she can play again in the United States unnoticed.[209] While Ivey is too well known to play in the United States unnoticed, the settlement will likely pave the way for him to return to United States gambling, although probably not with Sun as a partner. Hollywood has taken an interest in the story, and Ivanhoe Pictures is set to produce *The Baccarat Queen*,[210] the story of Sun based on Michael Kaplan's 2017 article "The Baccarat Machine" that appeared in *Cigar Aficionado* and is cited herein.[211] It will be interesting to see how the settlement impacts the gaming industry, especially since it has been devastated by the coronavirus. Will the public or the legislature have any interest in further regulating gaming, or is the current objective simply to get casinos open, dealers working, and gamblers spending money?

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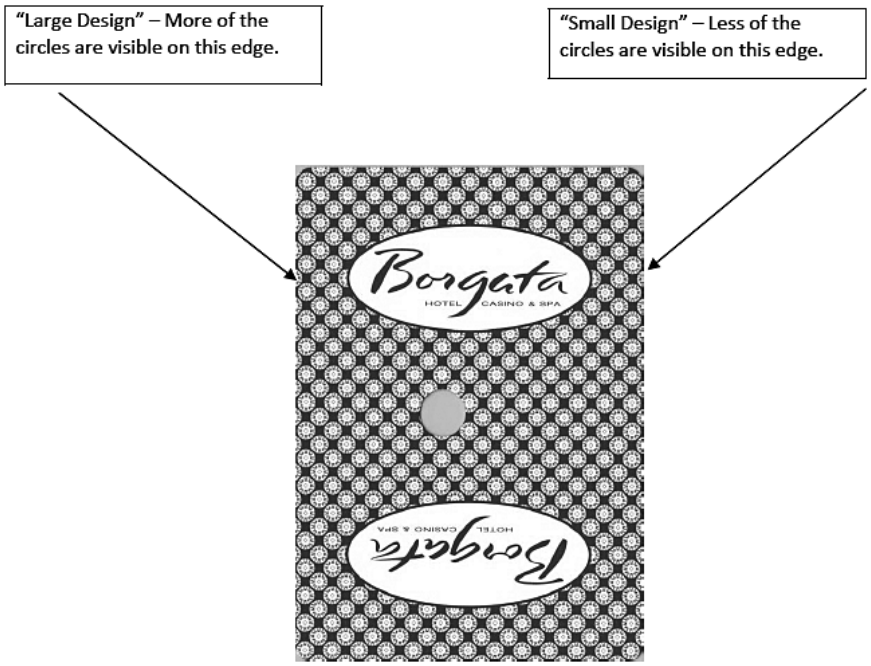
[208] *See id.*

[209] *See id.* (recognizing Sun is banned from many casinos on the Las Vegas strip, but can still play downtown where the limits are lower).

[210] *See* Amanda N'Duka, *Ivanhoe Pictures, Sharp Independent Pictures to Produce Film About Successful Female Baccarat Player*, DEADLINE (Feb. 14, 2019, 2:58 PM), https://deadline.com/2019/02/ivanhoe-pictures-sharp-independent-pictures-the-baccarat-queen-movie-1202557919/ [https://perma.cc/932D-GJX8].

[211] *See* Kaplan, *supra* note 26.

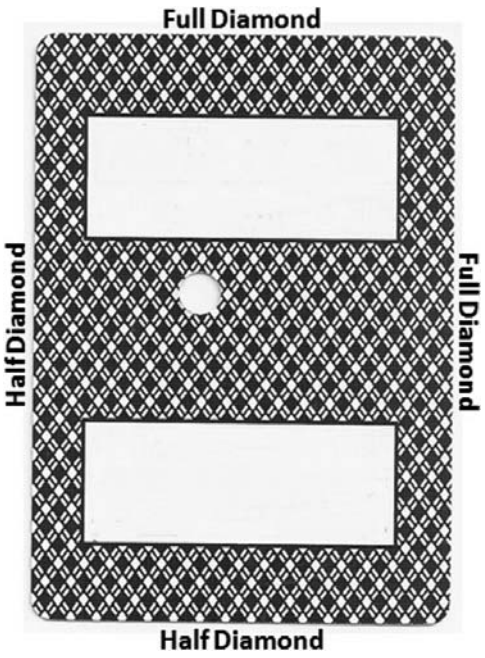
APPENDIX[212] A



[212] Amended Complaint, *supra* note 7, at 52.

Appendix B[213]

Below is another example of an asymmetrical card.



[213] Jacobson, *supra* note 75.

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Improving the Game: The Football Players Health Study at Harvard University and the 2020 NFL-NFLPA Collective Bargaining Agreement

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Abstract

This Article examines the connections between player health and safety provisions in the 2020 NFL-NFLPA collective bargaining agreement ("CBA") and research conducted, and recommendations made, by the Football Players Health Study at Harvard ("FPHS"). More specifically, between 2016 and 2019, the Law and Ethics Initiative of FPHS produced eight publications "with the primary goal of understanding the legal and ethical issues that may promote or impede player health and developing appropriate responsive recommendations." The Law and Ethics Initiative's work, among other things, analyzed the legal and ethical obligations of stakeholders in NFL player health; scrutinized the structure of club medical staffs; compared the NFL's health-related policies and practices to those of other sports leagues; evaluated the application of the Americans with Disabilities Act, Genetic Information Nondiscrimination Act, and Occupational Safety and

[1] Christopher R. Deubert is an attorney in Washington, D.C. As will be discussed herein, from May 2014 to May 2017, he was part of the Football Players Health Study at Harvard University ("Study"). Deubert is no longer affiliated with the Study in any way and all opinions expressed herein are his personally and should not be considered the opinions of Harvard University, the Study, nor anyone else affiliated with the Study.

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Health Act to the NFL workplace; and assessed challenges players face concerning mental health and transitioning out of the NFL.

The 2020 CBA responded to the Law and Ethics Initiative's work in many ways, including occasionally adopting wholesale some of its recommendations. This result is not surprising given that the Law and Ethics Initiative regularly engaged with the NFL, NFLPA, and other stakeholders during its work. The parties also made other changes to health and safety provisions not discussed in FPHS work. Nevertheless, the NFL and NFLPA have still failed to meaningfully address one of the principal legal and ethical issues concerning player health: the conflicted structure in which club medical staff provide services to both players and the clubs. Indeed, the NFL and NFLPA have yet to articulate a coherent response to the Law and Ethics Initiative's extensive analysis of, and recommendation toward, this issue. Consequently, while the 2020 CBA represents important progress on player health and safety issues, there is still work to be done.

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INTRODUCTION

2011 was a critical year for the National Football League ("NFL" or "League"). In the preceding years, the League had faced considerable and growing scrutiny for its alleged mishandling of player health matters, concussions in particular.[3] In July of 2011, 73 former NFL players sued the League and its member clubs alleging that they had failed to properly protect the players from the risks associated with head injuries.[4] Similar lawsuits soon followed.[5]

Also in 2011, the NFL was engaged in litigation with the National Football League Players Association ("NFLPA") concerning the recently expired collective bargaining agreement ("CBA"),[6] as a new season approached. In late July, the NFL and NFLPA settled their differences and agreed to a new CBA (the "2011 CBA").[7] The 2011 CBA significantly changed various components of the parties' relationship and League operations, including the parties' respective shares of revenue, salary cap calculations, and rookie compensation.[8] Yet, some of the biggest changes concerned player health and benefits for former players.[9]

Of particular relevance to this Article, the 2011 CBA set aside $11 million per year through 2021 to be dedicated to research on NFL player health.[10] After a request for proposal process, the NFLPA and Harvard University entered into an agreement in 2014 to create the Football Players Health Study at Harvard University ("FPHS"), a long-term research initiative with the goal of improving the health of professional football players

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[3] *See* Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* (Nov. 2016) at 208-11, available at https://footballplayershealth.harvard.edu/law-and-ethics-protecting-and-promoting/ [https://perma.cc/YF2B-D3BU] and at 7 HARV. J. SPORTS & ENT. L. 1 (2016) [hereinafter *Protecting and Promoting*].

[4] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 361 (E.D. Pa. 2014).

[5] *See id.*

[6] *See Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011); Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1 (2012) [hereinafter *All Four Quarters*].

[7] Collective Bargaining Agreement, NFL/NFLPA (Aug. 4, 2011) [hereinafter 2011 CBA]; *All Four Quarters*, *supra* note 6, at 39.

[8] *See All Four Quarters*, *supra* note 6, at 44-61.

[9] *See Protecting and Promoting*, *supra* note 3, at 211-12; *All Four Quarters*, *supra* note 6, at 70.

[10] *See* 2011 CBA, *supra* note 7, at Art. 12, § 5.

across a broad spectrum.[11] FPHS, as initially structured, understandably included a variety of medical studies.[12] However, what differentiated FPHS from the numerous other studies conducted around that time concerning NFL player health was the inclusion of a law and ethics component (the "Law and Ethics Initiative").[13]

The Law and Ethics Initiative encompassed "a variety of distinct projects with the primary goal of understanding the legal and ethical issues that may promote or impede player health and developing appropriate responsive recommendations."[14] One of the authors here (Deubert) was a key contributor to the Law and Ethics Initiative from May 2014 to May 2017, as will be discussed further below.

Fast forward to 2020. The 2011 CBA was set to expire in March 2021.[15] After a relatively subdued series of negotiations (*i.e.*, without litigation or a threat thereof), the parties agreed to a new CBA in March 2020 extending the agreement through March 2031 (the "2020 CBA").[16] The 2020 CBA, like the 2011 CBA, made numerous changes to player health and safety provisions. Those changes are the focus of this work. More specifically, this Article reviews how those changes respond or relate to recommendations and analysis put forth by FPHS, and the Law and Ethics Initiative in particular.

This Article proceeds in five Parts, with summaries of the following issues: (I) FPHS and the Law and Ethics Initiative; (II) relevant developments in NFL player health between the 2011 CBA and the 2020 CBA; (III) the player health and safety changes in the 2020 CBA that are connected to work produced by FPHS; and (IV) other player health and safety changes in the 2020 CBA. The Article concludes by summarizing the progress of the 2020 CBA and the work still to be done.

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[11] *See Protecting and Promoting*, *supra* note 3, at 24-25.

[12] *See id.*

[13] *See id.* at 25.

[14] *Id.*

[15] *See* 2011 CBA, *supra* note 7, at Art. 69, § 1.

[16] *See* Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 15, 2020), https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246 [https://perma.cc/GT6B-9P6L]; Collective Bargaining Agreement, NFL/NFLPA (Mar. 5, 2020) [hereinafter 2020 CBA], Art. 66, § 1.

I. The Football Players Health Study at Harvard University

FPHS initially included three components: "(1) [a] Population Studies component, which entail[ed] research using questionnaires and testing to better understand player health status, wellness, and quality of life, including the largest-ever cohort study of living former NFL players; (2) [a] Pilot Studies program aimed to develop new prevention strategies, diagnostics, and treatments by funding researchers working on innovative and promising developments that have the potential to impact the health of football players;" and (3) the Law and Ethics Initiative.[17]

Before providing additional information on these studies, it is important to clarify the relationship between Harvard University and the NFLPA during the course of FPHS. As alluded to above, Harvard University and the NFLPA agreed to an initial statement of work for three different types of research projects.[18] Otherwise, the FPHS researchers conducted their work independent of any control by the NFLPA, NFL, or any other party.[19] Indeed, this independence was contractually protected in the FPHS funding agreement.[20] Consequently, there should be no doubt that the work conducted by FPHS is of the high caliber expected of Harvard University.

The Population Studies and Pilot Studies have evolved over time. Today, FPHS describes itself as "[h]arnessing the expertise of the University's faculty and researchers across interdisciplinary domains, including neurology, sports medicine, rehabilitation medicine, public health, cardiology, and more . . . to advance our knowledge of the interdependency of the multiple, and often interrelated, conditions that players face."[21] FPHS' goals today are to: "[b]etter understand the benefits and risks of playing professional football"; "[i]dentify risks that may be reversible or preventable"; and "[d]evelop interventions to improve health and wellbeing."[22]

As of May 2020, FPHS has produced approximately 40 peer-reviewed publications in medical journals, concerning a wide range of health issues relevant to football players.[23] There are two projects worth highlighting.

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[17] *See Protecting and Promoting*, *supra* note 3, at 25.

[18] *See id.* at 10.

[19] *See id.*

[20] *See id.*

[21] *See Who We Are*, Football Players Health Study at Harv. U., https://footballplayershealth.harvard.edu/about/ [https://perma.cc/7XV7-C8HX] (last visited Nov. 4, 2020).

[22] *Id.*

[23] *See Publications*, Football Players Health Study at Harv. U., https://footballplayershealth.harvard.edu/publications/ [https://perma.cc/RRK9-M538] (last visited Nov. 4, 2020).

First, one of the core components of FPHS was to conduct the largest ever medical survey of former NFL players.[24] Using data obtained from the NFLPA and public resources, it was estimated that there were approximately 20,000 former NFL players, 16,000 of whom were alive as of 2014.[25] Following an extensive, complicated, and repetitive process of reaching out to and engaging with former players, FPHS ultimately collected medical information from 3,785 former NFL players, achieving its goal of being the largest ever study of former players.[26] The results of the questionnaires completed by the players have provided valuable data used to conduct numerous studies on specific issues.[27]

Among the most interesting results from related studies are: 40% of respondents reported "daily problems due to cognitive dysfunction";[28] "seasons of play and playing position in the NFL are associated with lasting neuropsychiatric health deficits";[29] "poor cognition-related QOL [quality of life], depression, and anxiety appear to be associated with concussion in the long term";[30] 27% of former players "reported two or more medical afflictions (chronic pain, cardiometabolic disease, sleep apnea, or neurocognitive impairment)";[31] and, when compared to Major League Baseball players, "NFL players had significantly elevated rates of all-cause . . . , cardiovascular disease . . . , and neurodegenerative disease . . . mortality."[32] Importantly, each of these studies has its own limitations, which should be carefully considered alongside any extensive reference. Nevertheless, the Population Studies component of FPHS has clearly helped to provide a valuable understanding of the health risks of an NFL career.

Second, one pilot study deserves special attention as a study representative of the program's goals. Dr. Martha M. Murray, an orthopedic surgeon with Harvard Medical School and an advisor to FPHS, has done ground-

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[24] *See generally* Ross Zafonte et al., *The Football Players' Health Study at Harvard University: Design and objectives*, 62 AM. J. INDUS. MED. 643 (2019).

[25] *See id.* at 646.

[26] *See id.* at 643, 651.

[27] *See id.* at 646-53.

[28] *See* Franziska Plessow et al., *Self-Reported Cognitive Function and Mental Health Diagnoses Among Former Professional American-Style Football Players*, 37 J. NEUROTRAUMA 1021 (2020).

[29] Andrea L. Roberts et al., *Exposure to American Football and Neuropsychiatric Health in Former National Football League Players*, 47 AM. J. SPORTS SCI. 2871 (2019).

[30] *Id.*

[31] Timothy P. Morris et al., *Multisystem Afflictions in Former National Football League Players*, 62 AM. J. INDUS. MED. 655 (2019).

[32] Vy T. Nguyen et al., *Mortality Among Professional American-Style Football Players and Professional American Baseball Players*, 2 JAMA NETWORK OPEN (2019).

breaking work on repairs of injuries to anterior cruciate ligaments ("ACLs"), which are critical components of a healthy knee. Torn ACLs are significant injuries that frequently end or significantly impact NFL players' careers.[33] Today, torn ACLs are typically repaired through a tendon graft, usually with a tendon from the hamstring or patella.[34] However, this procedure does not fully restore motion in the knee joint and leads to osteoarthritis in approximately 76% of patients.[35] Dr. Murray, with support from FPHS and other sources, has developed a new method for repairing torn ACLs.[36] Dr. Murray's method involves the implantation of a protein in the gap between the torn ends of the ACL, a procedure known as bridge-enhanced ACL repair, or BEAR.[37] This process effectively enables the ACL to heal itself in a much less invasive process.[38] Importantly, early clinical trials in humans have shown improved and shorter recoveries.[39] Dr. Murray's research thus presents a promising future for reducing problems associated with one of the worst injuries suffered by NFL players.

To finish our discussion of FPHS, we turn to the Law and Ethics Initiative, which will form the focus of this Article. The Law and Ethics Initiative was led by I. Glenn Cohen, a professor from Harvard Law School and the Faculty Director of the Petrie-Flom Center for Health Law Policy, Biotech-

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[33] *See* Matthew T. Provencher et al., *A History of Anterior Cruciate Ligament Reconstruction at the National Football League Combine Results in Inferior Early National Football League Career Participation*, 34 ARTHROSCOPY 2446 (2018); Connor R. Read et al., *Return to Play and Decreased Performance After Anterior Cruciate Ligament Reconstruction in National Football League Defensive Players*, 45 AM. J. SPORTS MED. 1815 (2017); Dave Siebert, *A Closer Look at the ACL as Tears Continue to Run Rampant in the NFL*, BLEACHER REPORT (Aug. 7, 2013), https://bleacherreport.com/articles/1729646-a-closer-look-at-the-acl-as-tears-continue-to-run-rampant-in-the-nfl [https://perma.cc/X7TB-AZ6P].

[34] *See generally* Martha A. Murray et al., *Bridge-Enhanced Anterior Cruciate Ligament Repair Is Not Inferior to Autograft Anterior Cruciate Ligament Reconstruction at 2 Years*, 48 AM. J. SPORTS MED. 1305 (2020).

[35] *See Martha Murray*, BOSTON CHILDREN'S HOSPITAL, https://www.childrenshospital.org/directory/physicians/m/martha-murray [https://perma.cc/DB6Q-NG8W] (last visited Nov. 4, 2020).

[36] *See id.*; Murray et al., *supra* note 34; *Moving Forward: Minimally-Invasive ACL Repair*, THE FOOTBALL PLAYERS HEALTH STUDY AT HARV. U. (Mar. 2, 2018), https://footballplayershealth.harvard.edu/about/news/developing-a-better-surgery-for-acl-repair/ [https://perma.cc/3WG9-UCTT].

[37] *See Moving Forward: Minimally-Invasive ACL Repair*, FOOTBALL PLAYERS HEALTH STUDY AT HARV. U. (Mar. 2, 2018), https://footballplayershealth.harvard.edu/about/news/developing-a-better-surgery-for-acl-repair/ [https://perma.cc/3WG9-UCTT].

[38] *See id.*

[39] *See id.*

nology, and Bioethics, and Holly Fernandez Lynch, the then-Executive Director of the Petrie-Flom Center.[40] Cohen and Lynch are both attorneys with expertise in health law and bioethics.[41] To complement Cohen and Lynch's expertise and part-time obligations to FPHS, they hired Christopher Deubert (one of the authors of this Article), to lead the full-time research efforts. Deubert had been a litigator in New York with extensive experience working on NFL-player matters.[42]

While the FPHS medical studies discussed above are ongoing, the Law and Ethics Initiative operated for approximately three years, from May 2014 through May 2017, as set forth in the initial Harvard-NFLPA agreement. The Initiative ultimately produced numerous publications analyzing legal and ethical issues affecting NFL player health:

1. Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* (2016), available at 7 HARV. J. SPORTS & ENT. L. 1 (2016).
2. I. Glenn Cohen et al., *NFL Player Health: The Role of Club Doctors*, 46 HASTINGS CTR. REP. 2 (2016).
3. Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227 (2017).
4. Jessica L. Roberts et al., *Commentary: The Legality of Biometric Screening of Professional Athletes*, 17 AM. J. BIOETHICS 65 (2017).
5. Christopher R. Deubert et al., *Comparing Health-Related Policies & Practices in Sports: The NFL and Other Professional Leagues* (2017), available at 8 HARV. J. SPORTS & ENT. L. 2 (May 2017, Special Issue).
6. Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Laws to Protect NFL Workers*, 60 ARIZ. L. REV. 291 (2018).
7. Sarah McGraw et al., *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health*, 12 J. CLINICAL SPORT PSYCH. 404 (2018).
8. Sarah McGraw et al., *NFL or 'Not for Long'? Transitioning out of the NFL*, 42 J. SPORT BEHAVIOR 461 (2019).

In addition to the above publications, Deubert independently published an article influenced by his time with FPHS: Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 PENN ST. L. REV. 303 (2019).

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[40] *See Protecting and Promoting*, *supra* note 3, at 8.
[41] *See id.*
[42] *See id.* at 6.

It is important to note that this Article is not affiliated with FPHS in any way. Further, before evaluating the connections between the 2020 CBA and FPHS, it is important to also understand how the universe of issues affecting NFL player health changed between the 2011 CBA and the 2020 CBA.

II. NFL Player Health and Safety From a Legal Perspective (2011-20)

The Introduction to this Article referenced lawsuits initiated by former NFL players against the League during the critical year of 2011. Although the lawsuits were initiated by former NFL players, these lawsuits had a major influence on NFL health and safety policy for current players as well.

A history of these lawsuits is instructive. Beginning with the first lawsuit in July 2011, former NFL players filed a wave of lawsuits against the NFL and its clubs, all generally alleging that the NFL had been negligent (or worse) in its handling of, and education surrounding, concussions.[43] The lawsuits focused on the work of the NFL's Mild Traumatic Brain Injury ("MTBI") Committee, which between 2003 and 2009 published 16 academic articles concerning concussions in the NFL.[44] The last 14 papers from the MTBI Committee were strongly and repeatedly criticized by the scientific community for downplaying the risks of concussions and the relationship between playing in the NFL and brain injuries.[45] At the same time the MTBI Committee was producing its research, medical experts made important progress on the types of brain injuries and conditions suffered by former NFL players, including the newly named chronic traumatic encephalopathy ("CTE").[46]

In January 2012, the lawsuits were consolidated into a single class action (the "Concussion Litigation").[47] Eventually, more than 5,500 former NFL players joined the lawsuit.[48] The Concussion Litigation presented considerable risks for both sides: even before reaching trial, the NFL was faced with voluminous and potentially embarrassing discovery concerning the MTBI Committee and the efforts and knowledge of individual club owners

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[43] *See id.* at 217.

[44] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 362 (E.D. Pa. 2014); *Protecting and Promoting*, *supra* note 3, at 208-209.

[45] *Protecting and Promoting*, *supra* note 3, at 176.

[46] *See id.*

[47] *See id.* at 184.

[48] *See id.*

and League officials concerning concussions;[49] on the other hand, the players faced the very real possibility of having their claims dismissed as preempted (*i.e.*, barred) by the CBAs executed over the years between the NFL and NFLPA.[50] Relatedly, if the cases had proceeded to trial, the former players would have faced scientific and legal hurdles in proving that their injuries and conditions were caused by the NFL's actions,[51] while the NFL would have been liable for "substantial damages awards" if the players were successful in their claims.[52]

In light of these competing risks, the parties settled in January 2014.[53] The settlement provided all former NFL players the opportunity to undergo baseline neurological and neuropsychological examination and the opportunity for multi-million dollar monetary awards (subject to various adjustments) for amyotrophic lateral sclerosis ("ALS"), death with CTE prior the date of the settlement, Parkinson's disease, Alzheimer's disease, or dementia.[54] Importantly, the players are not required to prove that their conditions are related to having played in the NFL and the NFL did not admit any wrongdoing or liability.[55] Although the settlement has no monetary cap, it is estimated that it will cost the NFL approximately $1 billion.[56]

In April 2015, the settlement was approved by the United States District Court for the Eastern District of Pennsylvania,[57] a decision affirmed by the United States Court of Appeals for the Third Circuit a year later.[58] Since that time, the settlement fund has paid out 1,200 awards at a total cost of $811,444,879.30, or $676,204.07 per award.[59] Additionally, players have had more than 12,000 free visits with doctors at which the players were

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[49] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 821 F.3d 410, 438 (3d Cir. 2016); *In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 388, 391 (E.D. Pa. 2014).

[50] *See* 307 F.R.D. at 362, 390-91.

[51] *See* 821 F.3d at 439-40; 307 F.R.D. at 391-94.

[52] *See* 821 F.3d at 440.

[53] *See* 307 F.R.D. at 422.

[54] *See Protecting and Promoting*, *supra* note 3, at 185.

[55] *See id.*

[56] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 821 F.3d 410, 447 (3d Cir. 2016).

[57] *See In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351 (E.D. Pa. 2014).

[58] *See* 821 F.3d 410 (3d Cir. 2016).

[59] *See* NFL Concussion Settlement, https://www.nflconcussionsettlement.com/ [https://perma.cc/2VYY-VU3C] (last visited Jan. 8, 2021).

evaluated for neurological and neuropsychological conditions potentially compensable under the settlement.[60]

Notably, the NFLPA was not immune to litigation from former players concerning head injuries. In 2014, several former players sued the NFLPA alleging that it had intentionally and fraudulently failed to protect them from the risk of concussions during their careers.[61] The lawsuit was brought by some of the same attorneys involved in the Concussion Litigation against the NFL and substantially duplicated the allegations in that lawsuit.[62] The case forced the NFLPA for the first time to express publicly an opinion about concussion-related claims by former players.[63] Interestingly, the NFLPA asserted the same defense as the NFL – that the players' claims were preempted by the CBAs.[64] The court agreed and dismissed the former players' claims, but not without having drawn public scrutiny to the NFLPA's role in past mishandling of concussions.[65]

In addition to the Concussion Litigation, there were other lawsuits concerning NFL player health. Former player Carl Eller filed separate lawsuits against both the NFL and NFLPA concerning the pension, retirement, and disability benefits provided to former players in the 2011 CBA.[66] Ultimately, the lawsuit against the NFL was settled on undisclosed terms, while the one against the NFLPA was dismissed.[67] Thus, while Eller failed to score any significant legal or financial wins, his lawsuits made clear that former players would continue to pursue creative avenues to influence the NFL and NFLPA to improve the benefits available to former players.

The decade between the 2011 CBA and the 2020 CBA also included considerable discussion and litigation concerning players' use, and NFL clubs' provision of, medications or "painkillers."[68] Various surveys found potentially troubling usage rates of opioids and prescription painkillers (such as Toradol) by former players during their playing days.[69] Not surprisingly then, in 2014, several former NFL players sued the NFL alleging that NFL clubs and their doctors had negligently and fraudulently prescribed

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[60] *See id.*
[61] *See Protecting and Promoting*, *supra* note 3, at 196.
[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See id.* at 228-29.
[66] *See Eller v. Nat'l Football League Players Ass'n*, 872 F. Supp. 2d 823 (D. Minn. 2012), *aff'd* 731 F.3d 752 (8th Cir. 2013); *Protecting and Promoting*, *supra* note 3, at 212.
[67] *See* 872 F. Supp. 2d 823 (D. Minn. 2012), *aff'd* 731 F.3d 752 (8th Cir. 2013).
[68] *See Protecting and Promoting*, *supra* note 3, at 142-48.
[69] *See id.* at 143-44.

and administered painkilling medications during the players' careers.[70] The lawsuit was initially dismissed by the United States District Court for the Northern District of California,[71] before being reinstated by the Ninth Circuit,[72] and then dismissed again by the District Court on remand.[73] In the District Court's most recent decision, it found that claims against the NFL could not be sustained since the NFL was not directly involved in the handling, distribution, and administration of medications.[74] However, the Ninth Circuit recently ruled that the players plausibly alleged a claim for negligence arising out of the NFL's purported voluntary undertaking.[75] In parallel, a similar lawsuit was brought against the NFL clubs, which was largely – but not entirely – dismissed.[76] The clubs later prevailed on summary judgment.[77]

The multitude of litigation unsurprisingly contributed to considerable public interest in and scrutiny of the NFL's handling of player health matters.[78] Indeed, in 2016, the NFL participated in a roundtable discussion before a congressional committee concerning concussion research and treatment.[79] During that discussion, Jeff Miller, the NFL's Executive Vice President for Health and Safety Policy, acknowledged a link between football and degenerative brain disorders.[80] To some, this statement was an important (and perhaps the first) public acknowledgement by the NFL of such a link.[81] Nevertheless, by then (and for at least some time earlier), the NFL was carefully and appropriately citing to the opinions of medical experts.[82]

Fortunately, the lawsuits and public scrutiny seemed to have a positive effect on player health and safety, particularly concerning concussions and medications.

In 2011, the NFL's Head, Neck and Spine Committee (a wholesale replacement of the MTBI Committee) instituted a new Game Day Concus-

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[70] *See id.* at 148.

[71] *See Dent v. Nat'l Football League*, C 14-02324, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014).

[72] *See Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018).

[73] *See Dent v. Nat'l Football League*, 384 F. Supp. 3d 1022 (N.D. Cal. 2019).

[74] *See id.* at 1030-33.

[75] *Dent v. Nat'l Football League*, 968 F.3d 1126 (9th Cir. 2020).

[76] *See Evans v. Arizona Cardinals Football Club*, 231 F. Supp. 3d 342 (N.D. Cal. 2017), *aff'd* 761 Fed. Appx. 701 (9th Cir. 2019).

[77] *Id.*

[78] *See Protecting and Promoting*, *supra* note 3, at 378-79.

[79] *See id.* at 28-29.

[80] *See id.*

[81] *See id.*

[82] *See id.*

sion Diagnosis and Management Protocol ("Concussion Protocol").[83] The 2011 Concussion Protocol required a standardized evaluation of players suspected of having suffered a concussion, encouraged a conservative approach to players returning to play and mandated that players be prohibited from returning to play if they were experiencing confusion; amnesia; headaches; nausea; or abnormal neurological findings, such as balance issues.[84]

In 2013, the Concussion Protocol was updated and expanded in response to a consensus statement from the world's leading medical experts on diagnosing and managing concussions in sports.[85] The 2013 Concussion Protocol defined a concussion, listed potential concussion signs and symptoms, required the use of a new sideline Standardized Concussion Assessment Tool ("SCAT2"), and required preseason baseline evaluations.[86] Moreover, the 2013 Concussion Protocol introduced the "Unaffiliated Neurotrauma Consultant," a medical expert assigned to each team for each game to assist in concussion evaluations, provided however that "[t]he responsibility for the diagnosis of concussions and the decision to return a player to a game remains exclusively within the professional judgment of the Head Team Physician[.]"[87] Lastly, the 2013 Concussion Protocol added a neutral athletic trainer (the "Booth ATC") sitting in a press box-level booth with multiple camera angles to assist teams in identifying players

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[83] *See NFL Head, Neck and Spine Committee's Concussion Protocol Overview*, NFL PLAYER HEALTH & SAFETY (June 22, 2018), https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/ [https://perma.cc/S6NK-ELMQ].

[84] *See* NAT'L FOOTBALL ASS'N, *NFL Announces new Sideline Concussion Assessment Protocol*, https://www.nfl.com/news/nfl-announces-new-sideline-concussion-assessment-protocol-09000d5d81e78cc4 [https://perma.cc/3458-BFGF]; *See also* Adam Kilgore, *NFL's new concussion protocol can't protect players if teams won't follow it,* WASH. POST (Sept. 9, 2016), https://www.washingtonpost.com/news/sports/wp/2016/09/09/nfls-new-concussion-protocol-cant-protect-players-if-teams-wont-follow-it/ [https://perma.cc/ZT7J-D4EB].

[85] *See* Erin Flynn, *What is the NFL's Concussion Protocol?*, SPORTS ILLUSTRATED (Sept. 16, 2016), https://www.si.com/nfl/2016/09/16/nfl-concussion-protocol-policy-history [https://perma.cc/NMQ7-5RYY] (linking to Concussion Protocol as amended in 2013); *NFL's Head Neck & Spine Committee's Protocols Regarding Diagnosis and Management of Concussion*, NFL, http://static.nfl.com/static/content/public/photo/2013/10/01/0ap2000000254002.pdf [https://perma.cc/2TBZ-GUGC] [hereinafter *NFL's Head Neck & Spine Committee*] (last visited May 4, 2020), *citing* Paul McCrory et al., *Consensus Statement on Concussion in Sport: the 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 BR. J. SPORTS MED. 250 (2013).

[86] *See NFL's Head Neck & Spine Committee*, *supra* note 85, at 1-3.

[87] *See id.* at 4.

who potentially suffered a concussion.[88] Beginning in 2015, the Booth ATC has the power to stop play for a medical timeout by messaging the referee if the Booth ATC believes a player needs to be evaluated for a concussion.[89]

In 2017, the experts updated their consensus statement based on the latest research,[90] contributing to the NFL updating its Concussion Protocol prior to the 2018 season.[91] The 2018 Concussion Protocol added a third Unaffiliated Neurotrauma Consultant designated to monitor broadcast video feeds for players who possibly suffered a concussion, broadened the symptoms of concussion requiring evaluation for concussion and removal from play, and required follow-up concussion evaluations for players who underwent a concussion evaluation on a game day.[92] Also in 2018, the NFL instituted a comprehensive Return-to-Participation Protocol that players diagnosed with a concussion must undergo before they can return to play.[93]

Between 2011 and 2020, the NFL also improved its practices and policies concerning medications.[94] As of 2015, NFL clubs do not store or provide controlled substances to players.[95] Club doctors can still prescribe controlled substances to players, but the prescription is filled at a local pharmacy.[96] Some players retrieve the prescription themselves, but according to the NFL, "[m]any players . . . request that their clubs assist them by picking up their prescriptions from a local pharmacy for them, and in many cases the clubs agree to accommodate those requests as a matter of convenience for the player."[97] The prescription is recorded in the player's electronic medical records.[98] Aside from controlled substances however, club practices vary on

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[88] *See id.*

[89] *See ATC Spotters*, NFL OPERATIONS, https://operations.nfl.com/the-game/game-day-behind-the-scenes/atc-spotters/ [https://perma.cc/B77V-CEDV] (last visited May 4, 2020).

[90] *See generally* Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 5th International Conference on Concussion in Sport, Held in Berlin, October 2016*, 51 BR. J. SPORTS MED. 838 (2018).

[91] *See NFL Head, Neck and Spine Committee's Concussion Protocol Overview*, NFL PLAYER HEALTH & SAFETY (June 22, 2018), https://www.playsmartplaysafe.com/newsroom/videos/nfl-head-neck-spine-committees-concussion-protocol-overview/ [https://perma.cc/S6NK-ELMQ].

[92] *See id.*

[93] *See NFL Return-to-Participation Protocol*, NFL PLAYER HEALTH & SAFETY (June 20, 2017), https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-return-to-participation-protocol/ [https://perma.cc/WM75-UGSS].

[94] *See Protecting and Promoting*, *supra* note 3, at 143-49.

[95] *See id.* at 145.

[96] *See id.*

[97] *Id.*

[98] *See id.*

other prescription medications (such as Toradol), as well as over-the-counter painkillers – some clubs store and/or provide them to players while others do not.[99] Additionally, beginning with the 2015 season, visiting clubs are assigned a Visiting Team Medical Liaison, a local doctor who can help prescribe medications and advise concerning local medical facilities.[100] This role was added, at least in part, because, technically, club doctors were prohibited from providing medical services in states in which they were licensed.[101] This problem was further remediated by the passage of the Sports Medicine Licensure Clarity Act in 2018, which now generally permits team doctors and athletic trainers licensed in one state to provide medical care in states in which they are not licensed.[102]

Finally, between 2010 and 2016, the NFL made 25 rule changes directed towards making the game safer – far more than in any previous decade dating back to the 1950s.[103]

With that important context, we now turn to evaluating 2020 CBA changes which may have been influenced by FPHS's work.

III. 2020 CBA Changes with Connections to FPHS Work

This Section examines the provisions of the 2020 CBA regarding player health and safety and compares these provisions to the recommendations and analyses set forth in the FPHS publications identified above. As stated above, the NFL and the NFLPA incorporated and revised many initiatives, clauses, and programs as part of the 2020 CBA. Among others, some of the most significant changes were made to Article 39: Players' Rights to Medical Care and Treatment. This new-look Article 39 includes 13 new sections, ranging from behavioral health, sleep studies, and biospecimen collection to new specialists, committees, and programs. Some of the new provisions of Article 39 correlate, either directly or indirectly, to the work of the FPHS.

The extent to which the new or altered provisions of the 2020 CBA were the result of FPHS work is unknown. We did not ask the NFL or NFLPA about this, and it is doubtful either would have responded (or acknowledged such influence). Nevertheless, there are clear connections between the new CBA and the work of FPHS. This Section illuminates those connections.

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[99] *See id.*
[100] *See id.*
[101] *See id.* at 97, 146-47.
[102] *See* 15 U.S.C. § 8601 (2018).
[103] *See Protecting and Promoting*, *supra* note 3, at 203.

This Section will summarize changes in the 2020 CBA to the following areas: (a) club doctors and medical specialists; (b) health and safety committees; (c) wearable technologies and biospecimen collection; (d) behavioral and mental health; (e) transitioning out of the NFL; (f) club personnel: athletic trainers, strength and conditioning coaches, and equipment managers; and (g) miscellaneous other areas.

A. Club Doctors and Specialists

The authority of club doctors and their relationships with the clubs are central issues in the NFL player health landscape. Multiple Law and Ethics publications discuss concerns about the structure of club medical staff. The Law and Ethics Initiative focused on this issue more than any other and made its most comprehensive recommendations as a result. While the 2020 CBA made some small changes concerning club medical staff, those changes were not adequate. Given the centrality of this issue to player health, we explain the issue first, including the inadequate responses of the NFL and NFLPA, and then discuss the minimal – and insufficient – changes made in the 2020 CBA.

i. The Structural Conflict of Interest in Club Medical Staff

There is an inherent conflict of interest in the professional sports healthcare setting – specifically that club doctors are hired (or retained), reviewed, and potentially terminated by the club, even though they are providing healthcare to the players. The Law and Ethics Initiative first addressed this issue as part of its 493-page report, *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations* ("*Protecting and Promoting*"), and centered on the issue in *The Role of Club Doctors* as part of a special issue in The Hastings Center Report, a bioethics journal.[104]

As explained in those publications, the current healthcare structure creates inherent problems in the treatment relationship. Club doctors provide care to players while also having some type of contractual or employment relationship with, and thus obligations to, the club.

The inherent conflict of interest is apparent from a full assessment of club doctors' responsibilities, including: (1) providing healthcare to the players; (2) helping players determine when they are ready to return to play; (3) helping clubs determine when players are ready to return to play; (4)

[104] *NFL Player Health: The Role of Club Doctors,* 46 THE HASTINGS CTR. 2 (Nov./Dec. 2016).

examining players whom the club is considering employing, *e.g.*, at the NFL Combine or as part of free agency; and (5) helping clubs determine whether a player's contract should be terminated because of the player's physical condition, *e.g.*, whether an injury will prevent the player from playing.[105] These responsibilities conflict with each other in that players and clubs often have conflicting interests, but club doctors are called to serve both parties.

As explained in *Protecting and Promoting*:

> Club doctors are clearly fundamental to protecting and promoting player health. Yet given the various roles just described, it is evident that they face an inherent structural conflict of interest. This is not a moral judgment about them as competent professionals or devoted individuals, but rather a simple fact of the current organizational structure of their position in which they simultaneously perform at least two roles that are not necessarily compatible.[106]

Chapter 2 of *Protecting and Promoting* recommends a comprehensive plan to restructure the club doctor's relationship in order to extinguish some of the conflicts.[107] In short, the report recommends that player care and treatment be provided by one set of medical professionals, appointed by a joint committee with representation from both the NFL and NFLPA, and evaluation of players for a club's business purposes should be done by separate medical personnel.

The NFL and NFLPA's responses to the recommendation were disappointing and, in part, even disturbing.

In its written response, the NFL objected to the recommendation.[108] Indeed, the NFL denied the existence of the structural conflict of interest that is the premise of the proposal, calling it merely "theorize[d]."[109] The Law and Ethics Initiative replied to the NFL in a letter, explaining the errors in the NFL's conclusions.[110] Similarly, the NFL Physicians Society

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[105] *See id.* at 96.

[106] *Id.* at 124.

[107] *See* Recommendation 2:1-A from *Protecting and Promoting*, *supra* note 3, at 128.

[108] *See* Letter from Jeffrey A. Miller, NFL, Executive Vice President, Health & Safety Initiatives, to Christopher R. Deubert, I. Glenn Cohen, and Holly Fernandez Lynch (Nov. 1, 2016), (on file with the Harvard Law School Library), available at https://footballplayershealth.harvard.edu/wp-content/uploads/2016/11/NFL-Response-to-Report-11.1.16.pdf.

[109] *See id.* at 12.

[110] *See* Letter from Christopher R. Deubert, I. Glenn Cohen, and Holly Fernandez Lynch to Jeffrey A. Miller, NFL, Executive Vice President, Health & Safety Initiatives (Nov. 10, 2016) (on file with the Harvard Law School Library), https://foot-

("NFLPS") called the conflict "theoretical" in a commentary as part of The Hastings Center Report.[111] That Report included an article by the Law and Ethics Initiative explaining its recommendation; commentaries from the NFLPS, a current player, a former player, a former player turned sports doctor, Dr. Ross McKinney, a law professor, and a bioethicist; and the Law and Ethics Initiative's reply to the NFLPS.[112]

While the Law and Ethics Initiative expected debate over the particulars of its recommendation, it was surprising that the NFL and NFLPS denied the existence of a conflict of interest outright.

Unfortunately, the NFLPA's response was no better. While the NFL accepted the Law and Ethics Initiative's invitation to publish a written response alongside *Protecting and Promoting*, the NFLPA did not. Moreover, following the report's release, the NFLPA did not comment on the substance of the recommendation, stating in response to at least one media inquiry "that it was too early to comment on the recommendations directly,"[113] despite the fact that the NFLPA had been provided a draft of the report – which included this recommendation – nine months earlier in February 2016.

Consequently, NFLPA Executive Director DeMaurice Smith's comments at the University of Houston Law Center on January 31, 2017,[114] in response to a question by Deubert, were the first time an NFLPA representative commented on the proposal. That exchange went as follows[115]:

> Deubert: I was wondering if the NFLPA thinks there's an inherent structural conflict of interest in having doctors . . . that treat players while also providing advice to the club, and if so, what does the NFLPA plan to do about it?

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ballplayershealth.harvard.edu/wp-content/uploads/2016/11/Authors-Reply-to-NFL-Response-11.10.16.pdf.

[111] *See* National Football League Physicians Society, Commentary, *NFL Physicians: Committed to Excellence in Patient-Player Car*e, 46 Hastings Ctr. Rep. S41 (2016), available at https://onlinelibrary.wiley.com/toc/1552146x/2016/46/S2.

[112] *See generally NFL Player Health: The Role of Club Doctors*, 46 Hastings Ctr. Rep. S2 (2016), available at https://onlinelibrary.wiley.com/toc/1552146x/2016/46/S2.

[113] Ike Swetlitz, *NFL Doctors' Conflicts of Interest Could Endanger Players, Report Says*, STAT (Nov. 17, 2016), https://www.statnews.com/2016/11/17/nfl-doctors-conflict-interest/ [https://perma.cc/REK4-QNFJ].

[114] *See* UH University Information Technology, *Medical and Legal Ethics in the NFL and Sports*, YouTube (Jan. 31, 2017), https://www.youtube.com/watch?v=Q2X6mZelr8Q.

[115] *Id.* at 1:05:25.

> Smith: Um, do I think that there could be a conflict of interest? Yes. Do I think that I would ever do anything to absolve the duty of an employer to provide a safe workplace? No. So I get the thought about whether we should have neutral doctors and whether or not we should somehow do something that removed the conflict of interest, but the reason why we have Hippocratic Oaths, the reason why people in this room, and I assume it's a mix of both students and lawyers, the reason why we raise our hand and take an oath of things like confidentiality to our clients, an oath that we are going to serve the interest of our clients, unilaterally, without anybody else, why do we do that? We do that because we recognize that each and every one of us are engaged in a profession, or should be engaged in a profession, where we have an exclusive duty, right? So my issue with doing anything to take that duty off of the back of a doctor, by accepting that there is somehow an unavoidable conflict of interest, is, that is the day, that we will start to remove the obligations of an employer to provide a safe workplace and health care to their employees. It's the exact same thing that happens at a coal mine when somebody at the coal mine goes to see one of the doctors. It's the exact same thing that happens at a university that has a student health plan, when somebody walks in and says, 'I'm sick.' The person at the student health center is employed by who? But we would never say that we need to come up with a committee of students and the university to create a neutral health care system. What would we say? We want doctors to act like doctors. We want doctors to obey their oaths. And if there's a conflict between a doctor and his Hippocratic Oath, maybe that's the day you shouldn't be a doctor again.

Smith provided a similar response at the Harvard Committee on Sports & Entertainment Law's Symposium on Legal and Ethical Issues Affecting NFL Player Health on March 7, 2017. At the Symposium, Deubert asked Smith, in sum and substance, why players receive independent treatment for concussions but not for other injuries. Smith answered the question by highlighting what Smith believed are doctors' obligations under the Hippocratic Oath, and that NFL players are entitled to second medical opinions.[116]

Smith's responses were inadequate and incorrect in five key ways.

First, to the extent Smith was arguing that the conflict is not omnipresent, in 2009, the then-titled Institute of Medicine ("IOM") released a report entitled *Conflict of Interest in Medical Research, Education, and Practice* that addressed exactly this issue.[117] The IOM report defined conflicts of interest as "circumstances that create a risk that professional judgments or actions regarding a primary interest will be unduly influenced by a secon-

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[116] Chris Deubert, DC United, *Harvard Committee on Sports & Entertainment Law Sympsium: Legal and Ethical Issues Affecting NFL Player Health* (March 7, 2017).

[117] *See generally* INST. MED., CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE (2009), *available at* https://www.nap.edu/catalog/12598/conflict-of-interest-in-medical-research-education-and-practice.

dary interest."[118] Once a conflict of interest is established, then the relevant parties can assess the severity and determine appropriate management of the conflict.[119] This position is in line with the leading views in the bioethics community.[120] Thus, Smith's statement that there "could" be a conflict of interest is incorrect. There is a conflict.

Moreover, as highlighted in the Law and Ethics Initiative's reply letter to the NFL, there is an overwhelming body of bioethical and legal literature agreeing with this perspective, recognizing the inherent structural conflict of interest in having medical staff treat players while also having relationships with and obligations to sports clubs.[121] In contrast to this extensive literature, there is no known expert analysis that either supports the denial of the existence of the present structural conflict of interest or defends the current arrangement as ethically optimal.

Second, Smith claimed that the recommendation would "absolve" NFL clubs of their obligation "to provide a safe workplace." While it is not clear what obligation Smith was referencing, the Occupational Safety and Health Act ("OSH Act") does require employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm

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[118] *Id.* at 45-46.

[119] *See id.* at 52-61; 80-87.

[120] *See* Matthew S. McCoy & Ezekiel J. Emanuel, *Why There Are No "Potential" Conflicts of Interest*, 317 JAMA 1721 (2017).

[121] *See* Dominic Malcolm, *Confidentiality in Sports Medicine*, 35 CLIN. SPORTS MED. 205 (2016); Brad Patridge, *Dazed and Confused: Sports Medicine, Conflicts of Interest, and Concussion Management*, 11 J. BIOETHICAL INQUIRY 65 (2014); Ron Courson et al., *Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and Colleges, 49* J. ATHLETIC TRAINING 128 (2014); Daniela Testoni et al., *Sports Medicine and Ethics*, 13 AM. J. BIOETHICS 4 (2013); Nancy M.P. King & Richard Robeson, *Athletes Are Guinea Pigs*, 13 AM. J. BIOETHICS 13 (2013); Bruce H. Greenfield & Charles Robert West, *Ethical Issues in Sports Medicine: A Review and Justification for Ethical Decision Making and Reasoning*, 4 SPORTS PHYSICAL THERAPY 475 (2012); Brian Meldan Devitt & Conor McCarthy, *'I am in Blood Stepp'd in So Far. . .': Ethical Dilemmas and the Sports Team Doctor*, 44 BR. J. SPORTS MED. 175 (2010); Warren R. Dunn et al., *Ethics in Sports Medicine*, 35 AM. J. SPORTS MED. 840 (2007); Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or is it Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165 (2005); Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians v. Athlete-Patients*, 50 ST. LOUIS U. L.J. 185 (2005); Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211 (2005); Charles V. Russell, *Legal and Ethical Conflicts Arising from the Team Physician's Dual Obligation to the Athlete and Management*, 10 SETON HALL LEGIS. J. 299 (1987); Thomas H. Murray, *Divided Loyalties in Sports Medicine*, 12 PHYSICIAN & SPORTS MED. 134 (1984).

to his employees[.]"[122] In fact, the application of the OSH Act to the NFL is discussed at length in another paper by the Law and Ethics Initiative.[123] Nevertheless, nothing about the Law and Ethics Initiative's recommendation would do anything to absolve NFL clubs of their obligations under the OSH Act or any other legal framework. The recommendation does nothing to change the employer-employee relationship between clubs and players and thus does not affect any obligations NFL clubs have as employers.

Third, Smith suggested that the recommended changes were unnecessary because club doctors have an "exclusive duty" to players pursuant to codes of ethics. While Smith mentioned the Hippocratic Oath, neither the original version[124] nor the modern version used by many medical schools[125] provide that doctors have an "exclusive duty" to their patients. Moreover, the American Medical Association ("AMA") Code of Medical Ethics ("AMA Code") also does not require doctors to have an "exclusive" duty or obligation to patient welfare.[126]

Nevertheless, giving the benefit of the doubt, Smith may have been referring to the AMA Code's decree that:

> The relationship between patient and physician is based on trust, which gives rise to physicians' ethical obligations to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.[127]

The code of ethics for the Féderation Internationale de Médicine du Sport ("FIMS"), the leading international sports medicine organization, contains similar provisions.[128]

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[122] 29 U.S.C. § 654(a)(1) (2018).

[123] *See* Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Laws to Protect NFL Workers*, 60 ARIZ. L. REV. 291 (2018).

[124] *See* Rachel Hajar, *The Physician's Oath: Historical Perspectives*, 18 HEART VIEWS 154 (2017).

[125] *See id.*

[126] *See* COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMA, CODE OF MEDICAL ETHICS, available at https://www.ama-assn.org/about-us/code-medical-ethics [https://perma.cc/ST53-PW35].

[127] AMA Code Opinion 1.1.1 – Patient-Physician Relationship.

[128] *See Code of Ethics*, FIMS http://www.fims.org/about/code-ethics/ [https://perma.cc/G6WF-RUED] (last visited Feb. 15, 2017) (on file with the Harvard Law School Library), at ¶ 1 ("The same ethical principles that apply to the practice of medicine shall apply to sports medicine. The main duties of a physician include: Always make the health of the athlete a priority. Never do harm. Never impose your

In addition to these codes of ethics, the 2011 CBA contained a provision governing the club doctor's standard of care:

> [E]ach Club physician's primary duty in providing medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. In addition, all Club physicians and medical personnel shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city.[129]

However, as explained in *Protecting and Promoting*, this CBA provision is susceptible to multiple interpretations.[130] On a generous reading (that is, one that does not give the words "in providing medical care" any special emphasis), club doctors' primary duty is to the player at all times. On a less generous reading, the CBA provision demands a primary duty to the player-patient *only* when the club doctor is "providing medical care," and it is inapplicable when the club doctor is rendering services to the club. However, given how club doctors are currently situated within the club, the two roles assigned to them cannot be truly separated, and their duties cannot possibly be exclusively to the players. Providing care to the player occurs simultaneously with performing duties for the club by judging the player's ability to play and help the club win.

Thus, the CBA requires the club doctor to provide medical care that puts the player-patient's interests above those of the club (in the event that these interests conflict). This is as it should be. However, in most instances—and as the CBA seemingly recognized—it is impossible under the current structure for the club doctor to always have a primary duty to the player-patient over the club because sometimes the club doctor is not providing care, but rather is advising the club on business decisions. In other words, the club doctor cannot always hold the player's interests as paramount and at the same time abide by his or her obligations to the club. Indeed, a club doctor could provide impeccable player-driven medical care (treating the player-patient as primary, in accordance with the CBA) while simultaneously hurting a player's interests by advising the club that the player's injury will limit his ability to help the club. Thus, under any reading of the CBA provision, players lack a doctor who is concerned only with their best interests at all times.

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authority in a way that impinges on the individual right of the athlete to make his/her own decisions.").

[129] 2011 CBA, *supra* note 7, at Art. 39, § 1(c).

[130] *See Protecting and Promoting*, *supra* note 3, at 125.

Aside from the problems with the CBA provision, Smith's position conflicts with other evidence. *Protecting and Promoting* includes multiple quotes and anecdotes from former and current NFL players who believed or do believe that the club medical staff was or is – at least some of the time – placing the club's interests ahead of their own.[131] Indeed, in 2013, the NFLPA stated that a survey it had conducted revealed that 78% of players do not trust club medical staffs.[132] An Associated Press survey also found troubling results.[133] Even if a club doctor can manage the conflicts, their mere existence can compromise player trust, which is a critical element of the doctor-patient relationship. This is what it means for the conflict to be inherent; the conflict is rooted in the perceptions of others as much as in the decisions and actions of the conflicted party. It is the *system* that deserves blame, not individual doctors.

Fourth, Smith suggested that the recommendation is unnecessary by comparison – there are many situations in which employers provide doctors for their employees and there is no objection to such situations. For sure, there are many workplaces in addition to the NFL where employers provide healthcare to their employees. Many doctors provide care to employees in a variety of occupational settings, such as the military, law enforcement, and factories and other industrial settings. In these settings as well, doctors can be conflicted between doing what is best for the employee and what is best for the employer. However, a review of the legal and ethical literature on occupational medicine did not reveal any clear resolution or guidance with bearing on the context of professional sports medicine. Simply put, just because this problem exists in other employment settings does not make it right in the NFL.

Fifth, Smith claimed that the recommended changes were unnecessary because players are entitled to second medical opinions under the CBA. NFL players' right to a second medical opinion paid for by the club is a valuable and important right.[134] However, second medical opinions are just that – a

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[131] *See id.* at 117-18.

[132] *See* Marc Sessler, *NFLPA: 78 Percent of Players Don't Trust Team Doctors*, NFL (Jan. 31, 2013), https://www.nfl.com/news/nflpa-78-percent-of-players-don-t-trust-team-doctors-0ap1000000133534 [https://perma.cc/L7J9-HY8C].

[133] *See* Howard Fendrich & Eddie Pells, *AP Survey: NFL Players Question Teams' Attitudes on Health,* ASSOCIATED PRESS (Jan. 30, 2016), https://apnews.com/article/66d9e9b4a4684ea2882db8423f6dff98 [https://perma.cc/AA5V-NVFW] (surveying one hundred current NFL players and posing the question whether "NFL teams, coaches and team doctors have players' best interests in mind when it comes to injuries and player health[,]" with forty-seven players answering yes, thirty-nine answering no, and fourteen either unsure or refused to respond).

[134] *See Protecting and Promoting*, *supra* note 3, at 179-83.

secondary level of care. While many players take advantage of this right, it seems likely that at least some players – particularly younger players – are reluctant to take advantage of this right for fear of angering the club and its medical staff. Players should receive independent medical care in the first instance. Indeed, this is largely the practice concerning the treatment of concussions. The value of independent examination and treatment has been recognized in the Concussion Protocol and should be extended to all player care situations.

ii. The 2020 CBA and Club Medical Staff

The 2020 CBA did not eliminate the above-mentioned conflicts but did make some changes in an apparent attempt to mitigate them. Article 39, Section 1(a) was amended to mandate that either a club's Head Team Orthopedist[135] or its Head Team Primary Care Sports Medicine Physician, established in the 2011 CBA, shall be designated as the "Head Team Physician."[136] With this position comes important and newly described authority. According to Article 39, Section 1(d), "either the Head Team Orthopedist or the Head Team Primary Care Sports Medicine Physician, as applicable, *shall have the exclusive and final authority to determine whether a player is cleared to return to participation in football activities*" (emphasis added).[137] This authority is further supported by a provision stating that club personnel "shall in no event take any measures inconsistent with players' medical care and management overseen by the Head Team Physicians." If the Head Team Physician determines that any such areas involve medical care and management, the Head Team Physician shall have the final authority to make, modify or override decisions in such areas."[138] On paper, these changes ensure that club doctors are always providing healthcare in the players' interests rather than those of the club. Nevertheless, the inherently conflicted employment or contractor structure discussed at length above remains and thus it is questionable whether these changes are meaningful.

Indeed, another change to the 2020 CBA casts doubt on the extent to which the NFL and NFLPA are committed to providing players with a healthcare environment in which the players' interests are always placed first. Article 39, Section 1(e) of the 2020 CBA, entitled "Medical Providers

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[135] Capitalized terms not defined herein have the same meaning as used in the 2020 CBA.

[136] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(a).

[137] *See id.* at Art. 39, § 1(d).

[138] *Id.*

and Allegiance," discusses the duty of the club's medical personnel.[139] This section is substantially similar to Article 39, Section 1(c) of the 2011 CBA, which was titled "Doctor-Patient Relationship." However, there is one meaningful difference between the two sections. When discussing the duty of club medical personnel, the 2011 CBA declared that "[t]his duty shall include traditional physician/patient confidentiality requirements."[140] Oddly, in reviewing a draft of *Protecting and Promoting*, the NFL denied that the 2011 CBA provision "requires the traditional patient-physician confidentiality requirements of a private system" despite its explicit language.[141] Perhaps it is then not surprising that this line is noticeably absent from the 2020 CBA.

The NFL and NFLPA seemingly (and tellingly) no longer want to describe the club doctor-player relationship as a traditional doctor-patient relationship. As pointed out in *Protecting and Promoting*,[142] the 2011 CBA provision establishing the traditional physician-patient confidentiality requirements requires that the care relationship between players and club doctors be afforded "traditional" confidentiality protections.[143] However, clubs request or require players to execute collectively bargained waivers, effectively vitiating this requirement, and players who were interviewed for FPHS work indicated that no player refuses to sign the waiver.[144] Players are effectively compelled to waive certain legal rights concerning their health without meaningful options. There is no doubt that players execute the waivers because they fear that if they do not, they will lose their jobs.

Indeed, the waivers (which are collectively bargained between the NFL and NFLPA) permit the athletic trainer and club doctors to disclose the player's medical information to club employees, such as coaches and the general manager.[145] Thus, it is unclear what work this CBA language was doing. The 2020 CBA removes any pretense of a traditional physician/patient relationship, to the detriment of the players.[146]

Finally, in the area of medical professionals, the 2020 CBA makes changes to the type of medical consultants that clubs must retain. Both the 2011 and 2020 CBAs mandate that each club retain consultants in the following areas: (i) neurological (head trauma); (ii) cardiovascular; (iii) nutri-

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[139] *See id.*
[140] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(c).
[141] *See Protecting and Promoting*, *supra* note 3, at 99.
[142] *See id.*
[143] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(c).
[144] *Protecting and Promoting*, *supra* note 3, at 99.
[145] These waivers are discussed at length in Section III.D.iv – Confidentiality.
[146] *See generally* 2020 CBA, *supra* note 16, at Art. 39.

tion; and (iv) neuropsychology.[147] The 2020 CBA adds two new types of required consultants: a behavioral health specialist and a pain management specialist.[148]

Both new specialists address issues raised in FPHS work. The Behavioral Health Specialist will be discussed further in Section III.D. – Behavioral and Mental Health. As for the need for a Pain Management Specialist, in Section II above, we discussed the multiple lawsuits brought by former NFL players alleging that the NFL and its clubs had previously mishandled pain management and related medications. Additionally, an FPHS medical study found that 28% of former players suffered from chronic pain.[149] These issues were examined at length in a special section of *Protecting and Promoting*, concluding with a finding that "[t]he evidence available to us, though admittedly far from complete, suggests that the misuse and abuse of medications is largely a thing of the past and that, by and large, current practices involving medications comply with legal and ethical obligations."[150] Nevertheless, the report also explained that "it is important that the NFL and the club doctors continue to evaluate practices concerning medications, including but not limited to how much they are being used, what types are being used and for what purposes, under what circumstances they are being used, their risks and effectiveness, prescriptions for and documentation of their use, and players' understanding of and consent to their use."

The Pain Management Specialist should help address the issues highlighted in the FPHS work. The Pain Management Specialist must have a minimum of five years post-residency and be board-certified in anesthesiology, emergency medicine, family medicine, psychiatry, physical medicine and rehabilitation, or neurology.[151] Moreover, a physician nominated to serve as a club's Pain Management Specialist must actively engage in pain management (at least 25% of her/his practice) as certified by the chairperson of the hospital at which they practice.[152]

In addition to the Pain Management Specialist, the 2020 CBA establishes a Joint Pain Management Committee, consisting of the NFLPA Medical Director and the NFL Chief Medical Officer.[153] The Committee is tasked

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[147] *See* 2011 CBA, *supra* note 7, at Art. 39, § 1(b)(i)-(iv); 2020 CBA *supra* note 16, Art. 39, § 1(b)(i)-(iv).

[148] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(b)(v) and (vi).

[149] *See* Timothy W. Churchill et al., *Weight Gain and Health Affliction Among Former National Football League Players*, 131 AM. J. MED. 1491 (2018).

[150] *See Protecting and Promoting*, *supra* note 3, at 149.

[151] *See* 2020 CBA, *supra* note 16, at Art. 39, § 20(c).

[152] *See id.*

[153] *See id.* at Art. 39, § 20(a).

with: "[i]mplement[ing] 'best practices' education protocols and guidelines for pain medication administration and patient engagement for club medical staffs"; "[d]evelop[ing] and implement standardized player education about the use of pain medication"; "[c]onduct[ing] joint-research into pain management, addiction, personalized medicine and alternative therapies"; and "[c]onduct[ing] surveys of clubs and players regarding pain, fatigue, recovery and related services."[154]

The 2020 CBA also creates the Prescription Drug Monitoring Program (the "Program").[155] The Program, through the Joint Pain Management Committee, is intended "to provide guidance and establish uniform standards addressing club practices and policies regarding pain management and use of prescription medication by NFL players, including the administration of certain federally scheduled drugs."[156] Moreover, the Program "will monitor all prescriptions issued to NFL players in all 32 clubs by club physicians and unaffiliated physicians."[157] The Program includes: (i) "[a]n electronic database that tracks de-identified data on all prescriptions dispensed to NFL players by club medical staff and unaffiliated physicians"; (ii) requirements that clubs update the database monthly; (iii) requirements that players report all prescription medications they are taking; and (iv) regular reports from the Program about player prescription usage.[158] Moreover, the 2020 CBA provides an enforcement process through which potential violations of the Program are to be promptly investigated and, if no agreement on the facts is reached between the NFL and NFLPA, can be appealed to the Impartial Arbitrator,[159] a neutral arbitrator otherwise designated to resolve disputes between arising under the CBA.[160] Possible punishment ranges from remedial education to fines and potential loss of draft picks.[161]

The totality of these improvements on pain management are welcome and should help ensure that players receive pain and prescription medications only as necessary and with full disclosure of the risks and benefits. Moreover, they should also help players increasingly avoid reliance on such medications.

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[154] *See id.*
[155] *See id.* at Art. 39, § 20(b).
[156] *See id.* at Art. 39, § 20(a).
[157] *See id.* at Art. 39, § 20(b).
[158] *See id.* at Art. 39, § 20(b)(i)-(iv).
[159] *See id.* at Art. 39, § 20(d).
[160] *See id.* at Art. 16.
[161] *See id.*

B. Health and Safety Committees

The 2020 CBA sets forth a considerable list of health and safety committees and related subcommittees. Specifically, the 2020 CBA includes the: (1) Accountability and Care Committee ("ACC"); (2) NFL Health and Safety Executive Committee; (3) General Medical Committee; (4) Musculoskeletal Committee; (5) Head, Neck and Spine Committee; (6) Pain Management Committee; (7) Comprehensive Mental Health and Joint Behavioral Health Committee; (8) Field Surface Safety & Performance Committee; and (9) Engineering and Equipment Safety Committee. Many (if not all) of these committees existed prior to the 2020 CBA but are now codified as part thereof. By comparison, the 2011 CBA only referenced two committees: the Joint Committee on Player Safety and Welfare ("Joint Committee") and the ACC, as will be discussed further below.

The creation or codification of these committees aligns with recommendations made in *Protecting and Promoting*. Recommendation 7:1-B recommended that "[t]he NFL and NFLPA should continue to undertake and support efforts to scientifically and reliably establish the health risks and benefits of playing professional football."[162] Next, Recommendation 7:1-C recommended that "[t]he NFL, and to the extent possible, the NFLPA, should: (a) continue to improve its robust collection of aggregate injury data; (b) continue to have qualified professionals analyze the injury data; and, (c) make the data publicly available for re-analysis."[163] The above-described committees should substantially satisfy these recommendations, with the notable exception of permitting public scrutiny of their work.

Turning back to the Joint Committee and the ACC, *Protecting and Promoting* described the inadequacies of both. Under the 2011 CBA, both the Joint Committee and the ACC initially appeared to be avenues through which players could raise concerns they had about health and safety issues. However, the authority of these committees was unclear. As explained in *Protecting and Promoting*, "[t]he Joint Committee has the authority to initiate an investigation run by neutral doctors, but the Joint Committee is only obligated to 'act[ ] upon' the doctors' recommendations, which is somewhat vague. It is unclear what it means for the Joint Committee to 'act[ ] upon' the recommendations and there is nothing binding the NFL or the clubs to 'act[ ] upon' the doctors' recommendations."[164] Further, *Protecting and Promoting* described "[t]he ACC [a]s even weaker than the Joint Committee.

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[162] *Protecting and Promoting*, *supra* note 3, at 231-32.
[163] *Id.* at 232.
[164] *See id.* at 241.

The ACC merely refers complaints to the NFL and the club involved and the NFL and the club are then free to 'determine an appropriate response.'"[165] Consequently, *Protecting and Promoting* recommended that "[t]he purpose of certain health-related committees should be clarified and their powers expanded."[166]

The 2020 CBA responds to these concerns. First, the parties made mild improvement in the area of enforcement. Whereas under the 2011 CBA a player complaint was submitted by the ACC only to the NFL and the club for resolution, the 2020 CBA now requires that the NFLPA be included in determining "an appropriate response or corrective action."[167]

Next, the composition of the committees under the 2020 CBA is responsive to *Protecting and Promoting*'s recommendations that the committees' roles be "clarified" and "expanded." Previously, the Joint Committee's breadth of duties included "discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects."[168] The Joint Committee no longer exists and its previous duties have been dispersed among the more specific committees listed above. This revised structure should provide more clarity and focus.

The ACC also underwent some notable changes. Previously, one of the ACC's principal responsibilities was to conduct a confidential player survey to solicit the players' input and opinions regarding the adequacy of medical care provided by their respective medical and training staffs.[169] This survey was supposed to be conducted every two years.[170] However, the first survey took four years to be conducted.[171] The 2020 CBA bows to this failure of punctuality by only requiring the survey to be conducted once every three years.[172]

There is, however, one positive change concerning the ACC's player survey. *Protecting and Promoting* recommended that de-identified, aggregate results of the survey be made public to permit further analysis.[173] The 2020

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[165] *Id.*
[166] *Id.*
[167] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(d).
[168] *See* 2011 CBA *supra* note 7, at Art. 50, § 1(a).
[169] *See id.* at Art. 39, § (3)(c)(iv).
[170] *See id.*
[171] *See Protecting and Promoting*, *supra* note 3, at 233.
[172] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iv); 2011 CBA, *supra* note 7, at Art. 39, § 3(c)(iv).
[173] *See Protecting and Promoting*, *supra* note 3, at 233-34.

CBA substantially adopts this recommendation, by requiring the ACC to "commission independent analyses of the results of such surveys."[174]

The ACC has otherwise taken on new responsibilities which speak to the Recommendations of 7:1-B and 7:1-C for more robust collection and analysis of data concerning injuries and the risks of playing football.[175] As an initial matter, the ACC is responsible for "[c]onduct[ing] research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods."[176] Moreover, the ACC will create a subcommittee that will analyze injury information and data from performance tracking technology to study training methods, practices, and drills that may lead to injuries.[177] This subcommittee will focus on training camp and preparation for training camp, including without limitation any conditioning testing, and whether offseason workout and training camp loads affect regular season performance and injury rates.[178] The subcommittee will then attempt to make recommendations or identify best practices that NFL players and clubs may follow to ensure players are both sufficiently conditioned, including evaluating any club conditioning tests, and prepared for the start of the Offseason Program and training camp, including a training camp "Acclimation Period."[179]

The ACC has also taken on a task recommended by the Law and Ethics Initiative. Recommendation 2:1-G recommended that "[a]t any time prior to the player's employment with the club, the player should be advised in writing that the club doctor is performing a fitness-for-play evaluation on behalf of the club and is not providing any medical services to the player."[180] The purpose of this recommendation was to resolve confusion that sometimes arises about the club doctor's role.[181] As part of the 2020 CBA, the ACC is charged with "[d]evelop[ing] a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the

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[174] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iv).
[175] *See Protecting and Promoting*, supra note 3, at 231-32.
[176] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(iii).
[177] *See id.* at Art. 39, § 5(g).
[178] *See id.*
[179] *See id.* The results of the subcommittee's analysis will be available to the NFL and the NFLPA but will not be publicly disseminated unless authorized pursuant to the NFL Player Scientific & Medical Research Protocol, as set forth in Section 18 of this Article and Appendix X of this Agreement.
[180] *See Protecting and Promoting*, *supra* note 3, at 139.
[181] *See id.*

role of the player and the team medical staff in preventing and treating illness and injury in professional athletes."[182]

The ACC's new duties continue, including to: "[e]ncourage and support programs to ensure outstanding professional training for team medical staffs"; "[a]ssist in the development and maintenance of injury surveillance and medical records systems"; "[d]evelop and issue joint position statements on health and safety issues relevant to and impacting professional football players (*e.g.*, CTE, concussion, lower extremity injuries)"; "[a]nnually review and develop a mandatory education program concerning health and safety issues relevant to NFL players, including but not limited to, concussion, CTE, and NFL injury data, to be presented to all NFL players by the parties throughout the course of each NFL Season"; "[a]nalyze and provide recommendations regarding injury trends"; "[c]oordinate public statements by the NFL, NFLPA, clubs and other interested parties regarding football-related health and safety issues"; "[c]onduct an annual comprehensive review of club rehabilitation equipment, facilities and modalities, and thereafter establish and implement minimum standards concerning these areas"; "[r]eview any proposed playing rules changes for health and safety impact"; and "[e]xamine any subject related to player safety and welfare it desires, and make non-binding recommendations to the parties."[183]

C. Wearable Technologies and Biospecimen Collection

In an increasingly connected and data-driven world, privacy has been a topic of much discussion and controversy.[184] Sports too have been deeply involved in these issues.[185] In *Evaluating NFL Player Health and Performance: Legal and Ethical Issues* ("*Evaluating*"), a 2017 University of Pennsylvania Law Review article, the Law and Ethics Initiative examined the increasing use of wearable technologies in the NFL workplace and the potential impli-

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[182] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5 (c)(ii).

[183] *See* 2020 CBA, *supra* note 16, at Art. 39, § 5(c)(v)-(xi).

[184] Daniel Rudofsky, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741 (2017); *Developments in the Law — More Data, More Problems*, 131 HARV. L. REV. 1715, 1722 (2018).

[185] *See* Barbara Osborne & Jennie Cunningham, *Legal and Ethical Implications of Athletes' Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37 (2017); Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L. J. 337 (2016); Anthony Studnicka, *The Emergence of Wearable Technology and the Legal Implications for Athletes, Teams, Leagues and Other Sports Organizations Across Amateur and Professional Athletics*, 16 DEPAUL J. SPORTS L. 195 (2020).

cations under the Americans with Disabilities Act ("ADA") and Genetic Information Nondiscrimination Act ("GINA").[186] The article included an appendix describing 13 wearable technologies used by NFL clubs, including those which measure agility, force (created and sustained), speed, location, "readiness," heart rate, sleep, body temperature, fatigue, hydration, power, and more.[187] These technologies can provide valuable health and performance information to assist a player both on and off-the-field, but they can also be intrusive and provide NFL clubs with information which can be used against the players.

The authors of *Evaluating* explained the surprising results of their work as follows:

> When we began working on this project, we imagined its chief import would be to help determine which, if any, of the *new* types of wearable technologies and genetic testing that are being considered or currently used in the NFL (among other professional sports leagues) violate existing laws, in particular GINA and the ADA. This concern remains an important part of the project, but we were surprised in our research: first on the way in which the testing of professional sports players violates or accords with these laws and second, to learn that even more basic and "lower tech" testing mechanisms that have been in place for a long time in the NFL may be problematic.[188]

Moreover, many of these concerns arose from long-standing practices at the NFL Combine, an annual process through which recent college football players are evaluated prior to the NFL Draft. As a result of these findings, the authors recommended the following: improved compliance with existing laws; clarity from regulators on the appropriate application of certain laws to the relative uniqueness of the NFL workplace; the elimination of practices which have the effect (if not the purpose) of circumventing certain laws; and changes to existing legislation.

While the 2020 CBA did not address the Combine-related concerns discussed in *Evaluating*, it did otherwise address, in part, the issues by adding multiple provisions, including provisions governing sleep studies and sensors, and biospecimen collection. We discuss each set of provisions in turn.

The 2020 CBA permits clubs to perform "Sleep Studies," which are defined as "any effort to test, monitor, observe, analyze or collect informa-

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[186] *See* Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227 (2017) [hereinafter *Evaluating*].

[187] *See id.* at App. B.

[188] *See id.* at 300.

tion on or in connection with the sleep activity of an NFL player or players, without limitation, through the use of wearable sleep trackers and any future iterations thereof," subject to certain limitations.[189] First, any club desiring to perform a Sleep Study must hire a qualified third-party company to conduct the Sleep Study.[190] Second, Sleep Studies may only be conducted during Organized Training Activities or preseason training camps.[191] Sleep Studies may not be performed at any other time during the year unless approved, in writing, by the NFLPA.[192] Third, player participation in any Sleep Study is strictly voluntary – clubs may not require player participation in a Sleep Study.[193] Fourth, each participating player shall own his individual data collected during participation in the Sleep Study.[194] Fifth, the data and information collected from a player participating in a Sleep Study may not be shared with or transferred to the club unless or until such player provides informed written approval of such transfer.[195] Sixth, information arising from a Sleep Study and transferred to the club shall not be used by the club or any third-party for any purpose other than supporting player health and/or performance through improving sleep habits.[196] Seventh, clubs intending to conduct a Sleep Study must notify the NFL of their intention to do so, indicating the intended date(s) of the testing, identifying the third-party company retained to conduct such testing, and forwarding a copy of the player consent form to be used in connection with the testing. These rules do not address the legal concerns raised in *Evaluating* but do provide important legal and bioethical protections for players.

Next, performance-based sensors raise much of the same privacy concerns as Sleep Studies. "Sensors," under the 2020 CBA, are defined as "any

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[189] *See* 2020 CBA, *supra* note 16, at Art. 39, § 13.

[190] *See id.* at Art. 39, § 13(a).

[191] *See id.* at Art. 39, § 13(b).

[192] *See id.*

[193] *See id.* at Art. 39, § 13(c).

[194] *See id.* at Art. 39, § 13(d).

[195] *See id.* at Art. 39, § 13(e). If a player gives such consent, the resulting data will only be shared with the club medical, sports performance and athletic training staffs. Notwithstanding the foregoing, a club may require a player to provide written consent for the transfer of his individual Sleep Study data as a prerequisite to the club paying for the player's participation in the Sleep Study. Such consent, once given, may not be rescinded.

[196] *See id.* at Art. 39, § 13(f). If a player consents to transfer data to his club, the receiving club shall not transfer player data to the NFL, any other NFL club, or other third-party. Any and all data/information collected during a Sleep Study must remain separate from and not be entered into or used in connection with a player's electronic medical record.

sensor, device or tracking device worn by an individual player used to collect, monitor, measure or track any metric from a player (*e.g.*, distance, velocity, acceleration, deceleration, jumps, changes of direction, player load), biometric information (*e.g.*, heart rate, heart rate variability, skin temperature, blood oxygen, hydration, lactate, and/or glucose), or other health, fitness and performance information."[197]The 2011 CBA provided that:

> [t]he NFL may require all NFL players to wear during games and practices equipment that contains sensors or other nonobtrusive tracking devices for purposes of collecting information regarding the performance of NFL games, including players' performances and movements, as well as medical and other player safety-related data. Sensors shall not be placed on helmets without the NFLPA's consent. Before using sensors for health or medical purposes, the NFL shall obtain the NFLPA's consent.[198]

The 2020 CBA considerably expands these sensor-related rules. Under the new CBA, "[t]he NFL may require all NFL players to wear during games equipment that contains Sensors for purposes of collecting information regarding the performance of NFL games, including players' performances and movements."[199] However, sensors of any type shall not be placed on helmets without the NFLPA's consent.[200] The data collected from sensors can be used during NFL games commercially, including, but not limited to, with broadcast partners, subject to providing advance notice to the NFLPA of such use.[201]

In addition, the 2020 CBA stipulates that the NFL and the NFLPA shall create a "Joint Sensors Committee" to review and approve Sensors for NFL and club use.[202] The Joint Sensors Committee shall be tasked with "[r]eviewing any and all NFL or club use of Sensor(s) for purposes of collecting any player bio-data and any data and/or information, including player performance and movement, during NFL practices"; "[a]pproving or prohibiting the use of any Sensor in NFL practices after review and/or used

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[197] *See id.* at Art. 51, § 14.

[198] *See* 2011 CBA, *supra* note 7, at Art. 51, § 13.

[199] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(b) However, a club may only require players to wear any Sensor(s) that has been reviewed and approved by the Joint Sensors Committee in NFL practices. *See id.* at Art. 51, § 14(f).

[200] *See id.* at Art. 51, § 14(b).

[201] *See id.*

[202] *See id.* The Joint Sensors Committee shall consist of three (3) representatives appointed by the NFL Management Council and three (3) representatives appointed by the NFLPA. Unless the parties agree otherwise, members of the Joint Sensors Committee may not have an ownership or other financial interest in any company that produces or sells any Sensor.

to collect bio-data in NFL games"; "[m]onitoring developments in relevant Sensor technology to make recommendations to the NFL and the NFLPA about changes"; and "[e]valuating data outputs from relevant Sensor technology for accuracy and potential for manipulation."[203]

The 2020 CBA also sets forth the disciplinary process if a club or any employee of a club knowingly and materially fails to comply with the rules concerning the approval and use of Sensors in NFL practices. This process includes both the NFL and the NFLPA designating at least one representative to monitor the enforcement of the Sensors subsection and investigate any deviations therefrom.[204] "The NFLPA, the NFL, any club, or any player involved in an alleged failure by a Club or Club employee to comply with the rules regarding the approval and use of Sensors in NFL practices shall each have the right (independently or collectively) to bring forward a complaint about such alleged failure to the NFL and NFLPA designated representatives."[205] The complaint is to be investigated and resolved by the representatives.[206] "If the parties are unable to agree upon whether or not a violation occurred or the appropriate discipline that should be imposed within three weeks following the filing of a complaint, the matter will be immediately referred to the Impartial Arbitrator.[207] The CBA provides for discipline ranging from remedial education to a fine of no more than $150,000 for a first violation, or at least $250,000 plus whatever other measures are deemed to be warranted for a second violation.[208]

The 2020 CBA also addresses ownership of the data collected by Sensors, which is a particularly controversial topic.[209] The 2020 CBA provides that each individual player owns his personal data collected by Sensors, and wearing Sensors shall not require or cause a player to transfer ownership of his data to the club or any other third-party.[210] Players may not, however, use data collected from approved Sensors for any commercial purpose.[211]

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[203] *See id.* at Art. 51, § 14(c).

[204] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(g).

[205] *See id.* at Art. 51, § 14(g)(i).

[206] *See id.*

[207] *See id.* at Art. 51, § 14(g)(iv); *Id.* at Art. 51, § 14(g)(iv)(a) and (b) set forth the Impartial Arbitrator's procedure for determining any violations of Section 14.

[208] *See* 2020 CBA, *supra* note 16, at Art. 51, § 14(g)(v).

[209] *See* Osborne & Cunningham, *supra* note 185; Gale, *supra* note 185; Studnicka, *supra* note 185.

[210] This grant of rights is subject to the grant of rights set forth in Paragraph 4 of the NFL Player Contract. *See* 2020 CBA, *supra* note 16 Art. 51, § 14(h).

[211] *See id*, at Art. 51, § 14(f) states that commercialization of any current or future data and/or information collected from approved Sensors used in practices is subject to agreement by the parties.

Also, members of the club staff shall have access to data generated by approved Sensors.[212] However, any data collected from Sensors may not be referenced or cited by any club, player or player's representative in contract negotiations.[213] Given that the clubs still have the data from the Sensors, it is unclear how much protection this prohibition provides. Moreover, the NFL and the NFLPA shall also have access to aggregated data collected from such approved Sensor(s).[214] Thus, as with the Sleep Studies, the 2020 CBA creates important rules that permit Sensors to continue to be used, while helping to protect player privacy and autonomy.

Next, the 2020 CBA also creates new rules governing the collection and use of biospecimens, which generally mean blood and urine samples.[215] *Evaluating* discusses such biospecimens as being among the types of medical tests conducted on NFL players or prospective NFL players which may run afoul of ADA or GINA.[216] Like with the usage of Sleep Studies and Sensors, the 2020 CBA does not resolve these legal concerns but does create additional protections for players.

The 2020 CBA requires that the collection of biospecimens must be approved by the NFLPA and, like other types of data collection in the 2020 CBA, subjects that collection to a number of limitations and regulations.[217] First, player participation in any biospecimen collection is strictly voluntary – clubs may not require player participation in a biospecimen collection. Second, each participating player shall own his individual data collected during participation.[218] Third, the data and information collected from a player participating in a biospecimen collection may not be shared with or transferred to the club unless such player provides informed written approval of such transfer.[219] If a player gives such consent, the resulting data will only be shared with the club medical, sports performance, and athletic training staffs.[220] Fourth, information arising from a club biospecimen collection and transferred to the club shall not be used by the club or any third-party for any purpose other than supporting player health and/or performance.[221] Fifth, the clubs intending to conduct a biospecimen collection must

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[212] NFL clubs shall comply with all federal and state laws regarding the storage, use and privacy of such data. *See id.* at Article 51, § 14(j).

[213] *See id.* at Art. 51, § 14(h)(i).

[214] *See id.* at Art. 39, § 14(h).

[215] *See id.* at Art. 39, § 14.

[216] *See Evaluating* at Online App. B, p. 11.

[217] *See* 2020 CBA, *supra* note 16, at Art. 39, § 14.

[218] *See id.* at Art. 39, § 14(b).

[219] *See id.* at Art. 39, § 14(c).

[220] *See id.*

[221] *See id.* at Art. 39, § 14(d).

notify the NFL of their intention to do so.[222] While these limitations place restrictions on clubs with regard to biospecimen collections, the new provisions do not affect a club physician's ability to order blood or other biospecimen collection and/or testing of an individual player when he or she determines it is clinically indicated (*e.g.*, to determine if such player is suffering from a medical condition at the player's request or based on the physician's clinical judgment). Otherwise, the purpose of biospecimen collection for NFL players is solely for player health and safety purposes.

D. Behavioral and Mental Health

In multiple works, the Law and Ethics Initiative addressed the importance of providing better mental health awareness and support for NFL players. First, in *Protecting and Promoting*, the authors contributed an entire section to discussing issues of NFL player mental health, including "the fact that medical literature and clinical practice has *associated* psychological symptoms such as anxiety, depression, liability, irritability and aggression in patients with a history of concussions."[223] In addition, chapters in *Protecting and Promoting* concerning financial advisors and family members also addressed the importance of mental health as to those individuals' roles.[224] Consequently, *Protecting and Promoting* included a variety of recommendations addressed to mental health, which will be discussed in more detail below.

Next, the Law and Ethics Initiative published an article in the Journal of Clinical Sport Psychology dedicated to the topic, entitled *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health* ("*Emotional Rollercoaster*").[225] Importantly, the findings and recommendations contained in *Emotional Rollercoaster*, discussed below as rel-

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[222] *See id.* at Art. 39, § 14(e).

[223] *See Protecting and Promoting*, *supra* note 3, at 68, *quoting In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 401 (E.D. Pa. 2015) (*quoting* Declaration of Dr. Christopher Giza) (emphasis in original); *see also* Zachary Y. Kerr et al., *Nine-Year Risk of Depression Diagnosis Increases with Increasing Self-Reported Concussions in Retired Professional Football Players*, 40 AM. J. SPORTS MED. 2206 (2012) (finding professional football players self-reporting concussions at greater risk for depressive episodes later in life compared with retired players self-reporting no concussions).

[224] *See Protecting and Promoting*, s*upra* note 3, at 329, 331, 350, 352.

[225] *See* Sarah McGraw et al., *Life on an Emotional Rollercoaster: NFL Players and Their Family Members' Perspectives on Player Mental Health*, 12 J. CLINICAL SPORT PSYCH. 404 (2018) [hereinafter *Emotional Rollercoaster*].

evant, were based on interviews with 25 NFL players (23 former and 2 current) and 27 family members (24 wives and 3 others) of NFL players.[226]

Finally, in an article published in the Journal of Sport Behavior, entitled *NFL or 'Not for Long'? Transitioning out of the NFL* ("*Not for Long*"),[227] the Law and Ethics Initiative analyzed challenges NFL players faced when their careers ended, many of which had a mental health component. This article utilized the same interview data as *Emotional Rollercoaster.*

Fortunately, the 2020 CBA made significant improvements in the area of player mental health. These improvements include: (i) the creation of a Comprehensive Mental Health and Joint Behavioral Health Committee; (ii) the requirement that each club retain a Behavioral Health Specialist, also identified as the "Team Clinician"; (iii) the creation of a Mental Health and Wellness Team at the club level; and (iv) increased confidentiality protections around player mental health issues.

i. Comprehensive Mental Health and Joint Behavioral Health Committee

The Comprehensive Mental Health and Joint Behavioral Health Committee (the "Joint Behavioral Health Committee"), consisting equally of NFL and NFLPA medical representatives, is charged with a variety of duties to promote player mental health.[228] Several of the Joint Behavioral Health Committee's responsibilities closely follow recommendations made by the Law and Ethics Initiative.

First, the Joint Behavioral Health Committee is responsible for developing and scheduling educational programs for players, coaches, and club personnel regarding mental health,[229] including but not limited to "mental health first aid; QPR (Question, Persuade, Refer); ASIST (Applied Suicide Intervention Skills Training); clinical concerns and issues (*i.e.*, depression and/or anxiety); drug and alcohol use and abuse; gambling addiction; violent behaviors' suicide prevention; athlete-specific stressors (*i.e.*, media, identity, social support, injury and navigating sports-specific relationships); and other topics that the Joint Behavioral Health Committee deems relevant for such personnel."[230] This responsibility tracks the second recommendation from *Emotional Rollercoaster*:

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[226] *See id.* at 404.

[227] *See* Sarah McGraw et al., *NFL or 'Not for Long'? Transitioning out of the NFL*, 42 J. Sport Behavior 461 (2019) [hereinafter *Not for Long*].

[228] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a).

[229] *See id.* at Art. 39, § 19(a)(i).

[230] *Id.*

> Players (current and former) and their family members should avail themselves of the mental health assistance currently available to them, with assistance from contract advisors (*i.e.*, agents), the NFL, the NFLPA, and others. Relatedly, we recommend that the NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them.[231]

Moreover, *Not for Long* discussed at length one of these issues, that of "identity foreclosure," defined as a "singular focus on athletic skills beginning at a young age, constraining career choices by limiting an athlete's range of life experiences, or the development of other skills and interests."[232]

Second, the Joint Behavioral Health Committee is responsible for

> [d]eveloping sample programming for a mental health/wellness workshop for parents and significant others of players to ensure they are aware of sign and symptoms that may be indicative of mental health concerns, the resources available to players and family members, and to know where to turn should they need support.[233]

These duties resemble multiple recommendations from *Emotional Rollercoaster*. The fifth recommendation from that article advocated that "players and their family members should have access to structured and well-tested programs to help them to anticipate and cope with their mental health challenges as well as gain insight into their personal experiences."[234] Next, the sixth recommendation proposed that "[p]layers and their family members should have confidential access to a variety of professionals trained in counseling or related issues."[235] Finally, the seventh recommendation from *Emotional Rollercoaster* put forth that "[w]ives and family members should be empowered to offer support regarding the mental health challenges that players may face. They should be aware of any gaps in their own understanding of player experiences, and the NFL and NFLPA should offer programs or materials to help them become better health advocates."[236]

Third, the Joint Behavioral Health Committee is tasked with collaborating with local and national mental health organizations to promote stigma reduction related to mental health.[237] In *Emotional Rollercoaster,* the authors discussed how the stigma of mental health treatment prevented

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[231] *Emotional Rollercoaster*, *supra* note 225, at 425.
[232] *Not for Long*, *supra* note 227, at 463.
[233] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(ii).
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(iii).

some players from seeking the care they needed.[238] Consequently, the authors stated that "[i]t is important that [mental health] issues be normalized, de-stigmatized, and treated with the appropriate levels of respect and seriousness, as well as confidentiality."[239] Further, the article's first recommendation was that "[p]layers and their families need to hear that they are not alone in their feelings and that mental health challenges are not an abnormal or shameful experience."[240]

Fourth, the Joint Behavioral Health Committee is responsible for developing models of player programs that clubs may use.[241] Among the programs to be addressed by the Joint Behavioral Health Committee are programs to promote "social connectedness and resilience."[242] Part 5 of *Protecting and Promoting* is focused on player advisors, specifically contract advisors (*i.e.*, agents), financial advisors, and family members.[243] As explained therein, these stakeholders are "particularly important in the[ ] broader aspects of health," "including financial wellbeing, education, and social support."[244] Thus, the Joint Behavioral Health Committee's programs concerning social connectedness and resilience would do well to focus on these stakeholders.

Fifth, the Joint Behavioral Health Committee's programs are intended to integrate the player's family ecosystem in the development and provision of mental health resources.[245] As discussed above, both *Emotional Rollercoaster* and *Protecting and Promoting* addressed at length the importance of family involvement in player health matters, stating, for example, that "[f]amilies can play a crucial role in protecting and promoting player health, including by encouraging players to seek proper medical care and appropriately consider long-term interests."[246] Moreover, family can provide crucial "support through challenging times."[247]

Sixth, the CBA declares that the Joint Behavioral Health Committee's programs should include a "model peer development program."[248] Recommendations 1:1-D and 1:1-E from *Protecting and Promoting* propose exactly that. Recommendation 1:1-D declares that "[p]layers should seek out and

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[238] *See Emotional Rollercoaster*, *supra* note 225, at 416, 418, 420.
[239] *Id.* at 422.
[240] *Id.* at 425.
[241] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v).
[242] *Id.* at Art. 39, § 19(a)(v)(B).
[243] *See Protecting and Promoting*, *supra* note 3, at 301.
[244] *Id.* at 302.
[245] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(C).
[246] *Protecting and Promoting*, *supra* note 3, at 347.
[247] *Id.*
[248] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(D).

learn from more experienced players, including former players, concerning health-related matters."[249] Next, Recommendation 1:1-E asserts that "[p]layers should take on a responsibility to one another, to support one another's health, and to change the culture for the better."[250] This recommendation draws support from a successful "Battle Buddy" program instituted by the United States Army in which soldiers are assigned partners who "help each other through training and then look out for each other physically, emotionally, and mentally when deployed."[251]

Finally, additional work to be done by the Joint Behavioral Health Committee is addressed below in Section III.E: Transitioning out of the NFL.

ii. Behavioral Health Specialist ("Team Clinician")

In addition to the Joint Behavioral Health Committee, the 2020 CBA requires each club to retain a "Behavioral Health Specialist," identified in the CBA as the "Team Clinician."[252] The Team Clinician must be a board-certified psychiatrist, a doctoral-level clinical or counseling psychologist, or a professional counselor with a master's degree in counseling or social work.[253] Moreover, the Team Clinician must have a minimum of seven years of relevant clinical experience working with a multicultural population.[254] Lastly, the Team Clinician is required to have a valid license to practice medicine as required under applicable state law, and any other applicable jurisdiction, that has never been denied, suspended, revoked, terminated, voluntarily relinquished under threat of disciplinary action, or restricted in any way.[255]

The requirement that the Team Clinician have "experience working with a multicultural population" is notable. This is believed to be the first instance in which the CBA acknowledges – even if implicitly – the subject of race. As discussed in *Protecting and Promoting*, the NFL player population is largely Black (about 68%).[256] Moreover, there "is some evidence to suggest that race may be correlated with distrust of the medical profession and medical establishment, although this may be mediated by a variety of fac-

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[249] *Protecting and Promoting*, *supra* note 3, at 79.
[250] *Id.*
[251] *Id.*
[252] *See* 2020 CBA, *supra* note 16, at Art. 39, § 1(b)(v).
[253] *See id.* at Art. 39, § 19(b)(i).
[254] *See id.*
[255] *See id.*
[256] *See Protecting and Promoting*, *supra* note 3, at 60.

tors, including geography and socioeconomic status."[257] Finally, it is important to acknowledge the "social determinants of health."[258]

Importantly, the NFLPA has a say in each club's Team Clinician. After each club has identified a candidate for the position, the NFL and NFLPA shall each designate one person to review and approve the nominee.[259] In considering whether to approve the nominee, the parties shall consider whether the nominee possesses the requisite clinical skills for the position.[260] However, similar to club physicians, athletics trainers, and other consultants, the Team Clinician can be terminated by the club.[261]

The NFLPA's role in selecting the Team Clinician is interesting. As discussed at length in Section III.A.i, both the NFL and NFLPA strongly rejected the Law and Ethics Initiative's recommendation that the structure of club medical staff be changed so that player care and treatment should be provided by one set of medical professionals and evaluation of players for a club's business purposes be done by separate medical personnel. A key component of that recommendation was that the medical staff treating players be appointed by a joint committee with representation from both the NFL and NFLPA. Again, the NFL and NFLPA rejected the recommendation in whole. Yet, now, the parties adopt one of its core features – that the NFLPA play a role in selecting the players' medical providers.

Once retained, the Team Clinician is tasked with a wide-ranging set of duties.[262] The Team Clinician is tasked with "[e]nsur[ing] that all mental health treatment and records created or obtained during the course of providing services to a club's players remain confidential and are maintained, used and disclosed in compliance with applicable laws"; "developing and supervising a comprehensive referral network to provide mental health care for the club's players";[263] "implementing the mental health educational pro-

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[257] *Id.*

[258] *See id.* at 329-30.

[259] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(b)(ii).

[260] *See id.* These skills include: effective player engagement; behavioral health treatment (within his/her areas of expertise); triage and referral for other community-based behavioral health providers and services; consulting effectively with the club Medical Staff and the club Director of Player Engagement; availability for and skill in engaging in modern electronic communication methods as used in professional football; and working effectively with a diverse, multicultural player and staff population, with an awareness and understanding of the culture of football at an elite level.

[261] *See id.*

[262] For a full list of duties, *see id.* at Art. 39, § 19(b)(iii).

[263] This network must include professionals that are qualified to address (if any are beyond the scope of the Team Clinician's expertise): (1) Substance Abuse, (2)

gramming developed by the Joint Behavioral Health Committee"; "[b]e[ing] available on-site to players at least twice weekly during training camp, preseason, regular season, and if applicable, postseason"; "be[ing] available to meet with any player placed on Injured Reserve ("IR") or designated Physically Unable to Perform ("PUP") in order to assess the need for any behavioral health interventions relevant to the player's IR or PUP status"; "[c]ontact[ing] all players transitioning out of the NFL for a voluntary interview and mental health evaluation"; "[p]articipat[ing] in continuing education and case consultation programming created for team clinicians"; and "[p]articipat[ing] in a certain number of conference calls per year and attend[ing] scheduled meetings as set by the Joint Behavioral Health Committee."[264]

The addition of the Team Clinician is responsive to multiple recommendations of the Law and Ethics Initiative. In particular, it responds to the fifth and sixth recommendations from *Emotional Rollercoaster*, which provided as follows: "Players and their family members should have access to structured and well-tested programs to help them to anticipate and cope with their mental health challenges as well as gain insight into their personal experiences"; and "[p]layers and their family members should have confidential access to a variety of professionals trained in counseling or related issues such as chaplains, therapists, and the team's development staff."[265] In addition, some of the other duties of the Team Clinician address other issues raised by the Law and Ethics Initiative, including confidentiality (discussed in Section III.D.iv) and transitioning out of the NFL (discussed in Section III.E).

iii. Mental Health and Wellness Team

The 2020 CBA requires that each club have a mental health and wellness team (the "Mental Health Team").[266] The Mental Health Team is to be led by its Team Clinician.[267] The Mental Health Team "shall also include, at a minimum, the Head Team Primary Care Sports Medicine Physician, Director of Player Engagement, Head Athletic Trainer, Head Strength and Conditioning Coach and Team Chaplain."[268] Further, the Mental Health

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Relationship Counseling, (3) Intimate Partner Violence or Abuse, (4) In-and Out-Patient Psychiatric Treatment, (5) Sport/Performance Psychology.

[264] 2020 CBA, *supra* note 16, at Art. 39, § 19(b)(iii)(A)-(I).

[265] *Emotional Rollercoaster*, s*upra* note 225, at 425.

[266] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(i).

[267] *See id.*

[268] *Id.*

Team is required to meet at least once a month "during the season and quarterly during the offseason to discuss ongoing mental health education and identify potential issues or concerns."[269] The Team Clinician is tasked with facilitating these meetings and providing education while at the same time maintaining the privacy and confidentiality of the player-patients.[270] Finally, the content of these meetings must "remain strictly confidential."[271]

The creation of the Mental Health Team tracks many of the recommendations from *Emotional Rollercoaster*, as discussed above. Moreover, the Mental Health Team addresses the role of two individuals highlighted in the work of the Law and Ethics Initiative.

First, the Mental Health Team includes a club's Director of Player Engagement. Player Engagement staff are lesser-known club personnel who, as described in *Protecting and Promoting*, "are often ex-players who are responsible for assisting the club's players with a blend of professional and personal issues, including transitioning from college to the NFL, getting the player and his family settled in a new environment, dealing with the media, continuing their education, planning for retirement, and providing general life coaching and guidance."[272] Further, *Protecting and Promoting* declared that "[a]s respected elder statesmen of the game, these individuals have the opportunity to play an important role in assisting players and making sure the actions taken are in their best interests."[273] Nevertheless, those who hold these positions are often not provided the resources or support to be successful in their roles.[274] Consequently, Recommendation 10:1-B of *Protecting and Promoting* recommended that "[c]lubs should adequately support the developmental staff."[275] The 2020 CBA's inclusion of the Director of Player Engagement within the Mental Health Team seemingly responds to these concerns and identifies this role as an important one moving forward.

Second, the Mental Health Team includes the Team Chaplain. As described in *Protecting and Promoting*,

> [e]very club generally has a chaplain who will visit practice once or twice during the week and be present before games. The chaplains often hold small studies or sermons but avoid overly religious messaging, instead fo-

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[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Protecting and Promoting*, *supra* note 3, at 286.
[273] *Id.*
[274] *See id.*
[275] *Id.* at 291.

> cusing on themes relevant to football and the players or other themes as directed by the coaching staff.[276]

Both *Protecting and Promoting* and *Emotional Rollercoaster* discussed Team Chaplains as important sources of support for many players.[277] For this reason, the Law and Ethics Initiative recommended that Team Chaplains be among the "professionals trained in counseling" and made available to players for mental health support.[278] The 2020 CBA effectively adopts this recommendation.

iv. Confidentiality

Successful mental health treatment requires confidentiality between the provider and the patient.[279] Unfortunately, players historically have had serious concerns that discussing mental health issues with club medical staff or personnel has not been kept confidential.[280] As a result, many players avoid seeking out mental health treatment.[281]

The players' concerns were well-founded. *Protecting and Promoting* includes copies of collectively bargained waivers that all players sign.[282] These waivers permit "the player's medical information to be disclosed to and used by a wide variety of parties, including but not limited to the NFL, any NFL club, and any club's medical staff and personnel, such as coaches and the general manager."[283] "Players sign these waivers without much (if any) hesitation out of fear that behaving otherwise could cost them their jobs."[284] The first of two waivers authorizes the club, the NFL, and other parties to use and disclose the player's "entire health or medical record," expressly including "all records and [protected health information] relating to any mental health treatment, therapy, and/or counseling, but expressly excluding psychotherapy notes."[285] The second waiver authorizes all of the players' "healthcare providers," including "mental health providers" to disclose

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[276] *Id.* at 69.

[277] *See id.*; *Emotional Rollercoaster*, *supra* note 225, at 417.

[278] *See Emotional Rollercoaster*, *supra* note 225, at 426.

[279] *Protecting Your Privacy: Understanding Confidentiality*, AM. PSYCHOL. ASS'N (Oct. 19, 2019), https://www.apa.org/topics/ethics-confidentiality [https://perma.cc/BM3J-X2MP].

[280] *See Emotional Rollercoaster*, *supra* note 225, at 416, 418-19, 420-21.

[281] *See id.*

[282] *See Protecting and Promoting*, *supra* note 3, at Apps. L, M.

[283] *Protecting and Promoting*, *supra* note 3, at 102.

[284] *Id.*

[285] *Id.* at 138.

player health information and records to the NFL, NFL clubs, and other parties.[286]

The Law and Ethics Initiative considered these waivers to be one of the most significant issues concerning player health.[287] Consequently, in both *Protecting and Promoting* and *Emotional Rollercoaster*, the Initiative recommended that "[t]he NFL and NFLPA should reconsider whether waivers providing for the use and disclosure of player medical information should continue to include mental health information."[288]

Unfortunately, the 2020 CBA leaves these waivers unchanged.[289] The continued existence of these problematic waivers is confusing in light of numerous other changes the 2020 CBA makes that positively address confidentiality issues.

First, the Team Clinician must "[e]nsure that all mental health treatment and records created or obtained during the course of providing services to a club's players (including any voluntary mental health evaluations) (collectively 'Mental Health Records') remain confidential and are maintained, used and disclosed in compliance with applicable laws."[290] Further, the 2020 CBA declares that

> all Mental Health Records, with the exception of diagnosis and prescription drug information related to the mental health services provided by the Team Clinician, shall be maintained by the individual Team Clinician in a record separate from the NFL EMR [electronic medical record], which shall be afforded all protections that the clinician's other patient records enjoy.[291]

Second, any Mental Health Records that the Team Clinician creates when providing mental health services shall be considered protected health information ("PHI") and subject to Health Insurance Portability and Accountability Act ("HIPAA").[292] The Team Clinician may only disclose such PHI as permitted by HIPAA.[293] The 2020 CBA further declares that "[f]or the avoidance of doubt, the Team Clinician may NOT share *any details* regarding treatment provided to a player with any member of the club, other than with the Head Team Primary Care Sports Medicine Physician when

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[286] *See id.*
[287] *See id.* (describing the waivers as "troubling").
[288] *Id.*; *Emotional Rollercoaster*, *supra* note 225, at 422.
[289] *See* 2020 CBA, *supra* note 16, at App. S.
[290] *Id.* at Art. 39, § 19(b)(iii)(A).
[291] *Id.* at Art. 39, § 19(f).
[292] *See id.* at Art. 39, § 19(c).
[293] *See id.*

medically necessary to provide treatment to the Player."[294] This express declaration nonetheless conflicts with the waivers players sign which relinquish their rights to confidentiality under HIPAA.[295]

Third, each year, the Team Clinician must sign an annual certification and submit it to the NFL Chief Medical Officer and the NFLPA Medical Director that (i) details any and all "Breaches" as defined under HIPAA in the prior year; (ii) confirms that he/she meets all state requirements to provide mental health services, including any licenses and certifications; (iii) confirms that his/her licenses have never been denied, suspended, revoked, terminated or voluntarily relinquished under threat of disciplinary action or restricted in any way; and (iv) assures that he/she has complied with all laws regarding the corporate practice of medicine, health care fraud and abuse laws, and laws regarding the privacy and security of patient information including but not limited to the ADA, HIPAA, and any applicable state laws.[296]

Fourth, the Team Clinician must be allotted space conducive to privacy and confidentiality in the club's facility for direct service provision and consultation to players and the space and resources necessary to maintain the confidentiality of any and all electronic and paper Mental Health Records in a manner that complies with applicable laws, including but not limited to HIPAA and the ADA.[297]

Fifth, and perhaps most importantly, the 2020 CBA sets forth a comprehensive process to address any breaches of confidentiality. The 2020 CBA states that:

> Should there be an unauthorized disclosure of a player's Mental Health Records, the Team Clinician shall notify the Head Team Physician and club President as well as the NFL Chief Medical Officer and NFLPA Medical Director. To the extent that the unauthorized disclosure constitutes a 'Breach' as defined by HIPAA, the Team Clinician and/or club shall comply with any breach notification requirements outlined in HIPAA at 45 CFR §§ 164.404. If there has been unauthorized access to Mental Health Records stored in the segregated part of the EMR, the Parties will cooperate in investigating such unauthorized access and provide appropriate remedial measures. Any intentional and/or knowing unauthorized access to or dissemination of Mental Health Records (*e.g.*, clinical diagnosis and/or

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[294] *Id.* at Art. 39, § 19(c)(i) (emphasis in original).

[295] *See id.* at App. S.

[296] *See id.* at Art. 39, § 19(a)(i)-(v). The ADA confidentiality requirements are discussed in *Evaluating*, *supra* note 186, at 260-62.

[297] *See* 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(iii)(E).

> prescription(s)) will be considered a material violation of this Agreement and subject to the discipline procedures set forth below.[298]

If the NFL and NFLPA's investigation determines that a Team Clinician improperly disclosed a player's Mental Health Records, "**that Clinician shall be subject to termination**."[299] Moreover, the Commissioner "shall impose discipline against the club in the form of a fine of no less than five hundred thousand dollars ($500,000) and such other measures as the Commissioner deems necessary as a deterrent for future violations (*e.g.*, loss of Draft Picks)."[300] Importantly, the $500,000 fine is not discretionary – the provision makes clear that the Commissioner "shall impose" such discipline.

As would be expected, the NFL and NFLPA might have different opinions about the result of such an investigation. Consequently, "[i]f the Parties are unable to agree upon whether or not a Breach or violation of [the 2020 CBA] has occurred, then either Party may immediately refer the matter to the Impartial Arbitrator."[301] As stated earlier, the Impartial Arbitrator is an arbitrator appointed by the NFL and NFLPA with jurisdiction over a broad range of disputes that might arise out of the CBA.[302] If the "Impartial Arbitrator finds that a club, or an individual acting under its control, willfully violated the provisions of this Agreement or willfully committed a Breach of its confidentiality obligations pursuant to HIPAA," then the Commissioner must impose the discipline described above.[303]

This newfound disciplinary scheme finds support in several recommendations from the Law and Ethics Initiative. Notably, in each chapter of *Protecting and Promoting*, the authors examined the mechanisms available to players to enforce the various legal and ethical obligations of stakeholders in player health.[304] Having found those mechanisms deficient,[305] Recommendation 7:2-A recommended that "[t]he CBA should be amended to provide for meaningful fines for any club or person found to have violated" Article

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[298] *Id.* at Art. 39, § 19(c)(ii).

[299] *Id.* (emphasis in original).

[300] *Id.* at Art. 39, § 19(c)(iii).

[301] The Impartial Arbitrator is described in Article 16 of the 2020 CBA and is discussed *infra* with regard to his or her role in player health and safety disciplinary measures.

[302] *See* 2020 CBA, *supra* note 16, at Art. 16.

[303] *See id.* at Art. 39, § 19(c)(iii).

[304] *See Protecting and Promoting*, *supra* note 3, at 33.

[305] *See id.* at 244 ("[Q]uestions have been raised by some stakeholders we interviewed about the NFLPA's ability to investigate and enforce player health provisions through grievances.").

39 of the CBA, governing player medical care and treatment.[306] Further, Recommendation 7:5-A recommended that "[t]he NFLPA should consider investing greater resources in investigating and enforcing player health issues, including Article 39 of the 2011 CBA."[307] As it concerns player mental health information, the 2020 CBA substantially adopts these recommendations.

Nevertheless, this Section must close by again pointing out the inconsistency between these extensive protections of player mental health records and the expansive waivers that players sign. Ideally, the provisions of the CBA will control in practice and in policy over the waivers – meaning player mental health records will be kept confidential.

E. Transitioning out of the NFL

As explained in *Not for Long*, NFL "players typically have a short playing career, often leaving the league due to injury or lack of interest from teams before they have been able to prepare sufficiently for life after the league."[308] Moreover, in transitioning out of the NFL, players face "challenges arising from the nature and structure of the NFL as a work environment, their special status as NFL players, the effects of identity foreclosure, limited exposure to work outside of the NFL, difficulties with financial planning, and, for some, limited educational and social skills."[309]

Through interviewing current and former players and their family members, *Not for Long* sought to analyze these exact issues and make recommendations for change. The article's recommendations are to: (1) "support the early and on-going preparation for career change, including supporting opportunities to identify new interests, encouraging players to think about their transferable skills, and help them with psychological preparations to anticipate their change in social status when they might find themselves at the bottom of the occupational ladder and may no longer receive preferential treatment";[310] (2) "help players to strengthen personal skills by recognizing that some players might benefit from learning how to manage new daily routines, conduct job searches, network, and enhance the interpersonal and communication skills necessary to work environments outside of football";[311] (3) "promote exposure to other professions by recognizing that

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[306] *See id.* at 238.
[307] *Id.* at 244-45.
[308] *Not for Long*, *supra* note 227, at 461.
[309] *Id.* at 482.
[310] *Id.* at 484.
[311] *Id.*

without work experience outside of football, some players have unrealistic expectations about salaries in other professions and do not develop strong job search skills";[312] (4) "develop programs for wives and other family members to help to support NFL players in preparing for a career change";[313] and (5) "develop programs to assist players with financial planning and management."[314]

Fortunately, the 2020 CBA makes two changes to address these important issues. First, as discussed earlier, the Joint Behavioral Health Committee is tasked with a variety of duties intended to improve the health and welfare of NFL players. On this specific issue, the Committee is responsible for developing a program "[a]ddressing the stresses and needs of Players transitioning out of NFL."[315] The Committee would be wise to read *Not for Long* to better understand these issues.

Second, the Team Clinician, discussed at length above, is responsible for "[c]ontact[ing] all Players transitioning out of the NFL for a **voluntary** interview and mental health evaluation. During this interview, the Team Clinician shall explain to the Player all mental health and career transitioning programs available via the NFL and NFLPA."[316] This obligation is responsive to Recommendation 7:3-A from *Protecting and Promoting*, which recommended that "[t]he NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them."[317] As explained in that report, "the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare and career-related guidance. However, it appears that many players are not taking full advantage of these programs."[318] The Team Clinician's work as part of the 2020 CBA should help remedy that problem.

Collectively, these two new CBA provisions will create programs to help players transition out of the NFL and make sure players take advantage of those programs. These changes were the goal of *Not for Long*.

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[312] *Id.* at 484-85.
[313] *Id.* at 485.
[314] *Id.*
[315] 2020 CBA, *supra* note 16, at Art. 39, § 19(a)(v)(A).
[316] *Id.* at Art. 39, § 19(b)(iii)(G) (emphasis in original).
[317] *Protecting and Promoting*, *supra* note 3, at 239.
[318] *Protecting and Promoting*, *supra* note 3, at 240.

F. Club Personnel: Athletic Trainers, Strength and Conditioning Coaches, and Equipment Managers

Athletic trainers, strength and conditioning coaches, and equipment managers are all important stakeholders in the health and safety of NFL players. For these reasons, *Protecting and Promoting* devoted chapters or specific sections to each of these club employees.[319]

The 2020 CBA makes changes addressing each of these positions and which track recommendations made by Law and Ethics Initiative work.

First, in *Protecting and Promoting*, the Law and Ethics Initiative pointed out that the 2011 CBA's requirement that athletic trainers be certified by the National Athletic Trainers Association ("NATA") was actually in error and a requirement with which athletic trainers were not able to comply.[320] NATA is a voluntary professional association but does not *certify* athletic trainers.[321] Athletic trainers are certified by the Board of Certification for the Athletic Trainer ("BOC").[322] The BOC used to be part of NATA but split from the voluntary association in 1989.[323] The 2020 CBA corrects this error by requiring athletic trainers to be certified by the BOC, while also adding the requirement of a Master's Degree and a current certification in Basic Cardiac Life Support or Basic Trauma Life Support.[324]

Second, *Protecting and Promoting* noted that the 2011 CBA contained "no references to or requirements for strength and conditioning coaches" even though they "play an important role in a player's career."[325] As explained in the report, "strength and conditioning coaches are responsible for overseeing a player's general fitness and physical preparedness for NFL games. Strength and conditioning coaches create weightlifting and stretching programs for players and otherwise monitor and assist players to ensure that they are in the best possible condition to play each week."[326] Moreover, "[g]iven the importance of NFL players' health to the success of the team, NFL clubs and players consider strength and conditioning coaches to be among their most important coaches and staff."[327] While "NFL strength

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[319] *See Protecting and Promoting*, *supra* note 3, at Ch. 3 (Athletic Trainers), Ch. 11 (Equipment Managers), 273 (discussing strength and conditioning coaches).

[320] *See Protecting and Promoting*, *supra* note 3, at 162.

[321] *See id.*

[322] *See id.*

[323] *See id.*

[324] *See* 2020 CBA, *supra* note 16, at Art. 39, § 2.

[325] *Protecting and Promoting*, *supra* note 3, at 273.

[326] *Id.*

[327] *Id.*

and conditioning coaches have typically had a college degree in exercise science or a similar discipline and certification from the National Strength and Conditioning Association," there was no such requirement in the CBA.[328]

The 2020 CBA remedies this deficiency. The 2020 CBA requires that by the opening of preseason training camp for the 2021 season, each club must have secured "the services of at least one strength and conditioning coach on a full-time basis to serve as the Head Strength and Conditioning Coach."[329] Further, the 2020 CBA requires that "[e]ach individual hired for the first time to perform services as a Head Strength and Conditioning Coach for a club must, as of the hiring date, have a Master's Degree in an accredited exercise science, health science, or physical education-related discipline; a certification from the National Strength and Conditioning Association ('NSCA') (or a similar organization as the parties may agree) as a Certified Strength and Conditioning Specialist ("CSCS"); at least five (5) years of experience as a strength and conditioning coach since he/she first received the foregoing certification; and demonstrated experience working with elite athlete populations."[330] These certification requirements will help ensure that players are working with appropriately and highly qualified strength and conditioning coaches.

Third, *Protecting and Promoting* discussed the role of Equipment Managers, who, among other duties, "help players select equipment and make sure the equipment fits according to the manufacturer's guidelines."[331] In this respect, "players rely on the equipment managers to help prepare and protect them."[332] The report further explained the role of the American Equipment Managers Association ("AEMA"), a voluntary organization which "provides certification to equipment managers working in sports across the country."[333] Recommendation 11:1-A of *Protecting and Promoting* recommended that "[t]he CBA should require that all equipment managers be certified by the AEMA."[334]

The 2020 CBA adopts this recommendation. The 2020 CBA requires that by the opening of preseason training camp for the 2021 season, each club shall have "at least one (1) equipment manager to serve as the Head Equipment Manager on a full-time basis."[335] Further, "[e]ach individual

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[328] *See id.*
[329] 2020 CBA, *supra* note 16, at Art. 51, § 17.
[330] *Id*.
[331] *Protecting and Promoting*, *supra* note 3, at 294.
[332] *Id.*
[333] *Id.*
[334] *Protecting and Promoting*, *supra* note 3, at 298.
[335] 2020 CBA, *supra* note 16, at Art. 51, § 18.

hired for the first time to perform services as a Head Equipment Manager for a club must, as of the hiring date: (a) be certified by the Athletic Equipment Managers Association (or a similar organization as the parties may agree); and (b) have experience working with elite athlete populations (*i.e.*, Division I Collegiate, Olympic, profession level athletes)."[336] As stated in *Protecting and Promoting*, "[r]equiring NFL equipment managers to be AEMA-certified is a meaningful way of ensuring that the equipment managers working with NFL players are among the most qualified and educated in the industry."[337]

G. Miscellaneous

In addition to the comprehensive set of issues discussed above, the 2020 CBA contains a variety of other changes with connections to work from the Law and Ethics Initiative. These miscellaneous changes concern the following issues: (i) player access to medical records; (ii) financial advisors; (iii) research protocols; (iv) prohibited drills; (v) squad size; (vi) former player benefits; and (vii) guaranteed compensation.

i. Player Access to Medical Records

As discussed in *Protecting and Promoting,*

> [r]esearch has. . . shown that patients who have access to their medical records feel more in control of their healthcare and better understand their medical issues.[338]

Consequently, Recommendation 1:1-I, directed at players, recommends that they "should review their medical records regularly."[339] While players can access their electronic medical records ("EMR") through an online portal,[340] it is not clear how often they do.

The 2020 CBA makes changes which should assist in players being more knowledgeable about their medical records. The 2020 CBA requires that within 30 days of a club's last game, the club must "provide a summary listing taken from the player's Electronic Medical Record ('EMR') of every

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[336] *Id.* Additionally, all Equipment Managers, regardless of dates of hiring, shall complete annual Continuing Education Units (CEUs) on jointly agreed-upon, relevant topics.

[337] *Id.*

[338] *Protecting and Promoting*, *supra* note 3, at 81.

[339] *Id.*

[340] *See Protecting and Promoting*, *supra* note 3, at 161-62.

club physician-diagnosed medical condition evaluated and treated by any club physician during the immediately preceding season and any club physician-prescribed medications given during the immediately preceding season (the 'Summary Report')."[341] Further, the Summary Report must "be provided, in written and electronic formats to the player's home and e-mail addresses contained within the EMR."[342] Clubs must provide Summary Reports "for all players who were on its roster at any time during that season."[343]

The obligatory Summary Report is an important step in transparency. As explained in *Protecting and Promoting*,

> [r]eviewing the records will ensure that the club's medical staff is properly documenting the player's condition and concerns while also helping the player to ensure he is following the proper treatment for the condition . . . . Additionally, in reviewing his medical records and knowing that the club will also review them, a player might become more aware of how his medical conditions or history could adversely affect his employment. For example, the medical records might include a note from the athletic trainer that a player's knee condition prevents him from cutting and running as he had in the past, leading the club to terminate his contract.[344]

ii. Financial Advisors

Financial advisors are a critical stakeholder in players' long-term health.[345] As explained in *Protecting and Promoting*, "[f]inancial health is a major contributor to physical and mental health, and also, in turn, affected by physical and mental health. Indeed, many studies have shown a correlation between financial debt and poor physical health." Unfortunately, "there are many stories of NFL players suffering from financial difficulties."[346]

For these reasons, since 2002, the NFLPA has maintained a program that registers financial advisors according to its Regulations and Code of

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[341] 2020 CBA, *supra* note 16, at Art. 40, § 3.
[342] *Id.*
[343] *Id*.
[344] *Protecting and Promoting*, *supra* note 3, at 81. In reviewing a draft of Protecting and Promoting Report, the NFL admitted as much, stating that clubs examine a player's medical records to "evaluate whether or not a player is healthy enough to practice and play." Of course, this has implications for the player's employment status.
[345] *Protecting and Promoting*, *supra* note 3, at 329.
[346] *Id.* at 330-32.

Conduct Governing Registered Player Financial Advisors ("Financial Advisor Regulations")."[347] The Financial Advisor Regulations "contain extensive eligibility requirements, including: a bachelor's degree; a minimum of eight years of experience with appropriate financial industry licensure; minimum of $4 million in insurance coverage; and, no civil, criminal or regulatory history relevant to financial services or fiduciary duties."[348] "The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions, and deserves praise in this regard."[349]

Nevertheless, the NFLPA's control over financial advisors is limited – there is no legal framework that requires financial advisors to register with the NFLPA and players are not obligated to use registered financial advisors.[350] This is a problem. As described in *Protecting and Promoting*, "[t]here is significant concern and evidence that players are not well-served by the financial advisor industry and otherwise are prone to mishandling their finances."[351] For this reason, *Protecting and Promoting* made numerous recommendations toward improving the financial advisor industry, including that: "[p]layers should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors" (Recommendation 13:1-A);[352] "[p]layers should be given information to ensure that they choose financial advisors based on their professional qualifications and experience and not the financial benefits the financial advisor has or is willing to provide to the player" (Recommendation 13:1-D);[353] and "[t]he NFLPA and NFL should consider holding regular courses on financial issues for players" (Recommendation 13:2-A).[354]

The 2020 CBA reiterates an aspirational provision also contained in the 2011 CBA: "[t]he parties will continue their programs to provide information to current and former players concerning financial advisors and financial advisory firms and shall jointly (at the Annual Rookie Symposia and otherwise) and separately develop new methods to educate such players concerning the risks of various investment strategies and products, as well as the provision of any background investigation services."[355]

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[347] *Id.* at 332.
[348] *Id.*
[349] *Id.*
[350] *See id.* at 331-32.
[351] *Id.* at 340.
[352] *Id.*
[353] *Id.* at 342.
[354] *Id.* at 343.
[355] 2020 CBA, *supra* note 16, at Art. 51, § 12.

At first glance, reiterating this vague provision is not progress. However, the 2020 CBA now directs that each club's Director of Player Engagement is responsible for "coordinating and participating in the administration" of these financial programs and "identify[ing] and develop[ing] educational programming that is relevant to his or her own Club's players."[356] As discussed earlier, Directors of Player Engagement have been historically under-utilized resources in advancing player health and wellness matters.[357] The 2020 CBA's explicit recognition and empowerment of this position could have a meaningful and positive impact on players' lives.

iii. Research Protocols

As mentioned in Part I, outside of FPHS, Deubert authored an article in the Penn State Law Review entitled *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*.[358] This article examined the application of federal regulations governing human subjects research, known as the "Common Rule," to studies being conducted with the medical information of prospective NFL players gathered at the NFL Combine.[359] The Common Rule typically requires that research be reviewed and approved by an Institutional Review Board ("IRB") and that the researchers obtain the participants' informed consent before proceeding.[360] The purpose of the Common Rule is to ensure that research on human subjects is conducted ethically and transparently.[361]

To be clear, the article concerned studies conducted on *prospective* – not current – NFL players. In total, Deubert found and examined 42 studies that have been published using medical data gathered at the NFL Combine.[362] The article ultimately found that "it is highly questionable whether informed consent—as required by the spirit and letter of the Common Rule—is being obtained" for these studies.[363] Consequently, the article makes multiple recommendations

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[356] *Id.* at Art. 51, § 19.
[357] *See infra* Section D.iii.
[358] Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 PENN ST. L. REV. 303 (2019).
[359] *See id.* at 304.
[360] *See id.*
[361] *See id.* at 308-12 (providing historical background on the Common Rule).
[362] *See id.* at 327.
[363] *Id.* at 304.

> for better protecting NFL Combine participants in the context of human subjects research: (1) requiring researchers and/or the Combine participants to read the consent form aloud and audio record the process; (2) requiring all research to be approved by the National Football League Players Association; (3) requiring consent forms to be provided to the Combine participants' agents; (4) having IRBs engage the perspective of a player when evaluating research; and (5) requiring that Combine participants' decision whether or not to participate in the research remain confidential.[364]

The 2020 CBA does nothing to address the specific problems raised in *The Combine and the Common Rule*. However, it did, for the first time ever in a CBA, set forth guidelines for research involving NFL players. More specifically, the new rules govern "the protection, extraction and analysis of certain player health information from the NFL Electronic Medical Record System database and its subsequent use and dissemination in furtherance of various player health and safety initiatives."[365]

The 2020 CBA firsts set forth new rules governing research done by IQVIA (formerly known as Quintiles).[366] "As part of the League's Injury Surveillance System, IQVIA collects and analyzes relevant data from the EMR regarding the occurrence of injuries and illnesses that may impact a player's ability to practice and play."[367]

> IQVIA subsequently produces injury/illness reports, which encompass all reportable injuries and broadly describe analyses of injury occurrence, time trends, rates, examinations based on setting, player position, contact level, team activity, player activity, impact source and other factors potentially related to injuries, such as turn type, timing within the season, and severity of injury.[368]

These reports are provided to both the NFL and NFLPA.[369]

Further, the 2020 CBA provides that

> The Parties agree that the purpose and intent of these activities is to assess, improve, and advance player health, safety, care, treatment and outcomes throughout the NFL and in the operation of the Clubs. This is done through the work of IQVIA and various committees, subcommittees, panels, boards, and others that advise the NFL, the Clubs, the players, and

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[364] *Id.* at 304.

[365] 2020 CBA, *supra* note 16, at Art. 39, § 18.

[366] *See id.* For more on Quintiles, *see Protecting and Promoting*, *supra* note 3, at 62-68.

[367] *Id.* at Art. 39, § 18(a).

[368] *Id.*

[369] *See id.* at Art. 39, § 18(b).

> the NFLPA on health and safety-related issues, policies, research and programs. These assessment and improvement efforts are also intended to yield education and technological opportunities and improvements for the NFL, the Clubs, and the players.[370]

Next, the 2020 CBA makes clear that IQVIA's data collection and reporting shall "not be used for treatment purposes and IQVIA does not and will not have the ability to modify a player's record in any manner."[371] Nevertheless, the parties seemingly disagree as to whether HIPAA applies to the data being analyzed by IQVIA, with the parties "reserv[ing] their respective positions" on this issue and instead agreeing "to adopt certain processes for using and disseminating this data in a manner that is intended to ensure its privacy and safeguarding."[372] In particular, such reports will either redact player names or de-identify the player data.[373]

Aside from research conducted by IQVIA, Appendix X contains eight pages which set "forth the protocols to obtain the requisite approval for the dissemination and use of NFL player injury data and related information for research."[374] The protocols vary depending on the nature of the research request, which will fit into one of the following categories: active/interventional player research; NFL club physician EMR data requests for internal/club use only; NFL medical committee member data requests for internal committee use only (de-identified data); NFL medical committee member data requests for internal committee use only (identified or identifiable data); NFL club physician/NFL medical committee member data requests for EMR data research in which publication or public disclosure is intended (de-Identified, identifiable, and identified data); NFL club physician/NFL medical committee member data requests for EMR data research in which publication or public disclosure is intended (case study); and research by third-parties without NFL affiliation.[375]

Generally, each of the aforementioned requests will be reviewed by the NFL, NFLPA, their respective medical advisors, and any relevant medical committee. Most importantly, Appendix X requires that many of these research requests be approved by an IRB.[376] In this respect, the 2020 CBA responds to the concerns raised in *The Combine and the Common Rule*. As that article stated, "IRBs have the potential to ensure that NFL Combine partici-

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[370] *Id.* at Art. 39, § 18(a).
[371] *Id.*
[372] *Id.*
[373] *See id.* at Art. 39, § 18(b).
[374] *Id.* at App. X.
[375] *See id.*
[376] *See id.*

pants [or current players] are being subjected to research in the dignified and respectful matter required by the Common Rule."[377]

iv. Prohibited Drills

Chapter 9 of *Protecting and Promoting* analyzes the role of NFL coaches in player health.[378] That Chapter briefly described the importance of NFL coaches to a player's career:

> NFL coaches work incredible hours and face unrelenting criticism and pressure to succeed. Coaches must be successful in order to retain their jobs and face pressure to provide good outcomes for the team. That pressure no doubt infects their relationship with their players and in some cases is transferred to the players. Head coaches are the individuals ultimately most responsible for the club's performance on the field and thus take on an immense stature and presence within the organization. Coaches largely determine the club's culture, dictate the pace and physicality of practice and workouts, and decide who plays — a decision often borne out by intense physical competition. Moreover, some head coaches are the final decision-makers on player personnel decisions.[379]

Of course, one of the principal responsibilities of an NFL coaching staff is determining the drills to be conducted during practice. In this respect, coaches can play an important role in determining players' exposure to harmful or dangerous physical contact, some of which is of course inherent in the nature of football. In recent years, there have been multiple examples of both college and NFL coaches utilizing new instructional methods to limit contact between players.[380] Most notably, the use of motorized tackling dummies has become common.[381]

For these reasons, Recommendation 9:1-C of *Protecting and Promoting* recommends that coaches "consider innovative ideas and methods that might improve player health."[382] The 2020 CBA responds to this recommendation by prohibiting certain drills, which will necessarily force coaches' instructional methods to evolve. Specifically, the following drills are now prohibited: Bull in the Ring/King of the Circle, Oklahoma Drill, OL/DL In-Line Run Blocking/Board-Drill, Half Line/Pods/3-Spot, and drills that in-

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[377] Christopher R. Deubert, *The Combine and the Common Rule: Future NFL Players as Unknowing Research Participants*, 123 PENN ST. L. REV. 303, 305 (2019).

[378] *See Protecting and Promoting*, *supra* note 3, at Ch. 9.

[379] *Protecting and Promoting*, *supra* note 3, at 272.

[380] *See Protecting and Promoting*, s*upra* note 3, at 282.

[381] *See id* at 67.

[382] *Id.*

clude the essential elements of these drills as defined by the CBA.[383] The prohibition of these drills will almost certainly lead to lower injury rates, particularly during training camp when injury rates are higher.[384]

v. Squad Size

The 2011 CBA provided that the number of active players on a game day was limited to 46 players.[385] With a full roster of 53 players, this means that seven players are designated as inactive for each game.[386] The seven inactive players typically include players with injuries that last one or a few weeks in duration. In *Protecting and Promoting*, the Law and Ethics Initiative argued in Recommendation 7:1-E that concussions required a unique approach: exempting players diagnosed with a concussion from the club's 53-man roster:

> According to the leading experts, 80 to 90 percent of concussions are resolved within 7 to 10 days. Thus, concussion symptoms persist for longer than 10 days for approximately 10 to 20 percent of athletes. In addition, a variety of factors can modify the concussion recovery period, such as the loss of consciousness, past concussion history, medications, and the player's style of play. Consequently, a player's recovery time from a concussion can easily range from no games to several. The uncertain recovery times create pressure on the player, club, and club doctor. Each roster spot is valuable and clubs constantly add and drop players to ensure they have the roster that gives them the greatest chance to win each game day. As a result of the uncertain recovery times, clubs might debate whether they need to replace the player for that week or longer. The club doctor and player might also then feel pressure for the player to return to play as soon as possible. By exempting a concussed player from the 53-man roster, the club has the opportunity to sign a short-term replacement player in the event the concussed player is unable to play. At the same time, the player and club doctor would have some of the return-to-play pressure removed.[387]

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[383] *See* 2020 CBA, *supra* note 16, at Art. 23, § 7(f).

[384] *See* Christopher Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 77-78 (2017), available at 8 HARV. J. SPORTS & ENT. L. 1 (May 2017, Special Issue).

[385] *See Protecting and Promoting*, s*upra* note 3, at 234.

[386] *See id.*

[387] *Id.*

Indeed, prior to the 2017 season, the Washington Football Team proposed this exact recommendation.[388] While the proposal was not adopted at that time, it potentially influenced the new roster rules in the 2020 CBA.

The 2020 CBA increased a club's active/inactive roster size from 53 players to 54 or 55 players if a club signs a player or players from its practice squad.[389] Practice squads are nine-man collections of players striving to make the club's active roster and who often do as players are injured during the season.[390] With the changes under the 2020 CBA, practice squad players can be elevated to the club's roster without affecting the status of a player recently diagnosed with a concussion. In this respect, practice squad players can serve as short-term replacements until the concussed player has fully recovered. This change thus substantially meets the purposes of Recommendation 7:1-E.[391]

vi. Former Player Benefits

As discussed in the Introduction and Section II of this Article, the health concerns of former players have been an important driver of change. Nevertheless, as discussed in *Protecting and Promoting*, the NFLPA's ability to assist, or negotiate on behalf of, former players is limited.[392] Pursuant to the National Labor Relations Act, the federal law governing the NFLPA's activities as a union, the NFLPA only owes duties to current players – not former players.[393] "This legal reality creates tension between the NFLPA and former players" as each dollar negotiated on behalf of former players is a dollar that is not available to current players.[394] For these reasons, Recommendation 7:6-A of *Protecting and Promoting* recommended that "[t]he NFLPA should continue to assist former players to the extent such assistance is consistent with the NFLPA's obligations to current players."[395]

Fortunately, the 2020 CBA reflects the NFLPA's continued efforts to help former players. The 2020 CBA increases the amounts available to for-

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[388] *See* Tom Pelissero, *Roster Exemptions for Players with Concussions Could Draw Vote from NFL Owners*, USA TODAY (May 22, 2017), https://www.usatoday.com/story/sports/nfl/2017/05/22/roster-exemption-concussion-proposal-vote-owners-spring-meeting/102030906/ [https://perma.cc/6KGN-PFGF].

[389] *See* 2020 CBA, *supra* note 16, at Art. 25, § 4.

[390] *See Protecting and Promoting*, s*upra* note 3, at 60.

[391] *See id.* at 234.

[392] *See id.* at 223-24.

[393] *See id.*

[394] *See id.* at 244.

[395] *Id.*

mer players under a wide range of benefit programs.[396] Next, perhaps the most significant change was the reduction of the vesting requirement for the NFL pension plan from four credited seasons to three credited seasons.[397] This change will enable about 700 former NFL players to receive pension benefits for which they were previously ineligible.[398] Furthermore, the new CBA included the implementation of a Health Reimbursement Account ("HRA") plan for vested former players with three or more credited seasons who did not previously have an HRA and are under age 65.[399] Finally, the 2020 CBA created a dedicated hospital network to be available to former players which will provide primary care and other services free of charge, including screenings, mental health care, and certain orthopedic treatment for former players, and eventually for their spouses.[400]

There were, however, some changes to the total and permanent disability benefits that drew criticism. First, the amounts available were reduced from a range of $5,000 to $22,084 monthly[401] to $40,000 to $48,000 annually,[402] or $3,333.33 to $4,000 monthly. Next, the 2020 CBA now requires a reduction in a player's total and permanent disability benefits by the amount the player receives in Social Security benefits.[403] As a result, about 400 former players on total and permanent disability will see their disability benefits decrease.[404] In addition to the Social Security offset, a player's qualification criteria for disability payments under the 2020 CBA was tightened. In the 2011 CBA, players who received a disability determination from the Social Security Administration automatically qualified for disability benefits under the NFL CBA.[405] Beginning April 1, 2024, this automatic qualification no longer applies.[406] The NFLPA stated it agreed to cuts in the disability benefits to win increases in pension benefits, which it says will help more

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[396] NFLPA, *CBA Side by Side*, https://nflpaweb.blob.core.windows.net/media/Default/PDFs/CBA%20Side%20by%20Side%203.9.20%20FINAL.pdf [https://perma.cc/2HK2-SY24].

[397] *See id.*

[398] *See* Ken Belson, *Help for Disabled N.F.L. Players Is Sacrificed for Pension Deal,* N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/sports/football/nfl-retired-players-benefits.html [https://perma.cc/X4SN-8WJC].

[399] *CBA Side by Side*, *supra* note 396.

[400] *See id.*

[401] *See* Deubert et al., *supra* note 384, at 115.

[402] *See* 2020 CBA, *supra* note 16, at Art. 60, § 2.

[403] *See id.* at Art. 60, § 4.

[404] *See* Belson, *supra* note 398.

[405] *See* 2011 CBA, *supra* note 7, at Art. 61.

[406] *See* 2020 CBA, *supra* note 16, at Art. 60, § 6.

players.[407] Nevertheless, former players commenced a lawsuit against the NFLPA alleging that the changes violated the Employee Retirement Income Security Act.[408]

vii. Guaranteed Compensation

The concept of guaranteed compensation in the NFL has long been a subject of controversy and misunderstanding. As of 2017, approximately 44% of all contracted compensation in the NFL was guaranteed and approximately 70% of all players had at least some guaranteed compensation in their contract.[409] These numbers are much lower than those in MLB, the NBA, and the NHL.[410] However, as explained in *Comparing Health Related Policies & Practices*, "there are several reasons why fully guaranteed compensation might not be beneficial to players *collectively.*"[411] In short, more guaranteed compensation could mean less turnover and thus less opportunity for some players, as well as lower salaries generally, as clubs would seek to reduce their financial exposure.[412] It is a complex issue and "it is not clear [a higher] percentage of guaranteed compensation would maximize player health for the most NFL players."[413] For these reasons, the Law & Ethics Initiative recommended that "[t]he NFL and NFLPA should research the consequences and feasibility of guaranteeing more of players' compensation as a way to protect player health."[414]

While the 2020 CBA does not adopt the recommendation made, it does make some progress on this issue. As mentioned in *Comparing Health Related Policies & Practices*, one impediment to increasing guaranteed compensation was "the NFL's requirement that clubs deposit into a separate account the present value, less $2 million, of guaranteed compensation to be paid in future years."[415] Clubs used this rule as a reason for why they could not offer more guaranteed compensation.[416] The 2020 CBA materially changed this rule by increasing the deducted amount from $2 million to

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[407] *See* Belson, *supra* note 398.
[408] *See Cason v. National Football League Players Association*, No. 1:20-cv-01875 (D.D.C. filed July 10, 2020).
[409] *See* Deubert et al., *supra* note 384, at 178-79.
[410] *See id.* at 193.
[411] *Id.* at 195.
[412] *See id.*
[413] *Id.*
[414] *Id.*
[415] *Id.* at n. ab.
[416] *See id.*

$15 million, rising to $17 million in 2029.[417] This change will allow clubs to offer more guaranteed compensation with reduced cash flow concerns associated with funding a separate account.

IV. Other 2020 CBA Player Health & Safety Changes

Importantly, the new or modified health and safety provisions discussed in Section III are not exhaustive of such provisions of the 2020 CBA – they merely reflected those with connections to FPHS work. This Section will address some additional player health and safety provisions included as part of the 2020 CBA: practice limitations, emergencies, and Concussion Protocol enforcement.

First, the NFL and the NFLPA implemented practice limitations as part of the 2020 CBA. No team may hold more than four joint practices (*i.e.*, practices with another club) in the preseason.[418] The 2020 CBA limits padded practices to 16 in training camp (the previous limit was 28) and prohibits three consecutive days of padded practices (there was no prior limit).[419] Additionally, there will be a five-day "acclimation period" at the start of training camp that places restrictions on certain activities.[420] Following the "acclimation period," players will not be permitted on the field for more than four hours per day between two practices, and no practices can last more than two and a half hours.[421] Beginning in 2020, players are not allowed to be on the field for more than 12 hours per day; this number then decreases in subsequent seasons.[422] Additionally, in the event the season extends to 17 games, it will be required that players have a bye week after the third preseason game and teams will not be able to add any padded practices during the regular season.[423]

Second, as part of the 2020 CBA, the parties will retain an expert in emergency medicine to create a standardized emergency action plan ("EAP") for each club.[424] As the name suggests, the EAP is intended to provide a response to any type of medical emergency that may occur on a

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[417] *See* 2020 CBA *supra* note 16, at Art. 26, § 9.

[418] *See* Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [https://perma.cc/2WEV-S96P].

[419] *See id.*

[420] *See id.*

[421] *See id.*

[422] *See id.*

[423] *See id.*

[424] *See* 2020 CBA, *supra* note 16, at Art. 39, § 4.

football field. More specifically, the EAP must address player medical, cardiac, and/or surgical emergencies that occur at home games as well as at the practice facility; identify local trauma centers; identify airway management physicians; identify appropriate local doctors for visiting clubs; determine the transportation methods in the event of an emergency; and conduct drills to prepare for such emergencies.[425]

Third, the 2020 CBA added meaningful mechanisms to enforce the Concussion Protocol. As discussed in *Protecting and Promoting*, at the time of that report, there were some concerns that players occasionally were not taking the Concussion Protocol seriously enough and that players with possible concussions sometimes were not removed from games when they should have been.[426] For these reasons, the authors recommended that "[t]he NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously."[427]

Subsequent to the report's 2016 release, there were an increasing number of instances in which it appeared that the Concussion Protocol was not being followed.[428] The 2020 CBA sets forth the procedures and potential discipline for such lapses. The Concussion Protocol now includes a mandatory checklist of steps for each suspected concussion.[429] Next, both the NFL and NFLPA shall appoint representatives to receive complaints of potential violations of the Concussion Protocol.[430] Those representatives are then to undertake an investigation of the complaint and, within three weeks, the NFL and NFLPA are to confer and agree on a proper disciplinary response.[431] If they are unable to agree, the matter is "immediately referred to the Impartial Arbitrator."[432]

> The Impartial Arbitrator shall determine: (1) whether a Club employee or member of a Club's medical team knowingly and materially failed to follow any of the mandatory steps in the NFL Concussion Checklist and, if

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[425] *See id.*

[426] *See Protecting and Promoting*, *supra* note 3, at 72, 359.

[427] *Protecting and Promoting*, *supra* note 3, at 242-43.

[428] *See* Mike Florio, *NFL Will Investigate Tom Savage Concussion Protocol*, NBC SPORTS (Dec. 11, 2017, 11:49 AM), https://profootballtalk.nbcsports.com/2017/12/11/nfl-will-investigate-tom-savage-concussion-protocol/ [https://perma.cc/M3RY-VZ4H]; Mike Florio, *Seahawks Clearly Violated Concussion Protocol; What Will NFL Do About It?*, NBC SPORTS, (Nov. 12, 2017, 7:44 AM), https://profootballtalk.nbcsports.com/2017/11/12/seahawks-clearly-violated-concussion-protocol-what-will-nfl-do-about-it/ [https://perma.cc/Y3GV-GM8S].

[429] *See* 2020 CBA *supra* note 16, at Art. 39, § 17(b).

[430] *See id.*

[431] *See id.*

[432] *Id.* at Art. 39, § 17(b)(4).

> so, (2) whether there were any relevant mitigating or aggravating factors present in the incident, including, without limitation: (a) whether the deviation resulted from an ambiguity in the Checklist or its failure to address the facts triggering the underlying violation, (b) whether any player interfered with the Club employee or medical team's ability to perform its duties, and (c) whether competitive concerns motivated the deviation.[433]

In the case of a first violation, the relevant club employees or medical staff are to be reprimanded and attend remedial education, and the club is to be fined up to $500,000.[434] If there are aggravating circumstances the fine can be as low as $100,000.[435] A second violation in the same league year results in a fine of at least $250,000 against the club, plus whatever other measures the Commissioner deems warranted.[436] Under a previous policy, the first violation resulted in either fines of anywhere from $50,000 to $150,000 or loss of draft picks, and fines for second and subsequent violations resulted in a minimum fine of $100,000.[437]

Moreover, in addition to the above-described penalties,

> [i]f the Commissioner determines that the violation of the NFL Concussion Checklist was motivated by competitive considerations (*e.g.*, intent to leave player in game and knowingly, intentionally and materially disregard the Protocol in order to gain a competitive advantage), the Commissioner may require the club to forfeit draft picks and pay additional fines exceeding those amounts set forth above.[438]

Finally, the new enforcement mechanisms contain an interesting, player-specific component. In the event that a player interferes with the medical staff's duties under the Concussion Protocol, such interference shall be considered a mitigating factor and be used as a mitigating defense by the team.[439] As discussed above, it is important that players take the Concussion Protocol seriously. However, this provision creates the possibility that in the event a club violates the Concussion Protocol, it will claim that a player contributed to its noncompliance in an attempt to mitigate its discipline.

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[433] *Id.* at Art. 39, § 17(b)(4)(a).

[434] *See id.* at Art. 39, § 17(c)(1).

[435] *See id.*

[436] *See id.* at Art. 39, § 17(c)(2).

[437] *See NFL Teams Now Face Fines, Loss of Draft Picks If They Violate Concussion Protocol*, ESPN.COM (July 25, 2016), https://www.espn.com/nfl/story/_/id/17142331/nfl-teams-now-face-fines-loss-draft-picks-violate-concussion-protocol [https://perma.cc/XDN5-VSUT].

[438] 2020 CBA *supra* note 16, at Art. 39, § 17(c)(3).

[439] *See id.* at Art. 39, § 17(d).

Conclusion

This Article demonstrates that the NFL and NFLPA made meaningful progress on a wide range of issues affecting NFL player health in the 2020 CBA. In particular, the addition of a Behavioral Health Specialist, Mental Health and Wellness Team, and Joint Behavioral Health Committee should help players better cope with the very important but often less visible challenges of a career in the NFL; similarly, the new Pain Management Specialist and Prescription Drug Monitoring Program should help players better handle the physical toll of their jobs while also taking into consideration their long-term health; new rules will protect player privacy in the rapidly developing area of biotechnologies; an identified and increased focus on assisting players with transitioning out of the NFL is welcome; stricter certification requirements for club support staff will help ensure that players are only working with the highest-qualified professionals; new research protocols will hopefully help to ensure players are treated with the dignity required of such studies; and tweaks to squad size rules could help to protect players with concussions from the pressure to return to the field too soon.

As demonstrated by the above list, fortunately, it appears that the NFL and NFLPA heeded the findings and recommendations of the Law and Ethics Initiative of the Football Players Health Study at Harvard University. Moreover, it appears that the parties will continue funding important research on these issues. The 2020 CBA, like the 2011 CBA, provides funding for "medical research"[440] and the Football Players Health Study is ongoing.[441]

Nevertheless, as discussed at length in Section III.A, the NFL and NFLPA have still failed to meaningfully address one of the principal legal and ethical issues concerning player health – the conflicted structure in which club medical staff provide services to both players and the clubs. Indeed, the NFL and NFLPA have yet to articulate a coherent response to the Law and Ethics Initiative's extensive analysis of, and recommendation on, this issue. Consequently, while the 2020 CBA represents important progress on player health and safety issues, there is still work to be done.

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[440] *Id.* at Art. 12, § 5.

[441] *OPEN STUDIES: Ways You Can Participate,* Football Players Health Study at Harv. U, https://footballplayershealth.harvard.edu/for-former-players/open-studies/ [https://perma.cc/QQ3V-BE2W] (last visited Oct. 21, 2020).

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Building a Better Mousetrap: Blocking Disney's Imperial Copyright Strategies

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ABSTRACT

Disney is one of the most powerful media corporations in the world, long dominant in the area of animation. It has successfully transferred this dominance in animated films into dominance in live theater, with hit productions including *Beauty and the Beast*, *Aladdin*, *The Little Mermaid*, and *Frozen*. It has also begun to convert its well-known animated properties into live-action films, including *Beauty and the Beast*, *Aladdin*, and *The Lion King*.

As a major media corporation, Disney has proven itself to be fiercely protective of its copyright. Twenty years ago, it famously lobbied hard for an extension of the copyright term to increase protection of valuable properties as basic as Mickey Mouse and Winnie the Pooh. It has issued millions of takedown notices under the Digital Millennium Copyright Act. It has brought litigation against Redbox so aggressive that a judge found it to be a rare example of copyright misuse.

However, while copyright misuse may be a rare legal ruling, Disney arguably misuses it frequently. Disney's properties are frequently built on public domain works, borrowing from myths, legends, folk stories, fairy tales, and other narratives that are free for the taking. However, once Disney

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builds a movie around these pieces of common intellectual property, it then tries to use copyright law to deprive other people of access to these public domain properties.

This Article examines the importance of the public domain as a balance to the copyright monopoly, including Disney's use of public domain properties to build its media empire. The Article then discusses the tactics by which Disney expands its copyright to conquer others' use of the public domain, through favorable legislation, aggressive litigation, and strategic trademarking. The Article concludes that Disney's plundering of the public domain represents the phenomenon of "re-copyrighting" that distorts the delicate copyright balance and limits future non-Disney-sponsored creativity. The Article argues that we are in the midst of a sea change in how people perceive the baseline of ownership of creativity and the importance of the public domain, and that society should fight to retain the bulwark of the public domain against encroaching ownership.

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I. INTRODUCTION

It's a tale as old as time.

Beauty and the Beast, that is. Versions of the story can be traced back some four thousand years.[1]

Nowadays, though, if you mention *Beauty and the Beast*, chances are people think of a bright yellow gown swirling around a ballroom, a French candelabra and a British clock, and a preening villain called Gaston. That, after all, is what categorized the blockbuster 1991 movie[2] (the first animated feature ever nominated for a Best Movie Oscar[3]), as well as its attendant stage musical version[4] and its subsequent live-action adaptation[5] (in which the famous yellow gown was the object of fevered fixation[6]).

This article argues that Disney's actions in taking the public domain folk tale of *Beauty and the Beast* and adding its own embellishments effectively "re-copyrighted" a work that had been in the public domain. Disney cannot own the basic structure of *Beauty and the Beast* – that belongs to all of us – but Disney does own everything it added, and the more that its additions come to define the original folk tale, the more Disney is able to assert ownership over the folk tale itself.

Disney's actions in this respect are merely one example of how Disney's conquering copyrights strip the public domain and deprive the culture of access to creative works, in turn stifling non-Disney-endorsed creativity. This article examines the importance of the public domain as a balance to the copyright monopoly. The article then discusses the tactics by which Disney plunders the public domain and then uses its resulting copyrights to block others' use of the public domain. The article concludes that Disney's behavior represents the phenomenon of "re-copyrighting" that distorts the

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[1] *See Fairy Tale Origins Thousands of Years Old, Researchers Say*, BBC (Jan. 20, 2016), https://www.bbc.com/news/uk-35358487 [https://perma.cc/SS7Z-Q7PS].

[2] *See* BEAUTY AND THE BEAST (Walt Disney Pictures 1991).

[3] *See Experience over Eight Decades of the Oscars from 1927 to 2020: The 64th Academy Awards — 1992*, ACAD. MOTION PICTURE ARTS & SCIS., https://www.oscars.org/oscars/ceremonies/1992 [https://perma.cc/47L5-CT3P] (last visited Feb. 20, 2020).

[4] *See Beauty and the Beast*, PLAYBILL, http://www.playbill.com/production/beauty-and-the-beast-palace-theatre-vault-0000009145 [https://perma.cc/C4UG-AUCW] (last visited Feb. 20, 2020).

[5] *See Beauty and the Beast (2017),* IMDB, https://www.imdb.com/title/tt2771200/ [https://perma.cc/5FPN-4HVZ] (last visited June 20, 2019).

[6] *See, e.g.*, Genevieve Valentine, *Belle's Costumes Don't Fit the Live-Action Beauty and the Beast, but They Fit Her Brand*, Vox (Mar. 28, 2017), https://www.vox.com/culture/2017/3/28/15071766/beauty-and-the-beast-belle-yellow-gold-dress-costumes [https://perma.cc/SAW3-ECLA].

delicate copyright balance and limits future non-Disney-sponsored creativity. The article argues that society should fight to retain the bulwark of the public domain against encroaching ownership.

II. THE VALUE OF THE PUBLIC DOMAIN

A. Copyright's Creation of the Public Domain

Copyright is much younger than creativity. After all, humans have been creating from the time of paintings in caves.[7] The idea of a legal protection providing ownership over that creativity lagged behind, however, and was a concept mainly driven by the invention of the printing press.[8]

Before the printing press came along in 1476, creativity was expensive to reproduce: "copying was so impractical as to be impossible."[9] Generally, reproduction happened by hand, transcribed by monks in monasteries.[10] The process was painstaking and laborious.[11] Even acquiring a book from which to make the copy was likely a difficult and time-consuming endeavor.[12] For this reason, most people rarely saw books or received exposure to written creativity.[13] In fact, prior to the printing press, the total number of books in all of Europe was estimated to be less than 15,000.[14]

The printing press's invention radically changed that culture. Whereas once knowledge was painstakingly copied by hand through a lengthy process, the printing press allowed works to be duplicated mechanically and

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[7] A recent paper dates the earliest cave paintings as occurring 64,000 years ago. *See* D. L. Hoffmann et al., *U-Th Dating of Carbonate Crusts Reveals Neandertal Origin of Iberian Cave Art*, 359 Sci. 912, 912–15 (2018).

[8] *See* 1 Patry on Copyright § 1:5 ("The printing press . . . is frequently cited as the raison d'être for copyright."); Edward Lee, *Freedom of the Press 2.0*, 42 Ga. L. Rev. 309, 328 (2008) ("It is well recognized that copyright originally developed in reaction to the advent of the printing press, which multiplied exponentially the number of copies of a work that could be made."); Robert L. Shaver, *Copyright Law in the Digital Age*, 49 Advocate 17 (2006).

[9] Shaver, *supra* note 8.

[10] *See* Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 Mich. St. L. Rev. 1, 3 (2006).

[11] *See id.* at 7–8.

[12] *See id.* at 8.

[13] *See id.* ("Any book, even badly produced and riddled with errors, might well be the only one on that subject that anyone in the community had ever seen.") (quoting Marc Drogin, Anathema!: Medieval Scribes and the History of Book Curses 1, 6 (1983)).

[14] *See* Ira Glasser, *The Struggle for A New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 Nova L. Rev. 627, 629 (1999).

much more quickly.[15] Its arrival in England immediately triggered a long, protracted struggle over what to do with this unprecedented ability to duplicate. The first knee-jerk reaction was one familiar to twenty-first century consumers who lived through the digital revolution: an attempt to put the technological cat back in the bag through strict regulation of the availability of the printing press.[16]

Throughout the sixteenth and seventeenth centuries, printing presses were strictly controlled by a series of powerful entities: the Church, Parliament, and the Crown.[17] The results were an undesirable amount of censorship and the increasing monopoly of a few printing presses, who possessed all the rights, even over the authors of the materials in question.[18] In arguing against this stranglehold over the dissemination of creative works, people seized upon the idea that the creators were being deprived of their property in their lack of agency.[19]

The solution was to put the power in the hands of the creators, by creating a copyright: "the Sole Liberty of Printing and Reprinting,"[20] established by the Statute of Anne in England in 1710.[21] In the beginning, this right was exactly as its name suggested: it conferred upon the holder the right to *copy* the creative work in question, no more, no less. As it arose in response to improved publication abilities, it was effectively a publication right.

Copyright still functioned as a type of government-approved censorship, in that it granted a monopoly over the production of certain pieces of creativity and prohibited others from sharing that creativity. However, it shifted the power of this censorship away from the government-approved publishers into the hands of the authors themselves.[22] It therefore intro-

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[15] *See* Lee, *supra* note 8, at 316 (calling the printing press "the only technological means of mass publication then in existence"); *see also* Patry, *supra* note 8; Nicholas G. Karambelas, *Where the First Amendment Comes from*, MD. B.J., July/August 2017, at 4, 7.

[16] *See* Lee, *supra* note 8, at 312; *see also* Transcript of Oral Argument at 11, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (No. 04-480) ("[F]or all I know, the monks had a fit when Gutenberg made his press.").

[17] *See* Karambelas, *supra* note 15, at 4, 8.

[18] *See* Lee, *supra* note 8, at 323; Patry, *supra* note 8.

[19] *See* Lee, *supra* note 8, at 324 (quoting a person accused of running an unauthorized printing press as arguing that the regulations "directly intrench on the hereditary liberty of the subject's persons and goods") (citing FREDERICK SEATON SIEBERT, Freedom of the Press in England 1476-1776, at 140 (1952)).

[20] Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

[21] *See id.*

[22] *See* Lee, *supra* note 8, at 326-27.

duced the idea not as one of censorship, but one of *ownership* over one's own creative fruits – a right that was foreign to the initial concept of creativity.[23] Whereas before the system was completely disconnected from the creative origin, copyright rooted itself in the idea of authorship conferring particular advantages.[24] It still involved control of creativity, but shifted whose hands were in control.

These days, most of the works we consume enjoy copyright protection, many of them for the entirety of our lifetimes. In the beginning, though, copyrighted works were the exception. The public domain was vast, containing all of the creativity that was produced prior to 1710, including many works that form the bulwark of the western canon of great books, such as *The Odyssey*, *The Iliad*, *The Aeneid*, and *The Inferno*.[25] The term of protection was a brief fourteen years, with one renewal allowed.[26] Life expectancy at the time was much lower than today but was still around thirty years for men,[27] meaning that the copyright term was only around half of a lifetime. This meant that, although censorship might block your access to a work initially, that work would enter the public domain relatively quickly, with the chances good that it would happen in your lifetime. Given that publication, while easier than it had been, was still much more difficult than the instantaneous copying all of us have at our fingerprints today, the half-life of a work of creativity was doubtless much longer than it is today, when new works are produced with dizzying speed.[28] At the beginning, the public

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[23] Patry, *supra* note 8 ("[T]he [royal] grant of [printing privileges] was by no means a 'right' in the modern sense of the term. The idea of anyone having a right . . . was completely unfamiliar in the early English . . . practice. The . . . grant was a tool for dispensing royal policy, and it was based on royal discretion. . . . [E]ach grant was an independent decision dependent on the exercise of specific discretion.") (quoting Oren Bracha, *Owning Ideas: The History of Anglo-American Intellectual Property Law*, Chapter 1 (SJD dissertation, Harvard University 2005)).

[24] *See* Lee, *supra* note 8, at 327. It also, however, established a system where this new right was divested by the author over to the publisher for a single lump sum; copyright transfer is rooted deep in history. *See* Patry, *supra* note 8.

[25] *See, e.g.*, Robert Spoo, Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs, 56 UCLA L. Rev. 1775, 1812 (2009) (noting that these works preceded the idea of copyright). The public domain also included (and includes) every frivolous and forgotten work as well, of course, but these tend not to loom as large in our imaginations.

[26] *See* Statute of Anne, *supra* note 20.

[27] *See* KENNETH POMERANZ, The Great Divergence: China, Europe, and the Making of the Modern World Economy 37 (2000).

[28] For example, a 2018 article explored the amount of data we produce each day and stated that in the two years prior to 2018, 90 percent of the data available in the whole world was created. Bernard Marr, *How Much Data Do We Create Every*

domain stalled for fourteen years as copyright terms fell into place, but then the public domain began expanding again, so that the effect of the initial creative ownership was relatively limited.

The Statute of Anne did not just create copyright; it simultaneously created the idea of the public domain.[29] By establishing the baseline that copyright was limited in duration and would expire automatically, the Statute of Anne was careful not just to provide some protections to copyright holders but also to provide some protections to the public in the form of an ongoing store of public domain works to which all had free access. In recognition of the tremendous censorship power of the copyright monopoly, the Statute of Anne made sure to limit its scope.[30]

B. The Shrinking of the Public Domain

The concept of the public domain, inherent at the birth of copyright in 1709, continued when the United States passed its first Copyright Act in 1789.[31] Taking its cue from the Statute of Anne a full eighty years earlier, the initial copyright ownership term automatically expired after fourteen years, unless it was renewed.[32] This system of renewal persisted nearly two centuries, with data showing an astonishingly small rate of renewal for most

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Day? The Mind-Blowing Stats Everyone Should Read, FORBES (May 21, 2018, 12:42 AM), https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/ [https://perma.cc/7M7N-P29S].

[29] Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L. J. 1427, 1437 (2010) ("The [Statute of Anne's] time limitations were seen as the standard means for blunting the pernicious effects of monopolies since the early seventeenth century. It was also a mechanism crucial to the Statute's 'encouragement of learning' purpose by effectively creating what is known today as the public domain.").

[30] *See* Lee, supra note 8, at 326-27.

[31] Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 425-27 (2004) (stating that "[t]he Act, like the Copyright Clause and the Statute of Anne before it, emphasized the public benefit rationale for copyright protection" and noting that prominent figures like James Madison and Thomas Jefferson emphasized the *limited* monopoly that copyright grants for the *public* benefit).

[32] Jennifer Jenkins, *In Ambiguous Battle: The Promise (and Pathos) of Public Domain Day, 2014*, 12 DUKE L. & TECH. REV. 1, 4 (2013); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 543 (2004); Farhad Manjoo, *The Mouse Who Would Be King*, SALON (Apr. 8, 2004), https://www.salon.com/2004/04/08/copyright_culture/ [https://perma.cc/HD4Z-PTJU]; *The Incredible Shrinking Pubic Domain*, *supra* note 29.

forms of creativity.[33] This means that, as recently as fifty years ago, the vast majority of copyrighted works fell into collaborative ownership of the public domain roughly thirty years after their creation, at the expiration of the first twenty-eight-year term of protection that was then in effect.[34] This meant that, only a few generations earlier, it was expected that the works you grew up with would enter the public domain as you were entering your late middle age.[35]

The 1976 Copyright Act shifted that expectation. Now, copyright would last for life – and for many decades beyond that as well.[36] The copyrighted works you grew up with would enter the public domain in time for your grandchildren to enter late middle age.[37] This shift in copyright happened to coincide with a shift in copyright ownership in general, away from the individual creators who had won ownership in 1709 toward corporate ownership of copyright.[38] While creative works are still done by individuals, the most profitable forms of creativity are reserved for corporate work. And, indeed, most of the most profitable forms of creativity are owned by one corporation: The Walt Disney Company.[39]

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[33] *The Incredible Shrinking Pubic Domain, supra* note 29 ("85% of copyrights were not renewed and went immediately into the public domain."); Jenkins, *supra* note 32, at 6 (noting that the percentage was even higher – 93% – for non-renewals in books).

[34] *See* LAWRENCE LESSIG, HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 135 (2004) ("In 1973, more than 85 percent of copyright owners failed to renew their copyright. That meant that the average term of copyright in 1973 was just 32.2 years. Because of the elimination of the renewal requirement, the average term of copyright is now the maximum term. In thirty years, then, the average term has tripled, from 32.2 years to 95 years."); *see also What* Could *Have Entered the Public Domain on January 1, 2020*, DUKE L. SCH.: CTR. FOR STUDY PUBLIC DOMAIN, https://web.law.duke.edu/cspd/publicdomainday/2020/pre-1976/ [https://perma.cc/A4QQ-EB97] (last visited Feb. 25, 2020) (contemplating the works that would have entered the public domain if the pre-1978, 28-year copyright terms were still in effect).

[35] *See What* Could *Have Entered the Public Domain on January 1, 2020*, *supra* note 34.

[36] 17 U.S.C.A. § 302 (2018) (stating that after Jan. 1, 1978, copyright in a work "endures for a term consisting of the life of the author and 70 years after the author's death."); Tushnet, *supra* note 32, at 543.

[37] *See* LESSIG, *supra* note 34, at 135.

[38] *See id*.

[39] *See Disney Reigns Supreme over the Film Industry*, ECONOMIST (Jan. 2, 2020), https://www.economist.com/graphic-detail/2020/01/02/disney-reigns-supreme-over-the-film-industry [https://perma.cc/UAJ7-SK4H]; David Sims, *Hollywood Makes Way for the Disney-Fox Behemoth*, ATLANTIC (Mar. 21, 2019), https://

Increased public access to works of creativity has always triggered a subsequent reaction in copyright holders seeking to tighten their monopoly. When copying was painstaking in the Middle Ages, no one worried about copyright; if you wanted another painting, you had to start from scratch with a blank canvas. There was no ability to record music; you experienced Vivaldi live or not at all. As it became easier to duplicate paintings and pass around recordings of Vivaldi, copyright emerged and increased its protection. And for those copyright holders, piracy of creativity has always threatened the creative world as we know it.[40] So, for instance, when the internet came along and made the copying and sharing of creative works easier than ever, the knee-jerk reaction, as it had been with the printing press, was to limit the technology itself.[41] This limitation ultimately failed, just as it had in the printing press scenario, too; technology, once out, can seldom be put back in the bag. However, it did eventually win some concessions for copyright holders, including the Copyright Term Extension Act of 1998[42] that froze the public domain for twenty years.[43]

Every expansion of copyright power results in an equivalent deprivation to the public domain. With every such expansion, the rights gained when a work passes into the public domain therefore increase. In the beginning, when copyright was still severely limited in both time and scope, the importance of the public domain was likewise more limited. But as copyright has expanded, the rights gained by the public when a work passes into the public domain have likewise expanded. Nowadays, a copyright holder does not just possess the right to copy their work; they also have the sole right to control the work being publicly displayed or performed.[44] If it is a piece of art, that can include the ability to show that art in the background

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www.theatlantic.com/entertainment/archive/2019/03/disney-fox-merger-and-future-hollywood/585481/ [https://perma.cc/894B-3JTK].

[40] *See* RONAN DEAZLEY, On the Origin of the Right to Copy 18 (2004); *Home Recordings of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the H. Comm. on the Judiciary*, 97th Cong. (1982); *see also* Transcript of Oral Argument at 11, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (No. 04-480) ("[F]or all I know, the monks had a fit when Gutenberg made his press.").

[41] *See* Lee, *supra* note 8, at 313; Yu, *supra* note 10, at 2.

[42] *See* Pub. L. No. 105–298 (1998).

[43] *See The Incredible Shrinking Public Domain*, *supra* note 29.

[44] 17 U.S.C. § 106 (2018). The definitions of all of these terms – "public," "performance," and "display" – have also steadily expanded. Tushnet, *supra* note 32, at 542.

of a movie or television show.[45] If it is a dramatic work, that blocks the ability of all theater companies to produce the show.[46] If it is a musical work, that prohibits the showing of anyone performing that musical work.[47]

Consider the song "Happy Birthday," sung at so many birthday parties every day. When that song was still under copyright, the copyright holder pulled in millions of dollars of licensing fees every time the song was sung publicly, including at birthday parties being depicted in documentaries.[48] When that song passed into the public domain, the public gained the right to sing "Happy Birthday."[49] Thereafter, pop culture was able to welcome more realistic depictions of birthday celebrations.

These days a copyright also includes the right to create derivative works, which is statutorily defined as any work "based on" the original copyrighted work.[50] This is often understood to protect changes in media. So, for instance, the copyright holder in a book also has the exclusive right to make that book into a movie or play. However, it has also expanded beyond media to merchandising: "The derivative works right gives Disney the exclusive right to authorize stuffed animals, home videos, t-shirts, pencils, figurines, games, teapots, and anything else bearing images of characters from Disney's copyrighted works."[51] This means that those rights are also rights gained by the public when the work passes into the public domain – and correspondingly minimized for Disney.

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[45] Tushnet, *supra* note 32, at 542. *See* Alexandra Lyras, *Incidental Artwork in Television Scene Backgrounds: Fair Use or Copyright Infringemen*t, 2 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 159, 168-170 (1992) (discussing the intent behind the display right and giving case examples where an image in a television broadcast constituted infringement); *see also* 17 U.S.C. § 106 (2018) (granting copyright holders the exclusive right to display and perform their works publicly).

[46] *See* Tushnet, *supra* note 32, at 542; *see also* 17 U.S.C. § 106 (2018) (granting copyright holders the exclusive right to reproduce their copyrighted work).

[47] *See* Tushnet, *supra* note 32, at 542; *see also* 17 U.S.C. § 106 (granting copyright holders the exclusive right to display and perform their works publicly).

[48] Jenkins, *supra* note 32, at 20-22; " Happy Birthday" song officially recognized in public domain, CBS NEWS, June 27, 2016, https://www.cbsnews.com/news/happy-birthday-song-officially-recognized-in-public-domain/ [https://perma.cc/Z5VY-UYFN].

[49] The litigation over "Happy Birthday" suggested that the song should have passed into the public domain earlier. Jenkins, *supra* note 32, at 20-22; "Happy Birthday" song officially recognized, *supra* note 48. This represents, therefore, a harm done to society at large, as all unjustified copyright grabs can be understood to be.

[50] *The Incredible Shrinking Public Domain*, *supra* note 29.

[51] Tushnet, *supra* note 32, at 542.

As mentioned, copyright has expanded not just in scope[52] but also in time. From the original term of fourteen years,[53] we have now arrived at life plus seventy years (or ninety-five or one-hundred-and-twenty years for corporate authors).[54] This is a considerable delay in the entry of works into the public domain. So, the public has many rights that it gains as soon as a work enters into the public domain, but it has had to wait longer and longer to gain access to those rights.

Therefore, the protection of the existing public domain is vitally important. While it remains ever-expanding as works continue (so far) to pass out of copyright, the public's active and engaged use of it has been somewhat hobbled, as it takes longer and longer for works the public cares about to enter the phase where they can freely be used and shared in a multiplicity of ways.[55] In fact, in the world we've set up, no member of the public will ever live long enough to engage on free and uninhibited terms with a new work of art[56]; the average copyright term is many decades longer than the average human lifespan. This is troubling in and of itself. As Salman Rushdie has eloquently noted, "those who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts."[57] But this is even more troubling when coupled with the fact that Disney's works are removing from public interaction even those ancient texts that were left to us.

C. Disney's Plundering of the Public Domain

It would be impossible to quantify the value of the public domain. As the eventual repository of all human creativity, it is too sprawling to ever fully categorize. The number of works created on any given day in any given year prior to 1920 is incalculable, and all of those works constitute the pub-

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[52] This includes expansion in scope as a consequence of technology itself. *See id.*

[53] *See The Incredible Shrinking Public Domain*, *supra* note 29.

[54] *See* Manjoo, *supra* note 32.

[55] The shrinking of the public domain is dangerous in other ways, too, resulting in the permanent loss of many works that cannot be preserved for future generations because of the operation of automatic lengthy copyright terms. *See The Incredible Shrinking Public Domain*, *supra* note 29.

[56] *See* Jenkins, *supra* note 32, at 1.

[57] *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1536 (1993) (quoting Salman Rushdie, Excerpts from Rushdie's Address: 1,000 Days 'Trapped Inside a Metaphor', N.Y. Times, Dec. 12, 1991, at B8 (excerpts from speech delivered at Columbia University)).

lic domain. "[M]any more valuable works occupy the public domain than the private one, and its contributors are legion."[58] And it is free, a bevy of incredible creativity that is anyone's for the taking.[59] That means if you want to print your own copy of any Charles Dickens novel, or you want to make it available for free on the internet, you are free to do so and no one can stop you. As one writer put it, "You are free to make use of this heritage in any way you want, by publishing, digitizing, compiling, translating, adapting, dramatizing, or treating the material in any other way. It's yours to enjoy and share with whomever, whenever, in whatever way you want."[60]

Once a work is out of copyright, anyone can do as they wish with it. When that "anyone" is a behemoth corporation like Disney, however, that invariably limits the operation of the public domain. Disney has made an artform out of capturing, owning, and monetizing the extraordinary free resource of the public domain.

Mickey Mouse was arguably an original Walt Disney creation,[61] although other similar cartoon mice had existed before him,[62] and the title "Steamboat Willie" was a play off the Buster Keaton film *Steamboat Bill, Jr.*[63] Disney's first feature-length cartoon, however, *Snow White and the Seven Dwarfs*,[64] was arguably unoriginal. Instead, it established a consistent pattern of using public-domain works for the basis of Disney movies. The essence of the film was taken from a nineteenth-century German fairy tale published by the Brothers Grimm,[65] which scholars in turn have theorized

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[58] Corynne McShery, *The Public Domain Is the Rule, Copyright is the Exception*, ELEC. FRONTIER FOUND. (Jan. 23, 2020), https://www.eff.org/deeplinks/2020/01/public-domain-rule-copyright-exception [https://perma.cc/ZW6J-SNLE].

[59] Gerald S. Jagorda, *The Mouse That Roars: Character Protection Strategies of Disney and Others*, 21 T. JEFFERSON L. REV. 235, 251 (1999).

[60] *See* E-mail from Wallace J. McLean, (Jan. 1, 2004), *available at* https://www3.wcl.american.edu/cni/0401/35315.html [https://perma.cc/LU79-BH4L].

[61] *See* Joseph Greener, *If You Give A Mouse A Trademark: Disney's Monopoly on Trademarks in the Entertainment Industry*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 598, 609 (2015); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 433-34 (1994); Manjoo, *supra* note 32.

[62] *See* Greener, *supra* note 61, at 609; Litman, *supra* note 61, at 433-34; Manjoo, *supra* note 32.

[63] *See* Manjoo, *supra* note 32.

[64] *See* DAVE SMITH, DISNEY A TO Z: THE OFFICIAL ENCYCLOPEDIA 45 (1996).

[65] The Brothers Grimm were a proto-Disney, taking public domain works that had existed for centuries but fixing them in such a way as to gain copyright ownership over them. However, as the Brothers Grimm were operating in a time with a much more limited copyright monopoly, their harm to the public domain was comparably minimized.

was based on tales dating from as early as the sixteenth century.[66] As with many fairy tales, there are a number of different permutations of the Snow White story, but Disney's version has come to dominate our popular cultural narrative.[67]

Snow White and the Seven Dwarfs established early on the Disney penchant for embellishing the canon material to make it its own. Disney named the seven dwarfs in the movie (unnamed in the folk tales that we know of),[68] opting to use them as comedic relief. It also aged the protagonist,[69] shifted Snow White's first meeting with Prince Charming to earlier in the story,[70] chose a new method to kill the Queen,[71] and changed the internal organs of Snow White that the Queen covets from "lungs and liver" to the more emotional choice of "heart."[72] Disney also, of course, visually represented the characters, giving Snow White a distinctive appearance to make her instantly recognizable wherever fans might encounter her.[73]

Snow White was only the first of the Disney movies to mine existing stories for inspiration.[74] Disney's traditional feature-length cartoon movies were often based on old, oft-told stories in the public domain, there for anyone to take. Disney took advantage of this vast depository of free stories for movies including: *Pinocchio* (1940), based on the 1881 novel *The Adven-*

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[66] *See* BOB THOMAS, DISNEY'S ART OF ANIMATION: FROM MICKEY MOUSE TO BEAUTY AND THE BEAST (1991).

[67] *See id.*; M. Thomas Inge, *Walt Disney's* Snow White and the Seven Dwarfs, 32 J. POPULAR FILM & TELEVISION 132, 140 (2004) ("Disney stands in relation to the twentieth century as the Brothers Grimm did to the nineteenth century. He took their work and the writings of numerous other authors and taletellers and retold their stories through animation and film with such consummate skill that he made them the modern definitive versions and the best-known ones worldwide.").

[68] *See* Inge, *supra* note 67.

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See* THOMAS, *supra* note 66; NPR Staff, *Interview with Peggy Orenstein, Saving Our Daughters From An Army of Princesses*, NPR (Feb. 5, 2011, 1:36 PM), https://www.npr.org/2011/02/05/133471639/saving-our-daughters-from-an-army-of-princesses [https://perma.cc/5VL9-XAVA] (describing her daughter beginning preschool and stating that within a week, "She came home having memorized, as if by osmosis, all the names and gown colors of the Disney princesses"); *see also* Alexander M. Bruce, *The Role of the "Princess" in Walt Disney's Animated Films: Reactions of College Students*, STUDIES IN POPULAR CULTURE (2007), at 2 ("The [Disney] films became such prevalent fixtures that it is reasonable to say that most American children growing up in the 1990s who came from even moderately affluent families were raised on a steady diet of Disney.").

[74] *See* Manjoo, *supra* note 32.

tures of Pinocchio by Carlo Collodi;[75] *Cinderella* (1950), based on a folk tale that can be traced back to ancient Greece;[76] *Alice in Wonderland* (1951), based on the 1865 novel *Alice's Adventures in Wonderland* by Lewis Carroll;[77] *Sleeping Beauty* (1959), based on a fairy tale dating to the fourteenth century;[78] *The Jungle Book* (1967), based on the 1894 book by Rudyard Kipling;[79] *Robin Hood* (1973), based on the folk hero from the fifteenth century;[80] *Oliver & Company* (1988), based on the 1839 novel *Oliver Twist* by Charles Dickens;[81] *The Little Mermaid* (1989), based on a nineteenth-century fairy tale published by Hans Christian Andersen;[82] *Beauty and the Beast* (1991), based on an eighteenth-century fairy tale originally published by Gabrielle-Suzanne Barbot de Villeneuve;[83] *Aladdin* (1992), based on a Middle Eastern folk tale added to *The Book of One Thousand and One Nights* in the eighteenth century;[84] *The Hunchback of Notre Dame* (1996), based on the 1831 novel by Victor Hugo;[85] *Hercules* (1997), based on ancient Greek mythology;[86] *Mulan* (1998), based on a Chinese legend from the fifth century;[87] *Tangled* (2010), based on the German fairy tale "Rapunzel" dating back to the seventeenth century;[88] and *Frozen* (2013), based on the fairy tale "The Snow Queen" published by Hans Christian Andersen in 1844.[89] Indeed, while many of these fairy tales were collected and published in the past few centuries, recent scientific work has revealed that many of them may in fact be thousands of years old.[90]

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[75] *See* Derek Khanna, *50 Disney Movies Based on the Public Domain*, FORBES (Feb. 3, 2014, 10:12 AM), https://www.forbes.com/sites/derekkhanna/2014/02/03/50-disney-movies-based-on-the-public-domain/ [https://perma.cc/6GDM-RTQF].

[76] *See id.*; Kelsey McKinney, *Disney Didn't Invent Cinderella. Her Story Is at Least 2,000 Years Old*, VOX (Mar. 15, 2015), https://www.vox.com/2015/3/15/8214405/cinderella-fairy-tale-history [https://perma.cc/YS4E-87ER].

[77] *See* Khanna, *supra* note 75.

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See id.* This list doesn't even include *The Lion King*, clearly based on Shakespeare's play *Hamlet*.

[90] *See Fairy Tale Origins Thousands of Years Old, Researchers Say*, *supra* note 1.

All of these movies followed the pattern set by *Snow White*: using the public domain material for inspiration on which to hang many of Disney's original flourishes. The resulting movies are skillful combinations of familiar stories and fresh Disney spin. Disney has now begun to spin those animated features into other derivative works, including stage musicals[91] and live-action films.[92] Each new embellishment on the tale starts a copyright clock ticking for that new embellishment,[93] thus extending Disney's ownership.

III. DISNEY'S CONQUERING COPYRIGHT

The trouble is not Disney's use of the public domain, which in and of itself would not be problematic. All of us are free to use the public domain, and all of us are free to possess copyrights in the original parts of the works that result. The trouble is coupling the monopoly of copyright with Disney's overall monopoly power in the creative culture. Disney's tactics of enforcing its intellectual property through legislative lobbying, aggressive litigation, strategic trademarking, and other anti-competitive acts combine to increase and expand Disney's copyright in an imperial fashion, not just protecting creativity going forward but reaching backward to "re-copyright" public domain works that had belonged to all of us.

A. Legislative Lobbying

The Copyright Term Extension Act that went into effect in 1998 retroactively extended copyright terms by twenty years, thus freezing the public domain for twenty years.[94] The Walt Disney Company was so much a beneficiary of the copyright term extension that it was dubbed "the Mickey

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[91] *See* Khanna, *supra* note 75.

[92] *See* Mahita Gajanan, *Here Are All of Disney's Upcoming Live-Action Movies*, TIME (Feb. 13, 2020, 1:22 PM), https://time.com/4525871/disney-live-action-movies/ [https://perma.cc/4ES7-45SU].

[93] So, for instance, when musical compositions pass into the public domain, newer *recordings* of those compositions retain copyright protection due to their original additions. *See* Jenkins, *supra* note 32, at 21-22; Samantha Cole, *Public Domain Day 2020: These 95-Year-Old Works Are Now Free to Use*, VICE (Jan. 2, 2020), https://www.vice.com/en_us/article/akwd7b/best-of-public-domain-day-2020 [https://perma.cc/K94L-J8HP].

[94] *See* Cole, *supra* note 93; Lawrence Lessig, *Public Domain Day – in Canada*, LESSIG 2.0 (Jan. 1, 2004), https://web.archive.org/web/20070701052954/http://lessig.org/blog/2004/01/public_domain_day_in_canada.html [https://perma.cc/8QYE-FDMF].

Mouse Copyright Act" by some commentators.[95] The act gave Disney an extra twenty years of protection over such aging creative properties as Mickey Mouse's original appearance in "Steamboat Willie" and A.A. Milne's Winnie-the-Pooh stories.[96] The benefit to Disney had a corresponding harm to society: the shared collective of creativity, held in common by all people, stopped growing.

The Copyright Term Extension Act of 1998 ushered in fears of continual copyright term extensions and triggered a Supreme Court challenge (holding that deference should be given to Congress on the length of the copyright term).[97] People have learned to view copyright protection as the default state of the world and public domain freedom as unusual. For instance, James L. W. West III, a professor emeritus at Pennsylvania State University and a scholar dedicated to F. Scott Fitzgerald, was quoted as lamenting the upcoming expiration of the copyright on *The Great Gatsby*: "I wish it were possible for the Fitzgerald Trust to retain copyright. . . . They have been wonderful caretakers of Fitzgerald's literary rights and his reputation."[98] West acknowledged that copyright law operates to maintain a public domain,[99] but expressed only dubious support for the system: "That's probably as it should be."[100]

Similarly, when articles discuss the copyright expirations, they often feel it necessary to justify the entire idea. For instance, the Electronic Frontier Foundation recently published a piece with a headline straightforwardly reminding people, "The Public Domain Is the Rule, Copyright Is the Exception."[101] The EFF attempted to remind people "that most production of knowledge and culture has always taken place within the public domain,"[102] at a time when ownership of creativity has come to be perceived as more

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[95] *See, e.g.*, Greener, *supra* note 61, at 608; Manjoo, *supra* note 32; *Public Domain Day 2020*, DUKE LAW SCH.: CTR. FOR STUDY PUBLIC DOMAIN, https://web.law.duke.edu/cspd/publicdomainday/2020/ [https://perma.cc/HF2P-WLSK] (last visited Mar. 9, 2020).

[96] *See* Greener, *supra* note 61, at 608; *Public Domain Day 2020*, *supra* note 95.

[97] *See* Greener, *supra* note 61, at 608; Eldred v. Ashcroft, 537 U.S. 186 (2003).

[98] *See* Cole, *supra* note 93; Hillel Italie, *Everyone Invited: 'Great Gatsby' Copyright to End in 2021*, AP NEWS (Jan. 22, 2020), https://apnews.com/27697da003ea226a4f66c3923fd84b9c [https://perma.cc/VYZ8-UF5P].

[99] *See* Italie, *supra* note 98 ("[U]nder our laws all literary works eventually belong to the people.").

[100] *Id.*

[101] Corynne McSherry, *The Public Domain Is the Rule, Copyright is the Exception*, ELEC. FRONTIER FOUND. (Jan. 23, 2020), https://www.eff.org/deeplinks/2020/01/public-domain-rule-copyright-exception [https://perma.cc/HT2F-KVY2].

[102] *Id.*

natural than free creativity. Disney and other copyright holders have successfully convinced many segments of society that the public benefit was on the side of a longer copyright monopoly and a smaller public domain.[103] During the debate over the Copyright Term Extension Act, the prevailing attitude seemed to be so heavily in favor of expanding copyright terms that one Congressional witness "suggested that copyright should last as long as possible."[104] Indeed, articles about the upcoming expiration of copyrights often muse upon how the copyright holder will "hold on to as much of the market as it can,"[105] which is hardly in the spirit of the public domain. And while you might not expect copyright holders to ever willingly sacrifice a revenue stream — no matter how many decades that revenue stream has already been exploited — the expectation that copyright expiration would naturally lead to some attempt to minimize the public domain effects should be a worrying one.

Although Disney did not lobby for another expansion of the Copyright Term Extension Act, Disney has begun to flex its lobbying muscles in other ways designed to protect its monopoly power. For instance, Disney has begun to lobby in favor of efforts to decrease the immunity granted by Section 230.[106] That legislative section in its original form provided broad immunity to internet platforms protecting them from liability for content provided by users.[107] Section 230 always had an exception for intellectual property violations,[108] but the landmark litigation of FOSTA/SESTA (Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act) for the first time introduced additional carveouts of the immunity protection, focused on sex trafficking.[109] Disney lobbied in favor of FOSTA/SESTA,[110] and while a

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[103] *See* Litman, *supra* note 61, at 431.

[104] *Id.*

[105] Italie, *supra* note 98.

[106] 47 U.S.C. § 230; David McCabe, *IBM, Marriott and Mickey Mouse Take on Tech's Favorite Law*, N.Y. TIMES, Feb. 4, 2020, https://www.nytimes.com/2020/02/04/technology/section-230-lobby.html [https://perma.cc/H2HV-WGGY].

[107] Joe Mullin, *How FOSTA Could Give Hollywood the Filter It's Long Wanted*, ELEC. FRONTIER FOUND., https://www.eff.org/deeplinks/2018/03/how-fosta-will-get-hollywood-filters-theyve-long-wanted [https://perma.cc/XQ6W-2ZXF].

[108] *Id.*

[109] Eric Goldman, *The Complicated Story of Fosta and Section 230*, 17 FIRST AMEND. L. REV. 279, 280 (2018). *See* Karen Gullo & David Greene, *With FOSTA Already Leading to Censorship, Plaintiffs Are Seeking Reinstatement of Their Lawsuit Challenging the Law's Constitutionality*, ELEC. FRONTIER FOUND. (Mar. 1, 2019), https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit [https://perma.cc/7S78-G4X3]; Jennifer Musto, *FOSTA, Sex Trafficking, and Automated Anti-Trafficking Interventions*, U. CAL. PRESS: UC

public stance against sex trafficking makes perfect sense, it has become clear that Disney's true aim seems to be to chip away at Section 230 immunity as it has since joined other lobbying efforts to introduce further Section 230 carveouts.[111] In the absence of the straightforward assistance of an additional copyright term extension, Disney has begun to construct an elaborate system of legal protections that it can use to effectively act as extensions of copyright. Creating greater liability for internet platforms will provide Disney with more leverage over how those platforms behave.

B. Litigation Tactics

With long, broad, and strong copyright protection established, Disney has turned frequently to the legal system for support. In this way, Disney has sometimes successfully parlayed its copyright on its added aspects to re-copyright the public domain material at the heart of its properties. Such misuse of copyright does not just harm the defendant in these actions; by keeping works out of the public domain, it harms the entire creative culture.

In one case, Filmation Associates made a number of animated features, including movies based on the public domain works of *The Adventures of Pinocchio*, *Alice's Adventures in Wonderland*, and *The Jungle Book*.[112] Disney sued for, among other things, copyright infringement, based on its copyrighted animated movies based on those same public domain works.[113] Filmation did not dispute that there was some similarity between its movies and Disney movies, since they were "concededly taken from specific literary characters within the public domain."[114] Therefore, the case revolved around whether the expression of those similar ideas was too similar.[115] The court noted that this is a question often difficult to decide on summary judgment and that reasonable people could disagree on the issue.[116] But given the dominance of Disney's expressive works in society and the diminishing profile of the public domain as an important part of creative culture, it is not difficult to imagine that jurors might be confused by the idea that defend-

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PRESS BLOG (June 1, 2019), https://www.ucpress.edu/blog/44576/fosta-sex-trafficking-interventions-2/ [https://perma.cc/NA4K-P2DA].

[110] *See* Mullin, *supra* note 107 ("Hollywood is lobbying for laws that will force online intermediaries to shut down user speech.").

[111] *See id.*; McCabe, *supra* note 106.

[112] *See* Walt Disney Productions v. Filmation Associates, 628 F. Supp. 871, 876 (C.D. Cal. 1986).

[113] *See id.* at 881.

[114] *Id.*

[115] *See id.* at 883.

[116] *See id.* at 880.

ants should be allowed to make their own movies when Disney got there first.

One might assert that surely Filmation was free-riding on Disney's popularity: Disney did the work to make *The Adventures of Pinocchio* a familiar property in late-twentieth-century America, and so Disney and Disney alone should reap those rewards. That, after all, is exactly what copyright is for: Disney was incentivized to make its movies, secure in the knowledge that it would be protected in its efforts to profit off of them. But the effect of that is to take many works that otherwise would have been in the public domain and "re-copyright" them. Where once Filmation could have just made a movie about *The Adventures of Pinocchio*, now Filmation must be sure to skirt widely around Disney's version of that movie, because copyright infringement is now in play, where it was not before.[117]

Of course, this is always the case with new works based on public domain properties, but Disney's unparalleled dominance makes the consequences of re-copyrighting more acute. Whereas many versions of public domain properties like Sherlock Holmes or even Hercules might coexist (Disney movies *The Great Mouse Detective* and *Hercules* notwithstanding), Disney's dominance means that it has grown increasingly difficult to reference Snow White without a Disney princess coming to mind, no matter the origins of the fairy tale.[118] Public domain princesses need to look recognizably like the Disney princesses for children to accept that they are the princess in question.[119] Try convincing your child of a Snow White who does not look like Disney's.[120] While you might try to remind the world that Snow White is in the public domain and not owned by Disney, Disney will have different ideas, and has in the past sued companies providing costumed princesses at children's birthday parties.[121] Disney is not always successful in these litiga-

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[117] Nor does Disney give other intellectual property rightsholders a similar courtesy. Disney's "re-copyrighting" activities are not limited to the public domain or the copyright realm. Litigations have revealed that it employs a similarly imperial attitude toward trademarked designs, using images of the products of others in creating its own merchandise. *See* Thoip v. Walt Disney Co., 736 F. Supp. 2d 689 (S.D.N.Y. 2010).

[118] *See* Jagorda, *supra* note 59, at 235; Litman, *supra* note 61, at 432.

[119] *See* Gordon, *supra* note 57, at 1535-36 (noting that Disney has "influenced generations of children"); *see also* Bruce, *supra* note 73; Orenstein, *supra* note 73.

[120] *See* Gordon, *supra* note 57 (noting that Disney has "influenced generations of children"); *see also* Bruce, *supra* note 73; Orenstein, *supra* note 73.

[121] Disney Ent., Inc. v. Sarelli, 322 F. Supp. 3d 413, 428 (S.D.N.Y. 2018), *reconsideration denied*, No. 16 Civ. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. Sept. 26, 2018).

tions,[122] but the very threat of litigation can be enough to give Disney the widespread ability to own the entire concept of Snow White in practice.[123] Often litigations are not about the final legal victory but more about the costs that can be levied on the other side as the case drags on. Very few defendants have the resources to take on Disney, and a threat of litigation can be enough to secure the victory Disney wants[124] (and one that might or might not have been possible in court).

Courts have cautioned Disney against misusing its copyrights to expand their protection in unacceptable ways.[125] But such cautions have done little to stop Disney's conquering copyrights. As Disney's multiple live-action remakes have begun to hit the cinemas, commentators have begun to notice that Disney's perpetual remakes allow it to effectively keep restarting the copyright clock.[126] While, as has been discussed, it can only capture ownership of the new things it adds to the remake, Disney's cultural dominance and aggressive approach to copyright protection mean that it can creep its copyright protection to continue to embrace aspects of works that should have belonged to the public at large long ago. Indeed, Disney's media ownership is now so extensive that in a way it has brought us back to the sixteenth-century pre-copyright state, when a small number of entities possessed all the creative rights.[127]

C. The Trademark Angle

Courts have scolded copyright holders trying to expand their copyright protection by pointing out that the idea of a "perpetual copyright" would turn copyrights into trademarks, which do last forever as long as they're being used.[128] Disney has definitely embraced that tactic.[129] While there may have been no copyright term extension granting Disney additional time on "Steamboat Willie" once the Copyright Term Extension Act of 1998

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[122] *See id.*

[123] *See* Greener, *supra* note 61, at 607 (discussing the success of this tactic in giving Disney ownership over many depictions of mice); Jagorda, *supra* note 59, at 236.

[124] *See* Greener, *supra* note 61, at 606-07.

[125] *See, e.g.*, Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc., 399 F. Supp. 3d 1018, 1026 (C.D. Cal. 2019).

[126] *See* Jenkins, *supra* note 32, at 21-22 (discussing how small changes to a work could "keep the copyright clock ticking); Khanna, *supra* note 75.

[127] *See* Lee, *supra* note 8, at 320.

[128] *See* 15 U.S.C. § 1127 (2006).

[129] *See* Jagorda, *supra* note 59, at 243.

expired,[130] Disney has taken care of that itself by trademarking particular "Steamboat Willie" clips.[131] This will allow Disney, after its copyright has expired, to continue to assert ownership over "Steamboat Willie" on a trademark theory: if people associate "Steamboat Willie" with Disney goods, then others using it in a public domain way could cause confusion.[132]

Disney is known to sue over the use of its characters in "live children's entertainment services,"[133] including characters like Eeyore and Tigger, both of which will soon join the public domain. However, because Disney also asserts EEYORE and TIGGER as trademark terms for many things, including "live performances by costumed characters,"[134] Eeyore and Tigger may effectively never join the public domain, granting to Disney a level of protection akin to a permanent copyright. Disney has thousands of these trademarks, covering the name of nearly every possible character.[135] Copy-

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[130] *See* Glenn Fleishman, *For the First Time in More Than 20 Years, Copyrighted Works Will Enter the Public Domain*, SMITHSONIAN MAG., Jan. 2019, https://www.smithsonianmag.com/arts-culture/first-time-20-years-copyrighted-works-enter-public-domain-180971016/ [https://perma.cc/5ESC-NYM4].

[131] *See id.* (noting that Disney's recent use of Steamboat Willie cartoons during the opening of new films "is a rock-solid trademark use of Disney's content. In effect, Disney is not only reinforcing its trademark rights in Mickey Mouse but they have created trademark rights in the iteration of Mickey Mouse as he appeared in Steamboat Willie").

[132] *See id.* (stating that Disney's use of the Steamboat Willie property, "will make it very difficult, if not impossible, for would-be competitors to capitalize on the expiration of the Steamboat Willie copyright").

[133] *See* Disney Enter., Inc. v. Sarelli, 322 F. Supp. 3d 413, 428 (S.D.N.Y. 2018), reconsideration denied, No. 16 CIV. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. Sept. 26, 2018).

[134] *See* TIGGER, Registration No. 4739239; EEYORE, Registration No. 4576085.

[135] A simple search for Disney trademark ownership in the U.S. Trademark and Patent Office trademark database returns approximately 6,400 results. Clearly not all of those are for graphic characters and some of those marks are either dead or have been abandoned, but there still remains a large number of registrations for characters. For example, even though *Winnie the Pooh* was originally created by A.A. Milne, Disney has filed trademark registrations covering entertainment services for the following characters: WINNIE THE POOH, Registration No. 4739240; TIGGER, Registration No. 4739239; EEYORE, Registration No. 4576085; and PIGLET, Registration No. 4118780. Disney has also filed registrations for entertainment services for the following characters from *The Jungle Book*, which was originally written by Rudyard Kipling: BALOO, Registration No. 5271890; SHERE KAHN, Registration No. 5257020; KAA, Registration No. 5257012; and BAGHEERA, Registration No. 5242223 (these lists are non-exhaustive).

right is practically irrelevant if you can use trademark to block people's access to the public domain.[136]

The interaction of perpetual trademarks with expiring copyrights is something with which courts have struggled. There have been valiant attempts to ensure that failed copyright claims do not convert into trademark claims, protecting against a second bite at the apple.[137] However, so far these cases have been relatively straightforward to decide on uncontroversial grounds because the underlying creative product has not served as a functioning trademark.[138] Where it is a closer question whether the underlying creative work functioned as a trademark, it appears that courts might be ready to permit trademark protection.[139] Many Disney properties *are* arguably functioning as trademarks[140]; certainly, the number of graphic characters Disney has registered as trademarks would seem to indicate as much.[141] Indeed, in dicta in a nonprecedential opinion, the Trademark Trial and Appeal Board has already acknowledged that Mickey Mouse functions as a mark.[142] Cases opening the door for Disney to pivot from copyright to trademark protection will surely grow in number as copyright expirations will lead Disney to lean more heavily on its stable of thousands of trademarks.[143]

Courts have been receptive to Disney's trademark arguments used in conjunction with copyright claims. In the *Filmation* case discussed *supra*, Disney also brought trademark claims, which the court affirmed by finding that consumers would be confused between Disney's movies and Filmation's versions.[144] Thus, even if the unowned public domain were given more land-

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[136] *See* Litman, *supra* note 61, at 432.

[137] *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-38 (2003).

[138] *See* Comedy III Prods. Inc. v. New Line Cinema, No. CV 97-3628 ABC VAPx, 1998 WL 334866, at *7 (C.D. Cal. 1998), *aff'd*, 200 F.3d 593 (9th Cir. 2000), *as amended on denial of reh'g and reh'g en banc* (Feb. 4, 2000); Sony Pictures Ent., Inc. v. Fireworks Ent., Inc., 137 F. Supp. 2d 1177, 1196-97 (C.D. Cal. 2001), *vacated pursuant to settlement*, No. 01-00723(ABC)(JWJX), 2002 WL 32387901 (C.D. Cal. 2002).

[139] *See Sony Pictures Ent., Inc.*, 137 F. Supp. 2d at 1196-97; Frederick Warne & Co. v. Book Sales Inc., 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979).

[140] *See Frederick Warne & Co.*, 481 F. Supp. at 1196 ("Dual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters.").

[141] *See, e.g.*, *supra* note 135.

[142] *See* In Re Me & the Mouse Travel, LLC, No. 76717725, 2017 WL 2297898, at *3 (T.T.A.B. Apr. 21, 2017) ("The probative evidence establishes both that Disney is a well-known company and that Mickey is a famous character and mark.").

[143] *See* Greener, *supra* note 61, at 606.

[144] *See id.* at 609.

scape in the Disney copyright universe, courts have already begun to allow Disney to bootstrap trademark protection into its imperial efforts.[145] Even if Filmation had skirted a wide berth around Disney's original embellishments to the public domain, its use of the public domain titles to refer to its works may still have gotten it into trouble based on the fact that Disney owns trademarks in many public domain titles like *The Jungle Book*,[146] *Pinocchio*,[147] and *Alice in Wonderland*,[148] including exclusive rights to use these words to identify motion pictures. To take advantage of the public domain, one would be allowed only to make the most convoluted references to it.

In a recent case, the court dismissed Disney's trademark infringement claim based on no likelihood of confusion between its marks and the costumed performers attending children's parties, but the dilution claims survived, as did the copyright infringement claim.[149] The defense in that case argued that it was using the free public domain versions of the characters,[150] which would have addressed the copyright claim but not the dilution claim. If Disney's marks are famous — which many of them arguably are due to Disney's virtual cultural monopoly[151] — then the expansive nature of dilution law, requiring no confusion, competition, or harm,[152] could allow Disney to swallow copyright law whole. In this situation, not only could Disney manage to achieve perpetual protection over a copyrighted work, but it could manage to do so with public domain works that it has re-copyrighted. Its conquest of the public domain would be complete.

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[145] *See* Jagorda, *supra* note 59, at 246 ("Here Disney was able to make its claim to a series of works where it had not created the characters, had not been responsible for the original stories, and where the tales on which their films were based had long since entered the public domain. Regardless, Disney was able to establish there was a sufficient link between their product and the public perception that they were at least entitled to their day in court to show the possibility of confusion.").

[146] *See* Registration No. 5944363; 5938252; 5932233, et al.

[147] *See* Registration No. 4262061; 3773508; 4799894, et al.

[148] *See* Registration No. 3993300; 3829626; 3794925, et al.

[149] *See* Disney Ent. v. Sarelli, 322 F. Supp. 3d 413, 444 (S.D.N.Y. 2018), *reconsideration denied*, No. 16 Civ. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. 2018).

[150] *See id.* at 442-43.

[151] *See* In Re Me & the Mouse Travel, LLC, No. 76717725, 2017 WL 2297898, at *3 (T.T.A.B. Apr. 21, 2017) (remarking that Mickey Mouse is a famous mark); Thoip v. Walt Disney Co., 736 F. Supp. 2d 689, 711 (S.D.N.Y. 2010) (noting in dicta "the fame of Disney's characters and its name"); Jagorda, *supra* note 59, at 242 (noting that Disney's characters are "American icons").

[152] *See* 15 U.S.C. § 1125 (2012).

D. Other Anticompetitive Measures

Because of the structure of online copyright — where many of today's copyright disputes take place — Disney does not even have to threaten litigation to protect its monopoly. It merely has to submit notices under the Digital Millennium Copyright Act.[153] While such notices statutorily require that they be made in good faith,[154] that requirement is seldom explored in any substantive fashion, and examples of algorithmic DMCA notices removing obvious instances of fair use or even properly licensed uses abound.[155] At any rate, most DMCA notices go unchallenged, even when the grounds are clearly questionable.[156] Therefore, there is little policing of DMCA notices, and thus little reason not to use them in questionable ways to expand protection. For instance, recently the Disney movie *Captain Marvel* revealed a deleted scene.[157] A number of YouTubers engaged in criticism regarding the scene and used the scene to illustrate that criticism.[158] Such criticism is ordinarily a protected fair use as one of the quintessential enumerated fair use categories,[159] and there is little indication that the use of the scene in any of the videos in question was excessive.[160] That did not stop Disney from issuing DMCA notices to remove all of the videos,[161] which effectively put an end to criticism, allowing Disney to spin its copyright power into a shaping of public discourse and viewpoint discrimination. While fair use is generally understood to be one of the methods by which

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[153] *See* 17 U.S.C. § 512(c)(3) (2012) (describing effective notification elements).

[154] *See* 17 U.S.C. § 512(c)(3)(A)(v) (2012).

[155] *See* Timothy Geigner, *Google Report: 99.95 Percent of DMCA Takedown Notices Are Bot-Generated Bullshit Buckshot*, TECHDIRT (Feb, 23, 2017), https://www.techdirt.com/articles/20170223/06160336772/google-report-9995-percent-dmca-takedown-notices-are-bot-generated-bullshit-buckshot.shtml [https://perma.cc/7G46-DJE7]; *see* Matthew Schonauer, *Let the Babies Dance: Strengthening Fair Use and Stifling Abuse in DMCA Notice and Takedown Procedures*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 135, 152-58 (2011).

[156] *See* Schonauer, *supra* note 155; Geigner, *supra* note 155.

[157] *See* Didi Rancovik, *Disney "Copyright Claims" YouTube Channels That Criticize Captain Marvel*, RECLAIMTHENET (May 31, 2019), https://reclaimthenet.org/disney-copyright-claims-youtube-channels-that-criticize-captain-marvel/ [https://perma.cc/E3GV-MYLH].

[158] *See id.*

[159] *See* 17 U.S.C. § 107 (2012).

[160] *See* Rancovik, *supra* note 157.

[161] *See id.*

the First Amendment is protected in copyright law,[162] it loses its efficacy as a doctrine in the heavily unsupervised DMCA context.

The extent of Disney's dominance in the creative industries means that other actions that might have had relatively inconsequential effects gain outsized importance when Disney does them. For instance, Disney has long had a history of "vaulting" its titles: making them unavailable for long periods of time to create artificial scarcity, thus increasing their value when they are eventually made available.[163] Now that Disney owns Twentieth Century Fox and its substantial movie library, Disney has begun to exercise the same technique with Fox titles.[164] This includes a number of titles, like *The Sound of Music*, *Alien*, and *Fight Club*, that have long been reliable, dependable money-makers for small theaters.[165] On their own they are no longer blockbusters, but independent theatres, looking for any way to create, have found valuable niches showing cult classics like these.[166] Disney has begun to remove the entire back catalog of Twentieth Century Fox from licensing discussions.[167] The ripple effect of this could be sizable. Yes, it may drive up the price for those movies when Disney eventually makes them available again, but in the meantime, it will further weaken small theatres' ability to compete against large chains and streaming services.[168] If small theatres fail, this will in turn limit independent films' ability to find an audience, since large chains often do not find it financially worthwhile to exhibit smaller movies.[169] Disney's move to exercise its rights as a copyright holder and deny access to movies thus has the effect of exacerbating the problem of cultural power being consolidated in the hands of fewer and fewer entities.

Moreover, many in the theatre industry have expressed reluctance to speak about Disney's conduct on the record, for fear of reprisal.[170] Little could be more indicative of the lopsided power structure existing between

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[162] *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 852 (2010).

[163] *See* Matt Zoller Seitz, *Disney Is Quietly Placing Classic Fox Movies into Its Vault, and That's Worrying*, VULTURE (Oct. 24, 2019), https://www.vulture.com/2019/10/disney-is-quietly-placing-classic-fox-movies-into-its-vault.html [https://perma.cc/WRD6-L39K].

[164] *See id.*

[165] *See id.*

[166] *See id.*

[167] *See id.*

[168] Perhaps most telling of the amount of power Disney has over the industry as a whole, many people refused to speak out on the record against Disney's actions, aware that they cannot afford to get on Disney's bad side. *See id.*

[169] *See id.*

[170] *See id.*

Disney and the movie theatre owners. Nor are the theatre owners irrational to fear reprisal: in a trademark litigation with DJ deadmau5 over his use of a mouse-shaped helmet, Disney leaned on its movie studios to retract offers to work with deadmau5 on two different projects, *Star Wars Rebels* and *Fantasia*, and then exerted pressure on its television network to cancel an appearance by deadmau5 on *Jimmy Kimmel Live!*.[171] It makes sense that a company would not want to do business with a person against whom it was litigating, but the reach of the Disney empire makes any stance against it an especially dangerous one.

IV. WHAT CAN WE DO

Taken individually, maybe none of these actions by Disney raise alarm. While some of them may be questionable, such as the overuse of DMCA notices, many of them are in fact nothing but the proper exercise of legal rights. So, the current political system welcomes Disney's lobbying efforts. So, too, does trademark law function to protect Disney's extensive marketplace. Disney has the right to use works from the public domain just as much as the rest of us. And, finally, Disney also has the power to use its government-granted copyright monopoly to create artificial scarcity – the way copyright has always functioned.

Taken as a whole, however, the pattern of Disney's behavior is alarming. The public domain was always built on a theory that society needed access to creative capital in order to progress.[172] Stories build upon stories, and the public domain operated to ensure that system. Copyright was intended to be a balance between the creator's power and the public's rights.[173] As the public domain has stalled, copyright scope and duration has expanded, and that, coupled with Disney's aggressive tactics in other areas of the law, has left society with a precarious relationship to the creativity that many would say is so important to civilization.[174]

Perhaps nothing illustrates that better than Disney's vaulting practice. When Disney "vaults" a movie, traditionally it renders that movie unavailable everywhere.[175] There is nowhere for a person to legally view the movie, unless that person happens to be friends with someone who legally bought it

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[171] *See* Greener, *supra* note 61, at 599.

[172] *See Why the Public Domain Matters*, DUKE LAW SCH.: CTR. FOR STUDY PUBLIC DOMAIN, https://web.law.duke.edu/cspd/publicdomainday/2019/why/ [https://perma.cc/V6KY-GM3N] (last visited Dec. 27, 2020).

[173] *See* Jagorda, *supra* note 59, at 235.

[174] *See id.* at 251.

[175] *See* Seitz, *supra* note 163.

before it disappeared. What harm, you may ask, comes from removing vast swaths of creativity from the cultural experience? After all, that creativity, Disney's actions remind us, does not belong to us.

Except that, in certain circumstances, it is crystal clear exactly how much creativity means to human beings. It is not simply evident in the way children experience Walt Disney World; it is evident in adult behavior as well. In articles discussing the disappearance of Twentieth Century Fox movies from small theaters, one movie was upheld as a notable exception: *The Rocky Horror Picture Show*.[176] An incomparable cult favorite, *The Rocky Horror Picture Show* is the subject of hundreds of midnight showings across the country every year.[177] It is a uniquely communal experience, so beloved that some have speculated that not even Disney will risk the "full-scale revolt" that would result from its inaccessibility.[178] This is an acknowledgment of the importance that some cultural properties come to hold to society as a whole. Their loss would be considered, on a certain level, catastrophic. But their loss is not within our control. *The Rocky Horror Picture Show* is owned by Disney. Our relationship with it is fragile and subject to Disney's whims. You might feel a kinship for the communal *Rocky Horror Picture Show* experience but, frankly, that experience does not belong to you, and it never will. *The Rocky Horror Picture Show* will not enter the public domain until 2070. In the meantime, it is subject to Disney's full arsenal of imperial copyright.

In addition, Disney often performs these tactics on works that previously belonged to the public domain. That in itself is neither alarming nor unusual.[179] But Disney is a special case. While Disney is only entitled to copyright on the original bits it has added to the work, the entire work becomes so entangled that determining where Disney's ownership begins and public domain ends can be tricky. The oddity of copyrighted works

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[176] *See id.*

[177] *See id.*; Katharine Schwab, *After 40 Years,* Rocky Horror *Has Become Mainstream*, ATLANTIC (Sept. 26, 2015), https://www.theatlantic.com/entertainment/archive/2015/09/after-40-years-rocky-horror-has-become-mainstream/407491/ [https://perma.cc/BXZ5-JN6Q].

[178] *See* Seitz, *supra* note 163.

[179] *See* Katherine J. Wu, *Start of 2020 Ushers Thousands of Once-Copyrighted Works into the Public Domain*, SMITHSONIAN MAG. (Jan. 2, 2020), https://www.smithsonianmag.com/smart-news/start-2020-ushers-thousands-once-copyrighted-works-public-domain-180973887/ [https://perma.cc/LPA8-KWPV] (noting that works entering the public domain now were themselves based on works that had entered the public domain earlier); *Public Domain Day 2020*, *supra* note 95 (same).

half-in public domain and half-out still has not been entirely dealt with.[180] Although courts are well aware that copyrighted works will be streaked through with unprotectable parts, determining exactly what those unprotectable parts are is often an incredibly complex operation,[181] and that is before one considers splitting a composite part as small as a character into copyrighted and uncopyrighted bits.[182] Then, add into the mix Disney's penchant for spinning off its own properties into live-action films and musicals, all of which frequently add new layers of originality onto old layers of public domain, and copyright quickly becomes an act of archaeology. Courts have shown themselves inclined to grant Disney a wide berth with rulings that are unusually restrictive of the behavior of non-Disney parties, doubtless because of the persuasive cultural power of Disney's creative properties.[183] Disney further complicates matters with a number of aggressive tactics that prevent others from taking advantage of the public domain exactly as Disney did.[184]

We might be able to try to balance the reach of the government-sanctioned copyright monopoly granted to Disney by using antitrust law more expansively. The recent trend has been a contraction in antitrust law, with ever-larger mergers being approved into unprecedented consolidations of power.[185] The unpopular nature of antitrust regulations can also be illus-

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[180] *See, e.g.*, Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496 (7th Cir. 2014).

[181] Nothing illustrates this as clearly as the struggle the Ninth Circuit has recently been having with exactly this issue through a string of music copyright cases. *See* Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018) (deciding Robin Thicke's "Blurred Lines" infringed Marvin Gaye's copyright to "Got To Give It Up" and explaining that music cannot be broken down into fix or six foundational parts but instead is "comprised of a large array of elements" and there is no magical formula for infringement to occur); *see also* Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin, 952 F.3d 1051, 1066 (9th Cir. 2020) (rejecting the inverse ratio rule the court had been applying haphazardly since 1977 and explaining that it was illogical).

[182] *See Klinger*, 755 F.3d at 501.

[183] *See* Jagorda, *supra* note 59, at 241-43.

[184] *See id.* at 242.

[185] *See* Brooks Barnes, *Disney Moves From Behemoth to Colossus With Closing of Fox Deal*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/business/media/walt-disney-21st-century-fox-deal.html [https://perma.cc/L58X-4EFN] (describing Disney's $71 billion acquisition of 21st Century Fox); Cecilia Kang, *Why the AT&T-Time Warner Case Was So Closely Watched*, N.Y. TIMES, June 12, 2018, https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-trial-antitrust-ruling.html [https://perma.cc/9P48-268C] (describing antitrust litigation aimed at AT&T's acquisition of Time Warner); Makena Kelly, *T-Mobile and Sprint Merger Approved,* VERGE (July 26, 2019), https://www.theverge.com/2019/7/

trated by the Department of Justice's ("DOJ") evident skepticism toward the consent decrees that have long attempted to regulate the monopolies of the copyright industry.[186] This re-evaluation of these regulations is happening at exactly a time when Disney has managed to amass an amount of horizontal and vertical power that should be inspiring the opposite reaction in the DOJ. While the DOJ is not wrong that the movie business has changed considerably from the early days of the twentieth century,[187] the industry still suffers from monopolistic tendencies that should be monitored.

The case of Redbox, a home movie rental service, against Disney regarding use of digital download codes in home movies contained an antitrust claim. Its dismissal indicates how the narrow reading of antitrust law is not helpful against the Disney juggernaut. The court focused on Disney's market power in the home movies market, which the complaint alleged to be "a dominant position" based on the "unique strength of the Disney brand."[188] The court took issue with this, finding that it was a conclusory assertion: the fact that Disney had a strong brand did not necessarily translate into market power, according to the court.[189] While Disney's strong brand is indicative of its transcendent market power, it is true that statistics may have been of help in the complaint.

At any rate, the court moved on to examine the anticompetitive effects of Disney's actions, and here antitrust law was no more helpful. Redbox's complaint was that Disney's actions were reducing output and raising prices with regard to Disney movies.[190] Although the complaint did not concern Disney's "vaulting" practice, one could see a similar argument being made there, where Disney's actions lead directly to a reduction in output and an eventual increase in prices when the artificial scarcity is eased. The court, however, found that the relevant market was *all* movies, not just Disney

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26/6646158/t-mobile-sprint-merger-justice-department-approves-26-billion-fcc [https://perma.cc/Q5QM-F9MX].

[186] *See* Brent Kendall & Erich Schwartzel, *Justice Department to Terminate Longstanding Legal Rules for Movie Distribution*, WALL ST. J. (Nov. 18, 2019), https://www.wsj.com/articles/justice-department-to-terminate-longstanding-legal-rules-for-movie-distribution-11574110393 [https://perma.cc/W2BR-7REU].

[187] *See id.*

[188] *See* Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc., 399 F. Supp. 3d 1018, 1029 (C.D. Cal. 2019).

[189] *See id.* at 1027.

[190] *See id.*

movies.[191] Therefore, while Disney's actions may have harmed the market for Disney movies, the market for other movies suffered no harm.[192]

Of course, this result might change if Disney continues to grow into a singular source of movies. Already, Disney has around one-third of the domestic box office ticket sales before the merger with Fox; that merger will only cause its share of the pie to grow.[193] In addition, Disney was responsible for seven of the top eight movies of 2019.[194] The only exception was *Spider-Man: Far From Home*, which Disney only *co*-produced.[195] Disney's projected schedule expects at least one film every month for the next four years, except for April 2023, when all of us will have a breather from the onslaught.[196]

The *Redbox* court was not comfortable using the word "monopoly" to describe Disney, but Disney's market power allows it to limit the number of movies it makes available in order to maximize profits. Disney has every incentive to limit the number of films in the marketplace to drive audiences toward a few choice selections, all of which it owns. The loser is the viewing public, which will receive fewer and fewer pop culture choices. That will eventually lead to fewer and fewer works of creativity for the public domain to welcome a hundred years from now. And in this way, Disney can eventually shrink the public domain as well.

The European Union may have developed an alternate way of addressing some Disney issues which may prove useful in the United States. Rather than making Disney decisions in a vacuum of strictly-applied laws, a decision in Disney's attempt to trademark PINOCCHIO in Europe revealed an approach that instead acknowledges the cultural value of the public domain and the extent of Disney's attempt to co-opt it. Disney's trademark application was challenged as "tantamount to establishing an unacceptable monopoly over a component of folklore."[197] Although the trademark was initially granted, on appeal it was refused on the basis that the popular story had entered the culture and could not be owned by Disney for films, books, toys,

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[191] *See id.*

[192] *See id.* at 1030.

[193] Adam B. Vary, *Disney Explodes Box Office Records With $11.1 Billion Worldwide for 2019*, VARIETY (Jan. 2, 2020, 1:02 PM), https://variety.com/2020/film/box-office/disney-global-box-office-2019-1203453364/ [https://perma.cc/RPE2-R83F].

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] Martini Manni, *Pinocchio is a Valid Community Trademark*, LEXOLOGY (Apr. 19, 2015), https://www.lexology.com/library/detail.aspx?g=057c7097-2f14-4e7c-a59f-4dca00958616 [https://perma.cc/L6LU-UCMS].

and amusement parks.[198] In those areas, it was concluded that PINOCCHIO was a reference to a popular folklore story that Disney could not own.[199] While Disney was granted a trademark to PINOCCHIO for other goods, the decision clearly limited the scope to give the public domain space. Such an approach could be a useful one. Rather than setting as a baseline that everything is owned and extracting the public domain from it, viewing Disney's intellectual property assertions from the baseline of *non*-ownership and asking what Disney has added to the unowned public domain could be a valuable way of flipping the question.

This has become a radical idea: the idea of creativity not being owned. Indeed, some commentators studying decisions involving Disney have suggested that courts seek "to safeguard the characters of the Disney menagerie because they have become such American icons."[200] Often, statements about the expiration of copyright feel the need to justify the public domain.[201] There are statements that imply that, through the law, the expiration of a copyright is an odd and regretful thing.[202] When the Copyright Term Extension Act was first proposed and debated, "nobody could think of a single disadvantage, or a single reason to oppose it."[203] Interestingly, the resistance to copyright expiration is sometimes framed as regret over the number of works that will now proliferate: *anyone* will be able to make a rap version of "Porgy and Bess."[204] This is presented as the tragic result of the copyright laws, instead of the actual intended objective of them at all times: the creation of more works. The expansion of creativity should be welcomed instead of viewed as suspect. The idea of the public domain as once again being the natural default is one whose return should be encouraged.

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[198] *See* Peter Lynn, *Another Reason to Hate the Mouse (or Copyright Terms: Growing Longer than Pinocchio's Nose*), MAN VS. CLOWN BLOG, https://manvsclown.wordpress.com/2004/08/03/another-reason-to-hate-the-mouse-or-copyright-terms-growing-longer-than-pinocchios-nose/ [https://perma.cc/GRY4-VY5F] (last visited Oct. 18, 2020).

[199] *See* Manni, *supra* note 197.

[200] Jagorda, *supra* note 59, at 242.

[201] *See* Italie, *supra* note 99.

[202] *See id.*

[203] Litman, *supra* note 61, at 431.

[204] *See* Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES (Mar. 28, 1998), https://www.nytimes.com/1998/03/28/arts/immortal-words-immortal-royalties-even-mickey-mouse-joins-the-fray.html [https://perma.cc/4YWW-WL8W] (describing the Gershwin family's reluctance for Porgy and Bess to enter into the public domain for fear that it would be "debased" or turned "into rap music."); Italie, *supra* note 99.

At any rate, one effect of Disney's conduct could likely be an increase in piracy. Disney's actions result in the opposite of copyright's theoretical purpose: the promotion of progress. Any actions that complicate public access to the shared heritage of the public domain should be considered an obstacle to progress.[205] Disney's draconian wielding of its power may therefore ultimately encourage acts of resistance through piracy. We know that piracy decreases when the public has ready legal access to creative works and increases in response to barriers placed around that access.[206] As Disney seeks to cordon off more and more of the public domain, the public's determination to find ways in may increase.

V. CONCLUSION

There is nothing wrong with using the public domain in your own commercial works. Indeed, that is the very purpose of the public domain: to encourage such ongoing use. The public domain exists to ensure that a lingering copyright monopoly doesn't stifle progress by leaving society unable to engage with the works that came before. As was widely understood for centuries of human creativity, engaging actively with works that came before you is a natural part of the process.

The danger of Disney's particular technique, though, is that it has reached into the public domain and attempted to take works out of it completely, frequently asserting ownership over characters and storylines lifted from fairy tales. This activity threatens to frustrate the efficacy of the public domain system in protecting our ability to use these works. And, given Disney's tactics, it could succeed in removing work from the public coffers forever. The government-approved monopoly contained in a copyright has, in Disney's hands, teetered close to a monopoly over all cultural creativity.

The shrinking of the public domain is not a harm that only affects the lazy and uncreative. As Disney's very success proves, the public domain is rich in meaningful stories that have resonated throughout humanity. We like to hear the stories we recognize; they carry a particular type of power difficult to replicate. When Disney re-copyrights works — taking them out

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[205] *See* Jagorda, *supra* note 59, at 250 ("[T]hese . . . characters . . . have become a part of our heritage . . .").

[206] *See* Brian Feldman, *Piracy Is Back*, N.Y. MAG. (June 26, 2019), https://nymag.com/intelligencer/2019/06/piracy-is-back.html [https://perma.cc/49EW-R3ZD]; Brett Danaher et al., *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, 60 COMMS. OF THE ACM 68 (Feb. 2017) ("[O]ffering content in a convenient way (on a digital-subscription or ad-supported service) can convert a significant number of pirates to legal consumption.").

of the public domain and then seeking to prevent their use by others — there is a very real toll taken on the rest of society. If copyright is about the promotion of progress, the shrinking of the public domain should make us contemplate the works that never get created. Copyright doesn't incentivize creation in a vacuum; it does so only in tandem with a rich and vibrant public domain. After all, without the public domain, we would never have had *Frozen* to begin with. Imagine your lives without "Let It Go."

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Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes

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Neither Professor Yasser nor Mr. Fox possessed the requisite athletic skill to take advantage of the Third-Party Payment System had it been available when they were in school, but they are both passionate about advocating for the student-athletes who are.

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") is a billion-dollar industry.[1] The so-called "money" sports—men's basketball and football—generate most of this revenue through the men's championship basketball tournament and post-season games in football.[2] While the majority of these funds are dispersed back to member schools and conferences who perform well in championship events,[3] the athletes—who play the vital role in generating revenue—do not receive any compensation beyond their scholarship award, room and board, books, and a cost-of-attendance stipend.[4] For generations, the NCAA has required student-athletes to forgo opportunities to monetize their athletic prowess to participate in college sports.[5]

As college athletics evolves into big business, coaches and administrators receive large salaries that stand in stark contrast to the benefits athletes can receive. For example, in 2018, Duke's men's basketball coach, Mike Krzyzewski (colloquially "Coach K"), brought home $8.98 million in salary;[6] his best player and one of the most dominant college basketball players of the twenty-first century, Zion Williamson,[7] received a financial aid package that capped compensation at the calculated full cost of attendance. Full

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[1] *See* Darren Rovell, *NCAA Tops $1 Billion in Revenue During 2016-2017 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [https://perma.cc/437W-6XDY]; Brent Schrotenboer, *College Football Playoff Business is Booming at Halfway Point, but Expansion Looms*, USA TODAY, (Jan. 9, 2020), https://www.usatoday.com/story/sports/ncaaf/2020/01/09/college-football-playoff-financial-success-expansion-future/2838495001/.

[2] *See id.*

[3] *See id.*

[4] *See* Len Simon, *NCAA Won Big in Case vs. Athletes,* SAN DIEGO UNION-TRIBUNE (Mar. 10, 2019), https://www.sandiegouniontribune.com/sports/sd-sp-ncaa-lawsuit-athletes-money-analysis-20190309-story.html [https://perma.cc/WH3F-7JJC].

[5] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–2020 NCAA DIVISION I MANUAL § 2.9 (2019), available at http://www.ncaapublications.com/productdownloads/D120.pdf [https://perma.cc/3SYA-6WV8] [hereinafter NCAA DIVISION I MANUAL].

[6] *See* Abigail Hess, *The 10 Highest-Paid NCAA Basketball Coaches*, CNBC (Mar. 10, 2019), https://www.cnbc.com/2019/03/08/the-10-highest-paid-ncaa-basketball-coaches.html [https://perma.cc/4DH7-RRQ].

[7] *See* Josh Planos, *Zion Williamson is the Best College Basketball Player in at Least a Decade*, FIVETHIRTYEIGHT (Dec. 12, 2018), https://fivethirtyeight.com/features/zion-williamson-is-the-best-college-basketball-player-in-at-least-a-decade/ [https://perma.cc/8Q4P-6E24].

cost of attendance at Duke is currently assessed at $78,828.[8] After ending his college hoops career and entering the NBA Draft, Zion was drafted first overall,[9] and he subsequently signed a shoe deal with Jordan brand—a subsidiary of Nike—worth $75 million over five years.[10]

In September 2019, Tim Tebow, a former quarterback for the Florida Gators and one of the most famous college athletes of recent memory,[11] spoke on First Take—a morning sports talk show aired by ESPN.[12] On air, the former Gator great passionately argued that college athletes should not receive compensation for participating in sports.[13] The crux of Tebow's argument was that athletes should participate for the love of the game and that if athletes want to be paid, they should be paid in professional leagues and not as collegiate athletes.[14] The same day, Dez Bryant, a decorated former receiver for the Oklahoma State Cowboys[15] and the Dallas Cowboys,[16] responded to Tebow on Twitter.[17] Bryant argued that most college athletes never receive the opportunities Tebow did as a Heisman Trophy winner,[18]

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[8] *See Cost*, DUKE KARSH OFFICE UNDERGRADUATE FIN. SUPPORT, https://financialaid.duke.edu/undergraduate-applicants/cost [https://perma.cc/RH9H-ATER] (last visited Oct. 30, 2020).

[9] *See* Brian Mahoney, *Pelicans Select Zion Williamson with No. 1 Pick in Draft*, NBA (June 20, 2019), https://www.nba.com/article/2019/06/20/pelicans-take-zion-williamson-no-1-pick-draft [https://perma.cc/CP9J-ALRK].

[10] *See* Darren Rovell (@darrenrovell), TWITTER (July 24, 2019, 1:51 PM), https://twitter.com/darrenrovell/status/1154131926988574721 [https://perma.cc/LS76-K9GK].

[11] *See generally* Fred Goodall et al., *Tebow, Teammates Reflect on 2008 Loss to Ole Miss, Promise*, USA TODAY (Oct. 2, 2015), https://www.usatoday.com/story/sports/ncaaf/2015/10/02/tebow-teammates-reflect-on-2008-loss-to-ole-miss-promise/73192500/ [https://perma.cc/2593-KEAK].

[12] *See* First Take (@FirstTake), TWITTER (Sept. 13, 2019, 8:51 AM), https://twitter.com/FirstTake/status/1172538239095332864/video/1 [https://perma.cc/7QPM-G9KS].

[13] *See id.*

[14] *See id.*

[15] *See generally* Anthony Slater, *Dez Bryant Reflects on his Oklahoma State Career and the Lie that Eventually Ended It*, OKLAHOMAN (Apr. 22, 2013), https://oklahoman.com/article/3795965/dez-bryant-reflects-on-his-oklahoma-state-career-and-the-lie-that-eventually-ended-it [https://perma.cc/52EV-W5EV].

[16] *See id.*

[17] Dez Bryant (@DezBryant), TWITTER (Sept. 13, 2019, 3:43 PM), https://twitter.com/DezBryant/status/1172642050837221381 [https://perma.cc/G2YT-KQQW].

[18] *See Tim Tebow*, HEISMAN TROPHY, https://www.heisman.com/heisman-winners/tim-tebow/ [https://perma.cc/5VYR-ZWHA] (last visited Jan. 22, 2020).

first round draft pick,[19] and NFL quarterback.[20] Bryant also indicated that many college athletes come from underprivileged backgrounds and that compensation could greatly help their situations.[21] Finally, Bryant noted the vast majority of college athletes never play professionally and thus, would not be eligible for payment according to Tebow.[22]

Proposed compensation schemes vary, but they can nearly all be placed on a spectrum. On one end of the spectrum lies the traditional amateur model used in college sports, in which there is no compensation beyond financial aid. On the other end of the spectrum lies "pay-to-play," where the NCAA member schools directly pay athletes. Allowing athletes to "cash in" on their Name, Image, and Likeness ("NIL") and be paid by third parties falls somewhere in the middle of these two extremes of the spectrum.

Even coaches have waded into the morass and chimed in on the issue of compensation. Some, like Washington State football coach Mike Leach, argue that compensation for college athletes would ruin college sports.[23] Others, like Duke's Coach K, support allowing athletes to capitalize on their NIL while in school.[24] Mike Gundy, head football coach of the Oklahoma State Cowboys, maintains a more pragmatic approach.[25] He approves of NIL payments in theory, but advocates for a uniform implementation scheme so a certain parity could be maintained in recruiting athletes.[26]

Today, because public opinion has shifted to support some sort of payment scheme for college athletes,[27] the NCAA has been forced to respond to

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[19] *See* Aaron Young, *Denver Broncos: Grading Tim Tebow and 11 Other First Round Draft Picks 2000-2010*, BLEACHER REPORT (Apr. 27, 2011), https://bleacherreport.com/articles/677083-denver-broncos-grading-their-first-round-draft-picks-2000-2010 [https://perma.cc/8AFU-3Z86].

[20] *See id.*

[21] *See* Bryant, *supra* note 17.

[22] *See id.*

[23] *See* Brenna Greene (@BrennaGreene_), TWITTER (Sept. 16, 2019, 3:02 PM), https://twitter.com/BrennaGreene_/status/1173718746222907392 [https://perma.cc/Z4QX-U7EY].

[24] *See* Michael Shapiro, *Mike Krzyzewski Supports Fair Pay to Play Act: 'We Need to Stay Current,'* SPORTS ILLUSTRATED (Oct. 8, 2019), https://www.si.com/college/2019/10/08/mike-krzyzewski-california-fair-pay-to-play-act [https://perma.cc/X5L7-2ATK].

[25] *See* Scott Wright, *OSU Football Journal: Mike Gundy Approves of California Law, but Hopes for Uniformity*, OKLAHOMAN (Oct. 1, 2019), https://oklahoman.com/article/5642751/osu-football-journal-mike-gundy-approves-of-california-law-but-hopes-for-uniformity [https://perma.cc/RVX6-DFBL].

[26] *See id.*

[27] *See* Rick Maese, *Should College Athletes Be Paid? Some Lawmakers, and a Presidential Candidate, Say Yes,* WASHINGTON POST (May 22, 2019), https://

calls to pay athletes.[28] While traditionally the NCAA has been diametrically opposed to any movement toward compensation, as things stand now, the NCAA appears willing to consider some sort of NIL scheme so long as the payment system is "consistent with the collegiate model."[29] To get to this point, athletes have used the legal system to challenge aspects of "amateurism" and have achieved varying degrees of success.[30] However, courts have been hesitant to upend a college athletic system that has become a unique staple of American sport.[31] Part of the problem could be that athletes have typically requested "pay-to-play" in which member schools directly pay athletes for their participation.[32] For reasons discussed below, "pay-to-play" is not acceptable to the courts, nor is it a reasonable solution to the legal quandary surrounding compensating college athletes.[33]

In 1906, NCAA member schools at the time adopted the "Principle of Amateurism" as a core tenet of the NCAA system.[34] This principle forbids athletes from receiving any compensation or benefit for their NIL, and it also forbids athletes from receiving any direct payment or benefit for their athletic prowess.[35] The NCAA justifies the rule in a twofold manner: first, it argues that amateurism prevents college athletes from exploitation,[36] and second, it argues that amateurism creates a clear demarcation between college and professional sports.[37]

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www.washingtonpost.com/sports/2019/05/22/should-college-athletes-be-paid-some-lawmakers-presidential-candidate-say-yes/ [https://perma.cc/QK8T-TMKZ].

[28] *See id.*

[29] *See Board of Governors Starts Process to Enhance Name, Image & Likeness Opportunities*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/TYX3-ATPG] [hereinafter *Board of Governors*].

[30] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n, Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013); Marshall v. ESPN Inc., 111 F.Supp. 3d 815 (M.D. Tenn. 2015).

[31] *See* O'Bannon, 802 F.3d at 1053, 1079.

[32] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 971–73 (N.D. Cal. 2014).

[33] *See* O'Bannon, 802 F.3d at 1053, 1079; *see also infra* Part III.

[34] *See* NCAA DIVISION I MANUAL, *supra* note 5, at § 2.9.

[35] *See id.*

[36] *See* NCAA Opposition to Petition for Rehearing en banc at *3, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601), LEXIS 63 [hereinafter NCAA O'Bannon Brief].

[37] *See id.*

Considering the wide range of ongoing litigation, state and congressional action (or inaction), and a general jockeying for favorable position in the sphere of public perception, there is little question that the issue of paying college athletes presents a quagmire lacking an apparent answer. Athletes are seeking "pay-to-play," but the courts are unwilling to upend the current system to such an extent.[38] Meanwhile, some states are implementing payment systems while other states are not, which will potentially create an uneven playing field when schools recruit athletes.[39]

Additionally, professional athletes like Los Angeles Lakers star LeBron James (who bypassed the NCAA by going straight to the NBA)[40] and San Francisco 49ers cornerback Richard Sherman (who turned professional after playing college football at Stanford)[41] use their platforms to speak out for compensating athletes with just as much passion as opponents argue that paying athletes will destroy college sports.[42] To resolve this pervasive conflict, the Third-Party Payment system could fulfill NCAA, member school, and student-athlete needs by offering a viable legal compromise that preserves the college athletics model and offers student-athletes reasonable compensation for their valuable talents.

The first part of this Article analyzes the historical landscape behind the current push for athletic compensation. Athletes have challenged aspects of the amateur system since the 1940s to varying degrees of success.[43] Today, the bulk of litigation involves antitrust disputes as to whether the NCAA system violates Section I of the Sherman Act.[44]

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[38] *See, e.g.*, *O'Bannon*, 802 F.3d at 1049; *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013); Marshall v. ESPN Inc., 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

[39] *See* Wright, *supra* note 25.

[40] *See* Marc Stein, *Cleveland is Officially Jamestown Now*, ESPN (June 27, 2003), https://www.espn.com/nbadraft/d03/story?id=1573511 [https://perma.cc/FV3E-T57Q].

[41] Zac Al-Khateeb, *Richard Sherman at Stanford: Revisiting the 49er's College Football, Academic Careers*, SPORTING NEWS (Feb. 2, 2020), https://www.sportingnews.com/us/nfl/news/richard-sherman-college-football-academic-careers/1xc5bxn4n0rv4114dnjwwzin1a [https://perma.cc/42M5-VAH6].

[42] *See* Taylor Branch, *The Shame of College Sports,* ATLANTIC, Oct. 2011, https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/S7LE-H7EK].

[43] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); O'Brien, *infra* note 63; Kupec, *infra* note 71.

[44] *See* 15 U.S.C § 1; *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

The second part of this Article discusses "pay-to-play." For reasons ranging from potential Title IX[45] violations to general public relations nightmares, "pay-to-play" is not a viable solution to the current standoff.[46] This part analyzes the issues plaguing the "pay-to-play" model in turn.[47] Additionally, this section argues that when confronted with an antitrust challenge to the current system, the legal system will not recognize "pay-to-play" as a less restrictive alternative to the current system when applying the antitrust "rule of reason."[48] Furthermore, the NCAA and member schools will not implement "pay-to-play" on their own. In some ways, the NCAA is correct in arguing that "pay-to-play" could kill the goose that laid the golden egg.[49]

Finally, the third part of this Article introduces and analyzes the Third-Party Payment system.[50] In contrast to "pay-to-play," the Third-Party Payment system is a reasonable solution to the legal quandary sur-

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[45] *See* 20 U.S.C. §§ 1681–1688.

[46] While "pay-to-play" does not implicate equal pay laws directly, one area that may offer a comparison for universities that pay females less than male athletes is the current struggle for the U.S. Women's Soccer Team to achieve equal pay. In a legal filing, the U.S. Soccer Federation asserted that female players have less skill and responsibility than their male counterparts. The public outcry has been enormous and the head of the Federation was forced to resign. *See* Lauren M. Johnson, *US Soccer Claims It Won't Pay Women Equally Because Being a Male Player Requires More Skill*, CNN (Mar. 12, 2020, 5:52 AM), https://www.cnn.com/2020/03/11/us/us-soccer-federation-court-document-trnd/index.html [https://perma.cc/2MEZ-HFLP].

[47] *See, e.g.*, Jane McManus, *Pressure to Pay Student-Athletes Carries Question of Title IX*, ESPN (Apr. 19, 2016), http://www.espn.com/espnw/culture/feature/article/15201865/pressure-pay-student-athletes-carries-question-title-ix [https://perma.cc/A7YA-URXT]; Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority,* Nat'l Collegiate Athletic Ass'n (Sept. 18, 2015), http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority [https://perma.cc/ABD9-XWPF]; Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 14, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness [https://perma.cc/266A-6BHD].

[48] *See* David A. Grenardo, *The Blue Devil's in the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 214 (2019).

[49] *See* Hosick, *supra* note 47.

[50] *See* Len Simon, *NCAA Should Allow College Athletes to Cash in on Endorsements*, S.F. CHRON. (Dec. 24, 2018), https://www.sfchronicle.com/opinion/openforum/article/NCAA-should-allow-college-athletes-to-cash-in-on-13489721.php [https://perma.cc/4F86-29MU].

rounding paying college athletes. After discussing how the Third-Party Payment system can address each issue that plagues the "pay-to-play" system, we conclude that the Third-Party Payment system can be implemented in a variety of ways. In particular, it could be implemented through litigation—either through a court order or a settlement agreement. Additionally, Congress and state legislatures can implement it within their jurisdictions. However, the easiest and best way to implement the Third-Party Payment system is through an amendment to the NCAA Division I Manual.

II. AMATUERISM IS A CORE TENET OF THE NCAA

The NCAA was founded in 1905 when sixty-two member schools sought to reform college athletics, and in part, to address the issue of schools hiring professional athletes to play on college teams.[51] A year later, in 1906, the member schools adopted the "Principle of Amateurism" as a core tenet of the NCAA.[52] To satisfy this core tenet, athletes cannot be paid for their athletic prowess.[53] In justifying the need for this tenet, the NCAA states that the "'basic purpose' of [the principle of amateurism] 'is to maintain inter-collegiate athletics as an integral part of the educational program.'"[54] Further, the NCAA offers a distinct sports product to consumers separate from professional leagues and argues that the amateurism rules create a clear line of demarcation from professional sports.[55]

Thus, the NCAA presents two primary arguments for maintaining amateurism. First, it argues that allowing athletes to be paid would upset the balance between member schools.[56] Ideally, sports leagues enforce rules that keep teams from becoming too good and dominating competition.[57] The NCAA argues that amateurism rules fall into this category. The NCAA's second primary argument is that college sports in general are distinct from professional sports and that the demarcation between the two promotes consumer choice.[58] Under this theory, the NCAA contends that amateurism rules are a necessary requirement for a sports "product" that is distinguisha-

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[51] *See* NCAA O'Bannon Brief, *supra* note 36, at *2.
[52] *See id.*
[53] *See id.*
[54] *Id.* at *3.
[55] *See id.*
[56] *See* NCAA O'Bannon Brief, *supra* note 36, at *2.
[57] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).
[58] *See id.*

ble from professional sports.[59] The thinking goes that college athletes—who are playing "for the love of the game" and nothing more—are more passionate than their professional counterparts.[60] Athletes have challenged the NCAA on both arguments in court.[61]

A. Athletes Have Historically Challenged Aspects of the Amateurism Model in Court

Athletes have not been reticent to legally challenge the restrictive amateur rules and the expansive control member schools and the NCAA maintain over student-athletes. In the 1940s, legendary quarterback Davey O'Brien[62] challenged Pabst Blue Ribbon in court for its use of his photograph without his consent.[63] The Fifth Circuit framed O'Brien's challenge with a biblical metaphor and began its opinion, "[p]laintiff, in physique as in prowess as a hurler, a modern David, is a famous football player."[64] As a famous football player, O'Brien understood his platform and was a member of the Allied Youth of America—an organization dedicated to eradicating drinking among young people.[65] O'Brien received opportunities to endorse alcohol products after turning professional, which he steadfastly refused.[66] However, O'Brien also allowed the Texas Christian University publicity department to take, use, and distribute his photos while he played for the Horned Frogs.[67] O'Brien ultimately lost his case because although he did not consent, Pabst Blue Ribbon paid his school, Texas Christian University, to use the photograph.[68] The court distinguished O'Brien's alleged injury, that the image advertising beer caused him damages, from a case in which O'Brien sued for the value of his picture in the advertisement.[69] While this

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[59] *See* NCAA O'Bannon Brief, *supra* note 36, at *2.

[60] *See id.*

[61] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013); Marshall v. ESPN Inc., 111 F. Supp. 3d. 815 (M.D. Tenn. 2015).

[62] Today, the award for best collegiate quarterback is named after O'Brien.

[63] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1941).

[64] *Id.*

[65] *See id.* at 168-69.

[66] *See id.* at 169.

[67] *See id.*

[68] *See id.* at 168; *see also* Sean Hanlon & Ray Yasser, *"J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA,* 15 VILL. SPORTS & ENT. L.J. 241, 260 (2008).

[69] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941).

case did not involve antitrust in any sense, and was instead an early "right of publicity" case, it is significant that the court determined that the NCAA member school could provide the necessary consent to use an athlete's NIL.

In the 1970s, University of North Carolina quarterback Chris Kupec[70] sued the Atlantic Coast Conference ("ACC"), a collective of NCAA member schools, partly on an antitrust theory.[71] Kupec alleged in his complaint that "[t]he actions of the member institutions of the Atlantic Coast Conference in combining to set maximum compensation to be received by student athletes . . . have unreasonably restrained . . . commerce . . . in violation of the Sherman Act."[72] While Kupec lost his case, and the court never addressed his antitrust theory, antitrust has become the playing field for current litigation battles between athletes and the NCAA.

After the NCAA gave the Southern Methodist University football team the "death penalty" in 1987 by ending the program for widespread and systematic violations of NCAA rules, [73] SMU athletes and cheerleaders sued the NCAA on an antitrust theory, arguing that by ending the program, the NCAA unlawfully restricted the benefits the athletes could receive.[74] Ultimately, this action was dismissed because the court determined that several plaintiffs lacked standing and the plaintiffs who had standing failed to "state a claim upon which relief could be granted."[75]

These early antitrust cases and arguments are important because in 1988, the Supreme Court slammed the door on challenging the NCAA under constitutional law theories when it determined that the NCAA was not a "state actor" in *NCAA v. Tarkanian*.[76] But, when one door shuts, another door opens, and athletes have found varying levels of success challenging the NCAA under antitrust theories.

In the early 2000s, the NCAA determined that skier, model, and celebrity Jeremy Bloom[77] was ineligible to play college football at the Univer-

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[70] Kupec played at the University of North Carolina from 1972 until 1974.

[71] For more on the complaint, *see* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 253 (8th ed. 2015).

[72] *Id.*

[73] *See* Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation has Changed*, TIME (Feb. 25, 2015), https://time.com/3720498/ncaa-smu-death-penalty/ [https://perma.cc/3YPV-TXL6].

[74] *See* McCormack v. Nat'l Collegiate Athletic Ass'n., 845 F.2d 1338 (5th Cir. 1988).

[75] YASSER ET AL., *supra* note 71, at 240.

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

[77] *See* ASSOCIATED PRESS, *No Football for Bloom While Taking Ski Endorsements*, ESPN (Aug. 24, 2004), https://www.espn.com/college-football/news/story?id=1867015 [https://perma.cc/U6XH-45V2].

sity of Colorado because he received compensation and benefits for his skiing ability.[78] Bloom filed suit seeking a permanent injunction on an antitrust theory.[79] The court determined that the amateur rules did not violate antitrust law and subsequently refused to permit an injunction.[80] Interestingly, in this case, the NCAA saw the writing on the wall and amended the Division I Manual so that athletes who received compensation and benefits for one sport could still maintain amateur status in other sports.[81] Former Oklahoma State University quarterback Brandon Weeden is an example of an athlete who benefited from this rule change, as he was able to pursue a collegiate football career after pitching in the New York Yankees organization.[82]

i. Courts Recognize Problems with the Current Amateur System but Are Unwilling to Upend a System That Has Become a Stalwart of American Sport.

A discussion of recent antitrust cases requires an understanding of the antitrust "rule of reason." In deciding antitrust claims, courts initially determine whether a defendant's conduct violates the Sherman Act.[83] This 1890 Act makes it unlawful for entities to unreasonably restrain trade within a market.[84] The first step of this analysis is to determine the unlawful conduct, and the subsequent step is to determine whether the violation is a per se violation or is to be analyzed under the rule of reason.[85]

Typically, per se violations are egregious restraints such as price fixing, group boycotts, collusive geographic sales agreements, etc.[86] If an alleged violation does not meet the per se standard, then the rule of reason is ap-

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[78] *See id*; Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. App. 2004).

[79] *See id.* at 622.

[80] *See id.* at 625–26.

[81] *See* Tully Corcoran, *Jeremy Bloom and the Shifting Sands of the Rules,* SPORTS ILLUSTRATED (Oct. 31, 2019), https://www.si.com/college/colorado/football/jeremy-bloom-ncaa-rules [https://perma.cc/MP5Q-B7VT].

[82] *See* John Henderson, *QB Brandon Weeden Trades Minor-League Baseball for Oklahoma State Football,* DENVER POST (Aug. 8, 2010), https://www.denverpost.com/2010/08/08/qb-brandon-weeden-trades-minor-league-baseball-for-oklahoma-state-football/ [https://perma.cc/PFY9-BTE2].

[83] Sherman Antitrust Act of 1890, 15 U.S.C §1 (2018).

[84] *See id.*

[85] *See* Grenardo, *supra* note 48, at 214.

[86] *See id.*

plied.[87] The rule of reason test first requires the plaintiff to show that the defendant's conduct restricts competition and in doing so hurts consumers.[88] If a plaintiff meets this burden, then the defendant has the opportunity to show that the anticompetitive behavior has a procompetitive justification.[89] Once a defendant meets this standard, the burden shifts back to the plaintiff to show that there is a less restrictive alternative that will serve the procompetitive justification.[90]

There is a distinct paradox unique to sports antitrust claims. To enhance parity among member teams in sport, it is necessary to restrict competition. Courts keep this core principle in mind while analyzing sports leagues for antitrust violations.[91] This is because sports competition requires an even playing field to be most effective, and parity has been achieved through a variety of anticompetitive means in professional leagues including salary caps[92] and maximum levels of compensation.[93] At the amateur level, NCAA member schools have a set number of scholarships available to grant to student-athletes which keeps certain powerhouse schools from cornering the market on talent.[94]

Due to this paradox, even though many antitrust claims in the sports setting appear to be per se violations of the Sherman Act, courts instead apply the rule of reason.[95] Because of this quirk in sports law, a viable solution to the legal quandary surrounding paying college athletes should be a system that satisfies the rule of reason.

O'Bannon v. National Collegiate Athletic Association is, thus far, the most significant antitrust case regarding compensating college athletes.[96] The

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[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] *See* Grenardo, *supra* note 48, at 214.

[91] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).

[92] *See generally* Tyler Brooke, *How Does the Salary Cap Work in the NFL?*, BLEACHER REPORT (June 10, 2013), https://bleacherreport.com/articles/1665623-how-does-the-salary-cap-work-in-the-nfl [https://perma.cc/JFT3-9JYP].

[93] *See generally* Morten Jensen, *Mission Impossible: Fixing the NBA Max Contract System*, FORBES (July 10, 2019), https://www.forbes.com/sites/mortenjensen/2019/07/10/mission-impossible-fixing-the-nba-max-contract-system/#32828633193b [https://perma.cc/V643-2FDG].

[94] *See generally* Peter Keating, *The Silent Enemy of Men's Sports*, ESPN (May 22, 2012), https://www.espn.com/espnw/title-ix/story/_/id/7959799/the-silent-enemy-men-sports [https://perma.cc/KCB9-JRGK].

[95] *See* Bd. of Regents, 468 U.S. at 101–03.

[96] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

crux of this massive class action involved the NCAA's agreement with EA Sports to produce lucrative sports simulation video games, and the NCAA's subsequent decision to pocket the proceeds instead of compensating the athletes for the use of their NIL.[97] Ed O'Bannon, an All-American basketball player at the University of California – Los Angeles,[98] sued the NCAA on behalf of all former college athletes who appeared in the EA Sports games.[99] The district court found that the NCAA's amateurism rules violated Section I of the Sherman Act. The court issued an injunction to the NCAA requiring it to cease barring schools from 1) offering full cost-of-attendance stipends and 2) providing deferred payments to student-athletes of up to five thousand dollars a year for each year the athlete participated in an NCAA sport.[100]

On appeal, the Ninth Circuit applied the antitrust rule of reason and affirmed in part and reversed in part.[101] While the court determined that the NCAA violated Section I of the Sherman Act, it was unwilling to approve "pay-to-play" as a less restrictive alternative.[102] In essence, the athletes carried their burden at step one of the rule of reason analysis (showing the NCAA's conduct restricts competition and in doing so hurts consumers), the NCAA met its burden at step two (showing that their anticompetitive behavior has a procompetitive justification), and the athletes failed at step three (failing to offer a less restrictive alternative that would serve the procompetitive justification).[103] Instead of implementing "pay-to-play," the Ninth Circuit affirmed the district court ruling prohibiting the NCAA from barring schools from offering full cost-of-attendance stipends.[104] Accordingly, the court reversed the lower court's deferred payment order.[105] To date, EA Sports has not produced any subsequent NCAA video games in light of the NCAA's refusal to allow EA to negotiate with the athletes directly.[106]

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[97] *See id.*
[98] *See id.* at 1055.
[99] *See id.*
[100] *See id.* at 1061.
[101] *See O'Bannon*, 802 F.3d at 1053.
[102] *See id.*
[103] *See id.*
[104] *See id.* at 1079.
[105] *See id.*
[106] *See* Kevin Webb, *Electronic Arts Wants to Make College Sports Games Again, But the Biggest Obstacle is Still the NCAA*, BUSINESS INSIDER (Oct. 22, 2019), https://www.businessinsider.com/electronic-arts-ea-college-sports-ncaa-football-basketball-2019-10 [https://perma.cc/56P6-KQAX].

In March 2019, the next potential landscape-shifting case, *Alston v. NCAA*, was decided at the district level and affirmed at the appellate court level.[107] Although the Supreme Court has granted certiorari in this case, as it stands, there will not be a huge shift towards "pay-to-play," as the lower courts again proved hesitant to upend the current system.[108] In his synopsis of the case, Len Simon[109] noted that, if the case were a football game, the NCAA would have won 55-3.[110] Once again, the lower courts recognized that the NCAA violated antitrust laws, but only allowed for broadening the definition of "education-related" benefits.[111] Presumably, this means that schools could provide benefits ranging from lab equipment to scholarships for graduate school without violating NCAA rules.[112] While broadening educational benefits would be a small step forward for athletes, this remains a far cry from "pay-to-play."

Much like *O'Bannon*, the *Alston* decision thus far signals that "pay-to-play" is not a less restrictive alternative palatable to the court.[113] Because "pay-to-play" fails to pass muster, the NCAA is a big winner in the current antitrust litigation battles.[114] Nevertheless, the fact that courts are willing to recognize that the amateur system violates antitrust law means that there is a possibility that a proposal could ultimately pass the antitrust rule of reason as long as it presents a less restrictive alternative to the NCAA's procompetitive justification.

III. THE "PAY-TO-PLAY" ALTERNATIVE IS NOT A VIABLE SOLUTION TO THE CURRENT LEGAL QUANDARY

As discussed above, courts thus far have been unwilling to impose "pay-to-play" upon the NCAA as a less restrictive alternative under the rule

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[107] *See In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2019)*; see also* Simon, *supra* note 4.

[108] *See In re Nat'l Collegiate Athletic Ass'n*, 958 F.3d at 1271.

[109] Len Simon, of Counsel with Robbins Geller Rudman & Dowd in San Diego, is a lawyer and law professor. He has handled sports-related litigation, antitrust cases, and taught Sports and the Law at the University of San Diego for more than a decade. *See Leonard B. Simon*, ROBBINS GELLER RUDMAN & DOWD LLP, https://www.rgrdlaw.com/attorneys-Leonard-B-Simon.html [https://perma.cc/D6EU-HU7E] (last visited Jan. 6, 2021).

[110] *See* Simon, *supra* note 4.

[111] *See In re Nat'l Collegiate Athletic Ass'n*, 958 F.3d at 1243–44.

[112] *See* Simon, *supra* note 4.

[113] *See id.*

[114] *See id.*

of reason analysis.[115] In particular, courts consider requiring member schools to directly compensate athletes for their participation in college athletics to be too drastic a departure from the current system.[116] Furthermore, if colleges are forced to directly pay student-athletes, the clear demarcation between college and professional sports would be obliterated.[117] Indeed, part of the hesitance in imposing "pay-to-play" could be that amateur sports in general present a procompetitive alternative to professional sports that actually increases consumer choice by offering a collegiate option and professional option.[118] A reasonable solution to the legal quandary surrounding paying athletes must be a proposal that allows college sports to be distinct from professional sports.[119]

A. Even if "Pay-to-Play" Were Imposed, There Are Serious Issues That Will Arise When It Is Implemented.

"Pay-to-play" will implicate concerns regarding Title IX, funding for non-revenue sports, the payment model itself, and "steering"—the practice of paying athletes to entice them to a certain school. Regarding Title IX, schools will likely end up paying male athletes more than their female counterparts. This could lead to violations of federal law and expose schools to litigation. "Pay-to-play" could also create serious issues for athletic program funding across American universities because the vast majority of college programs do not turn a profit that could be used to pay student-athletes.[120] Instead, the standard athletic department uses revenue generated by lucrative sports such as football and men's basketball to fund the plethora of other sports teams that the university sponsors.[121]

In addition to the aforementioned issues, universities directly paying athletes for their participation on the playing field increases tension regarding the line between professional and college sports, and it also opens the

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[115] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013); Marshall v. ESPN Inc., 111 F. Supp. 3d. 815 (M.D. Tenn. 2015).

[116] *See* NCAA O'Bannon Brief, *supra* note 36, at *1-2.

[117] *See id.*

[118] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).

[119] *See generally id.*

[120] *See* Burnsed, *supra* note 47.

[121] *See id.*

door for the steering of talented athletes to certain schools by wealthy benefactors.[122]

i. "Pay-to-Play" Likely Violates Current Title IX Regulations

Title IX requires that universities provide financial assistance to men and women on an equal basis.[123] Should "pay-to-play" take effect among NCAA member schools, there would be serious issues regarding what athletes and which programs receive compensation for participation.[124] Because most revenue generated by the NCAA stems from the men's championship basketball tournament, men's basketball players would be able to receive compensation from their schools for their participation in that sport.[125] However, women's basketball is not a "money" sport.[126] Should men's basketball players receive compensation, while their female counterparts do not, member schools would potentially open themselves up to Title IX litigation and a public relations disaster.[127]

Title IX ensures equal educational opportunities for men and women.[128] Because college athletics is considered part of the educational process, any attempt to pay men more than women would trigger Title IX protections.[129] Ironically, the NCAA's insistence that college athletics is a part of the educational process and remains distinct from professional sports actually increases the likelihood that "pay-to-play" would trigger Title IX scrutiny.[130] While it is true that athletes in "money" sports are uniquely situated among their peers in "Olympic" sports, courts have not drawn this distinction when interpreting Title IX.[131] Instead, according to Mary

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[122] *See* Marc Tracy, *NCAA Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html [https://perma.cc/7NEB-TFJL].

[123] *See* 20 U.S.C. §§1681–1688.

[124] *See* McManus, *supra* note 47.

[125] *See* Rovell, *supra* note 1.

[126] *See generally id.*

[127] *See* McManus, *supra* note 47.

[128] *See* 20 U.S.C. §§ 1681–1688.

[129] *See* NCAA O'Bannon Brief, *supra* note 36, at *2; *see also* NCAA DIVISION I MANUAL art. 1.3.1 ("The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program. . . .").

[130] *See id.*

[131] *See* Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), https://www.espn.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics [https://perma.cc/K6K2-VNQS].

Gambardella,[132] "[w]hat the court would say is, it's not an equally meaningful opportunity if the experience is richer, for lack of a better word, in some sports."[133]

Because Title IX arguments cut against "pay-to-play," some analysts argue that Title IX is simply a red herring that the NCAA uses to continue fighting compensation for athletes.[134] In making this argument, advocates for "pay-to-play" argue that when confronted with an issue of pay, courts should read Title IX as "coextensive with the Equal Pay Act of 1963 and the Civil Rights Act of 1964."[135] When taken together, courts have upheld greater pay for coaches for men's teams when that coach's work involves greater "skill, effort, or responsibility."[136] For example, in *Stanley v. University of Southern California*, the Ninth Circuit "noted that it may be permissible for the University of Southern California to offer higher pay to its men's basketball coach because the men's team generated far greater annual revenues."[137] Further support for this argument is found in looking at the current pay gap between men's and women's basketball coaches.[138] In analogizing coaching salaries to college athletes, the argument concludes that players should likewise be able to receive unequal compensation in accordance with revenue.[139]

This argument is fatally flawed. As previously discussed, Title IX is triggered when unequal educational opportunities are offered for men and women.[140] While the issue of paying coaches finds its source in employment law and the Equal Pay Act, "pay-to-play" would trigger Title IX because student-athletes would receive compensation as part of their educational process, and there would almost certainly be a disparate impact felt by fe-

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[132] Mary Gambardella is an attorney specializing in employment litigation. In the context of Title IX, Ms. Gambardella represented Quinnipiac University in a suit brought by the women's volleyball team. *See id.*

[133] *Id.*

[134] *See* Marc Edelman, *When it Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014), https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/#101d7f6c1bde [https://perma.cc/D5RK-BHDZ].

[135] *Id.*

[136] *Id.*

[137] Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994); *see also* Edelman, supra note 134.

[138] *See* James K. Gentry & Raquel Meyer Alexander, *Pay for Women's Basketball Coaches Lags Far Behind That of Men's Coaches,* N.Y. TIMES (Apr. 2, 2012), https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html [https://perma.cc/SJ5B-8NHS].

[139] *See* Edelman, *supra* note 134.

[140] *See* 20 U.S.C. §§1681–1688.

male athletes who would undoubtedly receive less compensation than their male counterparts in "money" sports. Because the NCAA has determined that college sports programs are part of the educational experience for student-athletes, unequal compensation among male and female athletes would trigger Title IX regardless of whether or not schools can make business decisions about how to compensate coaches.

Additionally, even if "pay-to-play" was found not to trigger Title IX protections, universities that paid female athletes less than male athletes would be skewered by public perception.[141] Given the recent publicity surrounding the fight of the U.S. Women's National Soccer Team ("USWNT") to achieve equal pay,[142] it is a near certainty that advocates would rally around female college athletes on social media, through demonstrations and other public displays of support. A college corollary to the USWNT could occur at the University of Connecticut ("UConn") should "pay-to-play" be implemented. Much like the USWNT faring better internationally than the men's U.S. National Team, UConn's women's basketball program is perhaps the most dominant sports program in American sports history[143]—and the women's program is certainly more successful than the men's program.[144] Should the UConn women be paid less than UConn men, the public outcry would be enormous.

Because "pay-to-play" likely implicates Title IX scrutiny, "pay-to-play" is not a reasonable solution to the legal quandary surrounding paying college athletes. Instead, a reasonable solution is one that can either pass Title IX muster or bypass it altogether.

ii. Non-Revenue Generating College Sports Programs Would Be Detrimentally Affected if "Pay-to-Play" Were Implemented

While it is true that the NCAA makes over $1 billion in revenues from major sports, it is important to note that revenue is not profit.[145] Instead,

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[141] *See* Johnson, *supra* note 46.

[142] *See* David Close & Wayne Sterling, *U.S. Women's National Team Granted Class Action Status in Equal-Pay Lawsuit*, CNN (Nov. 8, 2019), https://www.cnn.com/2019/11/08/sport/uswnt-soccer-equal-pay-lawsuit-class-action/index.html [https://perma.cc/53ZD-C97P]; *see also* Johnson, *supra* note 46.

[143] *See* Jan Diehm, *111 Wins and Counting: The Numbers Behind UConn Women's Basketball, One of the World's Most Dominant Teams,* GUARDIAN (Jan. 30, 2020), https://www.theguardian.com/sport/ng-interactive/2017/mar/29/uconn-womens-basketball-ncaa-most-dominant-team-in-sports-interactive [https://perma.cc/XNL8-VSVG].

[144] *See id.*

[145] *See* Rovell, *supra* note 1.

the vast majority of these funds are distributed back to the member schools to fund their athletic programs.[146] It is critical that the monies go to fund member school programs because most collegiate athletic programs operate at a deficit.[147] Schools use revenues generated by football and men's basketball to subsequently fund the other sports programs that do not generate revenue.[148]

If "pay-to-play" were implemented, most of the money generated by "money" sports would presumably go to paying the athletes competing in those sports instead of funding other sports programs.[149] This presents serious concerns regarding the future of these "Olympic"—or non-revenue generating—sports. Should schools determine that maintaining a competitive football and/or men's basketball team is worth more than funding a wrestling or volleyball program, these "Olympic" programs would face the possibility of being cut from the athletic program. Not only would eliminating sports have a deleterious effect on the athletes who are impliedly being told that their craft, and educational experience, is worth less than a football player or basketball player, but also cutting programs could implicate Title IX as discussed above. This issue could also affect schools that choose not to cut programs because they will have to find new programs to compete against. Because "pay-to-play" would likely result in diminished athletic programs, it is not a reasonable solution to the legal quandary surrounding paying athletes.

iii. A "Pay-to-Play" Scheme Would Obliterate the Line Between Professional and College Sports

The NCAA is willing to discuss potential compensation schemes for college athletes, but it asserts that any scheme must "maintain the clear demarcation between professional and college sports. . . ."[150] "Pay-to-play" does not provide for this required boundary between professional leagues and college teams because "pay-to-play" would require that member schools directly pay athletes for participating in college sports.

One hypothetical "pay-to-play" proposal even goes so far as to create a salary cap for member schools and discuss standard college player contracts.[151] Standard contracts and salary caps are hallmarks of professional

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[146] *See* Burnsed, *supra* note 47.
[147] *See* Simon, *supra* note 50.
[148] *See* Burnsed, *supra* note 47.
[149] *See* Simon, *supra* note 50.
[150] Hosick, *supra* note 47.
[151] *See* Grenardo, *supra* note 48.

sports leagues in America.[152] Furthermore, because the athlete is paid directly by the school for playing college sports, the payment is tied directly to athletic prowess—which is exactly the same as professional sports.[153]

This is a serious problem for "pay-to-play" schemes because the NCAA refuses to consider them valid proposals,[154] and because courts have long recognized that college sports are a "product" distinctly different from professional leagues.[155] Furthermore, thus far, courts have been unwilling to recognize "pay-to-play" as a less restrictive alternative to the current system.[156] Because the NCAA is unwilling on its own to consider "pay-to-play" and the courts seemingly find the demarcation argument sympathetic, "pay-to-play" is likely not a solution to the legal quandary surrounding paying college athletes. Instead, a reasonable solution is one that maintains the demarcation between professionals and amateurs.

iv. Steering Would be Nearly Impossible to Regulate Under the "Pay-to-Play" System

Steering—or the use of money to entice recruits to attend specific schools—is a major problem facing the NCAA today.[157] In September 2017, Adidas executives; major basketball programs including Louisville, Arizona, Auburn, and Oklahoma State; and middle men were caught up in a massive fraud investigation led by U.S. attorneys.[158] This investigation found that Adidas sponsored youth basketball teams and paid coaches and middle men to nurture relationships with young, promising players.[159] Once those players reached the age that they were able to be recruited by college programs, Adidas used the middle men to pay the recruited players and entice them to attend schools sponsored by Adidas.[160]

Obviously, this practice affects competitive balance, as players might well attend the school that provides them with the best deal—even if that deal is not entirely legal. Under a "pay-to-play" scheme, there would be nothing stopping wealthy philanthropists or donors like George Kaiser or

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[152] *See id.*
[153] *See id.*
[154] *See* Hosick, *supra* note 47.
[155] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).
[156] *See* Simon, *supra* note 50.
[157] *See* Tracy, *supra* note 122.
[158] *See id.*
[159] *See* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 652–53 (9th ed. 2020).
[160] *See id.*

Michael Case from paying the best quarterback prospect available to attend the University of Tulsa or well-connected alumni like Jerry Jones from paying the best point guard to attend the University of Arkansas.[161] Wealthy donors could have an outsized influence on competitive balance of major college sports.[162] Additionally, if an athlete is strictly getting paid to play a sport at a specific school, the demarcation between amateur and professional sports would be eroded because the athlete is attending a specific school for the sole purpose of the athlete's athletic prowess.

In light of all of these issues, "pay-to-play" is not a viable solution to the legal quandary surrounding paying college athletes. "Pay-to-play" would trigger scrutiny under Title IX should male and female athletes be compensated unequally, and stories of unequal treatment could create public outcry against certain institutions.[163] This payment scheme would also put "Olympic" sports programs in jeopardy because schools would not be able to use football and men's basketball revenue to fund non-revenue generating sports.[164] On top of these issues, "pay-to-play" would also obliterate the line between college and professional sports because universities would pay college athletes directly for their participation on the field.[165] In spite of "pay-to-play's" inadequacies in rectifying the legal quandary surrounding paying college athletes, there is a reasonable solution available: third-party payments.

IV. THE THIRD-PARTY PAYMENT SYSTEM IS A REASONABLE SOLUTION TO THE LEGAL QUANDARY SURROUNDING PAYING COLLEGE ATHLETES

The Third-Party Payment system would allow student-athletes to capitalize on their own names and likenesses. Third-Party Payment would allow athletes to use their own fame to garner endorsements, sponsor products, and negotiate deals, thus providing a reasonable compromise between colleges players and the NCAA.[166] In today's social media landscape, top col-

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[161] These men all have the means to participate in steering should they choose to do so.

[162] *See* YASSER, ET AL., *supra* note 159.

[163] *See* McManus, *supra* note 47.

[164] *See* Burnsed, *supra* note 47.

[165] *See* Simon, *supra* note 50.

[166] *See id.*

lege athletes are famous before they arrive on campus,[167] and they gain more notoriety based upon their exploits on the field or court. For example, Zion Williamson had over 2.7 million followers on Instagram while at Duke, and his domination of college hoops made him a household name.[168] As the 2019 NCAA basketball tournament ramped up, his picture was plastered on TV promos advertising the tournament.[169] However, he was forced to relinquish his intellectual property rights in order to compete under the current system.[170]

The Third-Party Payment system would allow athletes like Mr. Williamson to negotiate with third parties for the right to use his NIL in advertising, endorsements, etc. This is a right enjoyed by all Americans—except for NCAA athletes. Critically, "pay-to-play" does not even concern itself with this issue. While "pay-to-play" would allow athletes to receive compensation for their performance on the court, but no more, Third-Party Payments would allow athletes to have the opportunity to capitalize on their own intellectual property distinct from the playing field.

Ultimately, it is fundamentally unfair that athletes like Mr. Williamson cannot take advantage of their own intellectual property rights while the NCAA rakes in millions of dollars by utilizing their NIL.[171] The Third-Party Payment System would help address this issue by offering a reasonable solution to the legal quandary surrounding paying college athletes.

A. The Third-Party Payment System Offers a Reasonable Solution to the Issues Surrounding "Pay-to-Play."

As discussed above, "pay-to-play" could create serious issues for member schools relating to Title IX; the payment system itself; funding "Olympic" sports; and steering. However, the Third-Party Payment system does not have the same legal shortcomings.

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[167] *See generally* Matthew Foley, *Can Mac McClung Do More Than Dunk?*, BLEACHER REPORT (Mar. 6, 2020), https://bleacherreport.com/articles/2879229-can-mac-mcclung-do-more-than-dunk [https://perma.cc/4YQS-RZ7S].

[168] *See* Mina Kimes, *The Education of Zion Williamson*, ESPN (May 8, 2019), https://www.espn.com/mens-college-basketball/story/_/id/26406892/the-education-zion-williamson [https://perma.cc/D6ES-8NRF].

[169] *See id.*

[170] *See* NCAA DIVISION I MANUAL, *supra* note 5 § 2.9.

[171] *See* Rovell, *supra* note 1.

i. Third-Party Payments Would Not Trigger Title IX Scrutiny

Title IX prohibits discrimination on the basis of sex in educational settings.[172] "Pay-to-play" would trigger Title IX scrutiny because the NCAA justifies the current model as part of a student athlete's educational experience.[173] Additionally, if the member schools were required to pay college athletes directly, Title IX would be directly implicated because member schools would likely offer heftier financial aid packages to athletes in "money" sports than those offered to athletes in "Olympic" sports. Schools could violate Title IX by not balancing financial aid between male and female athletes.[174]

The Third-Party Payment system avoids this issue entirely. Under the Third-Party Payment system, the member schools would not pay athletes beyond what the NCAA and the courts have determined they can currently give athletes. Instead, athletes could capitalize on their NIL with third parties. These third parties would not trigger Title IX scrutiny because they are not educational institutions.[175] While the NCAA's Title IX concerns regarding "pay-to-play" are legitimate and not a "red herring," the issue is moot regarding Third-Party Payments.[176]

ii. The Third-Party Payment System Would Not Affect How Universities Fund "Olympic" Sports

University athletic programs fund the majority of their athletic programs with the revenue generated by men's basketball and football.[177] Because of this, should schools have to reinvest that money into paying basketball and football players, at best, the other athletic programs could face funding shortages, and, at worst, they could risk being cut from the athletic department.[178]

The Third-Party Payment system addresses this issue because it does not require member schools to pay student-athletes directly. This has two benefits for athletes in "Olympic" sports that do not generate a profit for

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[172] *See* 20 U.S.C. §§ 1681–1688.
[173] *See id.*
[174] *See id.*
[175] *See* McManus, *supra* note 47.
[176] *See* Edelman, *supra* note 134.
[177] *See* Burnsed, *supra* note 47.
[178] *See* Phil Mushnick, *Colleges Cutting Sports for 'Revenue' Doesn't Add Up at All*, N.Y. Post (Dec. 28, 2013), https://nypost.com/2013/12/28/colleges-cutting-sports-for-revenue-doesnt-add-up-at-all [https://perma.cc/3F8K-S3CR].

the member schools. First, the Third-Party Payment system lets these athletes capitalize on their NIL the same way "money" sport athletes would.[179] Under a "pay-to-play" system, "Olympic" sport athletes would almost certainly not receive any additional compensation from their member school.[180] However, in a Third-Party Payment system, "Olympic" athletes could capitalize on their NIL in niche markets.

For example, while Oklahoma State University has a competitive football program, its Cowboy wrestling program is one of the most successful athletic programs in the country.[181] OSU running back Chuba Hubbard[182] would have a national market on which he could capitalize as a potential Heisman Trophy finalist; wrestler Daton Fix[183] could also capitalize on his NIL in wrestling-centric markets. Particularly in and around the OSU campus in Stillwater, Fix would have opportunities to monetize his local fame. Furthermore, for wrestling fans, his appeal would be even more widespread as he attempts to make the 2020 U.S. Olympic Team.

The second major benefit the Third-Party Payment system would have for "Olympic" athletes is that "Olympic" sports would not face additional funding shortages because universities would not have to change how they fund their athletic programs.[184] The Third-Party Payment system does not implicate the current way that sports programs are funded because it does not require member schools to pay athletes directly and instead moves the potential compensation to third parties.

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[179] *See* Simon, *supra* note 50.

[180] *See id.*

[181] Cowboy wrestling is arguably the most successful wrestling program in America. By any measure, it is one of the most dominant sports programs in the country. *See Dynasty Defined: Cowboy Wrestling Tradition*, OKLA. ST., https://okstate.com/news/2017/3/12/dynasty-defined-cowboy-wrestling-tradition.aspx [https://perma.cc/7DEB-UCDQ] (accessed Jan. 29, 2020).

[182] Hubbard is a celebrated OSU running back who led the country in rushing yards in 2019. *See 2019 College Football Rushing Stats*, SPORTS REFERENCE, https://www.sports-reference.com/cfb/years/2019-rushing.html [https://perma.cc/ZNP8-9H7M] (last visited Jan. 6, 2021).

[183] Fix is one of the most-decorated amateur wrestlers to come out of Oklahoma, and he currently wrestles 133 pounds for OSU. In addition to his time with the OSU Cowboys, Fix also wrestles on the U.S. National Team. *See 2020-21 Wrestling Roster*, OKLA. ST. UNIV., https://okstate.com/sports/wrestling/roster/daton-fix/9368 [https://perma.cc/PFJ8-U3BY] (last visited Jan. 6, 2021).

[184] *See* Burnsed, *supra* note 47.

iii. The Third-Party Payment System Maintains a Clear Demarcation Between Collegiate and Professional Sports

A reasonable solution to the legal quandary surrounding college players must maintain a clear line of demarcation between college and professional sports.[185] While "pay-to-play" would certainly blur the line between professionals and student-athletes, under the Third-Party Payment system there would still be a clear boundary between the two.

As discussed above, "pay-to-play" requires member schools to directly pay student-athletes, which means that compensation is directly tied to athletic performance. Some advocates have gone so far as to propose salary caps, contract negotiations, and other hallmarks of professional sports for college athletics.[186] At the least, these proposals would blur the demarcation line between professional and collegiate sports. At the extreme, it would obliterate the line altogether. However, the demarcation is not a bad thing, and maintaining a distinction should be a goal for student-athletes, universities, and the NCAA.[187]

The Third-Party Payment system maintains a clear demarcation because payments are tied to NIL intellectual property rights and are not associated directly with play on the field. At the professional level, athletes are able to capitalize on their NIL and they receive salaries from their teams.[188] Under the Third-Party Payment system, the distinction between professional athletes and college athletes is that college athletes would not receive salaries from their member schools like professional athletes do from their teams. Because courts have been sympathetic to the NCAA's demarcation argument, it is important that a reasonable solution maintains the line between professionals and amateurs.[189] The Third-Party Payment system does so by allowing athletes to capitalize on their NIL while not requiring member schools to directly pay athletes for athletic prowess.

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[185] *See* NCAA O'Bannon Brief, *supra* note 36, at *2–4.

[186] *See* Grenardo, *supra* note 48.

[187] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–03 (1984).

[188] *See, e.g.*, Brooke, *supra* note 92; Jensen, *supra* note 93.

[189] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

iv. Steering Can Be Regulated When It Is Done in the Open and Not on a "Black Market"

Steering is a major issue regarding college athletics today, and both "pay-to-play" and the Third-Party Payment system would increase the opportunities for athletes to be enticed into attending specific schools for compensation. However, the Third-Party Payment system offers more reasonable opportunities for regulating the practice.

While steering has become a hot-button issue in college sports, at its core it is not significantly different from typical recruiting. All schools seek to entice athletes to attend their school through better benefits, coaches, facilities, etc.[190] Steering adds in an element of compensation to the recruitment process.[191] Taken to the extreme, steering could seriously undermine the competitive balance within NCAA member schools, and today it happens on a "black market."[192] However, with Third-Party Payments it could be regulated more easily in the open. Critically, the Third-Party Payment system requires some tie between NIL and the third-party, which would keep boosters from simply paying an athlete to play.

Under "pay-to-play," a wealthy booster could simply make a large donation to the football program to be used to pay athletes. This would allow the wealthiest schools to recruit the best athletes. However, under the Third-Party Payment system, the money an athlete receives would be tied to an athlete's NIL. Because many major boosters could meet this requirement, the Third-Party Payment system would not eliminate the problem. However, by requiring at the outset that third parties tie their compensation to athletes to their NIL usage, the NCAA could then regulate bad behavior.

Additionally, some steering could actually increase competitive balance by allowing small schools who struggle in recruiting, like the University of Tulsa, to entice athletes who otherwise would not be interested in playing at TU to attend TU.[193] Bringing steering into the open and then regulating bad behavior would allow the NCAA to cut down on illicit "black market"

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[190] *See* Jessica S. Lee, *LSU's Football Team has a New $28 Million Locker Room – Complete with Sleep Pods, a Pool, and a Mini Theater*, BUSINESS INSIDER (Aug. 30, 2019), https://www.businessinsider.com/louisiana-state-university-football-locker-room-athletic-facility-2019-8 [https://perma.cc/P5WP-9Y5Q].

[191] *See supra* Section III.A.iv.

[192] Mark Schlabach, *3 Convicted in NCAA Pay-for-Play Trial File Appeal*, ESPN (Aug. 13, 2019), https://www.espn.com/mens-college-basketball/story/_/id/27382222/3-convicted-ncaa-pay-play-trial-file-appeal [https://perma.cc/8J9T-PD7H].

[193] For the 2020 football recruiting class, TU ranks 116 out of 130 teams, and it is tenth in its conference. *See Tulsa 2020 Football Commits,* 247SPORTS, https://

fiascos and increase competitive balance.[194] While issues would still arise, it is clear that the Third-Party Payment system can respond to them more easily than the "pay-to-play" model.

A reasonable solution to the legal quandary surrounding paying college athletes must be able to address the issue of steering. The Third-Party Payment system does this by putting an obligation on boosters to use an athlete's NIL and by allowing for the regulation of bad behavior.

The Third-Party Payment system is a reasonable solution to the legal quandary surrounding paying college athletes for all of the reasons that "pay-to-play" is not a reasonable solution. Unlike "pay-to-play," the Third-Party Payment system would not implicate Title IX scrutiny because it would bypass the legislation entirely.[195] Third parties who negotiate with college athletes to use an athlete's NIL would not affect the educational experience the NCAA provides to athletes.[196] Additionally, because payments are made by third-parties and not by educational institutions, member schools would likely be free of litigation and the public outcry regarding unequal payments to male and female athletes.[197]

Furthermore, under the Third-Party Payment system, "Olympic" sports would not face extermination by athletic departments that need funds to pay athletes because the athletic department would not be responsible for paying athletes. This would allow member schools to continue funding "Olympic" sports in the way they are currently—with revenue from football and men's basketball.[198]

Finally, the Third-Party Payment system maintains the boundary between college and professional sports because third-party payments only allow college athletes to capitalize on their NIL—college athletes are not paid directly for athletic participation. Further, the issue of steering can be partially solved by requiring third parties to negotiate for use of NIL instead of simply paying an athlete to attend a school. By negotiating in the open, bad behavior could be regulated. For all of these reasons, the Third-Party Pay-

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247sports.com/college/tulsa/Season/2020-Football/Commits/ [https://perma.cc/4GQ5-F7P6] (last visited Nov. 3, 2020).

[194] *See* Will Hobson, *Inside the Basketball Black Market that put Adidas in the FBI's Crosshairs*, WASHINGTON POST (Oct. 1, 2018), https://www.washingtonpost.com/sports/inside-the-basketball-black-market-that-put-adidas-in-the-fbis-crosshairs/2018/10/01/2a73ba76-c1ad-11e8-97a5-ab1e46bb3bc7_story.html [https://perma.cc/U3JR-B97U].

[195] *See generally* 20 U.S.C. §§ 1681–1688.

[196] *See id.*

[197] *See id.*

[198] *See* Rovell, *supra* note 1; Burnsed, *supra* note 47.

ment system is a reasonable solution to the legal quandary surrounding paying college athletes, and it can be implemented in variety of ways.

B. The Third-Party Payment System Offers a Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes and Can Be Implemented Through NCAA Amendment, Litigation, or by State and Congressional Statute

On October 29, 2019, the NCAA Board of Governors voted unanimously to start the process of modernizing amateurism rules, opening the door to third-party payments.[199] It remains unclear whether the NCAA will truly embrace third-party payments or pivot towards some other restrictive scheme that would curtail the rights of athletes to capitalize on their NIL.[200] However, as discussed above, the Third-Party Payment system is a reasonable solution to the legal quandary surrounding college athletes. Because of this, the NCAA should amend its bylaws to allow for third-party payments.[201] Even if the NCAA refuses, the Third-Party Payment system can take effect through a settlement or judgment at the end of litigation or by state or congressional statute.

i. The NCAA Can Amend Its Bylaws to Allow for NIL Payments

An NCAA bylaw amendment is likely the easiest way to implement the Third-Party Payment system. Presently, the Division I Manual explicitly denies student athletes the right to receive compensation for NIL usage.[202] However, even before the Board of Governors decision to begin the process towards modernization, Condoleezza Rice—at the time the chair of the Commission on College Basketball—left third-party payments available as an avenue to explore after the court battles had ended.[203] If the NCAA is

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[199] *See Board of Governors*, *supra* note 29.

[200] *See id.*

[201] *See* Marc Edelman, *NCAA Can't Figure Out How to Grant Student-Athletes Endorsement Rights, But it's Simple – Really*, FORBES (May 10, 2018), https://www.forbes.com/sites/marcedelman/2018/05/10/the-ncaa-cant-figure-out-how-to-grant-student-athlete-endorsement-rights-so-i-will-help-them/#38fb2a8d2c01 [https://perma.cc/L5WW-YXYF].

[202] *See* NCAA DIVISION I MANUAL, *supra* note 5 § 2.9.

[203] *See* Press Release, Condoleezza Rice, Commission on College Basketball Chair, Nat'l Collegiate Athletic Ass'n, Independent Commission on College Basketball Presents Formal Recommendations (Apr. 25, 2018), https://www.ncaa.org/sites/default/files/2018CCBRemarksFinal_webv2.pdf [https://perma.cc/LA8R-WBWJ].

truly serious about modernizing the amateurism rules, the Third-Party Payment system can be legitimized through amendment. One potential amendment has been proposed by Professor Marc Edelman of Baruch College's Zicklin School of Business:

> "12.01.5 Permissible Student-Athlete Licensing Rights. A payment administered by a non-educational institution is not considered to be pay or the promise of pay for athletics skill, provided the student-athlete does not use the trademarks of the NCAA or any NCAA member college in any manner that may be construed as an endorsement, unless such manner is otherwise protected by principles of the First Amendment or fair use."[204]

By adding this, or similar, language, the Third-Party Payment system would be officially recognized by the NCAA and athletes could receive compensation for the use of their NIL.

ii. The Third-Party Payment System Can Also Be Implemented Through Litigation

Presently, the NCAA will continue defending antitrust litigation regarding the current amateur model—particularly against athletes who propose "pay-to-play." The Third-Party Payment system may well be a solution that satisfies the rule of reason test.[205] Should the litigants present the court with Third-Party Payments as a less restrictive alternative to the current amateur system, it could mean the end of the road for those seeking to implement "pay-to-play" in college sports.[206]

The Third-Party Payment system also appears to be a reasonable compromise in negotiations between litigants because the NCAA is finally starting to come to terms with allowing athletes to receive some sort of compensation for participating in college sports.[207] As it addresses the issues regarding paying college athletes, the Third-Party Payment system is likely a much more palatable solution for the NCAA because it maintains the clear line of demarcation between college and professional sports. Whether as a judgment or as a settlement agreement, the Third-Party Payment system can be implemented through litigation.

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[204] Edelman, *supra* note 204.
[205] *See* Grenardo, *supra* note 48, at 214.
[206] *See id.*
[207] *See Board of Governors*, *supra* note 29.

iii. Third-Party Payments Can Be Implemented Through State or Congressional Statute

It appears that state legislatures could have been the catalyst for the NCAA's current push towards modernization and evaluation of the amateur system.[208] This is because several states, including Florida,[209] South Carolina,[210] New Jersey,[211] and California[212] have passed, or are debating the passage of, bills which would allow athletes within that state to capitalize on their NIL.[213] Multiple NIL bills have also been introduced in Congress, though there has been little movement on Capitol Hill regarding the legislation.[214]

While a federal statute would allow for a more uniform application of an NIL payment scheme across the country, Congress is notoriously slow, and it does not appear that a bill will be passed anytime soon. By contrast, states are acting quickly. Upon California's passage of the Fair Pay to Play Bill,[215] other states soon followed and began the process of enacting their

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[208] *See* Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12 [https://perma.cc/A92X-27SP].

[209] *See* Charlotte Carroll, *Florida Rep Proposes Bill Compensating College Athletes for Names, Likeness*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/10/01/florida-state-representative-proposed-legislation-pay-student-athletes [https://perma.cc/NH6T-ZS8E].

[210] *See* Dan Murphy, *S. Carolina to Consider Fair Pay to Play-Type Bill*, ESPN (Sept. 13, 2019), https://www.espn.com/college-football/story/_/id/27607396/s-carolina-consider-fair-pay-play-type-bill [https://perma.cc/5XVU-RDLN].

[211] Justin A. Casey, *The Landscape for College Athletes' Commercial Rights is Changing,* FOLEY & LARDNER (Nov. 23, 2020), https://www.foley.com/en/insights/publications/2020/11/landscape-college-athletes-commercial-rights.

[212] *See* McCann, *supra* note 212.

[213] *See id.* In addition, the name of the California bill refers to "pay-to-play." However, the bill is actually legislation that allows athletes to receive compensation for the use of their NIL and is more closely related to third-party payments as defined in this Article.

[214] *See* Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019). *See also* Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports,* ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports. *See also* Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image, Likeness Bill to Be Introduced in Congress,* Sports Illustrated (Dec. 10, 2020), https://www.si.com/college/2020/12/10/ncaa-name-image-likeness-bill-congress.

[215] *See* Andre Earls, *Despite Early Efforts, Student Athlete Equity Act Stalls*, MEDILL NEWS SERVICE (July 2, 2019), https://dc.medill.northwestern.edu/blog/2019/07/02/

own legislation.[216] Coach Mike Gundy's fear of an uneven playing field in recruiting is most clearly seen here.[217] Because states are enacting their own laws, there is a lack of uniformity among the different state statutes. For example, California's law takes effect in 2023, while Florida's takes effect in 2020, and currently, Oklahoma does not have an NIL statute.[218] This means that when recruiting, Oklahoma universities are at a disadvantage because they do not allow athletes to capitalize on NIL like California and Florida soon will. Further, in the years between Florida's enactment of its law and California's enactment of its law, California universities would be disadvantaged because Florida universities could offer the ability to capitalize on NIL sooner than California. Because of the lack of uniformity among the states, should the Third-Party Payment system be implemented by statute, a federal statute would likely be the best option in order to promote clarity for all student-athletes and member schools.

However, these state statutes pushed the NCAA to evaluate its options, putting significant pressure on the NCAA to allow for NIL payments. Even lacking uniformity across states, the statutes have forced the NCAA into recognizing the need for third-party payments.[219] Ultimately, the best, and perhaps most efficient, avenue for implementation is by NCAA amendment.[220]

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despite-early-efforts-student-athlete-equity-act-stalls/#sthash.ONuhNNu7.dpbs [https://perma.cc/Y7SW-MR5E].

[216] *See* Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/ [https://perma.cc/QNC5-F5CW].

[217] *See* Wright, *supra* note 25.

[218] *See* Norlander, *supra* note 219.

[219] *See Board of Governors*, *supra* note 29.

[220] In addition to potential Congressional action, there has been some movement towards the Executive Branch taking action, though it is unclear if that would result in an Executive Order or what the action would look like. *See* Brian Murphy & Francesca Chambers, *California Changed Its Rules on College Athlete Pay. Now White House Looking into It*, NEWS & OBSERVER (Nov. 11, 2019), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article237131309.html.

V. CONCLUSION

Over the course of its existence, the NCAA has developed into an organization that oversees lucrative athletic programs.[221] Major college sports are a billion dollar industry, and it seems that the only people who are unable to take advantage of the financial opportunities afforded by college athletics are the very athletes who play the vital role in generating revenue.[222] On one hand, athletes argue that they should be entitled to a seat at the table and a share of the pot. On the other hand, the NCAA maintains that college sports are integral to the educational experience and that amateurism provides a clear demarcation between professional and college sports.[223]

Over the course of lengthy antitrust legal battles, the courts have appeared sympathetic to both parties.[224] Courts have tended to recognize that the current amateur model violates antitrust law, but they have not found "pay-to-play" to be a viable, less-restrictive alternative to the current system.[225]

The Third-Party Payment system can solve this legal quandary by offering a reasonable compromise to both parties. For athletes, they get the right to financially capitalize on their NIL with third parties.[226] For the NCAA, it does not have to pay athletes directly, thus avoiding Title IX concerns, and it can maintain the clear boundary line between professional and college sports.[227]

While the NCAA has been slow to evolve towards allowing any sort of compensation, recently it has deemed it necessary to begin the process of modernization and evaluating the amateur system.[228] In part due to influential states passing laws in direct contradiction to the NCAA rules, the NCAA may finally be facing the music about the need for change. The easiest way to implement the Third-Party Payment system is through an amendment to the NCAA Manual.[229]

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[221] Rovell, *supra* note 1.

[222] *See id.*

[223] *See* Brief for the Nat'l Collegiate Athletic Ass'n at 11-12, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601).

[224] *See O'Bannon*, 802 F.3d at 1053.

[225] *See id.*

[226] *See* Simon, *supra* note 50.

[227] *See id.*

[228] *See Board of Governors*, *supra* note 29.

[229] *See* Edelman, *supra* note 204.

Ultimately, allowing college athletes to capitalize on their NIL with third parties would afford athletes and the NCAA a reasonable solution to the legal quandary surrounding paying college athletes by eliminating Title IX concerns, maintaining a clear demarcation between college and professional sports, maintaining the status quo regarding funding "Olympic" sports, and allowing for the regulation of steering to maintain competitive balance. The Third-Party Payment system is a feasible answer to the issue of paying college athletes.