

Texas Review of Entertainment & Sports Law



Volume 14

Fall 2012

Number 1

Game On: Sports-Related Games and the Contentious
Interplay Between the Right of Publicity and the First
Amendment

Timothy J. Bucher

Cyber-Plagiarism for Sale!: The Growing Problem of Blatant
Copyright Infringement in Online Digital Media Stores

Sam Castree III

South Park & the Law

Kristen Chiger

Foul Territory: Identifying Media Restrictions in High School
Athletics Outside the Bounds of First Amendment Values

Michelle Newman

Update: The Curious Cases of Oscar Pistorius & Caster
Semanya

Aiden Johnson

Title IX Turns 40: A Brief History and Look Forward

Maggie Jo Poertner Buchanan

CONTENTS

ARTICLES

- GAME ON: SPORTS-RELATED GAMES AND THE CONTENTIOUS
INTERPLAY BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST
AMENDMENT 1
Timothy J. Bucher

NOTES

- CYBER-PLAGIARISM FOR SALE!: THE GROWING PROBLEM OF BLATANT
COPYRIGHT INFRINGEMENT IN ONLINE DIGITAL MEDIA STORES 25
Sam Castree III
- SOUTH PARK & THE LAW 47
Kristen Chiger
- FOUL TERRITORY: IDENTIFYING MEDIA RESTRICTIONS IN HIGH SCHOOL
ATHLETICS OUTSIDE THE BOUNDS OF FIRST AMENDMENT VALUES 59
Michelle Newman
- UPDATE: THE CURIOUS CASES OF OSCAR PISTORIUS & CASTER
SEMENYA 89
Aiden Johnson
- TITLE IX TURNS 40: A BRIEF HISTORY AND LOOK FORWARD 91
Maggie Jo Poertner Buchanan

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Cite as: TEX. REV. ENT. & SPORTS L.

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Volume 14
Issue 1
Fall 2012

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Texas Review of
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Volume 14
Issue 1
Fall 2012

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Game On: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*

Timothy J. Bucher

I. INTRODUCTION

Professional and amateur sports in the United States “generate[] an insatiable public interest in sports and the players themselves.”¹ Fans and, as a means to capitalize on fans’ interest, companies both invest a significant amount of time and money on a respective sport and its players. Unlike ever before, advancements in technology have allowed fans to follow their teams, purchase tickets and merchandise, and even interact with players. As technology develops, so do “opportunities for emerging and lucrative markets for sports-themed products.”²

In addition to tickets, television, and merchandise, fans have also turned to sports-simulated games. Fan-interest in these types of games started with board games but has reached its highest level of popularity and commercialization through online fantasy sports games and sports video games.³ These games incorporate well-known leagues, teams, and athletes, and specifically utilize athletes’ names, likenesses, and information.⁴ However, because of the great public interest in sports and an athlete’s identity, serious questions arise as to the “appropriate boundaries for players’ publicity rights against the right of commerce and the interests of the public under the First Amendment.”⁵ Though technology, the sports industry, and the commercialization of sports and athletes have grown at an astounding pace, legal jurisprudence relating thereto have not been as quick to develop.

In 1960, William Prosser authored an article that is largely viewed as the creation of the right of publicity.⁶ In the article, Prosser divided the right of privacy into four distinct categories.⁷ The fourth such category, which he termed as the “‘appropriation’ of the plaintiff’s name or likeness for commercial purposes,” has since developed into its own, largely separate doctrine, known as the right of publicity.⁸

The right of publicity, a creature of state law, is defined as the appropriation of “the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade.”⁹ This right, by limiting the extent to which others may use such information, creates “an inherent conflict between [it] and the First Amendment’s freedom of speech protection,” resulting in attempts by courts to

* A previous version of this Article was selected as the winning submission for the 2012 Anne Wall Brand Protection Award, an award given annually to the J.D. or joint J.D./M.B.A. student at Marquette University who is judged to have written the best article on “sports brand protection.” The Article has since been updated to reflect developments in litigation relative to the right of publicity and First Amendment.

¹ Maureen Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports’ Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581, 582 (2008).

² *Id.* at 589.

³ See James Montague, *The Rise and Rise of Fantasy Sports*, CNN (Jan 20, 2010), <http://www.cnn.com/2010/SPORT/football/01/06/fantasy.football.moneyball.sabermetrics/index.html>.

⁴ *Id.*

⁵ Weston, *supra* note 1, at 582.

⁶ William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)

⁷ See generally *id.*

⁸ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (citing William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)).

⁹ Restatement Third of Unfair Competition § 46 (1995).

“balance out these interests often by using differing standards.”¹⁰ Some have argued that, as a part of this balancing, the public’s right to know, a delineation of the First Amendment, should favor freedom of speech over the right of publicity.¹¹

Still, though the balancing of right of publicity and First Amendment interests may seem straightforward to some, the context in which an individual claims that his right of publicity has been infringed changes the analysis. Compare the Supreme Court’s jurisprudence, which states that types of commercial endeavors, such as books, newspapers, and magazines are protected by the First Amendment,¹² with the notion that the use of an individual’s right of publicity outside of the aforementioned news-related publications, if motivated by commercial intent, infringes on one’s right of publicity and does not garner First Amendment protection.¹³ Moreover, as the nature of alleged infringement on individuals’ right of publicity has evolved, courts have differed in the scope in which they classify types of commercial use and, as a result, whether or not the alleged infringers have a valid First Amendment defense.¹⁴ Sports-related games, their development through advancements in technology, and courts’ determinations as to the alleged “exploitation” of publicity rights illustrate courts’ inconsistent application of the right of publicity and First Amendment jurisprudence, lending support to the argument that the time has come for the U.S. Supreme Court to develop an instructive standard for which courts can consistently apply the right of publicity doctrine in the face of First Amendment considerations.

Part II of this Article will discuss the creation of the right of publicity and its interplay with the First Amendment, especially courts’ inconsistent application thereof. Part III will further discuss these doctrines but in the narrowed context of sports-related games, where the arguments of whether to favor the right of publicity or the First Amendment are at their strongest. In particular, Part III will begin by analyzing the right of publicity and First Amendment in the context in which it first emerged in the late 1960s, early 1970s via fantasy sports board games. Part III will continue to track how advances in technology led to new types of sports-related games and how courts have inconsistently applied right of publicity claims upon allegations of an unauthorized use of athletes’ names, likenesses, and information. Part IV will further analyze the inconsistent and incoherent case law with regard to the right of publicity and the First Amendment and, finally, will suggest that the U.S. Supreme Court, which has not heard a right of publicity case in over thirty years, needs to clarify the proper balancing standard between these two legal doctrines.

II. THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

Historically, the right of publicity doctrine derives from state law¹⁵ and protects an individual’s proprietary interest.¹⁶ Though early commentators and courts defined the right of publicity as a derivative of the law of privacy,¹⁷ at least one court, speaking in a sports

¹⁰ Mark Conrad, *The Right of Publicity in the Digital Age – Doctrinal Tensions, Common Law Theories and Proposals for Solutions*, 24 COMPUTER LAW & SECURITY REPORT 407, 407 (2008).

¹¹ Richard Karcher, *The Use of Players’ Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557, 560 (2007).

¹² *Time Inc. v. Hill*, 385 U.S. 374, 396–97 (1967) (citation omitted).

¹³ See Karcher, *supra* note 11, at 560, 566.

¹⁴ *Id.* at 567.

¹⁵ *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 822 (8th Cir. 2007).

¹⁶ See, e.g., *Lugosi v. Universal Pictures*, 603 P.2d 425, 440 (Cal. 1979).

¹⁷ See, e.g., *Pavesich v. New England Life Ins. Co.* 50 S.E. 68 (Ga. 1905); see also William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

context, observed that the right of publicity should be viewed as a type of property right.¹⁸ In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹⁹ the Second Circuit Court of Appeals distinguished the right of publicity from the right of privacy.²⁰ Specifically, the court held that “a man has a right in the publicity value of his photograph” and further noted that famous persons would be “sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”²¹

Since *Haelan*, state courts have adopted various tests and standards to determine the validity of plaintiffs’ right of publicity claims.²² However, this Article will refrain from exploring in-depth the makeup of the respective right of publicity tests, but will rather focus on the interplay between the right of publicity and the First Amendment and the balancing test between those two doctrines. Thus, further inquiry into the First Amendment itself is required.

Though the U.S. Constitution applies only to government actors, a court may apply the First Amendment to private parties in a right of publicity claim because such a “claim exists only insofar as the courts enforce state-created obligations that were ‘never explicitly assumed’” by those allegedly infringing upon one’s right of publicity.²³ Simply put, the right of publicity is a creature of state legislatures or state courts. Because a plaintiff could not otherwise bring a right of publicity claim without those state entities creating and enforcing this right, state action allows a defendant to assert constitutional protections as a defense. In particular, because the right of publicity prohibits a person from using aspects of another’s identity without consent, defendants will assert that the right of publicity violates the First Amendment by limiting expressive acts. This was the defense at issue when, in 1977, the U.S. Supreme Court heard its first and only right of publicity case to date.

In 1977, the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.* held that, under the specific factual circumstances of the case, the right of publicity trumped the First Amendment.²⁴ The plaintiff, Zacchini, was an entertainer who performed a “human cannonball” act, which usually took him a total of approximately fifteen seconds.²⁵ Zacchini had agreed to regularly perform his act at a county fair, where fairgoers could view the act as part of their fair admission fee.²⁶ At one of Zacchini’s performances, a free-lance reporter for the defendant, a television broadcasting station, videotaped the entire act, which was subsequently featured, in its entirety, on the late night news.²⁷ Zacchini responded by bringing an action for damages, alleging an unlawful appropriation of his professional property.²⁸ The Court concluded that while the First Amendment prevents the right of

¹⁸ See *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

¹⁹ See *id.*

²⁰ *Id.* at 868. The *Haelan* court’s recognition of the right of publicity was the first time a court had explicitly accepted a right of publicity separate and distinct from the right of privacy. Conrad, *supra* note 10, at 409.

²¹ *Haelan*, 202 F.2d at 868.

²² See, e.g., *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (enunciating a “transformative test”); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (enunciating a “predominant purpose test”).

²³ *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991)).

²⁴ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574-75 (1977).

²⁵ *Id.* at 563.

²⁶ *Id.*

²⁷ *Id.* at 564.

²⁸ *Id.*

publicity from restricting a news station from reporting newsworthy facts relative to his act, the First Amendment did “not immunize the media when [a news station] broadcast[s] a performer’s entire act without his consent.”²⁹ When entities engage in such action, it becomes “unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”³⁰ Thus, the Court found that the First Amendment did not protect the defendant’s misappropriation of the plaintiff’s performance.³¹

Though the discussion of *Zacchini* is obviously an important background for which to discuss the interplay between the right of publicity and the First Amendment, it is important to note that (1) the use at issue was not commercial in nature—it was for a newscast—and (2) that the Court failed to establish a specific right of publicity test or standard, instead deferring to a copyright analysis.³² As a result, some commentators have suggested that the narrowed specificity of the holding has rendered it to provide “limited precedential and analytical value,” as it failed to develop adequate standards for lower courts to analyze right of publicity cases.³³ As right of publicity claims increased, courts were faced with “a more compelling and difficult issue” of exacting a balance between the right of publicity and the First Amendment.³⁴ Specifically, right of publicity claims in the context of sports-related games evidences courts’ varied interpretations of *Zacchini* and inconsistencies in developing balancing tests between the right of publicity and First Amendment.

III. THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT IN SPORTS-RELATED GAMES

The commercialization of athletics has grown at an astounding pace, leading to a similar growth in the number of “products displaying the names, images, likenesses, statistics, numbers, and characteristics of” athletes, which are now “commonplace in the stream of commerce.”³⁵ This growth in commercialization, as well as technology, brings new opportunities for the unauthorized exploitation of an athlete’s identity. Specifically, the use of athletes’ publicity rights in sports-related games and athletes’ legal responses demonstrate the effect that the growth of commercialization and technology has had on the right of publicity doctrine and its interplay with the First Amendment.

Fantasy sports board games were the first type of fantasy sports-related game to utilize aspects of athletes’ identities.³⁶ The popularity of these board games eventually led to the creation of online fantasy sports games, which utilize athletes’ identities and gained immense popularity.³⁷ “[O]riginal fantasy leagues relied principally on newspapers and sports periodicals to obtain their game content,” but “[t]he advent of the Internet transformed the fantasy league industry . . . into a commercial enterprise.”³⁸ As traditional

²⁹ *Zacchini* at 574–75.

³⁰ *Id.* at 576.

³¹ *Id.* at 578–79.

³² *See id.* at 573; Conrad, *supra* note 10, at 411.

³³ Conrad, *supra* note 10, at 411.

³⁴ *Id.*

³⁵ Christian Dennie, *Tebow Drops Back to Pass: Videogames Have Crossed the Line, But Does the Right of Publicity Protect a Student-Athlete’s Likeness When Balanced Against the First Amendment?*, 62 ARK. L. REV. 645, 646 (2009).

³⁶ Martin E. Robins, *For It’s One, Two, Three Strikes You’re Out at the Old Board Game*, SPORTS ILLUSTRATED (May 28, 1979), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1094986/index.htm>.

³⁷ Montague, *supra* note 3.

³⁸ Karcher, *supra* note 11, at 561–62.

sports simulation board games slowly led to the development of more technologically advanced sports-related games, companies began to incorporate athletes' identities into new game types, from including names and information in online fantasy games to including prominent physical features in video games.³⁹ Three specific game types—(1) fantasy sports board games; (2) fantasy sports online games; and (3) sports-related video games—have been the cause of much litigation over the athletes' rights of publicity and companies' unauthorized use and exploitation of those rights.

In the context of fantasy sports board games, fantasy sports online games, and sports-related video games, athletes may have a compelling right of publicity claim. But as is the case for right of publicity claims in general, there is a tension between that right and the alleged infringer's First Amendment protections.

Based on the elements of the right of publicity and the First Amendment defense, as well as the context in which companies allegedly infringe upon athletes' publicity rights in such sports-related games, there is a strong likelihood that if the U.S. Supreme Court chooses to hear another right of publicity case, the case will be sports-related. Until then, however, one can only postulate as to what the correct approach is to balancing these two doctrines. Thus, for the time being, one must look to the context in which such infringement occurs, which requires analysis into both the commercialization of and technological advances in the world of sports—specifically, sports-related games.

A. BOARD GAMES

The use of players' names, likenesses, and information in sports-related games can be traced back to the 1920s, to a fantasy sports board game that “simulate[d] the play of actual MLB teams by using ‘cards’ representing real MLB players.”⁴⁰ This particular game led to the proliferation of more sophisticated fantasy baseball board games shortly after World War II.⁴¹ The games allowed users to trade players, select all-star teams, and even simulate an entire baseball season.⁴² As a result of the popularity of these games, companies manufactured similar games featuring other popular American professional sports, including several fantasy golf board games.⁴³

One such golf game, “Pro-Am Golf,” became the subject of litigation in 1967.⁴⁴ This marked the first time that a fantasy sports-related game that utilized players' names, profiles, and statistics had been challenged on the basis of misappropriation of an athlete's identity, “presumably because of an assumption that such information was in the public domain.”⁴⁵ Pro-Am Golf was manufactured by a New Jersey toy manufacturer, and the game included twenty-three sheets of paper, each featuring the name of a professional golfer or famous personality and his profile.⁴⁶ Four of the golfers who were featured in the game brought suit against the company based on the unauthorized use of their names and profiles, “contend[ing] that the use of their respective names reduce[d] their ability to obtain satisfactory commercial affiliation by licensing agreements, and that such use [invaded]

³⁹ *Id.*; *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 761 (D.N.J. 2011).

⁴⁰ J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 MARQ. SPORTS L. REV. 87, 93 (2006).

⁴¹ *Id.* at 94.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See generally *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

⁴⁵ Hylton, *supra* note 40, at 94–95.

⁴⁶ *Palmer*, 232 A.2d at 459.

their privacy and [was] an unfair exploitation and commercialization of their names and reputations.”⁴⁷

In ruling on the claim, the Superior Court of New Jersey focused its analysis on whether the manufacturer infringed on the golfers’ privacy rights,⁴⁸ specifically, the right of publicity, as defined by Prosser.⁴⁹ The manufacturer asserted that, as well-known athletes, the golfers waived their privacy rights by “deliberately invit[ing] publicity in furtherance of their careers,” and, further, that the manufacturer “should not be denied the privilege of reproducing that which is set forth in newspapers, magazine articles and other periodicals.”⁵⁰

The court responded by holding that though publishing biographical data of a famous person is not a per se invasion of privacy, using the data to capitalize on that famous person’s name “with a commercial project other than the dissemination of news or articles or biographies” is an invasion of that person’s privacy.⁵¹ Thus, the company had impermissibly capitalized on the golfers’ names and profiles.⁵² But even with the court’s ruling, not all fantasy sports board game manufacturers followed the court’s edict and refrained from the unauthorized use of professional athletes’ names, likeness, and information.⁵³ These continued violations led to a similar suit in *Uhlaender v. Henricksen*.⁵⁴

In *Uhlaender*, a Minnesota-based game manufacturer created and sold two games, “Negamco’s Major League Baseball” and “Big League Manager Baseball,” both of which utilized the names and statistical information of hundreds of MLB players.⁵⁵ Following two unsuccessful efforts to have the manufacturer purchase a license, the players’ union (the “MLBPA”)—the entity authorized to license players’ names for use or endorsement—filed suit against the manufacturer in Minnesota district court for the unauthorized use of the players’ names and information.⁵⁶ In response, the manufacturer asserted, in relevant part, “that the names and statistics concerning sports achievements used in the game are readily available to anyone . . . , are published with some regularity in the newspapers and news media and are thus in the public domain.”⁵⁷ In discussing the claim at issue, the court observed the differences between infringing on another’s privacy rights and misappropriating another’s name or personality, the latter of which it referred to as the “right of publicity” that, in its opinion, derived from one’s *property*, not privacy, rights.⁵⁸ Thus, the court turned its focus to “whether the plaintiffs’ names and published statistics can be considered property subject to legal protection from unauthorized use.”⁵⁹

In its analysis, the court looked to cases such as *Haelan* and *Palmer* and concluded that the manufacturer’s argument—that the players waived their rights due to the fact that their names and information are part of the public domain via their presence in the news and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 461.

⁵⁰ *Id.* at 460.

⁵¹ *Palmer* at 462.

⁵² *Id.*

⁵³ Hylton, *supra* note 40, at 96–97.

⁵⁴ See generally *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

⁵⁵ *Id.* at 1278.

⁵⁶ *Id.* at 1278–80.

⁵⁷ *Id.* at 1279.

⁵⁸ *Id.* at 1279–1281.

⁵⁹ *Uhlaender* at 1281.

the readily available nature of their names and information—had no merit.⁶⁰ Instead, the court observed that the players' right of publicity came to being from the very fact that the players were recognized by the public, thus providing the court justification to enjoin the unauthorized use of the players' publicity rights.⁶¹

As some commentators are quick to note, the court's ruling in *Palmer*, which found that the game at issue infringed upon players' privacy rights, and the court's ruling in *Uhlaender*, which ruled that the game at issue infringed upon the players' publicity rights, were both issued while "the right of publicity was . . . in its formative era."⁶² Several commentators have argued that the decision in *Uhlaender* was too paternalistic and, according to some, just plain wrong.⁶³ Still, neither case has been expressly overruled, and, as a result, the *Uhlaender* decision has proved to be a major victory for those advocating for courts to expand the right of publicity.⁶⁴ That is, however, until a Missouri district court, in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,⁶⁵ a fantasy sports case, held that *Uhlaender* had been "decided early in the development of the . . . right of publicity and [thus] is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*."⁶⁶ Both the district court and, ultimately, the Eighth Circuit Court of Appeals would rehash the issues surrounding the right of publicity, the First Amendment, and how the interplay of the two doctrines affect a player's intellectual property rights.⁶⁷

B. ONLINE GAMES

In the sports context, the development of technology and the introduction of the Internet caused fantasy sports board games to become dated and eventually concede popularity to online games. By the twenty-first century, online fantasy sports games had reached unheard-of commercial popularity.⁶⁸ In 2006, at the time the district court in *C.B.C.* issued its opinion,⁶⁹ there were approximately fifteen million fantasy sports users.⁷⁰

Online fantasy sports games consist of participants who form a "fantasy league," typically consisting of ten or twelve people.⁷¹ These participants draft actual, current players from a respective sports league's teams and compete against fellow participants, typically in a weekly head-to-head matchup in which the participants utilize their respective players' weekly statistics.⁷² Within the head-to-head match up, the team that totals the greatest number of points allotted for certain statistics in that given week is considered the

⁶⁰ *Id.* at 1282–83.

⁶¹ *Id.* at 1283.

⁶² Hylton, *supra* note 40, at 101.

⁶³ *Id.* at 107.

⁶⁴ *Id.* at 105.

⁶⁵ See generally *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media (C.B.C. I)*, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

⁶⁶ *Id.* at 1087 n.12.

⁶⁷ *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media (C.B.C. II)*, L.P., 505 F.3d 818 (8th Cir. 2007).

⁶⁸ Montague, *supra* note 3.

⁶⁹ See *C.B.C. I*, 443 F. Supp. 2d at 1107.

⁷⁰ Derrick Goold, *Local Firm Takes a Swing at MLB Over Fantasy Games*, ST. LOUIS POST-DISPATCH, Feb. 11, 2005, at D1.

⁷¹ See Getting Into a League, ESPN.COM, <http://games.espn.go.com/ffl/resources/help/content?name=introduction-videos> (last visited Nov. 5, 2012).

⁷² *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820–21 (8th Cir. 2007).

victor.⁷³ The process continues for the duration of the season, culminating with a league champion.⁷⁴ Online fantasy sports games are run by various fantasy sports providers,⁷⁵ many of which utilize players' names and information as well as players' likenesses in the form of their pictures, the use of which became the root of players' right of publicity claim against the provider in *C.B.C.*⁷⁶

In 2008, the Eighth Circuit, in a case involving online fantasy sports games, proffered an opinion on the interplay of the right of publicity and the First Amendment after Major League Baseball Advanced Media ("MLBAM") brought suit against a fantasy sports retailer, C.B.C., which hosted and charged its users to participate in fantasy sports games.⁷⁷ Pursuant to two consecutive license agreements, one in 1995 and another in 2002 ("2002 Agreement"), C.B.C. contracted with the MLBPA for the right to use MLB players' ("players") names, likenesses, and information.⁷⁸ The 2002 Agreement specifically gave C.B.C. the license to use "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" for its fantasy baseball games.⁷⁹ The 2002 Agreement also contained a provision by which C.B.C. agreed, upon expiration or termination of the agreement, to refrain from using the players' names, likenesses, and information, either directly or indirectly ("Non-Use Provision").⁸⁰ C.B.C. utilized the rights granted in the license agreements to run its fantasy baseball games, for which it charged participants a fee to play and to trade their respective players within their league.⁸¹ Additionally, C.B.C. provided participants the players' statistical information, which they could use in assessing which player to draft, trade, release, or sign.⁸²

Following the expiration of the 2002 Agreement, the MLBPA licensed MLBAM—the entity that exercises control over all MLB interactive media—a near exclusive right to control and license the players' names, likenesses, and information.⁸³ MLBAM subsequently began to provide fantasy baseball on MLB.com.⁸⁴ Instead of renewing the license agreement with C.B.C., MLBAM offered C.B.C. a commission to promote MLB.com fantasy baseball on its website,⁸⁵ meaning C.B.C. would no longer possess the authorization to utilize the players' names, likenesses, and information for use with its own fantasy baseball games.

The matter reached the Eighth Circuit when C.B.C., believing that it would be sued by MLBAM if it continued to operate its fantasy baseball games, brought an action against MLBAM in the Eastern District of Missouri, seeking a declaratory judgment that C.B.C. had the right to the unlicensed use of players' names, likenesses, and information in

⁷³ How Head-to-Head Fantasy Football Works, DRAFTSTREET.COM, <http://www.draftstreet.com/fantasy/football/head-to-head-fantasy-football/> (last visited Nov. 30, 2012).

⁷⁴ Regular Season and Playoffs Schedule in Standard Leagues, ESPN.COM, <http://games.espn.go.com/ffl/resources/help/content?name=regular-season-and-playoffs-standard> (last visited Nov. 5, 2012).

⁷⁵ See, e.g., Yahoo! Sports Fantasy Football, YAHOO! SPORTS, <http://football.fantasysports.yahoo.com> (last visited Dec. 2, 2011).

⁷⁶ *C.B.C. II*, 505 F.3d 818.

⁷⁷ See generally *C.B.C. II*, 505 F.3d 818.

⁷⁸ *Id.* at 821.

⁷⁹ *Id.*

⁸⁰ *Id.* at 824.

⁸¹ Conrad, *supra* note 10, at 416.

⁸² See *id.*

⁸³ *C.B.C. II*, 505 F.3d 818, 821.

⁸⁴ *Id.*; see *MLB.com 2011 Fantasy Baseball*, MLB.COM, <http://mlb.mlb.com/mlb/fantasy/fb/info/index.jsp> (last visited Oct. 29, 2011).

⁸⁵ *C.B.C. II*, 505 F.3d 818, 821.

connection with its fantasy baseball games.⁸⁶ In response, MLBAM alleged that C.B.C., through its unlicensed use of the players' names, likeness, and information for its fantasy baseball games, had violated the players' right to publicity, which was among the rights that the players, via the MLBPA, collectively licensed to MLBAM.⁸⁷ The MLBPA intervened on behalf of MLBAM and asserted a breach of contract claim against C.B.C. based on the Non-Use Provision within the 2002 Agreement.⁸⁸ The district court disagreed with MLBAM's claims and held that C.B.C. had not violated any right of publicity.⁸⁹ The court then granted C.B.C.'s summary judgment motion,⁹⁰ which MLBAM and MLBPA appealed to the Eighth Circuit.⁹¹

On appeal, the Eighth Circuit held that C.B.C.'s unauthorized use of the players' names, likeness, and information did in fact violate the players' right of publicity as the right was defined in Missouri.⁹² Missouri law required “(1) that the defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.”⁹³ Nonetheless, despite disagreeing with the district court's determination with regard to C.B.C.'s infringement on the players' right of publicity, the Eighth Circuit held that the First Amendment nonetheless preempted any such infringement by C.B.C.⁹⁴

The Eighth Circuit began its First Amendment analysis by noting the Supreme Court's holding in *Zacchini*, which explained that a party's right of publicity and the violation thereof must be balanced against the First Amendment.⁹⁵ Thus, the Eighth Circuit proceeded to attempt to balance C.B.C.'s unauthorized use of the players' names, likenesses, and information with C.B.C.'s First Amendment rights.⁹⁶ In doing so, the court held that the players' information, as used in C.B.C.'s fantasy baseball games, was within the public domain and was readily available not only to companies like C.B.C. but the public at large.⁹⁷ Additionally, the court rejected MLBAM's argument that C.B.C.'s use of the players' names, likeness, and information was not speech under the First Amendment.⁹⁸ Instead, the court held that C.B.C.'s interactive use of the players' names, likenesses, and information was expressive speech,⁹⁹ and the court further characterized such speech as “[s]peech that entertains[,]” which garners protection under the First Amendment.¹⁰⁰

In finding that C.B.C.'s First Amendment rights outweighed the players' right of publicity, the court even utilized an argument that MLB had made in 2001 in *Gionfriddo v. Major League Baseball*,¹⁰¹ where MLB argued that the league's unauthorized use of players' names, likenesses, and information was constitutionally protected.¹⁰² In

⁸⁶ *Id.* at 820.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F.Supp.2d 1077, 1107.

⁹⁰ *Id.*

⁹¹ See generally *C.B.C. II*, 505 F.3d 818.

⁹² *Id.* at 822–23.

⁹³ *Id.* at 822 (citing *TCI Cablevision*, 110 S.W.3d at 369).

⁹⁴ *Id.* at 824.

⁹⁵ *Id.* at 823 (citing *Zacchini*, 433 U.S. 562).

⁹⁶ *C.B.C. II*, at 823–24.

⁹⁷ *Id.* at 823.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996)).

¹⁰¹ See generally *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001).

¹⁰² *C.B.C. II*, 505 F.3d at 823–24 (quoting *Gionfriddo*, 94 Cal. App. 4th 400).

Gionfriddo, the California Court of Appeals held that the “recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball’s website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.”¹⁰³

Additionally, the court looked to the underlying public policies of the right of publicity and held that C.B.C.’s use of the players’ names, likenesses, and information did not implicate any state interests.¹⁰⁴ Specifically, the court noted that, in enforcing a right to publicity, states seek to promote an individual’s right to reap the benefits of his endeavors, including the right to earn a living, encourage personal productivity, and protect consumers from misleading advertising.¹⁰⁵ In concluding that C.B.C.’s use did not fall under these specific state interests, the court noted that “players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”¹⁰⁶ The court also held that C.B.C.’s actions did not constitute misleading advertising due to the fact that fantasy sports require the inclusion of every player for the game to function, which would not lead a participant to believe that a particular player is in any way associated with or endorsing C.B.C.¹⁰⁷

Finally, though the court agreed that the right of publicity is thought to advance certain non-monetary interests—specifically, to uphold an individual’s natural rights, to reward celebrity labor, and to avoid emotional harm—it did not find any such interests relevant with regard to the players and their claim against C.B.C.¹⁰⁸ According to the court, these non-monetary interests are not at issue because the players are rewarded separately for their labors by their respective team and any emotional harm would be a result of a respective player’s actual performance, not C.B.C.’s use of his name, likeness, or information.¹⁰⁹

Though both the district court and Eighth Circuit held that the First Amendment interests at play outweighed the players’ right of publicity interests,¹¹⁰ it is noteworthy to mention that only the district court mentioned the fantasy sports board games cases discussed above and sought to dismiss their precedential value.¹¹¹ Still, the district court only discussed *Palmer* in length and merely dismissed *Uhlaender* in a footnote, stating that both cases were “inconsistent with more recent case authority including the Supreme Court’s decision in *Zacchini*” but failed to provide further explanation.¹¹² Thus, though fantasy sports board games and online fantasy sports games are similar in premise and use of athletes’ identities, the district court, explicitly in its opinion, and the Eighth Circuit, by choosing to not even mention the two seemingly on-point board games cases, dismissed the

¹⁰³ *Gionfriddo*, 94 Cal. App. 4th 400, 411.

¹⁰⁴ *C.B.C. II*, 505 F.3d at 824.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *C.B.C. II*, 505 F.3d at 824.

¹¹⁰ *Id.* Moreover, the Non-Use Provision of the 2002 Agreement, in which the parties acknowledged that the MLBPA held exclusive right over players’ names, likenesses, and information, also contained a provision in which that C.B.C. agreed not to utilize those rights following the expiration or termination of the 2002 Agreement. *Id.* As a result, the Eighth Circuit held that because the First Amendment removed the players’ publicity rights from the ownership of the MLBPA and into the public domain, the MLBPA had breached its warranty of ownership. *Id.* at 825. Due to the MLBPA’s breach, the court held that C.B.C. was not obligated to honor the Non-Use Provision. *Id.*

¹¹¹ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F.Supp.2d 1077 (E.D. Mo. 2006).

¹¹² *Id.* at 1086–88, 1090.

cases' applicability and precedential value, though neither case has been expressly overruled.

C. VIDEO GAMES

Analogous to and important for the development of right of publicity doctrine in fantasy sports-related games is the doctrine's application to sports video games. Though the Supreme Court's only case with regard to the right of publicity is *Zacchini*, the Court recently heard a video game case that implicated the First Amendment in *Brown v. Entertainment Merchants Ass'n*.¹¹³ In *Brown*, a video-game association challenged a California statute that "prohibit[ed] the sale or rental of 'violent video games' to minors, and require[d] their packaging to be labeled '18'" on the grounds that it violated video-game makers' First Amendment protections.¹¹⁴ The Court held that the statute was unconstitutional because, in addition to being underinclusive, the statute overinclusively abridged the First Amendment rights of minors whose parents believed violent video games were harmless.¹¹⁵

Writing for the majority, Justice Scalia stated,

[V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but . . . it is difficult to distinguish politics from entertainment Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and the virtual world). That suffices to confer First Amendment protection.¹¹⁶

Scalia continued to assert that "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree."¹¹⁷

Further, the Court held that the statute at issue "abridge[d] the First Amendment rights of *young people* whose parents . . . think video games are a harmless pastime,"¹¹⁸ meaning the content of the videogames alone is not explicitly privy to absolute protection under the First Amendment, but that *Brown* needs to be read in conjunction with the interests at issue and analyzed accordingly. In terms of sports video games, those interests are the publicity rights of the athletes and the exploitation of their likenesses by video game manufacturers, interests that are nearly identical in the fantasy sports context. However, as previously mentioned, the Court has not heard another right of publicity case aside from *Zacchini*.

Though the Court has failed to provide any guidance with regard to the right of publicity and video games, a recent string of cases filed in federal courts by former student-athletes against video game manufacturers alleged the infringement of their right of publicity. These allegations sparked a First Amendment defense by the video game manufacturer and will perhaps shed light on the further development of the proper legal doctrine for balancing the right of publicity and First Amendment.

¹¹³ *Brown v. Entm't Merchants Ass'n*, 131 S.Ct. 2729 (2011).

¹¹⁴ *Id.* at 2732–33.

¹¹⁵ *Id.* at 2742.

¹¹⁶ *Id.* at 2733.

¹¹⁷ *Id.* (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000)).

¹¹⁸ *Brown*, 131 S.Ct. at 2742 (emphasis added).

1. *Keller v. Electronic Arts, Inc.*

Of these cases, the most publicized has been *Keller v. Electronic Arts, Inc.*, which was filed in California district court.¹¹⁹ Sam Keller, a former quarterback at Arizona State University and the University of Nebraska, alleged that Electronic Arts (“EA”), a video game software producer and manufacturer, used his likeness without his consent in its *NCAA Football* video games.¹²⁰ Specifically, Keller claimed that in the video game, EA used virtual football players that resembled actual student-athletes, evident from the fact that “they share the same jersey numbers, have similar physical characteristics and come from the same home state.”¹²¹ Though these virtual football players did not possess the actual student-athletes’ names, consumers could (and still can in subsequent editions) download each team’s rosters and the actual student-athletes’ names and upload them for use in the video game, a feature that EA has personally made available for its users.¹²² In addition to EA, Keller filed a right of publicity claim against the NCAA and its licensing agency, the Collegiate Licensing Company (“CLC”).¹²³

On January 15, 2010, the U.S. District Court for the Northern District of California consolidated *Keller* with other right of publicity claims,¹²⁴ as well as several antitrust claims, filed against EA, the NCAA, and CLC.¹²⁵ Following the consolidation, the action was subsequently referred to in the district court as *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.¹²⁶ Just over a month following the consolidation, the right of publicity claim made its way to the Ninth Circuit under the guise of *Keller v. Electronic Arts, Inc.*, while the antitrust claim remained in the district court.¹²⁷ Yet, more than two years after EA’s appeal to the Ninth Circuit, there has yet to be a resolution to either claim.

¹¹⁹ Complaint, *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). Another high profile case, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, arose from the use of a student-athlete’s likeness in a video game; however, in *O’Bannon*, the plaintiff alleged that the NCAA, its licensing entity, Collegiate Licensing Company (“CLC”), and video game manufacturer EA violated Section One of the Sherman Act by engaging in concerted action to unreasonably restrict his right to license his own image and likeness. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at *4 (N.D. Cal. Feb. 8, 2010).

¹²⁰ Order on Defendants’ Motions to Dismiss and Electronic Arts’ Anti-SLAPP Motion to Strike, *Keller*, 2010 WL 530108, *1-2.

¹²¹ *Id.* at *1.

¹²² *Id.*

¹²³ *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2010 WL 5644656 at *1 (N.D. Cal. Dec. 17, 2010)

¹²⁴ *Keller*, 2010 WL 530108, at *11.

¹²⁵ *O’Bannon* 2010 WL 445190; *Bishop v. Elec. Arts*, No. 09-4128 (N.D. Cal. 2009); *Newsome v. Nat’l Collegiate Athletic Ass’n*, No. 09-4882 (N.D. Cal. 2009); *Anderson v. Nat’l Collegiate Athletic Ass’n*, No. 09-5100 (N.D. Cal. 2009); *Wimprine v. Nat’l Collegiate Athletic Ass’n*, No. 09-5134 (N.D. Cal. 2009); *Jacobson v. Nat’l Collegiate Athletic Ass’n*, No. 09-5372 (N.D. Cal. 2009); *Rhodes v. Nat’l Collegiate Athletic Ass’n*, No. 09-5378 (N.D. Cal. 2009).

¹²⁶ No. 09-1967, 2010 WL 5644656 (N.D. Cal. Jan. 15, 2010). On October 17, 2011, the district court further consolidated the case *Russell v. National Collegiate Athletic Ass’n*, No. 11-4938 (N.D. Cal. 2011). Order Relating Cases, *In re NCAA Student Athlete Name & Likeness Litigation*, No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010).

¹²⁷ The litigation relative to the antitrust claim was filled with various procedural motions, orders, and even a sanction against the antitrust plaintiffs. A magistrate judge sanctioned the plaintiffs for overbroad and unduly burdensome discovery requests on non-parties, including the Big Ten and Fox Broadcasting Company. Order Denying Motions to Compel Production of Documents by Nonparties, No. 09-1967 (N.D. Cal. Feb. 27, 2012). The plaintiffs challenged the sanctions, but the district court denied their motion for relief from the magistrate’s issuance of sanctions. Order on Antitrust Plaintiffs’ Motion for Relief from Non-Dispositive Pretrial Order of Magistrate Judge, No. 09-1967 (N.D. Cal. Apr. 9, 2012). Moreover, the court’s acceptance of the claims has wavered. In May 2011, the district court granted EA’s motion to dismiss the antitrust plaintiffs claims, see Order Granting EA’s Motion to Dismiss and Denying CLC’s and NCAA’s Motions to Dismiss, No. 09-1967 (N.D. Cal. May 2, 2011), but also granted the plaintiffs leave to amend their complaint. A year later, the district court upheld

a. United States District Court for the Northern District of California

In late 2009, EA, the NCAA, and CLC all separately moved the district court to dismiss Keller's right of publicity claims, with EA also moving to strike Keller's claims pursuant to the California Code of Civil Procedure addressing Strategic Lawsuits Against Public Participation (referred to as an "anti-SLAPP statute").¹²⁸ Ultimately, the court denied EA and CLC's motion to dismiss, partially granted and partially denied the NCAA's motion to dismiss, and denied EA's motion to strike via the anti-SLAPP statute.¹²⁹

The district court, in ruling on EA's motion to dismiss, noted the history behind the right of publicity and its interplay with the First Amendment as an affirmative defense to infringement.¹³⁰ In its discussion, the court mentioned *Gionfriddo*—again, where MLB used retired players' names, likenesses, and information on its website and in video documentaries¹³¹—and *Montana v. San Jose Mercury News, Inc.*—where former NFL quarterback Joe Montana brought a misappropriation claim against a newspaper for the reproduction of newspapers bearing his image.¹³² In both of these cases, the California Court of Appeals applied the "public interest" defense to insulate each defendant's use of the respective plaintiff's name, likeness, and information from further judicial scrutiny.¹³³ But the district court distinguished Keller's and his fellow former student-athletes' right of publicity claims from *Gionfriddo* and *Montana*, holding that EA's video games are

unlike the works in *Gionfriddo* and *Montana*. The game does not merely report or publish Plaintiff's statistics and abilities. On the contrary, EA enables the consumer to assume the identity of various student athletes and compete in simulated college football matches. EA is correct that products created for entertainment deserve constitutional protection. But it does not follow that these protections are absolute and always trump the right of publicity.¹³⁴

As a defense, EA cited to *C.B.C.* to support the proposition that the First Amendment trumps its unauthorized use of Keller's name, likeness, and information.¹³⁵ However, the district court proceeded to distinguish *C.B.C.* from Keller's claim.¹³⁶ Specifically, the court held that success in the video game did not "depend on updated reports of the real-life players' progress during the college football season" and further noted that the game "provide[d] more than just the players' names and statistics; it offer[ed] a depiction of the student athletes' physical characteristics and . . . enable[d] consumers to control the virtual players on a simulated football field," which "goes far beyond what the court considered in *C.B.C.*."¹³⁷

the antitrust plaintiff's amended complaint by denying EA's motion for judgment on the amended pleadings; thus, for the time being, the antitrust plaintiffs' suit against EA was kept alive. Order Denying Electronic Arts Inc.'s Motion for Judgment on the Pleadings, No. 09-1967 (N.D. Cal. May 16, 2012).

¹²⁸ *See id.* at *1.

¹²⁹ *See id.* at *1, *22.

¹³⁰ No. 09-1967 (N.D. Cal. 2009).

¹³¹ *Id.* at *11 (citing *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 405–07 (2001)).

¹³² *Id.* at *10–12 (citing *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995)).

¹³³ *See id.* (citing *Gionfriddo*, 94 Cal. App. 4th at 411; *Montana*, 34 Cal. App. 4th at 794).

¹³⁴ *Id.* at *12 (citation omitted).

¹³⁵ No. 09-1967 at *12 (N.D. Cal. 2009).

¹³⁶ *Id.*

¹³⁷ *Id.* at *13.

Believing that EA's use of the student-athletes' likeness exceeded the scope of what courts had deemed permissible use in fantasy sports, the court rejected EA's "public interest" defense under the First Amendment.¹³⁸ The court also rejected EA's "transformative use" defense,¹³⁹ which insulates the infringement of one's right of publicity through the First Amendment as long as that use "contains significant transformative elements or . . . the value of the work does not derive primarily from the celebrity's fame."¹⁴⁰ Though the court's flat rejections of EA's First Amendment arguments were not immediately decisive for the case; the court may have tipped its hand with regard to how it would ultimately rule, and its analysis, when coupled with its denial of EA's anti-SLAPP motion, would become the subject of an appeal to the Ninth Circuit.¹⁴¹

EA, in addition to its motion to dismiss, moved to strike Keller's claims pursuant to a California anti-SLAPP statute, though it was again rejected by the district court.¹⁴² The anti-SLAPP statute, as found in the California Code of Civil Procedure, states that if a cause of action arises from the defendant's conduct "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue[, it] shall be subject to a special motion to strike, unless" the plaintiff demonstrates a probability that he or she will prevail on the cause of action.¹⁴³ EA argued that its conduct, which was the subject of Keller's cause of action, arose from protected activity and that Keller was unable to demonstrate a probability of prevailing on his claim.¹⁴⁴ In regard to the latter threshold, i.e., Keller's burden, EA argued that the plaintiff has a "substantial" burden to demonstrate that he will prevail on the claim; however, the court held that, on the federal level, a plaintiff did not have to meet as heightened a burden when responding to an anti-SLAPP motion as he would on the state level.¹⁴⁵ Instead, Keller's burden under the anti-SLAPP motion was to state his cause of action according to the "General Rules of Pleading" as outlined in Federal Rule of Civil Procedure 8.¹⁴⁶ The court held that Keller had sufficiently stated his claim and subsequently denied EA's anti-SLAPP motion.¹⁴⁷

b. Ninth Circuit Court of Appeals

Following the district court's denial of EA's anti-SLAPP motion, EA appealed to the Ninth Circuit.¹⁴⁸ EA argued that it had established that Keller's claims had in fact arisen from the exercise of its First Amendment rights, that its games related to an issue of public interest, and that Keller failed to meet his burden of demonstrating a probability of prevailing on his claim, specifically, because the First Amendment outweighed any infringement of Keller's right of publicity.¹⁴⁹

¹³⁸ *Id.* at *12.

¹³⁹ *Id.* at *9–10.

¹⁴⁰ *Id.* at *6–7.

¹⁴¹ *Lawsuit Against NCAA Set for Appeal*, FOX SPORTS (Feb. 13, 2011), available at <http://msn.foxsports.com/collegefootball/story/Sam-Keller-NCAA-video-game-lawsuit-021311> (last visited Nov. 9, 2012).

¹⁴² No. 09-1967 at *22.

¹⁴³ *Id.* at *20 (citing CAL. CIV. PRO. CODE § 425.16(b)(1) (2010)).

¹⁴⁴ *See id.* at *21.

¹⁴⁵ *Id.* at *21–22.

¹⁴⁶ *Id.* at *22.

¹⁴⁷ *Id.*

¹⁴⁸ *See generally* Appellant's Opening Brief, *Keller v. Elec. Arts, Inc.* (9th Cir. Aug. 30, 2010) (No. 10-15387), 2010 WL 5079222.

¹⁴⁹ *Id.*

First, EA argued that its games met the initial threshold required by California's anti-SLAPP statute—that the plaintiff's claim arose from a protected right of petition or free speech in connection with a public issue.¹⁵⁰ Citing federal district and circuit court precedent, including *C.B.C.*, EA contended that its video games were expressive works entitled to First Amendment protection and that, as a result, Keller's cause of action arose from EA's exercise of its free speech rights.¹⁵¹ Moreover, EA sought to demonstrate that its video games were sufficiently connected to a public issue so as to fall within the scope of the anti-SLAPP statute by noting the overwhelming public interest present in collegiate sports.¹⁵²

Second, as it did in the district court, EA contended that Keller failed to meet the latter threshold required to defeat an anti-SLAPP motion, failing to demonstrate the probability that he would prevail on his right of publicity claim.¹⁵³ EA acknowledged the various tests that have arisen throughout the lower courts since the Supreme Court's ruling in *Zacchini* and argued that, under any of these tests, Keller could not demonstrate a probability of prevailing on his right of publicity claim against EA.¹⁵⁴ According to EA, in each instance, whether under the "transformative use" test, the *Rogers* test (discussed below), the public-interest test, or California's statutory "public-affairs exemption," EA's First Amendment rights trumped Keller's right of publicity.¹⁵⁵

In response, Keller, though not disputing that EA sufficiently met its burden pursuant to the anti-SLAPP statute, argued that he sufficiently met his burden by demonstrating a probability that he would prevail on his right of publicity claim.¹⁵⁶ Among his arguments, Keller first contended that EA, through its licensing agreement with CLC, "released any right to replicate players' likenesses in its videogames"¹⁵⁷ and that it could not subsequently seek to utilize such rights under the First Amendment or the anti-SLAPP statute.¹⁵⁸ Even so, Keller argued that EA failed to prove that, as a matter of law, it would prevail on its First Amendment-affirmative defenses—specifically, its alleged successes under the "transformative use" test, the *Rogers* test, the "public interest" test, and California's statutory "public-affairs exemption."¹⁵⁹

On February 15, 2011, the Ninth Circuit heard oral arguments from the parties¹⁶⁰; however, following the death of Judge Pamela Rymer, one of the judges sitting on the three-judge panel, the Ninth Circuit requested that the attorneys reargue the motion,¹⁶¹ which was

¹⁵⁰ *Id.* at *15–18.

¹⁵¹ *Id.*

¹⁵² *Id.* at *18–20.

¹⁵³ *Id.* at *20–21.

¹⁵⁴ See generally Appellant's Opening Brief, *Keller v. Elec. Arts, Inc.* (9th Cir. Aug. 30, 2010) (No. 10-15387), 2010 WL 5079222, at *24–49.

¹⁵⁵ See *id.*

¹⁵⁶ Appellee's Brief, *Keller v. Elec. Arts, Inc.* (9th Cir. Oct. 29, 2010) No. 10-15387, 2010 WL 5079223, at *12–59.

¹⁵⁷ *Id.* at *18.

¹⁵⁸ *Id.* at *19–20.

¹⁵⁹ See *id.* at *14–59.

¹⁶⁰ U.S. CT. OF APP. FOR THE NINTH CIR., ORAL ARGUMENT DATES & LOCATIONS: LOCATION OF HEARING FOR THE FEBRUARY CALENDAR, Dec. 30, 2010, at 1, available at <http://www.ca9.uscourts.gov/datastore/calendaring/2010/12/30/npa021411.pdf>.

¹⁶¹ Jill Redhage, *Judge Keeps NFL Players Case Alive*, SAN FRANCISCO DAILY JOURNAL, Apr. 3, 2012, available at <http://twtlaw.com/news/TW0412.pdf>.

rescheduled for July 13, 2012.¹⁶² Still, at the time of this Article's writing, the Ninth Circuit has yet to issue a dispositive ruling on the merits of Keller's right of publicity claim. While manufacturers, sports leagues and associations, athletes, and legal scholars eagerly await the Ninth Circuit's ruling, on the opposite side of the country, a New Jersey district court issued a ruling contrary to the California district court, accepting EA's First Amendment defense in its use of student-athletes' likenesses in its video games—a case that also finds itself awaiting a decision from a federal appellate court following an appeal.¹⁶³

2. *Hart v. Electronic Arts, Inc.*

In *Hart v. Electronic Arts, Inc.*,¹⁶⁴ the plaintiff, Ryan Hart, a former Rutgers University football player, filed suit against EA in New Jersey district court, alleging, as did Keller, that the company had violated his right of publicity by “misappropriating his identity and likeness for a commercial purpose” in its video game, *NCAA Football*.¹⁶⁵ In response, EA argued that “video games are not commercial speech” and were thus entitled to “full First Amendment protection,” as evidenced by the U.S. Supreme Court's holding in *Brown*.¹⁶⁶ Hart's cause of action mirrors that of Sam Keller, with EA's response and arguments consistent throughout both cases.¹⁶⁷ Though *Hart* had a different result at the district court level, like *Keller*, the matter has reached the court of appeals, and the respective outcomes of these cases could be enough for the Supreme Court to rule on the proper balancing test for the right of publicity and First Amendment.

a. U.S. District Court for New Jersey

Contrary to the *Keller* court's analysis in the motion hearing, the U.S. District Court for New Jersey found that EA's infringement on the plaintiff's right of publicity was insulated by the First Amendment under two separate balancing tests, the “transformative use” test and the *Rogers* test, though the court refrained from formally adopting either.¹⁶⁸

The transformative test, which the court noted was derived from copyright law, was developed primarily by California state courts.¹⁶⁹ The district court observed that, in 2001, the California Supreme Court, ruling on a right of publicity case with regard to the unauthorized use of The Three Stooges' likeness, held that the most appropriate test to balance First Amendment and right of publicity interests was a “test incorporating elements of the copyright fair use doctrine.”¹⁷⁰ Specifically, the appropriate determination was, first, whether the new work was “transformative” and, second, to what extent.¹⁷¹ A party's work was “transformative” if the original work synthesized the celebrity likeness from “raw materials.”¹⁷²

¹⁶² U.S. CT. OF APP. FOR THE NINTH CIR., ORAL ARGUMENT DATES & LOCATIONS: LOCATION OF HEARING FOR THE JULY CALENDAR, July 9, 2012, at 1, available at http://www.ca9.uscourts.gov/datastore/calendaring/2012/07/13/sf07_12.pdf.

¹⁶³ 808 F. Supp. 2d 757 (D.N.J. Sept. 9, 2011).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 762-63.

¹⁶⁶ *See id.* at 768-69 (citing *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2733 (2011)).

¹⁶⁷ *See id.*; *see* *Keller v. Elect. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. May 5, 2009).

¹⁶⁸ *See* *Keller v. Elect. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. May 5, 2009), at *51.

¹⁶⁹ *Id.* at *55.

¹⁷⁰ *Id.* at *56 (citing *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (2001)).

¹⁷¹ *Id.* at *57 (quoting *Comedy III*, 21 P.3d at 808) (citation omitted).

¹⁷² *Id.* at *58 (quoting *Comedy III*, 21 P.3d at 809).

In determining the proper test, the *Hart* court found that “analogiz[ing] the right of publicity to federal copyright law” was appropriate due to the fact that, in the court’s eyes, the U.S. Supreme Court did just that in *Zacchini* when it analyzed a right of publicity claim under copyright principles.¹⁷³ As a result of the Court’s approach in *Zacchini*, the *Hart* court opined that the transformative test, utilizing copyright law’s fair use doctrine principles, adequately balanced the interests at odds under the right of publicity and the First Amendment.¹⁷⁴

Applying the transformative test to EA’s use of Hart’s likeness, the court held that, “[v]iewed as a whole, there [were] sufficient elements of EA’s own expression found in the game that justify the conclusion that its use of Hart’s image [was] transformative and, therefore, entitled to First Amendment protection.”¹⁷⁵ The court even cited to *C.B.C.*, stating that the same reasoning applied with regard to “the use of player names, statistics, and biographical data.”¹⁷⁶

Moreover, though the game utilized a “virtual player” with a close resemblance to Hart, the court noted that the game allowed users to alter the virtual player, his features, and other personal factors and was thus transformative in nature.¹⁷⁷ The court focused its analysis and application of the First Amendment on the fact that a user could alter a virtual “player’s height, weight, hairstyle, face shape, body size, muscle size, and complexion,” which “alone makes the game a transformative use of Hart’s image.”¹⁷⁸ Though the game included a photograph of Hart in a photomontage, the court stated that such an inclusion makes up only a minimal portion of the work so as not to impact the transformative test and the court’s ultimate finding.¹⁷⁹

Though the court in *Hart* held that the *Rogers* test did not directly apply to the facts of the case at issue,¹⁸⁰ for the sake of argument, the court believed that EA’s use of Hart’s likeness would nonetheless be insulated by the First Amendment if it were to apply the *Rogers* test.¹⁸¹ As the court stated, the *Rogers* test, created by the Second Circuit in the trademark case of *Rogers v. Grimaldi*,¹⁸² is typically used by courts “in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing the product.”¹⁸³ The *Rogers* test serves as a “relevance test” and, as applied to the right of publicity, is composed of two prongs: “(a) whether the challenged work is wholly unrelated to the underlying work; or (b) whether the use of the plaintiff’s name is a disguised commercial advertisement.”¹⁸⁴

Applying the *Rogers* test to EA’s conduct, the court ruled the Hart’s image and the use thereof was greatly relevant to EA’s game and that such use could not be reasonably thought to mislead consumers with regard to the video game’s content or source.¹⁸⁵ Rather,

¹⁷³ *Id.* at *61 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977)).

¹⁷⁴ *Keller v. Elect. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. May 5, 2009) at *62.

¹⁷⁵ *Id.* at *73.

¹⁷⁶ *Id.* at *74, note 22 (citing *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 823 (8th Cir. 2008)).

¹⁷⁷ *Id.* at *74.

¹⁷⁸ *Id.* at *76.

¹⁷⁹ *Id.* at *79.

¹⁸⁰ *Keller v. Elect. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. May 5, 2009) at *100.

¹⁸¹ *Id.* at *104.

¹⁸² See generally 875 F.2d 994 (2d Cir. 1989).

¹⁸³ *Id.* at *83–84 (quoting *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 956 (6th Cir. 2003) (citation omitted)).

¹⁸⁴ *Id.* at *102 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1004(2d Cir. 1989)).

¹⁸⁵ *Id.* at *100–01.

the court concluded that EA's use of Hart's image constituted expressive conduct and that the First Amendment interests at play outweighed Hart's right of publicity under the *Rogers* test.¹⁸⁶ Despite finding for EA, the court's decision would not be the final ruling on the matter. Like EA in *Keller*, Hart appealed the district court's holding to the court of appeals.¹⁸⁷

b. Third Circuit Court of Appeals

Though there was no anti-SLAPP statute at issue as in *Keller*, the issue on appeal in *Hart* still focused on the proper balancing of Hart's right of publicity with EA's First Amendment protections.¹⁸⁸ In particular, on appeal, Hart argued that, though EA's games contained expressive elements, the district court failed to properly balance the competing rights of publicity and the First Amendment at issue.¹⁸⁹ Hart contended that EA's infringement on his right of publicity would still be impermissible whether the court uses the "transformative use" test or an "ad hoc" balancing test, and, though EA may succeed under the *Rogers* test, the test was applicable exclusive to alleged violations of the Lanham Act, not where a balancing of the right of publicity and First Amendment is required, and, further, it failed to adequately balance the parties' interests.¹⁹⁰

More specifically, in contrast to EA, Hart advocated for the appellate court to utilize the "predominant use" test, which he believed best protected parties' "core interests" and best reflected the Supreme Court's opinion in *Zacchini*.¹⁹¹ He argued that the test best protects important state interests underlying the right of publicity by finding for a plaintiff if the defendant's use of the "plaintiff's name or likeness 'predominantly exploits the commercial value of an individual's identity,' but not where that use predominantly involves 'artistic or literary expression.'" ¹⁹² Thus, according to Hart, when the district court applied the "transformative use" test and found that EA's use of Hart's likeness was transformative based on users' opportunity to alter the avatars and the game's creative elements, the court incorrectly allowed commercial exploitation to outweigh his valid right of publicity, an important state interest.¹⁹³ Instead, Hart contended that EA's alleged infringement was not expressive and failed to align with the principles underlying the use of the First Amendment; thus, he argued that the court could uphold his right of publicity claim without significantly impacting EA's First Amendment rights.¹⁹⁴

Conversely, EA argued for the Third Circuit to uphold the lower court's application of the "transformative use" test, citing the creative and interactive elements of its games outside of Hart's alleged likeness and statistics, which EA referred to as "one of countless 'raw materials' from which [it] creates its own expressive work."¹⁹⁵ Moreover, it contended that the district court, in its analysis under the *Rogers* test, correctly noted that EA's First Amendment rights would similarly outweigh Hart's right of publicity¹⁹⁶ and,

¹⁸⁶ *Id.*

¹⁸⁷ See Notice of Appeal, *Hart v. Elec. Arts, Inc.* (3d Cir. Oct. 7, 2011) (No. 11-3750).

¹⁸⁸ Brief for Petitioner at *1, *Hart v. Elec. Arts, Inc.* (3d Cir. Feb. 10, 2012) (No. 11-3750).

¹⁸⁹ See *id.* at *25, *28.

¹⁹⁰ *Id.* at *30, *49; See Appellant's Reply Brief, *Hart v. Elec. Arts, Inc.*, at *13, *22, *26, (3d Cir. July 19, 2012) (No. 11-3750).

¹⁹¹ Brief for Petitioner at *30, *49, *supra* note 188; Appellant's Reply Brief at *3-8, *supra* note 190.

¹⁹² Brief for Petitioner at *30, *49, *supra* note 188, (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374).

¹⁹³ *Id.* at *34, *39; Appellant's Reply Brief at *12-13, *27-30, *supra* note 190.

¹⁹⁴ Appellant's Reply Brief at *33-35, *supra* note 190.

¹⁹⁵ Brief for Defendant-Appellee Electronic Arts Inc. at *33-34, *Hart v. Elec. Arts, Inc.* (3d Cir. May 16, 2012) (No. 11-3750).

¹⁹⁶ *Id.* at *46.

further, that Hart was incorrect in concluding that the test was reserved solely for Lanham Act claims.¹⁹⁷ Believing that the *Rogers* test provided a clearer and more predictable approach, EA rejected the “predominant use” test as endorsed and advocated by Hart, noting that it was too subjective.¹⁹⁸ Instead, EA urged the Third Circuit to adopt the *Rogers* test as its uniform approach to balancing the right of publicity and the First Amendment, which, it argued, would cause the court to rule in its favor.¹⁹⁹

As evidenced by its procedural history, and the varying and conflicting First Amendment and right of publicity American jurisprudence underlying the parties’ arguments, the *Hart* litigation has become considerably complicated and its end result all but certain. The Third Circuit, like the Ninth Circuit in *Keller*, is faced with a wide range of case law and tests for which to apply to the parties’ respective, competing interests. Nonetheless, the court could still render a decision by the year’s end, with oral arguments taking place mid-September 2012.²⁰⁰

3. Comparing *Keller* and *Hart*

The stark differences between the district courts’ respective holdings in *Keller* and *Hart* are readily apparent and the unique timing surrounding the cases—the district court in *Hart* issuing its holding only a year and a half following the district court’s decision in *Keller*—allowed for such differences to be brought to the forefront by the New Jersey district court and EA throughout the *Hart* litigation. Recognizing that its holding was in direct conflict with *Keller*, the district court in *Hart* distinguished its decision on various procedural and substantive grounds.²⁰¹ Moreover, in its *Hart* brief to the Third Circuit, EA downplayed the court’s holding in *Keller*, characterizing it as “misplaced” and claiming that the *Keller* court “failed to consider the interactivity of EA’s works” when deciding on its transformative nature.²⁰²

Regardless of the attempts by the *Hart* court and EA to distinguish the two cases, it is evident that the each district court’s decision relative to the interplay between the right of publicity and First Amendment was a result of two varied interpretations of *Zacchini* and varied applications of tests created by federal and state courts following the Court’s holding. Juxtaposing the district courts’ analyses in *Keller* and *Hart* exemplifies how, based on two very similar, if not identical, fact patterns, the ambiguity surrounding *Zacchini* and its progeny can lead to two entirely different holdings. *Keller* and *Hart*, along with other sports-related games cases and other right of publicity cases, demonstrate the need for the Supreme Court to set forth a clear standard so that courts can consistently determine the appropriate interplay between the right of publicity and the First Amendment, a necessity that will be all the more apparent if the Ninth Circuit and Third Circuit render divergent holdings on the matter.

¹⁹⁷ *Id.* at *49.

¹⁹⁸ *Id.* at *52.

¹⁹⁹ *Id.* at *46.

²⁰⁰ See Letter from Marcia Waldron, Clerk, Third Circuit Court of Appeals Clerk, to Julie A. Ahrens, Esq. et al. (August 30, 2012).

²⁰¹ *Hart*, No. 09-5990, *80–83 (D.N.J. Sept. 8, 2011).

²⁰² Brief for Defendant-Appellee Electronic Arts Inc., *supra* note 195, at *43–44.

IV. A CALL FOR THE U.S. SUPREME COURT TO CORRECT INCONSISTENCIES IN BALANCING THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

“As the commercialization of [athletics] has grown, the products displaying the names, images, likenesses, statistics, numbers, and characteristics of . . . athletes have become commonplace in the stream of commerce.”²⁰³ Advances in both commercialization and technology have fostered greater opportunities for people to achieve fame; however, it brings with it greater opportunity for others to exploit, through unauthorized means, one’s celebrity status. In response, federal and state courts have been exposed to a fair share of right of publicity claims that require the balancing of those interests with the First Amendment. Conversely, even amidst this development, the U.S. Supreme Court has heard only one case relative to the two doctrines when, in 1977, it set forth an ambiguous test for balancing the right of publicity and First Amendment.

Because of the Court’s reticence to render another opinion on the matter, lower courts have been left to their own devices to interpret the balancing test enunciated in *Zacchini* and to craft it to fit new forms of commercialization and technology. As a result, within the lower courts’ interpretation of the right of publicity doctrine, there has been confusion as to “what constitutes ‘commercial use,’ what constitutes an ‘identity,’ and when the First Amendment protects the use.”²⁰⁴

The paucity of right of publicity and First Amendment cases heard by the Supreme Court is not for a lack of opportunity. On several occasions, the Court has rejected requests for review on right of publicity cases that implicate the First Amendment,²⁰⁵ including cases in the sports context. In 2000, the Court denied a writ of certiorari petition from MLBAM following the Tenth Circuit’s ruling in *Cardtoons, L.C. v. Major League Baseball Advanced Media*,²⁰⁶ a case involving the production of trading cards that featured caricatures of MLB players.²⁰⁷ Upon completing its balancing test, the Tenth Circuit concluded that the players’ right of publicity was outweighed by the parodied cards, which were an “important form of entertainment and social commentary that deserve First Amendment protection.”²⁰⁸ Moreover, in 2008, following the Eighth Circuit Court’s ruling in *C.B.C.*, the Court again denied MLBAM’s petition for writ of certiorari.²⁰⁹ Like *Cardtoons*, the Eighth Circuit found that the First Amendment interests at issue outweighed the players’ right of publicity interest.²¹⁰

Because the Court refused to grant review of the aforementioned right of publicity and First Amendment cases, *Zacchini* remains the only guiding principle for lower courts. Even so, not all courts are quick to adhere to the principles enunciated in *Zacchini*, some even explicitly renouncing its holding.²¹¹ In *Cardtoons*, the Tenth Circuit postulated that *Zacchini* “is a red herring” because, in the case, the plaintiff “complained of the appropriation of the economic value of his performance, not the economic value of his

²⁰³ Dennie, *supra* note 35, at 646.

²⁰⁴ Karcher, *supra* note 11, at 557.

²⁰⁵ See e.g., *Samsung Elec. Am. v. White*, 971 F.2d 1395, *cert. denied*, 508 U.S. 951 (1993).

²⁰⁶ See generally *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 182 F.3d 1132, *cert. denied*, 531 U.S. 873 (2000).

²⁰⁷ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 962 (10th Cir. 1996) (“*Cardtoons II*”).

²⁰⁸ *Id.* at 976.

²⁰⁹ See generally *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.* 505 F.3d 818, *cert. denied*, 553 U.S. 1090 (2008).

²¹⁰ *Id.* at 824.

²¹¹ See, e.g., *Cardtoons II*, 182 F.3d at 970.

identity.”²¹² Moreover, as a dissenting federal appellate judge aptly described the current landscape, even following the Court’s “instructive” opinion, “the point of confusion most associated with the right of publicity law is its interplay with the First Amendment.”²¹³

As evidenced in cases dealing with sports-related games, in response to *Zacchini*, state and federal courts have developed an inconsistent standard for which to balance the right of publicity and the First Amendment.²¹⁴ For instance, on the state level, “Missouri state courts apply a ‘predominant purpose’ test”;²¹⁵ California state courts apply a “transformative” test;²¹⁶ Kentucky state courts apply the *Rogers* (a.k.a. “relatedness”) test;²¹⁷ and New York and Virginia state courts use a “purposes of trade” test²¹⁸—all varying standards for which courts interpret the interplay between the right of publicity and the First Amendment. Moreover, there are similar inconsistencies among the federal appellate courts. The Second Circuit and Sixth Circuit apply the *Rogers* test (the same as Kentucky);²¹⁹ the Eighth Circuit,²²⁰ the Tenth Circuit,²²¹ and the Sixth Circuit,²²² (in addition to its use of the *Rogers* test) weigh the “societal interests in free use of famous persons’ identities against the particular *plaintiffs’* interests in preventing exploitation”;²²³ and, in some contexts, the Ninth Circuit refrains from insulating a right of publicity violation altogether if it is for a commercial use to sell products,²²⁴ though its stance may change following its decision in *Keller*. All in all, within the various federal circuits, it appears that the First Amendment weighs “more heavily against some publicity-rights plaintiffs than against others.”²²⁵ And these inconsistencies may become all the more transparent if the Ninth Circuit in *Keller* and Third Circuit in *Hart* rule differently on the matter.

In addition to these inconsistencies, commentators have argued that, regardless of the existence of the varied tests, the federal appellate courts incorrectly apply their own adopted tests.²²⁶ Instead of focusing on what is being used, courts “must focus on *how* the player’s name or likeness is being used.”²²⁷ Alternatively, at least one scholar argues that, instead, specific attention should be paid to the fact that none of the commercial endeavors that utilize athletes’ identities would exist if it were not for the use athletes’ identity.²²⁸ The several appellate courts that found that companies’ unauthorized use of athletes’ right of publicity was protected under the First Amendment consistently utilized a similar argument. The courts contended that the right of publicity was created to incentivize celebrities—in

²¹² *Cardtoons II*, 182 F.3d at 970.

²¹³ *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 954 (6th Cir. 2003) (Clay, J. dissenting).

²¹⁴ Conrad, *supra* note 10, at 414–16; Petition for Writ of Certiorari, Major League Baseball Advanced Media v. C.B.C. Distrib. & Mktg., Inc., No. 07-1099, 3 (U.S. Feb. 22, 2008).

²¹⁵ Petition for Writ of Certiorari, *C.B.C.*, No. 07-1099, 3 (citing *TCI Cablevision*, 110 S.W.3d 363)).

²¹⁶ *Id.* (citing *Comedy III Prods.*, 21 P.3d 797).

²¹⁷ *Id.* (citing *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001)).

²¹⁸ *Id.* (citing *Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 362–63 (Va. 1995)); *Gautier v. Prof-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952)).

²¹⁹ *Id.* (citing *Rogers*, 875 F.2d 994; *Parks v. LaFace Records*, 329 F.3d 437, 447 (6th Cir. 2003)).

²²⁰ *Id.* (citing *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824).

²²¹ Petition for Writ of Certiorari, *C.B.C.*, No. 07-1099, 3 (citing *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1999)).

²²² *Id.* (citing *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 954 (6th Cir. 2003)).

²²³ *Id.* at 3–4 (emphasis in original).

²²⁴ *Id.* at 3 (citing *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992)).

²²⁵ *Id.* at 4.

²²⁶ See, e.g., Karcher, *supra* note 11.

²²⁷ Karcher, *supra* note 11, at 573 (emphasis added).

²²⁸ See *id.* at 570.

those cases, athletes—to continue to aspire for creativity and achievement with the knowledge that they will reap the reward of their work²²⁹ but that this incentive disappears when an athlete is compensated through means outside of his publicity rights.²³⁰ Because of the athlete's additional compensation, as noted by one circuit court, the incentive for creativity and achievement in sports in connection with athletes' right of publicity is frequently overstated.²³¹

However, though this consideration is not necessarily the crux of the courts' argument, it should not have any part of the analysis, especially when put in context of amateur players, who are not compensated at all. Using the fact that players are paid large sums separate from the licensed use of their names, likenesses, and information to trump a right of publicity violation essentially renders the right of publicity doctrine useless. The doctrine is mostly utilized by celebrities, as they are the few identities in society that have high enough of a commercial value to implicate the right of publicity. If courts were to nullify a celebrity's right of publicity claim based on the fact that he or she makes large sums of money separate from licensing the rights to his or her name, likeness, or information, the right of publicity doctrine would never prevail, as celebrities more often than not make their primary income from revenue streams separate from licensing the rights to their name, likeness, or information.²³² It is highly unlikely that the Court in *Zacchini* meant for its balancing test to develop to the degree in which it now threatens the very existence of the right of publicity doctrine.

These varied, and sometimes problematic, approaches by the lower courts, the Court's refusal to hear a right of publicity and First Amendment case, and the increasing issues introduced by new technology have prompted critical responses from numerous commentators.²³³ Many have suggested that because the right of publicity and First Amendment jurisprudence is fraught with confusion, courts should adopt a uniformed standard that better takes into account the interests at play or, further, that Congress should federalize the right of publicity as it does other intellectual property rights and include in the federal statute an appropriate First Amendment exception.²³⁴ Regardless, something must be done, and soon, to reroute the right of publicity and First Amendment jurisprudence, especially as it pertains to the use of names, likenesses, and information of players and student-athletes.

V. CONCLUSION

As emphasized throughout this Article, society's ever-growing desire to commercialize and the developing nature of technology, when both are combined with sports, creates a setting ripe for a right of publicity claim. The doctrine was meant to counteract the infringement of a celebrity's identity, but the First Amendment creates a direct tension with the right of publicity. Nonetheless, the Supreme Court has allowed this

²²⁹ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973-74 (10th Cir. 1999) ("Cardtoons IP"); see also *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007).

²³⁰ See e.g., *Cardtoons II*, 95 F.3d at 974; *ETW*, 332 F.3d at 938; *C.B.C.*, 505 F.3d at 824.

²³¹ *Cardtoons II*, 95 F.3d at 974.

²³² See Petition for a Writ of Certiorari, *C.B.C.*, No. 07-1099, *24 (U.S. Feb. 22, 2008).

²³³ See, e.g., Conrad, *supra* note 10; Karcher, *supra* note 11; Scott R. Chandler, *Whose Right is it Anyway?: How Recent Cases and Controversies Have Blurred the Lines Between First Amendment Protection and an Athlete's Right of Publicity*, 21 MARQ. SPORTS L. REV. 315 (2010).

²³⁴ See e.g., Conrad, *supra* note 10; Karcher, *supra* note 11; Chandler, *supra* note 233, at 336-37.

tension to linger, which has caused inconsistent and, at times, incoherent jurisprudence by lower courts.

The nature of players and student-athletes and the increasing use of their identities, both in an authorized and unauthorized fashion, makes it more probable than not that if the Court chooses to hear a right of publicity and First Amendment case, it will be sports-related—perhaps the *Keller* or *Hart* cases currently residing in the Ninth and Third Circuits, respectively. Professional and amateur sports in the United States are multi-billion dollar industries, which leave a lot of room for others to exploit the core of those industries—the players and student-athletes. However, like other right of publicity and First Amendment cases, outside of the sports context, courts have not maintained consistency, evidenced from courts' rulings in fantasy sports board games, online fantasy sports, and, a similar though somewhat nuanced industry, sports video games. The balancing test enunciated by the Court in *Zacchini* has proved, altogether, misleading, and, at some point, its inconsistent application will boil over, if it has not already. If the Court continues to refuse to hear and reframe its right of publicity and First Amendment jurisprudence, sports leagues and associations, professional and amateur athletes, those who license for the right to utilize athletes' identities, and those who infringe on athletes' right of publicity will suffer from the resulting legal uncertainties.



Cyber-Plagiarism for Sale!: The Growing Problem of Blatant Copyright Infringement in Online Digital Media Stores

Sam Castree, III*

Abstract: While much ink and rhetoric have been spilled over cyber-piracy, there has been little mention of the problem of what we shall call “cyber-plagiarism”: thieves copying completely the works of others and selling them in online digital media stores like Apple’s App Store and Amazon’s Kindle Store. Because the current state of the Digital Millennium Copyright Act does not properly address cyber-plagiarism and digital media stores, this article suggests a new safe harbor to be added to the Digital Millennium Copyright Act that is fair both to the legitimate authors and to digital media store operators. The proposed safe harbor would clarify many of the ambiguities of the current § 512(c) safe harbor for “Information Residing on Systems or Networks At Direction of Users”; it would place slightly more stringent duties on digital media store operators, in return for significantly limiting the amount of damages for which the operators would be liable under secondary copyright liability.

Introduction

The Internet has empowered authors to share their creative works like never before. Anyone with a personal website can upload his creative works for the world to freely access. Moreover, in recent years, many online platforms, such as Apple’s iTunes App Store and Amazon.com’s Kindle Store, have emerged allowing authors to earn money on their works through online sales. Take, for example, the game “Achilles Defense,” published by Hanoi, Vietnam-based PTT Solutions, Inc. PTT began selling Achilles Defense in Apple’s App Store, for use on the iPhone, on April 18, 2011. The game sold well, hitting the Top 10 in 17 different countries; it was also featured in the ‘New & Noteworthy’ section on the App Store. There was only one problem: PTT did not actually create Achilles Defense.

The actual game is “Clash of the Olympians,” a free-to-play offering on the Internet, released in August, 2010 by a small video game development company from Uruguay called Ironhide Game Studios.¹ PTT had copied Clash of the Olympians in its entirety, changed the name, removed two of the three playable characters, and (wisely, for them) exchanged the “Credits” link on the title screen for “Instructions” (sic.). Otherwise, Achilles Defense contained all of Clash of the Olympians’ original artwork and music, including two songs by a Wisconsin housewife named Shannon Mason.² At the time, Shannon’s husband had been out of work for several months, and the pair were in rough financial straits. In fact, their only income at that point came from licensing fees from Shannon’s music.³

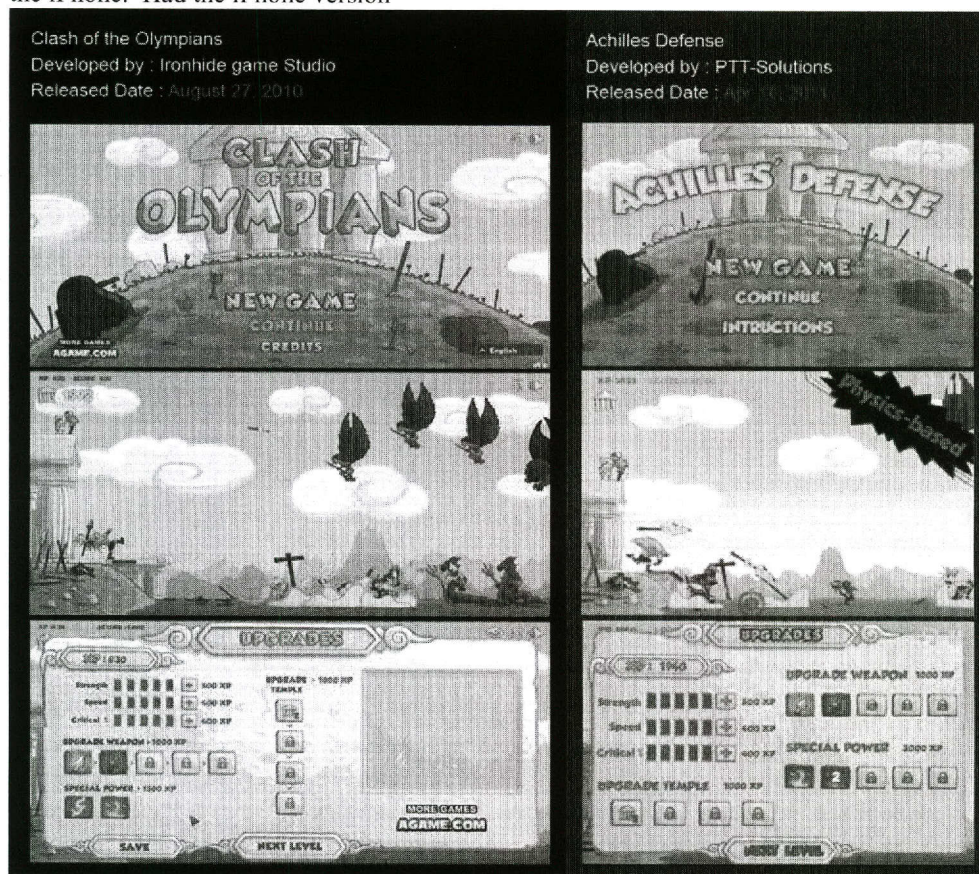
*J.D. expected May 2013, Chicago-Kent College of Law; B.S. in Cinema Studies, 2006, University of Illinois. Many thanks to Professors Edward Lee and Grant Shackelford for their comments and assistance throughout the process of making this Note a reality. This Note is dedicated to Shannon Mason and all of the fine people of The Shizz.

¹ The real game is available at http://ironhidegames.com/clash_of_the_olympians.php.

² Except where stated otherwise, all details from Shannon’s ordeal come from my own personal communications with her.

³ Owen Good, *iTunes’ Approval of Flash Game Ripoff Raises a Troubling Question for Gamers*, KOTAKU (Apr. 29, 2011 7:40 p.m.), kotaku.com/5797282/itunes-approval-of-flash-game-ripoff-raises-a-troubling-question-for-gamers.

As soon as the people at Ironhide learned about Achilles Defense, they contacted Apple to assert that their copyrighted work was being infringed. Apple, however, merely sent a canned response, and did not remove Achilles Defense from the App Store. Meanwhile, the Masons took to the Internet, and news of the theft spread quickly.⁴ After a couple days of intensely negative attention, PTT took down the stolen game on its own⁵, in order to avoid further backlash. Worldwide, Achilles Defense had been in the App Store for only a month and a half, but by the time PTT removed it, the damage had already been done. Ironhide scrapped its plans to develop its own version of Clash of the Olympians for the iPhone. Had the iPhone version



Above: Side-by-side comparison of Clash of the Olympians (left) and Achilles Defense (right).

sold well, Shannon could have gotten work on Ironhide's next project; which would have meant more much-needed income. As of this Note's publication, neither Shannon nor Ironhide have been able to bring a lawsuit against either PTT or Apple. Neither victim has seen a single cent of the profits made from the sales of Achilles Defense.

⁴ See e.g. Maurice Tam, *Achilles' Defense on iOS rips off Clash of the Olympians*, DESTRUCTOID (Apr. 30, 2011 9:00 a.m.), <http://www.destructoid.com/achilles-defense-on-ios-rips-off-clash-of-the-olympians-200049.html>; Good, *supra* note 3.

⁵ At least in the U.S. part of the App Store. Achilles Defense remained in international parts of Apple's stores until over a month later.

Sadly, incidents like this are becoming far too common.⁶ Much ink and rhetoric has already been spilled about the pros and cons of digital media files, regarding cyber-piracy and the ability to illicitly distribute copyrighted works as free downloads. Receiving far less attention is how plagiarists are more easily able to take the original works of authors⁷ and turn them into an illicit profit in online digital media stores⁸ such as Apple's App Store and Amazon.com's Kindle Store, what we shall call "cyber-plagiarism." This Note proposes a solution to protect the rights of authors without unfairly punishing digital media store operators for the sins of cyber-plagiarists. Building upon existing safe harbors in the Digital Media Copyright Act ("DMCA") this Note proposes an additional safe harbor for online digital media stores that imposes slightly greater burdens of monitoring and action on store operators in return for well-defined protection and limited monetary liability.

Part I of this Note will describe in more detail both the rampant problem of cyber-plagiarism in digital media stores; it will also survey some of the ambiguities in the DMCA that make effective litigation against the store operators uncertain at best, as well as the inadequacies of proposed legislation. Part II will propose a new DMCA safe harbor specifically tailored to digital media stores that creates greater clarity and strikes a balance between protecting and balancing the interests of both authors *and* digital media stores. Finally, Part III will address some possible objections to, and criticisms of, the proposal.

I. Inability to Protect Against Copyright Infringement in Digital Media Stores

While copyright law has largely sufficed to protect artistic works in the past, the advent of the Internet has muddied the waters significantly. Modern authors face many challenges in protecting their copyrights against cyber-plagiarism. Even the DMCA, which is meant to help protect copyright online, contains many ambiguities. When courts are not in agreement that provisions intensely favor service providers at the expense of authors, they offer inconsistent interpretations, which creates uncertainty for all parties and increases the time and costs of litigation.

A. Existing Copyright Law Fails to Properly Protect Against Cyber-Plagiarism

Copyright law grants certain rights to authors in the "original works of authorship" that they create.⁹ These rights include the eponymous right to make copies of the work and

⁶ See e.g. Owen Good, *iTunes Flash Game Ripoffs Get More Brazen with Canabalt Clone*, KOTAKU (May 5, 2011 8:30 p.m.), <http://kotaku.com/5799158/itunes-flash-game-ripoffs-get-more-brazen-with-canabalt-clone>; Jim Sterling, *Apple takes down stolen game following Internet uproar*, DESTRUCTOID (Jan. 23, 2011 7:00 a.m.), <http://www.destructoid.com/apple-takes-down-stolen-game-following-internet-uproar-192305.phtml>; David Rothschild, *Self-Publishing Plagiarism: Amazon Kindle Pirated Books*, ITHENTICATE (Jan. 26, 2012), <http://www.ithenticate.com/plagiarism-checker-blog/bid/77929/Self-Publishing-Plagiarism-Amazon-Kindle-Pirated-Books>.

⁷ As shorthand, this Note will use the term "author" in its constitutional sense per Art. I, § 8, cl. 8; namely, the creator of a copyrighted work. When necessary, it will also be short-hand for anyone who owns a copyright, no matter who created the underlying work.

⁸ A "digital media store" is an online retailer who sells electronic media files, rather than physical objects, that embody a copyrighted work. Thus, iTunes is a digital media store. Amazon.com is also a digital media store insofar as they sell e-books and Kindle apps, but not to the extent that they sell ink-and-paper books. This added citation seems unnecessary. Moreover, the "see generally" indicator seems rather misplaced, especially considering that the article is less than a page long. You probably want "see e.g.," or maybe "see also," but there doesn't seem to be a need for an additional example.

⁹ 17 U.S.C. § 102 (2012).

the right to distribute copies to the public.¹⁰ The penalties for infringing these rights can be severe. In addition to an injunction,¹¹ a court can award monetary damages.¹² These damages can be an author's actual damages plus the infringer's profits, or instead, anywhere from \$750 - \$30,000 *per infringing work*.¹³ And, in the event that the "infringement was committed willfully," the amount of damages per infringement may be increased to as high as \$150,000 per work.¹⁴

At least in theory, all of the works stolen by cyber-plagiarists are protected by existing copyright law. For example, books and music are traditional forms of copyrightable expression, while video games are audiovisual works.¹⁵ A cyber-plagiarist would violate the true author's rights to reproduce and distribute copies of the work.¹⁶ Cyber-plagiarism cannot but be extremely willful, and thus the cyber-plagiarist would be liable for up to \$150,000 per infringed work sold.¹⁷ However, actually recovering the money will rarely be possible. Apparently, many cyber-plagiarists are based in Asia, well beyond the reach of the U.S. Courts.¹⁸ As stated above, PTT Solutions is based in Vietnam.¹⁹ Because they have no office in the United States (and presumably no assets in this country whatsoever, except perhaps for the money from digital media sales that are still in Apple's custody), filing a U.S. lawsuit would do victims like Shannon Mason little good. The expense and hassle of finding a foreign lawyer is almost certainly prohibitive for most individuals and small start-up companies.

Nevertheless, a digital media store's operators can potentially be secondarily liable²⁰ for violations of the distribution right, and likewise liable for damages. And, because many of the large digital media store operators – like Apple, Google, and Amazon – are located in the U.S., the problems of litigating in foreign jurisdictions would not be present. Furthermore, since these store operators are multi-billion-dollar corporations, a victorious plaintiff would have little worry about collecting on a judgment. Unfortunately, the fact that these companies *are* so large means that they have sizeable and well-funded legal departments, which may be intimidating to unsophisticated plaintiffs, especially those with few resources to spare. Moreover, the DMCA may protect the store operators from any monetary liability. Although a plaintiff may obtain an injunction to prohibit the store from selling the infringing work,²¹ such relief fails to adequately right the wrong that has

¹⁰ *Id.* § 106(1) and (3), respectively.

¹¹ *See id.* § 502.

¹² *Id.* § 504.

¹³ *Id.* § 504(b) and (c)(1), respectively.

¹⁴ *Id.* § 504(c)(2).

¹⁵ 17 U.S.C. § 101(a)(1), (2), and (6) (2012). The Copyright Office specifically includes video games under audiovisual works. *Copyright Help: Type of Work*, U.S. COPYRIGHT OFFICE, (last revised Jul. 26, 2011) www.copyright.gov/eco/help-type.html.

¹⁶ *See* 17 U.S.C. § 106(1) and (2) respectively.

¹⁷ *See id.* at § 504(c)(2).

¹⁸ Adam L. Penenerg, *Amazon's Plagiarism Problem*, FAST COMPANY (Jan. 12, 2012 11:02 p.m.), <http://www.fastcompany.com/1807211/amazons-plagiarism-problem>.

¹⁹ Apparently, the company also has an office in Paris. *See* Contact Us, PTT SOLUTIONS (2009), <http://www.ptt-solution.com/contact-us.html>.

²⁰ Secondary liability for copyright infringement comes in two flavors: A digital media store operator can be contributorily liable if it knows of the infringing activity and materially contributes to it. *See e.g.* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996). The operator can be vicariously liable if it has a direct financial interest in the infringing activity, as well as the right and ability to control it. *See e.g. id.* at 262 (quoting Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)). It is important to note that knowledge of infringement is *not* an element of vicarious liability.

²¹ *See id.* § 512(j).

befallen the author, essentially leaving many victims of cyber-plagiarism with no real remedy at all. Even if the DMCA does not ultimately protect digital media stores, the state of the law is unclear; a victorious plaintiff could expect a lengthy and uncertain appeal process, adding additional time and expenses that many authors simply cannot afford.

B. Lack of Clarity in the DMCA

The DMCA offers safe harbors to online “service providers.”²² The courts have read the term very broadly,²³ such that any online digital media store will doubtlessly be covered. The DMCA has four separate safe harbors meant to provide “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements.”²⁴ However, the courts have generally read the DMCA to place the burden almost entirely on authors. The safe harbor that most likely may apply to digital media stores, that for “[i]nformation residing on systems or networks at direction of users,”²⁵ contains three ambiguous elements that courts often have read to very heavily favor online service providers.²⁶

1. Knowledge of Infringing Content

First, §512(c) may protect a service provider as long as that provider does not have knowledge of any infringing content on its system or network. Such knowledge can occur in two ways: either “actual knowledge”²⁷ or “aware[ness] of facts or circumstances from which infringing activity is apparent.”²⁸ However, the DMCA also explicitly relieves service providers of any duty to monitor the contents of their servers, nor to seek out infringing activity.²⁹ And, according to Prof. Nimmer, “a service provider who offers competent testimony that it lacked actual knowledge shifts the burden of proof to the plaintiff to negate those claims. That last proof usually represents an insuperable hurdle for the plaintiff.”³⁰

²² *Id.* § 215(k)(1)(A).

²³ *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1099 (W.D. Wash. 2004) (specifically holding that Amazon.com’s 3rd party zShops qualify as service providers).

²⁴ *Rossi v. Motion Picture Assn. of Am., Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004) (quoting H.R.Rep. No. 105–551, pt. 2, at 49 (1998)).

²⁵ 17 U.S.C. § 512(c). § 512(a) applies to “Transitory digital network communications,” and store operators would fail to qualify because material is permanently held on the store’s computers, and not for mere “transient storage,” in contravention of (a)(4). § 512(b) is for “System caching,” which does not apply to store operators because, simply put, they are not engaging in system caching. Finally, even if a court deemed digital media stores to be “Information location tools” under a strained reading of § 512(d), the requirements for the safe harbor under (d) are also found in (c), so the discussion below should cover claims under (d) as well.

²⁶ The safe harbor also has additional requirements that a service provider have an agent to receive DMCA takedown notices (17 U.S.C. § 512(c)(2)), reasonably implement a repeat infringer policy (*id.* at (§ 512(i)(1)(A))), and “not interfere with standard technical measures” (*id.* at § 512(i)(1)(B)). For the purposes of this discussion, I assume that digital media stores properly comply with these requirements.

²⁷ 17 U.S.C. § 512(c)(1)(A)(i).

²⁸ *Id.* § 512(c)(1)(A)(ii).

²⁹ *Id.* § 512(m)(1). See also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007) (“We do not place the burden of determining whether photographs are actually illegal on a service provider”).

³⁰ 3 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 12B.04 n. 41(2009).

Thus, an author whose works are being infringed must either catch a service provider admitting that specific infringing content resides on its network³¹ or send a proper take-down notice to the service provider.³² The take-down notice has been called “the most powerful evidence of a service provider’s knowledge,”³³ and at least one court has equated actual knowledge solely with receipt of a take-down notice.³⁴ However, for a take-down notice to be valid, it must “substantially” comply with the requirements of § 512(c)(3)(A), or a court will not consider it when assessing the service provider’s knowledge.³⁵

As for imputed knowledge (also known as “red flag” knowledge³⁶), authors often do not fare much better. Courts accept that the DMCA sets a “high bar for finding ‘red flag’ knowledge.”³⁷ One court has stated that a red flag may occur when a website uses terms like “pirate” or “bootleg” in its URL.³⁸ However, these may be the only magic words that will raise the red flag. Indeed, that same court held that words like “free,” “mp3,” and “file-sharing” were not enough to raise a red flag.³⁹ The Ninth Circuit has held, perhaps more egregiously, that even words like “illegal” or “stolen” were not enough to raise a red flag, at least for a pornographic website, because such words “may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.”⁴⁰ At this rate, an exculpatory alternative use for a “pirate” or “bootleg” website might very well be forthcoming. Ultimately, as Prof. Nimmer said, “the ‘flag’ must be brightly red indeed – and be waving blatantly in the provider’s face – to serve the statutory goal of making ‘infringing activity . . . apparent.’”⁴¹

Finally, while courts take extremely seriously the DMCA’s no-duty-to-monitor provision,⁴² some have also adopted the idea of “willful blindness,” that is, that a service provider cannot intentionally close its eyes to blatant infringement and still legitimately claim a lack of knowledge.⁴³ The Seventh Circuit held similarly in *In re Aimster Litigation* that a service provider cannot encrypt the users’ data so as to intentionally keep itself unaware of the identity of infringers.⁴⁴ However, beyond encryption, it is unclear to what

³¹ See e.g. *Viacom Intl., Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012) (material issue of fact exists as to YouTube’s knowledge, based on internal report by YouTube executive admitting that episodes of popular TV shows resided on YouTube).

³² See 17 U.S.C. § 512(c)(3).

³³ *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1107 (W.D.Wash.2004).

³⁴ See *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008) (“It is undisputed that, before it filed the instant action, plaintiff provided no notice to Veoh of any claimed copyright infringement. Thus, there is no question on the record presented that Veoh lacked actual knowledge of the alleged infringing activity at issue.”) (emphasis added).

³⁵ 17 U.S.C. § 512(c)(3)(B)(i). Substantial compliance seems to mean that only small errors like misspellings and outdated area codes are acceptable. *Recording Indus. Assn. of Am. v. Verizon Internet Servs.*, 351 F.3d 1229, 1236 (D.C. Cir. 2003) (citing S. Rep. No. 105-190, at 47 (1998); H.R. Rep. No. 105-551 (II), at 56 (1998)).

³⁶ See *Viacom*, 676 F.3d at 31.

³⁷ *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009). Similarly, the Second Circuit recently stated that “no court has embraced the . . . proposition . . . that the red flag provision requires less specificity than the actual knowledge provision.” *Viacom*, 676 F.3d at 32. (internal quotations omitted).

³⁸ *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 643-44 (S.D.N.Y. 2011).

³⁹ *Id.* at 644.

⁴⁰ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

⁴¹ 3 NIMMER, *supra* note 30, at § 12B.04[A][1].

⁴² See e.g. *Capitol Records*, 821 F. Supp. 2d at 644 (no red flag if investigation is needed to determine whether material infringes); *CCBill*, 488 F. 3d at 1114 (same); *UMG Recordings*, 665 F. Supp. 2d at 1108 (citing *CCBill* for the same proposition).

⁴³ *Viacom Intl., Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012).

⁴⁴ 334 F.3d 643, 650-51 (7th Cir. 2003).

extent willful blindness applies. Indeed, the Second Circuit, in *Viacom*, merely remanded the matter to the district court with no more guidance than that the DMCA “limits—but does not abrogate—the doctrine” of willful blindness.⁴⁵

The implications for digital media stores are unclear. How red must a flag be before store operators must take action? If the exact same work is being sold by several different authors in the same store,⁴⁶ is that a fact “from which infringing activity is apparent”? If so, proving that the store operator was “aware” of the duplication should be easy enough. Stores often require a period of review by actual human beings before a work will be made available for sale; for example, every submission to Apple’s App Store is reviewed by two people, and the process averages about two weeks.⁴⁷ For Amazon.com’s Kindle Store, works are available about 24 to 48 hours after submission⁴⁸ and likely will be checked only by an automated computer process.⁴⁹ Can stores hide behind computerized review, honestly claiming that they had no knowledge because no human ever checks the submitted works, and thus could not know whether any particular submission infringed another?

Conversely, under the doctrine of willful blindness, might some sort of human review be necessary? Could a store operator willfully blind itself to infringement by setting up an automated review of such exceptionally low quality that fails it to actually review anything?⁵⁰ For example, Search Specialist Mike Essex ran a test of Amazon’s review process. He “took the lyrics to the song ‘This is the song that never ends’ and repeated them over 700-plus pages. No formatting, just one continuous block of duplicate text.”⁵¹ The resulting “work” was available for sale less than 24 hours later.⁵² A “review” system that would let in the likes of Jack Torrance⁵³ may be so poor that a court might very well rule that Amazon willfully blinded itself to such blatant copyright infringement. However, such a ruling might lead store operators to forego *any* sort of review process for fear of falling short of the judiciary’s standard.

2. Direct Financial Benefit

The second requirement for the §512(c) safe harbor is that a service provider “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”⁵⁴ Since these

⁴⁵ *Viacom*, 676 F.3d at 35.

⁴⁶ This scenario is not uncommon. See *infra*, § II (A) (1).

⁴⁷ Erica Ogg, *Apple sheds light on App Store approval process*, CNET NEWS (Aug. 21, 2009 3:24 p.m.), http://news.cnet.com/8301-13579_3-10315328-37.html.

⁴⁸ See Publishing FAQ, KINDLE DIRECT PUBLISHING, <https://kdp.amazon.com/self-publishing/help?topicId=A36BYK5S7AJ2NQ> at 1-17 (last visited Jul. 23, 2012); Mike Essex, *Are eBooks the new Content Farms?*, KOOZAI (Mar. 8 2011), <http://www.koozai.com/blog/search-marketing/are-ebooks-the-new-contet-farms-2901>.

⁴⁹ Essex, *supra* note 48.

⁵⁰ Cf. *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004) (AOL held liable when it inadvertently had take-down notices sent to a non-existent e-mail address).

⁵¹ Laura Hazard Owen, *The Kindle Swindle*, PUBLISHING TRENDS (Mar. 31, 2011), <http://www.publishingtrends.com/2011/03/the-kindle-swindle>.

⁵² *Id.*

⁵³ i.e. From *The Shining*: “All work and no play makes Jack a dull boy: All work and no play makes Jack a dull boy. All work and no play makes Jack a dull boy.” Etc. Incredibly, that work is *also* available on Amazon, for only \$9.99, at http://www.amazon.com/Work-Play-Makes-Jack-Dull/dp/8887381070#reader_8887381070.

⁵⁴ 17 U.S.C. § 512(c)(1)(B). This Note assumes that digital media store operators have the requisite “right and ability to control” the infringing activity.

requirements are very much like those of vicarious liability,⁵⁵ courts and commentators are split over whether the DMCA might offer *any* protect to service providers against claims of vicarious liability. For example, the District Court of Maryland held in *Costar Group Inc. v. Loopnet, Inc.* that, “[b]asically, the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability.”⁵⁶ The Ninth Circuit agreed because Congress codified in § 512(c)(1)(B) “terms that have accumulated settled meaning under common law.”⁵⁷ On the contrary, the Fourth Circuit seems to have rejected this contention, stating that an ISP liable for vicarious infringement “could still look to the DMCA for a safe harbor if it fulfilled the conditions therein.”⁵⁸ Moreover, Professor Edward Lee disagrees with the Ninth Circuit’s analysis of what he calls the vicarious liability “loophole.”⁵⁹ He points out that the text of the DMCA is *not* the same as that of the common law standard: the common law required that a defendant have a right and ability to *supervise* and a direct financial *interest*, whereas the DMCA necessitates the right and ability to *control* and a financial *benefit* that is *directly attributable* to the infringing activity.⁶⁰

Regardless of what courts may say, however, they are setting the bar very high for what constitutes a “direct financial benefit” under the DMCA. For example, in *Costar*, the district court held that the defendant service provider did not receive a financial benefit from the infringing material: the service provider’s income came only from advertising; the infringing users made their postings without paying a cent to the service provider.⁶¹ Moreover, in *CCBill*, the Ninth Circuit held that, even though the defendant *did* receive money from the infringing user, there was still no direct financial benefit because the payments were made periodically and at a flat rate.⁶² However, the Northern District of Illinois has held otherwise. In *In re Aimster Copyright Litigation*, that court held that charging a monthly service fee of only \$4.95 to all users (infringing or not) was enough to constitute a financial interest.⁶³ Defendant Aimster also solicited donations to help fund its lawsuit and sold its own merchandise on the website, all of which indicated to the court that “Aimster is very much a commercial enterprise and Defendants have a direct financial interest in the infringement by its users.”⁶⁴

Unlike the foregoing, most digital media stores take a percentage of the sales price of the works sold, and pass the rest on to the author. For example, Apple keeps 30% of the sale price of every program sold in the App Store, and passes the rest on to the author,⁶⁵ while Amazon.com has options that offer either 35% or 70% royalties to authors who

⁵⁵ See e.g. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) (internal quotations omitted).

⁵⁶ 164 F. Supp. 2d 688, 704 (D. Md. 2001) (citing 3 Melville B. Nimmer and David Nimmer, Nimmer on Copyright, § 12B.04[A][2], at 12B-38 (2001)).

⁵⁷ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (internal citations & quotations omitted).

⁵⁸ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). However, the Fourth Circuit did not actually direct this comment to the District Court, nor in any way address the District Court’s assertions to the contrary. Moreover, the Fourth Circuit’s words were merely dicta, since the only issue on appeal was whether the defendant was liable for direct infringement; vicarious liability was no longer even an issue in the case at that point.

⁵⁹ Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 239 (2009).

⁶⁰ *Id.* at 240-41.

⁶¹ 164 F. Supp. 2d at 704-705 (D. Md. 2001).

⁶² 488 F.3d at 1118.

⁶³ 252 F. Supp. 2d 634, 655 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003).

⁶⁴ *Id.* However, the issue of financial benefit was not addressed by the Seventh Circuit’s opinion affirming the district court’s judgment.

⁶⁵ Saul Hansell, *The iTunes Store: Profit Machine*, THE NEW YORK TIMES (August 11, 2008 3:27 p.m.) available at <http://bits.blogs.nytimes.com/2008/08/11/steve-jobs-tries-to-downplay-the-itunes-stores-profit>.

publish Kindle e-books.⁶⁶ This model seems even closer to having a “direct financial benefit” than the flat-rate model. But, since the courts cannot even agree whether a flat-rate payment is enough to subject a service provider to liability, the question remains open as to a digital media store operator’s liability. According to Prof. Lee, “[i]n general, a service provider conducting a legitimate business would not be considered to receive a ‘financial benefit directly attributable to the infringing activity’ where the infringer makes the same kind of payment as non-infringing users of the provider’s service.”⁶⁷ This notion seems to accord with *CCBill*, but could be stretched even further than the court’s holding there. A friendly court could very well extend the safe harbor to digital media stores like the App Store, which takes no *additional* profit from infringing works (as compared to non-infringing works). But perhaps not. At the moment, only a lengthy battle in court is likely to resolve the issue.

3. § 512(c)(1)(C): Expeditious Removal of Infringing Material

Finally, to seek the shelter of the § 512(c) safe harbor, a service provider must act “expeditiously to remove, or disable access to,” any infringing material. This duty arises either when the service provider receives a valid take-down notice,⁶⁸ or upon gaining actual knowledge or red-flag awareness on its own.⁶⁹ Unfortunately, many cases that even address the issue merely state the fact (or lack) of expediency without anything more.⁷⁰ But even the cases that elaborate are not of much practical use. In *Io Group, Inc. v. Veoh Networks, Inc.*, the court granted summary judgment to a defendant that removed infringing content “on the same day the [take-down] notice is received (or within a few days thereafter)”.⁷¹ This raises several questions: Is “a few days” really to be considered “expedient? And how many days is “a few”? Seven? Five? Three? The court does not even specify the longest period of time the victorious defendant left infringing material on its system after receiving notification. Perhaps the clearest (but still largely unhelpful) answer was given by the district court in *Viacom*: “Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.”⁷² Thus, both authors and service providers may only ever be able to learn whether removal of infringing material was “expedient” *after* a potentially expensive litigation.

Ultimately, the DMCA may not be equipped to deal adequately with cyber-plagiarism, and the current state of the law prevents a quick or certain answer. Moreover, the problems of cyber-plagiarism have thus far managed to remain under the Congressional radar.⁷³ Thus, it should not come as a surprise that legislative proposals to protect

⁶⁶ *Pricing Page*, KINDLE DIRECT PUBLISHING, <https://kdp.amazon.com/self-publishing/help?topicId=A29FL26OKE7R7B> (last visited Jul. 23, 2012).

⁶⁷ Lee, *supra* note 59, at 249.

⁶⁸ 17 U.S.C. § 512(c)(1)(C).

⁶⁹ *Id.* at § 512(c)(1)(A)(iii).

⁷⁰ See e.g. *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1107 (C.D. Cal. 2009) *aff’d* sub nom. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) (merely stating that service provider “expeditiously removed” infringing material); *Wolk v. Kodak Imaging Network, Inc.*, 81 Fed. R. Serv. 3d 698 (S.D.N.Y. 2012). (“undisputed that [service provider] has acted promptly”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1182 (C.D. Cal. 2002) (stating that there was “no credible evidence . . . that [Defendant] . . . ever *expeditiously* removed infringing material” (emphasis in original)).

⁷¹ 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008) (parenthetical in original).

⁷² 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010).

⁷³ Most likely, the biggest reason for this lack of attention is that plagiarists tend to steal the works of individuals and small start-up companies. However, this is not always true. See Tom Goldman, *Apple Approves Blatant*

intellectual property rights have not adequately (or at all) addressed the matter directly.⁷⁴ To that end, I turn now to a solution that offers the needed finesse to help thwart cyber-plagiarists without unduly burdening either digital media stores or those who sell their works therein.

II. DMCA Safe Harbor for Online Digital Media Stores

Congress intended for the DMCA “to foster cooperation among copyright holders and service providers in dealing with infringement on the Internet.”⁷⁵ Unfortunately, as Part I has shown, authors currently receive little cooperation from service providers, who have very little incentive to help fight infringement.⁷⁶ Indeed, these problems may be even more pronounced in digital media stores, since operators share in the profits of infringing works. However, digital media stores, on the whole, are beneficial in greatly advancing the goals of copyright by promoting the creation of artistic works and facilitating distribution around the world. The proper solution to the problems of cyber-plagiarism requires a rebalancing of obligations between authors and service providers, by placing some important duties on digital media store operators without thereby relieving authors of any obligation whatsoever.

A. Proposal for a Safe Harbor for Online Digital Media Stores

To address the growing problem of cyber-plagiarism, this proposed safe harbor will protect online service providers that sell third party downloadable electronic files.⁷⁷ Naturally, a good safe harbor for digital media stores need not reinvent the wheel; many of the DMCA’s current provisions should remain unaltered. For example, false claims of infringement still ought to be actionable,⁷⁸ and alleged infringers still ought to receive notice – and have a chance to challenge – any take-down notice.⁷⁹ Much like the current §512(c), the proposed safe harbor will contain a requirement of knowledge before a service provider must act, but with some basic duty to monitor and a lower threshold for “red flags.” Similarly, this safe harbor will require expeditious take-down of infringing materials, but within a specific time limit.⁸⁰ Finally, rather than limiting a plaintiff solely to an injunction as a remedy, an author may seek limited monetary damages, restricted to profits earned by the true infringer over the two months preceding take-down. Of course, prohibition on “financial benefit” will be absent.

Mario Rip-Off for App Store, THE ESCAPIST (Apr. 29, 2011 5:44 p.m.) available at <http://www.escapistmagazine.com/news/view/109681-Apple-Approves-Blatant-Mario-Rip-Off-for-App-Store> (describing the game “Monino,” which ripped off various Super Mario Bros. games). See *infra* Section II (A) (1). It seems that Nintendo never brought suit, however.

⁷⁴ See e.g. the Stop Online Piracy Act (“SOPA,” H.R.3261.) and the Online Protection and Enforcement of Digital Trade Act (a.k.a. the “OPEN Act,” H.R. 3782).

⁷⁵ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1037 (9th Cir. 2011) (citing S.Rep. No. 105–190, at 48).

⁷⁶ See *supra* Part I (B).

⁷⁷ See *supra* note 8.

⁷⁸ See 17 U.S.C. § 512(f).

⁷⁹ See *id.* § 512(g). The requirements for an author’s initial take-down notice should likewise be imported unaltered from § 512(c)(3).

⁸⁰ It is beyond the scope of this Note to suggest broader changes to the meaning and contours of expeditious removal in the DMCA, outside of this proposed safe harbor. Of course, any further guidance from Congress or the courts would undoubtedly assist many would-be litigants in the future.

1. Knowledge and the Duty to Monitor

In order to strike the proper balance between digital media store operators and authors, store operators must actually share some of burden in detecting infringement. In drafting the DMCA, “Congress made clear . . . that service providers need not ‘make difficult judgments as to whether conduct is or is not infringing.’”⁸¹ Similarly, the proposed safe harbor does not oblige digital media store operators to make any *difficult* judgments in identifying infringing content; it does, however, require them to make *some* judgments. Every work to be sold in a digital media store should receive at least some brief examination. Of course, not every infringement will be particularly noticeable or noteworthy, and store operators will not be required to thoroughly investigate every work that they sell. However, a store should decline to sell a work when the infringing nature thereof is blatantly obvious.⁸²

In patent law, an inventor may not receive a patent for an invention that “would have been obvious . . . to a person having ordinary skill in the art to which [the invention’s] subject matter pertains.”⁸³ The proposed safe harbor draws upon this idea, but rather than seeking the judgment of a specialist in a technical field, looks to the judgment of an ordinary individual. This individual need not even be a specialized consumer of the media in question, nor of media in general. To that end, proving “obvious” plagiarism should not require any expert testimony. At times, the proof may not require any evidence at all, save juxtaposing the true work and its counterfeit before a judge or jury. At no time should this standard require anything other than common sense determinations, such as a determination that two works sold in a store are identical or nearly so, or that a real author cannot write dozens of books in the course of a day. What follow are some examples that may help to elucidate the contours of the proposed standard.

For example, in 2011, the App Store contained a game called “Lugaru HD,” by Wolfire Games, and a game simply called “Lugaru,” by iCoder.⁸⁴ If anyone at Apple had noticed the near-identity of the names and bothered to investigate, that person would have quickly discovered that Lugaru and Lugaru HD shared more than just a title. They were, in fact, the exact same game.⁸⁵ The only difference between the two was the price, with the rip-off Lugaru being sold for \$8 less than Lugaru HD.⁸⁶ What makes this flag particularly red is that the games not only had the same name, but the name was an entirely made-up word. The odds of two separate companies giving their own non-copied games the same imaginary title are low enough at least to warrant someone looking at both games. Upon noticing this red flag, even a cursory examination would have revealed the obvious problem.

This problem is not unique to the App Store, nor does Apple appear to have the worst of it. Many of the Kindle Store’s best-selling self-published authors “were actually

⁸¹ *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1101 (W.D. Wash. 2004) (quoting S.Rep. No. 105–190, at 32; H.R.Rep. No. 105–551, pt. 2, at 44).

⁸² The irony of decrying the nebulous ambiguities in the DMCA, and then introducing a standard as subjective as “obvious,” is not lost on me. *But see infra* Part III (C).

⁸³ 35 U.S.C. § 103(a). Thus, for example, a computing device that the ordinary computer scientist would regard as an obvious modification of an existing device will not be eligible for a patent.




⁸⁴ Stephen Totilo, *The Case Of The Identical Rabbit Games*, KOTAKU (Feb. 3, 2011 8:00 a.m.), <http://www.kotaku.com.au/2011/02/the-case-of-the-identical-rabbit-games>.

⁸⁵ *Id.*

⁸⁶ *Id.*

copycats who uploaded other writers' e-books under different titles."⁸⁷ These cyber-plagiarists sometimes even created multiple versions of the same stolen work (submitted under different names) to trigger different keywords that shoppers use in a search.⁸⁸ At one point, a book called "Your Guide to Good Health Insurance: The Health Insurance Guide" was being sold under at least three different titles. Each one even provided the exact same image of the book's cover, meaning that the title in the image and the listed titles of the books did not match.

Another obvious example of cyber-plagiarism is the game "Monino."⁸⁹ This game stole liberally from several games in Nintendo's immensely popular Super Mario Bros. series. Mario himself is one of the best-known characters in the world, and a survey in the 1990s showed that Mario was more recognizable to American children than Mickey Mouse.⁹⁰ Monino not only uses Mario's likeness, but copies his character sprites exactly from the game Super Mario World. In fact,

17.  **Health Insurance: Your Guide To Good Health Insurance. The Heath Insurance Guide** by unknown (Kindle Edition - 14 Feb 2011) - **Kindle eBook**
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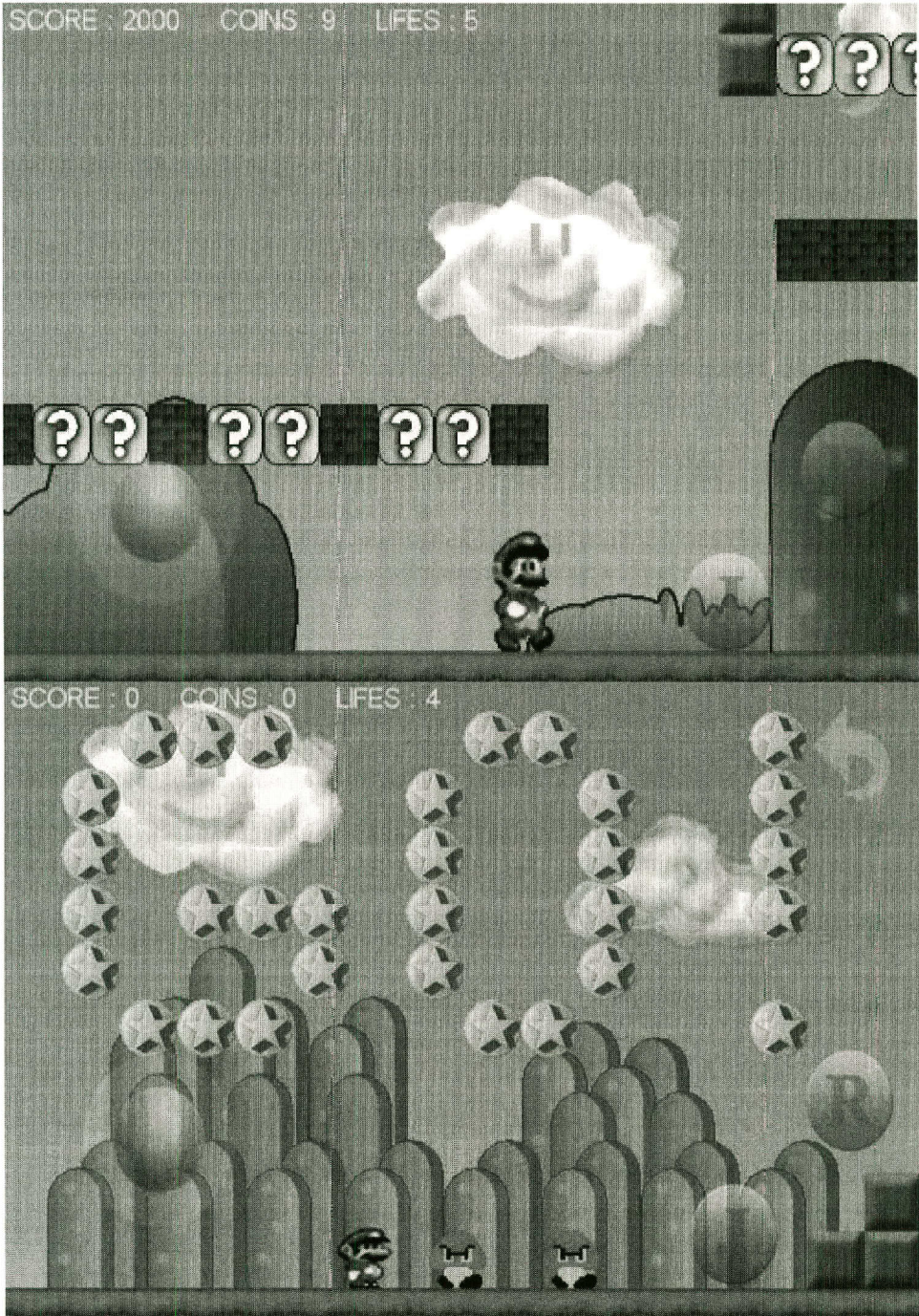
Above: The same book, with the same cover, sold under three different titles in the Kindle Store.

⁸⁷ Jeff John Roberts, *Why Amazon's Plagiarism Problem Is More Than A Public Relations Issue*, PAIDCONTENT (Jan. 18, 2012 7:14p.m.), <http://paidcontent.org/2012/01/18/419-why-amazons-plagiarism-problem-is-more-than-a-public-relations-issue>.

⁸⁸ Essex, *supra* note 48.

⁸⁹ See *supra* note 73.

⁹⁰ Iwabuchi, Koichi, *Recentering globalization: Popular culture and Japanese Transnationalism*, Duke University Press. (2002), at 30.



Above: Screenshots from Mario-rip-off "Monino."

almost the entire Monino game is made up of character sprites, artwork, music, and sound effects stolen directly from Super Mario games.⁹¹ The game's description is also a thinly-veiled rip-off of Mario games: titular hero Monino must battle the evil monster Bowler (rather than Mario's traditional nemesis Bowser).⁹² Every single one of the approximately 80 people who wrote a review of Monino recognized the source material.⁹³

§ 8.5 of Apple's App Store Review Guidelines for developers states, "Use of protected 3rd party material (trademarks, copyrights, trade secrets, otherwise proprietary content) requires a documented rights check which must be provided upon request."⁹⁴ At some point during the approval process, *someone* should have thought to ask to see some kind of license agreement with Nintendo. Based on all of the factors described above (extremely well-known character, exact copying, poor attempts to change names), Apple acted unreasonably in not asking for the required rights check.

Finally, a seller who uploads numerous works into a store in a short period of time should raise a red flag for digital media store operators. This problem arises more often in the context of e-books than in multimedia apps. For example, Kindle Store merchant "Manuel Ortiz Braschi" sometimes uploads over 20 e-books a day, and has uploaded over 3,000 e-books in total.⁹⁵ The likelihood of a person being able to write that many full-length books in so short a time is so minuscule, that Amazon should have realized that something was amiss. Had people at Amazon investigated, they would have discovered that many of the e-books were merely pre-existing books with a new name on the cover.⁹⁶

2. Expediency

Rather than continuing the nebulous "expeditious" standard of the DMCA as it exists now,⁹⁷ the proposed safe harbor gives store operators a hard deadline of 72 hours to take action.⁹⁸ Setting a firm deadline will encourage store operators not to drag their feet when dealing with cyber-plagiarism; it also will remove any worry that a store operator might have as to whether a response was "expeditious" enough. Such a deadline also benefits authors, who can be assured of prompt attention to their plight. They will no longer need to wonder when a store operator will respond, or whether a response is coming at all. A valid take-down notice will result in the prompt take-down of an infringing work, and an improper notice will at least receive a quick response, so that the authors can take the appropriate steps to fully comply.⁹⁹

Furthermore, 72 hours is a reasonable deadline. Most online service providers typically remove infringing content between 24 and 72 hours after receiving a take-down

⁹¹ Goldman, *supra* note 73.

⁹² *Id.*

⁹³ Brian Crecente, *Why Is Apple Allowing Mario Clones On iTunes?*, KOTAKU (Apr. 29, 2011 3:00 a.m.) <http://www.kotaku.com.au/2011/04/why-is-apple-allowing-mario-clones-on-itunes>.

⁹⁴ APPLE'S APP STORE REVIEW GUIDELINES, § 8.5, available at http://images.worldofapple.com/appstoreguidelines_9910.pdf.

⁹⁵ Owen, *supra* note 51.

⁹⁶ *Id.* Admittedly, some of the plagiarized titles are public domain books, for which copyright infringement does not apply. Nevertheless, such plagiarism demonstrates the need for a more thorough review of submissions before such works are offered for sale.

⁹⁷ See *supra* Part I (B) (3).

⁹⁸ If the store operator has gained knowledge of an infringing work, the appropriate "action" is to take down the work; if receiving an improper take-down notice, it is to respond to the sender.

⁹⁹ See 17 U.S.C. § 512(c)(3)(B)(ii).

notice.¹⁰⁰ If more than 120 hours have passed since receipt of a notice, “the likelihood [of take-down] becomes almost zero.”¹⁰¹ 72 hours strikes a good median based upon the real-world actions of service providers. Indeed, a full 72 hours may actually be generous. Google aims to remove links to infringing material in under 24 hours,¹⁰² and “YouTube can act on infringement notices within minutes.”¹⁰³ And because the problem of cyber-plagiarism is not nearly as widespread as cyber-piracy more generally,¹⁰⁴ a store operator is likely to receive far fewer notices than giants like Google and YouTube would.

3. Limited Damages

Unlike the existing safe harbors of the DMCA, the proposed safe harbor allows authors to seek both an injunction *and* limited monetary damages from store operators who comply with the safe harbor’s requirements. However, the amount of such damages will be limited to profits earned by the cyber-plagiarist over the two months prior to the infringing work’s removal from the digital media store in question. Although allowing damages may at first seem contrary to the DMCA, it actually comports with the typical operations of digital media stores. For example, Barnes & Noble has the following provision in its Publication and Distribution Agreement with e-book authors: “Barnes & Noble will pay Royalties on their respective eBook sales approximately sixty (60) days following the end of the calendar month during which they make the applicable sale.”¹⁰⁵ Amazon.com has a nearly identical provision in its “Kindle Direct Publishing Terms and Conditions.”¹⁰⁶ Thus, all a store operator needs to do upon receiving a take-down notice is to maintain possession of the plagiarist’s royalties until the conclusion of any litigation.

This arrangement benefits the real authors of plagiarized works, especially if the plagiarist resides outside of the U.S., because authors are able to recover the money earned from their own works without having to initiate a foreign lawsuit. Although, for those with the desire and ability to go after foreign plagiarists directly, the option remains open. In addition, store operators are no worse off than they otherwise would be. By complying with the safe harbor, they remain innocent of the plagiarists’ wrongdoing and are allowed to keep the money that they earned from sales of the infringing work.

¹⁰⁰ Jonathan Bailey, *How Long Should a DMCA Notice Take*, PLAGIARISMTODAY (Dec. 5, 2008), <http://www.plagiarismtoday.com/2008/12/05/how-long-should-a-dmca-notice-take>.

¹⁰¹ *Id.*

¹⁰² *Google to Unveil 24-Hour Notice-and-Takedown Improvements*, MEDIA & ENTERTAINMENT SERVICES ALLIANCE (Apr. 6, 2011) <http://mesalliance.org/blog/2011/04/06/google-to-unveil-24-hour-notice-and-takedown-improvements>.

¹⁰³ *Id.* See also Bailey, *supra* note 100. (YouTube responds “almost instantly” to take-down notices.)

¹⁰⁴ This claim is based on anecdotal evidence, but it seems eminently reasonable. For example, Apple boasts that the App Store contains over 500,000 apps. (iPhone, APPLE, <http://www.apple.com/iphone/built-in-apps/app-store.html> (last visited Jul. 23, 2012)). By contrast, Google received over 5 million take-down notices in 2011 alone. (Testimony of Katherine Oyama, Copyright Counsel, Google Inc. Before the House of Representatives Committee on the Judiciary Hearing on H.R. 3261, the Stop Online Piracy Act (Nov. 16, 2011), available at <http://judiciary.house.gov/hearings/pdf/Oyama%2011162011.pdf>.) This means that Google’s infringements in a single year outnumber *all* files in the App Store by 10 to 1.

¹⁰⁵ *eBook Publication and Distribution Agreement*, PUBIT!, at §VI(B) (2012), available at http://pubit.barnesandnoble.com/pubit_app/bn?t=reg_terms_print.

¹⁰⁶ § 5.4.2 (last updated June 30, 2012) available at <https://kdp.amazon.com/self-publishing/help?topicId=APILE934L348N>.

B. Advantages of Proposal

The proposed safe harbor equitably distributes burdens and benefits between the authors of creative works and the operators of digital media stores. Of course, in striving to craft a balance between the two, certain compromises must be made, and each side must shoulder its fair share of the burdens of thwarting cyber-plagiarism. However, under the proposed safe harbor, both authors and store operators will ultimately reap substantial benefits.

1. The Proposed Safe Harbor is Efficient

One of the main benefits of the proposed safe harbor is a great increase in efficiency. First, this safe harbor does not leave the task of fighting copyright infringement only to one party. As the number of digital media stores grows, authors will have an increasingly difficult time monitoring them all for cyber-plagiarism. By imposing some duty to monitor on store operators, the proposal makes each operator the keeper of its own gates. The results will be much more efficient than forcing authors to monitor an ever-increasing number of gates at once because store operators “are best situated to disrupt infringing activities *ex ante*, at relatively low cost.”¹⁰⁷ Yet, store operators are only responsible for detecting the most obvious violations of copyright law. Thus, to seek the protection of the safe harbor, a store operator still “need not make difficult judgments as to whether conduct is or is not infringing.”¹⁰⁸ It need not be aware of new or obscure works, works that only the author may know about; it need only make the easy judgments that are well within ordinary experience. Giving store operators a more active role in combating copyright infringement increases the likelihood of detecting cyber-plagiarism before significant harm occurs.

Moreover, the proposed safe harbor utilizes practices that many online service providers are already doing, anyway. A three-day response deadline accommodates the average speed of take-down by many service providers.¹⁰⁹ In addition, the amount of monetary liability by store operators is set at the amount of the plagiarists’ profits that the store operators temporarily retain, over the typical length of time that such money is retained.¹¹⁰ Thus, many digital media stores need not make drastic changes to their operations; they need only maintain current practices at their current efficiency.

2. The Proposed Safe Harbor Properly Incentivizes Parties to Help Fight Cyber-Plagiarism

The proposed safe harbor encourages both digital media store operators and authors to remain vigilant in the fight against cyber-plagiarism. By removing the current DMCA’s “no duty to monitor” provision,¹¹¹ store operators will no longer try to avoid any kind of investigation into the contents of their servers. Store operators wish to avoid full liability for copyright infringement, and thus, they will seek to comply with the duties to

¹⁰⁷ Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1202 (2011).

¹⁰⁸ *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101 (W.D. Wash. 2004) (internal quotations omitted).

¹⁰⁹ See *supra* note 100, and accompanying text.

¹¹⁰ See *supra* notes 105 and 106, and accompanying text.

¹¹¹ See 17 U.S.C. § 512(m)(1).

monitor and quickly respond to authors, which will in turn help to thwart cyber-plagiarists. However, these duties are not so onerous that store operators would rather risk possible liability than comply with the burdens of the safe harbor.

The proposed safe harbor includes not only a stick, but a carrot, as well. The monetary liability imposed under this proposal targets only those funds that would otherwise belong to the cyber-plagiarists. By fulfilling the requirements of the proposed safe harbor, store operators show that they have not encouraged cyber-plagiarism and that they have made a good faith effort to address the problem. They therefore receive certainty that they will keep their own cut of the profits for plagiarized works sold in their stores. Additionally, authors are assured of monetary redress for their injuries, without the need for lengthy litigation. Because the proposed safe harbor fosters cooperation between authors and store operators, unsophisticated authors need not fear to reach out to store operators for help; assured of a quick response to their take-down notices, authors are encouraged to take action, rather than remain wondering whether any help from a store operator will be forthcoming.

III. Possible Criticisms of a Safe Harbor for Online Digital Media Stores

Because this new safe harbor would change and redistribute the burdens of fighting online copyright infringement, both digital media store operators and authors may raise objections to some of the proposal's provisions. This Part shall address the most likely of those objections.

A. Won't Placing a Duty to Monitor on Digital Media Store Operators Create a Costly and Unfair Burden?

Digital media operators may complain about the imposition of a duty to monitor the works that they sell in their stores. Store operators are often unaware of the identity of a work's true author, especially when the work is new or otherwise relatively unknown. Moreover, complying with the requirements of the proposed safe harbor will add to the stores' operating costs and cut into profits. Ultimately, authors should be responsible for their own works, critics may say; it is not the store operator's job to protect the copyrights of countless people unrelated to the store.

While implementing the proposed safe harbor will likely cause digital media store operators to incur greater costs than they currently have, such burdens are neither unfair nor excessively costly. First, as between authors and store operators, it is entirely appropriate to expect store operators to monitor the contents of their stores because they are in the best position to stop plagiarized works from entering the stores in the first place; they "have better ability to deploy automatic filters and to identify and block materials as they are loaded, prior to their posting."¹¹² Thus, store operators are able to "perform more cost-effectively the activities that are currently performed by multiple [authors]."¹¹³ Conversely, the DMCA currently requires each of the thousands (probably millions) of individual authors in the world to monitor the entire content of a multitude of digital media store websites.¹¹⁴ Moreover, authors are normally unaware that their works have been

¹¹² Helman & Parchomovsky, *supra* note 107, at 1202-03.

¹¹³ *Id.* at 1203.

¹¹⁴ *See id.*

plagiarized until the counterfeit works appear for sale. By acting to stop obvious forgeries before they are sold, store operators are able to stop cyber-plagiarism before the true author comes to any harm.

Furthermore, the costs of monitoring will not be overly great for store operators. Indeed, some stores may not incur any costs at all. For example, Apple already has a waiting period during which its employees are supposed to rigorously analyze any work submitted for sale in the App Store.¹¹⁵ Apple even gives itself the right to demand a “documented rights check” of all third-party intellectual property appearing in a submitted work.¹¹⁶ Exercising that right would merely cost Apple the time it takes to write an e-mail. For stores like Amazon.com’s Kindle Store, which normally uploads works one to two days after submission,¹¹⁷ the costs will admittedly be higher. However, purchasing filtering software,¹¹⁸ contracting with a plagiarism detection service,¹¹⁹ or hiring a few people to review submissions (and run simple database searches) will almost certainly cost less than the legal fees, not to mention the potential monetary liability, that Amazon and its ilk could expect to incur while resolving ambiguities in the current law. Moreover, since digital media stores have already made money on plagiarized works, store operators could use the profits of past plagiarism to subsidize the costs of preventing future plagiarism. In any event, imposing preventative measures on store operators should ultimately cost less than the ever-growing monetary harm that cyber-plagiarism inflicts upon victimized authors.

B. Shouldn’t Digital Media Store Operators Have More Obligations to Fight Cyber-Piracy?

Certainly, authors will no doubt be pleased that the proposed safe harbor imposes some duty on digital media store operators to monitor what goes into their stores. However, many may think that the proposed safe harbor does not go far enough. Some might even insist that store operators be responsible for stopping all infringing works from being sold in their stores. However ideal these expectations might be, they are frankly unreasonable. By expecting store operators to detect any hint of cyber-plagiarism, authors would be forcing the entire burden of protecting their copyrights onto the store operators. Authors should not be allowed to so completely shirk their responsibilities to protect their own rights.

Furthermore, store operators often will lack any real means of acquiring the knowledge necessary to identify infringing works. Expecting store operators to detect non-obvious instances of cyber-plagiarism is infeasible. To put it mildly, the Internet is a big place. Store operators would have to be aware of every time that a burgeoning programmer, musician, or creative writer posted something to a small personal website on some far-flung corner of the Web. As Helman and Parchomovsky have pointed out, “the quantity of content is growing at a dizzying rate and most works, although protected, are not registered by their authors. [Online service providers] have no realistic way to overcome this problem. And they should not be expected to do so.”¹²⁰ The proposed safe harbor requires store

¹¹⁵ See *supra* note 47.

¹¹⁶ See *supra* note 94, and accompanying text.

¹¹⁷ See *supra* note 48, and accompanying text.

¹¹⁸ e.g. Audible Magic (<http://www.audiblemagic.com/technology.php>), which uses “digital fingerprint-based” technology to identify audio and video content.

¹¹⁹ e.g. iThenticate, (<http://www.ithenticate.com/quote-request>), “the leading plagiarism checker software for businesses.”

¹²⁰ Helman & Parchomovsky, *supra* note 107, at 1213-14.

operators to do their fair share, without forcing upon them the nigh-impossible task of monitoring the Internet in its entirety. In this way, store operators detect infringement that they are reasonably capable of detecting, working *with* authors rather than *instead of* authors.

C. Isn't "Obvious" Still Too Vague?

Finally, critics might object that the proposed safe harbor's "obvious" requirement retains a large element of uncertainty. For all its condemning of the current DMCA for being vague and ambiguous, they might say, the "obvious" standard is equally unclear and prone to the same problems as "expeditious" or "red-flag." What may seem obvious to one may not be at all obvious to another. Thus, the same lengthy court battles that resulted from arguments over what constitutes a "direct financial benefit" will reappear over what is "obvious."

Admittedly, the proposed safe harbor does introduce a subjective standard of "obvious" into its requirements for protection. Unfortunately, an objective standard is not feasible for matters of cyber-plagiarism. First, setting a number on "obvious" is incredibly difficult. 100% is a clear and, dare I say, obvious choice, but would also be very under-inclusive and far too easy to work around. A cyber-plagiarist need only Find + Replace a word or two with close synonyms, or change the names of some characters or places, and the 100% standard is defeated. On the other hand, 10%, and even 50%¹²¹, is undeniably too low a threshold to set. Is a work that is 80%-copied "obviously" plagiarized? What about 90%? Many cases will depend on what changes are made, and how. If a plagiarist takes a book and merely changes the names of the characters, the plagiarism should be obvious.¹²² On the other hand, if a plagiarist takes video game, changes some character and background art, but otherwise copies the rest of the code verbatim, the resulting work may not be nearly so easily recognized as counterfeit. Flexibility is needed when making a determination of "obviousness."

Moreover, assigning an understandable meaning to a number may be impossible in many cases. What does even it mean for a story to be 85% plagiarized? What about for a video game, which is a composite of sounds, music, art, text, and gameplay mechanics? How can one draw a line between 84% copied and 85% copied? Even if intelligible guidelines could be formulated, such formulation would inevitably set clear guidelines for some cyber-plagiarists to ensure that their forgeries receive a place (at least initially) on the proverbial shelves of a digital media store.

This Note has attempted to describe the contours of the "obvious" standard with a series of examples and standards. The standard imposes expectations based on common sense and ordinary experience. Prohibiting expert testimony further allows parties to predict more accurately the strength of their cases. If the proposed safe harbor accomplishes nothing else, it replaces several imprecise provisions with a single one. This change alone recommends adoption of the proposed safe harbor. Absent a workable

¹²¹ If half of a work is plagiarized, then the entire other half remains an original work of authorship by the plagiarist.

¹²² "Fred, Fred, wherefore art thou, Fred? Deny thy father and refuse thy name..." "Soft. What light through yonder window breaks? It is the east, and Ethel is the sun..."

objective standard (as it is absent, here), little more can be done before entrusting the law into the hands of the judiciary.¹²³

Conclusion

The many uncertain provisions of the DMCA, and the many conflicting interpretations that the courts have given it, show that a change is sorely needed. The proposed safe harbor for online digital media stores provides some much needed clarity to the current state of the law. Store operators would receive much greater certainty of shelter within the safe harbor. In exchange, the true authors of creative works would receive greater protection and be assured of real assistance in fighting cyber-plagiarism. The proposed safe harbor ultimately seeks to foster cooperation by incentivizing mutual assistance to assure that everyone's rights are protected.

Appendix: Proposed Statutory Amendment

(x) Online digital media stores.--A service provider shall be liable only for limited monetary relief, and for only such injunctive or other equitable relief as provided in 17 U.S.C. §512(j), for infringement of copyright by reason of the provider offering for sale electronic copies of third party material, if the service provider--

(1)(A)(i) does not have actual knowledge that the material or activity is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; and

(B)(i) upon notification of claimed infringement as described in 17 U.S.C. § 512(c)(3), responds within 72 hours of receiving such notification to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity; or

(ii) in a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of 17 U.S.C. § 512 (c)(3)(A) but substantially complies with clauses (ii), (iii), and (iv) of 17 U.S.C. § 512 (c)(3)(A), attempts within 72 hours of receiving such defective notification to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph 17 U.S.C. § 512 (c)(3)(A).

(2) For purposes of this subsection, "limited monetary relief" means the profits earned by the alleged infringer on the material that is claimed to be infringing during the sixty (60) days prior to the service provider taking action pursuant to subsection (1)(B)(i).

¹²³ Of course, courts need not necessarily start from a blank slate. For example, in the context of trademark dilution (especially dilution by blurring), courts already may be called upon to assess whether a given trademark is "famous," that is, whether "it is widely recognized by the general consuming public of the United States." 15 U.S.C. §1125(c)(2)(A). This determination can include analyzing both "[t]he extent of actual recognition of the mark" (§1125(c)(2)(A)(iii)), and "[t]he degree of recognition of the famous mark" (§1125(c)(2)(B)(iv)). Such a pre-existing body of experience and case law seem especially applicable to matters like "Monino," as discussed *supra* Section II (A) (1).

(3) a service provider shall not be liable to any person for any claim based on the service provider's good faith withholding of the money described in subsection (2), regardless of whether the material is ultimately determined to be infringing.

(4) Subsections (f) through (n) of 17 U.S.C. § 512 shall apply to this subsection (x) in full force. 17 U.S.C. § 512(n) shall be amended to include this subsection (x).

South Park & the Law

Kristen Chiger*

“We have to put something on the internet that everyone will find fascinating,” explained Kyle Broflovski,¹ on the April 2, 2008 episode of *South Park*² entitled “Canada On Strike.”³ “Wait! I’ve got it,” replied Eric Cartman.⁴ Little did these fictional characters know, their “fascinating” idea would soon develop into a litigation mess for Matt Stone and Trey Parker, the creators and executive producers of the hit animated comedy series, *South Park*.⁵

It was during the “Canada On Strike” episode when *South Park*’s parody version of a “viral”⁶ 2008 YouTube video first aired.⁷ The parody video in this episode mocks the real-life video entitled “What What (In the Butt).”⁸ The original version, which lasts for nearly four minutes, features an adult African-American male “ensconced in a bright red, half buttoned, silk shirt, dancing, grinning creepily at the camera, and repeatedly singing the same cryptic phrases: ‘I said, what what, in the butt’ and ‘you want to do it in my butt, in my butt.’”⁹

Meanwhile, *South Park*’s parody version of “What What (In the Butt)” features “nine-year old Butters”¹⁰ singing the central lines of the original video, while dressed as a teddy bear, an astronaut, and even as a daisy.”¹¹ It was this same parody version of the video that sparked a copyright infringement suit against the hit animated comedy series, filed by the creator of the real-life “What What (In the Butt)” video, nearly two years after

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¹ See generally Character Guide – Kyle Broflovski, South Park Studios, <http://www.southparkstudios.com/guide/characters/kyle-broflovski> (“When stuff gets crazy in South Park, he usually is the most sympathetic and, along with Stan, provides the voice of reason”).

² See generally *South Park*, IMDb, <http://www.imdb.com/title/tt0121955/> (describing *South Park* as an animated comedy that “[F]ollows the misadventures of four irreverent grade-schoolers in the quiet, dysfunctional town of South Park, Colorado”).

³ See *South Park: Canada On Strike* (Comedy Central television broadcast Apr. 2, 2008), <http://www.southparkstudios.com/full-episodes/s12e04-canada-on-strike>.

⁴ See generally Character Guide – Eric Cartman, South Park Studios, <http://www.southparkstudios.com/guide/characters/eric-cartman> (“Cartman is the fat, self-centered asshole in the group, often concocting schemes to make money”).

⁵ See generally Behind the Scenes—Cast & Crew, South Park Studios, <http://www.southparkstudios.com/fans/behind/cast-and-crew> (listing Trey Parker and Matt Stone as the Executive Producers).

⁶ See *What Does Going Viral Mean*, Louisiana SEO Expert, <http://www.louisianascoexpert.com/what-does-going-viral-mean> (2011) (“[I]n essence, going viral means that something gets a ton of views in a short period of time”).

⁷ *South Park: Canada On Strike*, *supra* note 3.

⁸ Compare Brownmark Films, *Samwell—What What (In the Butt)*, YOUTUBE (Feb. 14, 2007), <http://www.YouTube.com/watch?v=fbGkxcY7YFU>, with South Park, *What, What, What In the Butt* (Season 12, Episode 4), <http://www.southparkstudios.com/clips/165193/what-what-in-the-butt>.

⁹ Brownmark Films, LLC v. Comedy Partners, 800 F. Supp. 2d 991, 993 (E.D. Wis. 2011).

¹⁰ See generally Character Guide – Leopold Butters Stotch, South Park Studios, <http://www.southparkstudios.com/guide/characters/leopold-butters-stotch> (describing the character Leopold “Butters” Stotch as “by far the most naïve and well-natured of the 4th graders, and for this, he is often shit on”).

¹¹ *Brownmark*, 800 F.Supp.2d at 994.

the South Park episode originally aired.¹² Enter the case of: *Brownmark Films, LLC v. Comedy Partners*.

This article argues that despite copyright infringement concerns, the United States District Court for the Eastern District of Wisconsin properly granted *South Park's* motion to dismiss prior to discovery. Part I of this article discusses the television show *South Park* and its history of creating controversial parodies. Part II gives a background of *Brownmark Films, LLC v. Comedy Partners*. Part III outlines the Copyright Act and the *prima facie* elements of a copyright claim. Part IV discusses the fair use defense and its historical application in cases involving parodies. Finally, Part V explains why the decision of the lower court should be affirmed on the appeal of *Brownmark Films, LLC v. Comedy Partners*.

I. SOUTH PARK AND THE LAW: A LONG HISTORY OF CONTROVERSIAL PARODIES

Since the show's creation in 1997, *South Park* has arguably managed to offend every group of people under the sun.¹³ The fact that the show involves alleged offensive humor is evident at the beginning of every episode, when viewers are presented with a tongue-in-cheek disclaimer.¹⁴ Because *South Park's* creators, Trey Parker and Matt Stone, tackle any subject matter they believe to be funny, the show has been described as an "equal opportunity offender."¹⁵

An incredibly long list of parodies have been featured on *South Park*, both before and after the "Canada On Strike" episode aired.¹⁶ Not only does the show parody celebrities and public figures on a regular basis, but the "What What (In the Butt)" video was certainly not the first instance where *South Park* created a parody of another video.¹⁷ In fact, the show often parodies full-length movies.¹⁸

II. BROWNMARK FILMS LLC V. COMEDY PARTNERS

Nearly two years after *South Park* aired the episode "Canada On Strike," featuring the "What What (In the Butt)" parody video, the creator of the original "What What (In the Butt)" video brought suit against the show, claiming copyright infringement.¹⁹

¹² *Id.* at 991.

¹³ See Scott Collins, *Threat Against 'South Park' Creators Highlights Dilemma for Media Companies*, LA TIMES (April 23, 2010), <http://articles.latimes.com/2010/apr/23/entertainment/la-et-south-park-20100423> (stating that during its 200-episode run, "the irreverent animated program 'South Park' has mercilessly satirized Christianity, Buddhism, Scientology, the blind and disabled, gay people, Hollywood celebrities and politicians of all persuasions, weathering the resulting protests and threats of boycotts").

¹⁴ SouthParkStudios.com, *Disclaimer*, <http://www.southparkstudios.com/about/show-disclaimer> (last visited Nov. 11, 2012) (displaying the disclaimer which appears at the beginning of every episode as "All characters and events in this show — even those based on real people — are entirely fictional. All celebrity voices are impersonated...poorly. The following program contains coarse language and due to its content it should not be viewed by anyone.").

¹⁵ Dennis Lim, *Lowbrow and Proud of It*, THE INDEPENDENT (March 29, 1998), <http://www.independent.co.uk/arts-entertainment/television-lowbrow-and-proud-of-it-1153256.html>.

¹⁶ See Katla McGlynn, *The 15 Greatest 'South Park' Movie Parodies*, HUFFINGTON POST (October 22, 2010), http://www.huffingtonpost.com/2010/10/22/south-parks-best-movie-parodies_n_771957.html#s88257&title=Cloverfield.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, (E.D. Wis. 2011).

A. “Canada On Strike”

The episode “Canada On Strike” shares a theme similar to most *South Park* episodes: it mocks a popular current event that took place around the episode’s original release date.²⁰ In this instance, the event happened to be the Writers Guild of America strike (“writer’s strike”).²¹ “Canada On Strike” pokes fun at the writers’ strike by featuring a “Canadian strike,” during which all of Canada decides to go on strike because they “deserve more money.”²²

In one scene, Kyle, Stan,²³ Butters, and Cartman become frustrated by the repeated showings of a Canadian comedy being aired on television. “It’s not a big deal; we can just watch an American comedy,” Stan suggests.²⁴

The boys then change the channel to what is an obvious *Family Guy* parody.²⁵ “We are not resorting to that!” Cartman exclaims.²⁶ Kyle then proceeds to call the head of the WGA (the “World Canadian Bureau”) who demands money in order to end the strike.²⁷

From this conversation, the boys come up with the idea of creating the “What What (In the Butt)” parody video as a way to make money to give to Canada and end the strike.²⁸ During a later scene in the episode, the boys encounter other YouTube sensations, and it is clear that this particular scene was meant to poke fun at the recent fad of watching low-quality YouTube videos.²⁹

²⁰ See Katla McGlynn, ‘*South Park*’ Mocks Occupy Wall Street, Michael Moore & The Media, HUFFINGTON POST (Nov. 3, 2011), http://www.huffingtonpost.com/2011/11/02/south-park-mocks-occupy-wall-street-video_n_1073322.html (explaining that South Park is “a perfect microcosm for whatever current event or scandal is rocking the news that particular week”).

²¹ Compare Video, *Strike Over, Hollywood writers head back to work*, CNN, Feb. 13, 2008, at <http://www.cnn.com/2008/SHOWBIZ/TV/02/13/writers.strike/index.html#cnnSTCtext> (noting that the 100-day strike, which began on Nov. 5, 2007, had ended) with *Canada On Strike*, IMDB.COM, at <http://www.imdb.com/title/tt1211261/> (listing the original air date as April 2, 2008).

²² *South Park: Canada On Strike*, TV.COM, <http://www.tv.com/shows/south-park/canada-on-strike-1188951/> (last visited Nov. 27, 2012).

²³ See generally SouthParkStudios.com, Character Guide – Stan Marsh, <http://www.southparkstudios.com/guide/characters/stan-marsh> (last visited Nov. 27, 2012) (describing Stan’s character as “your average, American 4th grader” who, along with Kyle, “often provides the voice of reason and helps to fix the problem”).

²⁴ *South Park: Canada On Strike*, *supra* note 3.

²⁵ See Travis Fickett, *South Park: “Canada On Strike” Review*, IGN (March 6, 2012) <http://uk.tv.ign.com/articles/864/864427p2.html> (suggesting that perhaps this episode “falls back on old material one too many times” by “bashing [...] Family Guy”).

²⁶ *South Park: Canada On Strike*, *supra* note 3.

²⁷ Nancy Basile, ‘*South Park*’ Episode Guide – Season Twelve, ABOUT.COM, (April 3, 2012), <http://animatedtv.about.com/od/episodeguide2/a/epguidep12.htm> (listing the description for the episode “Canada On Strike” as: “the head of the World Canadian Bureau leads the country into a long and painful strike and the responsibility of brokering a settlement rests with the boys”).

²⁸ See *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 992 (E.D. Wis. 2011) (explaining that in the episode, the “What What (In the Butt)” parody video was made as a way for the characters to make money on the internet).

²⁹ See *id.* at 1001 (stating that “Canada On Strike” showcases the inanity of the “viral video” craze and comments on “a bizarre social trend”).

B. “What What (In the Butt)” Parody Video

Brownmark Films, the plaintiff, is the co-owner of the copyright for the original music video “What What (In the Butt).”³⁰ Brownmark Films brought suit against Comedy Partners (“*South Park*”) for featuring the “What What (In the Butt)” parody on their show. During “Canada On Strike,” *South Park* creators put their own twist on the video, making it what the court considered to be “even more absurd” than the original, by replacing the African-American featured in the original video with “an innocent nine-year old boy dressed in adorable outfits.”³¹ Brownmark Films alleged that such use constituted a copyright infringement under the Copyright Act.

The United States District Court for the Eastern District of Wisconsin granted *South Park*’s motion to dismiss before even beginning the discovery process, based on the affirmative defense of fair use raised by *South Park*.³² The court reasoned that, although evaluating an affirmative defense such as the fair use defense at the pleadings stage is uncommon, the dispute between Brownmark Films and *South Park* did not warrant putting the defendants through the trouble and expense of discovery.³³

III. COPYRIGHT LAW

A. The Copyright Act

The Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁴ The Copyright Act of 1976, in general, protects “original works of authorship fixed in any tangible medium of expression.”³⁵

The Copyright Act protects the owner of a copyright by granting him or her exclusive rights to “reproduce, redistribute, and publicly display copies of the work.”³⁶

B. Elements of a Copyright Infringement Claim

Under the Act, in order to establish a copyright infringement *prima facie* claim, a plaintiff must show the existence of two elements: (1) ownership of a valid copyright; and (2) actionable copying by the defendant of constituent elements of the work that are original.³⁷

The first element, ownership of a valid copyright, is established by: (1) proving the originality and copyright-ability of the material; and (2) compliance with the statutory formalities.³⁸ The second element, proof of actionable copying, is established by proving: (1) the defendant factually copied the protected material; and (2) there is a “substantial

³⁰ See *What What (In the Butt)*, YOUTUBE (Feb. 14, 2007), <http://www.YouTube.com/watch?v=fbGkxcY7YFU>.

³¹ *Brownmark*, 800 F.Supp.2d at 1000-01 (E.D. Wis. 2011).

³² *Id.* at 1002.

³³ See *id.* at 999 (reasoning that in this case, the plaintiff failed to “address the substance of the fair use question, providing the court with absolutely no indication of any evidence or factors outside of the episode in question that could even possibly influence the resolution of the fair use issue in the plaintiff’s favor”).

³⁴ U.S. Const. Art. I, § 8, cl. 8.

³⁵ 17 U.S.C. § 102(a) (1988).

³⁶ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).

³⁷ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

³⁸ *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 47 (5th Cir. 1995).

similarity” between the two works.³⁹

When a copyright infringement claim is presented to a court and it is determined that both elements are met, the court must then consider any affirmative defenses by the defendant, one being the fair use doctrine.⁴⁰ The fair use doctrine serves as such a defense by permitting uses that would ordinarily be infringement but for the existence of certain factors.⁴¹ It is this fair use doctrine under which the *Brownmark Films* case was dismissed prior to the discovery stage.⁴²

IV. FAIR USE DEFENSE AND ITS HISTORICAL APPLICATION IN CASES INVOLVING PARODIES

Three different types of works are protected by the fair use doctrine, under 17 U.S.C. § 107: (1) comment or criticism; (2) education; and (3) news reporting.⁴³ Comment or criticism is often considered a “paradigmatic fair use” and covers parody.⁴⁴ Courts have consistently recognized that parody enjoys broad protections under the First Amendment and the Copyright Act.⁴⁵ A parody is defined as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effort or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase or class of authors are imitated in such a way as to make them appear ridiculous.”⁴⁶

For purposes of copyright law, “the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s work.”⁴⁷ It should be noted that whether a parody is done in bad taste is not relevant for the purposes of analyzing whether it’s a fair use.⁴⁸

To determine whether a parody constitutes fair use, a court must engage in a careful case-by-case analysis and a flexible balancing of relevant factors.⁴⁹ The factors are

³⁹ *Bridgmon v. Array Systems*, 325 F.3d 572, 576 (5th Cir. 2003).

⁴⁰ See 17 U.S.C. § 107.

⁴¹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 575 (1994) (discussing that the defendant’s song “Oh, Pretty Woman” would be an infringement of the plaintiff’s rights under the Copyright Act, “but for a finding of fair use through parody”).

⁴² *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 1002 (E.D. Wis. 2011).

⁴³ 17 U.S.C. § 107.

⁴⁴ Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. Rev. 1107 (2007) (citing Julie E. Cohen, *The Place of the User in Copyright Law*, FORDHAM L. REV. 347, 366 (2005)).

⁴⁵ See Copyright.gov, *Fair Use*, <http://www.copyright.gov/fls/fl102.html> (last updated June, 2012) (stating that the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* cites examples of activities that courts have regarded as fair use: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) (“Parody is a form of artistic expression, protected by the First Amendment”).

⁴⁶ *Campbell*, 510 U.S. at 580.

⁴⁷ *Id.*

⁴⁸ *Id.* at 582.

⁴⁹ See *id.* at 577 (stating that the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis); See also *Fair Use*, COPYRIGHT.GOV, <http://www.copyright.gov/fls/fl102.html> (“The distinction between what is fair use and what is infringement will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken

“to be explored, and the results weighed together, in light of the purposes of copyright” and depending on the particular facts, some factors may be weighed more heavily than others.⁵⁰

The four factors of the fair use defense to be considered are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵¹

A. Purpose & Character

The first factor in a fair use inquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁵² The main purpose of this factor is to determine whether a new work merely “supersedes the objects” of the original work, or instead adds something new.⁵³ In other words, it must be determined whether the new work is “transformative.”⁵⁴

One of the various forms of “transformative use” relates to the right of publicity.⁵⁵ Another form is a parody.⁵⁶ A parody has “an obvious claim to transformative value” because “like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁵⁷

In *Burnett v. Twentieth Century Fox Film Corporation*, the United States District Court for the Central District of California found a work to be transformative under the first element of fair use—purpose and character—when *Family Guy* featured a cartoon version of Carol Burnett/the Charwoman in an “awkward, ridiculous, crude, and absurd situation.”⁵⁸ The court determined that the *Family Guy* episode in question used the Carol Burnett cartoon parody “in order to lampoon and parody her as a public figure,” therefore rendering the cartoon version merely transformative and not a copyright infringement.⁵⁹

Similarly, in *Mattel Inc. v. Walking Mountain Productions*, the United States Court of Appeals for the Ninth Circuit found a series of photographs to be transformative when a defendant artist depicted the toy Barbie in “various absurd and often sexualized positions.”⁶⁰ Mattel, the makers of the toy Barbie, alleged that the artist’s photographs infringed on their copyrights, trademarks, and trade dress.⁶¹ However, the court concluded that Forsythe’s work could “reasonably be perceived as a parody” because the work

without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.”).

⁵⁰ *Campbell*, 510 U.S. at 578.

⁵¹ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) (citing 17 U.S.C. § 107).

⁵² 17 U.S.C. § 107(1).

⁵³ *Campbell*, 510 U.S. at 579.

⁵⁴ *See Dr. Seuss*, 109 F.3d at 1400.

⁵⁵ *See* Marc Edelman, *Closing the “Free Speech” Loophole: The Case for Protecting College Athletes’ Publicity Rights in Commercial Videogames*, 63 FLA. L. REV. (forthcoming 2013) (discussing whether the transformative element requirement is met, as it applies to the use of college athletes’ right of publicity in videogames).

⁵⁶ *See Campbell*, 510 U.S. at 579.

⁵⁷ *Id.*

⁵⁸ *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 969 (C.D. Cal. 2007).

⁵⁹ *Id.*

⁶⁰ *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003).

⁶¹ *Id.* (stating the photographs “portray a nude Barbie in danger of being attacked by vintage household appliances”).

“create[s] a context for Mattel’s copyrighted work that transform[s] Barbie’s meaning.”⁶²

Finally, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the transformative requirement was analyzed by the Court of Appeals for the Ninth Circuit, when Dr. Seuss Enterprises brought an action against a publisher who intended to publish a parody of the O.J. Simpson trial written in the style of a Dr. Seuss book.⁶³

Dr. Seuss Enterprises alleged that the parody book infringed on their copyrighted works and “used six unregistered and one registered Seuss trademarks, and diluted the distinctive quality of [Dr. Seuss’s] famous marks.”⁶⁴ The court held that, in this instance, the transformative element was not met because even though the Cat in the Hat character was “replaced” by Simpson, there was not enough effort put forth to create a transformative work.⁶⁵

Based on the case law currently available, it is clear that South Park’s “What What (In the Butt)” parody indeed meets the transformative requirement under the first factor of the fair use defense. The District Court for the Eastern District of Wisconsin correctly found that the South Park parody video “is truly transformative, in that it takes the original work and uses parts of the video to not only poke fun at the original, but also to comment on a bizarre social trend, solidifying the work as a classic parody.”⁶⁶

B. Nature of Copyrighted Work

The second statutory factor under the fair use doctrine, “the nature of the copyrighted work,”⁶⁷ recognizes that creative works are “closer to the core of intended copyright protection” than informational and fictional works, “with the consequence that fair use is more difficult to establish when the former works are copied.”⁶⁸ When analyzing fair use as it applies to parodies, the second factor does not hold much weight, as the District Court for the Eastern District of Wisconsin correctly noted in *Brownmark Films, LLC v. South Park*,⁶⁹ because parodies almost always copy publicly-known works in order to put a comedic spin on them.⁷⁰ The scope of fair use is greater when the work is “informational,” as opposed to a parody work that is more “creative.”⁷¹

⁶² *Id.* at 802.

⁶³ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397 (9th Cir. 1997) (“Wickedly clever author ‘Dr. Juice’ gives the O.J. Simpson trial a very fresh new look. From Brentwood to the Los Angeles County Courthouse to Marcia Clark and the Dream Team, *The Cat Not in the Hat* tells the whole story in rhyming verse and sketches as witty as Theodore [sic] Geisel’s best. This is one parody that really packs a punch!”).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1401 (“While Simpson is depicted 13 times in the Cat’s distinctively scrunched and somewhat shabby red and white stove-pipe hat, the substance and content of ‘The Cat in the Hat’ is not conjured up by the focus on the Brown-Goldman murders or the O.J. Simpson trial. Because there is no effort to create a transformative work [...] the infringing work’s commercial use further cuts against the fair use defense”).

⁶⁶ *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 1001 (E.D. Wis. 2011).

⁶⁷ 17 U.S.C. § 107(2) (2012).

⁶⁸ *Dr. Seuss*, 109 F.3d at 1402 (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 586 (1994)).

⁶⁹ *Brownmark*, 800 F.Supp.2d at 1001 (“[T]he ‘nature’ of the copyrighted work factor is not particularly helpful to the court, however: while fair use is more difficult to establish when a core work is copied as opposed to when an infringer takes material that is only marginally within copyright protection, the ‘nature’ of the copyright in question does not help this court assess whether South Park’s parody is a fair use, because ‘parodies almost invariably copy publicly known, expressive works.’”) (quoting *Campbell*, 510 U.S. at 586).

⁷⁰ See *Campbell*, 510 U.S. at 586 (stating that the second factor of the fair use analysis “is not much help in resolving [...] parody cases, since parodies almost invariably copy publicly known, expressive works”).

⁷¹ See generally *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir.1983); see also *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (“[T]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”); see also *Sony Corp. of America v. Universal City*

C. Amount & Substantiality

The third factor of the fair use analysis asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”⁷² is reasonable in relation to the author’s purpose for copying the original work.⁷³ There is no specific number of words, lines, or notes that may safely be taken without permission.⁷⁴

Under the third factor, the general rule is less is more. In other words, the less one takes from the original work, the more likely it is that the new work will be found to be fair use, so long as the portion taken is not the heart of the original work.⁷⁵

However, when it comes to analyzing the third fair use factor as it applies to parodies, this rule does not always apply. An author of a parody is permitted to use quite a bit from the original work because, as the Supreme Court has acknowledged, “the heart is also what most readily conjures up the [original] for parody, and it is the heart which parody takes aim.”⁷⁶

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court of the United States ruled on a case in which the defendant created a parody of Roy Orbison’s song, “Oh, Pretty Woman.”⁷⁷ The plaintiff in *Campbell* argued that the defendant used the “heart” of the original in the first line of their parody version.⁷⁸ However, the Supreme Court stated that just because a parody may use the original’s heart does not automatically mean the copying is excessive, because it may be necessary to use a memorable part of the original to show its parodic character.⁷⁹

In this same vein, in *Carol Burnett v. Twentieth Century Fox Film Corporation*, Burnett argued that Fox “took more [...] than necessary” in order to create the Carol Burnett/Charwoman parody.⁸⁰ However, the court found this argument to be unpersuasive, stating that “there is no requirement that ‘parodists take the *bare minimum* amount of copyright material necessary to conjure up the original work” when analyzing the third factor.⁸¹ The court went on to say that *Family Guy* took “just enough” in order to make the Charwoman character recognizable and thus ruled that the third factor weighed in favor of fair use.⁸²

In *Brownmark Films, LLC v. Comedy Partners*, the District Court for the Eastern District of Wisconsin found that the defendants “did not mirror the original ‘What What (In

Studios, Inc., 464 U.S. 417, 455 n. 40 (1984) (“[C]opying a news broadcast may have a stronger claim to fair use than copying a motion picture.”).

⁷² 17 U.S.C. § 107(3) (2012).

⁷³ See *Campbell*, 510 U.S. at 586.

⁷⁴ See *Fair Use*, *supra* note 47.

⁷⁵ See 17 U.S.C. § 107(3) (2012).

⁷⁶ *Campbell*, 510 U.S. 569.

⁷⁷ *Id.*

⁷⁸ *Id.* at 587.

⁷⁹ *Id.* at 588–89 (“Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.”).

⁸⁰ *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962, 970 (C.D. Cal. 2007) (stating that “plaintiffs argue that Fox took more of the Charwoman character’s image and Carol’s theme music than was necessary to place that image in the minds of viewers.”).

⁸¹ *Id.* (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273 (11th Cir. 2001)) (emphasis added).

⁸² *Id.* at 970–71 (“*Family Guy* takes just enough of the imagery and accompanying theme music to make this crude depiction of the Charwoman character ‘recognizable’ to viewers”).

the Butt)’ video.”⁸³ The *South Park* creators used less than a third of the length of the original, just enough to create their own parody version, which featured a cartoon.⁸⁴ *South Park*’s use of the imagery and words from the original video “was all but the minimum needed to accomplish their goal of commenting on a social phenomenon.”⁸⁵

D. Effect of the Use

The fourth and final fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.”⁸⁶ This factor asks whether actual harm resulted from the defendant’s use of the copyrighted material, and whether “unrestricted and widespread conduct of the sort engaged in by the defendant [...] would result in a substantially adverse impact on the potential market” for the original work.⁸⁷

The court must consider the effect that the defendant’s use has on the copyright owner’s ability to exploit his or her original work, by balancing “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”⁸⁸ The less of an adverse effect that the alleged infringement would have on the original owner’s financial gain, “the less public benefit need be shown to justify its use.”⁸⁹

It is highly unlikely that there is any question that *South Park*’s parody video would somehow usurp the market demand for Brownmark’s original “What What (In the Butt)” video. The *South Park* episode on which the parody video aired “lampoons viral video crazes,” the original “What What (In the Butt)” video “is the epitome of a clip that fuels such crazes.”⁹⁰

V. WHY THE COURT GOT IT RIGHT

A. *South Park*’s Use of “What What (In the Butt)” is Clearly Fair Use

Having balanced all four of the fair use factors, it is clear that *South Park*’s work in the “What What (In the Butt)” parody video falls within § 107’s exception and is protected as a fair use. The work done by placing the character Butters in the parody video was highly transformative, and created an entirely new character. The amount of Brownmark’s YouTube video that was used was just enough to conjure up the memory of the original video, rendering such use justified. *South Park*’s infringement had no discernible impact on Brownmark’s market for derivative uses, being that there was no compensation to be earned by Brownmark’s posting of the video on YouTube. Finally, the benefits to the public in permitting *South Park*’s use—allowing “artistic freedom and expression and criticism of a cultural icon”⁹¹—are great.

⁸³ Brownmark Films, LLC v. Comedy Partners, 800 F.Supp.2d 991, 1001 (E.D. Wis. 2011).

⁸⁴ *Id.* (“[T]he derivative work was a cartoon of a nine year old boy repeating just enough lines to conjure up the original work”).

⁸⁵ *Id.* (referring to the recent craze of society’s interest in low quality “viral” YouTube videos as a social phenomenon).

⁸⁶ 17 U.S.C. § 107(4) (2012).

⁸⁷ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 13.05[A], at 13-102.61 (1993)).

⁸⁸ *Dr. Seuss*, 109 F.3d at 1403 (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981)).

⁸⁹ *Id.*

⁹⁰ Brownmark Films, LLC v. Comedy Partners, 800 F. Supp. 2d 991, 1000 (E.D. Wis. 2011).

⁹¹ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003).

B. Dismissing a Case on Fair Use Grounds Protects Creative Expression

In *Brownmark Films*, the court dismissed the case before allowing the plaintiff to go through discovery.⁹² Though this is not the most common approach, the judge's use of discretion to do so was certainly applied correctly, given that the trier of fact only pointed to one conclusion: the parody video is clearly protected under the fair use defense.⁹³ However, *Brownmark* then appealed to the Seventh Circuit Court of Appeals, claiming that fair use cannot be decided on a motion to dismiss, no matter how obvious.⁹⁴

The district court in *Brownmark Films* correctly noted that the "rationale behind the [fair use] doctrine is that unauthorized uses of a copyright are permissible when they 'advance the underlying constitutional purpose of copyright law: to promote broad public availability of literature, music, and other forms of creative arts.'"⁹⁵

In a more recent *South Park* episode entitled "Faith Hilling," the show once again features a parody of a YouTube video.⁹⁶ This time, rather than poking fun at the trend in society of watching low quality YouTube videos, the episode lampoons the recent "meme" craze that has swept the nation.⁹⁷ The episode takes memes to a ridiculous new level, first featuring actual memes such as "Tebowing"⁹⁸ and "Breeding,"⁹⁹ and then fictional memes, such as "Taylor Swifiting"¹⁰⁰ and "Faith Hilling."¹⁰¹

At the heart of the "Faith Hilling" episode, "Taylor Swifiting" is replaced by "Oh Long Johnsoning": a challenge where teens put themselves in dangerous situations to see how many times they can say the words "Oh Long Johnson" before getting hurt.¹⁰² According to *South Park*'s local news, "Oh Long Johnsoning" was invented by cats.¹⁰³ To

⁹² *Brownmark*, 800 F.Supp.2d at 1001-02.

⁹³ See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986) ("[I]f there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged qualifies as a fair use of the copyrighted work.").

⁹⁴ See Appellant's Reply at 6, *Brownmark Films, LLC v. Comedy Partners*, 800 F.Supp.2d 991 (E.D. Wis. 2011), *appeal docketed*, No. 11-2620 (7th Cir. Jan. 10, 2012), 2012 WL 120909, at *6 ("[W]hen a district court considers an affirmative defense asserted in a 12(b)(6) motion, where such defense is based on argument rather than stark actuality, it leads to factual error and robs the plaintiff of its opportunity to prove its case").

⁹⁵ *Brownmark*, 800 F.Supp.2d at 1000 (quoting BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 8.3 (2010)).

⁹⁶ Compare *Talking Cat*, YOUTUBE (Feb. 14, 2007), <http://www.youtube.com/watch?v=964uCtgsDoE>, with *Oh Long Johnsoning*, SOUTHPARKSTUDIOS.COM, <http://www.southparkstudios.com/clips/411089/oh-long-johnsoning#searchterm=oh%20long%20johnson>.

⁹⁷ See "South Park" Uncovers the Dangers of Memeing, HUFFINGTON POST (March 29, 2012), http://www.huffingtonpost.com/2012/03/29/south-park-the-dangers-of-memeing-video_n_1387727.html (stating that in the Faith Hilling episode, *South Park* "cut right to the quick of internet safety" by addressing memeing).

⁹⁸ See Jacob Kleinman, *New South Park Episode: Faith Hilling, Swifiting, Breeding, and Other Memes*, INTERNATIONAL BUSINESS TIMES, March 29, 2012, <http://www.ibtimes.com/articles/321458/20120329/south-park-episode-faith-hilling-swifiting-meme.htm> (describing Tebowing as kids posing as Tim Tebow); see also *TEBOWING*, <http://www.tebowing.com> (last visited Nov. 27, 2012) (defining Tebowing as the act of getting down on a knee and starting to pray, "even if everyone else around you is doing something completely different").

⁹⁹ See Erik Hayden, "South Park" Warns Against the Dangers of Memes, TIME (Mar. 30, 2012), <http://newsfeed.time.com/2012/03/30/south-park-warns-against-the-dangers-of-memes/> (defining breeding as "literally putting a slice of bread over a cat's head").

¹⁰⁰ See Kleinman, *supra* note 98 ("Taylor Swifiting" is done by "pulling down your pants and dragging your butt along the ground like a dog").

¹⁰¹ See *id.* ("The episode begins at a Republican primary debate where no one is saying anything interesting until suddenly Cartman runs onto the stage and pulls out the front of his shirt to imitate breasts, called Faith Hilling after the singer").

¹⁰² *Id.*

¹⁰³ Kleinmann, *supra* note 98.

show this, a real-life YouTube video is played, which features an actual “talking” cat reciting what sounds to be “Oh Long Johnson.”¹⁰⁴

If the court determined on appeal that a motion to dismiss can no longer be granted prior to discovery, it would drastically hurt § 107’s purpose of allowing creative expression.¹⁰⁵ Reason being, the limits on copyright are just as important as the incentives. Fair use is one of the most crucial limits on copyrights because it ensures that copyright does not “stifle the very creativity which that law is designed to foster,”¹⁰⁶ such as the “Oh Long Johnsoning” and “What What (In the Butt)” parodies and humor featured in the “Faith Hilling” and “Canada On Strike” episodes.

C. Dismissing a Case on Fair Use Grounds Prevents Future Arbitrary Litigation from Viral YouTube Video “Stars”

In today’s society, reality television is a booming market.¹⁰⁷ However, in addition to the salaries reality stars are paid for appearing on their shows, they are also able to capitalize on their so-called fame by making promotional appearances,¹⁰⁸ creating perfume lines,¹⁰⁹ writing books,¹¹⁰ and even recording songs.¹¹¹

However, a financially rewarding career is not a reality for most YouTube stars.¹¹² If the *Brownmark Films* case was not been affirmed on appeal and it was determined that a motion to dismiss cannot be granted based on the parody defense prior to the discovery stage, it would set a dangerous precedent.

Such a ruling could lead to frivolous future litigation by other YouTube stars trying to make money off anyone who uses their videos for parody purposes. On Brownmark’s theory, the defendants in such cases would have to suffer through expensive

¹⁰⁴ Exulus, *Talking Cat*, YOUTUBE (Mar. 24, 2006), <http://www.youtube.com/watch?v=964uCtgsDoE>.

¹⁰⁵ See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (stating that the Copyright Act’s primary objective is to “encourage the production of original literary, artistic, and musical expression for the good of the public”).

¹⁰⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

¹⁰⁷ Kelefa Sanneh, *The Reality Principle: The Rise and Rise of a Television Genre*, THE NEW YORKER, May 9, 2011, http://www.newyorker.com/arts/critics/atlarge/2011/05/09/110509crat_atlarge_sanneh (the author refers to reality television as “the television of television”).

¹⁰⁸ Lauren Streib, *Here are the 10 Highest-Paid Reality Stars*, BUSINESS INSIDER, December 7, 2010, <http://www.businessinsider.com/the-10-highest-paid-reality-stars-2010-12> (stating that “endorsement deals and appearance gigs are the best (and fastest) ways to capitalize on the flash-in-the-pan fame inherent to reality television”).

¹⁰⁹ E.g., Marianne Garvey, *5 Things We Learned from Kardashian Confidential*, MSNBC.COM, November 29, 2010, <http://today.msnbc.msn.com/id/40415651/ns/today-entertainment/t/five-things-we-learned-kardashian-konfidential/#.T3m5rczpg7A> (listing the following accomplishments by the Kardashian sisters: “Reality show? Check. Jewelry and perfume lines? Check. Modeling gigs, stores, marriage, a baby? Yup. Damn, it is hard to keep up with this family. All that’s left is a book. Well, now they’ve got that covered too”).

¹¹⁰ See *id.*

¹¹¹ See Leah Greenblatt, *Music Review: Paris (2006)*, ENTERTAINMENTWEEKLY.COM, August 28, 2006, <http://www.ew.com/ew/article/0,,1333765,00.html> (The author asks the question, “Why *shouldn’t* Paris Hilton be a pop star? Because she can’t sing (any better than you do in the shower)? Because she doesn’t need the money? Because there are roughly 9,396,547 more deserving talents out there? America has already obliterated that logic by embracing undertalented reality-show siblings, dabbling actresses, and oddly mannish burlesque dancers in the same role”).

¹¹² See William Wei, *Meet the Youtube Stars Making \$100,000 Plus Per Year*, BUSINESS INSIDER, August 19, 2010, <http://www.businessinsider.com/meet-the-richest-independent-youtube-stars-2010-8?op=1> (showing that there are only 10 YouTube stars who made over \$100,000 during the year leading up to the article’s publication).

discovery, and having to do so would likely encourage many to settle rather than defend their fair use.

VI. CONCLUSION

On June 7, 2012, Judge Cudahy of the United States Court of Appeals, Seventh Circuit affirmed the ruling of the United States District Court for the Eastern District of Wisconsin in granting South Park's motion to dismiss before even beginning the discovery process.¹¹³ Judge Cudahy stated that the court agreed "with the district court's well-reasoned and delightful opinion."¹¹⁴

Not only is this ruling a win for *South Park* producers Matt Stone and Trey Parker, but it's a win for creative writers everywhere. Thanks to the ruling of *Brownmark Films v. Comedy Partners*, future defendants will not have to endure expensive litigation costs after the discovery stage in order to defend their fair use,¹¹⁵ thus encouraging the creative expression the public gains from parodies. The *Brownmark Films v. Comedy Partners* ruling provides the protection needed to those who wish to tackle the challenge of creating such parodies in the future. With the precedent set, creative writers such as Stone and Parker now have the protection they deserve in order to continue delivering laughs and amusement to the public for years to come.

¹¹³ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012).

¹¹⁴ *Id.* at 694.

¹¹⁵ See, e.g., Order Denying Defendants' Motion for Attorney's Fees and Costs, *Savage v. Council on American-Islamic Relations*, No. 3:07-cv-06076, 2008 WL 4890892, (N.D. Cal. Nov 12, 2008), Dkt. 60 (illustrating that even though a prevailing party in a copyright action may be able to recover attorneys' fees, that right to recover is not guaranteed).

Foul Territory: Identifying Media Restrictions in High School Athletics Outside the Bounds of First Amendment Values

Michelle Newman*

Abstract: With the growth of high school athletics, we have seen sports leagues that are beginning to resemble their collegiate and professional counterparts. As high school sports associations throughout the country attempt to control the messages being produced about their events, while also taking advantage of their commercial value, they have reformed their relationships with the media. Through the media credential process, sports associations condition press access to events on compliance with very restrictive terms. Some media organizations have resisted or fought restrictions, only to find themselves forced into settlements due to the timeliness of media coverage and the costs of litigation. Only one legal opinion, Wisconsin Interscholastic Athletic Ass'n v. Gannett Co., has addressed the issue and, unfortunately for the press, it ignored First Amendment doctrine.

Media credential agreements impose access restrictions limiting the press' ability to attend events, production restrictions controlling how the press covers events, and exclusive-rights restrictions granting specific media organizations rights to cover events and limiting others from interfering with those rights. This article advances the argument that media organizations should not be so quick to settle because many media credential policies do run contrary to First Amendment doctrine. It offers appropriate lines of analysis that courts should employ in evaluating sports associations' media restrictions and addresses the viability of current media credential policies under First Amendment doctrine.

INTRODUCTION

High school athletic programs have undergone a recent revolution. What began as a simple football game under the Friday night lights in front of hometown fans is now often a nationwide multimedia exhibition. Local and national television networks regularly broadcast events.¹ National newspapers follow the top teams.² On the ESPN Rise website, fans can find rankings of teams and individual athletes, watch clips of the past week's games, or read articles about the team to beat.³

High school athletics are beginning to resemble their collegiate and professional counterparts, not only because of increased attention,⁴ but also in relationships with the media. Many state high school sports associations⁵ and individual high school programs have adopted media policies mirroring those of the National Collegiate Athletic Association

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¹ See Ashley J. Becnel, *Friday Night Lights Reach the Supreme Court: How a case about high school football changed the First Amendment*, 15 SPORTS LAW. J. 327, 331-332 (2008).

² See USA TODAY, High School Sports Net, <http://www.usatodayhss.com/news/> (last visited October 29, 2012).

³ See ESPN The Rise, <http://espn.go.com/high-school> (last visited January 16, 2012).

⁴ See Becnel, *supra* note 1.

⁵ High school sports associations are statewide organizations that regulate interscholastic athletics. See *infra* notes 28-30.

(NCAA) and professional leagues.⁶ While the NCAA and professional leagues can easily implement media restrictions without the threat of Constitutional challenges, high school associations, as the governing body of public school athletic programs, are more susceptible to suit because their public status denotes government action.⁷

High school sports associations have adopted media credential policies, which grant media access to athletic events, restrict media conduct, and have included exclusive rights agreements granting preferential access to particular media outlets. Their restrictions range from innocuous limits on the number of representatives an outlet can send to invasive prohibitions on what journalists can say about the event. In response to recent media policy revisions, several disputes between sports associations and media organizations have developed. For example, in 2007, the Illinois High School Association (IHSA) banned journalists who refused to sign credential waivers.⁸ The credential waivers prevented journalists from obtaining ownership rights and commercial use of any photographs taken at the events.⁹ Faced with a lawsuit brought by the Illinois Press Association, the IHSA retracted its regulations of media work product and guaranteed equal access to all photographers.¹⁰ This settlement also halted pending legislation in the Illinois General Assembly that would have prohibited IHSA from enforcing its policy.¹¹

More recently, the North Carolina High School Sports Athletic Association (NCHSAA) instituted a rule allowing live broadcasting of regular season games to create an additional revenue stream.¹² Under the rule, schools wishing to broadcast games are encouraged to enlist the resources of a company under contract with NCHSAA to produce the content and stream the events on school-sponsored websites.¹³ It does not allow media outlets to stream live broadcasts on their own websites.¹⁴ A few schools have chosen not to stream games out of fear that it would lead to decreased ticket sales.¹⁵ Some have even banned media outlets from streaming live information or any actual game footage.¹⁶ NCHSAA still claims rights to all postseason events and prohibits any media outlet from broadcasting them.¹⁷ However, NCHSAA has yet to see any legal action from North Carolina media outlets.

Most often the media in these situations have preferred to compromise with sports associations through negotiation rather than challenge them through costly litigation.¹⁸ Public pressure to provide reports of athletic events also favors quick settlements through

⁶ See, e.g., NCAA.com, Broadcast and Media Services, <http://www.ncaa.com/media> (last visited January 16, 2012); Steelers.com, Steelers 2011 Media Guide, available at <http://www.steelers.com/team/steelers-media-guide.html>.

⁷ See *infra* Part II(A). See also, Nat'l. Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

⁸ Timothy J. McNulty, *There's only 1 way to frame IHSA photo spat: Principle*, CHI. TRIB., Feb. 22, 2008, at 1.25.

⁹ *Id.*

¹⁰ *IPA Settles IHSA Dispute*, ILL. PRESS ASS'N, <http://illinoispress.org/ipa-vs-ihsa-government-97.html> (last visited January 16, 2012).

¹¹ Alan Sutton, *IHSA: Press Association Reach Deal*, CHI. TRIB., Apr. 9, 2008, at Sec. 4, pg. 9.

¹² Phillip Gardner, *Schools Ban Media Outlet from Streaming Football Games*, VARSITYNC.COM (Oct. 4, 2011, 7:26 PM), <http://www.varsitync.com/waptest/articles/football-4887-media-games.html>.

¹³ Powell Latimer, *NCHSAA Head Mulling His Options*, STARNEWS ONLINE (Apr. 13, 2011, 3:13pm), <http://www.starnewsonline.com/article/20110413/ARTICLES/110419848?p=2&tc=pg>.

¹⁴ See *id.*

¹⁵ Gardner, *supra* note 12.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Toby Carrig, *Be Willing to Fight Your High School Association Over Photo Reprints*, ASSOCIATED PRESS SPORTS EDITORS DEC. NEWSLETTER (Dec. 24, 2008), <http://apsportseditors.org/newsletter/be-willing-to-fight-your-high-school-association-over-photo-reprints>.

negotiations.¹⁹ The media are also completely dependent on associations for access.²⁰ Journalists must be careful not to disrupt their relationship with associations and thereby jeopardize their ability to cover athletic events. As a result of some of these negotiations, the media has been able to convince certain sports associations to completely retract restrictive policies.²¹

Despite their dependence on sports associations, journalists are armed with a very powerful weapon – the First Amendment. In Illinois, the imminent threat of a lawsuit grounded in freedom of the press principles persuaded high school associations to compromise with the media.²² Other associations compromised simply because regulating restrictions turned out to be more burdensome than beneficial.²³ In spite of these victories for media organizations, the lack of official precedent or codified rules prohibiting restrictions makes it difficult for media organizations to protect themselves.

In the only case to date making it to trial, a high school association rather than a media organization brought suit.²⁴ In 2010, the Wisconsin Interscholastic Athletic Association (WIAA) commenced action against a Gannett newspaper outlet to declare its ownership rights in athletic events and the legitimacy of their media policies regarding exclusive rights agreements.²⁵ Gannett, one of the country's leading media companies and publisher of USA TODAY, unsuccessfully responded by challenging the constitutionality of WIAA's restrictive policies.²⁶ The Seventh Circuit in *Wis. Interscholastic Athletic Ass'n v. Gannett Co.* essentially ignored Gannett's First Amendment arguments by focusing on the state's right to act as a private entity and protect its intellectual property rights in an athletic performance.²⁷

This Article argues that restrictive provisions in high school sports associations' media credential agreements threaten First Amendment values and violate its protection of the press. Part I describes the media credentialing system common in high school athletics and defines the three main categories of restrictions: access restrictions, production restrictions, and exclusive-rights agreements. Part II provides an overview of freedom of the press jurisprudence as a basis for analysis under the First Amendment. This Part further illustrates how sports associations' media restrictions threaten the fundamental values of the First Amendment. Part III offers the analytical framework under First Amendment doctrine, which courts should utilize to determine the constitutionality of media restrictions at high school athletic events.

I. THE MEDIA CREDENTIALING PROCESS

While the media credential process differs for each sports association, this Part gives a general overview of what high school sports associations are and how they restrict the media through credential agreements.

¹⁹ Alicia Wagner Calzada, *Shut Out: The Dispute Over Media Access Rights in High School and College Sports*, 7 DEPAUL J. SPORTS L. & CONTEMPORARY PROBLEMS 1, 5 (2010).

²⁰ See *infra* notes 39–50.

²¹ See Carrig, *supra* note 18.

²² See *supra* notes 8–11.

²³ Carrig, *supra* note 18.

²⁴ *Wis. Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 658 F.3d 614 (7th Cir. 2011).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

A. *High School Sports Associations*

High school sports associations are typically non-profit organizations that promote and supervise interscholastic athletic programs.²⁸ Each state has its own association that oversees the activities of voluntary member schools,²⁹ which usually include both private and public institutions.³⁰ In some states, the association is a branch of the state government or is statutorily recognized as the official governing body of high school athletics.³¹ Absent a legislative mandate, member schools themselves have collaborated to create sports associations for efficient oversight of interscholastic competition.³² The main objective of sports associations is to promulgate and enforce regulations that ensure the physical and mental welfare of students.³³ By setting standards of conduct for member schools and developing rules for athletes, sports associations have a pervasive influence on high school athletics throughout the country.

B. *Media Credentials*

In addition to regulating member schools, sports associations typically issue policies that control media conduct at athletic events. Sports associations enforce these media policies through credential agreements. By conditioning access to certain state events with these policies, sports associations force media organizations to surrender rights they might otherwise enjoy.³⁴ Associations will only grant credentials to “recognized” media agencies.³⁵ While some associations issue credentials for all athletic events,³⁶ many regulate

²⁸ Brief for Interscholastic Ass’ns as Amici Curiae Supporting Respondents at 3, *Brentwood Academy v. Tenn. Secondary School Athletic Ass’n*, 531 U.S. 288 (2001) (No. 99-901).

²⁹ *State Association Listing*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, <http://www.nfhs.org/stateoff.aspx>.

³⁰ Brief for Interscholastic Ass’ns, *supra* note 28.

³¹ Brief for Interscholastic Ass’ns, *supra* note 28; *About the FHSAA*, FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, <http://www.fhsaa.org/about> (last visited January 16, 2012)[hereinafter *About FHSAA*]; *DIAA Introduction*, DELAWARE DEPARTMENT OF EDUCATION, http://www.doe.k12.de.us/infosites/students_family/diaa/intro/default.shtml (last visited January 16, 2012)[hereinafter *DIAA Introduction*].

³² See *The History of the OHSAA*, THE OHIO HIGH SCHOOL ATHLETIC ASS’N, <http://www.ohsaa.org/general/about/history.htm> (last visited Feb. 10, 2012); *About the SDHSAA*, SOUTH DAKOTA HIGH SCHOOL ACTIVITIES ASS’N, <http://www.sdhsaa.com/AboutUs/AbouttheSDHSAA.aspx> (last visited Feb. 10, 2012); *History of the LHSAA*, LOUISIANA HIGH SCHOOL ATHLETIC ASS’N, <http://lhsaa.org/about/history> (last visited Feb. 10, 2012).

³³ See, e.g., *About the FHSAA*, *supra* note 31; *History of the NCHSAA*, NORTH CAROLINA HIGH SCHOOL ATHLETIC ASSOCIATION, <http://www.nchsaa.org/pages/3/History-NCHSAA/#.UJC62bRQO0s> (last visited October 30, 2012); *About the OSAA*, OREGON SCHOOL ACTIVITIES ASSOCIATION, <http://www.osaa.org/osaa/info> (last visited January 16, 2012); *Vision & Mission*, CALIFORNIA INTERSCHOLASTIC FEDERATION, <http://www.cifstate.org/index.php/vision-a-mission> (last visited January 16, 2012).

³⁴ Some media representatives boycott onerous policies by refusing to sign credential agreements. See McNulty, *supra* note 8.

³⁵ See *CHSAA Media/Photo Credentialing Policy*, COLORADO HIGH SCHOOL ACTIVITIES ASS’N (2012), www.chsaa.org/home/pdf/Media%20Credential%20Policy.pdf (last visited November 21, 2012) (evaluates media based on circulation numbers, Arbitron Rating numbers, and page views/hits)[hereinafter *Colorado Credentialing Policy*]; *Media Agency- Definition of for Credentialing Purposes*, ARIZONA INTERSCHOLASTIC ASS’N, <http://www.aiaonline.org/story?id=9059> (last visited October 9, 2011) (defines media as a daily newspaper, weekly newspaper, television station, radio station, magazine, or Internet site whose “original content is solely provided by this means and not through other sources.”)[hereinafter *Arizona Definition*]; Ohio High School Athletic Association prioritizes tournament access based on the type of media organization. Priority is given first to outlets with a statewide scope, then media from the teams’ hometowns, followed by media which covers the site of the host facility and all other media (internet sites, specialty publications). See *2012-2013 OHSAA General Media Regulations*, OHIO HIGH SCHOOL ATHLETIC ASS’N, 8-9, www.ohsaa.org/news/media/OHSAA-Media-Regulations.pdf (last visited November 21, 2012) [hereinafter *Ohio Media Regulations*].

only tournament or post-season championship events.³⁷ The most threatening media restrictions found in typical credential agreements can be divided into three main categories: (1) access restrictions; (2) editorial restrictions; and (3) exclusive rights restrictions.³⁸

1. *Access Restrictions*

The media credentialing process is a mechanism for high school sports associations to restrict access to their events. Signing the credential agreement does not guarantee media access to an athletic event because agreements in most states are merely applications for credentials.³⁹ In deeming it an application process, associations do not consider themselves under any obligation to grant every media outlet access to their events.⁴⁰ Stringent agreement terms provide evidence of high school associations' desire to limit the number and regulate the type of media representatives on the sidelines.

Many associations consider the grant of access conditional upon adherence to credential agreement terms.⁴¹ Some terms even empower association authorities to revoke

³⁶ Including games, tournaments, and practices. See *Media Rights Agreement*, FLORIDA HIGH SCHOOL ATHLETIC ASS'N (2010), http://www.fhsaa.org/sites/default/files/at11_media.pdf (last visited November 21, 2012) [hereinafter *Florida Agreement*]; *CIAC Media Policies/Procedures/Committee*, CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, <http://www.casciac.org/media.shtml> (last visited October 8, 2011) [hereinafter *Connecticut Media Policies*].

³⁷ See *Football State Championships Media Policy*, UNIVERSITY INTERSCHOLASTIC LEAGUE, <http://www.uiltexas.org/media/info/football-state-championships-media-policy> (last visited October 3, 2011) [hereinafter *Texas Football Policy*]; *Playoff Broadcast Policy*, ALABAMA HIGH SCHOOL ATHLETIC ASS'N, <http://www.ahsaa.com/Media/PlayoffBroadcastPolicy/tabid/142/Default.aspx> (last visited October 6, 2011) [hereinafter *Alabama Playoff Policy*].

³⁸ Sports associations also impose advertising requirements and technical production restrictions. Associations also regulate advertising accompanying the media's coverage of the event and even impose their own advertising obligations on the organizations. Sports associations tend to ban any advertising that would appear incompatible with educational dignity, including tobacco, alcohol, medicine, political, adult entertainment, and gambling advertisements. See *Florida Agreement*, *supra* note 36, at 5; *Texas Football Media Policy*, *supra* note 37; *Broadcast Request Form*, OREGON SCHOOL ACTIVITIES ASS'N, www.osaa.org/media/broadcastrequestform.pdf [hereinafter *Oregon Broadcast Form*]; *2010 VHSL Football Championships Media Credentials*, VIRGINIA HIGH SCHOOL LEAGUE, <http://www.vhsl.org/doc/upload/bkb-credential-instructions.pdf> [hereinafter *Virginia Credentials*]. Some require television and radio outlets to include approved public service announcements promoting the association or advertisements from the association's own sponsors. See *MIAA Media Agreement for Coverage of Tournament Events*, MASSACHUSETTS INTERSCHOLASTIC ATHLETIC ASS'N, 2 (Oct. 2007), www.miaa.net/gen/miaa_generated_bin/documents/basic_module/wb19_media_agreement_tournament.pdf [hereinafter *Massachusetts Agreement*]; *Oregon Broadcast Form*, *supra* note 38, at 1; *Florida Agreement*, *supra* note 36, at 3 (requiring 2 FHSAA PSA's during the actual game broadcast, not pregame or postgame shows). Technical production restrictions may limit the number of media credentials issued to a single organization, confine press representatives to designated areas of the venue, or require sideline reporters to dress professionally. See *Florida Agreement*, *supra* note 36, at 3; *Connecticut Media Policies*, *supra* note 36; *Arizona Definition*, *supra* note 35.

³⁹ See, e.g., *Media Policies and Procedures*, NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASS'N, <http://www.nysphsaa.org/media/policies.asp> (last updated Sept. 11, 2012) [hereinafter *New York Policies*]; *Connecticut Media Policies*, *supra* note 36; *Credentials*, ILL. HIGH SCHOOL ASS'N, <http://ihsa.org/NewsMedia/NewsMediaCenter/Credentials.aspx> (last visited January 16, 2012) [hereinafter *Illinois Credentials*].

⁴⁰ See, e.g., *New York Policies*, *supra* note 39; *Connecticut Media Policies*, *supra* note 36; *Illinois Credentials*, *supra* note 39.

⁴¹ *Florida Agreement*, *supra* note 36 at 3; *2012-2013 Request for Media Credentials*, ARIZONA INTERSCHOLASTIC ASS'N, <http://www.aiaonline.org/story?id=9061> [hereinafter *Arizona Credentials*]; *Connecticut Media Policies*, *supra* note 36.

access at any time for any reason, or for no reason at all.⁴² In so doing, associations force media compliance with their demands under threat of losing access completely.

2. *Editorial Restrictions*

Editorial restrictions represent the most invasive requirements on the media's editorial discretion. As a result, it is not surprising that only a few associations have explicitly incorporated them into their credential agreements.⁴³ Editorial restrictions often prohibit criticism of officials, coaches, teams, players, schools, or other involved entities.⁴⁴ For example, the Florida High School Athletic Association demands that discussion of injuries be minimized in order to "prevent undue anxiety on the part of viewers."⁴⁵ Further, if broadcasts are in "poor taste" or "incompatible with educational dignity," the media organization could lose all future reporting rights.⁴⁶

Other associations mask possible editorial restrictions as generic revocation provisions.⁴⁷ Broad clauses referring to the association's right to deny or revoke credentials without cause or for a media representative's improper conduct can easily lead to implied editorial restrictions.⁴⁸ Out of fear of losing access, media representatives may self-censor reports so they are not criticizing event participants or discussing athlete injuries.

3. *Exclusive Rights Restrictions*

A third category of restrictions arises from a sport association's claim to all property rights in an athletic event. Associations often presume⁴⁹ that they alone have the rights to commercially use, broadcast, or license any product of the events they sponsor.⁵⁰ Based on these erroneous presumptions, they assume the power to grant exclusive rights to third parties and the power to charge "rights fees" for certain media activities.⁵¹ As a result of exclusive rights agreements, other media organizations are subject to stringent limitations.⁵²

Associations typically grant exclusive contracts for broadcasting rights only.⁵³ Some exclusive agreements apply to post-regular season activities only, leaving individual schools

⁴² See *Arizona Credentials*, *supra* note 41 ("This credential is non-transferable and may be revoked at any time without cause"); *Connecticut Media Policies*, *supra* note 36 ("The CIAC has the right to refuse or revoke media credentials due to the applicant has falsified information on their request form or for improper conduct").

⁴³ *Radio Broadcasting Agreement*, UNIVERSITY INTERSCHOLASTIC LEAGUE (Aug. 2010), www.uiltexas.org/files/media/Radio_Broadcast_Agree_Form.pdf. ("There shall be no discussion of University Interscholastic League policies which are of a controversial nature"); *Florida Agreement*, *supra* note 36, at 3 ("Announcers are expected to handle broadcasts with efficiency and without introduction of objectionable comments such as criticism of an official, coach, team, player, school or other entity. Reports of any accidents, injuries or other incidents should be minimized and factual, in order to prevent undue anxiety on the part of viewers.").

⁴⁴ *Florida Agreement*, *supra* note 36, at 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Arizona Credentials*, *supra* note 41; *Connecticut Media Policies*, *supra* note 36.

⁴⁸ See *Arizona Credentials*, *supra* note 41 ("This credential is non-transferable and may be revoked at any time without cause."); *Connecticut Media Policies*, *supra* note 36 ("The CIAC has the right to refuse or revoke media credentials due to the applicant has falsified information on their request form or for improper conduct.").

⁴⁹ See *infra* notes 174–179 and accompanying text.

⁵⁰ *Arizona Credentials*, *supra* note 41; *Connecticut Media Policies*, *supra* note 36; *Texas Football Media Policy*, *supra* note 37.

⁵¹ *Florida Agreement*, *supra* note 36 at 1.

⁵² See *supra* notes 8–17 and accompanying text.

⁵³ These could include television, radio, and Internet broadcasts. *Florida Agreement*, *supra* note 36 at 3; *Arizona Credentials*, *supra* note 41; *Connecticut Media Policies*, *supra* note 36; *Alabama Playoff Policy*, *supra* note 37; *Texas Football Media Policy*, *supra* note 37; *Ohio Media Regulations*, *supra* note 35; *New York Policies*, *supra*

to decide who can broadcast regular season games⁵⁴ or prohibiting broadcasting of regular season events altogether.⁵⁵ To protect the value of exclusive contracts, associations will ban all other media representatives from live television and Internet broadcasts or radio play-by-play accounts⁵⁶ and impose time limits on video clips or news reports.⁵⁷ Some may grant permission for delayed broadcasts as the exclusive contracts allow.⁵⁸

In addition to broadcast agreements, associations often grant exclusive contracts for the commercial use of photographs and commercial distribution of game footage.⁵⁹ In such cases, the general media may only publish photographs and cannot sell the photos directly to consumers.⁶⁰

Associations also invoke their property rights in events to charge “rights fees.”⁶¹ These fees generally apply to live broadcasting. The fees could range from \$50 to \$2,000 for the right to broadcast the event live via television, radio, or Internet.⁶² Fees for video transmissions tend to be greater than those for audio broadcasts.⁶³ The amount can also vary depending on the popularity of the sport or the esteem of the event.⁶⁴ Exclusive rights agreements, whether granted for news reporting or commercial ventures, demonstrate another invasive way sports associations restrict the media’s ability to cover high school athletic events.

With access restrictions limiting the media’s ability to attend events, editorial restrictions infringing on the content they publish, and exclusive rights agreements precluding broadcasting capabilities, the media enjoys little freedom in covering high school athletic events.

note 39; *Media Guidelines and General Policies – FALL*, NEVADA INTERSCHOLASTIC ACTIVITIES ASS’N, 3 (2011), http://www.niaa.com/misc/Media/Media_Guidelines-_FALL.pdf [hereinafter *Nevada Policies*].

⁵⁴ See *Nevada Policies*, supra note 53, at 3.

⁵⁵ See *Texas Football Media Policy*, supra note 37; *Ohio Media Regulations*, supra note 35. See also, Gardner, supra note 12.

⁵⁶ *Arizona Credentials*, supra note 41; *Alabama Playoff Policy*, supra note 37; *Texas Football Media Policy*, supra note 37; *New York Policies*, supra note 39; *Ohio Media Regulations*, supra note 35; *Florida Agreement*, supra note 36, at 3.

⁵⁷ See *Arizona Credentials*, supra note 41 (limiting news package to five minutes, including game footage and interviews); *Connecticut Media Policies*, supra note 36 (limiting reports to 5 highlights less than 90 seconds each); *New York Policies*, supra note 39 (limiting free reports to 60 seconds and requiring payment of a fee and association approval for anything more); *Massachusetts Agreement*, supra note 38.

⁵⁸ A delayed broadcast ranges from 1 hour to 12 hours after the event. *Broadcast Permission Request*, ALABAMA HIGH SCHOOL ATHLETIC ASS’N, <http://www.ahsaa.com/Media/BroadcastPermissionRequest/tabid/1781/Default.aspx> (last visited October 8, 2011) [hereinafter *Alabama Broadcast Request*].

⁵⁹ See *Arizona Credentials*, supra note 41. Commercial distribution could include selling photographs to companies that reproduce material for t-shirts or selling a game film to athletes’ parents. *Id.*

⁶⁰ See *Florida Agreement*, supra note 36, at 3; *Connecticut Media Policies*, supra note 36; *Texas Football Media Policy*, supra note 37. However, Arizona allows the media to sell photographs to ultimate consumers (e.g. newspaper readers) and media distributors, but no one else. *Arizona Credentials*, supra note 41.

⁶¹ *Connecticut Media Policies*, supra note 36; *Alabama Broadcast Request*, supra note 58; *Massachusetts Agreement*, supra note 38, at 2; *Virginia Credentials*, supra note 38; *Oregon Broadcast Form*, supra note 38; *Nevada Policies*, supra note 53, at 3; *Florida Agreement*, supra note 36.

⁶² See *Virginia Credentials*, supra note 38; *2012-2013 Television/Video Web Cast Broadcast Agreement*, COLORADO HIGH SCHOOL ACTIVITIES ASS’N, <http://www.chsaa.org/home/pdf/TV%20Contract.pdf> [hereinafter *Colorado Broadcast Agreement*].

⁶³ See *Alabama Broadcast Request*, supra note 58.

⁶⁴ For example, in Colorado, a football, basketball, or soccer game costs more than other sports. *Colorado Broadcast Agreement*, supra note 62. And in Connecticut, tournament playoff radio broadcasters are charged \$100, but for the tournament finals it costs \$200. *Connecticut Media Policies*, supra note 36.

II. MEDIA RESTRICTIONS AND FIRST AMENDMENT DOCTRINE

This Article argues that sports associations violate fundamental First Amendment values when they impose restrictions and limit the freedom of the media to cover athletic events. By incorporating very restrictive provisions into media credential agreements, sports associations appear to have four main goals in mind: 1) preventing interference in athletic events; 2) controlling messages communicated about events; 3) preserving the commercial value of events; and 4) protecting the integrity of an educational atmosphere. This Part first provides an overview of the First Amendment's media protections, then establishes how each of these goals, especially when achieved through coercive means, are inconsistent with the First Amendment's guarantee of freedom of the press.

A. *First Amendment Doctrine*

By distinguishing freedom “of the press,” the Framers of the First Amendment granted the media a special status in society. They established “an unofficial fourth branch of government,” tasked with watchdog responsibility of checking on all three official branches to expose action contrary to the public interest.⁶⁵ Recognizing that informed citizens are a critical component of a successful democracy and the media's role in informing the citizenry, the Framers wanted to ensure that the media enjoyed freedom to criticize and comment on government action.⁶⁶ This philosophy is supported by First Amendment values, such as freedom from prior restraints,⁶⁷ prevention of interference with editorial discretion,⁶⁸ and encouragement of diverse viewpoints.⁶⁹ These values protect the media's watchdog role and preserve a marketplace of ideas.⁷⁰

While freedom of the press is provided special protection by the First Amendment, the media do not enjoy complete discretion to publish information as they choose. Courts have carved out certain exceptions from the First Amendment's protection to safeguard significant state interests such as guarding individual privacy,⁷¹ preventing defamation,⁷² limiting obscene material,⁷³ or ensuring national security.⁷⁴ Balancing First Amendment values against the conflicting state interests at stake, courts have attempted to establish reasonable limits on the press without significantly inhibiting their watchdog function. Reconciling the First Amendment with other social values and objectives has proven to be a difficult task,⁷⁵ thus creating what scholars describe as “a tumultuous doctrinal sea” and a

⁶⁵ LEONARD LEVY, *EMERGENCE OF A FREE PRESS*, reprinted in *THE FIRST AMENDMENT FREEDOM OF THE PRESS* 301, 303 (Garrett Epps ed., 2008).

⁶⁶ *Id.* at 304; *Cox v. Cohn*, 420 U.S. 469, 492 (1965) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”).

⁶⁷ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 633-34 (1977).

⁶⁸ *See id.* at 611-17.

⁶⁹ *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence* 88 CALIF. L. REV. 2353, 2363-66 (2000).

⁷⁰ The marketplace of ideas demands discourse between as many diverse viewpoints possible. It focuses on the idea that people with access to a wide range of ideas will ultimately find the truth. *Id.*

⁷¹ Thomas Emerson, *Toward a General Theory of The First Amendment*, 72 Yale L.J. 877 (1963), reprinted in *THE FIRST AMENDMENT FREEDOM OF THE PRESS* 256, 261 (Garrett Epps ed., 2008).

⁷² *Id.*

⁷³ *Id.* at 265-66.

⁷⁴ *Id.* at 263-64.

⁷⁵ *Id.* at 257.

“profoundly chaotic collection of methods and theories.”⁷⁶ Amidst the confusion over interpretation of the First Amendment’s “freedom of the press” doctrine, it is clear that courts will continue to consider not only the fundamental values embodied in the words “of the press,” but also other social objectives.⁷⁷

B. *Sports Association Media Restrictions & First Amendment Values*

As this Article discusses above, courts evaluating the constitutionality of media restrictions at high school athletic events must evaluate the objectives of sports associations in light of underlying First Amendment values. It appears that sports associations have four main objectives in mind when limiting the press: 1) Preventing interference in athletic events; 2) controlling messages communicated about events; 3) preserving the commercial value of events; and 4) protecting the integrity of an educational atmosphere.

1. *Controlling the Message*

Sports associations’ media restrictions often reflect an attempt to control the messages being communicated about their athletic events. Provisions illustrate that they do not want negative attention drawn toward the association, the athletes, the officials, or the schools involved.⁷⁸ Such attempts to control the media violate the value of protection from prior restraints,⁷⁹ which are government orders prospectively prohibiting the publication of information.⁸⁰ Protection from prior restraints also includes prevention of media self-censorship.⁸¹ Often courts fear that adopting a particular policy will ultimately stop the media from covering topics of public interest out of fear of subsequent punishment.⁸² A sports association’s assertion of control over what the media publishes about athletic events inhibits the media’s watchdog function through prior restraints.

2. *Preserving Commercial Value*

Sports associations also use media restrictions to preserve the commercial value of high school athletic events.⁸³ Exclusive contracts are a valuable commodity in sports reporting and media organizations are willing to pay a high price for the exclusive rights to broadcast an event.⁸⁴ Yet, this value is diminished if other media organizations are given the same or similar opportunities to cover an event.⁸⁵ Sports associations are also concerned with ticket sales and fear that some forms of coverage, especially live broadcasts and news feeds, will discourage fans from attending events.⁸⁶ However, preserving the commercial value of a generally state-funded or supported event runs counter to one of the policy reasons for protecting freedom of the press – encouraging diverse viewpoints.

⁷⁶ Post, *supra* note 69.

⁷⁷ Emerson, *supra* note 71, at 257.

⁷⁸ See *supra* notes 44–47.

⁷⁹ See Blasi, *supra* note 68.

⁸⁰ THE FIRST AMENDMENT FREEDOM OF THE PRESS, 107 (Garrett Epps, ed., 2008).

⁸¹ See *Near v. Minnesota*, 283 U.S. 697 (1931); *City of Lakewood v. Plain Dealer Publ’g Co.* 486 U.S. 750, 757 (1988).

⁸² For example, the Supreme Court refused to adopt a policy permitting a libel plaintiff to prove a mere negligence standard when he is a public official out of fear that media commentary on the actions of public officials would be chilled. See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

⁸³ See *supra* notes 50–54.

⁸⁴ See *supra* notes 61–62.

⁸⁵ See *Wisconsin Interscholastic Athletic Ass’n*, 658 F.3d at 628.

⁸⁶ See Gardner, *supra* note 12.

Encouraging diverse viewpoints supports the marketplace of ideas concept, which focuses on the idea that "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁸⁷ The more voices heard about a public issue the better. As applied to the media, encouraging diverse viewpoints requires that media organizations be given equal access to cover public issues in the same manner, in order to prevent any one viewpoint from gaining an advantage over another.⁸⁸ The principle also encourages state actors to welcome media organizations with various ideological agendas,⁸⁹ so that the public may discover the ultimate truth on any topic of public importance, including high school athletics. Granting preferential access to a particular media organization contradicts this fundamental value.

3. *Protecting Integrity of an Educational Atmosphere*

Perhaps the most compelling objective of sports associations is to protect the integrity of the educational atmosphere at high school athletic events.⁹⁰ They may want to avoid subjecting student athletes to a multimedia exhibition and the ensuing scrutiny of modern sports reporting.⁹¹ Further, minors and the education system tend to warrant special consideration under the First Amendment.⁹² These are all factors that must be balanced with the First Amendment values they cut against, in particular the prevention of interference with editorial discretion.

For a sports association to prohibit a media organization from saying certain things about athletes,⁹³ from allowing certain advertisements to accompany their coverage,⁹⁴ or limit the medium by which they can cover an event,⁹⁵ is a blatant interference with the media's editorial discretion to cover an athletic event as they choose. Courts are generally hesitant to say how a particular story is best covered,⁹⁶ claiming the public's interest in information about public matters is best served by the media's judgment rather than that of a court or jury.⁹⁷ Prohibiting government interference in editorial decisions helps the media fulfill their duties as the nation's watchdog by empowering them to publish information about the government without restraint.⁹⁸ In the high school sports context, editorial discretion is crucial to effective critique and comment on the actual athletic competition, the sports association's production of the event, and the state's or high schools' administration of athletic programs generally.

⁸⁷ *Abrams v. United States* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁸⁸ *See Post*, *supra* note 69.

⁸⁹ *See Post*, *supra* note 69.

⁹⁰ *See infra* notes 240–51.

⁹¹ *See infra* notes 240–51.

⁹² *See infra* notes 244–50.

⁹³ *See supra* notes 44–48.

⁹⁴ *See supra* note 38.

⁹⁵ *See id.*

⁹⁶ *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

⁹⁷ *See Blasi*, *supra* note 67, at 611–17.

⁹⁸ *See id.*

4. *Preventing Interference in Athletic Competition*

Sports associations also have an interest in preventing physical interference in athletic competitions.⁹⁹ Media credential provisions restricting the methods or procedures of reporting at events come at a sacrifice to the journalists' discretion to cover events as they see fit.¹⁰⁰ As demonstrated above, courts recognize the importance of editorial discretion to the First Amendment's protections and the fulfillment of the media's watchdog role.

III. FRAMEWORK FOR ANALYSIS

With different media restrictions reflecting a range of motives, it would be difficult for courts to apply a blanket policy prohibiting or allowing restrictions to meet First Amendment demands. Based on the aforementioned First Amendment values, courts have identified the levels of scrutiny that strike an appropriate balance between protecting the freedom of the press and legitimate state interests. Evaluating restrictions under a cohesive framework consistent with First Amendment doctrine ensures that courts develop the most accurate and consistent precedent. As discussed in the proceeding section, courts should employ a four-part framework for analysis. First, as with any constitutional analysis, it must be established that a state actor is involved. Second, courts must establish whether the First Amendment is applicable. Third, courts should determine the type of forum based on the location of the high school athletic event. Fourth, they must evaluate sports associations' justifications for media restrictions under the appropriate level of scrutiny.

A. *Is the Sports Association a State Actor?*

It is well established that the Constitution only applies to government conduct.¹⁰¹ Courts have no power to halt or prevent Constitutional infringements by private individuals or entities.¹⁰² However, if private conduct is so entangled with a state function, the private actor may be subject to Constitutional limitations.¹⁰³ High school sports associations are typically non-profit organizations separate from any branch of state government. In one instance, the Supreme Court has recognized a sports association that oversaw both public and private schools as a state actor.¹⁰⁴ In that case, pervasive state entwinement in athletic programs was illustrated by the association's significant composition of public schools, the involvement of public school officials acting in their official capacity, the payment of dues by member schools, and the extensive, often state approved, regulations enforced by the association.¹⁰⁵ Further, the association received a portion of ticket sales at member schools' games. It enjoyed "the schools' moneymaking capacity as its own."¹⁰⁶ Since the Supreme

⁹⁹ See *infra* notes 260–61.

¹⁰⁰ See *supra* notes 96–98 and accompanying text.

¹⁰¹ Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985).

¹⁰² *Id.* at 508.

¹⁰³ See *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n.*, 531 U.S. 288, 295 (2001) (state action can result from (1) State exercising coercive power, *id.* at 296 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (2001)); (2) a private actor acting as a willful participant in joint activity with the State, *id.* (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982)); (3) a State delegating a public function to a private actor, *id.* (citing *Edmonson v. Leesville Concrete Co.*, 500 US 614, 627-628 (1991)); or (4) State entwining itself in the private organization's management or control, *id.* (citing *Evans v. Newton*, 382 U.S. 296 299, 301 (1966)).

¹⁰⁴ See *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n.*, 531 U.S. 288 (2001).

¹⁰⁵ See *id.* at 290.

¹⁰⁶ *Id.* at 299.

Court's decision in *Brentwood*, several courts have also identified sports associations as state actors.¹⁰⁷

Many sports associations share the same characteristics that courts have found strong enough to establish a nexus with government conduct. Some associations have been created by state statute, while others are arms of the state board of education.¹⁰⁸ In both situations, the associations are granted express authority by the state to govern athletic programs.¹⁰⁹ These associations are "sanctioned in some way by the State" or "protected . . . by some shield of State law or State authority," and would thus be state actors.¹¹⁰

Unlike the few state-sanctioned associations, the majority of sports associations do not operate under express control of a state entity.¹¹¹ It is less clear whether such associations can be classified as state actors. Many of these sports associations adopt their own bylaws and competition rules to govern voluntary member schools without express guidance from a state entity.¹¹² However, "voluntary" is not the most accurate word to define sports association membership. In each state, there are very limited, or in most instances, no alternatives to membership in the single sports association.¹¹³ Sports associations often forbid member schools from competing with non-members.¹¹⁴ In reality, if a school wants to compete in the state, it is essentially forced to join the association and comply with its regulations. Therefore, voluntariness of membership should not be given much weight in considering an association's status as a state actor.

Other common characteristics weigh in favor of state actor status. The majority of an association's membership is typically comprised of public schools from a single state.¹¹⁵ The board members adopting the bylaws and rules are typically representatives from public schools and the state board of education.¹¹⁶ Sports associations set and enforce student athletic eligibility rules, establish standards of conduct for member schools, and control the

¹⁰⁷ See *Christian Heritage v. Oklahoma Secondary School Activities*, 483 F.3d 1025, 1030-1031 (10th Cir. 2007) (focusing on the percentage composition of public schools, the number directors who were public school employees, and state authorization to make rules); *Communities for Equity v. Michigan High*, 459 F.3d 676, 692 (6th Cir. 2006) (focusing on composition of public schools, leadership positions held by public school officials, and that students could satisfy physical education requirements by participating in association organized programs); *Babi v. Colorado High School Activities Association*, 77 P.3d 916, 920 (Colo. App. 2003) (assumed association's actions were state actions based on *Brentwood*); *McGee v. Virginia High School League, Inc.*, 801 F.Supp.2d 526 (W.D.Va. 2011).

¹⁰⁸ See Brief for Interscholastic Ass'ns, *supra* note 28, at 3. See also, *About the FHSAA*, *supra* note 31; *DIAA Introduction*, *supra* note 31.

¹⁰⁹ See Brief for Interscholastic Ass'ns, *supra* note 28, at 3. See also, *About the FHSAA*, *supra* note 31; *DIAA Introduction*, *supra* note 31.

¹¹⁰ *Civil Rights Cases*, 109 U.S. 3, 26 (1883).

¹¹¹ Brief for Interscholastic Ass'ns, *supra* note 28, at 3.

¹¹² *Id.*

¹¹³ See Joseph P. Trevino, *The WIAA as a State Actor: A Decade Later, Brentwood Academy's Potential Effect on Wisconsin Interscholastic Sports*, 22 MARQ. SPORTS L. REV. 287, 301 (2011); See *State Association Listing*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, <http://www.nfhs.org/stateoff.aspx>.

¹¹⁴ See e.g., *2011-12 Constitution and Bylaws*, CALIFORNIA INTERSCHOLASTIC FEDERATION at 67, available at http://205.214.168.16/governance/constitution_bylaws/pdf/CIF%20CONST%20BYLAW%20BOOK%201011.pdf; *Constitution and By-laws 2011-2012*, GEORGIA HIGH SCHOOL ASSOCIATION at 35, available at <http://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2012-13wholeCX9.pdf>; *Handbook and Policy Manual 2011-12*, VIRGINIA HIGH SCHOOL LEAGUE at 40, available at www.vhsl.org/doc/upload/pub-handbook-2011-12.pdf.

¹¹⁵ Brief for National Women's Law Center, et. al. as Amici Curiae Supporting Respondents, *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) (No. 99-901), 2000 WL 668855 at 8; Brief for Interscholastic Ass'ns, *supra* note 28, at 4.

¹¹⁶ Brief for National Women's Law Center, *supra* note 115, at 8. See also e.g. *Constitution and By-laws 2011-2012*, *supra* note 114, at 8-9; *Handbook and Policy Manual 2011-12*, *supra* note 114, at 19-20.

scheduling and participation in athletic events.¹¹⁷ Their rules and handbooks often reflect the same objectives as a school district's physical education program.¹¹⁸ Additionally, they are able to investigate, sanction, and discipline member schools and school officials for rule violations.¹¹⁹ While they may not be explicitly authorized by the state to regulate athletic activities, associations acting in the aforementioned ways demonstrate pervasive entwinement with the state's regulation of the education system.

While cases involving high school athletics have favored state actor status, the Supreme Court has ruled that two prominent amateur sports associations were not state actors: the National Collegiate Athletic Association (NCAA) and the United States Olympic Committee (USOC).¹²⁰ The state actor status of these organizations has essentially been "frozen in time."¹²¹ The Court has not reconsidered their status and lower courts have applied it without hesitation.

The NCAA, unlike high school associations, represents more than 1,200 public and private institutions with no shared connection to a single state.¹²² While a state university may participate in creating NCAA rules, that single school acting as a state actor is not the source of regulation.¹²³ Rather, the source is a collective membership of multi-state institutions "independent of any particular state."¹²⁴ The organization is structured to focus on the conduct of member schools, meaning that the NCAA does not enforce rules against school officials, athletes, or coaches, but rather enforces the rules against the school as a whole.¹²⁵ According to the Supreme Court in *Tarkanian*, the NCAA is not an agent of member schools that have delegated their power to regulate athletics.¹²⁶ Instead, the NCAA has an adversarial relationship with member schools as the representative of fellow members that ensures even-handed enforcement of standards.¹²⁷

The USOC is a private organization originally chartered by Congress to oversee Olympic athletics. It does not receive any government funding, but has been the subject of the government's persuasive power.¹²⁸ Even though the government extensively regulates the USOC, regulation "does not transform the actions of the regulated entity into those of the government."¹²⁹ Additionally, the government does not coerce or encourage any particular USOC enforcement decisions.¹³⁰ The differences between the NCAA or USOC and high school sports associations may appear slight, but they are significant from the Court's perspective. If a sports association more closely resembles the structure of the NCAA or USOC than the typical high school sports association, it should not be considered a state actor.

¹¹⁷ Brief for National Women's Law Center, *supra* note 115, at 13–14.

¹¹⁸ Thomas A. Mayes, *Tonya Harding's Case: Contractual Due Process, the Amateur Athlete, and the American Ideal of Fair Play*, 3 UCLA ENT. L. REV. 109, 133 (1995).

¹¹⁹ Brief for National Women's Law Center, *supra* note 115, at 8.

¹²⁰ See Dione L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183 (2008).

¹²¹ *See id.*

¹²² *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 297 (2001).

¹²³ Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 265 (2008).

¹²⁴ *Id.* (quoting *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988)).

¹²⁵ Koller, *supra* note 120, at 191.

¹²⁶ Kadence & Stippich, *supra* note 123, at 266.

¹²⁷ *Id.*

¹²⁸ For example, the 1980 Olympic boycott influenced by President Carter's intervention. Koller, *supra* note 120, at 200.

¹²⁹ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987).

¹³⁰ Koller, *supra* note 120, at 200.

B. *Is the First Amendment Appropriate?*

After determining if the sports association is a state actor and thus subject to Constitutional limitations, courts must evaluate whether First Amendment doctrine is the appropriate mode of analysis. There are a number of situations where a state actor may be removed from First Amendment restraints, precluding an analysis based on guarantees of a free press. These situations include those 1) where the state is acting as a proprietor; and 2) where the state is protecting an intellectual property right.

1. *State Acting as a Proprietor*

A state acting similar to a private entity can be removed from constitutional restraints because the Supreme Court has acknowledged the difference between managing a proprietary enterprise and regulating private conduct.¹³¹ The Court recognized the “common sense realization” that inefficiencies would result if every management decision became a constitutional matter.¹³² Therefore, state actors enjoy a “freer hand” when acting in a proprietary capacity.¹³³ Thus, the standard of review for a state actor acting as a proprietor is one of reasonableness.¹³⁴ This means that the action cannot be “arbitrary, capricious, or invidious.”¹³⁵

In *Wisconsin Interscholastic Athletic Ass’n*, the Seventh Circuit addressed when a sports association acts as a proprietor. Analogizing the enforcement of an exclusive broadcast contract to cases characterizing the state as a proprietor managing its internal operations, as opposed to regulator or licensor, the court applied the reasonableness test.¹³⁶ According to *Wisconsin Interscholastic Athletic Ass’n*, as long as the state did not act arbitrarily, capriciously, or invidiously, a media restriction will not be invalidated as unconstitutional.¹³⁷ The court held that the association could constitutionally grant exclusive contracts for broadcasting events.¹³⁸

Granting greater deference to a state actor in a proprietary role is not a recent trend.¹³⁹ Courts have recognized that certain public entities need freedom from constitutional constraints to effectively manage their internal operations and commercial ventures like a private entity.¹⁴⁰ Therefore, the Supreme Court has held that states acting in a proprietary capacity need only surpass the low-level hurdle of reasonableness to justify what could otherwise be infringement on a constitutional right. This less demanding level of scrutiny has been applied to First Amendment activities in various settings, including a Post

¹³¹ *NASA v. Nelson*, 131 S.Ct. 746, 757 (2011).

¹³² *Id.* at 757–58.

¹³³ *Id.* at 757.

¹³⁴ See *U.S. v. Kokinda*, 497 U.S. 720, 726–27 (1990); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

¹³⁵ *Lehman*, 418 U.S. at 303.

¹³⁶ *Wisconsin Interscholastic Athletic Ass’n*, 658 F.3d at 622–24.

¹³⁷ *Id.* at 622. See also, *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961). (“The function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but rather as proprietor to manage the internal operation of an important federal military establishment.”).

¹³⁸ *Wisconsin Interscholastic Athletic Ass’n*, 658 F.3d at 629.

¹³⁹ See *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886 (1961); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *United States v. Kokinda*, 497 U.S. 720 (1990); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Chicago Acorn v. Metro. Pier and Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998); *NASA v. Nelson*, 131 S.Ct. 746 (2011).

¹⁴⁰ See *supra* note 138.

Office sidewalk,¹⁴¹ an airport terminal,¹⁴² and Chicago's Navy Pier.¹⁴³ It has also been applied to certain types of government employment disputes¹⁴⁴ and to some military security restrictions.¹⁴⁵

In *Wisconsin Interscholastic Athletic Ass'n*, the Seventh Circuit classified the high school sports association as a "creator and disseminator of content."¹⁴⁶ According to the court's analysis, by granting media access and exclusive contracts, the government was employing private speakers to transmit its own program.¹⁴⁷ Generally, when the government is in the business of producing speech, it has the right to control its message, even if it imposes restrictions that are not viewpoint neutral.¹⁴⁸ Free from the requirement of content neutrality and the general prohibition of speech restrictions, the court held that WIAA could reasonably enforce media restrictions.¹⁴⁹ In reaching this result, the court relied on two arguments. First, it found that exclusive contracts are an effective means to avoid losing control over a government-produced message.¹⁵⁰ Second, relying on the principles of the right of publicity, the Seventh Circuit refused to acknowledge the media's right to broadcast an entire event.¹⁵¹

2. *State associations are proprietors in athletic event production, not media production*

The Seventh Circuit inappropriately analogized the WIAA's restrictions to cases in which the state acts as a proprietor and using these cases as support for evaluating WIAA's restrictions under a reasonableness standard was inapt. An analysis of that case and other cases reveals that high school sports associations' act as proprietors only in producing an athletic event, not in producing speech. Thus, the proprietor analogy should only apply in the context of technical restrictions.¹⁵²

Cases invoking the proprietor analysis typically involve a state actor operating a business enterprise similar to a private entity and then regulating constitutionally protected conduct that directly relates to that proprietary enterprise. Once the state begins to control conduct outside of this proprietary sphere, it becomes a regulator. The direct proprietary relationship between the regulated conduct and the enterprise is fundamental to the analysis.

¹⁴¹ See *United States v. Kokinda*, 497 U.S. 720 (1990) (holding it was not arbitrary, capricious, or invidious for a Post Office to ban solicitors from a sidewalk leading from its parking lot to the front door).

¹⁴² See *Int'l Soc'y for Krishna Consciousness v. Lee* 505 U.S. 672 (1992) (holding it was reasonable for a government agency to prohibit religious solicitation in airport terminals because airports are commercial ventures and solicitations can have a disruptive effect on business).

¹⁴³ See *Chicago Acorn v. Metro. Pier and Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998) (Government agency could ban protestors because the state was acting as a renter of the premises, or proprietor, not a producer of speech and the facilities were not a public forum.)

¹⁴⁴ See *NASA v. Nelson*, 131 S.Ct. 746 (2011) (holding background check requirements were reasonable, and therefore constitutional, for government contract employees because NASA was acting in a proprietary capacity).

¹⁴⁵ See *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886 (1969) (finding a military establishment can deny access to a civilian employee to an installation, where she worked in the cafeteria, for security reasons because the military was merely managing its internal operations by enforcing its security standards).

¹⁴⁶ *Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 624.

¹⁴⁷ *Id.* at 622–23.

¹⁴⁸ See *Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 623 (citing *Chiras v. Miller*, 432 F.3d. 606, 613 (5th Cir. 2005)) ("Establishing and implementing certain governmental functions, the government, including its educational institutions, has the discretion to promote policies and values of its own choosing free from . . . the viewpoint neutrality requirement.")

¹⁴⁹ *Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 629.

¹⁵⁰ *Id.* at 623.

¹⁵¹ *Id.* at 624–25. (citing *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 563, 575 (1977)).

¹⁵² See *supra* note 38.

For example, in one case the military operated a cafeteria in one of its establishments.¹⁵³ Just as a similarly situated private entity, the military required sufficient control to manage the internal operations of its establishment.¹⁵⁴ This control included the contracting of a private company to provide cafeteria services and the implementation of a policy to ensure that company's employees complied with the establishment's security requirements. Both of these actions directly relate to managing the building and cafeteria.¹⁵⁵ The Supreme Court recognized that the government was acting as a proprietor by managing the internal operations of the military establishment and permitted action that would have otherwise violated an individual's due process rights.¹⁵⁶

Similarly, the Supreme Court has found the government to be acting as a proprietor when it is managing contract employees.¹⁵⁷ The Court held that requiring background checks was a reasonable exercise of the agency's "broad authority in managing its affairs" that did not violate the employees' right to privacy.¹⁵⁸ Background checks were directly related to the agency's enterprise as an employer.

On its face, a sports association contracting with a private company to cover athletic events appears to be equivalent state action. However, where the comparison falls short is in the establishment of a direct relationship between the regulated conduct and the proprietary enterprise. Restricting the media must bear directly on a sports association's management of their enterprise. The Seventh Circuit chose to define the sports association's enterprise as producing speech.¹⁵⁹ The private entity equivalent of an enterprise producing speech would be a newspaper outlet or television network, whose principle business is producing speech to communicate to the public. Not all sports associations can be said to be in the business of producing speech. To determine if they are, courts must identify the relationship that exists between the media and the association.

There are two possible perspectives regarding associations' relationships with the media: (1) Sports associations solicit the services of the media to produce its message;¹⁶⁰ or (2) sports associations grant access to the media to produce their own commentary. The first relationship more closely resembles a private company "managing its affairs"¹⁶¹ because it views associations as producing speech like a private newspaper or television network.¹⁶² For the media to contribute to the first relationship, they must exhibit extremely limited editorial discretion. The media must clearly act only as a vehicle for state communication.¹⁶³ Otherwise, the state does not exercise sufficient control to be a proprietor managing the production of speech.¹⁶⁴ Rather, the state would be granting access for the media to advance its own proprietary agenda in producing speech. Sports

¹⁵³ *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961).

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 888.

¹⁵⁶ *Id.* at 896.

¹⁵⁷ *NASA v. Nelson*, 131 S.Ct. 746 (2011).

¹⁵⁸ *Id.*

¹⁵⁹ *Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 624.

¹⁶⁰ Just as the military establishment in *Cafeteria Workers* contracted with a private company to provide a service. *See* 367 U.S. 886 (1961).

¹⁶¹ *NASA v. Nelson*, 131 S.Ct. 746, 758 (2011).

¹⁶² *See Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 624.

¹⁶³ *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (explaining that when government uses "private speakers to transmit specific information pertaining to its own program," it has the right to control that message based upon content or viewpoint).

¹⁶⁴ *See Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d at 622-23.

associations that grant exclusive contracts to cover events under their terms establish this first type of relationship.¹⁶⁵

Typical media credential agreements, however, cannot and should not be seen as the state enlisting the services of the media to produce its messages. Sports associations relying on credential agreements to restrict the media create the second type of relationship – granting access to media organizations to produce their own speech. Simply granting access to the media cannot be interpreted as showing the association is soliciting the media to produce government speech. It would completely undermine the principles of media access and government transparency to say that press representatives become agents of a government public relations agenda every time the state grants access to a public event.¹⁶⁶ By allowing media representatives that are not directly serving the sports associations' messages to report on athletic events, the state loses its status as a proprietor.¹⁶⁷ Therefore, reasoning that the state is a proprietor, producing speech is not appropriate to justify media restrictions imposed under credential agreements.

If it was established that a sports association's proprietary enterprise is producing speech, restricting the media would be directly related to that business. In such a case, a sports association would only have to overcome the reasonableness level of scrutiny adopted by the Supreme Court in the state.

A sports association's enterprise may also be defined as producing athletic events. Similar to the military ensuring a safe and secure environment with security requirements,¹⁶⁸ associations need to be able to manage conduct at athletic events to prevent interference with the games. Associations could reasonably impose technical restrictions to advance that state interest. For example, limiting the number of representatives from each media organization could prevent overcrowding on the sidelines.¹⁶⁹ However, editorial restrictions, advertising restrictions, and exclusive-rights restrictions cannot be seen as relating to any proprietary interest in preventing interference with the physical production of an athletic event.

3. *Protecting an Intellectual Property Right*

The First Amendment does not protect speech that infringes on the intellectual property rights of another.¹⁷⁰ Under copyright law, the media cannot publish facts or ideas in a way that is substantially similar to someone else's expression,¹⁷¹ unless the use qualifies under the fair use exemption.¹⁷² While news reporting is considered a fair use of copyrighted material, courts will still consider the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market value of the protected work.¹⁷³ Generally

¹⁶⁵ *See id.*

¹⁶⁶ *See Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978).

¹⁶⁷ The state should lose its status by failing to exercise sufficient control. *See supra* notes 161-64 and accompanying text.

¹⁶⁸ *See Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 887 (1961).

¹⁶⁹ *See Florida Agreement*, *supra* note 36, at 5.

¹⁷⁰ *Harper & Row Publishers Inc. v. Nations Enter.*, 471 U.S. 539, 556-57 (1985).

¹⁷¹ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 167 (1998).

¹⁷² *Id.*

¹⁷³ *See Harper & Row*, 471 U.S. at 560-61.

speaking, a court will not allow a media organization to appropriate an entire work or performance.¹⁷⁴

4. *Intellectual property rights do not extend to athletic events.*

While state government organizations can hold intellectual property rights, courts have refused to establish any rights in sporting events.¹⁷⁵ Copyright protects works fixed in a tangible medium;¹⁷⁶ however, an athletic performance is not fixed in such a medium.¹⁷⁷ Only a recorded broadcast, not the game itself, is protected.¹⁷⁸ Sports associations do not have any intellectual property interest in the facts or statistics of the game, and cannot prevent others from appropriating them. For the same reason, associations have no rights to license in exclusive contracts. The copyright in the broadcast does not preclude the media from producing its own broadcasts either.¹⁷⁹ The copyright protection only extends to the actual broadcast an association produced.¹⁸⁰ Copyright protection of association-produced broadcasts would give sports associations the right to contract the use of their self-produced content and allow them a cause of action against media organizations seeking to appropriate that content.

C. *What is the forum?*

After establishing that a First Amendment analysis applies, courts must identify the forum in which athletic events are taking place. Much of a court's analysis will turn on whether the events take place in a publicly or privately owned facility. Identifying the forum ultimately directs courts as to the appropriate level of scrutiny to apply to the challenged restrictions. For restrictions applying to on-site conduct, courts should engage in either a public forum doctrine analysis or an analysis grounded in the media's established right to gather news. This decision depends on whether the facility is generally accessible to the public. For restrictions on off-site conduct, courts must evaluate them in light of the general principle against prior restraints.

1. *Public Forum Analysis*

The Supreme Court established the public forum doctrine to analyze First Amendment rights on government property. There are certain public places that have long been recognized as devoted to expressive activities,¹⁸¹ but the First Amendment does not guarantee access simply because they are government-owned.¹⁸² The right of access is based on the character of the property at issue.¹⁸³ Traditional public fora have always been held out and must continue to be held out by the government as open to communicative

¹⁷⁴ See *id.* at 565–66; See also *Zacchini v. Scripps-Howard Broadcasting* 433 U.S. 562, 575–77 (1977).

¹⁷⁵ See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997); See also *Detroit Base Ball Club v. Deppert*, 61 Mich. 63 (1886).

¹⁷⁶ 17 U.S.C. § 102(a) (1990).

¹⁷⁷ *Nat'l Basketball Ass'n*, 105 F.3d at 846–47.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 847.

¹⁸⁰ *Id.*

¹⁸¹ *E.g. Hague v. CIO*, 307 U.S. 496, 515 (1939) (streets and parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

¹⁸² *U.S. Postal Service v. Greenburg Civic Ass'n*, 453 U.S. 114, 129 (1981).

¹⁸³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Int'l Soc'y for Consciousness v. N.J. Sports and Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982).

activity.¹⁸⁴ In addition, property the government has opened, but is not required to open, for expressive activity becomes a forum for purposes of First Amendment analysis.¹⁸⁵ Content-based regulations in such places must be narrowly tailored to serve a compelling state interest.¹⁸⁶ By contrast, restrictions on the time, place, and manner of expressive activity in these settings are subject to a lower standard of scrutiny and must be narrowly tailored to serve a significant state interest.¹⁸⁷ Courts do not recognize First Amendment protection for access to any other type of public property.¹⁸⁸ For property not reserved for communications by either designation or tradition, the state has power to “reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁸⁹

Public forum analysis traditionally applies to speech, not access. The Supreme Court has not specifically articulated a similar framework for access restrictions; however, the Court noted that “the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”¹⁹⁰ Lower courts have applied this dictum, grounded in Equal Protection principles, to prohibit state actors from limiting access to members of the media once it has granted access to other press representatives.¹⁹¹

Sports associations host events in both public and private facilities.¹⁹² An athletic event that takes place in a publicly funded stadium or arena does not take place in a traditional public forum simply because the facility is government owned.¹⁹³ Rather, public forum classification is conducted on a case-by-case basis with a strong focus on how the locale is used.¹⁹⁴ In adhering to the case-by-case inquiry, courts have avoided making general pronouncements that state owned athletic facilities are or are not public forums.¹⁹⁵

Furthermore, a facility “may not have the same public forum status in all places at all times.”¹⁹⁶ Courts have designated athletic facilities as public forums when they were created for general expressive interest and officials have failed to consistently limit expressive activities.¹⁹⁷ Facilities are not considered public forums when they are created merely as a commercial venture to generate revenue by attracting athletic events and

¹⁸⁴ *Perry Educ. Ass’n*, 460 U.S. at 45.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 45–46.

¹⁸⁷ *Id.*; *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535 (1980).

¹⁸⁸ *Perry Educ. Ass’n*, 460 U.S. at 46.

¹⁸⁹ *Id.* at 46; *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (a school’s internal mail system or an election debate broadcast on a public television station fall under this third category because they were not designed for expressive activity or opened to the general public for indiscriminate use).

¹⁹⁰ *Perry Educ. Ass’n*, 460 U.S. at 55.

¹⁹¹ *Am. Broad. Co. v. Cuomo*, 570 F.2d 1080, 1084 (1977).

¹⁹² See 2011 PIAA Football Championships Information and Results, PENN. INTERSCHOLASTIC ATHLETIC ASS’N, <http://www.piaa.org/news/details.aspx?ID=2345> (last visited February 1, 2012) (Football championships hosted at Hershey Park Stadium); State Championships 2012-2013, GEORGIA HIGH SCHOOL ASS’N, <http://www.ghsa.net/state-championships> (last visited October 30, 2012) (State championships hosted at public high schools).

¹⁹³ *Greer v. Spock*, 424 U.S. 828, 837 (1976).

¹⁹⁴ See *Int’l Soc’y for Krishna Consciousness*, 691 F.2d at 160; Gerhardt A. Gosnell II, *Banner Policies at Government-Owned Athletic Stadiums: The First Amendment Pitfalls*, 55 OHIO ST. L.J. 1143 (1994); *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1017 (D.C. Cir. 1988) (a court looks at the character of the forum in the nature of the property, its compatibility with expressive activity, and the consistent policy and practice of the government).

¹⁹⁵ Gosnell, *supra* note 194.

¹⁹⁶ *Stewart*, 873 F.2d at 1018.

¹⁹⁷ *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013 (D.C. Cir. 1988); *Paulsen v. Cnty. of Nassau*, 925 F.2d 65 (2d Cir. 1991).

entertainers.¹⁹⁸ Courts look for clear state actor intent to create a public forum dedicated to use for expressive activity.¹⁹⁹ Typically, cases addressing sports facilities only discuss grand stands and areas generally open to the public. Conversely, associations usually grant the media special access to sidelines, locker rooms, and other locations typically off limits to the general public. This is a crucial distinction, as courts have frequently held that the media do not have access rights beyond those of the general public.²⁰⁰ However, voluntarily opening traditionally non-public facilities for media use does not vest in state actors absolute authority to deny media access without proper justification.²⁰¹ As demonstrated below, precedent addressing the right to gather news can protect access to such facilities.

The Supreme Court in *Arkansas TV v. Forbes* refused to engage in the public forum analysis where a public broadcasting station restricted a political candidate's access to a televised debate.²⁰² Similarly, the Seventh Circuit in *Wisconsin Interscholastic Athletic Ass'n* found the analysis inapplicable because it was unhelpful;²⁰³ however, the Seventh Circuit's reliance on *Forbes* in *Wisconsin Interscholastic Athletic Ass'n* was premised on state associations serving in a proprietary capacity.²⁰⁴ Because state associations are only serving in a proprietary capacity in producing entertainment and not in broadcasting,²⁰⁵ public forum analysis should be employed to evaluate all regulations aside from technical restrictions. The level of scrutiny given to other restrictions that govern events taking place in a public forum depends on whether the restriction is content-based or a time, place, or manner restriction.

2. "Right to Gather News" Doctrine

Cases involving the right to gather news should govern the court's analysis when sports associations grant media access to facilities otherwise inaccessible to the general public. The Supreme Court has been hesitant to create an explicit right of media access for newsgathering, even when the government has opened its facilities to media representatives.²⁰⁶ Courts have wrestled to decipher the Framers' intent under the First Amendment Press clause.²⁰⁷ They have relied on what little historical evidence can be found to identify the appropriate ranking of press freedom among other constitutional values.²⁰⁸ In *Richmond Newspapers v. Virginia*, the Supreme Court ultimately defined the

¹⁹⁸ *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *Hubbard Broad. v. Metro. Sports Facilities*, 797 F.2d 552 (8th Cir. 1986); *Int'l Soc'y for Krishna Consciousness v. N.J. Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

¹⁹⁹ *See Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *Hubbard Broad. v. Metro. Sports Facilities*, 797 F.2d 552 (8th Cir. 1986); *Int'l Soc'y for Krishna Consciousness v. N.J. Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

²⁰⁰ *See Houchins v. KQED*, 438 US 1 (1978); *Branzburg v. Hayes*, 408 U.S. 684 (1972); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

²⁰¹ *See Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED*, 438 US 1 (1978); *Nixon v. Warner Comm'n*, 435 U.S. 589 (1978).

²⁰² *Ark. Educ. Television Commc'n v. Forbes*, 523 U.S. 666 (1998).

²⁰³ *Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d 623–24.

²⁰⁴ *Id.* at 623.

²⁰⁵ *See supra* Part II(B)(1).

²⁰⁶ For a discussion of the media's right to gather news see, Erik Ugland, *Demarcating The Right To Gather News: A Sequential Interpretation Of The First Amendment*, 3 DUKE J. CONST. LAW & PUB. POL'Y 113 (2007), and Timothy Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992).

²⁰⁷ Dyk, *supra* note 206, at 928–929.

²⁰⁸ Dyk, *supra* note 206, at 931–933. *Compare* *First Nat'l Bank of Boston v. Bellotti* 435 U.S. 765 (1978) (“The history of the Clause does not suggest that the authors contemplated a ‘special’ or ‘institutional’ privilege”), *with* Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), quoted in JEFFREY A. SMITH, PRINTERS AND

media's right of access as equal to that of the public. In the handful of cases in which it has subsequently addressed the question of media access, the Supreme Court has refused to extend the rights of the media beyond that of the general public.²⁰⁹ However, lower courts, applying First Amendment values, have recognized the importance of (1) protecting the press against discriminatory access, even where the public is generally excluded, and (2) guaranteeing continued access in places traditionally open to the press.²¹⁰

Lower courts have developed protection for the press against discriminatory access consistent with the First Amendment values for preserving a marketplace of ideas.²¹¹ Even where the public is generally excluded, the government cannot limit access to a select few media outlets.²¹² Not only does the media have to have equal access to the event, but representatives must also be given "access with equal convenience...within reasonable limits."²¹³ This equality protects against government favoritism towards certain media outlets and suppression of expression unfavorable to the government.²¹⁴ Suppression of unfavorable expression affects the marketplace of ideas by preventing multiple viewpoints from reaching the public. Even in cases without evidence of malicious motivations, the mere possibility is dangerous enough to prohibit discrimination.²¹⁵

Lower courts have also protected a continued right to media access in traditionally press-only areas because it allows the press to fulfill its central responsibility of exposing and criticizing government conduct.²¹⁶ To protect the media's watchdog role, lower courts have not allowed the government to revoke media access to areas with a tradition of press accessibility if the revocation was based on arbitrary or less than compelling reasons. The lower courts have not established a universal test to determine whether a tradition of press accessibility has been established.²¹⁷ Some look to the history of access in the area, while others also consider whether the access would contribute to the "functioning of the particular process in question."²¹⁸ Courts have evaluated tradition on a case-by-case basis.²¹⁹ This allows them to apply the analysis to specific media activities. For instance, if the media has typically been allowed to film in a certain area, it can be considered an established tradition to bring cameras.²²⁰ Generally, high school athletic events have an established tradition of permitting media access.

Restrictions evaluated under the "right to gather news" doctrine cannot be arbitrary or implemented for less than compelling reasons.²²¹ Courts will look at the state interest in

PRESS FREEDOM 163 (1988) ("were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate for a moment to prefer the latter").

²⁰⁹ See *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED*, 438 U.S. 1 (1978); *Nixon v. Warner Communications*, 435 U.S. 589 (1978).

²¹⁰ See *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965); *Borrecia v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Am. Broad. Co. v. Cuomo*, 766 F.2d 1080 (2d Cir. 1977).

²¹¹ *Dyk*, *supra* note 206, at 929.

²¹² See *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965); *Borrecia v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Am. Broad. Co. v. Cuomo*, 766 F.2d 1080 (2d Cir. 1977).

²¹³ *Sw. Newspapers v. Curtis*, 584 S.W. 2d 362, 365 (Tex. Civ. App. 1979).

²¹⁴ *Dyk*, *supra* note 206, at 946.

²¹⁵ See *Am. Broad. Co. v. Cuomo*, 766 F.2d 1080 (2d Cir. 1977); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) ("The danger of granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment").

²¹⁶ *Dyk*, *supra* note 206, at 940.

²¹⁷ *Id.* at 944-53.

²¹⁸ *Id.* at FN 126 (quoting *Press Enter. Co. v. Super. Ct.* 478 U.S. 1 (1986)).

²¹⁹ *Id.* at 948.

²²⁰ See *CNN v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981)

²²¹ *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

regulating access and the procedures or standards used to determine eligibility. Arbitrary restrictions include those that give unfettered discretion to sports associations.²²² Courts uphold standards for decision makers that are narrowly tailored and available to the public.²²³ Further procedures should be put in place to provide notice to denied applicants that explain the reason for denial and give denied applicants the opportunity to respond.²²⁴

4. *Restrictions on Speech Occurring Off-Site*

Some restrictions do not address activities on public premises or involve media access to government property, which means they cannot be evaluated under the public forum analysis. Rather, some sports associations attempt to restrict or control speech produced off-site – this control can amount to a prohibited prior restraint on the media.

The First Amendment prohibits prior restraints on the media.²²⁵ The notion of freedom of the press favors allowing the media to publish information before their authority to publish it is challenged.²²⁶ Prior restraints can either explicitly prohibit the publication or constitute a burdensome policy that deters publication.²²⁷ Licensing schemes, like the media credential process, threaten expressive activity because they vest broad, unguided discretion in a licensor.²²⁸ An actual abuse of that discretion does not have to exist in order to challenge the scheme because the potential for self-censorship in licensing schemes is so strong that it amounts to a prior restraint.²²⁹ This is not to say that the government can never license expressive activity. If the procedures are based on clearly established neutral criteria, there is less risk of abuse and less potential of media self-censorship.²³⁰

D. *Evaluating the Justifications*

In the final step of their analysis, courts must identify the sports associations' justifications for restrictions and evaluate them under the appropriate level of scrutiny. If public forum analysis applies, then content-neutral time, place, and manner restrictions are evaluated under intermediate scrutiny and content-based restrictions are evaluated under strict scrutiny. For restrictions falling under the "right to gather news" line of authority, there must be a compelling reason for the restriction and the restrictions cannot be arbitrary or grant unfettered discretion in a decision maker.²³¹ Restrictions on off-site speech, or prior restraints, must be evaluated under strict scrutiny.

1. *Public Forum Analysis: Strict or Intermediate Scrutiny*

For restrictions in areas generally open to the public for communicative activity, a state actor can only implement very limited regulations on expressive activity.²³²

²²² See *Borrea v. Fasi*, 369 F.Supp. 906 (D. Haw. 1974); *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. 1979); *Anderson*, 805 F.2d 9; *Sherrill*, 569 F.2d 124.

²²³ *Sherrill*, 569 F.2d at 130.

²²⁴ *Id.*

²²⁵ See *Near v. Minnesota*, 283 U.S. 697 (1931).

²²⁶ *Id.*

²²⁷ See *id.*; *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

²²⁸ *City of Lakewood*, 486 U.S. at 757.

²²⁹ *Id.* ("The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.")

²³⁰ *Id.*

²³¹ *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

²³² DANIEL A. FARBER, *THE FIRST AMENDMENT* 173 (2010).

Restrictions based on content must overcome strict scrutiny²³³ and are not permitted without a compelling state interest.²³⁴ Content-neutral time, place, and manner regulations are permitted if they can satisfy intermediate scrutiny or are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communicating the information.²³⁵

By conditioning access on agreement to credential terms, sports associations are able to restrict media access in a variety of ways. Credential agreements that regulate editorial discretion restrict access based on coverage content.²³⁶ Sports associations must present a compelling interest to justify such limits. The Supreme Court has recognized several compelling interests in the First Amendment context including: “maintaining a stable political system”; ensuring that “criminals do not profit from their crimes” and that crime victims are compensated by the criminals; protecting the right of “members of groups that have historically been subjected to discrimination . . . to live in peace where they wish”; protecting voters from confusion, undue influence and intimidation; preventing vote-buying; “eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations” and protecting “the unique role of the press,” which may justify otherwise impermissible speaker discrimination.²³⁷ Conversely, the Court has rejected public relations or the desire to ensure fair and accurate reporting as adequate justifications.²³⁸ The Court has also established general principles for evaluating compelling interests. The government cannot assert the furtherance of a particular subset of speech as a compelling interest.²³⁹ Nor can the government assert general offensiveness or societal disagreement to justify restrictions on First Amendment activities.²⁴⁰

Sports associations do not publish the reasoning behind their credential policies, which makes it difficult to pinpoint the precise state interests involved; however, an evaluation of credential terms sheds some light on possible justifications for their content-based restrictions. Because high school students are involved, sports associations may want to shield them from the critical limelight.²⁴¹ Media attention can negatively affect athletic performance, academic focus, and psychological wellbeing.²⁴² It can also inflate already prevalent psychological conflicts commonly found among athletes, such as fears of success or failure, poor athletic performance, social isolation, academic problems, career-related concerns, and athletic injuries.²⁴³ Protecting young athletes from these issues is a

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding a regulation on the volume of amplified music in a public bandshell was constitutional).

²³⁶ See *supra* notes 43–48.

²³⁷ Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420–21 (1996).

²³⁸ See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); *Wilson v. Layne*, 526 U.S. 603 (1999).

²³⁹ Volokh, *supra* note 237, at 2419.

²⁴⁰ Volokh, *supra* note 237, at 2419–20.

²⁴¹ See *Oregon Broadcast Form*, *supra* note 38; *Florida Agreement*, *supra* note 36, at 3.

²⁴² See Mary Howard-Hamilton & Julie Sina, *How College Affects Student Athletes*, 93 NEW DIRECTIONS FOR STUDENT SERVICES 35 (2001); Peter Adler & Patricia Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, 58 SOC. OF EDUC. 241, 244–46 (1985); Kyle Ott & Marieke Van Puymbroeck, *Does the Media Impact Athletic Performance*, THE SPORTS JOURNAL, available at <http://www.thesportjournal.org/article/does-media-impact-athletic-performance>; Kathleen Hill, Kelly M. Burch-Ragan, & Denise Y. Yates, *Current and Future Issues and Trends Facing Student Athletes and Athletic Programs*, 93 NEW DIRECTIONS FOR STUDENT SERVICES 65, 71 (2001).

²⁴³ Elizabeth Broughton & Megan Neyer, *Advising and Counseling Student Athletes*, 93 NEW DIRECTIONS FOR STUDENT SERVICES 47, 49. (2001)

compelling interest for a state actor charged with overseeing the wellbeing of students and high school athletic programs.

Sports associations may also want to preserve educational dignity in the athletic environment.²⁴⁴ Courts have recognized the importance of protecting students from First Amendment activities that interfere with a school's educational mission;²⁴⁵ however, in those cases, the Court focused on speech in a public school setting or speech produced by public school students, not off-campus speech about a public school event.²⁴⁶ Their application must be limited to demonstrating a state interest in education. They cannot be used to grant sports associations broad authority to regulate all First Amendment activity in the name of preserving an educational mission.

The Supreme Court has recognized a state interest in avoiding "substantial disruption of or material interference with school activities."²⁴⁷ The state must assert more than "a mere desire to avoid [the] discomfort and unpleasantness that always accompany[ies] an unpopular viewpoint."²⁴⁸ Increased media attention that criticizes athletic events or athletic performance, focuses on student injuries, or sensationalizes the high school athletic experience could potentially draw students' focus from academics to athletics. These types of disruptions could arguably interfere with a school's educational mission.

However, evidence of a restriction's underinclusiveness undermines the legitimacy of state concerns.²⁴⁹ Media credential terms only apply to media organizations in attendance at athletic events. While restricting media representatives who have signed credential agreements prevents disruption in school activities by eliminating undesirable media coverage of athletic events, media organizations not bound by credential agreements can discuss any issues related to high school athletics. This exposes the possibility that sports associations are using student wellbeing as a guise for avoiding bad publicity;²⁵⁰ however, fear of bad publicity is not a compelling state interest,²⁵¹ even in the education system.²⁵²

Sports associations have an easier hurdle to overcome in justifying content-neutral time, place, and manner restrictions, as such restrictions need only be narrowly tailored to serve a significant governmental interest.²⁵³ Content neutrality is a facial analysis focused on whether the restriction applies to all viewpoints and all subjects.²⁵⁴ Sports associations impose various manner restrictions, including strict prohibitions of certain news gathering

²⁴⁴ See *Oregon Broadcast Form*, *supra* note 38; *Florida Agreement*, *supra* note 36, at 3.

²⁴⁵ See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

²⁴⁶ See Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U.L. REV. 1167, 1175-79 (2009).

²⁴⁷ *Tinker*, 393 U.S. at 514. The Court has also recognized interest in prohibiting vulgar and lewd speech that would undermine the school's educational mission, (*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)), controlling school-sponsored publications (*Hazelwood*, 484 U.S. 260), and prohibiting advocacy of drug use (*Morse v. Frederick*, 551 U.S. 393 (2007)).

²⁴⁸ *Tinker*, 393 U.S. at 509.

²⁴⁹ Volokh, *supra* note 237, at 2420.

²⁵⁰ Some restrictive media policies reflect the tendency of educational institutions to distrust the media. The distrust results from perceived media oversimplification of issues, assignment of blame, and focus on short-term problems. See Ben Levin, *Media-Government relations in education*, 19 J. OF EDUC. POL'Y 271 (May 2004).

²⁵¹ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Wilson v. Layne*, 526 U.S. 603 (1999).

²⁵² See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969).

²⁵³ See *supra* note 235.

²⁵⁴ See *Heffron v. Int'l Soc'y for Krishna*, 452 U.S. 640 (1981); *Hill v. Colo.*, 530 U.S. 703 (2000).

activities and reserving specific activities for a select few media representatives.²⁵⁵ For example, a sports association might decide to ban live broadcasts of their events. This type of blanket prohibition has been justified as preventing rivals from gaining a competitive advantage,²⁵⁶ discouraging high schools from competing with each other for fans,²⁵⁷ and avoiding lost ticket revenue.²⁵⁸

Other content-neutral manner restrictions result from exclusive rights agreements,²⁵⁹ which are imposed to preserve the commercial value of athletic events and allow sports associations to more easily control media coverage.²⁶⁰ Sports associations might also limit the number of journalists a media organization can send to an event in order to include as many different organizations as possible,²⁶¹ regulate the type of flash or strength of lighting to avoid interference,²⁶² demand certain standards of behavior while covering events to preserve the integrity of the game,²⁶³ or prohibit interviews with athletes during the game to protect students from distractions.²⁶⁴ These restrictions are content-neutral, in that they apply equally to all media organizations regardless of their viewpoints.²⁶⁵ They are entirely permissible if they are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information.²⁶⁶

Sports associations' justifications for these restrictions are significant. In time, place, and manner precedent, the Supreme Court has accepted many significant interests outside of the high school sports context. To support a city's sound amplification guidelines for use of a bandshell, the Court found the interests of preventing excessive noise from disrupting nearby homes and ensuring sound quality for audience members significant.²⁶⁷ Other interests the Court has accepted include preventing disruption to school activities,²⁶⁸ ensuring traffic safety,²⁶⁹ avoiding visual clutter,²⁷⁰ and protecting public parks.²⁷¹ In sum, the state interests accepted by the Supreme Court as significant, range from serious safety fears to more trivial aesthetic concerns. Sports associations' interests relating to the educational mission, commercial value of events, physical interference, and promoting media access appear to fit within this range.

As mentioned above, the Court has recognized state interests in protecting school activities and the educational mission.²⁷² Any restrictions imposed to protect the integrity of

²⁵⁵ See *Massachusetts Agreement*, *supra* note 38, at 2; *Arizona Credentials*, *supra* note 41; *Alabama Playoff Policy*, *supra* note 37; *Connecticut Media Policies*, *supra* note 36.

²⁵⁶ See Gardner, *supra* note 12.

²⁵⁷ Tim Stevens, *Football Powers Consider TV Game*, THE CHAPEL HILL NEWS (Sept. 5, 2006, 7:45 PM), http://www.chapelhillnews.com/2006/09/05/v-print/2073_football-powers-consider-tv-game.html.

²⁵⁸ Tom Roussey, *ESPN Televising SC High School Football, but Can't in NC*, WBTB.COM (Sept. 27, 2010, 6:49 PM), <http://www.wbtv.com/Global/story.asp?s=13058147&clienttype=printable>

²⁵⁹ See *supra* notes 28–39.

²⁶⁰ See *Wisconsin Interscholastic Athletic Ass'n. v. Gannett Co., Inc.*, 658 F.3d 614 (7th Cir. 2011).

²⁶¹ *Ohio Media Regulations*, *supra* note 35, at 8.

²⁶² *Ohio Media Regulations*, *supra* note 35, at 3–4.

²⁶³ See *Colorado Broadcast Agreement*, *supra* note 62.

²⁶⁴ See *Virginia Credentials*, *supra* note 38.

²⁶⁵ *Hill v. Colo.*, 530 U.S. 703, 719 (2000).

²⁶⁶ See *supra* note 235.

²⁶⁷ *Ward*, 491 U.S. at 792–93.

²⁶⁸ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

²⁶⁹ *Metromedia & Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

²⁷⁰ *Id.*

²⁷¹ *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002).

²⁷² See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Grayned*, 408 U.S. at 119–20; *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

such an important institution, and the students involved must be significant, especially if the Court has accepted “avoiding visual clutter.” Commercial justifications, such as preventing lost ticket revenue and preserving the commercial value of an event are significant because high school athletic programs and sports associations depend on athletic events and membership dues for funding.²⁷³ Given the crucial role of athletics on students’ physical and mental wellbeing, the state has an important interest in ensuring the survival of sports programs.²⁷⁴

Organizing athletic competitions is a central function of sports associations.²⁷⁵ To do so successfully, they must be allowed to prohibit physical interference at events that could result from media conduct. Additionally, some media restrictions are designed to foster diverse media access.²⁷⁶ Promoting access is consistent with First Amendment values and thus should be a significant state interest.²⁷⁷

The Court has made it relatively simple for a state to prove the narrowly tailored requirement in content-neutral restrictions. A state actor need only show that (1) an interest would have been achieved less effectively without the restrictions and (2) that it has left open ample alternative channels of communication.²⁷⁸ The first prong is satisfied because sports associations’ interests in educational mission, commercial value of events, physical interference, and promoting media access would be achieved less effectively without restrictions on media conduct. The restricted behavior is directly related to each of these interests, so that eliminating the behavior advances the state interest.²⁷⁹ As for the second prong, state associations leave open ample alternative means of communication for media organizations. The content-neutral restrictions typically only prohibit or limit one form of media coverage,²⁸⁰ leaving journalists able to pursue with other methods of reporting.

2. The “Right to Gather News”: Compelling Interest and Non-arbitrary

For a sports association to interfere with the media’s right to gather news, there must be a compelling reason for the restriction and the restriction cannot be arbitrary or grant unfettered discretion to a decision maker.²⁸¹ The importance of multiple viewpoints in the marketplace of ideas and the danger of exclusion based on opposition set a high bar for the state to overcome.²⁸²

Exclusive rights restrictions in particular pose a significant threat to the media’s right to gather news. The same can be said for associations that self-produce media content

²⁷³ See Aaron Echols, *Fair Play: The Tension between an Athletic Association’s Regulatory Power And Free Speech Rights Of Member Schools - The Practical Implications Of Tennessee V. Brentwood*, 28 NAT’L ASS’N ADMIN. L. JUDICIARY 237, 272 (2008).

²⁷⁴ See *The Case for High School Activities*, NAT’L FED’N OF STATE HIGH SCHOOL ASS’NS, available at www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=6075&libID=6097.

²⁷⁵ *Supra* notes 28–33.

²⁷⁶ *Ohio Media Regulations*, *supra* note 35, at 8.

²⁷⁷ *Supra* note 69 and accompanying text.

²⁷⁸ *Ward*, 492 U.S. at 798–99. (“A regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”)

²⁷⁹ See *supra* notes 256–64.

²⁸⁰ For example, flash photography, player interviews, or live broadcasts. See *supra* notes 128–37.

²⁸¹ See *Borreca v. Fasi*, 369 F.Supp. 906 (D. Haw. 1974); *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. 1979); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

²⁸² See *ABC v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977).

and prohibit media organizations from producing the same form of coverage.²⁸³ Excluding all other media outlets would violate the media's right to gather news if there were an established tradition of broadcasting from the event.²⁸⁴ Following the "established tradition" analysis also poses a problem for enforcing exclusive-rights agreements. Many associations condition access upon compliance with exclusive-rights restrictions. For example, revoking access for violating time limits on video clips could violate access rights if there is a tradition of broadcasting entire games.

Many of the same interests discussed above for public forum analysis may also be offered by state associations for restricting media access at athletic events; however, the interests accepted under the "right to gather news" precedent do not seem to be as grave as those identified under the public forum analysis. Courts have accepted state interests such as security considerations, space limitations, preservation of an orderly process, and maintenance of confidentiality in the right to gather news cases.²⁸⁵ Compelling interests under public forum analysis, in particular the interest in protecting young athletes,²⁸⁶ are also compelling enough to justify restrictions on the media's right to gather news. Additionally, sports associations may assert space limitations as a basis for restrictions, which has been accepted as a compelling interest by one lower court.²⁸⁷ Physical limitations might prevent sports associations from granting access to every media organization that requests credentials.

In addition to identifying a compelling interest, courts must evaluate whether credential terms are arbitrary before allowing associations to restrict the right to gather news. Generally, credential agreements provide very detailed standards, some amounting to several pages of guidelines.²⁸⁸ If associations limit the basis of revocation to the standards in credential agreements, this complies with courts' requirements. Other agreements may be detailed but contain a fatal provision that either empowers associations to revoke credentials for any reason or reserve the right to deny any request.²⁸⁹ Associations can revoke access for a wide variety of reasons, ranging from limited space on the sideline to disagreeing with a reporter's comments on the state's budget for high school athletics. Overly broad terms like "behavior deemed inappropriate for the intended use of the pass,"²⁹⁰ "poor taste,"²⁹¹ or "incompatible with educational dignity"²⁹² are precisely the type of terms courts have warned give unfettered, and potentially unconstitutional, discretion to state officials.²⁹³

While most sports associations provide adequate information concerning grounds for revocation, all fall short in defining and publishing the standards under which media

²⁸³ In Ohio, the sports association produces its own radio broadcast of athletic events. *The OHSAA Radio Network*, OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, <http://www.ohsaa.org/news/Radio/radiohome.asp> (last visited January 16, 2012).

²⁸⁴ *Supra* notes 216–20.

²⁸⁵ See *CNN v. ABC*, 518 F.Supp. 1238, 1244–45 (N.D. Ga. 1981); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

²⁸⁶ See *supra* notes 240–42 and accompanying text.

²⁸⁷ See *CNN*, 518 F.Supp. at 1239–40.

²⁸⁸ See, e.g., *Arizona Credentials*, *supra* note 41; *Ohio Media Regulations*, *supra* note 35, at 3–4.

²⁸⁹ See, e.g., *Florida Agreement*, *supra* note 36; *Oregon Broadcast Form*, *supra* note 38, at 1;

²⁹⁰ *Colorado Broadcast Agreement*, *supra* note 62.

²⁹¹ *Florida Agreement*, *supra* note 36, at 3.

²⁹² *Id.*

²⁹³ See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 154–56 (1969); *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977).

access will be granted. Granting access to “recognized”²⁹⁴ or “traditional”²⁹⁵ is a vague standard. With the rise of independent online journalism and the evolution of the media industry, it becomes increasingly important for state actors to have well-defined criteria for a bona fide journalist.²⁹⁶ As journalism expands, so will the number of credential applicants. It is clear that sports associations will not want to, and probably physically cannot, grant access to every applicant, but denying access without clear, non-arbitrary standards will violate the accepted standard for restricting the right to gather news.

3. *Prior Restraints: Clearly Established Neutral Criteria*

Sports associations do not issue direct prior restraints on the media. While they may not review and approve media coverage, some condition access on vague and broad terms.²⁹⁷ Knowing they could lose credentials, journalists may be deterred from reporting information that reflects poorly on sports associations,²⁹⁸ which is precisely the burden on the press that has concerned courts in addressing indirect prior restraints.²⁹⁹ The criteria used to grant and revoke credentials should be clearly listed on the agreement forms.³⁰⁰ Instead, as mentioned above, many sports associations state they will grant credentials to recognized media organizations or merely that credentials are subject to the association’s approval.³⁰¹ Others go into slightly more detail and specifically state what type of media organizations are recognized, but they still reserve the right to deny credentials to anyone.³⁰² Even if associations have an established tradition of granting credentials to every media outlet that applies, the possibility of denial still exists. This lingering threat is enough to lead to self-censorship and amounts to an intolerable prior restraint on the media.³⁰³

CONCLUSION

Courts employing the aforementioned framework of analysis will be able to identify sports associations’ media restrictions that threaten the First Amendment’s protection of the press. Each association action, credentialing process, and individual restriction must be evaluated on a case-by-case basis. This Article does not attempt to engage in such a particularized level of analysis; however, based on First Amendment values and precedent establishing free press doctrine, it is clear that associations’ media restrictions contain three common traits that put them most at risk of an unfavorable decision: 1) vague or broad terms in credential agreements; 2) content-based provisions; and 3) exclusive-rights agreements.

²⁹⁴ *Ohio Media Regulations*, *supra* note 35, at 3–4; *New York Policies*, *supra* note 39; *Colorado Broadcast Agreement*, *supra* note 62; *Texas Football Media Policy*, *supra* note 37; *Connecticut Media Policies*, *supra* note 36.

²⁹⁵ *Ohio Media Regulations*, *supra* note 35, at 3–4.

²⁹⁶ Ryan Benjamin Witte, *It’s My News Too! Online Journalism and Discriminatory Access to the Congressional Periodical Press Gallery*, 12 *YALE J.L. & TECH.* 208 (Spring 2009-2010).

²⁹⁷ *Supra* notes 39–41.

²⁹⁸ *See City of Lakewood v. Plain Dealer Publ’g Co.* 486 U.S. 750, 757-58 (1988) (“It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor’s discretion will eliminate this danger by adding an element of certainty fatal to self-censorship.”).

²⁹⁹ *Id.*

³⁰⁰ They must do so to comply with *City of Lakewood’s* clearly established requirements. *See id.*

³⁰¹ *Ohio Media Regulations*, *supra* note 35, at 3–4; *New York Policies*, *supra* note 39; *Colorado Broadcast Agreement*, *supra* note 62; *Texas Football Media Policy*, *supra* note 37; *Connecticut Media Policies*, *supra* note 36.

³⁰² *Arizona Definition*, *supra* note 35.

³⁰³ *See City of Lakewood*, 486 U.S. at 758.

As high school sports associations make efforts to control media coverage and preserve the commercial value of athletic events, they impose more restrictions on the press through credential agreements. As this article demonstrates, media credential policies in high school sports associations are a threat to the constitutional protections of the media and many provisions run contrary to First Amendment values. Media organizations give serious consideration to taking their arguments to court. If and when they do, courts should engage in the framework described herein to determine the constitutionality of credentialing processes.

Update: The Curious Cases of Oscar Pistorius & Caster Semenya

Aiden Johnson

In publication 12.2, this review published an article entitled, “*You Can Only Race if You Can’t Win? The Curious Cases of Oscar Pistorius & Caster Semenya*,” which dealt with many of the issues circling the eligibility of both South African athletes.¹

This past summer, after prevailing in their much-disputed legal battles for eligibility, both athletes competed in the London Olympics.² Pistorius, known as “Blade Runner,” because as a double amputee he uses carbon fiber prosthetic blades to run, was one of the biggest stories of the Olympic games.³ Oscar made it to the semi-final round of his individual 400 meter race.⁴ He finished eighth with a time of 46.54 seconds.⁵ In an unusual show of support and respect, Kirani James, the reigning 400 meter world champion, made a point to swap name bibs with Pistorius after the race.⁶ Pistorius also anchored his South African 400 meter relay team, which also finished eighth in the final.⁷ In the relay Oscar posted a split of 45.67 seconds, the second fastest split on his South African team.⁸

Semenya, the 800 meter world champion in 2009, had been forced out of racing for nearly a year as questions continued to be raised about her eligibility in light of gender tests.⁹ In a show of support from her country, Semenya served as South Africa’s opening ceremony flag bearer.¹⁰ She came on late to finish second with a time of 1:57:23.¹¹

¹ Professor Shawn M. Crincoli, *You Can Only Race if You Can’t Win? The Curious Cases of Oscar Pistorius & Caster Semenya*, 12 TEX. REV. OF ENT. & SPORTS L. 133, (2011).

² The Associated Press, *Semenya to Carry South Africa’s Flag at Olympics*, N.Y. TIMES, (July 8, 2012), available at http://www.nytimes.com/2012/07/19/sports/olympics/caster-semenya-to-carry-south-africas-flag-at-olympics.html?_r=0.

³ See Dan Wetzel, *Oscar ‘Blade Runner’ Pistorius shows his heart and fulfills his dream – just like every other Olympian*, YAHOO! SPORTS, (Aug. 10, 2012, 06:59 PM), <http://sports.yahoo.com/news/olympics--blade-runner-oscar-pistorius-shows-his-heart-and-fulfills-his-competitive-dream--ndash--just-like-every-other-olympian.html>.

⁴ *Id.*

⁵ Sam Borden, *Pistorius Misses Chance at Final, but Remains Upbeat*, N.Y. TIMES, (Aug. 5, 2012), available at <http://www.nytimes.com/2012/08/06/sports/olympics/pistorius-eliminated-track-and-field-roundup.html?pagewanted=all>.

⁶ *Id.*

⁷ Wetzel, *supra* note 3.

⁸ *Id.*

⁹ The Associated Press, *supra* note 2.

¹⁰ *Id.*

¹¹ Ian Chadband, *London 2012 Olympics: Caster Semenya finds a silver lining after misjudged start in the 800m final*, THE TELEGRAPH (Aug. 12, 2012), available at <http://www.telegraph.co.uk/sport/olympics/athletics/9470212/London-2012-Olympics-Caster-Semenya-finds-a-silver-lining-after-misjudged-start-in-the-800m-final.html>.

Title IX Turns 40: A Brief History and Look Forward

Maggie Jo Poertner Buchanan

When I was four years old, I played in my first soccer game. Though I would continue competitively playing soccer until college, that first game wasn't extremely impressive: I ran around with the pack of other girls around the bright pink soccer ball—vaguely recalling what our coach had tried to teach us about dribbling—before wandering off the field to try to find the orange slices my mother had brought to the game. I mostly remember having fun that day, and my father running up and down the sidelines when I was on the field to cheer me on. I was entirely unaware of the fact I was taking advantage of a program whose existence would have been unheard of throughout my mother's entire childhood.

This past summer, Title IX had its fortieth anniversary.¹ Title IX of the Education Amendments of 1972 was signed into law by President Richard Nixon. This landmark legislation prohibited sex discrimination in all education programs and activities that received federal funds. The law states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.²

While Title IX applies to a variety of students,³ the legislation is certainly best known for its effect on schools' athletic programs—and that effect has been inarguably profound. Despite its broad implementation, however, the law is frequently misunderstood. And despite the law's significant successes, Title IX still has room to improve opportunities for all athletes in America.

1. THE SUCCESS OF TITLE IX

Before Title IX, women and girls were excluded from almost all athletic opportunities in schools at any level.⁴ Fewer than 300,000 girls participated in high school sports before the law was passed, but by 2011, that number had grown to over 3 million.⁵ In collegiate athletics, the change was significant as well: The number went from a pre-Title IX total of under 30,000 to almost 200,000.⁶

The rapid growth of the number of female athletes has positive effects entirely separate from diversity in athletic programs. For example, the improvement in athletic opportunities has significantly contributed to improvements in the short-term and long-term public health signified by a seven percent decline in obesity among former female athletes—while this number may not seem overwhelming, no public health initiative has

¹ 20 U.S.C. § 1681(a).

² *Id.*

³ *See, e.g.*, 34 U.S.C. § 106.40(b)(1) (codifying regulations that require pregnant and parenting students to be protected by Title IX).

⁴ *See* NATIONAL COALITION FOR WOMEN & GIRLS IN EDUCATION (NCWGE), TITLE IX at 40, 10 (2012), available at www.ncwge.org/TitleIX40/TitleIX-print.pdf.

⁵ NATIONAL FEDERATION OF HIGH SCHOOL ASSOCIATIONS, 2010–11 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2011).

⁶ NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA), SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT: 1981–1982—2010–2011 (2011).

achieved the same results.⁷ Additionally, female athletes greatly reduce their risk for developing breast cancer.⁸ Further, middle and high school female athletes are less than half as likely to experience an unintended pregnancy than their non-athlete peers.⁹ Significantly, this decrease is universal among Caucasian, African-American, and Latina athletes.¹⁰

Career opportunities improve for former athletes as well. Studies demonstrate that executive businesswomen overwhelmingly participated in sports growing up, and that sports participation for girls leads to an increase in the labor force.¹¹

II. WHAT TITLE IX ACTUALLY REQUIRES

Title IX created three legal requirements for any school receiving federal funds: participation opportunities for female students,¹² athletic scholarship programs for female students (if they offer them for male students),¹³ and equal treatment of male and female athletes by their schools.¹⁴

These requirements are frequently misunderstood by Title IX's critics: The law does not require exact parity, but it does require substantially equal opportunity.¹⁵ Nor does the law require any type of quota system or any program resembling an affirmative action scheme.¹⁶

The U.S. Department of Education uses a three-part test that has been frequently upheld in courts, despite repeated legal challenges, to determine whether a school is in compliance with Title IX in regard to participation opportunities.¹⁷ The test is generous, and compliance with Title IX can be found if:

- Males and females participate in athletics in numbers substantially proportional to their enrollment numbers; or
- The school has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of members of the underrepresented sex; or
- The institution's existing programs fully and effectively accommodate the interests and abilities of the underrepresented sex.¹⁸

To satisfy the scholarship requirement, schools must provide scholarships to female athletes in proportion to one percent of their levels of participation.¹⁹ In regard to equal treatment of

⁷ See NCWGE, *supra* note 4.

⁸ NATIONAL WOMEN'S LAW CENTER (NWLC), THE BATTLE FOR GENDER EQUITY IN ATHLETICS IN COLLEGES AND UNIVERSITIES (2011), available at http://www.nwlc.org/sites/default/files/pdfs/2011_8_battle_in_college_athletics_final.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See NATIONAL WOMEN'S LAW CENTER (NWLC), THE BATTLE FOR GENDER EQUITY IN ATHLETICS IN ELEMENTARY AND SECONDARY SCHOOLS, 2012, http://www.nwlc.org/resource/battle-gender-equity-athletics-elementary-and-secondary-schools##_edn19.

¹² 34 C.F.R. § 106.37(c).

¹³ 34 C.F.R. § 106.41(c).

¹⁴ *Id.*

¹⁵ See 20 U.S.C. § 1681(b).

¹⁶ *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1996).

¹⁷ See 44 Fed Reg. § 41413 et seq. (1979) and NCWGE, *supra* note 4, at 11.

¹⁸ *Id.*

¹⁹ NCWGE, *supra* note 4, at 13.

male and female athletes, Title IX does not require that the athletes receive the same facilities or equipment, only that the differences are not substantial. “For instance, the school cannot provide men with top-notch uniforms and woman with low-quality uniforms.”²⁰

Despite these flexible standards, amendments to Title IX have frequently been proposed to limit its scope, usually justifying those restrictions on similar grounds to Brown University’s reasoning in the 1996 case *Cohen v. Brown University*, when the university, in an effort to avoid its Title IX obligations, argued that women simply weren’t as interested in sports as men.²¹ The court in that case thoroughly rejected that logic.²²

For a brief period during the second Bush administration, Title IX was extremely restricted. In 2005, the Department of Education issued guidance that allowed schools to simply send out an email survey to their female students, asking what additional sports they may have the interest and ability to play.²³ If the responses to the survey were not significant, the school did not have to alter any programs and the school was presumed to be in compliance with Title IX.²⁴ That guidance was rescinded during President Obama’s first term.²⁵

III. THE FUTURE OF TITLE IX

The law still has work to do on behalf of athletes to move toward greater equality. Opportunities to participate in athletics are still not equal to total female enrollment and interest.²⁶ Minorities and immigrant girls have much lower rates of participation than their white counterparts.²⁷ While participation in female sports has expanded, the role of female coaches has decreased: “In 1972, 90% of women’s teams were coached by females while today 43% are. Only 2–3% of men’s teams are coached by women.”²⁸

Perhaps most significantly, however, the policies improving equality for female athletes must be expanded to also take into account the special needs of transgendered athletes, so sex equality does not become pigeonholed into addressing only the needs of men and women.

Despite room to move forward, Title IX has had clear success. Personally, soccer brought me a variety of benefits. Besides the obvious benefits of supportive friendships with my teammates and the experiences gained while traveling for tournaments, soccer also gave me an enduring commitment to physical fitness and a healthy sense of competition. None of that would have been possible without Title IX.

²⁰ *Id.*

²¹ Cohen, 101 F.3d at 174.

²² *Id.*

²³ See U.S. DEP’T OF EDUC., ADDITIONAL CLARIFICATION OF THE INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE (2005).

²⁴ *Id.*

²⁵ U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: INTERCOLLEGIATE ATHLETICS POLICY CLARIFICATION: THE THREE-PART TEST – PART THREE (2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

²⁶ NWLC, *supra* note 8.

²⁷ NWLC, *supra* note 11.

²⁸ NCWGE, *supra* note 4, at 15.

