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Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century

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ESSAYS

APPLYING ANTITRUST LAW TO NCAA REGULATION OF “BIG TIME” COLLEGE ATHLETICS: THE NEED TO SHIFT FROM NOSTALGIC 19TH AND 20TH CENTURY IDEALS OF AMATEURISM TO THE ECONOMIC REALITIES OF THE 21ST CENTURY*

MATTHEW J. MITTEN**

The original purpose of intercollegiate athletics was to provide an extracurricular activity for talented students who attended college primarily to earn an academic degree that would enable them to pursue a career outside of professional athletics. According to the National Collegiate Athletic Association (“NCAA”), “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”¹ Today, this concept of an “amateur” athlete and the student-athlete model still applies for most sports and most students, especially women’s sports and men’s non-revenue sports.²

* Presented on January 8, 1999, as part of the Law and Sports Section of the Association of American Law Schools symposium titled *The NCAA’s Evolving Role in Governing Intercollegiate Athletics*.

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1. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL, art. 2.9 (2000-01) (*hereinafter* MANUAL). However, as Dean Rodney Smith observed in his presentation, commercial sponsorship of college athletic events has been present since the mid-1800s.

2. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L. REV. 269 (1994).

Not all NCAA sponsored sports fit neatly within this amateur model. Athletes participating in NCAA Division I football and basketball often are more interested in developing their skills in hope of a future professional playing career than in earning a college degree. In fact, universities sponsoring "big-time" football and basketball programs effectively serve as a farm system for the National Football League and National Basketball Association by providing the training environment and playing field for talented football and basketball players to hone their physical talents.

The tremendous public popularity of men's college football and basketball creates a substantial revenue-generating capacity and the prospect of increased visibility for universities. The significant economic rewards of winning have generated fierce off-field competition among universities for inputs necessary to produce winning teams (e.g., coaches and players) as well as efforts to fully exploit the economic value of their athletic products by maximizing fan and booster support, television revenues, and commercial sponsorships. The economic realities of this environment contrast sharply with the nostalgic ideal of the college amateur athlete whose participation in a sport is merely incidental to a university's provision of higher education in an academic environment.³

The NCAA's basic regulatory objective is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."⁴ In other words, the NCAA seeks to: 1) preserve the amateur nature of college sports; 2) as a component part of higher education; and 3) to ensure competitive balance on the playing field. Although these are laudable objectives, they are quite difficult to achieve given the economic reality of "big-time" college athletics, namely an existing "athletics arms race" fueled by the multi-million dollar economic rewards of winning teams fielded by members operating "big time" programs.⁵

The NCAA effectively determines the permissible nature and scope of virtually all aspects of both on-field and off-field competition among its members. It appears to function as an economic cartel in its regulation of Division I football and basketball programs. The NCAA's mem-

3. See generally, MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* (1990); MURRAY SPERBER, *ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS* (1998).

4. MANUAL, art. 1.3.1.

5. John C. Weistart, *Can Gender Equity Find A Place In Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 211-12 (1995).

ber schools are economic competitors that collectively possess monopsony power over the demand for college football and basketball players and monopoly power over the supply of college football and basketball games. They frequently agree to limit (or prohibit) free market forces from determining input prices for players, output of games, and other aspects of economic competition among themselves. The NCAA polices and enforces its rules and agreements by disciplining violators. Although individual NCAA members have an incentive to gain a competitive advantage by not complying with the association's rules, there is an economic necessity to remain a part of this national organization to reap the economic rewards of "big-time" college sports.

Given the economic realities of "big-time" college athletics, many NCAA rules limiting economic competition among universities appear to violate the federal antitrust laws. However, although there have been several antitrust suits challenging the legality of NCAA imposed restraints affecting Division I football and basketball, most litigation has been unsuccessful. In analyzing judicial treatment of the NCAA and its rules for antitrust purposes, it is important to look at the historical evolution of antitrust jurisprudence concerning intercollegiate athletics. Courts initially held that NCAA rule-making, regulatory, or enforcement activities do not sufficiently impact interstate trade or commerce to establish Sherman Act jurisdiction.⁶ NCAA rules designed to promote amateurism and protect academic integrity were deemed to constitute regulation of noncommercial activity that does not trigger antitrust scrutiny. Beginning in the mid-1970s, courts began recognizing that the provision and regulation of "big-time" intercollegiate athletics is business activity subject to the Sherman Act, but were reluctant to find that NCAA regulations violated the antitrust laws.⁷

In 1984, in *NCAA v. Board of Regents*,⁸ the Supreme Court held that the NCAA does not have a blanket exemption from the antitrust laws, although it is a nonprofit entity with educational objectives, because the "NCAA and its member institutions are in fact organized to maximize revenues."⁹ The Court invalidated NCAA restrictions on its members'

6. *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *College Ath. Placement Serv. v. NCAA*, No. CIV. A. 74-1144, 1974 U.S. Dist. LEXIS 7050, at *10 (D. N.J. Aug. 22, 1974), *aff'd*, 506 F.2d 1050 (3d Cir. 1974).

7. *Association of Intercollegiate Ath. for Women v. NCAA*, 735 F.2d 577 (D.C. Cir. 1984); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

8. *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

9. *Id.* at 101. The two dissenting justices criticized the Court's majority for "treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which col-

sale of television rights to football games that prevented economic competition among them. However, the Court acknowledged the NCAA's role "as the guardian of an important American tradition" and its "historic role in the preservation and encouragement of intercollegiate amateur athletics."¹⁰ The Court's majority strongly suggested that primarily noncommercial NCAA rules to preserve amateurism, academic integrity, and competitive balance do not violate the antitrust laws.¹¹

After *Board of Regents*, courts generally have rejected antitrust challenges to NCAA rules by providing great deference and discretion to the NCAA. These courts have assumed that NCAA rules are ancillary non-commercial restraints necessary to produce intercollegiate athletics and/or to further legitimate higher education objectives. Courts appear eager to find that NCAA regulation that does not directly fix prices for inputs (e.g., coaches' salaries)¹² or the sale of output (e.g., television rights)¹³ is either: 1) characterized as noncommercial and not subject to antitrust challenge¹⁴; 2) not found to have significant anticompetitive effects¹⁵; or 3) assumed to be procompetitive by being the least restrictive means of furthering the NCAA's stated objectives (which are usually judicially deemed to be legitimate).¹⁶

On the one hand, courts have held that agreements among NCAA member schools that directly fix prices in input or output markets for college sports are illegal. The *Board of Regents* Court ruled that the NCAA's exclusive football television rights plan violates the antitrust laws because it effectively establishes a set price for televised football games without any offsetting procompetitive justification, such as preserving competitive balance or the integrity of intercollegiate athletics. Consistent with *Board of Regents*, in *Law v. NCAA*, the Tenth Circuit recently held that an NCAA imposed cap of \$16,000.00 on Division I

leges and universities participate solely, or even primarily, in the pursuit of profits" because of the "essentially noneconomic nature of the NCAA's program of self-regulation." *Id.* at 121, 133.

10. *Id.* at 101 n.23.

11. *Id.* at 101-02.

12. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

13. *Board of Regents*, 468 U.S. 85, 119 (1984).

14. *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *aff'd on other grounds*, 524 U.S. 982 (1999); *Adidas Am., Inc. v. NCAA*, 193 F.R.D. 693 (D. Kan. 2000); *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D. N.J. 1998); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990).

15. *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

16. *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Hairston v. Pacific 10 Conf.*, 101 F.3d 1315 (9th Cir. 1996) (affirming validity of conference sanctions imposed on member university for violation of amateurism rules because no proof this procompetitive objective can be achieved in substantially less restrictive manner).

entry-level basketball coaches' salaries is an unreasonable restraint of trade as a matter of law.¹⁷ Applying the truncated or "quick look" rule of reason, the court found this salary cap has the naked anticompetitive effect of fixing one of the costs of producing Division I basketball games without furthering product availability or competitive balance among NCAA members in the least restrictive manner.¹⁸

At the other end of the spectrum, courts have uniformly upheld NCAA eligibility standards that athletes must satisfy to participate in intercollegiate athletics. Athlete eligibility requirements promulgated by the NCAA appear to be virtually per se legal under the antitrust laws. Courts have rejected antitrust challenges to NCAA regulations designed to preserve the amateur nature of college sports, such as the "no draft" and "no agent" rules¹⁹ and the imposition of disciplinary sanctions on institutions for violation of the NCAA's amateurism rules.²⁰

In *Smith v. NCAA*,²¹ the Third Circuit ruled that an NCAA eligibility rule prohibiting a student from participating in intercollegiate sports while enrolled in a graduate program at an institution other than where she earned her undergraduate degree does not violate the antitrust laws.²² The court distinguished *Law* because the challenged rule is not "a restriction on [any] business activities of [NCAA] institutions."²³ Moreover, *Law* observed that "courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."²⁴

Adidas' recent antitrust challenge to NCAA restrictions on its members' sale of promotional rights to sponsors illustrates judicial unwillingness to acknowledge that universities engage in economic competition among themselves off the playing field and that some NCAA rules may restrain trade. In *Adidas America, Inc. v. NCAA*,²⁵ Adidas alleged that NCAA limits on the size of manufacturer logos on uniforms and playing equipment unreasonably restrained competition among NCAA member institutions for the sale of advertising rights.²⁶ The court initially denied Adidas' motion for a preliminary injunction against enforcement of this

17. *Law*, 134 F.3d at 1010.

18. *Id.* at 1016-19.

19. *Banks*, 977 F.2d at 1089, 1091; *Gaines*, 746 F. Supp. at 746.

20. *McCormack*, 845 F.2d at 1345-46; *Hairston*, 101 F.3d at 1318-20.

21. 139 F.3d 180 (3d Cir. 1998).

22. *Id.* at 184-87.

23. *Id.* at 186.

24. 134 F.3d at 1022 n.14.

25. 64 F. Supp. 2d at 1100.

26. *Id.* at 1100.

rule.²⁷ Observing that *Law* provides no guidance regarding the line between commercial and noncommercial activities, the court characterized the subject NCAA regulation as noncommercial because it does not have the purpose or effect of giving NCAA members a direct economic benefit.²⁸ Rather, it found the rule furthered the NCAA's legitimate objective of preventing the commercialization of college sports, notwithstanding that patches identifying football bowl game sponsors on player uniforms are not subject to the size limits of this rule (not to mention that athletes may be required to wear a particular manufacturer's shoes as part of a sponsorship agreement with an NCAA university).²⁹

Subsequently, the court granted the NCAA's motion to dismiss Adidas' complaint.³⁰ The court found that Adidas failed to properly allege a relevant market in which competition is adversely affected by the challenged NCAA rule.³¹ Adidas only asserted a reduction in competition in the market for the sale of advertising rights on uniforms worn by players at NCAA institutions.³² However, the court ruled that the appropriate relevant market "includes all advertising vehicles that are reasonably interchangeable with NCAA promotional rights on athletic apparel,"³³ such as uniforms worn by players for professional and Olympic sports teams. In other words, the court concluded that the NCAA's rule restricting the size of manufacturer logos on uniforms has no significant anticompetitive effect as a matter of law.

The *Adidas* trial court's disposition of the case is another example of unwarranted judicial deference to NCAA regulation of economic competition among its member institutions. The *Adidas* holding is inconsistent with the *Board of Regents* and *Law* precedent establishing a framework of antitrust analysis for NCAA regulatory activity with a commercial impact. Adidas' allegations, at the very least, raise a factual issue for discovery regarding the anticompetitive effects of this NCAA rule. If the limitation on logo size has the effect of reducing economic competition among NCAA members, the NCAA must prove that it furthers a valid procompetitive objective that cannot be accomplished by a substantially less restrictive means.

27. *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1287 (D. Kan. 1999).

28. *Id.* at 1296.

29. *Id.*

30. *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097 (D. Kan. 1999).

31. *Id.* at 1104.

32. *Id.*

33. *Id.* at 1102.

There is no valid justification for permitting the NCAA to determine arbitrarily the permissible degree of economic competition among its members or, in light of these universities significant economic self-interest, for courts to defer to the NCAA's judgment. Courts should abandon anachronistic precedent based on unrealistic ideals of the "amateur" nature of "big-time" college athletics and develop a principled antitrust jurisprudence more consistent with the economic realities of college sports in the 21st century.

I am not advocating that all NCAA regulation of competition violates the antitrust laws. However, courts should not continue to make unrealistic or unwarranted assumptions about the economic effects of NCAA rules reducing or eliminating competition among its approximately 1,100 member schools. NCAA regulation that has anticompetitive, intrabrand effects should be proven to be the least restrictive means of promoting interbrand competition as a matter of fact, rather than being presumed to do so as a matter of law.

A BRIEF HISTORY OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S ROLE IN REGULATING INTERCOLLEGIATE ATHLETICS*

RODNEY K. SMITH**

I. INTRODUCTION

As one whose scholarship focuses on religious liberty and sport, I am often asked why I write in such seemingly disparate areas. My typical response is that given my interest in the role of religion in society, I certainly should be interested in sport, the religion of the American people. This response invariably engenders a slight smile and chuckle.¹ I fear that there is some truth to the statement. Although I do not have the statistics necessary to prove it, my impression is that as many adults are zealously devoted to "the game" on any given day as are devoted to a worship service at a religious institution. As a people, we seem almost fixated on sport and devote much space in newspapers and newscasts to sport, with little space being allocated to religion. Yet, the discourse regarding sport is generally just description of events occurring, and rarely peers more deeply into the ramifications of specific issues², or of the

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1. I often wonder whether the response is based on a feeling that I have said something cute, or whether it is founded in a deeper disquietude over the fact that I may just be right.

2. Sports sections are filled with description and occasional polemics over aspects of the role of sport in society, but that discourse rarely goes beyond the superficial as to specific issues raised. For example, commentators repeatedly argue that intercollegiate athletes should be "paid" without discussing in any depth the ramifications of their suggestions on the athletes and educational institutions. Marty Lang, *Pay-For-Play Versus NCAA*, at http://www.linkmag.com/link/Feb_Mar_99/990121cc1_sports.html (Feb.-Mar. 1999). Academics, who understand the need to study major phenomena that affect our culture in great depth, often shun the exploration of deeper ethical and moral issues related to sport. For example, once during lunch with a group of my faculty colleagues, a fellow faculty member asked me what I thought about "the game" that weekend. I responded that I did not watch the game. Almost aghast, he wondered out loud, "how can you teach sports law and not watch the game." As academics, like our journalistic counterparts, we are too often caught up in the anecdotal moment of

general issue of our virtually thoughtless zeal for sport in contemporary society. While I find this to be personally troubling, it is just such thoughtless zeal as to sport, and the desire to see one's team win at virtually any cost,³ that contributes to the increasing regulation of athletics at virtually all levels.

Devotees of a given team, including coaches and fans alike, often strive mightily to find clever ways to unbalance the playing field in their team's favor through questionable recruiting techniques or other devices. This propensity to seek undue advantages in sport has made regulation of intercollegiate athletics a necessity in order to maintain even a semblance of a balanced playing field. Each new, creative way of bending the rules to create an undue advantage has necessarily led to the development of new rules and regulations.⁴ In turn, the growth in the number of rules has required development of an extensive structure to ensure that the rules are enforced.

In this essay, I will briefly examine the historical development of the National Collegiate Athletic Association (hereinafter NCAA) and the regulation of intercollegiate athletics. I will also offer some general comments regarding the history and future of the regulation of intercollegiate athletics.

II. A BRIEF HISTORY OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

A. 1840-1910

The need for regulation of intercollegiate athletics in the United States has existed for at least a century and a half. One of the earliest interschool athletic events was a highbrow regatta between Harvard and Yale Universities, which was commercially sponsored by the then power-

"the game," and rarely pause to reflect thoughtfully on the very ramifications of sport in our society. This is even more true when, as educational institutions, we have made an academic home for intercollegiate athletics.

3. This is reminiscent, in some ways, of the zeal of some religionists that has led them to conduct holy wars in order to prove that their religion is superior.

4. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL (2000) [hereinafter *MANUAL*]. Including the index, the *MANUAL* is 479 pages long, with small print. These rules are in large measure a reflection of efforts to curtail the creativity of devotees of a particular team to find ways to gain an advantage over another institution. Each time a new way of creating an unfair advantage is concocted in the head of a coach or other devotee of a given team, a new rule is spawned to deal with that excess. In turn, as rules proliferate, an increasingly complex structure for enforcing the rules is necessitated.

ful Elkins Railroad Line.⁵ Harvard University sought to gain an undue advantage over its academic rival Yale by obtaining the services of a coxswain who was not a student.⁶ Thus, the commercialization and propensity to seek unfair advantages existed virtually from the beginning of organized intercollegiate athletics in the United States. The problem of cheating, which was no doubt compounded by the increasing commercialization of sport, was a matter of concern.⁷ Initially, these concerns led institutions to move the athletic teams from student control to faculty oversight.⁸ Nevertheless, by the latter part of the nineteenth century, two leading university presidents were voicing their fears that intercollegiate athletics were out of control.⁹ President Eliot at Harvard was very concerned about the impact that commercialization of intercollegiate athletics was having, and charged that "lofty gate receipts from college athletics had turned amateur contests into major commercial spectacles."¹⁰ In the same year, President Walker of the Massachusetts Institute of Technology bemoaned the fact that intercollegiate athletics had lost its academic moorings and opined that "[i]f the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics."¹¹ In turn, recognizing the difficulty of overseeing intercollegiate athletics at the institutional level, whether through the faculty or the student governance, conferences were being created both to facilitate the playing of a schedule of games and to provide a modicum of regulation at a broader level.¹²

5. These regatta, which were student run for the most part, were among the first intercollegiate athletic events.

6. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988-89 (1987) [hereinafter Smith, *Death Penalty*]; Rodney K. Smith, *Little Ado About Something: Playing Games With the Reform of Big-Time Athletics*, 20 CAP. U. L. REV. 567, 569-70 (1991) [hereinafter Smith, *Little Ado*].

7. The commercialization of intercollegiate athletics, with the payment of star athletes, was rather firmly entrenched by the latter part of the 19th Century. For example, it is reported that Hogan, a successful student-athlete at Yale at that time, was compensated with: (1) a suite of rooms in the dorm; (2) free meals at the University club; (3) a one-hundred dollar scholarship; (4) the profits from the sale of programs; (5) an agency arrangement with the American Tobacco Company, under which he received a commission on cigarettes sold in New Haven; and (6) a ten-day paid vacation to Cuba. See Smith, *Death Penalty*, *supra* note 6, at 989.

8. *Id.* at 989-90.

9. Smith, *Little Ado*, *supra* note 6, at 570.

10. *Id.*

11. *Id.*

12. Smith, *Death Penalty*, *supra* note 6, at 990.

Despite the shift from student control to faculty oversight and some conference regulation, intercollegiate athletics remained under-regulated and a source of substantial concern.¹³ Rising concerns regarding the need to control the excesses of intercollegiate athletics were compounded by the fact that in 1905 alone, there were over eighteen deaths and one hundred major injuries in intercollegiate football.¹⁴ National attention was turned to intercollegiate athletics when President Roosevelt called for a White House conference to review football rules.¹⁵ President Roosevelt invited officials from the major football programs to participate.¹⁶ Deaths and injuries in football persisted, however, and Chancellor Henry MacCracken of New York University called for a national meeting of representatives of the nation's major intercollegiate football programs to determine whether football could be regulated or had to be abolished at the intercollegiate level.¹⁷ Representatives of many major intercollegiate football programs accepted Chancellor MacCracken's invitation and ultimately formed a Rules Committee.¹⁸ President Roosevelt then sought to have participants in the White House conference meet with the new Rules Committee.¹⁹ This combined effort on the part of educators and the White House eventually led to a concerted effort to reform intercollegiate football rules, resulting in the formation of the Intercollegiate Athletic Association (hereinafter IAA), with sixty-two original members.²⁰ In 1910, the IAA was renamed the NCAA.²¹ Initially, the NCAA was formed to formulate rules that could be applied to the various intercollegiate sports.²²

In the years prior to the formation of the NCAA, schools wrestled with the same issues that we face today: the extreme pressure to win, which is compounded by the commercialization of sport, and the need for regulations and a regulatory body to ensure fairness and safety.²³ In terms of regulation, between 1840 and 1910, there was a movement from

13. *Id.*

14. *Id.*

15. GEORGE W. SCHUBERT ET AL., SPORTS LAW 1 (1986); Smith, *Death Penalty*, *supra* note 6, at 990.

16. Smith, *Death Penalty*, *supra* note 6, at 990.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 991; SCHUBERT, *supra* note 15, at 2.

21. *Id.*

22. *Id.*

23. Smith, *Little Ado*, *supra* note 6, at 571.

loose student control of athletics to faculty oversight, from faculty oversight to the creation of conferences, and, ultimately, to the development of a national entity for governance purposes.²⁴

B. 1910–1970

In its early years, the NCAA did not play a major role in governing intercollegiate athletics.²⁵ It did begin to stretch beyond merely making rules for football and other games played, to the creation of a national championship event in various sports.²⁶ Indeed, students, with some faculty oversight, continued to be the major force in running intercollegiate athletics.²⁷ By the 1920s, however, intercollegiate athletics were quickly becoming an integral part of higher education in the United States.²⁸ Public interest in sport at the intercollegiate level, which had always been high, continued to increase in intensity, particularly as successful and entertaining programs developed, and also with increasing access to higher education on the part of students from all segments of society.²⁹

With this growing interest in intercollegiate sports and attendant increases in commercialization, outside attention again focused on governance and related issues.³⁰ In 1929, the highly respected Carnegie Foundation for the Advancement of Education issued a significant report regarding intercollegiate athletics and made the following finding:

[A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth.³¹

The Carnegie Report, echoing themes that appear ever so relevant in the year 2000, concluded that college presidents could reclaim the integrity of sport.³² College administrators “could change the policies permitting

24. Smith, *Death Penalty*, *supra* note 6, at 989-91.

25. *Id.* at 991.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

commercialized and professionalized athletics that boards of trustees had previously sanctioned.”³³

While the NCAA made some minor attempts to restructure rules to increase integrity in the governance of intercollegiate athletics, those efforts were insufficient to keep pace with the growing commercialization of, and interest in, intercollegiate athletics.³⁴ Recruitment of athletes was not new, but the rising desire to win, with all its commercial ramifications, contributed to recruitment being raised to new heights.³⁵ Red Grange, for example, is often given credit for “starting the competition for football talent through . . . recruiting.”³⁶ Public interest in intercollegiate athletics continued to increase with support from the federal government during the 1930s. The capacity of the NCAA to regulate excesses was not equal to the daunting task presented by the growth of, interest in, and commercialization of sport.³⁷

After World War II, with a dramatic increase in access to higher education on the part of all segments of society, largely through government support for returning military personnel to attend college, public interest expanded even more dramatically than it had in the past.³⁸ Increased interest, not surprisingly, led to even greater commercialization of intercollegiate athletics. With the advent of television, the presence of radios in the vast majority of homes in the United States, and the broadcasting of major sporting events, these pressures further intensified.³⁹ More colleges and universities started athletic programs, while others expanded existing programs, in an effort to respond to increasing interest in intercollegiate athletics. These factors, coupled with a series of gambling scandals and recruiting excesses, caused the NCAA to promulgate additional rules, resulting in an expansion of its governance authority.⁴⁰

In 1948, the NCAA enacted the so-called “Sanity Code,” which was designed to “alleviate the proliferation of exploitive practices in the recruitment of student-athletes.”⁴¹ To enforce the rules in the Sanity Code, the NCAA created the Constitutional Compliance Committee to interpret rules and investigate possible violations.⁴² Neither the Sanity

33. *Id.*

34. *Id.* at 991-92.

35. *Id.* at 992.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 992.

40. *Id.*

41. *Id.*

42. *Id.*

Code with its rules, nor the Constitutional Compliance Committee with its enforcement responsibility, were successful because their only sanction was expulsion, which was so severe that it rendered the Committee impotent and the rules ineffectual.⁴³ Recognizing this, the NCAA repealed the Sanity Code in 1951, replacing the Constitutional Compliance Committee with the Committee on Infractions, which was given broader sanctioning authority.⁴⁴ Thus, in 1951, the NCAA began to exercise more earnestly the authority which it had been given by its members.⁴⁵

Two other factors are worth noting in the 1950s: (1) Walter Byers became Executive Director of the NCAA, and contributed to strengthening the NCAA, and its enforcement division, over the coming years to televise intercollegiate football; and (2) the NCAA negotiated its first contract valued in excess of one million dollars, opening the door to increasingly lucrative television contracts in the future.⁴⁶ The NCAA was entering a new era, in which its enforcement authority had been increased, a strong individual had been hired as executive director, and revenues from television were beginning to provide it with the wherewithal to strengthen its capacity in enforcing the rules that were being promulgated.⁴⁷ Through the 1950s and 1960s, the NCAA's enforcement capacity increased annually.⁴⁸

C. 1971-1983

By 1971, as its enforcement capacity had grown yearly in response to new excesses arising from increased interest and commercialization, the NCAA was beginning to be criticized for alleged unfairness in the exercise of its enhanced enforcement authority.⁴⁹ Responding to these criticisms, the NCAA formed a committee to study the enforcement process, and ultimately, in 1973, adopted recommendations developed by that committee designed to divide the prosecutorial and investigative roles of the Committee on Infractions.⁵⁰ In the early 1970s, as well, the membership of the NCAA decided to create divisions, whereby schools would be placed in divisions that would better reflect their competitive capacity.⁵¹

43. *Id.* at 992-93.

44. *Id.* at 993.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 992.

50. *Id.* at 994.

51. *Id.* at 993.

Despite these efforts, however, by 1976, when the NCAA was given additional authority to enforce the rules by penalizing schools directly, and, as a result, athletes, coaches, and administrators indirectly, criticism of the NCAA's enforcement authority grew even more widespread.⁵² Indeed, in 1978, the United States House of Representatives Subcommittee on Oversight and Investigation held hearings to investigate the alleged unfairness of the NCAA's enforcement processes.⁵³ Once again, the NCAA responded by adopting changes in its rules designed to address many of the criticisms made during the course of the hearings.⁵⁴ While concerns were somewhat abated, the NCAA's enforcement processes continued to be the source of substantial criticism through the 1970s and 1980s.⁵⁵

The NCAA found itself caught between two critiques. On the one hand, it was criticized for responding inadequately to the increased commercialization of intercollegiate athletics, with all its attendant excesses; while on the other hand, it was criticized for unfairly exercising its regulatory authority.⁵⁶ Another factor began to have a major impact as well. University and college presidents were becoming more directly concerned with the operation of the NCAA for two major reasons: (1) as enrollments were beginning to drop, and expenses were increasing in athletics and elsewhere, presidents began, with some ambivalence, to see athletics as an expense, and as a potential revenue and public relations source; and (2) they personally came to understand that their reputations as presidents were often tied to the success of the athletic program and they were, therefore, becoming even more fearful of the NCAA's enforcement authority.⁵⁷

D. 1984-1999

In difficult economic times for higher education in the 1980s, university presidents increasingly found themselves caught between the pressures applied by influential members of boards of trustees and alumni, who often demanded winning athletic programs, and faculty and educators, who feared the rising commercialization of athletics and its impact

52. *Id.* at 994.

53. *Id.*

54. *Id.*

55. *Id.* at 995.

56. *Id.*

57. *Id.* at 995-96.

on academic values.⁵⁸ Many presidents were determined to take an active, collective role in the governance of the NCAA, so they formed the influential Presidents Commission in response to these pressures.⁵⁹ In 1984, the Presidents Commission began to assert its authority, and by 1985, it took dramatic action by exercising their authority to call a special convention to be held in June of 1985.⁶⁰ This quick assertion of power led one sports writer to conclude that "There is no doubt who is running college sports. It's the college presidents."⁶¹

The presidents initially were involved in a number of efforts to change the rules, particularly in the interest of cost containment.⁶² These efforts were not all successful.⁶³ Over time, however, the presidents were gaining a better understanding of the workings of the NCAA, and they were beginning to take far more interest in the actual governance of intercollegiate athletics.⁶⁴ A little over a decade later, the presidents' involvement grew to the extent that they had changed the very governance structure of the NCAA, with the addition of an Executive Committee and a Board of Directors for the various divisions, both of which are made up of presidents or chief executive officers.⁶⁵

In *NCAA v. Tarkanian*⁶⁶, in a 5-4 decision, the United States Supreme Court held that the NCAA was not a state actor, freeing the NCAA from defending against due process allegations brought by Coach Jerry Tarkanian.⁶⁷ Despite this victory, concerns persisted regarding due process in the NCAA's enforcement processes. In time, the presidents decided to take action in reforming the enforcement process.⁶⁸ The presidents were involved in forming a Special Committee to Review the NCAA Enforcement and Infractions Process,⁶⁹ and supported the naming of one of their own, President Rex E. Lee of Brigham

58. *Id.* at 995; Rodney K. Smith, *Reforming Intercollegiate Athletics: A Critique of the Presidents Commission's Role in the N.C.A.A.'s Sixth Special Convention*, 64 N.D. L. REV. 423, 427 (1988).

59. Smith, *Death Penalty*, *supra* note 6, at 996-97.

60. Smith, *supra* note 58, at 428-30.

61. Smith, *Death Penalty*, *supra* note 6, at 997.

62. Smith, *supra* note 58, at 428.

63. *Id.*

64. *Id.*

65. MANUAL, *supra* note 4, at 22-23.

66. 488 U.S. 179 (1988).

67. *Id.* at 199.

68. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS, Oct. 28, 1991, at 1 [hereinafter REPORT AND RECOMMENDATIONS].

69. The Committee was charged as follows:

Young University, as Chairman.⁷⁰ This distinguished committee, which included other luminaries such as former Chief Justice of the United States Supreme Court Warren E. Burger, issued a report in 1991.⁷¹ The Committee made the following basic recommendations: (1) "Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer;"⁷² (2) "Establish a 'summary disposition' procedure for treating major violations at a reasonably early stage in the investigation;"⁷³ (3) "Liberalize the use of tape recordings and the availability of such recordings to involved parties;"⁷⁴ (4) "Use former judges or other eminent legal authorities as hearing officers in cases involving major violations and not resolved in the 'summary disposition' process;"⁷⁵ (5) "Hearings should be open to the greatest extent possible;"⁷⁶ (6) "Provide transcripts of all infractions hearings to appropriate involved parties;"⁷⁷ (7) "Refine and enhance the role of the Committee on Infractions and establish a limited appellate process beyond that committee;"⁷⁸ (8) "Adopt a formal conflict-of-interest policy;"⁷⁹ (9) "Expand the public reporting of infractions cases;"⁸⁰ (10) "Make available a com-

Conduct a thorough review of the enforcement and infractions process, including (a) the investigation process by the enforcement staff; (b) the function of the Committee on Infractions, including the hearing process and the method used to determine penalties if guilty, and (c) the release of information to the public regarding sanctions and the conduct of press conferences at institutions announcing sanctions. The purpose of the review is to make sure that the process is being handled in the most effective way, that fair procedures are guaranteed, that penalties are appropriate and consistent; to determine ways to reduce the time needed to conclude the investigation and the infractions process, and to determine if there can be innovative changes that will make the process more positive and understandable to those involved and to the general public.

Id.

70. *Id.*

71. *Id.*

72. *Id.* at 3. This recommendation certainly reflected a concern on the part of chief executive officers that they were not sufficiently involved in the enforcement process, when an institution was being investigated.

73. *Id.* at 4. Again, in this area, the recommendation called upon the staff to "share with the chief executive officer its information regarding rules violations" at an early stage. *Id.* at 5.

74. *Id.* at 5.

75. *Id.* at 6.

76. *Id.*

77. *Id.* at 7.

78. *Id.* at 7. This recommendation was adopted, with the creation of the Infractions Appeals Committee, a five-member committee, that hears appeals from the Committee on Infractions, and has been developing appellate case law or jurisprudence.

79. *Id.* at 8.

80. *Id.*

pilation of previous committee decisions;"⁸¹ and (11) "Study the structure and procedures of the enforcement staff."⁸² These recommendations have been taken seriously, and, as implemented, are helping to improve the enforcement processes.

During this time period, there were a number of additional developments that had an impact on the role of the NCAA in fulfilling its enforcement and governance of responsibilities. Even in a short history, like this one, a few of those developments are noteworthy.

As the role of television and the revenue it brings to intercollegiate athletics has grown in magnitude, the desire for an increasing share of those dollars has become intense. The first television event in the 1950s was a college football game, and the televising of college football games remained under the NCAA's control for a number of years.⁸³ In time, however, a group of powerful intercollegiate football programs were determined to challenge the NCAA's handling of the televising of games involving their schools.⁸⁴ In *NCAA v. Board of Regents*⁸⁵, the United States Supreme Court held that the NCAA had violated antitrust laws.⁸⁶ This provided an opening for those schools, and the bowls that would ultimately court them, to directly reap the revenues from the televising of their football games.⁸⁷ This shift has effectively created a new division in football called the College Football Association, which is made up of the football powerhouses in Division I.⁸⁸ Because these schools have been able to funnel more television revenues in their direction, which has led to increases in other forms of revenue, they have gained access to resources that have unbalanced the playing field in football and other sports.⁸⁹

Another matter that has dramatically impacted intercollegiate athletics during the past two decades is Title IX, with its call for gender equity

81. *Id.* This provision, together with the developing appellate case law, will make for a jurisprudence of enforcement that will warrant study in the future. It will also help establish the fairness or equality of treatment that characterizes the rule of law.

82. *Id.*

83. SCHUBERT, *supra* note 15, at 2.

84. *Id.*

85. 468 U.S. 85 (1984).

86. *Id.* at 113, 120.

87. SCHUBERT, *supra* note 15, at 57-58.

88. *Id.* at 58.

89. It is clear that the membership of the College Football Association has been able to use those additional revenues to enhance their entire athletics program, giving them a competitive edge.

in intercollegiate athletics.⁹⁰ With some emphasis on proportionality in opportunities and equity in expenditures for coaches and other purposes in women's sports, new opportunities have been made available for women in intercollegiate athletics.⁹¹ The cost of these expanded opportunities have been high, however, particularly given that few institutions have women's teams that generate sufficient revenue to cover the cost of these added programs.⁹² This increase in net expenses has placed significant pressure on intercollegiate athletic programs, particularly given that the presidents are cost-containment conscious, desiring that athletic programs be self-sufficient.⁹³ Revenue producing male sports, therefore, have to bear the weight of funding women's sports.⁹⁴ This, in turn, raises racial equity concerns because most of the revenue producing male sports are made up predominantly of male student-athletes of color,⁹⁵ who are expected to deliver a product that will not only produce sufficient revenue to cover its own expenses, but also a substantial portion of the costs of gender equity and male sports that are not revenue producing.⁹⁶

The gender equity and television issues have been largely economic in their impact, but they do indirectly impact the role of the NCAA in governance. Since football funding has been diverted from the NCAA to the football powerhouses, the NCAA for the most part has had to rely even more heavily on its revenue from the lucrative television contract for the Division I basketball championship.⁹⁷ Heavy reliance on this funding source raises racial equity issues, since student-athletes of color, particularly African-American athletes, are the source of those revenues.⁹⁸ Thus, the very governance costs of the NCAA are covered predominantly by the efforts of these student-athletes of color.⁹⁹ This inequity is exacerbated by the fact that schools and conferences rely heavily on revenues from the basketball tournament to fund their own institutional and conference needs.¹⁰⁰

90. Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 367 (1996).

91. *Id.* at 355.

92. *Id.* at 368.

93. *Id.* at 359-60.

94. *Id.* at 368.

95. *Id.* at 369-70.

96. *Id.* at 370.

97. *Id.* at 348.

98. *Id.* at 349.

99. *Id.*

100. *Id.* at 369-70.

Generally, developments during the past two decades have focused on governance and economic issues.¹⁰¹ There have been some efforts, however, to enhance academic integrity and revitalize the role of faculty and students in overseeing intercollegiate athletics.¹⁰² Of particular note in this regard has been the implementation of the certification process for intercollegiate athletic programs.¹⁰³ The certification process involves faculty, students (particularly student-athletes), and staff from an institution in preparing an in-depth self-study, including substantial institutional data in the form of required appendices.¹⁰⁴ The study covers the following areas: Governance and Rules Compliance, Academic Integrity, Fiscal Integrity, and Commitment to Equity.¹⁰⁵ This process helps institutions focus on academic values and related issues.¹⁰⁶ These efforts also provide the chief executive officers with additional information and a potentially enhanced role in intercollegiate athletics at the campus level.¹⁰⁷

The past two decades have been active ones for the NCAA. With meteoric rises in television and related revenues, the commercialization of intercollegiate athletics has continued to grow at a pace that places significant strain on institutions and the NCAA. These commercial pressures, together with increasing costs related to non-revenue producing sports, costly gender equity requirements, and other resource demands (e.g., new facilities), make it challenging to maintain a viable enforcement process and a balanced playing field.

III. THE FUTURE

Over the past 150 years, the desire to win at virtually any cost, combined with the increases in public interest in intercollegiate athletics, in a consumer sense, have led inexorably to a highly commercialized world of intercollegiate athletics.¹⁰⁸ These factors have created new incentives for universities and conferences to find new ways to obtain an advantage over their competitors. This desire to gain an unfair competitive advantage has necessarily led to an expansion in rules and regulations. This

101. Smith, *Little Ado*, *supra* note 6, at 573.

102. Smith, *Death Penalty*, *supra* note 6, at 1058.

103. This certification process has been in place for a number of years and is becoming institutionalized. Smith, *Little Ado*, *supra* note 6, at 573.

104. *Id.* at 573-74.

105. *Id.*

106. *Id.* at 576.

107. *Id.*

108. Smith, *Death Penalty*, *supra* note 6, at 991.

proliferation of rules and the development of increasingly sophisticated regulatory systems necessary to enforce those rules, together with the importance that attaches to enforcement decisions, both economically and in terms of an institution's reputation (and derivatively its chief executive officer's career), places great strain on the capacity of the NCAA to govern intercollegiate athletics. This strain is unlikely to dissipate in the future because the pressures that have created the strain do not appear to be susceptible, in a practical sense, to amelioration. Indeed, the one certainty in the future of the NCAA is the likelihood that big-time intercollegiate athletics will be engaged in the same point-counterpoint that has characterized its history; increased commercialization and public pressure leading to more sophisticated rules and regulatory systems.

As rules and regulatory systems continue along the road of increased sophistication, the NCAA will more closely resemble its industry counterparts. It will develop an enforcement system that is more legalistic in its nature, as regulatory proliferation leads to increasing demands for fairness. In such a milieu, chief executive officers will have to take their responsibilities for intercollegiate athletics even more seriously.¹⁰⁹ It can be hoped, as well, that their involvement, and the increased involvement on the part of faculty and staff, through the certification process and otherwise, will lead to a more responsible system in terms of the maintenance of academic values. If the NCAA and those who lead at the institutional and conference levels are unable to maintain academic values in the face of economics and related pressures, the government may be less than a proverbial step away.¹¹⁰

109. It can be anticipated, as well, that chief executive officers will be held increasingly accountable for rules violations at their institutions.

110. Just as the government (the legislative and judicial branches) became involved at the turn of the century and again in the 1970s, it is likely that similar oversight will occur in the future. With increased formalization of regulatory processes, the judiciary may well become more involved.

CORPORATE SPONSORSHIPS OF SPORTS AND ENTERTAINMENT EVENTS: CONSIDERATIONS IN DRAFTING A SPONSORSHIP MANAGEMENT AGREEMENT

BY GREGORY J. HELLER & JEFFERY A. HECHTMAN¹

I. INTRODUCTION

A. *Overview of Corporate Sponsorships in the Sports and Entertainment Industry*

As we enter a new millennium, corporations are continuously looking for ways to effectively reach their target markets. One method of access that has exploded in popularity in recent years is the sponsorship of sports and entertainment events. With broad demographics and well-known personalities, corporate sponsorships of sports and entertainment events are at an all-time high, as growth in sponsorship was estimated to continue at a double-digit pace in 1999.² It was projected that North American companies would spend \$7.6 billion on the sponsorship of sports and entertainment events in 1999, while worldwide spending was projected to be \$19.2 billion, 12% and 11% increases, respectively, from 1998.³

The projected breakdown of North American companies' sponsorship spending on sports and entertainment events for 1999 was as follows: (i) \$5.1 billion on sports events, representing 67% of the projected total sponsorship spending for 1999; (ii) \$756 million on entertainment tours and events, representing 10% of the projected total sponsorship spending for 1999; (iii) \$685 million on festivals, fairs and annual events, representing 9% of the projected total sponsorship spending for 1999; (iv) \$630 million on "cause" marketing events, representing 8% of the projected total sponsorship spending for 1999; and (v) \$460 million on

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2. *1999 Sponsorship Spending: \$7.6 Billion*, IEG SPONSORSHIP REP. (IEG, Inc., Chi., Ill.), Dec. 21, 1998, at 1.

3. *Id.* at 1, 4.

the arts, representing 6% of the projected total sponsorship spending for 1999.⁴

Some of the largest corporations in the world make significant investments in sports or entertainment properties. There are sixty-one United States-based companies which have spent more than \$10 million on the sponsorship of sports and entertainment events.⁵ Included among the organizations spending significant dollars on the sponsorship of sports and entertainment events are well-known companies such as Philip Morris, Coca-Cola, McDonald's, and General Motors and lesser-known companies such as Mars, Inc., Bausch & Lomb, Inc., and Thomson Consumer Electronics.⁶

B. Recent Sponsorships in the Sports and Entertainment Industry

Corporate sponsorships of sports and entertainment events occur in a wide-range of events for varying amounts of investment. Examples include AFC Enterprises (Church's Chicken) recently paying in excess of \$750,000 to be the presenting sponsor of the Kirk Franklin gospel tour; Levi Strauss & Co. paying in excess of \$250,000 to be the title sponsor of the snowboarding Sno-core tour; and American Express paying in excess of \$500,000 to be the official card of the National Collegiate Athletic Association.⁷ In contrast, for as little as \$1500, a company can be a corporate sponsor of the Independence Bowl, an annual college football game,⁸ while companies such as Anheuser-Busch spent as much as \$10 million to be the co-sponsor of the Federation Internationale Football Association World Cup,⁹ and Pittsburgh-based PNC Bank entered into a naming rights agreement with the Pittsburgh Pirates for \$30 million dollars.¹⁰ Even utility companies are entering the sponsorship field, as Sempra Energy recently announced a \$20 million deal with the Los Angeles Staples Center, home to the National Hockey League's Los Angeles Kings and the National Basketball Association's Los Angeles Clippers and Los Angeles Lakers.¹¹

4. *Id.* at 4.

5. *Id.*

6. *Id.*

7. *New Deals*, IEG SPONSORSHIP REP. (IEG, Inc., Chi., Ill.), Dec. 21, 1998, at 7.

8. Independence Bowl, *Corporate Sponsorships*, at <http://www.independencebowl.org/sponsor.html> (last visited Sept. 16, 2000).

9. *New Deals*, *supra* note 7, at 7.

10. *PNC Ponies Up \$30M for Naming Rights to Pirates' New Park*, SPORTS BUS. DAILY (Street & Smith's Sports Group, South Norwalk, Conn.), Aug. 7, 1998, at 10.

11. *Utilities Tie More Power Into Their Deals*, IEG SPONSORSHIP REPORT (IEG, Inc., Chi., Ill.), Dec. 21, 1998, at 6.

C. Corporate Sponsors and Event Management Firms

As previously mentioned, there are a large number of companies in the United States investing millions of dollars in the sponsorship of sports and entertainment events. With so many dollars at stake in connection with the investment involved in sponsoring a sports or entertainment event, a corporate sponsor ("Sponsor") should ensure that the event is managed, coordinated and promoted with great care and expertise. As a result, there are great opportunities for sports and entertainment event management firms ("EMF") to provide services for Sponsors in this multi-billion dollar industry. A number of different EMFs conduct business in the sports and entertainment industry today. EMFs range from large, well-known companies such as the Cleveland-based International Management Group ("IMG"), to smaller, lesser-known companies such as Ryno Sports located in Carlsbad, California.¹² As Sponsors and EMFs approach the management of a particular sponsorship, both the Sponsor and the EMF should be cognizant of their respective rights and responsibilities regarding the EMF's management and implementation of a sports or entertainment event. With so much at stake, a well-thought-out Sponsorship Management Agreement ("SMA") is essential.

This article sets forth a variety of considerations in preparing a SMA for the Sponsor and the EMF and suggests ways to deal with specific issues involved in the SMA. Part II addresses considerations in the management services provided by an EMF for a Sponsor in managing and coordinating an event. Part III addresses contractual provisions relating to the management fees and expenses of such management services. Part IV discusses term, cancellation and exclusivity provisions to be considered in the SMA, while Part V sets forth considerations relating to intellectual property rights of the Sponsor and EMF. Finally, Part VI discusses a variety of miscellaneous provisions which should be included in the SMA.

II. MANAGEMENT SERVICES

A. Overview

Many issues should be addressed in structuring and drafting the SMA. The SMA must clearly set forth the sponsorship management services to be provided by the EMF. A Sponsor should be concerned with an EMF's ability and commitment to make available and provide the

12. Ryno Sports, *About Us*, at <http://www.rynosports.com> (last visited Sept. 16, 2000).

personnel, materials, services and functions necessary to ensure the success of its sponsorship of an event. Conversely, an EMF needs to have a clear understanding of its responsibilities, tasks and authority in order to manage a successful event and fulfill its client's best interests. Nevertheless, the management of an event entails so many variables that certain issues may arise during the course of the event that are not addressed in the SMA, such as a cancellation by a performer or the unavailability of a venue. The SMA should be flexible in order to deal with these situations. A sample provision addressing this issue is as follows: "Client acknowledges that the nature of the event is such that it is impossible to list all of the responsibilities of the EMF. Nonetheless, the EMF shall be generally responsible for the coordination of the event management and implementation."

B. Types of Services

EMFs across the country offer a wide range of services. Examples include: (i) Harper Entertainment, located in Gallatin, Tennessee, which "specializes in creating and implementing entertainment, sports, and media-driven promotions, and corporate sponsorship programs;"¹³ (ii) Executive Sports International, located in North Palm Beach, Florida, which provides services including event management, on-site surveys, sponsorship sales and sports marketing consultations;¹⁴ and (iii) National Media Group, located in New York, New York, which provides services such as creating and implementing sports and entertainment programs and representing talent and organizations.¹⁵ The SMA should set forth the types of services the EMF will provide for the Sponsor in connection with the event, as well as the Sponsor's expectations, requirements and limitations on the EMF's authority. In general, the SMA should state that the EMF is responsible for the overall coordination, management and implementation of the event.

There are a variety of other services that an EMF could also provide, such as: (i) sponsorship sales; (ii) researching and analyzing potential markets and venues; (iii) assigning an event manager to coordinate logistics at the venue for access, shipping, merchandising and other administrative matters; (iv) coordinating with artists, athletes or their agents for

13. Harper Entm't Group, at <http://www.harpergroup.com> (last visited Sept. 16, 2000).

14. Executive Sports Int'l, at <http://www.nicklaus.com/executivesports> (last visited Sept. 16, 2000).

15. Nat'l Media Group, at <http://www.nmgports.com/about.htm> (last visited Sept. 16, 2000).

their participation in the event; (v) establishing and negotiating marketing and sales programs; (vi) providing advance coordination, management and implementation of sponsorship activities, including arranging for signage displays, promotional displays, artists' or athletes' "meet and greets," hospitality rooms, ticketing needs, merchant visits, and the distribution of promotional merchandise; (vii) developing radio trade for mention in advance of the event; (viii) negotiating and coordinating television rights; (ix) providing event information to both the Sponsor and key personnel of the Sponsor, such as event dates, venues, venue sites, and any other information the Sponsor may request; (x) providing a summary and analysis of each event for the Sponsor, including a summary of the Sponsor's visibility and exposure at the venue and surrounding merchants, a summary of media coverage, and a summary of signage placement; (xi) filling vacant seats for the event for which the Sponsor has provided tickets; (xii) providing Sponsor with materials that require Sponsor's consent, including artwork or advertisements; and (xiii) sourcing and securing all items such as signage and promotional materials.

With so many possible services to be provided by an EMF, both the Sponsor and the EMF should ensure that the SMA clearly identifies the services to be provided and a time frame in which the services should be completed. The SMA could contain provisions detailing the services to be provided by the EMF similar to the following: "The EMF shall provide to Client all event sponsorship management and implementation services described in *Exhibit A*, attached hereto, and any other services referred to in this Agreement. The EMF and Client may agree, in writing, to change the list of services set forth in *Exhibit A*."

C. Specific Considerations

1. EMF's Considerations

The EMF should pay particular attention to the services description in drafting and negotiating the SMA. It is important for the EMF to have clarification from a Sponsor with respect to a Sponsor's expectations. At the same time, the EMF should get an affirmative acknowledgement from a Sponsor that the nature of the event may make it impossible to list all of the EMF's duties, allowing the EMF to go beyond the scope of the services listed when necessary to successfully perform its duties for the event. In addition, the EMF should negotiate a provision in the SMA that protects the EMF's rights if the EMF is required to perform services outside of the scope of the SMA, or if the Sponsor alters the nature of the event for which the management services are to be provided. The EMF could protect its rights by securing a

provision which states that it will be entitled to adjust its management fee if the scope of the services it is required to provide is altered.

Another key to the EMF's success in managing the event is accessibility to the Sponsor, athletes or artists involved in the event, and knowledge of the marketing objectives of the Sponsor. The EMF should negotiate an accessibility provision into the services section of the SMA that contains a provision allowing the EMF's representative access to the Sponsor, artist and/or athletes and their representatives with respect to the Sponsor's marketing objectives for the event. Additionally, the SMA should require that the EMF's representative be informed and aware of all promotional activities connected with the event, including photo appearances and public appearances, and that the EMF representative be allowed to participate in the coordination of these activities. Also, the SMA should allow the EMF's representative to be afforded all clearances and privileges usually provided to a staff member of the event and/or an athlete's or artist's agent.

Another beneficial provision for the EMF is an acknowledgment from the Sponsor that a majority of the services are provided to the Sponsor in the planning and preparation of the event, which take place before the start of the event. This provision enables the EMF to better establish and prove that it is entitled to all or a large portion of its management fee if the event or events which make up the event are cancelled.

Finally, the EMF should secure a provision which protects its rights to: (i) continue to develop creative and unique programs and provide services to other clients for other events; and (ii) include references in its promotional materials and the event's promotional materials that it has provided services for a particular Sponsor or for a specific event. A sample provision from a SMA which addresses these rights is as follows: "Client acknowledges and agrees that nothing contained in this Agreement shall prohibit the EMF from providing services similar to the services provided pursuant to this Agreement to a third party, so long as such engagement does not violate the exclusivity provisions set forth herein."

2. Sponsor's Considerations

A Sponsor has a great deal of time, money and effort at stake in connection with its sponsorship of an event. Therefore, it should carefully scrutinize the management services section of the SMA. For example, a Sponsor should typically secure a covenant from the EMF that the EMF will perform its services using reasonable care and being subject to

the highest industry standards. In addition, a Sponsor must be cognizant to limit its liability in an event and insert provisions relating to the EMF's employees or independent contractors.

First, a Sponsor must be aware of the qualifications of individuals an EMF employs in providing its services. To protect against potential illegal labor claims, a Sponsor should negotiate a provision in the SMA whereby the EMF will perform its services in accordance with all laws, including, without limitation, the Child Labor Act and the Immigration Reform and Control Act of 1986.¹⁶ To protect itself from a breach of this provision by the EMF, the Sponsor should secure a veto right allowing it to prohibit an employee or independent contractor of the EMF from working an event if such employee or independent contractor does not meet the Sponsor's requirement for qualification or was hired in violation of the law. While a veto right is a beneficial provision for a Sponsor to retain, it must also be careful to specifically delineate that the EMF is an independent contractor of the Sponsor and that employees of the EMF are not employees of the Sponsor. The Sponsor should ensure that this critical factor is clearly spelled out. Failure to do so could potentially result in worker's compensation, unemployment and tax liability to the Sponsor. A sample independent contractor provision is as follows: "The parties shall be and act as independent contractors, and under no circumstances shall this Agreement be construed as creating an agency, partnership, joint venture or employment between the parties."

The Sponsor must also be cognizant of the materials being created by the EMF on behalf of the Sponsor for the event. With this in mind, the Sponsor should seek to secure an agreement from the EMF that all materials created by the EMF in connection with an event will be "works made for hire" within the meaning of the Copyright Act of 1976,¹⁷ as amended, and are the sole and exclusive property of the Sponsor. A sample "works made for hire" provision is as follows: "As part of the services provided hereunder, EMF will propose and deliver, as applicable, EMF's original concepts, designs, mechanicals, layouts, etc. for the Event which shall be deemed 'works made for hire' and Sponsor shall be considered the 'author' of such works." Additionally, the Sponsor may include in the SMA a provision that at the conclusion of the event or termination of the SMA, the EMF will, at the option of the Sponsor, destroy all promotional materials or return all such materials to the Sponsor.

16. See generally 8 U.S.C. §§ 1101-1525 (1994).

17. 17 U.S.C. § 101 (1994).

The Sponsor should also secure the right to modify the timing and nature of the event in order to ensure flexibility to make the event successful. A sample provision securing this right is as follows: "The parties acknowledge that the schedule of events may change from time to time and that Sponsor will use its best efforts to notify the EMF of such changes." This is of particular importance when there are a number of events involved at a wide range of venues in many different markets. Typically, the Sponsor and EMF will agree that there will be a certain number of events at particular venues in a specific number of markets. If a particular venue or market is not achieving the results the Sponsor desires, the retention of a right to modify the location or nature of the event will allow the Sponsor to address this concern.

Finally, the Sponsor should ensure that the SMA contains a provision requiring the EMF to provide an analysis of all market activities of the event, in order to measure its success, and provide quantitative documentation of such analysis, updated on a periodic basis, throughout the duration of the event. A sample provision securing this right is as follows: "EMF shall provide Sponsor with documentation of all management services and an analysis of all market activities and such other detail and quantitative reporting as is generally provided in the industry and as may from time to time be agreed upon by EMF and Sponsor."

III. MANAGEMENT FEES AND EXPENSES

A. Overview

While the services to be provided by the EMF are important to successfully drafting a SMA, the provisions relating to the EMF's fees and expenses in connection with the event are of equal importance. The EMF wants fair compensation and timely reimbursement for expenses, while a Sponsor wants to ensure that payments are in accordance with the nature of the services being provided, as well as the ability to control the manner and type of expenses for the event. Management fees for a sports or entertainment event can run from thousands to millions of dollars depending on the nature and length of the event. The city of Sacramento, California paid the Wilkinson Group, a San Francisco-based EMF, \$90,000 over a six-month period plus 15% commission on any corporate sponsorships for local sports events it sold on behalf of the city.¹⁸ Recently, Cleveland-based IMG received approximately \$6.6 million from New Millennium Experience Co., in connection with IMG's sale of

18. Mark Larson, *What's in a Name? Big Bucks*, *Bus. J.* (Sacramento), Sept. 11, 1998, at 3.

sponsorships for the United Kingdom's Millennium Dance.¹⁹ Disputes over fees and expenses can also lead to a Sponsor's decision to end its relationship with an event. Computer giant IBM's decision to no longer sponsor the Olympics was based in part on the inability of IBM and the International Olympic Committee ("IOC") to agree on how much local organizers should pay in connection with IBM's sponsorship of the event.²⁰

B. EMF's Considerations

An EMF is obviously concerned with how and when it will be paid. In setting forth the management fees the Sponsor must pay in connection with the EMF's management of an event, the EMF will typically attempt to secure in advance as much of its fee as possible and provide for timely reimbursement of, or an advance on, its expenses. The start-up time, planning and implementation that go into the successful management of an event may cause the EMF to incur a great deal of cost and expense prior to the start of an event. By securing a large portion of the management fee upon the execution of the SMA, the EMF is better able to withstand this initial impact of time and money. The SMA should spell out exactly how and when the management fee is earned, whether it is on an event-by-event basis, hourly basis, or for achieving certain results or milestones. With this in mind, the EMF should secure an acknowledgment from the Sponsor that the Sponsor realizes a great deal of the management services are provided before the first event, and that all, or a certain portion, of the management fee is non-refundable and in no event will it be reduced. A sample provision of this acknowledgment is as follows: "Based upon the nature of the event, including, but not limited to, EMF's investment in front-end development, creative and planning work and the allocation of EMF's resources for the entire project, 50% of EMF's management fee is non-refundable notwithstanding the number of events completed."

The EMF must also be cognizant of the occurrence of additional events or the Sponsor's substitution of new events for the events that the EMF agreed to manage and implement. In order to maintain flexibility and continue to provide services, the EMF should negotiate a provision that allows it to adjust its management fee in the event of additional or

19. *Working with Sales Agents: A Guide for Agencies and Properties*, IEG SPONSORSHIP REP. (IEG, Inc., Chi., Ill.), Jan. 11, 1999, at 4.

20. *Big Blue's Olympic Burnout*, SPORTS BUS. DAILY (Street & Smith's Sports Group, South Norwalk, Conn.), Aug. 7, 1998, at 1.

substituted events. An EMF must also protect itself from a situation in which it allocates a great deal of time and money and the Sponsor abruptly cancels the event. Payment of the majority of the fee up-front can reduce the risk of this occurring and the EMF being impacted negatively.

EMFs should also be concerned with the expenses the EMF will incur in connection with providing management services. The parties should agree to a budget and allow for an adjustment from time to time, by written agreement, between the Sponsor and the EMF. The EMF should negotiate a provision which allows it to reallocate budgeted items that do not alter the total budgeted amount. In addition, as costs and expenses with the management and implementation of an event can be quite high, the EMF should negotiate the reimbursement of its expenses within a timely period or require the Sponsor to advance funds for certain expenses or pay vendors directly. Finally, an EMF may also attempt to negotiate a provision which allows the EMF to mark-up certain items such as banners, event announcements and event merchandise which require the EMF's time to source and develop.

C. Sponsor's Considerations

A Sponsor has a great deal to consider as well with respect to the management fees and expenses section of the SMA. As previously discussed, it is the Sponsor who is funding the event and expending great amounts of time and money. It is important for the Sponsor to require the EMF to commit to a budget and receive an acknowledgment from the EMF that the budget agreed to by the parties is a reasonable projection of what the EMF expects it will cost to successfully manage and implement the event. From the Sponsor's perspective, it is more appealing to pay the EMF its fees after the event has occurred, or for a sports or entertainment event which consists of multiple events, on a per event basis. In addition, the Sponsor should negotiate a provision allowing it to substitute different types of events, and/or add additional events, at no additional cost. With respect to the budget and expenses, the Sponsor should include provisions which require the EMF to strictly adhere to the budget and obtain the Sponsor's prior approval for budgeted items in excess of a nominal amount. Also, the Sponsor should also require the EMF to submit invoices of all expenses that will be reimbursed, paying only actual costs for the production of materials. Finally, the Sponsor should secure the right to audit the books and records of the EMF for an extended period after the conclusion of the event. A sample audit provision is as follows: "Upon reasonable prior notice, Sponsor shall have the right during the term of this Agreement and for six

months thereafter to inspect and review the books and records of EMF relating to this Agreement.”

IV. TERM, CANCELLATION, AND EXCLUSIVITY PROVISIONS

A. Overview

As discussed above, both the Sponsor and EMF have a great deal at stake in connection with a Sponsor's sponsorship of a sports or entertainment event. As such, the duration of the SMA, the ability to cancel an event and the right to ensure that an EMF's services are exclusive to a particular Sponsor are of particular importance to both a Sponsor and an EMF. Term and cancellation provisions of the SMA set forth the nature of the Sponsor's and EMF's ability to ensure a commitment to the event and allow flexibility to cancel the event upon a realization that it will not be successful. The term provision of the SMA sets forth the length of time the Sponsor and EMF expect to conduct business with each other. The term of the SMA could be as short as a few weeks or as long as several years. Conversely, cancellation provisions allow a Sponsor or an EMF to terminate the arrangement between the Sponsor and/or the EMF. Cancellation provisions may be “at-will” and require no prior notice or may be lengthy and require certain conditions be met. Exclusivity provisions set forth the extent of the EMF's performance of services for other Sponsors and/or the Sponsor's right to retain other EMFs to provide services to the Sponsor. Exclusivity rights are desirable to prevent a quality EMF from performing the same service or type of event for a competitor of a Sponsor. Conversely, an EMF would benefit tremendously if it retained the right to be the exclusive provider of services for a Sponsor. Bank One Louisiana's sponsorship of Louisiana State University (“LSU”) athletes prohibits LSU from allowing other financial institutions to use LSU sports' logos to market products.²¹ Additionally, it was reported in 1998 that IBM, a previous sponsor of the Olympic Games, based its decision to terminate its long-standing relationship with the Olympics in part on the IOC's decision to seek separate sponsorship deals for handling the Olympics' Internet service and web sites.²²

21. Peter Shinkle, *Banking on the Tigers*, ADVOCATE (Baton Rouge), Aug. 25, 1998, at 1C.

22. *Big Blue's Olympic Burnout*, *supra* note 20, at 1.

B. EMF's Considerations

In light of today's competitive marketplace among EMFs, it is most likely in the EMF's best interest to secure a long-term arrangement with a Sponsor. A long-term arrangement allows an EMF the security of steady workflow as its business continues to grow. As a strategy to contractually require or encourage a Sponsor to enter into a long-term relationship, the EMF should secure a provision in the SMA which states that if the event is extended beyond its anticipated completion date, or a similar agreement is entered into by the Sponsor to sponsor the event or a similar event beyond the completion date, then the SMA will be extended for each additional extension of the agreement on the same terms and conditions. In connection with this extension, the EMF should secure an acknowledgement that the parties will negotiate the EMF's management fee and expenses in good faith, consistent with industry standards, and that such fees and expenses may not be decreased.

The EMF should also be cognizant of securing rights to provide services for future events of the Sponsor. The EMF should secure a right of first refusal from the Sponsor which would allow the EMF to manage additional events sponsored by the Sponsor that are similar to the events for which the EMF has already been retained. The following is a sample right of first refusal provision:

In the event that the Sponsor elects to conduct or sponsor an event similar to or the same as the event being sponsored pursuant to this Agreement (the "Additional Event"), and Sponsor receives an offer (the "Offer") from a third party event management firm (the "Competitive EMF") to manage and implement the sponsorship of the Additional Event, Sponsor shall provide the EMF a copy of the Offer received by the Competitive EMF. The EMF shall have the right, but not the obligation, to provide the Sponsor written notice of its intent to match the Offer for the management of the Additional Event, upon terms no less favorable than the Offer. If the EMF has rejected the Offer, the Sponsor may retain the Competitive EMF to manage the Additional Event. Sponsor shall give EMF written notice of its intention to sponsor an Additional Event.

The EMF should also negotiate an alternative provision which states that if the Sponsor decides to sponsor additional events the parties will negotiate in good faith to provide that the EMF be permitted to bid on the management and implementation of such event.

While an EMF is most likely interested in securing a long-term arrangement with a Sponsor, there are certain instances in which an EMF should secure the right to cancel its participation in the event. The most

obvious circumstance under which the EMF should secure a cancellation right is when the Sponsor fails to pay the EMF its fees and expenses under the SMA. A second scenario for which the EMF should negotiate a cancellation right is when the Sponsor breaches a material term of the SMA. Finally, an EMF should protect itself by securing a cancellation right in a situation where the Sponsor's image and/or philosophy is no longer consistent or compatible with the EMF. An example of this occurrence is when the Sponsor is found to have violated the law and an EMF no longer wants to be associated with the Sponsor. A cancellation right under this example would permit the EMF to discontinue its relationship with the Sponsor.

After securing a term that the EMF is comfortable with, and providing the necessary cancellation provisions for its protection, the EMF should also negotiate a provision indicating that it is the exclusive manager of the Sponsor's event. Consistent with the exclusivity provision, the EMF should secure the right to provide services for other Sponsors of other events. A sample exclusivity provision is as follows: "EMF shall be Sponsor's exclusive sponsorship manager of the Event."

C. Sponsor's Considerations

While the EMF has a great deal at stake in negotiating acceptable provisions with regarding the term, cancellation and exclusivity provisions of the SMA, these provisions are even more important for the Sponsor to consider. With its name and a great deal of time and money invested in a particular event, the Sponsor should ensure that it is in control of the duration of its involvement with a particular sports or entertainment event. With this in mind, it is unlikely that a Sponsor will be willing to enter into a multi-year sponsorship management agreement for a particular event. Rather, the Sponsor is more likely to negotiate the right to terminate the SMA at any time, in its sole discretion, if the Sponsor does not feel that the event is creating the publicity and economic return that the Sponsor deems necessary to continue the event.

A Sponsor will typically secure a termination provision that allows it to terminate the SMA and retain another EMF if the Sponsor is not satisfied with the current EMF services being provided. This is typically referred to as a "for cause" termination right. Examples of "for cause" include an EMF's failure to follow a Sponsor's guidelines and rules for implementing the event, failure to deliver adequate analysis, and poor promotion of an event. Another potential "for cause" situation of concern to a Sponsor when negotiating the cancellation rights is the ability to cancel the event, and terminate the EMF, if the EMF is found to have

violated any laws including, without limitation, any laws which deal with child labor, immigration and/or the use of illegal aliens. Conversely, the EMF will most likely try to negotiate a provision which would allow it to cure any failure or breach of a "for cause" provision. A sample cancellation provision is as follows:

Sponsor shall have the right to terminate this Agreement upon thirty days prior written notice if EMF has failed to perform its obligations under this Agreement in accordance with customary industry standards, provided any performance failures identified by Sponsor in such notice have not been cured within said thirty days.

As mentioned earlier, the Sponsor will also desire the ability to cancel the event and terminate the SMA if the event is no longer profitable, desirable or no longer fits into the Sponsor's marketing plan. Examples of this include situations in which the athletes and/or artists involved in the event committed an act that a Sponsor considered detrimental to the Sponsor and/or was regarded as an act of bad moral character damaging to the name and reputation of the Sponsor. Pepsi encountered this situation after signing a \$70 million deal with Michael Jackson who was accused of improper behavior.²³

Finally, when retaining an EMF, a Sponsor should try to negotiate a provision which restricts the EMF's ability to provide the same types of services to a company which is competitive with, or in the same industry as, the Sponsor. An exclusivity provision such as this allows the Sponsor to prevent the EMF from creating programs similar to the Sponsor's event for a competitor of the Sponsor and diluting the Sponsor's goodwill and investment in a particular event. Additionally, most Sponsors would not want to label an EMF as its exclusive manager of a particular type of event as the sponsor may require multiple EMFs to provide the services necessary to ensure the success of that particular event.

V. INTELLECTUAL PROPERTY RIGHTS

A. Overview

Another important aspect of the SMA deals with the intellectual property rights that are exchanged in connection with the sponsorship of a sports or entertainment event. Bank One Louisiana recently agreed to a sponsorship deal with LSU that will pay the LSU Athletic Department

23. Emily Bell, *Media Guardian: Nike Don't Put the Boot In*, GUARDIAN (London), Jan. 30, 1995, at T17.

\$3.65 million over five years.²⁴ Bank One officials indicate that they will spend more than \$5 million to use LSU logos and carry out a variety of promotional activities.²⁵ As evident by the time and expense invested in the sponsorship of a particular event, in addition to the expense associated with securing trademark protection, both the Sponsor and the EMF have a great deal at stake in protecting their respective intellectual property rights in connection with the sponsorship of sports and entertainment events.

B. EMF's Considerations

One of the most important aspects of the EMF's ability to successfully promote, coordinate and implement the event on behalf of the Sponsor is the use of the Sponsor's, athlete's and/or artist's intellectual property rights in connection with the event. With this in mind, the EMF should negotiate an acknowledgement from the Sponsor that the EMF is granted the right to use all of the Sponsor's intellectual property rights, including trademarks, trade names, trade dress and copyrights in its promotion and management of the event. A sample provision securing this right is as follows: "Sponsor grants to EMF a non-exclusive license to use any trademark or other intellectual property rights of Sponsor in connection with EMF's providing the management services set forth herein." Additionally, the EMF should secure the right to use the Sponsor's intellectual property rights in the promotion of its own business.

Also of importance is the ability of the EMF to use the name and likeness of athletes and/or artists involved in the particular event in order to effectively ensure the event's success. As such, the EMF should also negotiate a representation and acknowledgement from the Sponsor that the Sponsor has the right to use the athlete's and/or artist's intellectual property rights in connection with the EMF's management and promotion of the event. The EMF should also require that the Sponsor provide evidence of those rights and indemnify the EMF for any failure of the Sponsor to obtain such rights. As an example, an EMF cannot effectively promote the XYZ Company's sponsorship of the John Doe Music Tour if the EMF does not know that it has the right to use both XYZ's and John Doe's trademarks, tradenames and images in promoting the event. The SMA should identify the circumstances under which an EMF may use the Sponsor's, athlete's and/or artist's intellectual prop-

24. Shinkle, *supra* note 21, at 1C.

25. *Id.*

erty rights. Alternatively, the Sponsor may be retaining the EMF to secure such rights of an athlete or an artist on behalf of the Sponsor for a particular event. Finally, the EMF should also ensure that its own intellectual property rights are protected pursuant to the SMA by providing that its own intellectual property rights will remain the sole and exclusive property of the EMF.

C. Sponsor's Considerations

While it is important for the EMF to have the ability to use the intellectual property rights of the Sponsor, athletes and/or artists, in its implementation and management of an event, a Sponsor has even more at stake in negotiating this section of the SMA. Companies such as Alltel, McDonald's and Quaker Oats have invested a great deal of time and money in developing and protecting their intellectual property rights.²⁶ With this in mind, while the Sponsor may grant the EMF a non-exclusive license to use such intellectual property, it is essential that the Sponsor secure an acknowledgment from the EMF that such intellectual property will remain the sole and exclusive property of the Sponsor and/or the artists and athletes. In addition, the Sponsor should negotiate provisions which restrict the parameters in which the EMF can use such intellectual property, such as retaining the right to approve certain usage of trademarks and tradenames. To further protect its intellectual property rights, the Sponsor should also require in the SMA that an EMF will promptly notify the Sponsor of any infringement of the Sponsor's intellectual property rights, and retain the right to prosecute and protect its intellectual property rights in case of infringement.

VI. MISCELLANEOUS PROVISIONS

A. Overview

There are a number of miscellaneous provisions which should be included in the SMA, including provisions dealing with indemnification, insurance and confidentiality. These provisions are necessary for the protection of both the EMF and the Sponsor and should be carefully drafted and negotiated.

B. Indemnification and Insurance Provisions

Both the EMF and the Sponsor have a great deal at stake in connection with the management and sponsorship of a sports or entertainment

26. 1999 Sponsorship Spending: \$7.6 Billion, *supra* note 2, at 4-5.

event. With this in mind, both the Sponsor and the EMF should negotiate a provision in the SMA which provides that one party will indemnify and hold the other party harmless from certain events. An indemnification provision allows a Sponsor or an EMF that suffers a loss to look to the other party to reimburse or protect such party from that loss. Typical events from which a Sponsor or EMF would negotiate indemnification include a breach of the terms of the SMA by the other party, negligent or intentional acts of a party and the violation by a party of a third party's intellectual property rights. A sample indemnification provision is as follows:

Sponsor will indemnify and hold harmless EMF and its shareholders, affiliates, officers, directors and employees from and against all claims, expenses, suits and judgments arising from or connected with (i) any alleged or actual breach by Sponsor of any provision of this Agreement, (ii) any negligent or intentional acts of Sponsor in connection with the Event or (iii) any violation of any intellectual property rights of any third parties caused by the use of Sponsor's trademarks.

An EMF should negotiate an exception to its indemnification obligations in the event a breach of the SMA by an EMF is a result of the EMF's acting pursuant to a Sponsor's directive.

Related to an EMF's and Sponsor's indemnification obligations, both the EMF and Sponsor should also require the other party to provide a certificate of insurance evidencing such party's insurance coverage in an amount acceptable to both parties. Insurance provisions typically include requirements of commercial general liability insurance and should include coverage for death, bodily injury and property damage. The parties may also negotiate a provision that they will be named additional insureds on the other party's insurance policy in addition to securing the right of being notified of any change or cancellation of the other party's insurance coverage.

C. Confidentiality

In connection with a Sponsor's retention of an EMF to manage and coordinate a sports or entertainment event, both parties are likely to provide the other party access to and disclosure of proprietary information. This information could include items such as marketing plans, financial information, client lists and sales information. It is in both the EMF's and Sponsor's best interests to include a provision in the SMA which provides that each party will keep the other party's proprietary

information confidential and provide for the return of such information to the other party at the end of the event.

D. Press Releases

As discussed above, while it is important for both an EMF and a Sponsor to protect its respective proprietary information, an EMF may be desirous of making announcements to the public of its affiliation with a Sponsor and/or athlete or artist. This may prove useful to the EMF in marketing its services to other Sponsors. The SMA should contain a provision which provides for a joint press release announcing and describing the event. Joint participation in the press release allows the Sponsor some control over the details of the event which are described, while permitting the EMF to promote its own business in the process.

VII. CONCLUSION

As the sponsorship of sports and entertainment events continues to grow in this century, both Sponsors and EMFs have a great deal at stake in this multi-billion dollar industry. With so many dollars at stake, it is important for both the Sponsor and EMF to clearly set forth their respective rights and responsibilities in connection with an EMF's management and coordination of an event. A well-drafted SMA is essential to a successful Sponsor/EMF arrangement and a successful event. The considerations set forth in this article should provide insight into some of the more important provisions that should be considered in drafting a SMA for corporate sponsorships of sports and entertainment events.

ARTICLE

SPORTS BROADCASTING AND VIRTUAL ADVERTISING: DEFINING THE LIMITS OF COPYRIGHT LAW AND THE LAW OF UNFAIR COMPETITION

ASKAN DEUTSCH*

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I. INTRODUCTION

Constant technological development has introduced another player in sports broadcasting: virtual advertising, a form of digital technology that allows advertisers to insert computer-generated brand names, logos or animated images into previously recorded television programs or movies. In sporting events, the advertisements can even be inserted live as the game is played, as seen in Superbowl XXXIV on January 31, 2000.¹ This technology has been used since 1995, but has not experienced a major breakthrough yet. Several Major League Baseball ("MLB") teams have made use of virtual advertisements along the wall behind home plate.² Beginning this 2000 season, the technology will be used in a minimum of twenty Sunday Night baseball games.³ Some teams in the National Basketball Association ("NBA") display virtual advertisements on their billboards on the sideline, while many collegiate conferences have already made use of virtual advertising in their regular season and tournament broadcasts.⁴ The National Football League ("NFL"), however, has yet to approve the use of virtual advertisements during regular season games.⁵ The Formula One, with some of the world's largest sport-

1. The New Jersey based company Princeton Video Image, Inc., at <http://www.princetonvideoimage.com/> (last visited Mar. 15, 2000), globally and regionally inserted advertisements for the past three Super Bowls, NFL pre-season and NFL Europe games, MLB games, professional soccer matches, motor sports and thoroughbred horse races.

2. For example, the games of three MLB teams, the San Francisco Giants, Philadelphia Phillies and San Diego Padres, included virtual advertisements last season. See Stuart Elliott, *Real or Virtual? You Call It*, N.Y. TIMES, Oct. 1, 1999, at C1.

3. The agreement with ESPN and Princeton Video Image, Inc., covers the use of virtual advertising in more nationally televised baseball games than in any other previous season and will begin with the first week of the baseball season. Press Release (Feb. 22, 2000), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=PVII&script=410&layout=6&item_id=75829 (last visited Mar. 15, 2000).

4. These conferences are the Mid Atlantic Athletic Conference, Atlantic 10, Big South, Midwestern Collegiate, and others. Pete Dougherty, *Virtual Reality Hits MAAC Telecasts*, TIMES UNION (Albany, NY), Mar. 5, 2000, at E6.

5. The NFL's exercised restraint is probably based on the lack of control over the virtual images on the television screen because the advertisements could be eclipsed or overshadowed by virtual signs. Alan Snel, *These are Ads for All Stadiums; Only Home Viewers See 'Virtual' Logos*, SUN-SENTINEL (Fort Lauderdale), Dec. 31, 1998, at 1D. However, the NFL approved its use in high school and college broadcasts, as well as pre- or postseason professional games.

ing events, has successfully employed the technology in the third season for the international broadcast of races in countries where tobacco advertising is banned.⁶ With the establishment of European and World soccer leagues, virtual advertisements open the advertising market for national or even regional advertisers and do not limit the advertising space to worldwide operating companies. However, in international soccer it was not until recently that the Federation Internationale de Football Association⁷ ("FIFA") approved regulations that allow the use of virtual advertisements on any flat area in the stadium at any time, except on the playing field during the play itself.⁸ Whereas in Latin America, where virtual advertising – even on the playing field – experiences a widespread acceptance for soccer telecasts, the several European soccer leagues are still struggling to adopt a uniform standard. With the rising popularity of the NFL in Europe, not to mention "NFL Europe," a similar development can be expected with regard to internationally broadcasted football games, which is not limited to the Superbowl.

Although virtual advertising allows signs, billboards, and other types of in-stadium and on-field advertisements to be inserted into the televised picture in virtually any empty space, the demand has been mediocre, mainly because of the high costs of insertion in the early days of the technology. Another reason for the reserved acceptance is the lack of judicial review. So far, broadcast stations have exercised a rule of self-restriction about use and abuse of virtual advertising, absent an agreement.⁹ In fact, most professional marketing contracts are silent on rules on alteration by virtual advertising. There exists no explicit federal regulation with regard to virtual advertising. Despite the liberal advertising market in the United States, there are limits by virtue of common law.

6. Such as the races in EU member states England, France, Germany, and Belgium, but not in Monte Carlo. Johnny Watterson, *Sport and Tobacco Drifting Apart*, IRISH TIMES, May 24, 1997, at 8.

7. This is the governing body for world league soccer.

8. On January 1, 2000, FIFA's "Regulations for the Use of Virtual Advertising" became effective, available at http://www.fifa2.com/fifa/handbook/Va/downloads/VirtualRegs_e.txt (last visited Mar. 15, 2000). The issue of these regulations is intended to ensure that virtual advertising is applied reasonably and the integrity of football matches maintained. See also, Reuters, *Fifa Yellow-Cards Virtual Ads*, WIRED NEWS, Dec. 22, 1999, available at <http://www.wired.com/news/print/0,1294,33232,00.html> (last visited Mar. 15, 2000).

9. Virtual placement has to be done "tastefully," *Virtual Ads, Real Problems*, ADVERTISING AGE, May 24, 1999, at 30; "responsibly," Bruce Horowitz, USA TODAY, Aug. 19, 1996, at 1B; "with taste and discretion," Patrick Allossery, *Virtual Ads Make Their Global Debut: Technology Draws Both Supporters and Detractors*, FIN. POST (Nat. Post), Oct. 8, 1999 at C3; and "in a subtle way," Dougherty, *supra* note 4, at E6.

First, conflicts arise when “real” advertisements are substituted by virtual advertisements without the consent of the owner of the physical location. This practice generates new forms of conflicts among adjacent parties, such as sponsors, different advertisers, team owners, broadcast stations, and the stadium owners.¹⁰ The question often boils down to who owns the rights to place and sell those advertisements.¹¹ Furthermore, any altering of the appearance of the broadcasted event, with regard to the advertising, raises copyright issues under the existing doctrine of commercial substitution or may even violate Sections 111, 119, and 122 of the Copyright Act, as amended by the Satellite Home Viewer Improvement Act of 1999.¹² Finally, such behavior could constitute Unfair Competition under Section 43(a)(1)(B) of the Lanham Act.¹³ Virtual advertising and product placement add a new level of commercialism to television broadcasts by blurring the line between advertising and programming, ultimately exposing the consumer to an ever-increasing stream of commercials. Whereas in Europe, a heated legal discussion has evolved on these issues, the American marketplace, with its liberal advertising policy, and the judiciary has not taken it into significant consideration. However, in the long run these problems will have to be faced.

The purpose of this analysis is to address these potential issues and present solutions that incorporate the international – especially European – standards for the use of virtual advertising.

II. FEATURES OF VIRTUAL ADVERTISING

Virtual advertising is the use of high-power computers to place still or video images into live video broadcasts in real time so that they look

10. This form of advertising strategy is referred to as “ambush-ad,” see *infra* Part V.D.; e.g. when CBS covered up a Times Square Advertisement on New Years Eve’s broadcast with a CBS logo. Ned Potter, *Arbitrary Digital Advertising* (Jan. 31, 2000), available at http://more.abcnews.go.com/onair/closerlook/wnt_000131_cldigitalads_feature.html (last visited Mar. 15, 2000); Paul Vercammen, *Digital Developments: Networks Changing Images on Your TV*, available at <http://www.cnn.com/2000/SHOWBIZ/TV/01/25/digital.inserts/> (last visited Mar. 15, 2000); Alex Kuczynski, *On CBS News, Some of What You See Isn’t There*, N.Y. TIMES, Jan. 12, 2000, at A1. In the sports context, this may not always be a problem, because the teams control the sale of advertising space in the stadium and in the broadcast to both kinds of advertisers. However, problems do arise, when different entities are involved.

11. Dean Bonham, *‘Virtual Technology’ Takes the Field – With an Ad-Itude*, COMMERCIAL APPEAL (Memphis, TN), Feb. 21, 1999, at C1.

12. The Satellite Home Viewer Improvement Act, §1948, 106th Cong. (1999), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s1948is.txt (last visited Mar. 15, 2000).

13. 15 U.S.C. § 1125 (1994 & Supp. III 1997).

as if they are part of the original scene. It works by tampering with the digital broadcast signal before it reaches our homes. In more technical terms, virtual advertising refers to the computer manipulation of authentic images, either live or delayed, and the substitution of various elements of those images with the purpose of implementing advertising messages into the signal transmitted by television or by similar current or future technologies (on-line, desktop publishing, single frame, DVD).¹⁴ The technology is based on a patented adaptive occlusion process, a sophisticated version of something similar to the blue-screen technology used in broadcast weather forecast maps.¹⁵ Before the broadcast, the cameras are set up at certain angles, so as to give the best impressions of the game while allowing in-stadium advertisements to be exposed to the viewer as well. In the virtual advertising system, a computer instantly superimposes the advertisement when it recognizes a previously designated spot and adjusts it accordingly as the camera follows the action. This technology allows advertisers to cover over existing advertising signage in a stadium and can even feature two- or three-dimensional animations.¹⁶ Virtual advertising companies can disguise the video advertisements as standing billboards, banners blowing in the wind, or logos painted directly on the playing field. The advertisements also can be combined with special effects, such as the pitch speed indicator and game statistics. Players "occlude" the ad or logo so that they appear to move in front of it. The technology does not only occur in sports telecasts, but also in entertainment programs and even movies.¹⁷

Television exposure is the advertisers' most important benefit of any small advertisement, for which they sometimes pay millions of dollars per season. The advantages of virtual advertising are evident.¹⁸ This technology enhances the possibilities available to advertisers and raises television advertising to a new level. It is possible to effectively reach consumers through unique marketing strategies by adjusting virtual ad-

14. FIFA Regulations for the Use of Virtual Advertising § 2a, available at http://www.fifa2.com/fifa/handbook/Va/downloads/VirtualRegs_e.txt (last visited Mar. 15, 2000).

15. It originated in various military forces around the world to mark targets on computerized maps. Peter Goddard, *The New Ad Fad*, TORONTO STAR, Feb. 12, 2000, at 1.

16. Princeton Video Image, Inc., at <http://www.princetonvideoimage.com/service/index.html> (last visited Mar. 15, 2000).

17. CBS uses virtual advertising in entertainment programs, such as "CBS Evening News," "48 Hours," and "The Early Show." Don Aucoin, *TV & Radio; CBS Faulted for Digital Inserts*, BOSTON GLOBE, Jan. 13, 2000, at D12.

18. Theresa E. McEvilly, *Virtual Advertising in Sports Venues and the Federal Lanham Act § 43 (a): Revolutionary Technology Creates Controversial Advertising Medium*, 8 SETON HALL J. SPORT L. 603, 606 (1998).

vertisements to respective geographic markets, such as foreign markets. Furthermore, adjusting the content of a televised event, with existing bans on television advertising for alcohol and tobacco, renders the use of advertisements more efficient for international broadcasts.¹⁹ The system also allows previously unmarketed portions of the television screen to be sold to advertisers who do not have to wait for breaks in the action to get their image before the viewers. Virtual advertising contains elements of individualized advertising in cyberspace, where the banner advertisements are selected in accordance with information contained in a "cookie" of the consumer's computer or to the search words that are entered into a search engine as part of the content mix.²⁰ In both scenarios, the user is subject to individualized commercials, which offer the advertiser a more efficient means of reaching his target consumer market. At the same time, it is a tool against "channel zapping," because the viewer is exposed to advertisements during the sports coverage itself. The advertiser is rewarded with a guaranteed audience, while the broadcaster has a wonderful opportunity to increase revenues – provided the advertiser and broadcaster first gain the permission of the program's rights holder.²¹ The element of product placement is rendered more valuable. Some television executives even contend that the technology is a means of reducing the amount of commercial breaks.

Virtual advertising may even make live attendance more attractive to sport fans because the technology allows the playing field and surrounding areas to be cleared of advertisements while television viewers at home are exposed to commercials. At the same time, however, team owners lose control over their broadcasts. As much as they used to be able to control the physical access of television teams to the stadium, the outcome of the television transmission, the placement of advertising, and their allocation during the broadcast, television transmissions are now subject to digital alteration at any point in the chain of transmissions throughout the country and even internationally. As much as the teams

19. Virtual advertisements enable the worldwide Formula One broadcasts, which heavily depend on tobacco advertising, to continue and guarantee their future financial survival, even after several countries enacted a ban on tobacco advertising. This affects, for example, all races within the European Union. Watterson, *supra* note 6, at 8; Jimmy Burns, *Virtual Adverts Hit Harsh Reality*, FIN. TIMES, Apr. 25, 1997, at 14.

20. Dennis P. Wilkinson, *Virtual Ads Make Sense*, ADVERTISING AGE, June 14, 1999, at 36.

21. In Canada, broadcasters are restricted to 12 minutes of commercials every hour. Because the characterization of virtual advertising is unclear, regulators have yet to rule on virtual advertising so it is not counted as part of that allotment. Chris Zelkovich, *Virtual Advertising*, TORONTO STAR, Aug. 1, 1999, at 1.

and leagues seek to control misuse by contractual terms in their license and marketing agreements, the threat of alterations of the original broadcasts remains, especially for secondary transmissions under the compulsory license scheme.²² On the downside, there is also a potential for a distracting application of the medium by inserting large animated images or offensive product placement, for example, products flying around the players during the action.²³

The costs of virtual advertisements are somewhat equivalent or relative to conventional advertising. For instance, in baseball a half-inning of static virtual advertising is typically valued as equivalent to one thirty-second spot in the same broadcast.²⁴ However, the production costs of the virtual advertisement have to be added. Because the advantages of virtual advertising in light of the still high costs play out especially for trans-border sports broadcasting, the necessity for clear legal standards becomes crucial.

III. FEDERAL COPYRIGHT INFRINGEMENT (SECTIONS 501(A), 106-122 OF THE COPYRIGHT ACT)

Section 501(a) of the Copyright Act of 1976²⁵ provides that the copyright owner can recover damages from anyone who infringes on one of the exclusive rights. Copyright infringement must be considered if the unauthorized deletion or substitution of existing advertisements by inserting virtual advertisements infringes the copyright owners' exclusive rights provided under sections 106-122 of the Copyright Act. Since the subject matter is television broadcasting, copyright infringement should be examined if the special provisions in sections 501(c)-(e), 111(c), 119(a)(5), and 122 of the Copyright Act on secondary transmissions are applicable.

A. Sport Broadcasting and "Work of Authorship" (Section 102(a) of the Copyright Act)

The Copyright Act protects only "original works of authorship fixed in any tangible medium of expression,"²⁶ including "motion pictures and

22. 17 U.S.C. §§ 111, 119, 122 (1999).

23. Jim Davies, *Connected: Advertising Conjuring Ads Out of Thin Air Using Pinpoint Technology Based on Military Tracking, Virtual Advertising Can Impose Images Tailored to Particular Countries, Tweaking the Display to Complement the Market*, DAILY TELEGRAPH (London), Dec. 11, 1999, at 6.

24. In Superbowl XXXIV a 30 second commercial cost \$ 1.6 million.

25. Copyright Act § 501, 17 U.S.C. § 501 (1999).

26. Copyright Act § 102(a).

other audiovisual works.”²⁷ With regard to virtual advertising in sports broadcasting, the first hurdle is to determine the rights in the broadcast that could be subject to litigation and if the placement of virtual and non-virtual advertisements in itself is part of the original expression of the work of authorship. If not, any substitution, insertion or deletion cannot constitute a violation of the rights provided in section 106 of the Copyright Act.

First, the telecasts of a sporting event have to meet the requirement of an “original work[s] of authorship.”²⁸ The requirement of originality actually subsumes two separate conditions, that is, the work must possess an independent origin and a minimal amount of creativity.²⁹ Section 102(a) of the Copyright Act lists eight categories of “works of authorship” covered by the act, including such categories as “literary works,” “musical works,” and “dramatic works.”³⁰ The list does not include athletic events and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.³¹ Consequently, the underlying games of a sports telecast do not fall within the subject matter of federal copyright protection because they do not constitute “original works of authorship.”³² If it were, any team that performs a unique combination or play could claim a copyright in it and enjoin other teams from competing with the same plays or combinations; after all, it would be impractical to include all participants – players, fans, the league, stadium workers, etc. – as copyright holders.³³

As for the telecasts’ originality, courts have long recognized that photographing a person or filming an event involves creative labor.³⁴ But sporting events are not authored in any common sense of the word. They do not rely on an underlying script;³⁵ moreover, the thrill of a sporting event is just the fact that there is no underlying predetermined

27. Copyright Act § 102(a)(6).

28. Copyright Act § 102(a).

29. See, e.g., *Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Withol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956); see also, MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01 (1999).

30. Copyright Act § 102(a).

31. *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997).

32. *Id.*

33. NIMMER & NIMMER, *supra* note 29, § 2.09[F].

34. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n.*, 805 F.2d 663, 668 (7th Cir. 1986); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *Time Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130, 143 (S.D.N.Y. 1968).

35. Anne M. Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 MARQ. SPORTS L.J. 77, 145 (1996).

sequence of events.³⁶ Even so, the elements of surprise, improvisation, and wholly unanticipated occurrences create the attractiveness of a sporting event. However, the creative element of the original work of authorship that underlies a sporting event rests in unique selection of sequences and the like. The many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts. When a football game is being covered by four television cameras, with a director guiding the activities of the cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship."³⁷ These decisions by the director therefore create a work of authorship and hence a property right in the broadcast of the games, which reaches full copyright status at the moment of transmission and simultaneous recording.³⁸

Furthermore, the telecasts are audiovisual works, which under section 102(a)(6) of the Copyright Act come within the subject matter of copyright.³⁹ Section 101 of the Copyright Act defines an "audiovisual work" as a work that consists "of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the [work is] embodied."⁴⁰ For purposes of section 101, the statutory term "series" need not be interpreted to mean a rigid, predetermined sequence.⁴¹ This is precisely what a television broadcast of a sporting event consists of, in spite of its lack of predetermination. The telecasts are, therefore, copyrightable works.

However, the copyright protection only extends to those components of a work that are original to the author.⁴² Therefore, it does not extend to the basic ideas or facts of the game, such as statistics and basic data, as opposed to the described broadcast expression. Only the constituent cre-

36. *Motorola*, 105 F.3d at 846.

37. H.R. REP. NO. 94-1476, at 52 (1976). See also, National Ass'n of Broad. Stations v. Copyright Royalty Tribunal, 675 F.2d 367, 378 n.18 (D.C. 1982); *Motorola*, 105 F.3d at 847.

38. David E. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L.J. 369, 371, 390 (1988); The elements of this "fixation" in the sport broadcasting context are discussed *infra*.

39. Copyright Act § 102(a)(6).

40. Copyright Act § 101.

41. *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 629 (7th Cir. 1982).

42. *Feist Publ'ns v. Rural Tel. Servs.*, 499 U.S. 340, 345 (1991); *Motorola*, 105 F.3d at 846.

ative elements of a work of authorship constitute the original expression of ideas that is protected by copyright.⁴³ Notwithstanding, in the leading case, *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court granted copyright protection to a photograph because it exhibited sufficient originality for the arrangement of the setting, the light and shade and the selection of the camera, costume.⁴⁴ The protection extends to the fact that the game and the particular televised selection of the action, and not the inserted commercials and station breaks, constitute the work of authorship.⁴⁵

The question arises as to whether advertisements as part of the broadcasted event are part of the "original expression of authorship" of this broadcasting. Generally, the author of the specific advertisement is the owner of its copyright, not the broadcast station.⁴⁶ However, the placement of the advertising and the specific capturing by camera could be part of the original expression of the broadcast.⁴⁷ While the arrangement of facts in an alphabetical order lacks the minimum amount of creativity or originality, the arrangement of the advertisements in the background of a television recording requires more artistic elements.⁴⁸ First, the involved entities have to make decisions about the number, size and style of advertisements and include respective terms in the marketing contracts. Because the viewer will only accept a certain amount of tasteful advertisements in a television broadcast before he switches channels, a producer then has to make a choice about the placement of such advertising in the broadcast. Nonetheless, especially with the possibility of inserting advertisements subsequently, the contribution of the

43. *Feist Publ'ns*, 499 U.S. at 348; *see also*, *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513; *NIMMER & NIMMER*, *supra* note 29, § 2.08[B][1] ("a very modest quantum of originality will suffice").

44. *Burrow-Giles*, 111 U.S. at 61 (granting protection for a picture of Oscar Wilde); *followed by* *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903) (upholding a copyright in a circus poster); *Time*, 293 F. Supp. at 142 (for the protection of a home movie film ["the selection of the kind of camera, the kind of film, the kind of lens, the area in which the picture were to be taken, the time they were taken, and the spot on which the camera would be operated {constituted sufficient originality}"]). *See also*, *NIMMER & NIMMER*, *supra* note 29, § 2.08[E][1][2].

45. *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 732 (8th Cir. 1986).

46. The advertisement in itself is clearly copyrightable. *NIMMER & NIMMER*, *supra* note 29, § 2.08 [E][4].

47. *Cable News Network, Inc. v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471, 1477 (11th Cir. 1991) (finding the creative reportage of events, replete with moving images, graphics, etc. to be copyrightable).

48. *Southern Bell Tel. & Tel. Co. v. Assoc. Tel. Directory Publishers*, 756 F.2d 801 (D.C.Ga. 1985) (Arguments based on lack of originality failed to defeat validity of copyright in telephone book infringed by defendant's solicitation of yellow pages advertising).

original producer's selective interpretation is minimized. The intention of how and where to place advertising certainly plays an important role. However, it does not constitute an integral part of a television broadcast. There is no other reason for the appearance of advertisements other than the appearance itself, but it is also a contractual obligation for the creator. Moreover, the intent rather undermines a non-creative element of advertising and, therefore, weighs against copyrightability. Nevertheless, these criteria do not help for copyright analysis, because copyright is not based on monetary or contractual considerations. A producer has to make a creative choice about camera angles and the sequence of images to be seen, even with regard to green walls, on which virtual advertising could be added later. The Seventh Circuit approached the issue with respect to teletext by comparing it to subtitles on television: If subtitles were part of the performance intended to be seen, they should be considered "related images" within the meaning of the statutory definition of an audiovisual work.⁴⁹

After all, the placement of advertisements and their incorporation into a television broadcast may not be an ingenuous thing to do, but it is part of the viewer's overall artistic impression of the broadcast and therefore should generally be considered copyrightable.

*B. The Fixation Element and the Television Broadcast System
(Sections 111, 119, and 122 of the Copyright Act)*

Section 102(a) of the Copyright Act states that a work of authorship needs to be fixed in a tangible medium of expression in order to obtain statutory protection.⁵⁰ The mere act of thinking or the underlying ideas are not protected as long as they remain unfixed or intangible.⁵¹ As for live broadcasts, such as the football games, the Copyright Act states that a "work consisting of sounds, images, or both, that are being transmitted, is 'fixed' if a fixation of the work is being made simultaneously with its transmission," and thereby explicitly includes sports broadcasts once they are broadcast and simultaneously recorded.⁵² Under section 101 of

49. *WGN*, 693 F.2d at 626 ("[I]t is clear that United Video may not use it for that purpose without WGN's permission, any more than if the publisher of a book leaves the inside covers blank the book seller (or book wholesaler, to make the analogy more precise) may inscribe the Lord's Prayer on them in order to broaden the book's appeal.") (citing *National Bank of Commerce v. Shaklee Corp.*, 503 F.Supp. 533, 543-44 (W.D.Tex. 1980)).

50. Copyright Act § 102(a).

51. *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 254 (N.Y. 1968).

52. At the urging of the sports leagues, Congress afforded copyright protection to live sports programming by devising an appropriate definition of "fixation" in Copyright Act § 101. "The committee was persuaded that . . . the content of a live transmission should be

the Copyright Act, the simultaneous recording of a transmission suffices for the element of fixation in a tangible medium of expression.⁵³ To "transmit" is defined as "to communicate . . . by any device or process whereby images or sounds are received beyond the place from which they are sent."⁵⁴ This leads us into the complex regulation of primary and secondary transmissions for television broadcasts, which is set forth in sections 111, 119, and 122 of the Copyright Act.

Originally, these definitions of copyright in broadcasts were designed for television stations and networks. After the introduction of cable television, the Supreme Court rejected copyright protection for the original broadcasts under the 1909 Copyright Act against retransmissions by cable networks, because they did not "perform" within the meaning of the statute.⁵⁵ With rising sophistication of cable networks, Congress eventually amended section 111(c)-(d) of the Copyright Act, which granted cable networks a compulsory license to retransmit certain broadcast signals.⁵⁶ In return, a semiannual fee in the form of statutorily prescribed royalties is collected and distributed by the Copyright Royalty Tribunal to indemnify copyright owners of the sports broadcasts.⁵⁷ The compulsory license program now covers retransmissions of distant

regarded as 'fixed' and should be accorded statutory protection if it is being recorded simultaneously with its transmission." H. REP. NO. 94-1476, at 54 (1976). "The bill seeks to resolve, through the definition of 'fixation' in section 101, the status of live broadcasts— sports, news coverage, live performances of music, etc.— that are reaching the public in unfixed form but that are simultaneously being recorded." *Id.* at 52; *see also*, *Copyright Royalty Tribunal*, 675 F.2d at 378 n.17-18; *Baltimore Orioles*, 805 F.2d at 668.

53. *Motorola*, 105 F.3d at 847.

54. Copyright Act § 101. Specifically, Copyright Act § 111(f) defines a primary transmission as:

a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted" [as opposed to a] "secondary transmission," [which] is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the . . . states.

55. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *see also*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (a state ban on alcohol advertisement conflicts with the requirements of a cable operator's obligation to refrain from deleting commercial advertising under the compulsory license system).

56. H.R. REP. NO. 94-1476, at 89, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704; NIMMER & NIMMER, *supra* note 29, at § 8.18[B].

57. Copyright Act § 111(d)(2). The first suit over the compulsory license was *Eastern Microwave v. Doubleday Sports*, 691 F.2d 125 (2d Cir. 1982); *see also*, PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 413 (2d ed. 1998).

network programming for cable television services. After the Eleventh Circuit ruled that a satellite carrier is like a cable system within the meaning of section 111 of the Copyright Act and therefore subject to a compulsory license for the retransmission of distant signals,⁵⁸ Congress added section 119 of the Copyright Act for satellite carriers⁵⁹. Additionally, the Satellite Home Viewer Improvement Act of 1999 extended the compulsory license explicitly for satellite carriers to include retransmissions of local broadcasts to rural areas in section 122 of the Copyright Act.⁶⁰ Nonetheless, the compulsory license in these cases applies only to those carriers who exercise no "control over the selection of the primary transmission," and "whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others," turning the secondary transmitter into merely a passive figure ("passive carrier exemption").⁶¹ Moreover, any retransmission under either type of broadcasts must be without any deletions or editing of any material, including commercials, contained in the original programming.⁶²

This compulsory license scheme plays an important role with regard to the advertising provided, since technology enables cable-network providers to edit the program itself and alter the content of commercial breaks. This was precisely the scenario in *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, where WTBS made use of a new technology that could insert different advertising in the programming trans-

58. *Nat'l Broad. Co. v. Satellite Broad. Networks*, 940 F.2d 1467 (11th Cir. 1991); *Satellite Broad. & Communications Assoc. v. Oman*, 26 U.S.P.Q. 2d 1313 (BNA) (N.D. Ga. 1993), *rev'd*, 17 F.3d 344 (11th Cir. 1994), *cert. denied*, 513 U.S. 823 (1994).

59. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, §§ 201-02.

60. Copyright Act § 122(a)(3) as amended by the Satellite Home Viewer Improvement Act of 1999. The purpose of the Act is to promote competition among satellite and cable industries in derogation of the exclusive property rights granted by the Copyright Act to copyright holders. Similar to sections 111 and 119 of the Copyright Act, section 122 requires strict compliance with limitations, such as the prohibition to willfully alter the programming. 145 CONG. REC. H11769 (daily ed. Nov. 9, 1999); *see also*, 145 CONG. REC. H11811 (daily ed. Nov. 9, 1999) (statement of Rep. Tauzin & Rep. Markey).

61. Copyright Act § 111(a)(3); *see also* NIMMER & NIMMER, *supra* note 29, §§ 8.18[E], 8.18[F], 12.04[B][3] (providing an overview on the compulsory license scheme).

62. See the general provisions of Copyright Act §§111(c)(3), (e)(1) for cable systems, the specific prohibitions of Copyright Act § 119(a)(4) for satellite carriers and Copyright Act § 122(e) for satellite carriers in rural areas. Any secondary transmission that does not satisfy all of the compulsory license requirements is an unlicensed and hence infringing transmission. NIMMER & NIMMER, *supra* note 29, §§ 8.18[E][9]; 8.18[F][3][c]; *Cablevision Co. v. Motion Picture Ass'n of Am., Inc.*, 641 F.Supp. 1154, 1163 (D.C. 1986), *stay denied*, 836 F.2d 599, 616 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988); *see also*, *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F.Supp. 531 (S.D.N.Y. 1977); *Hubbard Broad., Inc., v. Southern Satellite Sys., Inc.*, 777 F.2d 393 (8th Cir. 1985) and discussion *infra* Part III.D.3.

mitted to distant cable systems from that incorporated in the original programming, for example substituting commercials and editing the original broadcast.⁶³ The court's primary concern was whether the compulsory license scheme covered the new technology of microwave links and the attached opportunity to substitute commercials.⁶⁴ The court found that Southern Satellite Systems did not exceed their compulsory license by using the new technology and that the accompanying quality improvement was consistent with the principle goal of the Copyright Act; to make copyrighted work readily available to the public, while still allowing the copyright owner to protect his or her interests as long as the content remained original.⁶⁵ Also, *Hubbard* failed to show that *WTBS* had ever substituted commercials or even attempted to do so.⁶⁶ Therefore, no infringement occurred.

This detailed legislation and the accompanying judicial authority on retransmissions provides important information for construing the Copyright Act with regard to the alteration of virtual advertising even under a non-compulsory license – which is the case in most sports broadcasting – and will, therefore, have to be kept in mind. However, before turning to the analysis of copyright violations in this context, it is necessary to identify the copyright owner in order to distinguish him from any potential infringer.

C. *Owner of the Copyright (Sections 201(a), (b) of the Copyright Act)*

The threshold of any litigation for property rights is the determination of the ownership of the rights in question.⁶⁷ Having determined that there exists a copyright in a broadcast sporting event – and presumably in the arrangement and capture of the advertisements as a part of the overall work of authorship – the question now turns to who has the right to place and sell the advertisements in connection with a sporting event? The issue does not arise if the event, the television broadcast rights, and the stadium signs' property rights are in one hand. A broadcast entity that directs, produces and, therefore, creates a protectible work of authorship is often required to transfer some or all of the copyrights in the broadcast to the sports team or club as an initial condition of being au-

63. *Hubbard*, 777 F.2d at 397.

64. *Id.* at 399, 401.

65. *Id.* at 403-04.

66. *Id.* at 402.

67. *Topolos v. Caldewey*, 698 F.2d 991 (Cal. Ct. App. 1983).

thorized to broadcast the games.⁶⁸ The underlying reason is that the clubs have a legitimate property interest in their games, which they can sell and license exclusively to broadcasting companies that in turn value them as affording advertising mediums.⁶⁹ However, the legal challenge erupts if several different entities are involved and the contract terms do not address the issue or are invalid.

According to section 201(a) of the Copyright Act, the copyright in a work vests initially in the "author" of the work.⁷⁰ In general, the author is the person that created the work. However, in the case of "works made for hire" under section 201(b) of the Copyright Act, the employer or other person for whom the work was prepared is considered the author and, therefore, the owner of the rights comprised in the copyright.⁷¹ Section 101(1) of the Copyright Act defines a work made for hire as a "work prepared by an employee within the scope of his employment."⁷² The parties may expressly agree that the employee shall be deemed to own the copyright in all works produced in the employment relationship.⁷³ Likewise, the parties may expressly agree that all works produced by the employee during the period of the employment relationship shall belong entirely to the employer.

In professional sports, if the teams are part of a league like the MLB, the NFL, or the NBA, the ownership rights will be distributed according to the terms of their agreements. The underlying authorization is based on the collective bargaining agreement of the respective organization with the members of the league, which serves as a basis for the internal rules, such as the League's Constitution, the bylaws, and the Uniform Player's Contract.⁷⁴ Externally, the collective bargaining agreement serves as a basis for the collective marketing and broadcasting agreements with regard to these games. All major team sports include terms in their collective bargaining agreements and the uniform players contracts that grant any rights in the games to the club or the respective

68. Shipley, *supra* note 38, at 392; *Pittsburgh Athletic Co. v. KQV Broad.*, 24 F.Supp. 490 (W.D.Pa. 1938).

69. *Pittsburgh Athletic Co.*, 24 F.Supp. at 492; Shipley, *supra* note 38, at 393.

70. Copyright Act § 201(a).

71. *Id.* § 201(b).

72. *Id.* § 101(1).

73. For the interpretation of a work for hire absent an agreement, see *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); NIMMER & NIMMER, *supra* note 29, § 5.03[B].

74. The Uniform Player's Contract is the standard form contract between individual players and their respective clubs. *Baltimore Orioles*, 805 F.2d at 671.

league, turning it into a work made for hire.⁷⁵ The NFL, for example, is the owner of the copyrights of the games involved on behalf of its member clubs and the clubs as to their games.⁷⁶ Since television marketing generates most of the revenue in football, baseball and basketball, the agreements with local, national, and superstations are crucial. The NBA, for example, deals with national television exposure; however, the revenues generated therefrom are shared among the teams. In baseball, the league ordinarily permits each team control over arrangement for local telecasts in its home city under the Federal Communications "Syndicated Exclusivity Rules," which allow the teams to keep the local revenue. The Syndicated Exclusivity Rules also prohibit retransmissions of local broadcasts in order to protect the local markets. The underlying purpose of this distribution scheme is to protect the unique competition in professional sports nationwide and maintain its attractiveness to the viewer.⁷⁷ Some doubts arose in 1980s baseball, when baseball players challenged their contracts claiming to be the owners of the copyright in the baseball games.⁷⁸ The players contended that the baseball games were performed outside the scope of their employment and, therefore, would not be encompassed by the work for hire doctrine.⁷⁹ Hence, players claimed that the baseball clubs did not own the exclusive rights to the televised performances of the players during major league baseball games. The court disagreed since the parties did not expressly agree to this respect, as is required by section 201(b) of the Copyright Act. Moreover, the Uniform Players Contract provided the opposite.⁸⁰ Professional baseball today allows almost unlimited broadcasting over superstations, while claiming a portion of the revenues for distribution among the clubs.⁸¹ Most in-game advertising is sold directly through the networks, such as Turner Network Television ("TNT"), TBS or NBC. It

75. Pamela R. Lester, *Marketing the Athlete: Endorsement Contracts*, SD58 ALI-ABA 385, 390 (1999).

76. *McBee & Bruno's, Inc.*, 621 F.Supp at 885, *aff'd*, 792 F.2d 726 (8th Cir. 1986) ("Such game programs were duly registered in the United States Copyright office and those registrations were valid and enforceable"). *Id.* at 885.

77. Franklin M. Fisher, et. al., *The Economics of Sports Leagues - The Chicago Bulls Case*, 10 MARQ. SPORTS L.J. 1, 8, 9 (1999).

78. *Baltimore Orioles*, 805 F.2d at 666.

79. *Id.* at 667-68.

80. *Id.* at 679. (In rejecting the player's arguments, the court left it to the players to attain their objective by bargaining with the Clubs for a contractual declaration that they own a joint or an exclusive interest in the copyright of the telecasts).

81. *Chicago Prof'l Sports Ltd. P'ship & WGN v. National Basketball Ass'n*, 754 F.Supp. 1336, 1339-1445 (N.D. Ill. 1991); *see also*, WEILER & ROBERTS, *supra* note 57, at 583 (contracts provide the exclusive broadcasting of the games by ESPN or Fox).

is not clear, however, whether the original copyrights in the telecasts of the various games are owned separately by individual clubs or jointly by some combination of clubs. It is also unclear whether the copyrights in the telecasts are owned exclusively by the clubs or jointly by the clubs and the television stations or networks that record and broadcast the games.

These issues have been addressed for the NBA in *Chicago Professional Sports Limited Partnership & WGN v. National Basketball Association*.⁸² Although the NBA has transferred the exclusive rights to broadcast most of the games to TNT, this did not limit the individual clubs to broadcast other contests on local over-the-air broadcast stations. Both the contracts and the league's articles and bylaws reserve to the individual clubs the full copyright interest in all games that the league has not sold to networks.⁸³ The question then turns to whether the copyrighted game broadcasts stem from a single source or rather a joint venture.⁸⁴ One theory viewed the NBA as a single firm producing the product "games," and a group of potential competitors selling them.⁸⁵ Following a series of decisions, Judge Easterbrook found that the NBA, when acting in the broadcast market, was closer to a single firm than to a group of independent firms, calling it a "single bargaining employer."⁸⁶ Following his opinion, the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment.⁸⁷ Therefore, the NBA, as an agent acting on behalf of the individual club when selling the broadcast rights collectively, is closer to being considered the owner of the copyright by virtue of the collective bargaining agreement than the individual club. Otherwise, the league would not be in a position to sell these rights in the first place.

With regard to secondary transmission, section 501(e) of the Copyright Act provides that a network station holding a copyright or other license to transmit or perform the same version of that work shall be treated as owner of the work.⁸⁸ Therefore, in the established licensing

82. 754 F.Supp. 1336

83. *Chicago Prof. Sports*, 961 F.2d at 671, *vacated and remanded*, 95 F.3d 593 (7th Cir. 1996). Following this series of decisions the Chicago Bulls and TNT eventually settled their dispute with an intermediary solution.

84. *Chicago Prof. Sports*, 95 F.3d at 596; WEILER & ROBERTS, *supra* note 57, at 583.

85. *Chicago Professional Sports*, 961 F.2d at 672; Fisher, et. al., *supra* note 77, at 5 (providing a sound description of the genuine 'product' in the sports context).

86. But only for antitrust purposes, see *Chicago Prof. Sports*, 95 F.3d at 598.

87. *Id.* at 600.

88. Copyright Act § 501(e).

chain for sports broadcasting, any legal or beneficiary owner of such a compulsory or contractual license shall be treated as the owner of the copyright with standing to sue.

D. Copying of the Owner's Rights (Section 106 of the Copyright Act)

The Copyright Act does not give the copyright holder control over all uses of a copyrighted work; instead, it enumerates several "rights" that are made exclusive to the copyright holder.⁸⁹ "Copying" is the shorthand reference to the act of infringing on any of the copyright owner's five exclusive rights set forth in section 106 *et seq.* of the Copyright Act.⁹⁰ The infringing act by substituting advertising could constitute the preparation of a reproduction, a performance or the preparation of a derivative work. In the absence of one or more of these enumerated results, the claim of violation of the copyright law by unlawful distribution of a work is barred.⁹¹ Courts have been unclear in defining the specific infringing action in television broadcasts, even calling it the "right to make changes."⁹² However, the underlying theory mostly points towards the preparation of a derivative work under section 106(2) of the Copyright Act.⁹³

Section 101 of the Copyright Act defines a "derivative work" as "a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."⁹⁴ A derivative work consists of a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work.⁹⁵ It consists of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original

89. *Fortnightly Corp.*, 392 U.S. at 393-94 (1968); *Capital Cities Cable*, 467 U.S. at 710; *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624 (7th Cir. 1982).

90. *Paramount Pictures Corp. v. Video Broad. Sys., Inc.*, 724 F.Supp. 808, 819 (D.Kan. 1989); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081 (9th Cir. 1989). See also, NIMMER & NIMMER, *supra* note 29, § 8.01[A].

91. *Paramount*, 724 F.Supp. at 821.

92. NIMMER & NIMMER, *supra* note 29, § 8D.04 [A][1] ("the license to reproduce and/or perform is limited to reproduction and/or performance in the form in which the authors wrote the work, so that a material departure from such form goes beyond the terms of the license, and hence results in an infringement of the reproduction and/or performance rights"); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984). Another court called the infringement 'unauthorized revision,' see *Nat'l Bank*, 503 F.Supp. at 544.

93. Copyright Act § 106 (2); *Paramount*, 724 F.Supp. at 819.

94. Copyright Act § 101.

95. NIMMER & NIMMER, *supra* note 29, § 3.03.

work of authorship.⁹⁶ The alteration of television signals with virtual advertising is such a modification of the television broadcast as a whole. However, a work will be considered a derivative work only if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work.⁹⁷ While advertisement as a part of the sport-broadcast is an original work under the described circumstances and the insertion of virtual advertising constitutes the preparation of a derivative work, the television broadcasts are made with the consent of the copyright owner by virtue of compulsory or non-compulsory licenses. The author can always grant the right to make changes to the work. In sports broadcasts, the leagues' and the clubs' agreements with the broadcast stations include detailed terms about the right to insert commercials. But these assignments or licenses are silent with respect to the right to make changes in the work by using virtual advertisement, except for the explicit rights to use virtual advertising in certain games' broadcasts, such as Superbowl XXXIV. Also, the broadcast agreements do not encompass the statutory compulsory license scheme for any number of retransmissions. Finally, sections 111(c)(3), 119(a)(4), and 122(e) of the Copyright Act impose limitations on alterations for retransmissions under the passive common carrier exemption. These detailed rules also provide helpful hints for interpreting the effect of alterations on the copyrights with respect to non-compulsory licenses by virtue of analogy absent an agreement.

By taking into consideration these elements in the context of sports television broadcasts, it has to be determined if the unauthorized insertion of virtual advertising meets the legislative and common law standards for "copying" under sections 106, 111, 119, and 122 of the Copyright Act.

1. Legislative History of the Passive Carrier Exemptions

Section 111(c)(3) of the Copyright Act provides that a cable system is fully subject to the remedies provided for copyright infringement if the cable system willfully alters the original transmission through changes, deletions, or additions.⁹⁸ Included in this prohibition are commercial messages and station announcements during the program, so as to ensure a continuous ban on the so-called "commercial substitution."⁹⁹ In

96. Copyright Act § 101.

97. NIMMER & NIMMER, *supra* note 29, § 3.01 n.10.

98. Copyright Act § 111(c)(3).

99. 122 CONG. REC. H10727- 8 (daily ed. Sept. 21, 1976).

adopting section 111(c)(3) of the Copyright Act, Congress concluded that to allow cable television systems to alter the primary transmission by substituting commercials would significantly alter the basic nature of the cable retransmission service and make its function similar to that of a broadcast station and hence constitute copyright infringement.¹⁰⁰ Further, the placement of substitute advertising in a program by a cable system on a "local" signal harms the advertiser, and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a "distant" signal, the placement of substitute advertising harms the local broadcast station in the distant market, because the cable system is then competing for local broadcasting dollars without having comparable programming costs.¹⁰¹ Congress, in prohibiting commercial substitution by cable systems, primarily sought to ensure the competitive compatibility of the cable system and the local broadcast station while also protecting the copyright owner.¹⁰² Cable systems, when retransmitting local signals, would retransmit exactly what was received, and in doing so would neither undercut the local broadcast station's ability to generate local advertising revenues nor jeopardize the ability of creators of programming to receive a fair return for their product based upon the size of the audience that the advertiser's message was calculated to reach.¹⁰³ In other words, the status quo relationship between local broadcast stations and copyright holders would be protected and facilitated.¹⁰⁴ Cable or satellite retransmissions enlarge a television station's audience and increase the value of station advertising. As the 1975 Congressional Hearings pointed out, the impact of cable retransmissions is vital to college sports, because they depend on the distribution of those

100. H. R. REP. NO. 94-1476, at 91 (1976) ("The cutting out of advertising, the running in of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability"); *see also*, NIMMER & NIMMER, *supra* note 29, § 8.18[C][1][b].

101. H.R. REP. NO. 94-1476, at 93-94, *reprinted in* 1976 U.S.C.C.A.N 5708. Consequently, Congress "attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages." *Id.* at 94; *Hubbard*, 777 F.2d at 404.

102. *Final Report on the Inquiry into Professional Sports*, H.R. REP. NO. 1786, at 115 (1977).

103. H.R. REP. NO. 94-1476, at 94, *reprinted in* 1976 U.S.C.C.A.N 5708.

104. H.R. REP. NO. 1487, at 92 (1976) ("Further, the placement of substitute advertising in a program by a cable system on a 'local' signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach").

revenues,¹⁰⁵ inasmuch as professional sports rely on advertising revenue.¹⁰⁶

The underlying intent points to the protection of the copyright holders' exclusive rights in the work against alteration while still promoting broad public availability of literature, music, and the other arts, as provided in the Commerce Clause of the Constitution.¹⁰⁷ Since the issues with regard to virtual advertising arise in large part from the use of technology perfected after the enactment of the Copyright Act of 1976, these goals of the Copyright Act will have to be kept in mind. In such a situation, courts looked to the "common sense" of the statute, to its purpose, and to the practical consequences of the suggested interpretations "for what light each inquiry might shed."¹⁰⁸ As the Supreme Court stated: "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose, [which is to stimulate artistic creativity for the general public good.]"¹⁰⁹

2. Common Law

In applying these legislative standards, courts in the 1980s have been remotely split on the question of "copying" under the theory of "commercial substitution" in television broadcasts.

In the landmark case of *Gilliam v. ABC Inc.* the defendant bought rights to three separate television programs produced by the British Broadcasting Corporation.¹¹⁰ The plaintiffs-authors of the script for these programs, known collectively as "Monty Python," held the copyright on the script and objected when the defendant edited the programs

105. Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1823 (1975) (testimony of Barbara Ringer, Register of Copyrights); see also, *Copyright Royalty Tribunal*, 675 F.2d at 379 n.20. The NFL agreed with Fox on the exclusive rights in sports broadcasting for a four-year package worth \$1.66 billion. The NFL created a total revenue of \$ 2.2 billion in 1998. WEILER & ROBERTS, *supra* note 57, at 585.

106. H.R. REP. NO.1786, at 115 ("[C]able should be regulated in its own right and allowed to grow, but this growth should not be based on its use of copyrighted material in a way which would financially injure the copyright owner").

107. U.S. CONST. art. I, § 8; see also, *Hubbard*, 777 F.2d at 396; *Capital Cities Cable, Inc.*, 467 U.S. at 710; *Eastern Microwave, Inc.*, 691 F.2d at 132 (2d Cir. 1982); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

108. *Hubbard*, 777 F.2d at 399; *Eastern Microwave, Inc.*, 691 F.2d at 127; *New York State Comm'n on Cable Television v. Fed. Communications Comm'n*, 571 F.2d 95, 98 (2d Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

109. *Hubbard*, 777 F.2d at 399 (citing *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 432-33 (1984); *Twentieth Century Music Corp.*, 422 U.S. at 156).

110. 538 F.2d 14, 17 (2d Cir. 1976).

to such an extent that the script was materially altered by deletion, editing, and insertion of commercial breaks.¹¹¹ In view of the material changes and the substantive editing of the original broadcast, the court found that absent an express agreement as to what alterations could be made to a television program, unauthorized changes in the work that are so extensive as to impair the integrity of the original work constitute copyright infringement.¹¹² Even though the defendant had a valid license to prepare a derivative work, this permission to use the original work "may not exceed the specific purpose for which permission was granted."¹¹³ The rationale for this result lies in the need to allow the proprietor of the underlying work to control the method of exploitation.¹¹⁴

The first significant ruling involving only the unauthorized insertion of advertising into an existing work was *National Bank of Commerce v. Shaklee Corp.*¹¹⁵ This case involved a book with an original collection of household hints, which was published by the defendant Shaklee.¹¹⁶ In the published version, Shaklee added a number of advertisements related to household items without the consent of the author.¹¹⁷ The court held that a licensee infringes a copyright by exceeding his license and that an author should have control over the context and manner in which his or her work is presented.¹¹⁸ "[The] author has a right to protect the integrity of his or her work and unauthorized changes in the work violate the author's rights even when he has parted with the publishing rights."¹¹⁹

In *WGN Continental Broadcasting Co. v. United Video, Inc.*, a television broadcasting company sought to enjoin a telecommunications common carrier from retransmitting its copyrighted television program into the carrier's cable television system after stripping the vertical blanking interval of teletext information.¹²⁰ The original teletext portion was sub-

111. *Id.* at 17-18.

112. *Id.* at 22; *Oddo*, 743 F.2d at 634.

113. *Gilliam*, 538 F.2d at 20.

114. *Id.* at 21.

115. 503 F.Supp. 533 (W.D. Tex. 1980).

116. *National Bank*, 503 F. Supp. at 536.

117. *Id.* at 538.

118. *Id.* at 543 (acknowledging the lack of authority, the court relied on *Gilliam*, 538 F.2d 14 (2d Cir. 1976)). However, it did not specify the type of copyright – moral right, the right to prepare derivative work, etc.

119. *National Bank*, 503 F.Supp. at 543; *Bonner v. Westbound Records, Inc.*, 364 N.E.2d 570, 575 (Ill. App. Ct. 1977); *Chesler v. Hearst Publ'ns, Inc.*, 352 N.Y.S.2d 552, 555 (1973).

120. 693 F.2d 622 (7th Cir. 1982).

sequently inserted into the program alternatively as an integral part of the news program or on a different channel and contained additional information for the viewer, such as ballgame scores or weather reports.¹²¹ The defendant did not retransmit this information along with the original news, but instead substituted teletext supplied with other sources.¹²² As a general rule, the court found that a copyright licensee who “makes an unauthorized use of the underlying work by publishing it in a truncated version” is an infringer.¹²³ Absent an agreement with the copyright owner, the carrier may not even delete commercials.¹²⁴ Section 111(c)(3) of the Copyright Act requires that any cable system that wants to retransmit a broadcast signal without negotiating with the broadcast station or copyright owner must transmit intact any commercials it receives from that station.¹²⁵

The district court in *Paramount Pictures Corp. v. Video Broadcasting Systems, Inc.* did not follow the prior rulings in *WGN v. United Video* and *National Bank v. Shaklee*.¹²⁶ Here, the defendant had placed commercials for local businesses at the beginning of the producer-plaintiff’s motion-picture videocassettes.¹²⁷ The court focused on the elements of a copyrightable work and found that – unlike the holding in *WGN* – the additions of advertisements would not always constitute an infringement.¹²⁸ The unauthorized use of the protected work in a manner outside the scope of any of the copyright holder’s exclusive rights, therefore, is not an infringement of the copyright.¹²⁹ The “related images” that the court in *WGN* relied upon did not encompass the advertisement at the beginning of rental videocassettes containing motion pictures.¹³⁰ Those advertisements were insignificant and, in fact, did not alter the motion picture in any way.¹³¹ This was not a case where the substance of the protected work was significantly altered and its quality and integrity compromised by a licensee or grantee that oversteps his authority.¹³²

121. *Id.* at 623-24.

122. *Id.* at 624.

123. *Id.* at 625 (citing *Gilliam*, 538 F.2d at 20 [“any unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright”]).

124. *Id.* at 624.

125. *WGN Cont. Broad.*, 693 F.2d at 624-25.

126. *Paramount*, 724 F.Supp. at 820.

127. *Id.* at 812.

128. *Id.* at 821.

129. *Id.* at 820; *Twentieth Century Corp.*, 422 U.S. at 155.

130. *Paramount*, 724 F. Supp. at 820.

131. *Id.* at 820-21.

132. *Id.*

While defendant's advertisement was an original work, the court did not "recognize the addition of it to a videocassette in any way recasting, transforming, or adapting the motion picture."¹³³ The result is not a new version of the copyrighted motion picture.¹³⁴

3. Discussion

While courts have been inconsistent in defining the nature of the infringed right of section 106 of the Copyright Act, the bottom line is that the alteration of advertisement constitutes a copyright infringement, if the changes are substantial. The scope of protection is even broader for television broadcasts: Sections 111(c)(3), 119(a)(4), and 122(e) of the Copyright Act proscribe any willful alteration of a licensed retransmission if such a license falls within the scope of the statutory compulsory license scheme. Congress' intent indicates that this protection applies to the content and the advertising. Sections 111, 119, and 122 of the Copyright Act and most of the above-mentioned decisions were based on the compulsory license scheme. However, with regard to contractual licenses that cover the entire market in sports broadcasting and absent any agreement to the alterations of the original programming by using virtual advertising, the detailed rules serve as precedent and help construe the application of the Copyright Act to unauthorized virtual advertising. Applying the language of section 111(c)(3) of the Copyright Act in the detailed framework for compulsory licenses, Congress implicates that absent an agreement, willful alterations of television broadcasts constitute a copyright infringement. Clearly, the element of willfulness will have to be imputed in the scenarios at hand. Even if the license agreements contained a term on commercial substitution in general, the changes made with virtual advertising will have to be construed in light of this legislation and the precedents.

Congress intended to protect the author's monetary interest in a reasonable return for the creation when section 111 of the Copyright Act was amended.¹³⁵ This interest explicitly involved advertising. As with all statutory licenses, they have to be interpreted narrowly, because statutory licenses are a derogation of the exclusive rights granted and in turn the limitations have to be construed broadly.¹³⁶ Congress was also aware of future technological development. Having these interests in mind, vir-

133. *Id.* at 821.

134. *Id.*

135. 145 CONG. REC. H11811, 11812 (daily ed. Nov. 9, 1999) (statement of Rep. Coble).

136. 145 CONG. REC. H11769 (daily ed. Nov. 9, 1999) (text of conference report).

tual advertising opens new alleys for the unauthorized substitution and deletion of existing advertising and thereby keeps the author from receiving a financial return for the work he created. In *Midway Manufacturing Co. v. Artic International Inc.*, the court held that a speeded-up video game that was created by a licensee with the circuit boards that were supplied by the licensor was a derivative work based upon a copyrighted video game.¹³⁷ The preparation of this altered version by the licensee therefore constituted an infringement of these copyrighted works.¹³⁸ The court reasoned that the speeded-up version is a "substantially different product from the original game and generated more license revenue per game, which was deprived from the copyright owner without his consent."¹³⁹ This amounts to a free ride of the violator on someone else's creation. Section 111 of the Copyright Act was created to protect this interest. Even if the specific scenario in section 111 of the Copyright Act does not apply to all transmitters, the underlying ideas promote the copyright protection of advertising against virtual alterations under section 106(2) of the Copyright Act.

Virtual advertising can be inserted into an existing television program after the work is completed or it may be inserted into pre-designated spots, such as green walls, with the consent of the author. The unauthorized rearrangement, inserting, combining, or cutting of elements in an existing program distorts the original work, using the unique adaptive occlusion process.¹⁴⁰ Those changes take away some of the original expression from the work by altering the overall arrangement and selection of advertising in the background of a sports performance. A significant change in the scenery of a broadcast, such as a large advertisement on or next to the football or baseball field, constitutes a copying, since the selection of camera angles, the placement and size of the advertisements constitute original and creative elements. Even if the changes are not significant, there may still be an infringement.¹⁴¹

"It is obvious that the commercial success of live television sports and entertainment depends substantially on advertising."¹⁴² Advertising

137. 704 F.2d 1009, 1014 (7th Cir. 1983).

138. *Id.* at 1013-14.

139. *Id.* at 1014.

140. *See infra* Part II.

141. *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927) (Slight differences between picture, observable by close scrutiny, do not avoid infringement); Raphael Winick, *Intellectual Property, Defamation and the Digital Alteration of Visual Images*, 21 COLUM.-VLA J.L. & ARTS 143, 155 (1997).

142. *McBee & Bruno's, Inc.*, 621 F.Supp. at 886, *aff'd*, 792 F.2d 726, 728 (8th Cir. 1986).

is normally inserted at a network control point.¹⁴³ “Any live show, including football games, requires at least two satellite transmissions, one with a clean feed of the show itself to the control point and the other of the dirty feed including the show and commercials to broadcast stations.”¹⁴⁴ The sole purpose for the clean feed broadcast is to transmit this signal from satellite so that the network control point could receive it and insert the economically vital commercials.¹⁴⁵ With the adaptive occlusion processing, this clear differentiation is watered down to a point where any broadcast station, transmitter, or retransmitter or any cable network is in a position to alter the content, needless to say the commercials of a television broadcast. Unlike the scenario in *Hubbard*, the satellite carriers and cable network providers today are in a position to exercise control over the content and the selection of the broadcast by using virtual advertising.¹⁴⁶ The ultimate beneficiary of subsequent insertion of virtual advertising is the broadcast station. The loser is the first advertiser, who paid to have his advertisement placed – either physically, or even by using virtual advertising in the first place – and the consumer, who is exposed to an ever-increasing stream of commercials, now even as part of the game. The original copyright owner also loses control over his work and its distribution.¹⁴⁷ Copyright law seeks to prevent such a scenario. The right for the exploitation of a copyrighted work rests in the owner. Therefore, any subsequent alteration should be banned if it harms the interest of the original owner or the public.¹⁴⁸ Therefore, the unauthorized deletion or substitution of existing advertisements in a television broadcast by inserting virtual advertising can constitute copyright infringement.

IV. VIOLATION OF THE RIGHT OF PUBLICITY

Another cause of action against unauthorized virtual advertising in sports telecasts could be the player's right of publicity, if the virtual advertisement appears in a distorting manner in the background of the player's performance during the game. The right of publicity was created

143. *Id.*, 621 F. Supp. at 886.

144. *Id.*

145. *Id.*

146. *Hubbard*, 777 F.2d at 402.

147. Winick, *supra* note 141, at 155.

148. After all, any state statute and/or common law is preempted by the Federal Copyright Act, if they are applicable. *Motorola*, 105 F.3d at 848.

in the sports world by a number of cases involving celebrities.¹⁴⁹ The right of publicity protects an individual's right to control the commercial exploitation of his or her identity. The present statutory or common law in over thirty states recognizes a right to control the commercial appropriation of an individual's name, likeness, and reputation.¹⁵⁰ Sport celebrities were the most prominent figures in advertising of the 1990s. In due course, a player's good reputation is likely to be the subject of advertisers' messages. However, there are limits as to the free use of a celebrity's image, even under an existing advertising agreement. For example, if a player is exposed in front of beer commercials that catch the eye of the viewer, he is automatically affiliated with this product. In *O'Brien v. Pabst Sales Co.*, the plaintiff, a famous football player, alleged invasion of his right of privacy when his picture was placed next to the defendant's beer advertisement.¹⁵¹ The court denied his allegations under the evidence presented, stating that he had lost his right of privacy by consenting to widespread publicity, and the advertising did not falsely indicate that the player used, endorsed, or recommended the beer advertised.¹⁵² Nevertheless, New York statutory law acknowledges a right of privacy as a personal and non-assignable right not to have his feelings hurt by unauthorized publications, and the common law even adds the protection for a famous person's right of publicity.¹⁵³ Other states agreed that a right of publicity exists that grants personal control over commercial display and exploitation of the personality and the exercise of a person's talents.¹⁵⁴ The Supreme Court upheld such common law and/or state legislation.¹⁵⁵

149. See generally, *Hirsch v. S.C. Johnson*, 280 N.W.2d (1979); *Ali v. Playgirl*, 447 F.Supp. 723, (S.D.N.Y. 1978); *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (D.Minn. 1970).

150. David H. Bernstein, *Current Developments in False Advertising and Right of Publicity*, 1148 PLI/CORP 133, 174 (Nov. 1999); Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23 (1999); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 11:14, 28:1 (4th ed. 1999).

151. 124 F.2d 167, 168 (5th Cir. 1941).

152. *Id.* at 170.

153. *Halean Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (Famous persons "would feel sorely deprived if they no longer received money for authorizing advertisements"). See also, *Pirone v. Macmillan Inc.*, 894 F.2d 579, 585 (2d Cir. 1990).

154. *Zacchini v. Scripps-Howard Broad. Co.*, 376 N.E.2d 582 (1978), *rev'd*, 433 U.S. 562, 569 (1977) (holding that state law could award damages to an entertainer who attempted to restrict the showing of his act to those who paid admission, when a television station broadcast his entire act (a 15 second "Human Cannonball" stunt)); *Housh v. Pety*, 133 N.E.2d 340, 341 (1956).

155. *Zacchini*, 433 U.S. at 579.

In professional sports, the right of publicity is ordinarily transferred to the clubs with regard to the players' appearances and their performances during the game. However, this does not affect the individual player's right to exploit his or her personal image commercially outside the playing field.¹⁵⁶ Today, players' associations exercise the group marketing of certain publicity rights. The issue is whether certain virtual advertisements can violate the individual player's right of publicity under state law in spite of and independent of these group-marketing agreements. Within the NBA, no rules exist to prevent companies from signing NBA players to advertising contracts.¹⁵⁷ Players in all major sports are free to enter into endorsement agreements in accordance with the player's contracts that regularly provide the requirement of the written consent of the club, which in turn shall not be withheld except in the reasonable interests of the club or the sport.¹⁵⁸ Similarly, the FIFA seeks to protect the integrity of the sport of soccer by a set of rules, parts of which are the rules about virtual advertising. This legislation is embedded into the European framework of keeping program and advertising separate.¹⁵⁹ Players and their performance should not be exploited by businesses solely as objects of commercials by inserting virtual advertisements during the player's performance. The line has to be drawn by the governing authorities of the respective sport and – absent any rules – by the judiciary. However, every player today is exposed to widespread publicity, far excessive from the standard in *O'Brien*.¹⁶⁰ The club and the league largely control the publicity. With this in mind, it seems unlikely that a court would not assume or imply the player's consent to the advertisements.

After all, there exists no federal right of publicity.¹⁶¹ Moreover, it appears well settled that any potential individual player's publicity right is preempted by section 301 of the Copyright Act with regard to the rights in the broadcast.¹⁶² Any such claims would interfere with the uni-

156. However, most professional sports leagues prohibit their athletes from endorsements of alcoholic beverages and tobacco products, *see* Lester, *supra* note 75, at 390, 393.

157. Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 427 (1996).

158. Lester, *supra* note 75, at 390.

159. *See infra* Part VI.

160. *O'Brien*, 124 F. 2d at 170.

161. Bernstein, *supra* note 150, at 182.

162. Under Copyright Act § 301, a state law claim is preempted when: (i) the state law claim seeks to vindicate "legal or equitable rights that are equivalent" to one of the bundle of exclusive rights already protected by copyright law under Copyright Act § 301 — styled the "general scope requirement;" and (ii) the particular work to which the state law claim is being

formity of the copyright system and the exploitation of the works by the author.¹⁶³ Although game broadcasts are copyrightable while the underlying games are not, the Copyright Act should not be read to distinguish between the two when analyzing the preemption of a claim based on copying or taking from the copyrightable work.¹⁶⁴ Especially with regard to virtual advertising, any player's right of publicity based on distorting advertising would be essentially equivalent to the right to prepare derivative work, which falls under the Copyright Act.¹⁶⁵ Even if the copyright claim allegedly does not encompass the uncopyrightable elements within the work, it has been held that section 301 of the Copyright Act preemption bars state law claims even with respect to both copyrightable and uncopyrightable elements.¹⁶⁶ Moreover, the Uniform Players Contract in all major team sports, in connection with the collective bargaining agreement, explicitly states that the clubs and not the players own the rights to the names,¹⁶⁷ photographs or electronic images, including television pictures. However, such rights may be assigned to the players association.¹⁶⁸ In spite of the discrepancy in interpreting preemption, it is safe to say that preemption applies, if a falsity claim is based upon state law and merely alleges that defendant prepared a derivative work from the plaintiff's original work and sold it under defendant's name.¹⁶⁹

applied falls within the type of works protected by the Copyright Act under §§ 102, 103—styled the “subject matter requirement.” *Motorola*, 105 F.3d at 848; *Baltimore Orioles*, 805 F.2d 663 at 674; *distinguished by*, *Brown v. Ames*, No. 98-20736 2000 WL 48992, at *6 (5th Cir. Feb. 7, 2000); in support of a right of publicity, *Shipley*, *supra* note 38, 384-88, 402; Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L.Rev. 861, 870 (1989). The 9th Circuit rejected preemption in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

163. *Brown*, 2000 WL 48992, at *6; *Bonito Boats, Inc. v. Thunder Craft Boat, Inc.*, 489 U.S. 141, 162 (1989) (“One of the fundamental purposes behind the . . . Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property”).

164. It has been argued, however, that even if one owns the copyright to a photograph or other visual image, one does not necessarily also own the right to commercially exploit the images of the persons appearing in that image; *see Winick*, *supra* note 141, at 179 (citing *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 446 (1st Cir. 1985)); *National Bank*, 503 F.Supp. at 540; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 Cmt. I (1995); MCCARTHY, *supra* note 150, §§ 11:14 [B], [C].

165. *Ahn v. Midway Mfg. Co.*, 965 F.Supp. 1134, 1138 (N.D.Ill. 1997). However, a copyright is not a license to engage in unfair competition; *see World Championship Wrestling v. Titan Sports, Inc.*, 46 F.Supp. 2d 118, 126 (D.Conn. 1999); *see infra* Part VI.

166. *Motorola*, 105 F.3d at 849.

167. *Baltimore Orioles*, 805 F.2d at 675. In fact, the Major League Players Association acts as the assignee of the individual publicity rights of all players; *see Cardtoons, L.C. v. Major League Players Assoc.*, 95 F.3d 959, 963 (10th Cir. 1996).

168. *Lester*, *supra* note 75, at 390-91.

169. MCCARTHY, *supra* note 150, § 6:27.

Taking into consideration these problems in pursuing a cause of action under state law, it seems more appropriate under federal law to apply a cause of action under section 43(a) of the Lanham Act.¹⁷⁰

V. FALSE ADVERTISING UNDER FEDERAL UNFAIR COMPETITION
(SECTION 43(A)(1)(B) OF THE LANHAM ACT)

Section 43(a) of the Lanham Act was amended, effective November 1989, to expressly prohibit, among other things, the use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person.¹⁷¹ Due to the broad language of section 43(a) of the Lanham Act, the elements of such a cause of action are remotely unclear.¹⁷² However, courts have established certain groups of unfair behavior in the marketplace that fall under section 43(a) of the Lanham Act. The Ninth Circuit has read the amended language to encompass the so-called "false endorsement" claims.¹⁷³ Section 43(a) of the Lanham Act even allows competitors to invoke a cause of action for unfair competition to prevent others from marketing altered versions of copyrighted works.¹⁷⁴ Furthermore, sporting events in particular are often faced with "ambush advertising," another type of false advertising. Since the judicial analysis often left the public with little guidance with regard to the specific elements of false

170. Copyright does not affect liability under the Lanham Act, *see World Championship Wrestling*, 46 F.Supp. 2d at 126.

171. Lanham Act § 43(a) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

172. Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 808 (1999).

173. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); Katherine C. Spelman, *Advertising and Promotions under Federal and California Law* 1999, 552 PLI/PAT 271 (1999). In *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391, 1401 (9th Cir. 1996), the Ninth Circuit held that the use of basketball star Kareem Abdul-Jabbar's former name, Lew Alcindor, in a television commercial for automobiles aired during a national men's basketball tournament raised an issue of fact as to whether consumers would believe Jabbar endorsed defendants' products.

174. *See, e.g., Gilliam*, 538 F.2d at 24.

advertising, commentators have tried to narrow down and define the elements of the specific violations and establish groups of violations.¹⁷⁵ The following analysis focuses on critical elements and emphasizes the most suitable types of false advertising as applied to virtual advertising.

A. General Requirements

To establish a federal cause of action for false advertising under section 43(a)(1) of the Lanham Act, the plaintiff must show either that the allegedly infringing representation of fact is literally false, or that it is likely to deceive or confuse consumers.¹⁷⁶ False advertising claims are thus predicated on a statement or assertion that confuses customers.¹⁷⁷ Furthermore, "falsely suggesting the existence of affiliation with a well-known business by usurping the latter's goodwill constitutes. . . unfair competition."¹⁷⁸ Specifically, to state a claim for false advertising under the Lanham Act, a plaintiff must allege: (1) that defendant has made a false or misleading description or representation of fact; (2) in interstate commerce; (3) in connection with goods or services; (4) in commercial advertising and promotion; (5) when the description or representation misrepresents the nature, qualities or geographic origin of the defendant's or another person's goods, services or commercial activities; and (6) that there is likelihood of injury to plaintiff in terms of declining sales, loss of goodwill, etc.¹⁷⁹

The traditional plaintiff under section 43(a) of the Lanham Act has been a competitor injured in its line of business as a result of false advertising.¹⁸⁰ Hence, a cause of action could be available not only for the

175. MCCARTHY, *supra* note 150, § 27:24; McEvilly, *supra* note 18, at 620-21; Wegman Burns, *supra* note 205, at 864-67.

176. *Motorola*, 105 F.3d at 855 (citing *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995)).

177. Craig K. Weaver, *Signposts to Oblivion? Meta-Tags Signal the Judiciary to Stop Commercial Internet Regulation and Yield to the Electronic Marketplace*, 22 SEATTLE U. L. REV. 667, 677 n.75 (1998).

178. *Showtime/The Movie Channel v. Covered Bridge Condo. Ass'n, Inc.*, 693 F.Supp. 1080, 1089 (S.D. Fla. 1988); *Playboy Enters., Inc. v. Frena*, 839 F.Supp. 1552, 1561 (M.D.Fla. 1993); *Burger King v. Mason*, 710 F.2d 1480, 1492 (11th Cir. 1983).

179. MCCARTHY, *supra* note 150, § 27:24; *Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 872 (3d Cir. 1992).

180. *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987); *Waits*, 978 F.2d at 1109. False advertising claims can be brought by corporations as well as individuals, *see Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (recognizing Section 43(a) of the Lanham Act claim where uniform worn by star of X-rated movie was confusingly similar to plaintiffs' trademark uniforms, falsely creating impression that plaintiffs "sponsored or otherwise approved the use" of uniform).

copyright owner or licensee of the broadcast, but also for advertisers of in-stadium advertisements, such as billboards or other fixed advertisements that are being subsequently substituted without the assignment of any copyright claims by the owner of the broadcast. Even if it can be assumed that the parties using virtual advertising compete for the most effective television commercials, most courts have held that the parties need not always be in direct competition for the plaintiff to have standing under section 43(a) of the Lanham Act.¹⁸¹ The Fifth Circuit stated: In order for representations to constitute commercial advertising or promotion they must be by a defendant who is in commercial competition with plaintiff for the purpose of influencing consumers to buy defendant's goods or services.¹⁸² If a party advertises, he is necessarily involved in commercial activity. As soon as both parties use the same advertising channel, they are necessarily competitors. Therefore, standing can be established fairly easily.

A claim of false advertising may be asserted against "all those allegedly responsible for falsely describing and placing in commerce the advertised goods."¹⁸³ This includes advertisers as well as contributory infringers.¹⁸⁴ However, the media is generally not liable for acting as passive carriers for false advertising.¹⁸⁵ But this exemption involves only innocent communicators of otherwise misleading or false advertising. A broadcasting company that willfully inserts virtual advertisements without the consent of the involved parties is to be considered in violation of the Lanham Act. Just like the limitation of the passive carrier exemption for willful alterations, section 43(a) of the Lanham Act is applicable if the defendant did not act innocently.¹⁸⁶

Just like any advertising in sports, virtual advertising implicates a statement of affiliation between the advertised product or service and the object of sponsorship. It implicates the sponsorship or other type of

181. McCarthy, *supra* note 150, § 27:32, p.27-53 ("with the possible exception of the 9th Circuit"); *Waits*, 978 F.2d at 1107, *cert. denied*, 506 U.S. 1080 (1993); *see also*, McEvilly, *supra* note 18, at 618-19; *Wegman Burns*, *supra* note 205, at 838-39; *Bernstein*, *supra* note 150, at 134.

182. *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996). Using this language reveals that it is in fact difficult to separate the elements of false advertising.

183. *Grant Airmass Corp. v. Gaymar Indus., Inc.*, 645 F. Supp. 1507, 1511 (S.D.N.Y. 1986).

184. *Bernstein*, *supra* note 150, at 135.

185. *Grant Airmass Corp.*, 645 F. Supp. at 1512; McCarthy, *supra* note 150, §§ 27:52, p.27-78; 27:70, p.27-105.

186. McCarthy, *supra* note 150, § 27:83 (quoting 134 CONG. REC. H10420 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier on S.1883)).

affiliation between the subsequently inserted or substituted advertisement and the teams, clubs, the respective league or the sport in general. These representations typically occur in the context of "false endorsement" and "ambush advertising."

B. False Endorsement

Falsity may be established by proving that the advertising is literally false as a factual matter, or although the advertisement is literally true, it is likely to deceive or confuse consumers or viewers as to the sponsorship or affiliation of the goods or services.¹⁸⁷ This scenario is often called "false endorsement."¹⁸⁸ Although a virtual advertisement in itself correctly represents the nature and origin of the advertised goods, the falsity has to be established in connection with the sponsorship and affiliation of the advertisement to the sporting event. The error occurs in the viewer's mind, when he or she unknowingly denies the right to public credit for the sponsorship of the event to the original advertiser, while affiliating the virtual advertiser's goodwill with the sponsorship.¹⁸⁹ The attractiveness of sports advertising is based on the popularity of the teams and the players. No other television events attract greater audiences than the major sporting events. In turn, advertisers are willing to pay large sums of money for their appearance in such an event. Even though there is no direct affiliation or proof of a product's quality in such an advertisement, the public associates the large sums paid with the good quality of a product. This behavior generates a company's goodwill that is attached to its products.¹⁹⁰ The goodwill of a manufacturer is the

187. *Lipton*, 71 F.3d at 474.

188. Lanham Act § 43(a) prohibits the imitation of a person's distinctive attributes without authorization where the imitation misrepresents, expressly or by implication, the person's association with or endorsement of a product. *See Waits*, 978 F.2d at 1106 (establishing a likelihood of consumer confusion that Waits endorsed Doritos); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 371 (S.D.N.Y. 1988) (granting summary judgment on Woody Allen's Lanham Act § 43(a) claim where ad featured photo of look-alike with clarinet and ad copy evoking "schlemiel" persona, falsely representing that products were associated with him).

189. *See also, Playboy Enter., Inc.*, 839 F.Supp. at 1562. The trademarks were obliterated from the photographs, and then defendant Frena attempted to take credit for plaintiff's work by placing its own advertising with the photographs. Thus, plaintiff has been denied the right to public credit for the success and quality of its goods. *Roho, Inc. v. Marquis*, 902 F.2d 356, 357 (5th Cir. 1990).

190. Jacob Laufer, *Good Faith and Fair Dealing with the American Consumer*, 1987 COLUM. BUS. L. REV. 167, 173-74 (1987); states that trademarks serve three basic purposes: 1) to indicate origin; 2) to guarantee equal quality of all goods under that mark; and 3) as an embodiment of goodwill – buyers will recognize high-quality products by its trademark and the seller eventually will benefit from this recognition by increased sales. *See also*, William M.

result of high-quality work combined with a strong effort in advertising, which is all embodied in the affiliated trademark. The substitution or deletion of an advertisement creates a false mental association in the viewer's mind between the large expenditure on sponsorship and the product. Furthermore, in-stadium advertisers have an interest in being exposed over an entire season to achieve an ultimate and lasting mental association for the viewer between the advertised product or service and the sport broadcastings. This goodwill is wrongfully transferred to the virtual advertiser resulting in a corresponding loss of goodwill for the original advertiser. Section 43(a)(1)(B) of the Lanham Act was designed to protect trademark owners and competitors from precisely this type of free ride on a company's goodwill by false endorsement.

C. Copyrights and Section 43(a) of the Lanham Act

Even though the Lanham Act is a trademark statute, it has been recognized that it applies to copyrights as well if they are used in connection with any goods or services.¹⁹¹ A violation of false advertising prohibitions can arise in connection with the unauthorized use of copyrighted materials in several ways. The unauthorized editing of a creative work in connection with the original author's name can constitute a false representation that this is the author's work when in fact it is a distorted version of the author's talents. Also, the unauthorized reproduction or distribution of a copyrighted work in connection with the true owner or creator's name or mark can falsely imply that the copyright owner has agreed to this use of its work.¹⁹² The situations before us involve an overlap between copyright and protection by virtue of unfair competition; in addition to and independent of receiving copyright protection, advertising matter may be protectible under false advertising law. The scope and extent of protection of each area of law have to be distinguished accurately.¹⁹³

In *Gilliam*, the court held, notwithstanding the copyright infringement, that the editing by the defendant also misrepresented the origin of the "Monty Python" show and therefore violated section 43(a) of the Lanham Act, stating that it:

Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1970).

191. *Gilliam*, 538 F.2d at 26.

192. MCCARTHY, *supra* note 150, §§ 6:27; 27:82; 27:83.

193. *Id.* § 6:30.

impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents. . . . To deform his work is to present [an artist] to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done. Thus an allegation that a defendant has presented to the public a "garbled," distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act.¹⁹⁴

The general rule that can be derived from this landmark case is where a copyright licensee acts outside the scope of the license to make unpermitted editing resulting in a distorted travesty of the original work, use of the author's name is a false representation. In effect, a work not created by the author is falsely attributed to the author.¹⁹⁵ However, where the unauthorized alterations are relatively minor and inconsequential and lack the kind of distortion found in the "Monty Python" case, there will be no violation of section 43(a) of the Lanham Act.¹⁹⁶ For example, in one such case, the court said that the issue is whether the edited version "departed so substantially from the original work that [plaintiff] may be said not to be its author." The court distinguished the "Monty Python" case as one in which the unpermitted editing resulted in an "edited version [that] simply made no sense."

It is against this background that commentators have argued that the colorization of a motion picture without the permission of the author may be found to confuse consumers into believing that those creators approved of or created the altered version.¹⁹⁷ Courts have acknowledged that substantial alterations may violate unfair competition laws.¹⁹⁸ Nonetheless, similar to the copyright analysis, minor changes would not lead consumers to confuse products or their affiliation with a certain source. The changes need to be material in order to deceive consumers.¹⁹⁹ Otherwise, section 43(a) of the Lanham Act would be construed as a general moral rights statute, which does not enjoy federal protection.²⁰⁰ In addition, a broad interpretation of the unfair competition cause of action

194. *Gilliam*, 538 F.2d at 24-5; Winick, *supra* note 141, at 172, 174.

195. *Gilliam*, 538 F.2d at 24-5; McCARTHY, *supra* note 150, § 27:83.

196. McCARTHY, *supra* note 150, § 27:83; Choe v. Fordham Univ. Sch. of Law, 920 F. Supp. 44, 48 (S.D.N.Y. 1995); *Considine v. Penguin, U.S.A.*, 24 U.S.P.Q.2d (BNA) 1947 (S.D.N.Y. 1992).

197. Winick, *supra* note 141, at 174 n.143.

198. Under the doctrine of false designation of origin, *see* *Stevens v. Nat'l Broad. Co.*, 148 U.S.P.Q. (BNA) 755, 757 (Cal. 1966); *Schatt v. Curtis Mgmt. Group, Inc.*, 764 F.Supp. 902, 913 (S.D.N.Y. 1991).

199. *Paramount*, 724 F.Supp. at 821; Winick, *supra* note 141, at 175-76.

200. *Gilliam*, 538 F.2d at 26; McCARTHY, *supra* note 150, § 27.08[2][c][iii], [2][d].

would undermine the standards that Congress intended to set with the Copyright Act. The unfair competition claim merely gives competitors other than the copyright owner or licensee legal standing. It would undermine the copyright owner's rights in the work and its monopoly to market and exploit the works, if a competitor with some financial interest at stake is allowed to pursue these interests. Such a result causes an unacceptable tension between competitor's rights and the rights of the copyright holder.²⁰¹

D. Ambush Advertising

Section 43(a) of the Lanham Act can be triggered in cases of "ambush advertising." Although section 43(a) of the Lanham Act is primarily designed to protect consumers from confusion, it is well established that it also protects commercial interests of competitors.²⁰² Consumer confusion, however, is not the primary concern in ambush marketing cases; the courts ultimately seek to protect legitimate business interests and sponsorship agreements. Much similar to the false endorsement category, ambush advertising is a type of marketing by a company that is not an official sponsor of an event, but which centers its advertising campaign around the event to induce customers to pay attention to the advertisement and appears to be one of the official sponsors.²⁰³ The advertisement may only remind customers of the event, or it may go further to create the misleading impression that the company is an official sponsor regarding these goods or services or is affiliated with the event. In any event, a misleading impression is created that may lead the public to believe that the owner of the advertisement sponsored or otherwise approved the use of the advertisement.²⁰⁴ Through advertising and promotional campaigns, the ambushing company tries to confuse consumers and to misrepresent the official sponsorship of the event. In a broader sense, rather than such direct and intentional misrepresentation, ambush marketing refers to a company's attempt "to capitalize on the goodwill, reputation and popularity of a particular sport or sporting event by creating an association without the authorization or consent of

201. Winick, *supra* note 141, at 176.

202. MCCARTHY, *supra* note 150, § 27:25, p.27-40; *see also*, S. REP. NO. 100-515, at 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5580.

203. Davis, *supra* note 157, at 430; MCCARTHY, *supra* note 150, § 27:66, p. 27-100.

204. Mastercard Int'l, Inc. v. Sprint Communications Co., 30 U.S.P.Q.2d (BNA) 1963, 1966 (S.D.N.Y. 1994) (*following Dallas Cowboys Cheerleaders*, 604 F.2d at 205).

the necessary parties.”²⁰⁵ Another type of ambush advertising may arise when a company, which has a valid license from the event sponsor for a defined market, uses the event to also promote goods or services outside of its defined market. This, in effect, impinges on the rights of another company who has exclusive rights in the invaded market.²⁰⁶ This scenario applies to professional sports in a unique manner: All of the major sports leagues prohibit non-sponsors from using league logos, official team uniforms, hats and insignia in advertisements, but nothing prohibits them from sponsoring individual teams. In an event where the market is invaded by another non-exclusive sponsor, the company whose market has been invaded may have standing to sue for false advertising.²⁰⁷

Virtual advertising opens a whole new field of possibilities for these types of ambush advertising.²⁰⁸ Virtual advertisements appear in the background of the broadcast of the sporting event. They implicate that the copyright owner of the game, the clubs and/or the owner of the original advertisement approved the advertised products for just that location. If this is not the case, the advertisements create the misleading impression that the virtual advertiser invested large sums in sponsoring the sporting event, which the category of ambush advertising under section 43(a)(1)(B) of the Lanham Act seeks to prevent. In due course, the virtual advertiser capitalizes on the reputation and goodwill of the sporting event and gains a free-ride on the goodwill of the exclusive or official sponsors.²⁰⁹ The sponsors spend enormous amounts of money to be called the exclusive sponsor of major sporting events.²¹⁰ “By diluting the value of the corporate sponsorship, ambush marketing ultimately jeopard-

205. Lori L. Bean, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U. L. REV. 1099, 1100 (1995).

206. See limitations for official sponsorship in *Nat'l Hockey League v. Pepsi-Cola Canada, Ltd.*, 92 D.L.R. 4th 349, 369 (Brit. Columbia Sup.Ct. June 2, 1992).

207. MCCARTHY, *supra* note 150, § 27:66; *Mastercard Int'l*, 30 U.S.P.Q.2d at 1965-66.

208. Goddard, *supra* note 15, at 1 (comparing the situation with ambush advertisements in *Mastercard Int'l*, 30 U.S.P.Q.2d at 1966; John A. Nagy, *Today's Column Brought to Us By (Your Ad Here)*, GREENSBORO NEWS & REC., July 28, 1997; Wayne Walley, *SciDel's Virtual Ads Stay Underfoot*, ELECTRONIC MEDIA, Nov. 27, 1995, at A2 (acknowledging the possibility of ambush advertising). Advertisers argue that because teams control the sale of space to both kinds of advertisers, “that doesn’t happen,” see William Power, *Signs of the Times; Virtual Promotions Give Sports Advertisers a State-of-the-Art Advantage*, FORT WORTH STAR-TELEGRAM, Aug. 2, 1998, at B4; the fact is, however, that virtual advertising enables third parties to alter and therefore control the broadcast signal, allowing ambush advertising; see Snel, *supra* note 5, at 1D.

209. Bean, *supra* note 205, at 1100; Davis, *supra* note 157, at 430; Wall, *supra* note 35, at 144.

210. Davis, *supra* note 125, at 424.

dizes the financial vitality of sporting events.”²¹¹ “One popular indirect ambush technique involves buying commercial time prior to and during event broadcasts.”²¹² Virtual advertising goes beyond that by not only lessening the quality of the original advertising or the sporting event itself, but also by lessening the value of the advertisements during commercial breaks. These advertisers may seek to prevent virtual advertisers from diluting the distinction between program and commercial breaks, which may eventually generate the impression of an advertising channel. Finally, if consumers are exposed to virtual advertising, this does not necessarily mean that there are fewer commercials. In turn, sports broadcasting is abused for commercial exploitation.²¹³ Even though virtual advertising does not always depict the typical scenario, in which an advertiser seeks to create a mental association between the consumer and the non-existing sponsorship by advertising in addition to the existing sponsorship advertisements, the scenario resembles ambushing in an obtrusive manner. Not only can virtual advertisements be added to the broadcast without the knowledge of the involved parties, for example, other advertisers, virtual advertisers are also enabled to delete, or even substitute the existing banners. Such anticompetitive behavior should therefore be banned as well.

“Still, because the traditional consumer protection approach to section 43(a) [Lanham Act] is irrelevant to sponsorship and licensing contracts and because ambush marketing claims are relatively new, courts have yet to establish an appropriate analysis to deal with the protection of sponsorship agreements.”²¹⁴ Section 43(a) of the Lanham Act constitutes an appropriate and useful basis to fill the gap between contract law and copyright law in order to protect third party advertisers. After all, official sponsors and licensees who spend millions of dollars to affiliate themselves with an event and a trademark surely will not hesitate to enforce their exclusive rights.

211. Bean, *supra* note 205, at 1100-01.

212. *Id.* at 1103. In order to counter Visa’s advertisement of its wide acceptance at the Olympics, American Express bought substantial advertising time on major networks. *Id.*

213. Jim Abbott, *A Different Playing Field*, ORLANDO SENTINEL, Nov. 26, 1998, at D1.

214. Bean, *supra* note 205, at 1129.

E. Impact of Consumer Protection

Section 43(a) of the Lanham Act was designed to protect consumers as well as commercial interests from the effect of false advertising.²¹⁵ One dangerous element of virtual advertising is that it is part of a trend in which the advertiser shapes the entertainment and information content of this society.²¹⁶ The consumers' perception of reality in the shape of a live or recorded television broadcast is ultimately diluted, distorted, and cluttered.²¹⁷ Consumers are "blanketed in a continuous fog of sponsored pitches."²¹⁸ The development begins to highlight the possibility to touch content and change it.²¹⁹ To prevent this blurring of reality by engendering virtual images, the viewer could be informed of the existence of virtual advertisements. Early on, some teams and broadcasting companies ran disclaimers in their broadcasts to disclose that some advertisements viewers would see were virtual substitutes or inserts. But this practice has stopped.²²⁰ The average consumer in today's age of digitalization may even be well aware of the fact that he is constantly exposed to advertising and hence does not need such a disclaimer. On the contrary, virtual advertisement puts television on better competitive footing with the Internet, where viewers readily accept promotional messages as part of the content mix.²²¹ However, the intrusion of the television viewer's privacy deserves even more protection, because by virtue of a remote control he is not capable of choosing the setup of his television screen, like he is when surfing the World Wide Web.

The issue is if this topic is merely a question of morality or ethics²²² or if the law should step in, as it does in Europe for certain situations.²²³ Even in the liberal American advertising market, this technology can push commercialism just over the line, leading to a William Gibson or

215. *Vidal Sassoon, Inc. v. Bristol-Myers, Co.*, 661 F.2d 272, 277-78 (2d Cir. 1981); *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987); see Wegman Burns, *supra* note 205, at 833-34.

216. Paul Farhi, *Finding Versatility in the 'Virtual Ad'; Sports Broadcast Stations, Advertisers Warm Up to Billboards That Aren't Really There*, WASH. POST, Aug. 18, 1998, at C1.

217. *Virtual Advertising Comes up Roses For Sponsors Bowl Viewers to See Logos Not Really There*, FLA. TIMES-UNION, Jan. 1, 1999; *Digital Deception; TV Can Insert Ads Into Programs After They're Filmed*, FRESNO BEE, Apr. 1, 1999, at B6.

218. Elliott, *supra* note 2, at C1.

219. McEvilly, *supra* note 18, at 611.

220. Power, *supra* note 208, at B4; see also, James Hattori, et al., *Computer Technology: That's Entertainment*, 2000, available at <http://www.cnn.com/1999/SHOWBIZ/Movies/12/31/entertainment.future/> (last visited Mar. 15, 2000).

221. Wilkinson, *supra* note 20, at 36.

222. Goddard, *supra* note 15, at 1.

223. See *infra* Part VI.

George Orwell-like alteration of reality.²²⁴ For sports fans it could even affect the sanctity and credibility of the sport to have commercials spread out along the sidelines, the walls, the air, or even on the playing field.²²⁵ Virtual advertising generates more airtime for sponsors, squeezing more money out for the network.²²⁶ Retransmissions of sporting events generate even more revenue, whereas it also harms sports performers, because they are degraded to objects of commercialism.²²⁷ This scenario becomes even worse for the viewer and more offensive for the performers in cases where the virtual advertisement is animated. Such a use creates an annoying and distorting background to the action on the playing field.²²⁸ The courts will have to ask themselves if the consumer will ultimately accept a television environment in which reality cannot be distinguished from virtuality, content cannot be separated from advertising and advertising is ultimately encroached into athletics.²²⁹ As it seems, television landscape has done so. The line is drawn, where a competitor is involved and financial interests are at stake. The line is crossed in cases where the virtual advertiser substantially alters, adds, or deletes existing advertising, thereby causing harm to the competitor.

VI. VIRTUAL ADVERTISING IN EUROPE

Virtual advertising is not codified in most of the fifteen member states of the European Union. No regulations were incorporated into the 1997 Television Without Frontiers Directive that regulates the television broadcasting activities among the member states.²³⁰ However, the permanent council of the European Council for trans-national television

224. David Williams, *See You at The Virtual Ballpark*, COMMERCIAL APPEAL (Memphis, TN), Apr. 13, 1999; William Gibson, *Neuromancer*, 1984, at *51 ("Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators . . .").

225. Zelkovich, *supra* note 21, at 1.

226. Dan Caesar, *Hidden Ads are Adding up to Poor Sports*, ST. LOUIS POST-DISPATCH, Feb. 28, 2000, at C5 ("...toying with reality for a profit motive is a device that should be left to the movies and the video games, not something that is being presented as a legitimate live event. A question arises: What's next?").

227. Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong. 1823 (1975), at 817-825 (testimony of John O. Coppedge on behalf of NCAA).

228. Dougherty, *supra* note 4, at E6.

229. Denise Gellene, *The Cutting Edge; The New Age Ad: 'Virtual Billboards' May be a Boom for Businesses, But Will Viewers Take to Them?*, L.A. TIMES, Sept. 16, 1996, at D1.

230. Council Directive 89/552/EEC, as amended by Directive 97/36/EEC, art. 10, 11, 13, 1997 O.J. (L 202) 60 *et seq.* ("[Directive on the] coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities").

recommended that the exclusively responsible broadcast station should retain the ultimate control over the content of a transmission. They should ensure the compliance with articles 7, 10 and 11 of the Convention. These provisions prohibit the certain uses of advertising, such as surreptitious advertising or the use of subliminal techniques.²³¹ It also prohibits advertising during the program as opposed to the designated commercial breaks.²³² The permanent council, therefore, recommends that the presence of virtual advertising messages during the broadcast of sporting events should be indicated to the viewers at the beginning and the end of the program. Furthermore, in no case should virtual advertising messages transform the perception or the understanding of the event, or be detrimental to its visibility.²³³

The Television Directive is valid law in all member states of the European Union. Most countries incorporated the provisions verbatim into national statutory law. Some countries even added special provisions for virtual advertising. The new German Broadcast Treaty among its 16 states, which will be effective in April 2000, generally allows virtual advertising to replace existing advertisements at the venue in sport broadcasts, provided its presence is indicated to the viewer at the beginning

231. *Id.*

232. The Directive includes the following terms for television advertising:

Article 7

member states shall ensure that broadcast stations under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rights holders.

Article 10

Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means. Isolated advertising and teleshopping spots shall remain the exception. Advertising and teleshopping shall not use subliminal techniques. Surreptitious advertising and teleshopping shall be prohibited.

Article 11

1. Advertising and teleshopping spots shall be inserted between programmes. Provided the conditions set out in paragraphs 2 to 5 are fulfilled, advertising and teleshopping spots may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced.

2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances containing intervals, advertising and teleshopping spots shall only be inserted between the parts or in the intervals. . . .

Article 13

All forms of television advertising and teleshopping for cigarettes and other tobacco products shall be prohibited.

233. Recommendation by the Permanent Committee of the European Council for Television Without Frontiers, 12th Session, March 1997.

and the end of the respective program. The United Kingdom permits the use of electronic imaging systems under similar prerequisites.²³⁴ In addition, the United Kingdom provisions prohibit virtual advertising if the use results in a discernible degradation of picture quality and restricts the licensee's right to insert virtual advertising while providing him with a right to refuse to carry virtual advertising. Spain goes even further by requiring the consent of all parties involved for the substitution of existing advertisements through virtual advertising.

The Netherlands, Italy, France, Greece and Denmark did not adopt any legislation on virtual advertisement. Therefore, the respective statutory or common law rules on telecommunication, competition, and advertising are applicable. While the directive requires these countries to adopt the minimum standard as it is set forth in articles 7, 10, 11 *et seq.*, the interpretation of the existing law eventually exceeds these standards. This has to be kept in mind for any sports broadcast to and from these countries.²³⁵

In general, the European countries take a more restrictive approach towards virtual advertising, yet they realize its advantages. Whereas, for the European Soccer community it is a useful means to render the use of existing advertisements more efficient, the Latin American countries exercise a much more liberal approach. Consequently, the FIFA has adopted fairly restrictive regulations for the broadcasts of its members' games.²³⁶ Notwithstanding, the use of virtual advertising is crucial for the survival of the Formula One in Europe in light of the ban on tobacco advertising.²³⁷ However, the limitations are fairly strict; generally, only physically existing advertisements can be replaced by virtual advertise-

234. Code of Programme Sponsorship, which is published by the Independent Television Commission (ITC). Rule 13.5 of this Code requires compliance with the ITC Sponsorship Guidance Note on "Virtual Advertising."

235. Norway, as a non-member of the EU, also has no specific regulation on virtual advertising. For television advertising during sporting events in general, it adopted an even more restrictive approach under the 1992 Broadcasting Act by allowing advertising in sports broadcasts only in 'natural breaks' or the designated breaks, such as half-times. Virtual advertising may well be not allowed at all. However, this restriction only applies to Norwegian broadcast stations and broadcasts in Norway only, since Norway is not a member of the EU. The broadcast is also targeted at EU member states would lead to the application of the above-mentioned rules.

236. FIFA Regulations for the Use of Virtual Advertising § 6, available at http://www.fifa2.com/fifa/handbook/Va/downloads/VirtualRegs_e.txt (last visited Mar. 15, 2000); However, it is not necessary to point out the existence of virtual advertising to the viewers.

237. Article 13 Television Without Frontiers Directive (1999), available at <http://www.nomos.de/nomos/zeitschr/zum/pdf/zum1099t.pdf> (last visited Mar. 15, 2000).; However, Formula One was able to negotiate an extension until 2006 for the ban to come into full effect, because it depended on tobacco advertising more than any other industry.

ments. Under no circumstances is a broadcast station entitled to insert or substitute virtual advertisements without the consent of the rights holders.²³⁸ The underlying object for these restrictions is the principle of separation between program and advertising, which furnished the heated legal discussion.²³⁹ After all, the present standard for the use of virtual advertising in Europe is still far from being uniform.

VII. CONCLUSION

The complex legal problems that arise out of the unauthorized use of virtual advertising could ideally be avoided by including explicit terms in the marketing agreements between the leagues, the individual clubs, the owners of the venue, sports marketing and broadcasting companies and advertisers. Such terms should proscribe the insertion, substitution, and/or deletion of existing virtual and non-virtual advertisements without the consent of the parties involved. Under the compulsory license program, an explicit agreement on advertising is replaced by the specific rules of sections 111(c)(3), 119(a)(4), and 122(e) of the Copyright Act, which prohibit any unauthorized, willful alteration of the content and the commercial advertising of the original transmission. Even though these provisions do not explicitly include virtual advertising, the legislative intent and the history indicate their application. If no agreement exists and sections 111, 119, and 122 of the Copyright Act do not apply, common law offers a promising remedy.

Having in mind the specific rules for the alteration of secondary transmissions, sections 501, 106(2), and 201(a)(6) of the Copyright Act are applicable concurrently. Although the placement of advertisements, the unique selection of camera angles, lighting, and other decisions by the director of a sports broadcast do not require substantial amounts of creativity or originality, they do meet the minimum standards of creativity required to constitute an audiovisual work of authorship. For this reason, anyone who materially alters this unique selection of images in a sports broadcast transmission without or in excess of a valid license is preparing an unauthorized derivative work and is therefore a copyright infringer. The scenario applies to substantial alterations of the unique selection of advertisements in a sports broadcast by inserting virtual ad-

238. It is unclear, however, who owns the rights – the broadcasting company, the owner or tenant of the in-stadium advertisement, or the holder of the television rights.

239. This principle is based on Art. 10, Section 1 Television Without Frontiers Directive; Karl-Heinz Ladeur, *Neue Werbeformen und der Grundsatz der Trennung von Werbung und Programm*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 672, 1999, available at <http://www.nomos.de/nomos/zeitschr/zum/pdf/zum1099t.pdf> (last visited Mar. 15, 2000).

vertisements. If such alterations were allowed, the original copyright owner would lose control over his or her work and its distribution, taking away the owner's exclusivity provided by section 106 of the Copyright Act. This result is consistent with Congress' underlying intent to protect the copyright owner from intrusions that violate his or her exclusive right to commercially exploit the work and receive an equivalent benefit for the creative endeavor. Part of the constitutional guarantee "to promote the progress of science and useful arts"²⁴⁰ is to guarantee the author the right to exploit his achievement financially, by using advertising and especially if advertising is part of the overall impression. If the author would not get a financial return for the work, he or she would be deprived of an incentive to create works.²⁴¹ Even though the accomplishment to insert an advertisement and select the camera angles and images is not substantial, the adjacent financial interests at stake play an overwhelmingly important role in the copyright of sports broadcasting. The Copyright Act protects these interests on a case-by-case basis, insofar as some of the original expression is taken by another person, depending on the impact of the alteration on the overall impression of the work.

In summary, the explicit statutory scheme for compulsory licenses bars any alteration of the original broadcast, including virtual advertising. In the cases that do not fall within this scheme, copyright protection should only extend to alterations by virtual advertising to that part of the broadcast that meets the requirement of a modicum of intellectual labor involved in a sport broadcast. An example of this would be if the inserted or substituted advertisement distorts the overall impression or the individual arrangement of advertising in the background of a sports broadcast.

In cases where this alteration affects the overall impression of the sports broadcast by changing or even diluting the entire sports performance, there may even be an unfair competition claim under section 43(a)(1)(B) of the Lanham Act. The analysis of this claim for "false advertising" focuses even more on consumer protection, while also protecting competitors. This cause of action is, therefore, not only available for the copyright holder, but also for competing advertisers. Plaintiffs can allege "false endorsement" or "ambush advertising" under the general

240. U.S. CONST., art. I, § 8, cl. 8.

241. See *Brown*, No. 98-20736 2000 WL 48992 at *5, n.4 ("... major objective of the Copyright Act to support and encourage artistic and scientific endeavors"); *Zacchini*, 433 U.S. at 576.

unfair competition. In these scenarios, the public is misled by the misrepresentation of the virtual advertiser, who creates the false mental association in the viewers mind that he is officially authorized to advertise in the designated spot. In turn, the authorized advertiser suffers direct financial damage, because he did not receive the contractual benefit of television exposure that he paid for, and/or the goodwill is diminished and conferred to the virtual advertiser. Both situations equally affect fair competition if the alteration is substantial. The seriousness of harm is based on the effect on the consumer and on competing advertisers. In the worst case scenario, the technology can mislead the public, defame the persons depicted, deprive the original artists of control over (and compensation for) subsequent changes to their work, and destroy the delicate credibility and objectivity of all visual images.²⁴² Generally, unauthorized substitution using virtual advertising implicates unfair market behavior to the disadvantage of the original owner of the advertising. Section 43(a)(1)(B) of the Lanham Act was designed to prevent such behavior in the advertising market.

Transmitters should be aware of liability under U.S. common law especially for broadcasts of U.S. sporting events in Europe.²⁴³ Virtual advertisers, who use the technology to insert advertisements into broadcasts from other countries, are subject to liability under the Lanham Act where the plaintiff has standing, is able to prove all of the section 43(a) of the Lanham Act elements, and shows an impact on U.S. commerce.²⁴⁴ On the other hand and in light of the increasing number of international sporting events, broadcast stations, the drafters of marketing and broadcasting agreements and courts should be aware of the strict standards in Europe. Many of these countries prohibit the use of virtual advertising on the playing field during the game action. Broadcast stations are often required to give notice to the viewer of the use of virtual advertisements. The underlying policy seeks to protect the integrity of

242. Raphael Winick, *supra* note 141, at 155.

243. Steele et al. v. Bulova Watch Co., 344 U.S. 280, 286 (1952) ("Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States"). The United States government has the power to enforce the Lanham Act beyond the territorial limits of the United States under the following conditions: 1) the acts impact U.S. commerce; 2) the defendant is a citizen of the U.S.; and 3) "application of the act would not interfere with the laws of a foreign nation."

244. Gordon Breach Sci. Publishers v. Am. Inst. of Physics, 905 F.Supp. 169, 181 (S.D.N.Y. 1995); Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 503 (9th Cir. 1991); McEvilly, *supra* note 18, at 626; *see also*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 641 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

the sport and the consumer from exposure to a stream of undetectable alterations of reality by blurring the line between program and advertising.

The American advertising environment does not meet these high standards of consumer protection in Europe. However, the law provides sufficient remedy to protect the rights holders. Beyond the point of substantial alterations by virtual advertising, the existing statutes and principles of copyright law and the law of unfair competition can effectively protect and balance the competing needs of copyright owners, advertisers, broadcast stations, players, and the public. Up to this point, only a defined set of contractual terms or specific legislation for all sorts of digital alterations in television transmissions can ensure that the conflicting interests are fairly protected in the digital age.

INTERNATIONAL SPORTS LAW PERSPECTIVE

CITIUS, ALTIUS, FORTIUS? A STUDY OF CRIMINAL VIOLENCE IN SPORT

JACK ANDERSON*

"Nothing should be punished by the law that does not lie beyond the limits of toleration."

—Devlin, *The Enforcement of Morals*

I. INTRODUCTION

This article intends to examine what role, if any, the criminal law should have in regulating and sanctioning violent behaviour "beyond the touchline."¹ The principal focus will be on the crime of assault. Generally, that which is done by consent is no assault at all, though this is not a license to inflict serious harm. However, what role does consent play in modern contact sports where physical aggression of a kind that would otherwise be deemed illegal, is permitted? In short, contact sports, or what were once called "manly diversions," have long received an exemption from the lower thresholds of consent. Accordingly, this article will address three broad issues; the origins of this "sporting" exemption, its justification under criminal legal theory and its actual application. In discussing these objectives, focus will be on the Anglo-Irish experience of this area of the law. Ultimately, conclusions will be drawn as to the relationship between violence, sport and the criminal law not only as to the effects of criminal violence in sport but also as to its causes.

II. MANLY DIVERSION: *R. v. CONEY*

It is suggested that an ideal starting point in contemporary legal attitudes to violence in sport is provided by the infamous prize-fighting case of *R. v. Coney*.² The judgments in this case contain many insights into

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1. The English barrister Edward Grayson, now President of the British Association of Sport and the Law, first used the phrase.

2. *The Queen v. Coney*, 8 Q.B. 534 (1882).

the birth of modern criminal law's approach to sporting violence. In brief, the judgments suggest that even sporting activities as manifestly violent as gloved boxing, may be permitted as "manly diversions," so long as public order and safety is not threatened.³ These policy considerations apart, *Coney* is also an enlightening initial reference on the controversial question of so-called "sporting consent." The judgments in *Coney* may provide an answer as to why levels of force that would normally be criminal assaults are deemed lawful once inflicted in the course of a game.

The facts of the case are straightforward. On June 16, 1881, at the close of the Ascot races, two men, Mitchell and Burke, were seen fighting each other in a ring, formed by ropes surrounded by posts, in the presence of a large crowd.⁴ The combatants were assisted by their "seconds" Parker and Symonds.⁵ In addition, three named prisoners, Coney, Gilliam and Tully and five other persons were seen amongst the crowd.⁶ They were also charged in an indictment containing a number of counts for unlawful assaults, riot and rout.⁷ At trial, all counts except the seventh and eighth were given up by the prosecution.⁸ The seventh count charged all prisoners, except Burke, with a common assault upon him.⁹ The eighth count charged all prisoners, except Mitchell, with a common assault upon him.¹⁰

In defence of Coney and the other spectators, two principal arguments were forwarded. Firstly, that it was questionable whether the combatants were guilty of assaults upon each other and secondly, that it was incorrect to state that the defendants were aiding and abetting the fight given that they took no active part in the fight or its management.¹¹ The initial argument centred on the proposition that the offence of aiding and abetting could only have been committed where it was a criminal activity that was being encouraged by the party charged.¹² It followed that in order for an assault to have been committed, it was necessary that the act had been executed without the consent of the alleged victim.¹³

3. *Id.* at 539-40.

4. *Id.* at 535.

5. *Id.*

6. *Id.*

7. *Coney*, 8 Q.B. at 534-35.

8. *Id.*

9. *Id.* at 536.

10. *Id.*

11. *Id.* at 539-40.

12. *Coney*, 8 Q.B. at 539.

13. *Id.*

Thus, counsel for the defendants argued that since Burke and Mitchell consented to their fight, an assault could not have occurred.¹⁴

As regards the second defence, witnesses supplied evidence that the named prisoners did not participate in any way in the fight, its organisation or in any of the betting activity that surrounded the occasion.¹⁵ In fact, one witness said that the crowd was so tightly packed that it would not have been possible for Coney to push his way out!¹⁶ It was claimed that the prisoners' attendance at the fight was merely passive in nature.¹⁷

At trial, the chairman directed the jury that prizefights are illegal and all persons who go to such an event to see the combatants strike each other, and who are present when they do so, are guilty in law of an assault on the grounds of aiding and abetting.¹⁸ In this, the chairman added the words of Justice Littledale in *R. v. Murphy* to his direction "[i]f they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."¹⁹

The jury found that Burke and Mitchell were clearly guilty of assault on each other as combatants, as were Parker and Symonds, who directly aided the management of the fight.²⁰ The jury also found that Coney, Gilliam and Tully were guilty of assault, but only in consequence of the chairman's direction of law.²¹ The jury could not hold, as a matter of fact, that Coney and the others were aiding and abetting.²²

The chairman asked the opinion of the Court of Criminal Appeal as to whether his direction to the jury on this matter was correct.²³ Eleven judgments were handed down and on a clear eight to three majority the conviction of the spectators was quashed.²⁴ The Court was of the opinion that mere voluntary presence at such an event could not be translated into aiding and abetting a criminal activity.²⁵ Nevertheless, in this instance, it is not so much the debate on active, as opposed to passive presence, at a criminal event that is important. It is the nature of this particular criminal event that interests us, *i.e.*, the sport of prize fighting.

14. *Id.* at 538-39.

15. *Id.* at 539.

16. *Id.* at 535.

17. *Coney*, 8 Q.B. at 535.

18. *Id.* at 537-38.

19. *Id.* at 537 (citing *R. v. Murphy*, 172 Eng. Rep. 1164, 1165 (1833)).

20. *Id.* at 536 (holding all duly sentenced to six weeks imprisonment with hard labour).

21. *Id.*

22. *Coney*, 8 Q.B. at 536.

23. *Id.*

24. *Id.*

25. *Id.* at 534.

To this end, it is well to note the reasons why the court was unanimous in holding that prize fighting was illegal and what these, essentially policy, concerns can contribute to the modern judicial view of aggressive sporting activities.

Justice Cave, after reviewing relevant authorities such as *Matthew v. Ollerton*,²⁶ *R. v. Perkins*²⁷ and *R. v. Lewis*²⁸ was of the opinion that in agreeing to fight in the fashion that they did, Burke and Mitchell were clearly guilty of assault.²⁹ He continued,

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve and assault; nor does boxing with gloves in the ordinary way.. . .³⁰

What Justice Cave meant by boxing in the "ordinary" way is open to question, though presumably he intended it to encapsulate sparring as regulated by the Queensbury rules. In addition to this brief review of "sporting consent," Justice Cave also dismissed the trial judge's direction to the jury with alacrity, observing, "[w]here presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, for the jury."³¹ In affirmation, Justice Cave referred to authority such as *R. v. Atkinson*,³² *R. v. Borthwick*,³³ and *R. v. Perkins*³⁴ where similar issues were considered and in particular to two "duelling" cases of *R. v. Young*³⁵ and *R. v. Cuddy*.³⁶

26. 90 Eng. Rep. 438 (1724).

27. 172 Eng. Rep. 814 (1831).

28. 174 Eng. Rep. 874 (1844).

29. *Coney*, 8 Q.B. at 539.

30. *Id.*

31. *Id.* at 540.

32. 11 Cox C.C. 330, 333 (1869) (indicting persons for serious rioting; held that mere presence among the rioters did not render the person liable).

33. 99 Eng. Rep. 136 (1779).

34. 172 Eng. Rep. 814 (1831) (finding Perkins guilty of assault as a combatant in a prize-fight, as were certain spectators directly involved in the management of the fight, one who acted as Perkins' second, one who collected the money *i.e.*, a bookmaker, and one who kept the ring clear).

35. 10 Cox C.C. 371 (1871).

36. 174 Eng. Rep. 779 (1843).

In the particular "duelling" cases referred to above, *Young* concerned the indictment of the prisoners for the murder of Mr. Mirifin, who was killed in a duel by a Mr. Elliot.³⁷ *Young* assisted in the preparation of the duel and was deemed a principal of the second degree.³⁸ In *Cuddy*, the prisoner was charged with aiding and abetting a Mr. Munro in the murder of a Colonel Fawcett, whom Munro had shot in a duel.³⁹ Williams, in directing the jury stated "[w]hen two persons go out to fight a deliberate duel, and death ensues, all persons who are present on that occasion, encouraging or promoting that death, will be guilty of abetting the principal offender."⁴⁰ Applying this "active participation" test, Cave distinguished *Murphy* and held that the present conviction ought not to stand.⁴¹

Stephen, Lopes, North, Huddleston, and Denam, agreed with Cave that the trial judge's reliance on *Murphy* was incorrect and that mere presence at a prize fight did not automatically sustain a charge of aiding and abetting.⁴² Similar to Cave, they distinguished between deliberate presence at the event and mere casual attendance.⁴³ However, unlike Cave, these judgments did not consider, at any great length, the issue of the combatant's consent to the fight. On the majority side, this issue seems to have been left to Cave and Hawkins.

Hawkins eloquently reviewed the status of consent in criminal assault [a]s a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all. . . .⁴⁴

Hawkins continued with reference to *R. v. Guthrie*⁴⁵ and *R. v. Billingham*⁴⁶ that "it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution."⁴⁷

37. *Coney*, 8 Q.B. at 541.

38. *Id.*

39. *Id.* at 542.

40. *Id.*

41. *Id.* at 543.

42. *Coney*, 8 Q.B. at 549-50, 552, 557-58, 561, 567.

43. *Id.*

44. *Id.* at 553.

45. 11 Cox C.C. 522 (1870).

46. 172 Eng. Rep. 106 (1825).

47. *Coney*, 8 Q.B. at 553.

Again, applying the "moralistic" test that a man may compromise his own civil rights but not the public interest, Hawkins was clear:

that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage.⁴⁸

At first instance, it would seem to supporters of the sports of boxing and martial arts that such a holding renders their sports illegal. Indeed, this feeling is exacerbated by Hawkins's immediate reference to *R. v. Ward*⁴⁹ as support for his proposition that every fight containing an element of a violent trade of blows is illegal.⁵⁰ In the stated case, "the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted."⁵¹

Hawkins did admit however, "[t]he cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury or to rouse angry passions in either, do not in the least militate against the view I have expressed."⁵² Thus, it would seem that boxing as practiced under the Queensbury rules, martial arts, and indeed contact sports in general, were exceptions to this rule on the grounds that they are neither breaches of the peace, nor are they calculated to be productive thereof. In short, such sports can be deemed socially acceptable on the grounds that they are not designed to produce mischief.

Nevertheless, even under the colour of a friendly encounter, where the parties really have as their object the intention to beat each other until one of them is exhausted or subdued by that force, and so engage in a conflict likely to end in breach of the peace, each is liable to be prosecuted for assault.⁵³ According to Hawkins, it is a matter of fact for the jury to decide whether the circumstances of the fight are socially acceptable or not.⁵⁴

48. *Id.* at 553.

49. 12 Cox C.C. 123 (1872).

50. *Coney*, 8 Q.B. at 554.

51. *Id.*

52. *Id.*

53. *R. v. Orton* 14 Cox C.C. 226, 227 (1878) (holding that it appeared to be an organised boxing match, but the severity and intensity of the punishment inflicted was such as to go beyond that which would be expected in a gloved boxing match of fixed duration).

54. *Coney*, 8 Q.B. at 558.

On this dubious thread of policy does the legality of boxing hang. The legality of this sport is defined in entirely negative terms, i.e., it is not prize fighting which is illegal because it disturbs the peace and may incite rioting and social disorder. As Papworth argues:

it does not seem possible to distinguish [as Hawkins attempted to do] between those fights which are assaults and thus deserving of the sanction of the criminal law and those which are not assaults on the basis of the intention of the parties, when in truth, both prize fighters and boxers seek the same end; '*to hurt the opponent more than he is hurt himself*.'⁵⁵

Papworth is forced to conclude that "the apparent immunity of boxing from the sanction of the law defies rational explanation,"⁵⁶ and that all one can surmise is that boxing remains "*outside the ordinary law of violence because society chooses to tolerate it*."⁵⁷

In conclusion in *Coney* the dissenting judgments, agreed with the view that in no way could one consent to that which is clearly an illegal act and contributes to a disturbance of the peace, thereby threatening public order and safety.⁵⁸ As Matthew stated simply on the matter, "[t]here is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous."⁵⁹ Moreover, it is precisely on these grounds of public protection that Chief Justice Lord Coleridge, Pollock, and Mathew took a firmer line on the prisoners' attendance at the fight. The learned judges took the view that the best way to rid society of this vicious practice was to punish those who sustain it with their support.⁶⁰ As Chief Justice Lord Coleridge remarked:

[i]n such a case as this the spectators really make the fight; without them, and in the absence of any one to look on and encourage, no two men, having no cause of personal quarrel, would meet together in solitude to knock one another about for an hour

55. Neil Papworth, *Boxing and Prize Fighting: The Indistinguishable Distinguished?*, 2 SPORT & L. J. 5, 8 (1994) (citing *R. v. Brown*, 2 WKLY. L. REP. 556, 592 (1993)).

56. *Id.*

57. *Id.* (citing *Brown*, 2 WKLY. L. REP. at 592). For a select bibliography on the legality of boxing see: Edward Grayson, *Boxing Clever*, 142 N.L.J. 48 (1992); Steve Greenfield & Guy Osborn, *A Gauntlet for the Glove: The Challenge to English Boxing Contracts*, 6 MARQ. SPORTS L.J. 153 (1995); Kelly Howard, *Regulating the Sport of Boxing - Congress Throws the First Punch*, 7 SETON HALL J. SPORT L. 103 (1997); Neil Papworth, *Parliament and the Boxing Bill*, 4 SPORT & L.J. 24 (1996); Mike Seabrooke, *Going to Hell in Your Own Way*, 142 N.L.J. 438 (1992).

58. *Coney*, 8 Q.B. at 534.

59. *Id.* at 547.

60. *Id.* at 534.

or two. The brutalizing effects of prize-fights are chiefly due to the crowd who resort to them. . .⁶¹

To this end, fellow dissenter, Mathew, noted:

a prize-fight, which is an assault, and therefore contrary to the law, takes place in public, in order that it may be witnessed by spectators. The spectators by their presence lend themselves to the purpose of the combatants, and countenance and encourage them in a violation of the law. They therefore aid and abet.⁶²

It must be noted, though, that Manisty representing the majority took great care to dismiss this view:

[i]t is said that if the ruling of the chairman is not upheld a great impetus will be given to prize fighting. I do not share in that apprehension. It is well settled law that every person who by his presence or otherwise encourages a fight, be it prize or an ordinary fight, is guilty of a criminal offence, that is to say, of an assault or manslaughter, as the case may be, but it is for the jury in each particular case to say as a matter of fact whether the accused did by his presence or otherwise encourage the combatants to fight . . . Suppose that the fight in question had resulted in the death of one of the combatants, then, if the direction given to the jury was right, every person who was in the crowd was in point of law guilty of manslaughter . . . I cannot believe such is the law of England.⁶³

The question that now needs to be addressed is whether or not that proposition and the principles underlying it, namely that there is recognition of a limited level of sporting consent, is the current law of England.

III. THE PROBLEM OF "SPORTING" CONSENT

The essence of *Coney* is succinctly stated by McCutcheon "[a]pplications of force which would normally be criminal assaults are lawful when inflicted in the course of a game. The traditional explanation has been that the law recognises the consent of the participants as providing a defence."⁶⁴ To this effect, *Coney* reaffirmed earlier decisions such as *R. v. Bradshaw*⁶⁵ and *R. v. Moore*⁶⁶ as regards the legal limits to which sports participants can consent to bodily harm within the course of

61. *Id.* at 569.

62. *Id.* at 548.

63. *Coney*, 8 Q.B. at 562-63.

64. Paul McCutcheon, *Sports Violence, Consent and the Criminal Law*, 45 N. IR. LEGAL Q. 267, 267 (1994).

65. 14 Cox C.C. 83 (1878).

66. 14 T.L.R. 229 (1898).

their sport. (In fact, it could be argued that Coney extended the principle first enunciated in these cases by including non-fatal violence.) In the former case, the accused during a football game struck an opponent in the stomach with his knee, resulting in the eventual death of the opponent.⁶⁷ Bramwell's seminal direction to the jury is well-held as the source of criminal law's involvement in sport, much of which merits lengthy quotation:

[I]f a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of a contrary opinion you will acquit him.⁶⁸

Given the evidence, the jury acquitted the footballer on the manslaughter charge, after representation had been given by an umpire that no unfair play had occurred.⁶⁹ Twenty years later, in *Moore*, a similar factual scenario led to a guilty verdict.⁷⁰ Resonant of Bramwell, Hawkins directed the jury that "[n]o one had a right to use force which was likely to injure another, and if he did use such force and death resulted, the crime of manslaughter had been committed."⁷¹

In the above cases, Bramwell and Hawkins were faced with three questions.⁷² Firstly, did the victim consent to the act?⁷³ Secondly, was the act of a nature that the victim could effectively consent to it?⁷⁴ And thirdly, what threshold of consent should apply herein?⁷⁵ Both lordships were of the view that, in sport, the victim would have consented to whatever the rules permitted and that it was reasonable to suggest, given

67. *Bradshaw*, 14 Cox C.C. at 84.

68. *Id.* at 85.

69. *Id.* at 84.

70. *Moore*, 14 T.L.R. at 230.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Moore*, 14 T.L.R. at 229.

the formulated rules of the recognised sport of football, that these rules were of a nature that they could be effectively consented to.⁷⁶

Thirdly, while evidence that the accused was acting within the rules would be of obvious benefit to the accused,⁷⁷ it was clear from the judgments, Bramwell in particular, that it was immaterial whether the accused broke the rules or not if the accused "intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not,"⁷⁸ or, as Hawkins suggested, "[n]o one had a right to use force which was likely to injure another."⁷⁹

Therefore, it is submitted that the above cases imply that the criminal law's intrusion into the sporting sphere is founded on the basis that deliberate and/or reckless tackling causing injury, particularly in breach of the playing laws of that particular game, creates a *prima facie* offence. It seems, from the above, that the threshold of "sporting consent" in assault is breached where intention or knowledge that the act was likely to cause serious injury is proven.

This basic proposition has been implicitly reaffirmed in more recent cases, beginning with the Court of Appeal decision of *R. v. Donovan*,⁸⁰ where it was stated firmly, "[i]f an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime."⁸¹ This view was reiterated in the *Attorney General's Reference (No. 6 of 1980)*.⁸² In this case, two youths of 18 and 17 decided to settle an argument by a fistfight.⁸³ One of them sustained a bleeding nose and bruises to his face and it was held that the other was guilty of assault occasioning bodily harm as:

it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason

76. It follows that, in the unlikely instance of a recognized game having rules that permitted an unacceptably dangerous act, a court could hold that the act was unlawful, notwithstanding the victim's consent. See generally JOHN SMITH, SMITH AND HOGAN'S CRIMINAL LAW, 410-11 (9th ed., 1999).

77. In later judgments, it is also acknowledged that players consent to actions, and can be reasonably held to act, outside the rules of the game but within the "spirit" of the game. The spirit of the game is taken to include the incidental norms of play *i.e.*, incidents though strictly prohibited by the rules, regularly occur in the ordinary course of play.

78. *Bradshaw*, 14 Cox C.C. at 85.

79. *Moore*, 14 T.L.R. at 230.

80. 2 K.B. 498 (C.A., 1934).

81. *Id.* at 507.

82. 2 All E.R. 1057 (1981).

83. *Id.* at 1058

... [I]t is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.⁸⁴

In this, the court added the reminder, "nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports," (this being justified in the public interest).⁸⁵

This exception is not confined to organised games. There is also what one could call a "horseplay" exception, in that consent by boys to such activities may be a defence to a charge of inflicting serious bodily harm if there is no intention to cause injury, as *per R. v. Jones*.⁸⁶ It is suggested that there is an element of recognition in this case that schoolboys have always behaved in such fashion and probably always will.⁸⁷ In fact, a genuine belief of consent in these circumstances, even if unreasonably held, may negative recklessness, as *per R. v. Aitken*.⁸⁸ In this case, members of the RAF set fire to each other's clothes as part of over-exuberant celebrations.⁸⁹ The injuring parties, who were initially court-martialed, were held to have genuinely believed that the victim, who suffered severe burns, had consented to the acts.⁹⁰ Presumably, similar reasoning would apply to unorganised games such as "tackle."

IV. NO LICENSE FOR THUGGERY: RECENT ENGLISH CASE LAW

In any event, contemporary English case law is no less insistent that the inherent violence of sport cannot go unhindered. Chief Justice Lord Lane observed in *R. v. Lloyd*, that while "forceful contact was allowed by the rules [of rugby union and *semble* the Law] ... [t]he game was not,

84. *Id.* at 1059. SMITH, *supra* note 76, at 410 (questioning this definition and, in particular, they have difficulty with the use of "or should cause" and "and/or." They suggest that these words imply that the act done to the other with consent is an assault, though it is not intended to cause harm, if in fact it does. Smith and Hogan refer to *Case and Comment: Manslaughter*, 42 CRIM. L. REV. 570, 571 (1995) where both the defendant and the plaintiff engaged in vigorous sexual activity. The victim consented and did so lawfully. During the activity, a ring that the accused was wearing injured the victim and resulted in her death. The defendant was charged with manslaughter by an unlawful and dangerous act. Judge J was of the opinion that it would be incorrect to treat as criminal, activity which would otherwise amount to an assault merely because an injury was caused).

85. *Id.*

86. *Case and Comment: Inflicting Grievous Bodily Harm*, 34 CRIM. L. REV. 513 (1987).

87. *Id.*

88. 1 WKLY. L. REP. 1006 (1992).

89. *Id.*

90. *Id.* at 1018.

however, a licence for thuggery.”⁹¹ Admittedly, the consistent sentiment expressed by Lord Lane markedly contrasts to the more sporadic precedents of the earlier criminal courts. Indeed, it wasn’t until the late 1970s that a burgeoning of this type of prosecution was witnessed on these islands.

In fact, *R. v. Billingham*⁹² was the first successful prosecution of a rugby footballer for assault occasioning actual bodily harm for incidents occurring on the field of play.⁹³ This case centred on an amateur rugby game in South Wales where, during the course of a rather rugged encounter, the accused broke his opponent’s leg.⁹⁴ The victim was a prison officer whose principals were not content to lose his services in such a manner without an attempt to let similar offenders realise the potential consequences of such behaviour.⁹⁵ Therefore, by the time David Bishop, a Welsh international player, punched an opponent on the ground, away from the ball, during a club rugby match in South Wales in 1986, an incident which, because of the intensity of the violence therein attracted a considerable amount of publicity, neither he nor his club could claim that they were unaware of the legal consequences.⁹⁶ In the case itself, Mr. Bishop pleaded guilty to common assault for the “off the ball” incident and was duly convicted and sentenced to one month imprisonment, varied to one of twelve months suspended by the Court of Appeal.⁹⁷

Despite the notoriety of the above case involving an internationally renowned player, this ignorance of the penal repercussions of the criminal law remained and a litany of sports prosecutions arising from on-field violence littered the jurisdiction in the 1980s. Rugby Union, in particular, contributed to this increase and included *R. v. Gingell*, where a conviction for inflicting grievous bodily harm was successful, leading to a sentence of six months, which was overturned and reduced to two months imprisonment.⁹⁸ Furthermore, in 1986, in *R. v. Johnson*, the accused bit the ear off of an opponent in a police rugby union match and was, quite rightly, charged with the infliction of grievous bodily harm with intent contrary to §18 of the Offences Against the Person Act,

91. *Case and Comment: Violence*, 36 CRIM. L. REV. 513, 514 (1989).

92. *Case and Comment: Assault*, 22 CRIM. L. REV. 553 (1978).

93. *Id.* at 553.

94. *Id.*

95. *Id.*

96. *Id.*

97. John Goodbody, *Rugby International Jailed for Punch*, TIMES (London), Sep. 2, 1986.

98. *Case and Comment: Sentence*, 25 CRIM. L. REV. 661 (1980).

1861.⁹⁹ Johnson was subsequently convicted and sentenced to six months custodial imprisonment, confirmed on appeal.¹⁰⁰

These prosecutions were not confined to the rugby field, and in 1988, in Swindon Magistrates' Court the accused, Chris Kamara, a professional soccer player, broke the jaw of a fellow professional soccer player after a match. Subsequently, in *R. v. Kamara*,¹⁰¹ Mr. Kamara pleaded guilty to inflicting grievous bodily harm contrary to §20 of the Offences Against the Person Act, 1861, and was fined a total of £1500, including compensation and costs.¹⁰² It is interesting to note that on February 6, 1997, the *Irish Times* reported that Bradford had decided to initiate legal action against Huddersfield defender Kevin Gray, following his potentially career ending tackle on Bradford's record signing of the time, Gordon Watson.¹⁰³ The criminal proceedings against Gray were instigated after a meeting, on that date, between Bradford chairman Geoffrey Richmond, club directors and manager Chris Kamara, whose familiarity with the criminal courts was no doubt invaluable in the circumstances.¹⁰⁴

1988 had also seen, in Wood Green Crown Court, the case of *R. v. Birkin*.¹⁰⁵ In this instance, the accused had run after and struck an opponent who had 'late' tackled him.¹⁰⁶ The accused duly pleaded guilty to assault occasioning actual bodily harm and was sentenced to eight months imprisonment, reduced on appeal to six months.¹⁰⁷ Similar prosecutions for what could be dubbed 'assault in retaliation' can be found in *R. v. Davies*,¹⁰⁸ though there seems to be a thin line between such a conviction and an acquittal based on the loosely defined defence of 'accident', successfully pleaded in *R. v. Rees*.¹⁰⁹ It is interesting to note that in the later cases the resulting injury had tragic, fatal consequences.

Arguably however, the most specific and significant contribution to the position of sport *viz* the criminal law, in recent times, can be found in

99. *PC Who Bit Player Loses Appeal*, TIMES (London), Oct. 15, 1986.

100. *Id.*

101. John Goodbody, *Kamara Fined £ 1200 in Pitch Assault Test Case*, TIMES (London), Apr. 15, 1988.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Case and Comment: Assault Occasioning Actual Bodily Harm*, 35 CRIM L. REV. 854 (1988).

106. *Id.*

107. *Id.* at 855.

108. *Case and Comment: Assault*, 38 CRIM L. REV. 70 (1991).

109. Edward Grayson, *Sport and the Law*, in ALL E.R. ANN. REV. 362, 365 (1992).

R. v. Brown.¹¹⁰ In *Brown*, where the law on consent was fully reviewed, the House of Lords confirmed that the existing law on the area indicated that, whereas consent negatives liability for minor harm, the victim's consent does not provide a defence where actual bodily harm is intentionally or recklessly caused, unless the case falls within a range of special "socially acceptable" categories, including lawful sports and games.¹¹¹ In the latter context, Lord Mustill's dissenting speech is most authoritative and well worth citing at length, his Lordship taking the view that:

Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a mid-point between fighting, where the participant knows that his opponent will try to harm him, and the milder sports where there is at most an acknowledgement that someone may be accidentally hurt. In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately.¹¹²

The present law of England, as stated by Lord Mustill in *Brown*, is that no one can consent to serious bodily harm and the participant cannot, therefore, consent to the fact that he might be seriously injured.¹¹³ It suffices to say that, from a practical point of view, this view of "sporting consent" has been strongly questioned regarding its functional applicability to the nature of sport. Indeed, in 1994, the UK Central Council of Physical Recreation ("CCPR") similarly queried the above principle, and their response is worth citing at length:

This raises a crucial question for sport. Does a player who walks on to a pitch be it cricket, football or rugby, for example, consent to the fact that he may be injured but *not* to the fact that he might be seriously injured? Is it right that no one can consent to the risk

110. 2 WKLY. L. REP. 556 (1993).

111. *Id.* at 592-93.

112. *Id.*

113. Additionally, see the support this approach has received in the UK Law Commission's Consultation Paper dealing, *infra*, with violence in sport entitled: "Consent and Offences Against the Person, Consultation Paper No. 134." This report was published on February 23rd, 1994, and is reviewed in detail by Alexander Radley, *A Study of Consent to Violence in Sport with Particular Reference to the Law Commission Paper No. 134*, 3 SPORT & L. J. 47 (1995).

of serious injury? If a rugby tackle is made within the rules of the game (*i.e.*, not too high and not too late) but nevertheless is an extremely hard tackle and the opponent sustains a *serious* injury as a result of the tackle, the question has to be, did the opponent consent to that tackle? Hard tackles in rugby are not only encouraged but applauded. Any player must, we submit, therefore consent to being tackled hard by walking onto the pitch. If we assume that the tackler did not intend to injure his opponent but did intend to tackle him as hard as he possibly could and if a court held that he applied more force than was strictly necessary and was therefore reckless as to whether his opponent was injured, (notwithstanding the fact that the rules not only permit hard tackling [but] actively encourage it) the tackler would not perhaps be able to rely on the defence of consent.¹¹⁴

To this end, the CCPR argues that the line of lawful consent in sport should be drawn on the grounds of what they term the “lawfulness” of the activity in question *i.e.*, that a player consents to the risk of injury, perhaps even serious injury, provided the rules of the sport in question are adhered to.¹¹⁵ This, the CCPR suggests, addresses the problem that arises in many sports where a particular skill of that game carries an almost unavoidable sense of risk, for example, fast bowling in cricket.¹¹⁶ As the law stands, a bowler who continues to bowl in this fashion and injures the batsman would risk criminal liability, given that the consent threshold is one of injury and not serious injury.¹¹⁷ However, if the line was drawn at “lawfulness,” the batsmen would be seen to have consented to the risk of injury, even serious injury, provided the bowler was bowling within the rules and, also, what one could term the “spirit” or “culture” of the game *i.e.*, what was an accepted and expected part of the game.¹¹⁸

The CCPR’s argument is that the criminal law should be wary, if not reluctant, to interfere “beyond the touchline” and, when it does so, as it clearly must from time to time, it should do so from the proper perspective *i.e.*, the norms and values of that sport.¹¹⁹ The CCPR submits that the essential (and practical) problem for the law as it now stands is, that

114. Central Council of Physical Recreation, *The Law Commission: Consultation Paper No. 134 Criminal Law - Consent and Offences against the Person; A Response on the Issues for Sports and Games*, 3 SPORT & L. J. 4 (1995).

115. *Id.* at 5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

in assessing whether the player's conduct is criminal, conformity to the rules of the game is merely persuasive in nature.¹²⁰ Unsurprisingly, the CCPR is of the opinion that this is clearly wrong and to be avoided for it may result in an undesirably interfering role for the criminal law in sport, paradoxically threatening the spontaneity, the athleticism and genuine competitiveness that it seeks to protect.¹²¹ As the CCPR put it simply and conclusively in its reply to the UK Law Commission report of 1994,

If the courts are to decide whether an activity is lawful by means of objective criteria and not by means of the rules of a particular game, then there is also a danger that the offending player would not be tried by reference to what was acceptable to his sport but by reference to the opinions on the sport in question by a judge and jury who may never have played his sport.¹²²

V. IRISH CASE LAW

Ireland has seen some development in this area of the law, particularly as regards the sport of Gaelic football.¹²³ The most serious incident to date occurred in April, 1999, when a Galway footballer was jailed for nine months.¹²⁴ McCutcheon points out, between 1987 and 1992 four other similarly-based cases were referred to the Director of Public Prosecutions.¹²⁵ More recently, a number of prosecutions have been noted and on February 19, 1998, the *Irish Times* reported that a player had pleaded guilty to assault occasioning actual bodily harm to an opponent during a North Dublin, Gaelic football, under-21 final in 1995.¹²⁶ The Dublin Circuit Criminal Court heard that the incident which led to latter's jaw being broken occurred near the end of a game played amid intense hostility between the rival supporters and that there had been frequent crowd incursions onto the playing field and that this atmosphere had ultimately contributed to blows being struck between the players.¹²⁷

In addition to criminal cases, more and more civil actions are being initiated for football assaults, although the old "omerta" tradition of

120. *Id.*

121. *Id.*

122. *Id.*

123. Jack Anderson, *Violence, Sport and the Law: An Application to Gaelic Games*, 7 SPORT & L. J. 51 (1999).

124. *Footballer Gets 9 Months for Injuring Player in Junior Match*, IRISH TIMES, Apr. 9, 1999, at 6.

125. McCutcheon, *supra* note 64, at 271.

126. *Sentence on GAA Player Adjourned*, Irish Times, Feb. 19, 1998, at 4.

127. *Id.*

"tell 'em nothing" still pervades and there is a certain social reluctance among those involved in sport to invoke or at least co-operate with the legal process. The law is not seen as a credible sanction for such assaults and it is interesting to note that in two recent assault cases taken in Ireland for violence in sport, both were unsuccessful on the grounds of mistaken identity, both judges expressing their exasperation at the uncooperative attitude of the parties involved including the refereeing officials. One notes a case taken by an aggrieved footballer in the Navan District Court in June, 1997 where the defendant was cleared of assault occasioning actual bodily harm in a Meath senior Gaelic football match in October, 1996 on the grounds of mistaken identity.¹²⁸ Similar grounds of mistaken identity led to the dismissal of a claim in damages brought by Donegal Gaelic footballer against an opponent who it was alleged broke the victim's jaw in the match in question.¹²⁹

Given these developments, it is argued that the games organising body, the Gaelic Athletic Association (GAA) will have to reflect on a number of issues, notably, the provision of a comprehensive insurance/compensation scheme for injured players, a reorganisation of the current disciplinary structures and possibly a consideration of the continuing sustainability of the amateur status of the GAA at all levels. In fact, in many of the recent cases mentioned above, reference was made to the inadequacy of the GAA's current compensation scheme for injured players. This insurance-based injury scheme allows for payment of up to £25,000 once medical evidence of injury is submitted but it is a notoriously dilatory system. Apparently, it is extremely difficult to secure compensation from the fund for the player as aggravated by the fact that the amounts paid may not suffice the payment of all medical bills, particularly in the case of serious injury. In addition, there is no compensation outside of medical expenses, therefore time off work is at the players' own expense, and it is regularly the case that players depend on the fund-raising of team-mates to get by. Surely this is not acceptable and it may be time for the GAA to introduce a comprehensive, "no-fault" scheme of compensation as operated by an independent body. As one leading hurler who himself suffered a serious injury has remarked, if the GAA does not act soon they may end up facing a nightmarishly enormous compensation bill such as given in the Ian Knight case.¹³⁰

128. *GAA Referee and Linesman Criticism in Assault Case*, IRISH TIMES, Jun. 26, 1997, at 9.

129. *GAA Footballer Loses for Damages Against Garda*, IRISH TIMES, Nov. 14, 1997, at 7.

130. Philip Reid, *Absence Makes Dunne's Heart Grow Stronger*, IRISH TIMES, May 17, 1999, at 55. The Knight case refers to English soccer and ex-footballer Ian Knight's claim for

VI. RECENT IRISH DEVELOPMENTS

In the early 1990s, the Law Reform Commission (LRC) undertook a review of the law on offences against the person. Many of its recommendations were adopted in the Non-Fatal Offences Against the Person Act, 1997.¹³¹ The provision significantly overhauled this area of the law. In particular, it abolished the common law offences of assault and battery and repealed the relevant provisions of the Offences Against the Person Act, 1861.¹³²

The LRC Report on Non-Fatal Offences Against the Person devoted a brief section to the issues of sports violence and it presents a useful summary as to the issues involved in this area of the criminal law.¹³³ Generally, as regards violence in sport, the Irish LRC was of no doubt that criminal liability should continue to attach to acts of violence committed in the course of sporting activities.¹³⁴ The LRC was not minded to recommend the extension of a general exemption to persons engaged in contact sports.¹³⁵ Nevertheless, the LRC was of the opinion that the criminal law should be viewed as the "policeman of last resort" in these circumstances.¹³⁶ Borrowing heavily from a similar review by the Canadian Law Reform Commission, the Irish LRC was of the opinion that the curbing of sporting violence in the long term is better served by administrative and educational measures from the sporting bodies themselves.¹³⁷

The LRC's report also specifically reviewed the question of "sporting" consent. The LRC's brief analysis of this area of the law was quite similar to that which has been enunciated in the English courts. According to the Commission, a participant in a sport may be regarded as consenting to any contact in accordance with the rules of the game, and/or any contact of an accidental nature, arising incidentally in the course of

£1.5 million in the Sheffield High Court in the UK for an "over the top" tackle during an FA Cup match in 1987. At the time, the claim was the largest made for alleged recklessness on the pitch; it was settled after a day of trial for an estimated £500,000. (reported as *Ex-football Star Claims £1.5m Over Tackle That Ended Career*, IRISH INDEP., Oct. 14, 1997.)

131. LAW REFORM COMMISSION, REPORT ON NON-FATAL OFFENCES AGAINST THE PERSON, 1994, Cmnd. 45, at 272. (*hereinafter* LRC).

132. A brief background to the 1997 Act is given in an Explanatory Memorandum that accompanied its publication. *Non-Fatal Offences Against the Person Act, 1997* (Explanatory Memorandum issued by the Department of Justice, February, 1997).

133. *Id.* at 272-75.

134. *Id.* at 274-75.

135. *Id.* at 275.

136. *Id.*

137. *Id.* at 272-73.

it.¹³⁸ In short, if the requisite intent or recklessness is absent and the contact is within the rules and the spirit of the game, the fact that the force used is likely to cause injury will be irrelevant.¹³⁹

In an overall sense, the LRC justified this somewhat laissez-faire attitude to violence in sport on two grounds. Firstly, on the grounds of public policy, where the justification of the self-regulation of sport is tolerated, as “[p]articipation in sports promotes fitness and good health, discipline, teamwork and self-control.”¹⁴⁰ Secondly, the Law Reform Commission quite rightly alluded to the fact that the criminal law is a rather blunt instrument when it comes to regulating violence in sport.¹⁴¹ If a person suffers a severe injury as a result of taking part in a contact sport, the Law Reform Commission was of the opinion that as the victim undertook that risk of injury as part of a lawful sporting activity, it would then be unjust to prosecute the injuring partner.¹⁴² The LRC felt that the individual concerned would, in effect, be a ‘scapegoat’ for the sport as a whole and unjustly targeted.¹⁴³ The LRC stated that it would be far better if, on seeing that there was no possibility of prosecution, public debate would be generated as to whether or not the sporting activity in question, which frequently resulted in serious harm, should be proscribed.¹⁴⁴

VII. CONCLUSION

It is submitted that the approach of the Irish LRC towards the issue of violence in sport is quite reasonable. Contact sports are exempted from the usual scope of consent to assault not only on the public policy grounds that they are good for the health of society, but also, because their methods of self-regulation are for the main part satisfactorily drawn. This exemption is not however a license for thuggery, and where

138. *Id.* at 273.

139. *Id.*

140. *Id.* at 274.

141. *Id.* at 275.

142. *Id.*

143. A similar view is taken in the United States, *see generally* Don Eugene-Nolan Gibson, Comment, *Violence in Professional Sports: A Proposal for Self-Regulation*, 3 L. REFORM COMMISSION OF CAN. 425, 439-440 (1981); RICHARD B. HORROW, *SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAW MAKING AND THE CRIMINAL LAW* (1980); GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES (Arthur T. Johnson & James H. Frey eds., 1985); and Karen Melnik, *Giving Violence a Sporting chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123 (1990).

144. LRC at 274-75. (With similar reasoning the LRC rejected that idea that boxing should be singled out in specific legislation.)

the inflicted injury is clearly intentional and reckless to the extent that it is beyond the rules and norms of the game in question, the criminal law's threshold of toleration will be breached. This seems to be the accepted position both in the English and Irish courts. It is also the well-established view in many other parts of the common law world, notably Canada.¹⁴⁵

Finally, and as stated earlier, the history of contact sports is rooted in injury, violence and mishap. Indeed, it is submitted that contact sports provide an outlet for physical contact of a kind not normally tolerated by society is, to a large extent, the *raison d'être* of these sport's popularity. The criminal law has given the public reasonable scope to pursue these activities and only when this exemption is abused to the extent that it threatens general public behavioural standards, will the courts act. Sporting bodies should be careful not to abuse this privilege. They should ensure that they have a strict, consistent and transparent disciplinary code. And to borrow a phrase from one of the most popular contact sports on these islands, rugby union, if sports authorities do not properly use their power of self-regulation to combat excessive violence in their sports, they may lose it, to the criminal courts.

145. R. v. Green, 16 D.L.R. 137 (1970); R. v. Maki 14 D.L.R. 164 (1970); R. v. Cey 48 C.C.C. 480 (1989).

COMMENTS

TITLE VII: AN ALTERNATIVE REMEDY FOR GENDER INEQUITY IN INTERCOLLEGIATE ATHLETICS

I. INTRODUCTION

The quest for gender equality in college athletics is a road that has been heavily traveled. For well over twenty-five years, women have pursued equal opportunities on the playing field.¹ The main avenue utilized in achieving that goal has been the application of Title IX of the Education Act of 1972² (hereinafter Title IX) to collegiate athletic programs.³ While this legislation has allowed women to make great strides in their quest for athletic equality, which has frequently resulted in increased participation opportunities for women, it has not fully remedied the problem of gender inequity. Accordingly, while the use of Title IX has effectively increased opportunities for women and eliminated a portion of the existing gender bias, it has not eliminated all of the gender inequity present in collegiate athletic programs. As such, Title IX should not be the only available remedial option for female athletes facing discrimination.

Title VII of the Civil Rights Act of 1964⁴ (hereinafter Title VII) protects individuals from employment discrimination on the basis of race, color, religion, sex and national origin.⁵ If colleges and universities are defined as employers of the scholarship athlete, as they should be, protection under Title VII becomes available.⁶ Accordingly, a female athlete who does not receive the same privileges of "employment" as a male

1. Daniel Mahony & Donna Pastore, *Distributive Justice: An Examination of Participation Opportunities, Revenues and Expenses at NCAA Institutions 1973-1993*, 22 J. SPORT & SOC. ISSUES 127, 127 (1998).

2. 20 U.S.C. § 1681(a) (1994).

3. Mahony & Pastore, *supra* note 1, at 129.

4. 42 U.S.C. § 2000(e)(2) (1994).

5. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FILING A CHARGE OF JOB DISCRIMINATION (1999) [hereinafter EEOC].

6. Protection under Title VII is not predicated on being an employee; it is available to any individual. However, this comment will focus on disparate treatment females receive regarding fringe benefits of employment as college athletes. Accordingly, Title VII will be discussed in the context of an existing employer-employee relationship.

athlete should have the ability to file a discrimination claim using Title VII because her employment rights will have been violated.

Although, at first glance, Title IX seems an adequate remedy to the problem of gender discrimination in college athletics, it has not been completely effective thus far. As stated, Title IX has primarily been used to effectuate a positive change in the number of female participants in collegiate athletic programs. Title VII, however, can be effective in balancing the benefits received between male and female college athletes. Title VII provides a new avenue that can be taken in the pursuit of gender equity. When applied to college athletics, Title VII would undoubtedly rejuvenate the quest for gender equality; it would provide a new and useful method for achieving the goal.

This comment will primarily address the viability of a Title VII claim in the area of college athletics. First, however, the comment will discuss the impact of Title IX on college athletics thus far, and the disparate treatment female athletes continue to experience. Next, Title VII will be discussed, specifically the requirements for filing a Title VII claim. Emphasis will be placed on the idea that under Title VII, an employer-employee relationship exists between the scholarship athlete and the educational institution. Next, the benefits of using Title VII to remedy gender inequity in college athletics will be discussed. Finally, the comment addresses potential ramifications of applying Title VII to college athletics.

As stated by Robert Frost, at times taking the road less traveled is what makes all the difference.⁷ By applying Title VII to college athletic programs, a world of difference can be made regarding gender inequity.

II. GENDER DISCRIMINATION IN COLLEGE ATHLETICS

A. History

Historically, female athletes have not dominated college athletic programs. In the late 1960s and early 1970s, opportunities for women interested in participating in college athletics were quite limited.⁸ It is estimated that in 1969, only about 16,000 women competed in college athletics.⁹ Although opportunities for women increased slightly, women still accounted for less than 20% of athletes at National Collegiate Ath-

7. ROBERT FROST, *The Road Not Taken*, reprinted in THREE BOOKS 119 (1916).

8. Daniel Mahony, *Collective Reaction to Injustice in Intercollegiate Athletics*, 23 J. SPORT & SOC. ISSUES 328, 329 (1999).

9. R. Vivian Acosta & Linda Jean Carpenter, *The Status of Women in Intercollegiate Athletics*, in WOMEN, SPORT AND CULTURE 111, 112 (Susan Birrell & Cheryl L. Cole eds., 1994).

letic Association (hereinafter NCAA) member institutions during the 1970s.¹⁰ Additionally, female athletes did not receive financial assistance in the form of scholarships until the mid-1970s, and then only approximately ten thousand dollars per year was spent directly on college athletics for women.¹¹

In contrast, opportunities for male athletes in the 1970s were numerous. In 1973, approximately 165,000 men competed at NCAA member institutions, accounting for more than 90% of participation.¹² Division I schools spent more than \$1.5 million per year on male athletic programs.¹³ It is clear by looking at this comparison that the "opportunities and resources spent on men's college sports were significantly larger than what was afforded the women."¹⁴

Although there was clearly disparate treatment of female athletes in the 1960s and 1970s, an analysis of more recent NCAA data indicates that change has occurred in the distribution of athletic resources at NCAA member schools.¹⁵ In 1994, there were over 160,000 female college athletes.¹⁶ As compared to 1973, women have approximately 57% more opportunities to participate at NCAA schools.¹⁷ In addition, the amount of money used to fund women's collegiate athletics increased dramatically during the same period of time.¹⁸ Although disparate treatment still exists, primarily in the area of benefits received by female athletes,¹⁹ positive changes have occurred.²⁰ Participation opportunities have increased, and there has been a rise in the funding available to female athletic programs.²¹ These changes are due, in large part, to the application of Title IX to college athletics.

10. Mahony, *supra* note 8, at 332.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 332-33.

15. *Id.*

16. Acosta & Carpenter, *supra* note 9, at 112.

17. Mahony, *supra* note 8, at 330.

18. *Id.* at 331.

19. Felice Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does Not Exist*, 19 QUINNIPIAC L. REV. 67, 68 (2000).

20. Mahony, *supra* note 8, at 330.

21. *Id.* at 329.

1. Title IX Defined

Title IX "forbids discrimination on the basis of sex in any educational program or activity receiving federal funds."²² In pertinent part, the statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance"²³

Congress enacted Title IX in response to a finding of "pervasive discrimination against women with respect to educational opportunities."²⁴ Case law dictates that "Title IX was passed with two objectives in mind: to avoid the use of federal resources to support discriminatory practices, and to provide individual citizens effective protection against those practices."²⁵ Although the statute does not identify athletes directly, it had an immediate impact on collegiate athletic programs "because differences in opportunities and resources provided strong evidence of discrimination."²⁶ As interpreted by the courts, Title IX was "designed to remedy gender discrimination against the underrepresented athletes—either men or women."²⁷

Those challenging Title IX identified its potentially disruptive effect immediately.²⁸ In 1984, those in opposition won a major battle. The court in *Grove City College v. Bell*²⁹ held that "Title IX applied only to those specific programs that received federal funds, and not to an entire institution."³⁰ This decision had a very limiting effect on the potential impact of Title IX "because the majority of college athletic departments did not receive direct federal aid."³¹

Fortunately for female athletes, the "program-specific approach" was rather short-lived.³² In 1988, Congress passed the Civil Rights Restoration Act, which, in effect, "reestablished the institutional approach for Title IX."³³ This required all programs at educational institutions, in-

22. Timothy Davis, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 74 (1998).

23. 20 U.S.C. § 1681(a) (1994).

24. *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996).

25. *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

26. Mahony & Pastore, *supra* note 1, at 129.

27. *Kelley v. Board of Trustees*, 832 F. Supp. 237, 243 (D. Ill. 1993).

28. Mahony & Pastore, *supra* note 1, at 129.

29. 465 U.S. 555 (1984).

30. *Id.* at 573-74; Mahony & Pastore, *supra* note 1, at 129.

31. Mahony & Pastore, *supra* note 1, at 129.

32. *Id.*

33. *Id.*

cluding athletics, receiving federal funds to comply with Title IX.³⁴ This change led to widespread litigation concerning Title IX's effect on the inequities present in college athletics.³⁵

2. Title IX Applied

While both men and women have filed cases alleging gender discrimination under Title IX, the majority of cases focus on the application of Title IX to remedy the disparate treatment that female athletes receive.³⁶ There can be no argument that, since its passage in 1972, women have used Title IX to their advantage. The opportunities for women to participate in college athletics, the funding for female programs, and the number of scholarships available for female athletes have all increased in the past twenty years.³⁷ However, while some feel "[t]here is little doubt that the passage and the threat of enforcement of Title IX resulted in a vast improvement in the sporting opportunities and resources available to girls and women in . . . institutions of higher education in the U. S.,"³⁸ Title IX's application to college athletics has not solved all problems stemming from gender inequity. "Despite Title IX's many victories over the last several years, equality for female athletes remains an unmet goal at most schools."³⁹ Gender inequality still runs rampant within college and university athletic programs.⁴⁰

B. Present Discrimination

The previous section addressed the ways in which Title IX sparked positive change in the quest for gender equality in college athletics. At first glance, Title IX provided a more than adequate remedy for gender inequity. However, despite some improvement, gender equity in intercollegiate athletics has not been achieved.⁴¹ While it is undisputed that

34. *Id.*

35. *Id.*

36. The application of Title IX to college athletics is quite detailed and complex; accordingly, an entire comment could be dedicated to the application of Title IX alone. However, because the primary focus of this comment is the proposed application of Title VII to college athletics, Title IX is only discussed in a general sense.

37. Mahony, *supra* note 8, at 329.

38. Annelies Knoppers, *Politics, Public Policy and Title IX*, in *WOMEN, SPORT AND CULTURE*, *supra* note 9, at 97, 103.

39. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 *DUKE J. GENDER L. & POL'Y* 51, 68 (1996).

40. Mahony & Pastore, *supra* note 1, at 139.

41. *Id.*

Title IX has been a catalyst for reform of college athletic programs, it has not eliminated the disparate treatment female athletes endure.⁴² "In 1997, it was estimated that 80% to 90% of the athletic programs of . . . post-secondary educational institutions were not in compliance with Title IX."⁴³ Arguably, female athletes still face gender inequity. The gender inequity that continues to exist is best evidenced by examining the following five aspects of male and female athletic programs.

1. General Participation

In 1995, there was a national average of 8.35 college sports teams per university for men and 8.04 college sports teams per university for women.⁴⁴ On its face, that statistic seems to indicate that gender inequity, in terms of participation opportunities, is almost nonexistent. However, the previous statistic fails to indicate that the average number of male athletes participating in college athletics, per institution, was 245, while the average number of female athletes was only 143.⁴⁵ Further support that athletic participation levels are still disproportionate can be found by looking at, for example, the male/female athlete to student ratio at Louisiana State University (hereinafter LSU). Currently, the student population at LSU is 51% male and 49% female; however, the population participating in the athletic program is 71% male and 29% female.⁴⁶

In addition to the previous statistics, a trend has developed amongst educational institutions that indicates the discrepancy that exists between male and female participation rates. To facilitate Title IX compliance, and ensure that the sports offered and participation opportunities provided for male and female athletes are comparable, many universities eliminate men's non-revenue sports teams, instead of increasing opportunities for women.⁴⁷ "This trend is likely to continue because the court held in *Kelley v. University of Illinois*⁴⁸ that using this strategy (eliminating men's opportunities while maintaining the same number of female opportunities) was a legally appropriate way to achieve Title IX compliance."⁴⁹ Male athletes have almost twice the number of participation

42. Mahony, *supra* note 8, at 329.

43. Duffy, *supra* note 19, at 68 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER EQUITY STUDY (1997)).

44. *Id.* at 92 (citing Brian Metzler & Carol Rowe, *Poor Sports*, BOULDER NEWS, Apr. 1997, at 4).

45. *Id.*

46. Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000).

47. Mahony & Pastore, *supra* note 1, at 139.

48. 832 F. Supp. at 237.

49. *Id.* at 244; Mahony & Pastore, *supra* note 1, at 142.

opportunities as female athletes.⁵⁰ Accordingly, educational institutions would rather decrease the male opportunities than increase female opportunities to equal the opportunities available to both sexes.⁵¹ This remedy, while legally appropriate under Title IX, is not an effective solution. Moreover, it demonstrates the disparate treatment female athletes receive regarding participation opportunities.

2. Recruiting and Scholarships

“In 1992, twenty years after the enactment of Title IX, on average, less than 20% of recruiting funds went to women in college athletics, 25% of the total operating budgets went to women, and institutions allocated only 20% to 42% of athletic scholarships to women.”⁵² These percentages remain accurate today.⁵³ Overall, female athletes receive approximately \$184 million less in athletic scholarships than do male athletes, and male athletes “have more than three times the financial resources in the areas of recruiting and operating expenses.”⁵⁴

A recent survey published by The Chronicle of Higher Education indicates that over one hundred colleges or universities currently allot a disproportionate percentage of their scholarship and recruiting budgets to female athletes.⁵⁵ For example, Miami University had a total scholarship budget of \$3,215,937 as of June 2000.⁵⁶ Of that, \$1,025,262, or 32%, was allotted to females.⁵⁷ However, 45% of the athletes at Miami University are females.⁵⁸ Accordingly, the budgetary allocation of scholarships for female athletes is disproportionate.⁵⁹

In the area of recruiting budgets, as of June 2000, Miami University allotted \$268,006, or 72% of its total recruiting budget to male teams, while only \$103,887, or 28%, was allotted for recruiting female ath-

50. Duffy, *supra* note 19, at 92. The discrepancy between male and female participants is most likely attributable to college football programs. Admittedly, there is no female equivalent to men's football. Thus, the athletic opportunities for females at the college level are still considerably unequal to those of men.

51. Mahony & Pastore, *supra* note 1, at 139.

52. Duffy, *supra* note 19, at 92.

53. *Id.* at 68.

54. *Id.*

55. *Facts and Figures*, THE CHRON. OF HIGHER EDUC., at <http://chronicle.com/search97cgi/s97.cgi>, May 21, 1999 (last visited June 29, 2000).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

letes.⁶⁰ Clearly, Title IX has not effectively eliminated gender inequity in the area of recruiting and scholarships.

3. Operating Expenses: Travel Expenses and Per Diem Allowance; Equipment and Supplies

Analyzing operating expense budgets for intercollegiate athletic programs reveals that gender inequity is widespread. The Chronicle of Higher Education reported that over two hundred educational institutions spent less than half of their athletic operating expense budgets on female athletes.⁶¹ While in some cases the numbers are only slightly disproportionate, there are examples of extreme inequity.⁶² For example, at the University of Arizona, 75% of the operating expense budget is spent on male athletes, while only 25% is spent on female athletes.⁶³

Additionally, when the overall operating expense budgets are broken down, and specific benefits are analyzed individually, evidence of gender inequity is again present. For example, although on a per capita basis travel expenses and per diem allowances for male and female athletes may appear equal, it can still be argued that the two genders are treated differently.⁶⁴

Department policies differ in terms of the number of people on a team, length of time on road trips, number of total road trips, and road trips that require overnights. Male teams traditionally have more overnight trips . . . and more overnight stays . . . The fact that women comprise only 36% of college athletes makes this practice discriminatory, despite equal individual allowances per trip, because universities spend only 36% of the budget on women's travel.⁶⁵

Another area where discrimination is prevalent is the provision of equipment and supplies. Title IX does not mandate that budgetary allocation to each gender be exactly identical.⁶⁶ Rather, the legislation only requires that the equipment provided to both male and female teams be

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Duffy, *supra* note 19, at 95.

65. *Id.* (citing RICHARD TELANDER, FROM RED INK TO RED ROSES (1994); NATIONAL WOMEN'S LAW CENTER, TITLE IX AND MEN'S MINOR SPORTS: A FALSE CONFLICT (1997); Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.J. 5, 9 (1995)).

66. Bloom, *supra* note 65, at 14-15.

of the same quality.⁶⁷ Accordingly, it is acceptable that universities fail to provide women's programs that require expensive equipment (such as gymnastics and ice hockey),⁶⁸ yet still provide programs such as men's football (which requires a significant amount of equipment), as long as the quality of equipment that all athletes receive is the same.⁶⁹ A male program that requires expensive equipment will likely be implemented or maintained, whereas a female program requiring costly equipment will not.⁷⁰ This provides evidence of the preferential treatment that male athletic programs receive.

Additionally, it is important to note that most prominent men's teams are sponsored by equipment companies, and these teams receive equipment that is not factored into the universities' equipment budgets.⁷¹ It is likely that even at universities that provide an equal equipment budget for both men's and women's teams, the women are still subject to an unequal distribution of equipment.⁷²

4. Practice and Competitive Facilities

"Traditionally, men get more and better time on the practice and game fields."⁷³ University athletic directors often justify this practice by arguing that men's sports receive significantly more spectators, and produce more revenue, than do women's athletic events.⁷⁴ However, "it could be argued that . . . acceptance of college sports for women has been slow,"⁷⁵ because "the fact remains that athletic departments generally have not been successful at making women's sports into major revenue producers and profit making entities."⁷⁶

If women's sporting contests are never given the "prime time" playing time, it is impossible to judge how many spectators would attend a given event, and how much revenue would be produced.⁷⁷ Accordingly, unequal use of facilities, for both practice and hosting athletic competitions, demonstrates another area in which female athletes face disparate treatment.

67. *Id.*

68. Duffy, *supra* note 19, at 94.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 94.

73. *Id.* at 97.

74. *Id.*

75. Mahony & Pastore, *supra* note 1, at 131.

76. *Id.* at 133.

77. Duffy, *supra* note 19, at 97.

5. Publicity

"Disparity in coverage of male and female athletes by the athletic sports information departments is common."⁷⁸ To justify this, athletic directors use an argument similar to the one presented in the facilities context: women's sports do not generate public interest, and therefore, it is an inefficient use of resources to allocate funding and personnel to cover female athletic events.⁷⁹ "However, the sports information directors are actually in a position to affect these policies by conditioning releases of information about major men's sports on the publication of women's sports. Media coverage is . . . in the control of the department and should be considered when assessing gender equity."⁸⁰

As evidenced by the preceding examples, it is obvious that despite some of the increases in opportunities for female athletes facilitated by the application of Title IX to college athletics, gender inequity is still present. "Most schools still offer more scholarships for male athletes and spend considerably more money on male sports."⁸¹ Even though many "advances have been made in the past twenty-five years, women are still struggling to enforce the intent of Title IX, and proportionality at most schools is still a dream."⁸² The former Advocacy Director for the Women's Sports Foundation, Kathryn Reith, believes that the quest for gender equality has become somewhat stagnant.⁸³ Reith has stated that "the process has stalled," and that "we are sort of stuck at [a] level of discrimination that [the educational institutions] are comfortable with."⁸⁴ One possible way to revitalize the movement for gender equality within college athletics is to use a new avenue to effectuate change. That avenue is Title VII.

III. TITLE VII AS A VIABLE REMEDY FOR GENDER DISCRIMINATION IN COLLEGE ATHLETICS

A. *Objective of Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.⁸⁵

78. *Id.* at 98.

79. *Id.*

80. *Id.*

81. Mahony, *supra* note 8, at 329.

82. *Id.* at 329-330.

83. Susan Morse, *Women and Sports*, 2 CONG. Q. RESEARCHER 195, 198 (1992).

84. *Id.*

85. EEOC, *supra* note 5.

Title VII provides, in material part: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."⁸⁶ Under Title VII, it is illegal for an employer to discriminate in any area of employment, "including hiring, firing, promotion, layoff, compensation, *benefits*, job assignments, training . . . or any other terms of employment."⁸⁷

Title VII was enacted by Congress "to achieve equality of employment opportunities."⁸⁸ In interpreting Title VII, "[c]ourts have prohibited both the disparate treatment of individuals and the use of policies that have a disparate impact on protected classes. Even those employment policies that are fair in form but discriminatory in operation have been declared unlawful."⁸⁹ Congress intended Title VII to offer comprehensive protections and, in short, eliminate discrimination in the workplace.⁹⁰

B. The Elements of a Title VII Claim

There are two primary requirements necessary to sustain a Title VII claim. First, the individual bringing the claim must be a member of a protected class.⁹¹ The classes which receive protection under Title VII are those based on sex, race, color, religion or national origin.⁹² Second, the alleged discriminating party must be an employer covered under Title VII.⁹³ All private employers, state and local governments, and educational institutions that employ fifteen or more individuals are covered by Title VII.⁹⁴ Accordingly, a female scholarship athlete filing a claim

86. 42 U.S.C. § 2000(e)(2) (1994).

87. EEOC, *supra* note 5 (emphasis added).

88. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75 (1984) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

89. *Id.*

90. Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2622-23 (1998).

91. 42 U.S.C. § 2000(e).

92. EEOC, *supra* note 5.

93. 42 U.S.C. § 2000(e).

94. *Id.* It should also be noted that the question of whether the defendant in a Title VII action is a covered employee is greatly debated. Employers will often claim that its workers are independent contractors and that the fifteen employee requirement is not met. *See* Ortner, *supra* note 89, at 2647. However, in any Title VII case brought against a college or university, it would be implausible to argue that the college or university did not have fifteen employees. Accordingly, that issue will not be addressed as part of this comment.

against her university under Title VII would have no difficulty meeting these two initial requirements.

In any action brought by a scholarship athlete under Title VII attempting to remedy the disparate treatment females receive with regard to privileges or fringe benefits of employment, the college or university would likely move for summary judgment.⁹⁵ In so doing, the college or university may claim that the relationship between the scholarship athlete and the educational institution is not one of employment, and therefore, not governed by Title VII.⁹⁶ The prospective plaintiff would have to show that a scholarship athlete is, in fact, an employee of his or her school and, therefore, Title VII is applicable.⁹⁷

In the past, scholarship athletes have had difficulty convincing courts that they are employees for the purposes of Workers' Compensation Acts.⁹⁸ However, the policy of Title VII is different from that of work-

95. Thomas Archer, *The Structure of a Title VII Action Against a College for the Enforcement of NCAA Proposition 48*, 2 SPORTS LAW. J. 111, 113 (1995).

96. *Id.*

97. *Id.*

98. Several cases have addressed the issue of whether an athletic scholarship is, in effect, an employment contract that creates an employer-employee relationship between the educational institution and the athlete. One of the first cases to address this question was *Van Horn v. Industrial Accident Commission*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963). Van Horn was a student athlete killed in a plane crash while traveling from an intercollegiate football game. After his death, his widow and minor children applied for death benefits, asserting that Van Horn was an employee of his university. The Industrial Accident Commission ("IAC") denied the award. Upon review, the *Van Horn* court held Van Horn had made a prima facie showing of an employment contract and remanded the case for further consideration by the IAC. The *Van Horn* court reasoned that because Van Horn's athletic prowess and membership on an athletic team were factors in his receipt of an athletic scholarship, the scholarship could constitute an employment contract. *Id.* at 169.

After *Van Horn*, the NCAA went on alert and began implementing language and policies that would lessen the resemblance between the athletic scholarship and an employment contract. ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* 80-81(1998). In 1983, the NCAA received support for that principle with the decision of *Rensing v. Board of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

Rensing was an Indiana State University football player who was paralyzed during spring football practice. In denying his workers' compensation claim, the *Rensing* court held that intercollegiate sports are clearly distinguished from professional sports and that financial inducements in the form of scholarships and financial aid based on athletic ability cannot be considered an employment contract. SACK & STAUROWSKY, at 85.

After the *Rensing* decision, several other courts held that, in the context of workers' compensation, the athletic scholarship does not constitute an employment contract. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983); *Graczyk v. Workers' Comp. App. Bd.*, 229 Cal. Rptr. 494 (Cal. Ct. App. 1986); *Townsend v. California*, 237 Cal. Rptr. 146 (Cal. Ct. App. 1987). However, these cases all incorporate the specific principles of workers compensation law into the analysis of whether a scholarship athlete is a university employee. When

ers' compensation. The decisions in the context of workers' compensation focus on the definition of employee contained in workers' compensation statutes.⁹⁹ However, the definition of employee contained in Title VII is much broader than the definition contained in workers' compensation statutes.¹⁰⁰ Accordingly, the analysis of the courts under the workers' compensation framework does not apply to employer-employee questions in other legal contexts.¹⁰¹ Scholarship athletes have a much stronger argument that the relationship between the educational institution and the scholarship athlete is one of employment when analyzed under Title VII.¹⁰²

Perhaps the most effective argument a scholarship athlete could make is that the athlete's acceptance of a scholarship, in exchange for participation on an athletic team, is the formation of a contract between the educational institution and the athlete.¹⁰³ Such a conclusion is easily reached when the three basic elements of contract law are applied to the relationship between the scholarship athlete and the educational institution.

For a contract to exist, the elements of offer, acceptance, and consideration must be present.¹⁰⁴ In the context of college athletics, all three elements are easily satisfied. First, it is clear that when an educational institution recruits a scholarship athlete, the college or university is offering the athlete an opportunity to attempt to participate in an athletic

analyzed in the context of Title VII, an entirely different conclusion must be reached. Under Title VII, a scholarship athlete would be an employee of the educational institution.

99. For example, the state of Wisconsin workers' compensation statute defines employees as "[e]very person in the service of another under any contract of hire, express or implied, all helpers and assistants of employers, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer . . ." WIS. STAT. § 102.07(4)(a) (1999).

100. Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000(e) (1994).

101. Charlotte M. Rasche, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating College Athletes*, 16 REV. LITIG. 219, 235 (1997).

102. Archer, *supra* note 95, at 113.

103. Courts have recognized that contractual relationships are created by scholarship agreements. In *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972), the court determined that the agreement signed between the scholarship athlete and the university created a contractual relationship under which each party was required to fulfill their respective obligations. *Id.* at 382. Additionally, other courts have addressed the issue of a contractual relationship existing between a student and a university. *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Ward v. Wash. State Univ.* 695 P.2d 133 (Wash. Ct. App. 1985).

104. RESTATEMENT (SECOND) OF CONTRACTS §52 (1981).

program.¹⁰⁵ Second, the athlete demonstrates his or her acceptance of the educational institution's offer by signing the NCAA National Letter of Intent.¹⁰⁶ This letter contractually binds the athlete to compete at the respective university.¹⁰⁷ Finally, consideration is found in the scholarship itself.¹⁰⁸ Athletes receive varied benefits ranging from full tuition, room and board, to smaller benefits in the form of tuition reduction.¹⁰⁹ Regardless of the benefit, the element of consideration is met.

It is apparent that the colleges and universities intend for scholarship athletes to be contractually bound to the institution.¹¹⁰ Colleges and universities recruit scholarship athletes for their superior athletic abilities. Stated differently, they are "hired for a specific purpose."¹¹¹ Scholarship athletes are required to sign letters of intent indicating the educational institution to which they are committing their services.¹¹² Moreover, scholarship athletes receive compensation. The procedure entailed in distributing the athletic scholarship is a valid basis for concluding that the scholarship athlete is indeed under contract as an employee of the educational institution.¹¹³

Still, courts have been reluctant to alter the dynamics of collegiate athletics by holding that such a contract creates an employee-employer relationship.¹¹⁴ The existence of the contract has been recognized;¹¹⁵ the employment relationship stemming from the contract has not.¹¹⁶ Until courts are willing to accept that the athletic scholarship is an employment contract, it will be necessary for scholarship athletes to prove their

105. David W. Woodburn, *College Athletes Should Be Entitled to Workers Compensation For Sports Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611, 630 (1995).

106. *Id.*

107. *Taylor*, 191 S.E.2d at 379.

108. Woodburn, *supra* note 105, at 631.

109. Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5(3) KAN. J.L. & PUB. POL'Y 137, 143 (1996).

110. *Id.* at 139.

111. *Id.* at 143.

112. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL ART. 13.02.9 (2000) [hereinafter MANUAL]. The letter of intent is signed by the athlete after the recruitment process. It is analogous to the standard contract; the university makes the athlete an offer, the athlete accepts the offer by signing the letter of intent, and both parties then provide consideration, namely the educational institution providing the athlete the opportunity to participate and the athletes actual participation.

113. Riggs, *supra* note 109, at 143.

114. *Id.*

115. *Taylor*, 191 S.E.2d at 379.

116. Riggs, *supra* note 109, at 143.

employment status in accord with the methods traditionally used in the context of Title VII.

1. The Employer-Employee Relationship

The existence of an employer-employee relationship is one of the most debated elements of a Title VII claim. Title VII defines an employee as "an individual employed by an employer."¹¹⁷ This language is quite ambiguous. Accordingly, the judiciary developed three tests used to determine whether an employer-employee relationship exists: (1) the common law test; (2) the economic realities test; and (3) the hybrid test.¹¹⁸

a. The Common Law Test

The common law test focuses on whether an employer had the right to control the details and means by which work was completed and the result accomplished by the work.¹¹⁹ The Supreme Court has defined the test as the following:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; and the hired party's role in hiring and paying assistants
¹²⁰

Although this list is not determinative, it illustrates many factors the courts consider when using the common law test to determine if an employer-employee relationship exists.

117. 42 U.S.C. § 2000(f) (1994).

118. Lewis L. Maltby & David C. Yamada, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 247-48 (1997).

119. *Id.* at 248.

120. *Nationwide Mut. Ins. Co. v Darden*, 503 U.S. 318, 323-24 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1988)).

b. The Economic Realities Test

The economic realities test asks whether an individual is "economically dependent for his livelihood on the business to which the person performs a service."¹²¹ There are five factors used to make that determination: (1) the extent of the employer's supervision and control over the worker; (2) responsibility and cost for orientation and equipment; (3) the length of job commitment and/or expectations; (4) the kind of occupation and skill required; and (5) the method of payment and benefits.¹²²

c. The Hybrid Test

The test courts use most often is the hybrid test.¹²³ The factors usually considered by courts under the hybrid test are: (1) the type of occupation; (2) the skill required; (3) whether the individual or the employer furnishes the equipment with which the work is done; (4) the length of time the individual has worked; (5) the method of payment; (6) the manner in which the work relationship can be terminated; and (7) the intention of the parties.¹²⁴

2. The Employer-Employee Relationship in the Context of College Athletics: The Athlete Control Test

When comparing the preceding three tests, it becomes evident that five factors are common to each test.¹²⁵ These same five factors also apply to the relationship between the educational institution and the scholarship athlete because they address the more fundamental aspects of the relationship. Accordingly, when determining whether a scholarship athlete is an employee of his or her university, a fourth test, which will be termed the "Athlete Control Test," should be applied.

The Athlete Control Test will analyze the following five factors: (1) the degree of control the university exercises over the scholarship athlete; (2) opportunities the scholarship athlete creates for an educational institution's profit or loss; (3) the university's investment in facilities used by the scholarship athlete; (4) permanency of the relationship be-

121. Kimberly Hayes, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Title VII, the ADEA and Other Labor Laws*, 44 BUFF. L. REV. 963, 986 (1996).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

tween the university and the scholarship athlete; and (5) the scholarship athlete's required skill.¹²⁶

a. Degree of Control

The educational institution has a great degree of control over the scholarship athlete.¹²⁷ This is evidenced by the emphasis that is placed on athletics as opposed to other aspects of student life. During the playing season, most aspects of the athlete's life are dictated by the athletic program.

i. Athletics v. Academics

Some scholarship athletes are athletes first, and students second. Their first priority is the athletic program in which they participate. For example, at Creighton University, the athletic department encouraged a scholarship athlete to register for courses such as Marksmanship and Theory of Basketball, even though such courses did not count towards a university degree.¹²⁸ Additionally, the same scholarship athlete was provided with a secretary to read his assignments and prepare and type his papers.¹²⁹

Unfortunately, this is just one of many examples where the scholarship athlete is expected to put his athletic responsibilities ahead of his academic responsibilities. Although instances such as the one described above are probably more prevalent at schools with larger athletic programs, it is plausible to assume that the academic integrity of athletes is compromised at almost every educational institution where a scholarship athlete is expected to make a positive contribution to his or her athletic team. Conduct by athletic departments similar to the conduct of Creighton University is evidence that a scholarship athlete's existence is controlled to a great degree by the educational institution.

ii. Athletics v. Work Study

In addition to fulfilling all of the athletic requirements mandated by the coach and the school, the scholarship athlete's life off the playing field is also controlled to a great degree.¹³⁰ For example, during both the academic semester and the summers between school years, scholarship

126. *Id.*

127. Riggs, *supra* note 109, at 144.

128. Ross, 957 F.2d at 412.

129. *Id.*

130. Riggs, *supra* note 109, at 144.

athletes' employment decisions are strictly regulated.¹³¹ During the athletic season, student athletes are not allowed to hold full or part-time jobs.¹³² During the off-season, a scholarship athlete must remit his or her earnings to the educational institution, and the earnings are then applied against the athlete's scholarship.¹³³ During the summer, when the scholarship athlete should be allowed a break from the confines of the scholarship agreement, the NCAA still controls the employment opportunities a scholarship athlete can accept.¹³⁴ Accordingly, even when a scholarship athlete is not at practice or playing in a game, his or her choices and decisions are limited.

b. Opportunities for Profit or Loss

"Although the concept of amateurism is firmly embedded in college athletics, college athletics has become big business."¹³⁵ This is evidenced by the \$1 billion dollar television contract between Columbia Broadcasting System (hereinafter CBS) and the NCAA.¹³⁶ Additionally, Notre Dame University and National Broadcasting Company (hereinafter NBC) have a \$38 million contract that grants NBC exclusive broadcasting rights for Notre Dame athletic contests.¹³⁷ These contracts, however, are not the only evidence of the money involved in college athletics.

In 1996, both Virginia Tech and the University of Texas earned \$8.3 million by playing in the Sugar Bowl.¹³⁸ That same year, the University of Nebraska and the University of Florida each earned \$8.8 million for playing in the Fiesta Bowl.¹³⁹ These figures seem outrageous; however, considering the increased involvement of corporate sponsors and television with intercollegiate athletics, they are not outlandish.¹⁴⁰

When the contracts are considered together with the amount of revenue that colleges and universities generate from athletic programs each year, it is clear that there is a direct correlation between an educational institution's yearly profits or losses and the athletic program. The ath-

131. *Id.* at 139-40.

132. *Id.* at 139.

133. *Id.* at 139-40.

134. *Id.* at 140.

135. Rasche, *supra* note 101, at 220.

136. Woodburn, *supra* note 105, at 611.

137. *Id.*

138. Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167, 180 (1996).

139. *Id.*

140. *Id.*

letic program could not exist, and certainly could not produce a profit for the college or university, without the scholarship athletes. Therefore, the scholarship athlete has a substantial effect on the yearly profits of the college or university.

c. Facilities

The educational institution also controls the athletic facilities used by scholarship athletes. Educational institutions are the primary providers of facilities, equipment, and supplies for their athletic teams. Whether the athlete is participating in a practice session or playing in an athletic contest, he or she is undoubtedly using equipment and playing in a facility controlled by the college or university.

Additionally, as stated earlier, athletic departments exercise total control over scheduling and uniforms. Athletes have no control over which teams use which practice and playing facilities throughout the athletic season, or which equipment they practice with, or which uniforms they wear. The athletes have no control or decision making power with respect to equipment and facilities.

The lack of control over equipment and facilities is analogous to the traditional employer-employee relationship. In the conventional employment setting, employees perform their job responsibilities in facilities provided and regulated by the employer. Employees seldom create their own training and work schedules; that task belongs to the employer as well. Finally, employers typically require employees to wear a uniform or conform to a specific dress code. Just as the traditional employee is mandated by the employer's rules regarding facilities and equipment, so too is the scholarship athlete.

d. Permanency of Relationship

In the case of college athletics, the employer-employee relationship has the potential to last four years. While it is true that some athletes enter professional sports before completing four years of college, and the scholarship itself is only a one-year renewable agreement,¹⁴¹ those facts do not change the overall average duration of the relationship. Many athletes participate in college athletic programs as scholarship athletes for at least four years. The duration of the relationship is controlled by the college or university.¹⁴² According to the NCAA Manual, an athlete's scholarship can be terminated by the educational institution.

141. Riggs, *supra* note 109, at 144.

142. Ukeiley, *supra* note 138, at 190.

Section 15.3.4.1 of the NCAA Manual . . . expressly provides the university with this authority. The Manual states:

Reduction and Cancellation Permitted. Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient:

(a) Renders himself or herself ineligible for intercollegiate competition; or

(b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement; or

(c) Engages in serious misconduct warranting substantial disciplinary penalty; or

(d) Voluntarily withdraws from a sport at any time for personal reasons; however, the recipient's financial aid may not be awarded to another student-athlete in the term in which the aid was reduced or cancelled.¹⁴³

Accordingly, if a scholarship athlete engages in any activity that either results in a declaration of ineligibility, or is considered misconduct in the eyes of the educational institution, the athlete's scholarship may be reduced or canceled. Again, this situation is analogous to a traditional employee-employer relationship.

In the conventional employment setting, there are certain violations of an employment contract which, if committed by an employee, could result in the employee's termination. The same is true for the scholarship athlete. If an athlete were to engage in unlawful conduct, his or her scholarship could be withdrawn.¹⁴⁴ Just as in the traditional employment context, it is clear that the scholarship athlete does not control all aspects of the duration of the employment relationship.

e. Required Skill

Undoubtedly, college athletes must possess a high level of skill in their respective sports, enabling them to compete at the college level. Only the most skilled athletes receive scholarships. Accordingly, tremendous talent and highly specialized skill in a particular sport is a prerequisite for obtaining an athletic scholarship. Colleges and universities seek the most talented players, in hopes of creating a winning team, as demonstrated by the amount of time that colleges and universities spend on recruiting, practicing, and coaching college athletes.¹⁴⁵

143. MANUAL, *supra* note 112, at art. 15.3.4.1(a)-(d).

144. *Id.*

145. Archer, *supra* note 95, at 120.

Similar skill is required in the traditional employment context. Employers also seek and actively recruit employees with the most skill in hopes of creating a productive work force. Just as being skilled in a particular trade or profession is crucial to being hired by an employer, being skilled in a particular sport is a fundamental aspect of receiving an athletic scholarship.

Based on the preceding analysis and application of the proposed Athlete Control Test, it is appropriate to characterize the relationship between a scholarship athlete and an educational institution as that of an employer and employee. Scholarship athletes contract with the college or university and agree to provide a service in return for an economic benefit. Throughout the duration of the contract, a large majority of the athlete's athletic and non-athletic decisions are made for him or her. Scholarship athletes do not make their own choices; they are mandated to perform certain tasks at specific times. Just as an employee satisfies his or her job requirements in order to avoid termination, a scholarship athlete must fulfill his or her responsibilities to the educational institution in order to avoid losing his or her scholarship.

As demonstrated, the scholarship athlete can prove he or she is an employee of the educational institution. As such, the scholarship athlete can proceed with a Title VII claim against the college or university.

3. Necessary Elements of Proof for a Title VII Claim

There are two types of discrimination that have been recognized under Title VII: disparate treatment and disparate impact.¹⁴⁶ Disparate treatment is intentional discrimination based upon an individual's race, color, religion, sex, or national origin.¹⁴⁷ A claim of disparate treatment requires proof of a discriminatory motive.¹⁴⁸ Disparate impact is discrimination caused by a neutral employment policy that has a disproportionate impact on a class of protected persons.¹⁴⁹ A disparate impact claim does not require proof of a discriminatory motive.¹⁵⁰ Because a disparate treatment claim has the most viability in terms of the gender inequity present in college athletics, only this type of claim will be discussed in detail.

146. GEORGE RUTHERGLEN, *MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION* 6 (1983).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

To prove intentional discrimination under Title VII, a female athlete would likely use the disparate treatment model. The disparate treatment model, first set forth in *McDonnell Douglas Corp. v. Green*,¹⁵¹ and most clearly articulated in *Texas Department of Community Affairs v. Burdine*,¹⁵² is used when an individual or several individuals are treated differently because of their race, color, sex, religion, or national origin. The disparate treatment model is useful because it sets forth an evidentiary framework to be followed by plaintiffs, defendants, and courts in cases involving alleged intentional discrimination for which there is no direct evidence.

If the plaintiff only has circumstantial evidence that the employer intentionally discriminates against employees, the plaintiff must proceed under the *McDonnell Douglas* burden-shifting analysis.¹⁵³ However, a plaintiff may also present direct evidence of discrimination, if it is available, to establish that an employer intentionally discriminated against employees.¹⁵⁴ Direct evidence and the disparate treatment model "are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent."¹⁵⁵

The burden-shifting analysis in the disparate treatment model requires plaintiff to meet all elements of a three-part test. First, the plaintiff must prove a prima facie case of discrimination.¹⁵⁶ Second, the defendant must offer a legitimate nondiscriminatory reason for the discrimination.¹⁵⁷ Third, the plaintiff must demonstrate that the reason offered by the defendant is actually pretext for discrimination.¹⁵⁸

A prima facie case of discrimination is proven when an individual shows that: (1) they belong to a protected class; (2) they have performed the job satisfactorily; (3) they have suffered an adverse employment action; and (4) the employer treated similarly situated employees more favorably.¹⁵⁹

151. 411 U.S. 792, 801-02 (1973).

152. 450 U.S. 248, 252-53 (1981).

153. *McDonnell Douglas Corp.*, 411 U.S. at 802. When using the disparate treatment model, the availability of direct evidence of disparate treatment shifts the burden of proof. *Id.* at 802. However, in most circumstances, the female athlete will not have direct evidence of discrimination. Accordingly, this comment will only address the use of the disparate treatment model with circumstantial evidence.

154. *Id.*

155. *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).

156. *McDonnell Douglas Corp.*, 411 U.S. at 802.

157. *Id.*

158. *Id.* at 804.

159. *Davis v. McCormick*, 898 F. Supp. 1275, 1286 (D. Ill. 1995) (citing *Hughes v. Brown*, 20 F.3d 745, 746 (7th Cir. 1994)).

Once the prima facie case of discrimination is established, the burden then shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for the disparate treatment.¹⁶⁰ The reason will be considered nondiscriminatory if it has its basis in anything not prohibited by Title VII.

After the employer has offered a nondiscriminatory reason for the adverse employment action, the plaintiff may challenge the offered reasons by showing that they are simply pretext for discrimination.¹⁶¹ Pretext is defined as a false or weak reason or motive advanced to hide the actual or strong reason or motive.¹⁶² It can be established by proving that: (1) the employer's explanation has no basis in fact; or (2) the employer's explanation was not the real reason; or (3) that the stated reason is insufficient to warrant the disparate treatment.¹⁶³

4. Application to College Athletics

The preceding burden structure is seemingly ideal for the female scholarship athlete who, as an employee of her college or university, is subjected to disparate treatment resulting from the educational institution's policies and budgetary allotments within the athletic department. To further demonstrate the compatibility between a female athlete's discrimination claim and the use of Title VII, the preceding burden structures will be applied to the context of college athletics. The following analysis of the facts in *Pederson v. Louisiana State University*¹⁶⁴ will demonstrate how Title VII can be used to remedy an instance of discrimination at an educational institution.

LSU has offered competitive athletics for female athletes since 1977.¹⁶⁵ In the years following 1977, LSU had eight female athletic teams.¹⁶⁶ "In 1979, women's fast pitch softball was added, but was dropped following the 1982-83 season, with no credible reason given."¹⁶⁷ In 1995, LSU decided to add two intercollegiate varsity women's sports, fast pitch softball and soccer.¹⁶⁸ Soccer was scheduled to begin competitive conference play in the fall of 1995; competitive conference play for

160. *Id.*

161. *Id.*

162. BLACK'S LAW DICTIONARY 1187 (6th ed. 1990).

163. *Davis*, 898 F. Supp at 1286.

164. 213 F.3d 858 (5th Cir. 2000).

165. *Pederson v. La. State Univ.*, 912 F. Supp 892, 901 (D. La. 1996).

166. *Id.*

167. *Id.*

168. *Id.*

softball was scheduled to begin in 1997.¹⁶⁹ However, in January 1996, neither the facilities nor the recruiting for either team was complete.¹⁷⁰ Additionally, although eleven scholarships were allocated for each team, only two partial softball scholarships had been awarded, and "less than the full compliment of soccer scholarships [had] been awarded."¹⁷¹

The plaintiffs in the case asserted a claim for unequal treatment of female athletes.¹⁷² Included in the claim were assertions of "unequal pay to coaches, lesser quality facilities and other related grievances."¹⁷³

Additionally, testimony in the case revealed that administrators at LSU had an "archaic" attitude towards female athletics.¹⁷⁴ In fact, the *Pederson* court found that LSU "persisted in a systematic, intentional, differential treatment of women."¹⁷⁵ The court stated that:

LSU perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many . . . ways. For example, LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator," which the NCAA defines as the most senior women in the athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's teams at a rate far below that of its male coaches LSU arguably acted with deliberate indifference to the condition of its female athletics program.¹⁷⁶

The facts and findings in *Pederson* illustrate that gender inequity was present at LSU, and that female athletes were subject to discrimination based on their sex.¹⁷⁷ Accordingly, a female scholarship athlete at LSU

169. *Id.*

170. *Pederson*, 912 F. Supp at 902.

171. *Id.*

172. *Id.* at 904.

173. *Id.* It must be noted that the plaintiffs in *Pederson* were not varsity athletes. Rather, they were women who believed they would qualify to participate on either the soccer or softball team if said teams were implemented by LSU. Accordingly, the plaintiffs in *Pederson* would not likely meet the definition of employee, as discussed earlier in this paper, and therefore, they would not have been well served to proceed under Title VII. However, the facts of the case, and the discriminatory practices at LSU, could easily have been used as evidence of discrimination by a female scholarship athlete at LSU to prove a case of discrimination under Title VII. Accordingly, although the facts of the case have been set out as specific to the *Pederson* plaintiffs, they will be used to demonstrate how a Title VII claim would have been beneficial to an existing female scholarship athlete at LSU.

174. *Id.* at 881.

175. *Pederson v. La. State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000).

176. *Id.* at 881-82.

177. *Id.*

could have filed a suit under Title VII based on the legal theory articulated in this comment.

*a. Application of the Disparate Treatment Model to the
Facts of Pederson*

Assuming that a female scholarship athlete at LSU proved her status as an employee of the university by use of the Athlete Control Test discussed earlier, she would undoubtedly be able to satisfy the necessary elements of proving a prima facie case of discrimination.

As stated earlier, a female scholarship athlete could establish her prima facie case of discrimination using either direct evidence or circumstantial evidence. Although it is possible that a plaintiff facing discrimination under the facts of *Pederson* would have direct evidence of discrimination, the following application of the disparate treatment model will assume that only circumstantial evidence is present.

First, as a female, the LSU scholarship athlete is a member of a protected class. Second, assume that the athlete is fulfilling her athletic responsibilities in a satisfactory manner. Third, the athlete suffered an adverse employment action (disparate treatment) as shown by the findings in *Pederson*. As stated, the court found that LSU intended to treat female athletes differently "on the basis of their sex by providing them unequal athletic opportunity."¹⁷⁸ Presumably, evidence of disparate treatment must have been present for the *Pederson* court to make such a determination. Fourth, the similarly situated male athletes receive far better treatment in terms of budgetary allotment, scholarships, and fringe benefits of participation in the college or university athletic program. This finding is also supported by the language of the *Pederson* court.¹⁷⁹

The next step under the disparate treatment model is for the accused employer to offer a legitimate, non-discriminatory reason for the alleged discrimination. The court states that LSU had "not even attempted to offer a legitimate, nondiscriminatory explanation for the blatantly differential treatment of male and female athletes, and men's and women's athletics in general; they merely argue archaic values do not equate to intentional discrimination."¹⁸⁰ Although LSU did not offer a legitimate nondiscriminatory reason to defend the claim of a Title IX violation, they would be required to do so if defending a claim under Title VII.

178. *Id.*

179. *Id.*

180. *Pederson*, 213 F.3d at 881.

While it is difficult to anticipate every counter argument that LSU, or any other educational institution, could offer, it is safe to assume that LSU would offer a nondiscriminatory reason that it believed to be legitimate, such as budget constraints or lack of interest in female athletics.

Finally, the female scholarship athlete at LSU would need to prove that this legitimate, nondiscriminatory reason offered by LSU was simply pretext for discrimination. The reasons potentially offered by LSU, or any other educational institution, are pre-textual. LSU intentionally denied female athletes the same privileges of employment received by men because female programs were not the money makers and generally did not bring the institution national recognition.¹⁸¹ LSU acknowledged that it had "archaic" views concerning the female athletic program.¹⁸² Accordingly, the *Pederson* court correctly held that LSU intended its discriminatory practices. The scholarship athlete would have successfully demonstrated pretext on the part of LSU.

As demonstrated, a female scholarship athlete at LSU could satisfy her evidentiary burden and show that discriminatory practices at LSU resulted in the disparate treatment toward female athletes. As stated, a disparate treatment analysis focuses on whether the accused employer had a discriminatory motive. The facts and findings in *Pederson* make it clear that a discriminatory motive existed. Based on the preceding application of the disparate treatment model to college athletics, it can be concluded that a female athlete subjected to disparate treatment or impact by her college or university should succeed with a Title VII claim and be afforded the available remedies.

5. Remedies Available Under Title VII

When there is a finding of employment discrimination under Title VII, several remedies exist, including hiring, reinstatement, reasonable accommodation, promotion, back pay, front pay, or *other actions that will make the wronged individual whole*.¹⁸³ The majority of these remedies are inapplicable to the employer-employee relationship created by the athletic scholarship. However, under Title VII, the court does have rather broad discretion in awarding remedies.

A court would be justified in ordering an educational institution to modify its current practices or to implement new policies to eliminate disparate treatment of female athletes. Such an award would not afford

181. *Id.*

182. *Id.*

183. EEOC, *supra* note 5 (emphasis added).

the specific plaintiff any direct monetary relief in the form of damages, front pay, or back pay (differing from most remedies given under Title VII); however, the nature of the relief would still be monetary and the female athlete would still benefit from the award.

For example, if a court ordered an educational institution to restructure its budgetary allocations so that men and women receive equal funding, the change would affect the economic structure of the college or university. Additionally, if an educational institution were ordered to provide new facilities or equipment for the female teams, those provisions would certainly be costly. Although the athletes would not personally receive damages for being treated disparately, the female athletes would still benefit from the relief awarded.

The obvious benefit from this type of relief award is twofold. First, awards that order educational institutions to implement new policies to remedy disparate treatment achieve the ultimate goal of balancing the resources available for male and female athletes. Second, the threat of forced economic restructuring may deter colleges and universities from promoting gender inequity in their athletic department practices.

Accordingly, the relief available under Title VII may serve to effectively eliminate the disparate treatment female athletes receive in their share of the benefits of participating in college athletic programs. Although Title IX is capable of providing female athletes with a similar remedy, the use of Title IX to effectuate such change has become stagnant. Title VII cannot offer any additional remedy when compared to Title IX, but the use of Title VII could plausibly be the catalyst needed to re-ignite the quest for gender equity.

V. POTENTIAL RAMIFICATIONS OF APPLYING TITLE VII TO COLLEGE ATHLETICS

The successful application of Title VII to college athletics brings with it acceptance of the idea that a scholarship athlete is an employee of his or her educational institution. That finding would undoubtedly disrupt the current structure of the NCAA and college athletic programs. Although a distinction is made between the definition of employee under Title VII and other statutes, such as workers compensation, defining the scholarship athlete as an employee in any context would prompt scholarship athletes to file other claims for which a finding of an employment relationship is necessary. While it cannot be stated that athletes will succeed with claims other than Title VII, it certainly can be stated that the NCAA will encounter more lawsuits.

If Title VII were successfully applied to college athletics, the door would be open to a whole new host of litigation. However, that should not deter the use of Title VII in the context of college athletics. As evidenced by the earlier analysis of the *Pederson* case, Title VII has the potential to remedy many of the gender inequities that are present in college athletics. When Title IX was initially introduced, it too presented many potential ramifications for educational institutions, but it has, in many regards, helped female athletes in their quest for gender equality. If applied correctly, Title VII has the potential to be just as successful, if not more so, than Title IX, and effectively eliminate gender inequity in the area of athlete benefits in college athletic programs.

VI. CONCLUSION

Although it is impossible to assert with absolute certainty that the application of Title VII will fully remedy the gender equity problems that exist in college athletics, there is a viable argument that Title VII can accomplish what Title IX was intended to do, and yet has often failed to do. It is time to move past the stagnancy resulting from Title IX; it is time to apply Title VII to college athletic programs.

This comment focuses on the viability of Title VII as an additional resource female scholarship athletes can use to remedy gender inequity in college athletics. Title VII is not being offered as a substitute for Title IX. However, a new problem-solving method is needed if female athletes are going to achieve the gender equity they deserve.

The largest hurdle the scholarship athlete must overcome when attempting to use Title VII is the establishment of the employer-employee relationship between scholarship athletes and universities; however, this hurdle is not insurmountable.¹⁸⁴ When analyzed using the proposed Athlete Control Test, a scholarship athlete qualifies as an employee of the educational institution under Title VII. Accordingly, the scholarship athlete should be afforded the protections offered by Title VII.

184. The ordinary athletic scholarship does indeed create an employer-employee relationship. For a variety of unarticulated reasons—foremost among them the fear of uncharted waters—it is not surprising that the courts have tended to refuse (under workers' compensation statutes) to hold that amateur athletes are really employees. It is an uncomfortable and unsettling realization that scholarship athletes are really employees, but it is a conclusion that an honest appraisal compels. And it is a conclusion from which a number of beneficial consequences will undoubtedly flow, contributing to the reform of a system much in need of constructive change.

Archer, *supra* note 95, at 117 (quoting RAY YASSER ET AL., *SPORTS LAW CASES AND MATERIALS* (3d ed. 1994)).

There is no question that female athletes have more opportunities and athletic privileges than twenty-five years ago. However, that fact should not serve as a barrier to a continued quest for equality. Female athletes are still subject to disparate treatment, and although Title VII has never been applied in this context before, it provides a new avenue to effectuate change. While both Title IX and Title VII exist as methods of eliminating gender inequality, it is often taking the road less traveled that makes all the difference.¹⁸⁵

KRISTI L. SCHOEPPER

185. FROST, *supra* note 7, at 119.

PROTECTING UNIVERSITIES' ECONOMIC INTERESTS: HOLDING STUDENT-ATHLETES AND COACHES ACCOUNTABLE FOR WILLFUL VIOLATIONS OF NCAA RULES

The role of intercollegiate athletics at major colleges and universities has undergone a dramatic change since the inception of the National Collegiate Athletic Association ("NCAA") in 1906.¹ Amateur athletics have become a very big commercial enterprise. Each year, collegiate athletics generates millions of dollars in revenue for universities.² The NCAA negotiates billion dollar television contracts, conducts national championships, and markets many products bearing its name.³ For example, the Columbia Broadcasting System ("CBS") recently agreed to pay the NCAA six billion dollars over an eleven-year period for the exclusive rights to the Division I Men's Basketball Championship.⁴

This increased commercialism has led the NCAA and its member institutions to a very difficult balancing act between maintaining academic integrity and amateurism, while striving to generate large revenues in order to operate a self-financing athletic department. Many coaches, politicians, and journalists argue that the NCAA and its member institutions are exploiting the student-athlete in order to generate large amounts of revenue.⁵ However, many of these same commentators do not want to hold student-athletes accountable for their own willful violations of NCAA rules and regulations.

Despite what many individuals believe, most NCAA Division I athletic programs actually lose money.⁶ Membership in Division I requires a college or university to sponsor at least fourteen varsity sports, most of which do not generate revenue.⁷ Thus, when a student-athlete knowingly or willfully violates NCAA rules and regulations, it may not only

1. *The History of the NCAA*, <http://www.ncaa.org/about/history.html> (last visited Mar. 25, 2000).

2. Kyle Parks, *Marketing Madness Series: The Final Four: St. Petersburg*, ST. PETERSBURG TIMES, Mar. 28, 1999, at 1B.

3. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participating in Intercollegiate Athletics*, 3 SPORTS L. J. 25, 31 (1996).

4. The NCAA News, *NCAA, CBS Reach 11-year \$6 Billion Agreement*, <http://www.ncaa.org/news/19991206/active/3625n01.html> (last visited Mar. 25, 2000).

5. Abby Haight, *Bringing the Future Into Focus*, PORTLAND OREGONIAN, Mar. 31, 2000, at C7.

6. Jeffrey Selingo, *In College Sports, Is Bigger Better?*, CHRON. OF HIGHER EDUC., Oct. 31, 1997 at A55.

7. *Id.*

jeopardize the student-athlete's eligibility, but it may also subject the university to costly NCAA investigations and sanctions.⁸ Recent examples of academic fraud, gambling scandals, and prohibited contact with sports agents, have caused great harm to universities' reputations and economic standings, while the offending athlete walked away unscathed.⁹

This article argues that student-athletes are adults and should be held accountable for their willful disregard of long-established NCAA rules and regulations. Schools invest significant time and money into student-athletes in the form of recruiting, scholarships, uniforms, equipment, and travel.¹⁰ The university must have a means of protecting its investment from athletes who have no regard for established rules and coaches with a win-at-all-costs attitude. However, the question remains as to the best method with which to hold coaches and student-athletes accountable for violating rules that cause the university to be exposed to NCAA penalties.

The analysis is set forth in six parts. Part I explains how coaches and athletes blatantly violate established NCAA rules for their own benefit at the expense of the university. Part II discusses the legal relationship embodied in the contractual relationship between the student-athlete and the university in the National Letter of Intent, the Financial Aid Agreement, and the Student-Athlete Statement. Part III will examine any valid legal claims a university may have against a student-athlete through its contractual relationship. Part IV will examine if it is in the university's best interest to pursue a legal claim against a student-athlete. Part V will discuss the drafting of coaches' contracts and recommend possible changes in the structuring of the contract in order to hold coaches accountable for their involvement in violations. Part VI will explore alternative ways a university can protect its reputation and economic interest. This section will examine possible non-legal solutions along with any consequences that may accompany these recommendations.

8. Anita M. Moorman & Mary A. Hums, *Potential Student-Athlete Liability for NCAA Violations: Can They or Should They Be Held Legally Accountable?*, 9 J. LEGAL ASPECTS OF SPORT 163, 164 (1999).

9. *Id.*

10. *Id.* at 163.

I. THE PROBLEM

Much has been written recently concerning the unethical conduct of student-athletes, coaches, and sports agents.¹¹ Recent examples of student-athletes receiving extra benefits from sports agents, or boosters and coaches establishing a system of academic fraud to maintain athlete eligibility, have had a detrimental impact on unsuspecting universities.¹² However, little has been done to hold coaches and athletes accountable for their role in these actions.¹³

The cost of the University of Minnesota's investigation into academic fraud in men's basketball was almost \$1.9 million.¹⁴ Not taken into account in this total was the \$1.5 million buyout of former coach Clem Haskins' contract or the cost of hiring a replacement coach.¹⁵ Furthermore, the NCAA has yet to impose penalties upon the university for the cheating scandal, which may include financial sanctions.¹⁶

The scandal also caused harm to the university's reputation.¹⁷ According to Representative Peggy Leppik, Chairwoman of the Higher Education Finance Committee in Minnesota, '[t]here is no doubt that significant harm has been done to the university's reputation in the eyes of both the public and the Legislature.'¹⁸ Although the investigation implicated Haskins' involvement in the scandal, he received a \$1.5 million buyout and escaped accountability for his role.¹⁹ In addition, at least eighteen former men's basketball student-athletes escaped accountability, leaving the athletic department with the difficult task of paying the bill.²⁰

11. *LSU Wins Appeal, Can Participate in SEC Tournament*, USA TODAY, Mar. 1, 1999, at 14C; Curt Rallo, *A 'Black Eye' For Boilermakers: Purdue to Appeal NCAA Penalties to Basketball Program*, SOUTH BEND TRIB., July 1, 1999, at B1.

12. Mark Asher, *Irish are Assessed Penalties; Probation a First for Notre Dame*, WASH. POST, Dec. 18, 1999, at D1; Jay Weiner, *Haskins' Sweet Deal Leaves Sour Taste: The New Findings About the Coach's Role Have Some Wondering Why He Was Able to Leave with \$1.5 Million*, STAR TRIB. (Minneapolis), Nov. 20, 1999 at A1; *Porter Admits Taking Money From Agent*, ST. LOUIS POST-DISPATCH, Feb. 29, 2000 at C1.

13. Moorman & Hums, *supra* note 8, at 169.

14. Mary Jane Smetanka, *U Inquiry Costs Nearly \$2.2 Million: The Total is Higher than Expected, but the NCAA is Pleased with the Report's Thoroughness*, STAR TRIB. (Minneapolis), Feb. 24, 2000, at 1A.

15. *Id.*

16. *Id.*

17. *A Sample Of Reaction to the U Story*, STAR TRIB. (Minneapolis), Nov. 20, 1999, at 12A.

18. *Id.*

19. Weiner, *supra* note 12, at A1.

20. Smetanka, *supra* note 14, at 1A.

Another example of an athlete causing economic harm to a university was Marcus Camby's involvement with sports agents.²¹ Camby, who admitted receiving cash and expensive jewelry from sports agents, subjected the University of Massachusetts to NCAA violations.²² The University of Massachusetts was stripped of its 1996 regional championship and forced to return \$151,000.00 in tournament money.²³ However, Camby escaped accountability.²⁴ In 1996, Camby signed a three-year, \$8 million contract after being selected as the second overall draft pick by the Toronto Raptors.²⁵ Subsequently, Camby signed a six-year, \$40 million contract with the New York Knicks.²⁶

The above examples are only two of numerous examples of coaches and student-athletes escaping accountability while the university suffers harm to its reputation and to its wallet. Moreover, unethical conduct of student-athletes and coaches is not going to disappear. In an atmosphere populated by players craving money, gamblers looking for a chance to get rich, and unscrupulous agents looking to secure future clients, problems will continue to persist.

II. LEGAL RELATIONSHIP BETWEEN THE STUDENT-ATHLETE AND THE UNIVERSITY

In order to understand the legal relationship between the student-athlete and the university, it is important to examine their contractual relationship.²⁷ Traditional contract doctrine can function to hold student-athletes accountable for their willful violations of NCAA rules and regulations. This accountability begins by recognizing the reasonable obligations placed on student-athletes that arise from the contractual relationship between a student-athlete and the university.

A. Overview of Modern Cases

Many cases have examined the potential contractual relationship between a student-athlete and a university in situations where student-ath-

21. Joe Burris, *Would-be Agent Suing Camby*, B. GLOBE, Feb. 18, 1999, at D3.

22. *Id.*

23. *Reports Name Vegas Lawyer in Auburn Eligibility Scandal*, USA TODAY, Mar. 13, 2000, at 10E.

24. Moorman & Hums, *supra* note 8, at 164.

25. *Id.*; *Reports Name Vegas Lawyer in Auburn Eligibility Scandal*, *supra* note 23, at 10E.

26. Shawna Richer, *Knicks' Camby Marvels at Raptors' New Digs: Knick Forward Reflects on the Turmoil of His Lasts Days in Toronto*, THE GLOBE & MAIL (Toronto), Mar. 22, 1999, at S3.

27. Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1283-84 (1989).

letes alleged a breach of contract by their university.²⁸ Although these suits were brought by student-athletes, a similar analysis can be used to examine a possible claim brought by a university. In analyzing the relationship, many courts have acknowledged that the university-student relationship is contractual in nature, especially when financial aid is a part of the agreement.²⁹

Taylor v. Wake Forest University represented "the first major court decision to hold that a contract exists between the student-athlete and the university."³⁰ In *Taylor*, a student-athlete football player alleged that the university wrongfully terminated his scholarship after he refused to participate in team practices due to his poor academic performance.³¹ "Taylor's grade point average at the end of his first semester of his freshman year was 1.0 on a 4.0 scale."³² As a result of his low grade point average, Taylor was ineligible to play football during the spring semester of his freshman year.³³ However, after improving his grade point average enough to regain his athletic eligibility, Taylor refused to participate in football during his sophomore year.³⁴ The university then terminated Taylor's scholarship, citing his failure to comply with his contractual obligations.³⁵ Taylor continued to attend Wake Forest University and sought to recover the \$5,500.00 he would have incurred during the last two years of college.³⁶

The trial court granted summary judgment for Wake Forest University and the North Carolina Court of Appeals affirmed.³⁷ Affirming the trial court's grant of summary judgment, the appellate court stated that Taylor failed to comply with his contractual obligations. The appellate court stated:

As long as his grade average equaled or exceeded the requirements of Wake Forest, he was maintaining his scholastic eligibility

28. Moorman & Hums, *supra* note 8, at 165.

29. *Id.*; Cozzillio, *supra* note 27, at 1283-84.

30. Daniel Nestel, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L. J. 1401, 1403 (1992).

31. *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 381 (N.C. App. 1972), *cert. denied*, 192 S.E.2d 197 (N.C. 1992).

32. Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 770 (1991).

33. *Id.* Wake Forest University required a 1.35 GPA after the first year, a 1.65 after the second year, and a 1.85 after the third year.

34. *Id.*

35. *Id.*; Nestel, *supra* note 30, at 1403.

36. Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163, 175 (1991).

37. *Id.*

for athletics . . . When he refused to do so in the absence of any injury or excuse other than to devote more time to studies, he was not complying with his contractual obligations.³⁸

A second prominent case that discussed the contractual relationship between a student-athlete and a university is *Begley v. Corporation of Mercer University*.³⁹ In *Begley*, a student-athlete brought a breach of contract claim against the university for revoking his scholarship when it discovered his high school grades did not meet the NCAA requirements.⁴⁰ The court granted Mercer University summary judgment, stating that *Begley's* grades violated a provision in the scholarship agreement.⁴¹ More significantly, the court reaffirmed the belief that an athletic scholarship created a contractual relationship between the athlete and university.⁴²

Finally, a third and more recent decision implies that a court would not have any difficulty in viewing a scholarship agreement as an enforceable binding contract.⁴³ In *Ross v. Creighton University*, the student-athlete claimed that the university failed to properly educate him.⁴⁴ The court concluded that it was impossible to enforce a claim that the university failed to provide 'adequate' educational services because a court was incapable of determining the quality of education.⁴⁵ Although this case did not directly address whether the scholarship was a contract, the court concluded that the relationship between the university and a student-athlete is, in part, contractual.⁴⁶ Furthermore, the court concluded, "[a] contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced."⁴⁷

The decisions in *Taylor*, *Begley*, and *Ross* have consistently used a contractual analysis to define the parties' respective rights and responsibilities to resolve disputes.⁴⁸ The *Taylor* and *Begley* decisions endorse the proposition that the athletic scholarship creates a contractual rela-

38. *Taylor*, 191 S.E.2d at 382.

39. 367 F. Supp 908 (E.D. Tenn. 1973).

40. Nestel, *supra* note 30, at 1403.

41. *Id.* at 1403-04.

42. *Id.* at 1404.

43. Davis, *supra* note 36, at 191-92.

44. 957 F.2d 410, 412 (7th Cir. 1992).

45. Davis, *supra* note 36, at 191-92.

46. *Ross*, 957 F.2d at 413.

47. *Id.* at 416 (quoting *DeMarco v. University Health Sciences*, 352 N.E.2d 356, 361-62 (1976)).

48. Moorman & Hums, *supra* note 8, at 165.

tionship between the university and the student-athlete.⁴⁹ Therefore, a university may try to use contract analysis as a mechanism to hold a student-athlete accountable when he or she willfully violates NCAA rules and regulations.

B. Elements of the Contractual Relationship

The essential elements of a contract are straightforward.⁵⁰ In its simplest terms, the formation of a contract requires an offer, acceptance, and consideration.⁵¹ These same basic elements can be used to examine the more complex contractual relationship between the student-athlete and the university.

There are numerous documents containing statements that may potentially form a contract between the student-athlete and the university.⁵² The primary documents that may establish a contractual relationship between the student-athlete and the university are the National Letter of Intent, the Financial Aid Agreement, and the Student-Athlete Statement.⁵³ In order to understand the contractual relationship these documents may create, it is important to understand the role each plays.

The National Letter of Intent program is administered by the Collegiate Commissioners Association.⁵⁴ The purpose of the National Letter of Intent program is to provide certainty in the recruiting process.⁵⁵ Participating institutions agree to provide a prospective student-athlete, who is admitted to the university and is eligible for financial aid under NCAA rules, athletic aid for one academic year in exchange for the prospect's agreement to attend the university for that academic year.⁵⁶ In addition, participating universities agree to not recruit any prospective student-athlete who has signed a National Letter of Intent with another university.⁵⁷

Under the National Letter of Intent program, the university's athletic director sends a written offer to the prospective student-athlete, offering

49. Nestel, *supra* note 30, at 1404.

50. Davis, *supra* note 36, at 165.

51. *Id.*

52. Moorman & Hums, *supra* note 8, at 165.

53. Cozzillio, *supra* note 27, at 1290-91.

54. *National Letter of Intent*, available at <http://www.national-letter.org> (visited Mar. 25, 2000).

55. *Id.*

56. *Id.*

57. *Id.*

a "scholarship in exchange for the student-athlete's commitment to attend the institution and participate in intercollegiate athletics."⁵⁸ The National Letter of Intent must first be executed by the school's athletic director or authorized representative and, then, by the prospective student-athlete and the student's parent.⁵⁹ After executing the National Letter of Intent, the prospective student-athlete is committed to the university, generally, but not to a particular program.⁶⁰ In addition, the prospective student-athlete is only allowed to sign one National Letter of Intent.⁶¹

The National Letter of Intent contains a penalty if the prospective student-athlete does not attend the named institution, but rather attends another participating university.⁶² The penalty is that the student-athlete cannot represent another institution in intercollegiate athletics competition until the student-athlete has completed two full academic years at the other institution.⁶³ Further, the student-athlete is charged with the loss of two seasons of athletics eligibility in all sports.⁶⁴ However, the student-athlete can receive a qualified release from the original university, thereby losing only one season of eligibility.⁶⁵ Additionally, there are several actions that nullify the National Letter of Intent.⁶⁶ A few activities that nullify the National Letter of Intent include: active duty in the armed forces for eighteen months, failure to attend any university for a year, and if the student-athlete's sport is discontinued at the institution named on the Letter.⁶⁷

The second important document is the Financial Aid Agreement. Before signing the National Letter of Intent, the student-athlete must have the Financial Aid Agreement in his/her possession.⁶⁸ The Financial Aid Agreement is the offer from the university to pay for the student-athlete's tuition, fees, room, board, and books.⁶⁹ The wording of the Financial Aid Agreement is at the discretion of each individual univer-

58. Cozzillio, *supra* note 27, at 1290.

59. *National Letter of Intent*, *supra* note 54, at <http://www.national-letter.org>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Cozzillio, *supra* note 27, at 1291-92.

67. *Id.* at 1292; *National Letter of Intent*, *supra* note 54, at <http://www.national-letter.org>.

68. Derek Quinn Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L.REV. 96, 115 (1985).

69. Davis, *supra* note 32, at 772.

sity.⁷⁰ Typically, the Financial Aid Agreement contains a list of the terms and conditions of the award, as well as the amount and duration.⁷¹ These terms and conditions require the student-athlete to comply with institution, conference, and NCAA rules.⁷² Furthermore, the student-athlete promises to remain academically eligible and to participate in the institution's athletic program.⁷³ The Financial Aid Agreement is renewable on an annual basis, for a maximum of five years.⁷⁴ However, the university may withdraw the award if the student-athlete fails to comply with the conditions set forth the agreement.⁷⁵

The third material document is the Student-Athlete Statement. Prior to a student-athlete being able to compete each year, he/she must sign the Student-Athlete Statement.⁷⁶ The athletic director or a designee administers the Student-Athlete Statement.⁷⁷ The Statement verifies that to the best of the student-athlete's knowledge, the athletic department's conduct, as well as their own actions, are in compliance with the appropriate NCAA, conference, and university rules.⁷⁸ The Student-Athlete Statement includes a summary of NCAA regulations regarding the student-athlete's eligibility, recruitment, financial aid, and amateur status.⁷⁹ Finally, the Student-Athlete Statement demands that a student-athlete consent to drug testing.⁸⁰ If the student-athlete refuses to sign the Student-Athlete Statement, they are ineligible to participate in NCAA competition.⁸¹

The National Letter of Intent, the Financial Aid Agreement, and the Student-Athlete Statement, taken together, are an "express contract that specifically delineates the student-athlete's contractual obligations."⁸² The language of these documents clearly indicates that the relationship between the university and a student-athlete is more than an "academic gift."⁸³ These documents contain promises that provide consideration

70. Johnson, *supra* note 68, at 115.

71. Davis, *supra* note 32, at 771-72.

72. Davis, *supra* note 36, at 166.

73. Davis, *supra* note 32, at 772.

74. *Id.*

75. *Id.*

76. STUDENT-ATHLETE STATEMENT – DIVISION I, NCAA, ACADEMIC YEAR 1998-99.

77. *The University of Tennessee at Martin Department of Intercollegiate Athletics*, available at <http://www.utm.edu/~danellef/compliance.html> (visited Mar. 25, 2000).

78. *Id.*

79. *Student-Athlete Statement*, *supra* note 78.

80. *Id.*

81. *Id.*

82. Davis, *supra* note 32, at 771-73.

83. Davis, *supra* note 36, at 165.

for the agreement.⁸⁴ The student-athlete, in prior possession of the Financial Aid Agreement, promises to attend a university when he signs a National Letter of Intent.⁸⁵ In exchange for this commitment, the university promises to provide the student financial assistance.⁸⁶ In its simplest terms, the relationship between the university and a student-athlete satisfies the requirements of offer, acceptance, and consideration.

C. Contract Formation

In order to form the contract between the student-athlete and the university, it is essential that there is mutual assent and that the parties intend to be legally bound to the agreement.⁸⁷ The key issue is whether each party to the agreement manifests an intent to be legally bound by their promises.⁸⁸ Intent is an important element in the contract formation because the entire transaction may be aborted if either party, expressly or implicitly, manifests intent not to be bound by their apparent promises.⁸⁹ A contract will not be enforced if the parties intend not to be bound or held legally accountable for failure to satisfy their promises.⁹⁰ Thus, further analysis is necessary to examine the intent of the student-athlete when entering into a contractual agreement with a university.

The student-athlete's intent is measured by a reasonable person's interpretation of the other party's representation.⁹¹ The recruiting process by which a prospective student-athlete receives a National Letter of Intent offer reflects the serious nature of the prospect's intent to be bound by the agreement. Recruiting is an aggressive process where prospective student-athletes compete for scholarships and athletic departments spend millions of dollars traveling the country scouting athletic talent.⁹²

Another factor used in determining whether the parties manifested their intent to be bound by the contract is if the document is sufficiently definite and certain to permit a court to apply an appropriate remedy.⁹³ Here, the National Letter of Intent reflects a final, formal document that

84. Davis, *supra* note 32, at 771.

85. *Id.*

86. *Id.*

87. Cozzillio, *supra* note 27, at 1293.

88. *Id.* at 1294.

89. *Id.* at 1293.

90. *Id.* at 1294.

91. *Id.*

92. Kimberly Sweet, *U. Nebraska: University Funding Essence of Athletic Success*, *Nebraska Staff Says*, U-WIRE, Jan. 24, 2000.

93. GORDON D. SCHABER & CLAUDE D. ROHWER, *CONTRACTS*, 1, 12 (3d ed. 1990).

is a reflection of the parties' desire to engage in a comprehensive agreement.⁹⁴ The National Letter of Intent, along with the Financial Aid Agreement and the Student-Athlete Statement, represent all the material terms of the agreement, leaving no room for judicial 'gap-filling.'⁹⁵ Therefore, these documents stand as a clear reflection of the student-athlete's serious intent to be bound by their commitment to the university in exchange for the financial aid.

D. Potential Problems

Even though it appears that a contract exists between student-athletes and universities, it could be argued that the agreement represents an adhesion contract.⁹⁶ The NCAA rules prescribe that member institutions administer documents that are uniform.⁹⁷ For example, Article 3.2.4.5 of the NCAA Constitution states that the Student-Athlete Statement "shall [be] administer[ed] annually, on a form prescribed by the Management Council."⁹⁸ Adhesion contracts are contracts that are offered as "take-it-or-leave-it" propositions.⁹⁹ General contract law indicates that adhesion contracts are looked at with disfavor when there is a gross inequity in bargaining power between parties to the contract.¹⁰⁰ However, many courts have held that adhesion contracts are enforceable absent a finding of unfairness or unconscionability.¹⁰¹ Assuming an individual voluntarily enters into a standardized contract (i.e., not procured by fraud or unconscionability), courts will not invalidate the contract and will uphold the doctrine of freedom of contract.¹⁰²

Although student-athletes are recruited by numerous universities and retain a considerable power to choose what university to attend, the contract documents at each university are the same.¹⁰³ However, the student-athlete does not agree to any specific clauses that are so shock-

94. Cozzillio, *supra* note 27, at 1305.

95. *Id.* at 1305-06.

96. Mark A. Conrad, *Letters of Intent and Scholarships*, *Sport Law for Sport Managers*, in *SPORT LAW FOR SPORT MANAGERS* 218, 227 (eds. Doyice J. Cotton & T. Jesse Wilde, 1997).

97. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL, art. 3.2.4.5 & art. 13.02.9 (2000).

98. *Id.*

99. James V. Jordan & Judith B. Gitterman, *Franchise Agreements: Contracts of Adhesion?*, 16 SUM. FRANCHISE L. J., 1, 1 (1996).

100. Conrad, *supra* note 96, at 227.

101. Jordan & Gitterman, *supra* note 99, at 1.

102. Jonathan E. Breckenbridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 956 (1993).

103. *Id.*

ingly unfair that a court would decide against enforcement. Requiring student-athletes to maintain a minimum level of academic standing, not accept extra benefits from sports agents to restrain from using illegal drugs, and to avoid gambling on intercollegiate athletic competition are not unconscionable expectations. Furthermore, prospective student-athletes have alternatives to intercollegiate athletics.¹⁰⁴ An increasing number of prospective student-athletes are skipping collegiate athletics altogether, choosing to turn professional after high school.¹⁰⁵ Thus, applying the concept of adhesion contracts to the student-athlete/university relationship may be difficult.

A second potential problem in the contractual agreement between student-athletes and universities is the possible incapacity of the athlete to enter into a binding contract.¹⁰⁶ Since most prospective student-athletes sign the National Letter of Intent during their senior year of high school, it is possible that they will only be seventeen and are therefore considered a minor in most jurisdictions.¹⁰⁷ Thus, the question arises if the contract becomes voidable due to the student-athlete's lack of capacity.¹⁰⁸

The National Letter of Intent requires that an adult party (i.e., parent or guardian) co-sign with the student-athlete in an attempt to ensure that the agreement will be enforceable.¹⁰⁹ Generally, an adult co-signer is liable for damages when a minor breaches the contract.¹¹⁰ The use of the co-signature by an adult allows the National Letter of Intent to exist as a viable contract even though the student-athlete may still be under the age of majority.¹¹¹ In addition, most student-athletes will reach the age of majority when they attend the university and will then implicitly or expressly ratify the agreement, removing the capacity problem.¹¹² Furthermore, the Student-Athlete Statement, which contains many key promises, is not signed until the student-athlete has enrolled at the institution and, most likely, has reached the age of majority.

104. *College Basketball Notebook*, THE COURIER-J. (Louisville), June 13, 1999, at 11C.

105. *Id.*

106. Cozzillio, *supra* note 27, at 1325.

107. *Id.*

108. Conrad, *supra* note 96, at 228; *see also*, Cozzillio, *supra* note 27, at 1326.

109. *Id.* at 226.

110. Cozzillio, *supra* note 27, at 1326.

111. *Id.*

112. *Id.*

III. THE UNIVERSITY'S CLAIM

Since a breach of contract action is available to the university, it is important to analyze what type of claim the university could bring against the student-athlete.¹¹³ When a party who owes a duty under the contract fails to perform that duty, that party has breached the contract.¹¹⁴ The basic remedy for a breach of contract action involves the awarding of damages to compensate the injured party.¹¹⁵

In their contract with the university, student-athletes make several specific promises. Included in the Letter of Intent, Financial Aid Agreement, and the Student-Athlete Statement are specific clauses where the student-athlete promises to abide by NCAA, conference, and institution rules. The Student-Athlete Statement incorporates Articles 10 (Ethical Conduct), 12 (Amateurism), 13 (Recruiting), 14 (Eligibility), 15 (Financial Aid), and 16 (Awards and Benefits) into the agreement.¹¹⁶ For example, Bylaw 12.3 of the NCAA Division I Manual is included in the Student-Athlete Statement.¹¹⁷ The Bylaw states that student-athletes are not eligible for a sport if they have ever accepted money, transportation, or other benefits from an agent or agreed to have an agent market the student-athlete's athletic ability or reputation in that sport.¹¹⁸ This rule, barring athletes from receiving extra benefits has been in existence for at least fifteen years, and student-athletes are well aware of its existence.¹¹⁹

Consider a situation where a high profile student-athlete accepts extra benefits (i.e., money, gifts) from a sports agent placing the unsuspecting university at risk for NCAA violations, financial penalties, and investigative costs. After a lengthy investigation, the university incurs several NCAA penalties, including the return of revenues generated from NCAA Championship competition. Subsequently, the student-athlete who violated NCAA rules has become a professional athlete accepting a multi-million dollar contract. This scenario could lead a university to bring a contract action against its former student-athlete. The university could bring a breach of contract action for monetary damages to recover for the economic harm incurred, and more importantly,

113. Moorman & Hums, *supra* note 8, at 166.

114. Frank J. Cavico, Jr., *Punitive Damages for Breach of Contract – A Principled Approach*, 22 ST. MARY'S L. J. 357, 361 (1990).

115. *Id.* at 363.

116. Student-Athlete Statement, *supra* note 76.

117. *Id.*

118. *Id.*

119. Tom D'Angelo, *Miller Cleared by UF*, PALM BEACH POST, Mar. 31, 2000, at 1C.

to establish a precedent of holding student-athletes accountable for their willful misconduct. However, some state statutes bar claims against student-athletes for violations of collegiate athletic association rules.¹²⁰ In Texas, a cause of action cannot be brought by a regional athletic association if, at the time of the violation, the defendant was a student at a member institution of the regional athletic association.¹²¹

Additionally, a student may raise an antitrust defense to a breach of contract claim. Over the last thirty years, student-athletes have brought several suits challenging the draft, agent, and compensation bylaws as violations of antitrust law.¹²² "Courts have rejected all of these challenges."¹²³ Courts have deferred to the NCAA's rules and principles of amateurism and have concluded that such rules fail to constitute unlawful restraints of trade.¹²⁴ Thus, based on the existing precedent, it is unlikely that an antitrust defense would be successful.

The university could also bring a claim based on fraud due to the intentional misrepresentations made by a student-athlete. Fraud in the inducement claim relates to false representations made prior to the inception of the contract.¹²⁵ It occurs when a party to a contract is induced to enter into that contract by the fraud of the other party.¹²⁶ Because fraud neglects the essential element of meeting of the minds, the defrauded party has the right to void the contract and/or seek damages.¹²⁷

A student-athlete may fraudulently represent his eligibility to the university when signing the student-athlete statement each year prior to competition. In this situation, the university would have to show that the student-athlete knowingly made a false representation of a material fact to the university that the institution relied upon to its damage.¹²⁸ Since the contract documents contain specific clauses that relate to student-athlete eligibility, particularly in regard to their involvement with agents,

120. TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.003 & 131.005 (1999).

121. *Id.*

122. *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1302 (1992).

123. *Id.*

124. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L. J. 269, 310 (1994).

125. Thomas M. Giesler, Jr., *Proof of Fraudulent Inducement of a Contract and Entitlement to Remedies*, 48 AM. JUR. PROOF OF FACTS 3d 329, 338 (Mary G. Leary et al. eds., 1998).

126. *Id.* at 338-39.

127. 66 AM. JUR. 2d *Release* § 21 (1973).

128. MELVILLE M. BIGELOW, *THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF* 3 (1981).

the university could file a claim based on fraud to recover damages for economic harm.

Damages from fraud may not be predicated on speculation and must be a proximate consequence of the fraud.¹²⁹ Generally, damages for fraud are in an amount that will compensate the plaintiff for the loss caused by the fraud.¹³⁰ In a situation where an athlete receives extra benefits from a sports agent, a university should not have any difficulty showing that their economic harm was the proximate consequence of the student-athlete's fraudulent representation. Thus, the university should be able to recover damages to offset its financial injury.

IV. POTENTIAL CONSEQUENCES OF UNIVERSITY LEGAL ACTION

While a valid contract claim is probably available to a university, the question remains whether it is the most practical solution to the problem. In theory, pursuing a contract action against a former or current student-athlete sounds like a good idea. However, there are numerous ramifications that may occur if a university brings suit against a student-athlete.

If a university takes legal action against a student-athlete who has caused harm to its reputation and economic status, it could have a negative effect on the university's reputation.¹³¹ Recently, universities have received a substantial amount of criticism due to low graduation rates and the perceived exploitation of student-athletes.¹³² Universities continue to claim that their primary interest is the education of student-athletes, rather than winning championships and generating revenue.¹³³ Universities assert that intercollegiate athletics is an incidental and subordinate activity to the essential task of providing a quality education.¹³⁴ Legal action against a student-athlete could make a philosophical statement that universities are more concerned with operating a business than educating their student-athletes.¹³⁵ Therefore, it is con-

129. Fraud, 19A Ill. Law and Prac., Fraud §9 (1991).

130. *Id.* at §61.

131. Moorman & Hums, *supra* note 8, at 169.

132. Rob Oller, *Buckeyes Bottom Out In Diplomas*, THE COLUMBUS DISPATCH, Nov. 14, 1999, at 1A; Jim Donaldson, *Graduation Rates Are NCAAs Top Farce*, TIMES-PICAYUNE (New Orleans), Feb. 20, 2000, at C9.

133. Johnson, *supra* note 68, at 106.

134. *Id.*

135. Moorman & Hums, *supra* note 8, at 170-71.

ceivable to expect a negative media and public reaction to a university suing a student-athlete.¹³⁶

This negative reaction to university legal action could also have a negative effect on fundraising.¹³⁷ While success in athletics obviously makes institutions' fundraising efforts easier, legal action against student-athletes could have the opposite effect. Alumni and other donors may be less inclined to donate money to a university whose interests may seem to conflict with that of their mission.¹³⁸

Another potential consequence of university legal action is the detrimental effect it may have on future recruiting. Today, the Internet has a major impact on the recruiting of prospective student-athletes.¹³⁹ High school recruits are well informed about the universities who are recruiting them.¹⁴⁰ Trying to convince a prospective student to attend a university that has previously brought suit against a student-athlete would be a difficult obstacle to overcome.¹⁴¹

Finally, using the legal system to hold student-athletes accountable for their action would be extremely costly.¹⁴² Retaining a private law firm to handle the university's case would be very expensive.¹⁴³ Due to escalating court costs and legal fees, compounded with the long delays that result from overcrowded court dockets, the use of the legal system may not be very cost effective.¹⁴⁴ Furthering the problem is the fact that many student-athletes come from impoverished backgrounds and probably would not be able to pay the damages the university was awarded.¹⁴⁵

V. CONTRACTUAL ANALYSIS OF A COACH'S RELATIONSHIP TO A UNIVERSITY

The problem with individuals disregarding NCAA rules is not limited to student-athletes and agents. Coaches with a win-at-all-costs attitude place their own career above the future of the university, often leading

136. *Id.* at 171.

137. *Id.*

138. *Id.*

139. Steve Eighinger, *The Internet is Changing High School Athletics Too*, ST. LOUIS POST-DISPATCH, Oct. 4, 1999, at 13.

140. Moorman & Hums, *supra* note 8, at 172.

141. *Id.* at 172.

142. *Id.* at 173.

143. *Id.*

144. Kathleen A. Devine, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 88 (1991).

145. Hal Bock, *Report: Two-thirds of Athletes Break NCAA Rules*, STATE TIMES/MORNING ADVOC. (Baton Rouge), Nov. 9, 1996, at 2D.

to NCAA penalties.¹⁴⁶ Coaches' contracts have escalated in value with several college football and basketball coaches making more than one million dollars.¹⁴⁷ However, regardless of the pressure placed on coaches by fans, alumni, and boosters, this type of conduct is inexcusable for a coach who knowingly disregards NCAA rules.¹⁴⁸

The contractual relationship between a coach and a university is much simpler than that of a student-athlete. Coaches' contracts, like many employment agreements, contain the usual clauses identifying the nature, duration, and compensation to be paid.¹⁴⁹ However, one important aspect of coaches' contracts is the inclusion of university, conference, and NCAA rules.¹⁵⁰ The contract of Clem Haskins, the former University of Minnesota men's basketball coach who was involved in the university's recent academic fraud scandal, included the following compliance responsibilities:

Section 1.4 Compliance. Throughout the term of this Agreement, Haskins shall comply with the current and hereafter enacted or promulgated laws, policies, rules and regulations of and governing the University and its employees and the current and hereafter enacted or promulgated constitution, bylaws, and rules and regulations of the National Collegiate Athletic Association ("NCAA"), the Big Ten Conference ("Big Ten"), and any other conference or organization with which the University becomes associated or which affects MICA (collectively, the "Governing Association"). Haskins shall attempt to have all assistant men's basketball coaches and any other University employees for whom Haskins is administratively responsible comply with the foregoing laws, policies, rules and regulations.¹⁵¹

Accordingly, if a coach violates any rule governing recruiting or player eligibility, the coach may not only be subject to NCAA penalties, but also to a possible breach of contract action by the university.¹⁵²

Coaches' contracts will almost always contain some type of "termination for just cause" provision.¹⁵³ The just cause provision allows the uni-

146. Johnson, *supra* note 68, at 107.

147. Michael S. Selvaggi, *The College v. The Coach*, 3 SETON HALL J. SPORT L. 221, 224-25 (1993).

148. *Id.* at 225.

149. *Id.*

150. Martin J. Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 MARQ. SPORTS L. J. 207, 235 (1991).

151. EMPLOYMENT AGREEMENT BETWEEN CLEM SMITH HASKINS AND REGENTS OF THE UNIVERSITY OF MINNESOTA (1992) (hereinafter Haskins' contract).

152. Selvaggi, *supra* note 147, at 226-27.

153. Greenberg, *supra* note 150, at 265.

versity to terminate, suspend salary payments, or take other disciplinary action if there is a determination by the university that the coach has committed a major NCAA violation.¹⁵⁴ Just cause usually means a major violation by the head coach, a major violation by a member of the coaching staff that the head coach knew about, the conviction of a felony by the head coach, a substantial failure to perform any of the duties which are reasonable related to his duties, and multiple secondary violations.¹⁵⁵ In regards to just cause, the determination of whether a major or secondary rule violation occurred usually requires a finding of the governing association rather than the university.¹⁵⁶

A coach's contract may also give the university the right to terminate the contract without just cause.¹⁵⁷ Normally, the contract will have a built-in provision for premature termination, without cause, outlining the amount and method of payment.¹⁵⁸ However, some coaches' contracts also contain a provision that allows a coach to be compensated even if they are fired with just cause.¹⁵⁹ For example, Clem Haskins' contract contained a provision that paid him \$423,000.00 in deferred compensation even if he was terminated with just cause.¹⁶⁰

One possible solution to hold coaches accountable for their violations of NCAA rules is for the university to bring a breach of contract suit.¹⁶¹ The university could sue a coach for expectation damages.¹⁶² Expectation damages, including consequential damages, would include all revenue lost as a result of the NCAA sanctions imposed due to the coach's violation of rules.¹⁶³ In order for the university to receive consequential damages, the university must demonstrate: (1) the damages were caused by the coach's breach of contract; (2) the amount of damages with a reasonable degree of certainty, and (3) the damages sustained were within the contemplation of the parties at the time of the agreement.¹⁶⁴

154. *Id.*

155. *Id.* at 265-67; HASKINS' CONTRACT, *supra* note 151.

156. HASKINS' CONTRACT, *supra* note 151.

157. Greenberg, *supra* note 150, at 272.

158. *Id.*

159. Dennis Brackin & Randy Furst, *Haskins Covered by Strong Contract*, STAR TRIB. (Minneapolis), May 23, 1999, at 1B.

160. *Id.*

161. Selvaggi, *supra* note 147, at 228.

162. *Id.*

163. *Id.*

164. *Id.* at 228-33.

It is likely that a university would be able to fulfill this burden of proof.¹⁶⁵ The university should be able to show that damages were caused by the coach's violation of NCAA rules through the investigative report.¹⁶⁶ Secondly, the university should be able to prove damages with certainty by showing its lost television revenue or an inability to participate in post-season play.¹⁶⁷ Finally, it would seem obvious that both the university and the coach could reasonably foresee that a violation of NCAA rules would lead to penalties.¹⁶⁸ Thus, a university may be able to protect its economic interest by recovering consequential damages.¹⁶⁹

If a school would fail to establish the existence of damages, it still may obtain a judgment for nominal damages.¹⁷⁰ Nominal damages represent a sum that is fixed without regard to the amount of harm.¹⁷¹ Although nominal damages may not fully compensate the university for its financial harm, it will establish a precedent that coaches who violate NCAA rules will be held accountable for their actions.

However, some universities could encounter a potential problem when pursuing a contract action against a coach. Some states have statutes that bar causes of action brought by regional collegiate athletic associations when an employee (i.e., coach) of a member institution violates a rule.¹⁷² Thus, in these locations, universities could not rely on bringing suit against coaches.

VI. ALTERNATIVES TO A BREACH OF CONTRACT SUIT FOR HOLDING COACHES AND STUDENT-ATHLETES ACCOUNTABLE

Since pursuing breach of contract actions against student-athletes and coaches is a complex situation with various unknown consequences, it is important to examine alternative possibilities that may address the problem. The NCAA, coaches, legislators, and educators all have contributed their recommendations to reform the current state of college athletics.¹⁷³ Reform proposals include the use of state athlete-agent legislation, a change in recruiting rules, paying student-athletes, restructur-

165. *Id.* at 235.

166. Selvaggi, *supra* note 147, at 228.

167. *Id.* at 229-31.

168. *Id.* at 232-33.

169. *Id.* at 233.

170. *Id.* at 234.

171. Russ VerSteeg, *Slander & Slander Damages After Gertz and Dun & Bradstreet*, 38 VILL. L. REV. 655, 663 (1993).

172. TEX. CIV. PRAC. & REM CODE ANN. §§131.003 & 131.005 (1999).

173. Moorman & Hums, *supra* note 8, at 171.

ing coaching contracts, and a ban on legal gambling on college athletics.¹⁷⁴ Thus, the following section will briefly discuss alternative means of preventing harm to the universities' economic interests.

A. Athlete-Agent Legislation

The problems between athletes, agents, and universities have been around for quite some time, and it does not appear that they will disappear anytime soon. However, in an effort to address the problems created by the unsavory practices of agents, many states have adopted athlete-agent legislation.¹⁷⁵ Athlete-agent legislation has been implemented to help protect universities' economic interests. Many legislators believe that the legislation would help reduce or eliminate the chances of universities being penalized by the NCAA and suffering financially.¹⁷⁶

Currently there are twenty-eight states that have adopted some type of athlete-agent legislation.¹⁷⁷ Penalties imposed upon agents for violating state athlete-agent legislation range from civil fines to criminal felony charges.¹⁷⁸ In addition, some states also impose civil and/or criminal liability on student-athletes. Civil remedies include restoring the injured party to their previous position and compensating the victim for any harm incurred.¹⁷⁹ Some states have expanded the scope of recovering damages to include lost revenue from media coverage, lost revenue from the forfeiture of athletic competition, and lost revenue from a ban of post-season play.¹⁸⁰ Agents can also be subject to criminal penalties. In Florida, for example, an agent who fails to comply with the state's registration requirements or engages in unlicensed agent activity is subject to a third degree felony which could lead to imprisonment not exceeding five years and/or a fine of up to \$5,000.00.¹⁸¹

174. Andrew Bagnato, *NCAA Exploring Ways to Fix College Basketball*, TIMES-PICAYUNE (NEW ORLEANS), Mar. 12, 2000, at C12; Michael O'Keeffe, *Wagers Fuel NCAA's Fears: Bill Would Ban Bets On Colleges*, N.Y. DAILY NEWS, Mar. 12, 2000, at 26.

175. Moorman & Hums, *supra* note 8, at 172.

176. Don Walker, *Legislation Proposed To Target Agents: Lawmaker Wants Protection for Athletes and Schools*, MILWAUKEE J. SENTINEL, Dec. 17, 1999, at 10.

177. *Athlete Agent Laws By State*, available at http://www.ncaa.org/agents_amateurism/agents/ (last visited Mar. 25, 2000).

178. Moorman & Hums, *supra* note 8, at 168.

179. Linda S. Calvert Hanson, *The Florida Legislature Revisits the Regulation and Liability of Sports Agents and Student Athletes*, 25 STETSON L. REV. 1067, 1080 (1996).

180. Moorman & Hums, *supra* note 8, at 168.

181. Hanson, *supra* note 179, at 1079.

Student-athletes can also be subject to liability for violating legislation.¹⁸² For example, consider Auburn University basketball player Chris Porter's recent involvement with a sports agent.¹⁸³ Porter admitted accepting \$2,500.00 from an agent and was subsequently declared ineligible to participate in NCAA competition.¹⁸⁴ However, under Alabama's agent regulation law, it is possible that Porter could face further legal action.¹⁸⁵ Alabama has a sports agent regulatory law that makes a student-athlete who is convicted of a violation subject to a possible fine, community service, or a damage lawsuit.¹⁸⁶ The Alabama law provides that student-athletes who enter into contracts with agents are subject to the following penalty: "A student-athlete who negotiates for or enters into an agent or professional sports services contract without giving the required notice is guilty of a Class A misdemeanor and is subject to a fine of not more than \$1,000, and shall perform a minimum of 70 hours of community service."¹⁸⁷

Furthermore, Alabama law also provides that student-athletes who accept extra "benefits without giving the required notice [are] liable to the institution for actual damages that result from the loss of the student's eligibility."¹⁸⁸

Several other states have taken an aggressive approach to dealing with illegal agent/athlete activity and other states are currently considering legislation similar to Alabama.¹⁸⁹ As a result, some universities have a specific statutory remedy, an alternative to a breach of contract action, to hold student-athletes accountable.¹⁹⁰ Furthermore, athlete-agent legislation can also serve to protect naïve student-athletes, who are lured by agents with the promises of wealth and glory.¹⁹¹ Therefore, the use of athlete-agent legislation is an important step in providing a safeguard to both student-athletes and universities.¹⁹²

182. Darrell Williams, *Porter Says Agent Gave Him Money; Suspended for Now, He Hopes; For Reinstatement from NCAA*, TIMES-PICAYUNE (New Orleans), Feb. 29, 2000, at E1.

183. *Id.*

184. *Id.*

185. *Alabama Agent Laws*, available at <http://www.ncaa.org/agents?amateurism/agents/alabama.html> (last visited Mar. 25, 2000).

186. *Id.*

187. *Id.*

188. *Id.*

189. Adam Mertz, *Sauer Backs Bill to Control Agents*, THE CAPITAL TIMES (Madison), Dec. 17, 1999, at 1C.

190. Moorman & Hums, *supra* note 8, at 169.

191. Hanson, *supra* note 179, at 1070.

192. *Id.* at 1082-83.

B. *Changes in NCAA Recruiting Rules*

The NCAA has proposed a change in the summer recruiting calendar for men's basketball in the hopes of decreasing the chances of students receiving extra benefits from AAU coaches, summer camp directors, and agents.¹⁹³ Recently, many violations involving prospective student-athletes receiving extra benefits from individuals with ties to agents prior to enrolling in college have caused a great deal of disruption.¹⁹⁴ For example, St. John's University point guard, Erick Barkley, was suspended twice during the season for receiving extra benefits.¹⁹⁵ His relationship with a sports agent is still the focus of a NCAA investigation.¹⁹⁶ Another example includes UCLA forward, JaRon Rush, who was suspended for receiving \$6,325.00 from an individual with connections to agents and a shoe company.¹⁹⁷

The summer recruiting period was used because it is more cost-effective for college coaches to evaluate the top high school prospects in a few summer camps than to travel the country to see each player individually during the season.¹⁹⁸ However, this reliance on summer recruiting has led to an increase in NCAA violations.¹⁹⁹ The NCAA is hoping the changes in summer recruiting will help reduce the unwelcome influences faced by student-athletes.²⁰⁰ Although this change could negatively affect small universities with limited budgets who rely on the summer to recruit, it may alleviate some of the problems of athletes receiving extra benefits.²⁰¹

C. *Restructuring Coaches Contracts*

Since universities may not desire to go to litigation as a result of having to "air their dirty laundry" in a public proceeding, the need to

193. Ken Goe, *NCAA Official Pushes for Culture Change*, PORTLAND OREGONIAN, Mar. 31, 2000, at C7.

194. Scott M. Reid, *Points of Contention: The NCAA is Taking a Hard Look at Potentially Serious Problems That Plagued Men's Basketball This Season*, THE ORANGE COUNTY REGISTER (Orange County, CA), Mar. 31, 2000, at D10.

195. *Id.*

196. *Id.*

197. *Id.*

198. Goe, *supra* note 193, at C7.

199. *Id.*

200. Hank Lowenkron, *NCAA Approves Changes in Summer Recruiting, Scholarships*, AP, April 28, 2000.

201. Goe, *supra* note 193, at C7.

restructure coaches' contracts is evident.²⁰² Coaches' contracts that allow a coach to be paid even if they are terminated with "just cause" promote an environment that tolerates unethical behavior.²⁰³ Removing this type of clause from a coach's contract will send the message that coaches are going to be held accountable for their role in NCAA violations.

D. Ban on Legal Gambling

Student-athlete involvement in gambling can not only threaten the integrity of the game, but can also have a negative financial effect on universities through investigation costs and financial sanctions.

A [1996] study by the University of Cincinnati of 648 Division I Intercollegiate men's basketball and football respondents indicated that 25.5% had gambled money on other college sporting events, 3.7% had gambled money on a game in which they had played, and 0.5% received money from a gambler for not playing well in a game.²⁰⁴

These results have caused the NCAA and its member institutions to be concerned with the integrity of intercollegiate athletics.²⁰⁵ Currently, legislation is being proposed that would eliminate legal gambling in Las Vegas.²⁰⁶ The NCAA believes that this proposed legislation will aid in preserving the integrity of college sporting events and assist in protecting student-athletes from pressures to influence the outcome of a game or contest.²⁰⁷

However, the gambling industry will not give up the approximately \$1 billion that is wagered on college sports each year in Las Vegas without a fight.²⁰⁸ Some people believe that the elimination of legal betting will only make the sports betting problem worse by putting it underground.²⁰⁹ Nevertheless, at worst, a ban on legal gambling can only help increase the integrity of the game, increase the likelihood that student-

202. Rick Linsk, *Contract Gives Coach Clem Haskins Lofty Severance Package; Coach Compensated Even if Minnesota Can Justify Removing From Job*, ST. PAUL PIONEER PRESS, June 11, 1999, at *Sports*, 1.

203. Greenberg, *supra* note 150, at 265.

204. Bock, *supra* note 145, at 2D; *Gambling/Sports Wagering*, available at <http://www.ncaa.org/gambling> (last visited Mar. 25, 2000).

205. O'Keeffe, *supra* note 174, at 26.

206. *Id.*

207. *Gambling/Sports Wagering*, *supra* note 204.

208. O'Keeffe, *supra* note 174, at 26.

209. Steve Tetreault, *Gaming Has NCAA in Retreat*, LAS VEGAS R. J., Nov. 24, 1999, at 1A.

athletes will not bet on games, and help out the public image of an organization that desperately needs support.

VII. CONCLUSION

The relationship between a university and a student-athlete represents a binding contract. Universities have access to a valid legal claim, a means to recovering financial losses, and an important mechanism to establish a precedent of holding unethical student-athletes accountable. However, filing a lawsuit against a student-athlete also comes with many possible consequences. Institutions must realize that there are many political, social, and public relations issues that may negatively affect the university if it decides to pursue a contract action against a student-athlete. In addition to a contract claim, universities have several alternatives that may allow them to hold student-athletes accountable and to maintain a level of institutional control.

The time has come to treat student-athletes and coaches as adults and require a minimum level of accountability. One corrupt student-athlete or coach can set an athletic program back for years and unquestionably damage the reputation and finances of the university for several years. However, universities do not have to sit back idly while student-athletes and coaches run afoul of NCAA regulations. The choice to pursue a contract action resides with the university. Nonetheless, universities must take further steps to protect themselves from the unethical behavior of student-athletes, agents, and coaches.

KEVIN STANGEL

BOOK REVIEWS

SAFE AT FIRST: A GUIDE TO HELP SPORTS ADMINISTRATORS REDUCE THEIR LIABILITY

Gil Fried

[Durham, NC: Carolina Academic Press 1999]

519 pages

ISBN: 0-89089-761-1

Gil Fried, the author of this book, is well known in the area of sport law and sport litigation. Fried has amassed a large publication list – in books and articles – as well as teaching and practicing law. *Safe at First* was also edited by Herb Appenzeller, who is also well known and respected in the sport law and risk management fields. Therefore, one goes into reviewing a book with such “heavy hitters” associated with it with a greater expectation of quality and clarity. This book truly lives up to those expectations.

The author emphasizes that this book is actually a guide to assist coaches and administrators in the sports field in reducing their risks of being sued, as well as creating a safer environment to view and participate in sport. While the book consists of four major sections (Event Development, Event Participants, Event Spectators, and the Appendices), the “text” of the book – which gives the reader a primer in sport law – consists of only 141 pages.

Section I of the guide includes all the basics for the understanding of sport law as it relates to risk management, including major concepts and legal cases. The legal cases are very concise and beneficial in understanding the legal concepts being discussed, and won’t intimidate the novice legal reader. The Event Development section begins with the introduction to the reader of the need for a risk management plan, which includes facts and lists of previous areas of litigation and risks associated with sport. The guide goes on in subsequent chapters to discuss basic legal terms and principles useful in developing risk management programs, the responsibilities and need for a risk management committee – or as the author recommends, an “event safety committee.” After the development of a committee, Fried discusses area of liability concerns and then the means in which to exculpate the organization from liability and possible litigation and damages. The author introduces the use of waivers and releases, statutory issues that may influence an organiza-

tion's liability, membership associations which may assist in the development of the standard of care requirements, and the issue of insurance.

After reading the first section of the guide, the reader is ready to tackle the issues of specific sport and event risk management techniques. The Event Participants section of the guide discusses the most popular sports of baseball, basketball, football, golf, gymnastics, hockey soccer and track and field. Other sports events addressed in a broader manner are contact sports such as wrestling and the martial arts, racquet sports, water sports (swimming pools, water parks and water craft), wheel sports (from bicycles to auto racing), and winter sports (from skiing to bobsled-ding). For the most part, these chapters include discussions on facility, equipment and supervision issues, with case synopses to serve as examples. The section also includes chapters, which discuss risk management issues associated with officials, first aid, and the ever important and troublesome area of transportation.

The third section of the guide deals with the area of Event Spectators, which, as anyone who reads the news knows, is becoming an ever important area of risk and possible litigation due to violence and spectator expectations. The first chapter in this section covers the area of spectator management, and discusses the issues of facility inspections, required warnings, sport specific spectator issues and crowd management (which is very concise and very useful). Other very important topics dealt with in this section are concessions, alcohol policies, and parking.

The guide concludes with extensive Appendices, which include policy examples, checklists, manuals on sexual abuse in youth sports, and examples of waivers and releases. These documents and the examples are extremely useful for the practitioner who has not gone through formal risk management training and does not have access to such documentation. The practitioner can either use these documents as examples to create their own policies and checklists, or use them simply to refine and update the ones they currently use.

The risk management guide *Safety at First* by Gil Fried is an excellent reference book for anyone in the area of sport event management. The book is simple and concise, easily understood, and very practical. The issues discussed in the book are documented well through case law and other reference materials, and the Appendices serve as a specific guide for the reader in special areas of policy development and applications. The book can be used by sports professionals in the field, as well as stu-

dents of sport law who wish to have a better understanding of risk management program development.

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YOUTH SPORT AND THE LAW: A GUIDE TO LEGAL ISSUES

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216 pages + x pages

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In *Youth Sport and the Law: A Guide to Legal Issues*, Tom Appenzeller ambitiously attempts to cover all aspects of the law as applied to youth athletics. Appenzeller's overview contains an analysis of various topics including; tort liability for injuries suffered by players and spectators, sports facility issues, disabled athletes and those with HIV, and sports medicine. Appenzeller provides basic information primarily directed at those outside of the legal profession.

The opening pages of the book chronicle the beginnings of youth sports. In six pages the author takes the reader from the ancient Olympic games, to muscular Christianity, and then to the formation of little league baseball in the United States. This is a good indication of the amount of ground superficially covered. This opening chapter is strangely concluded with a reprint of the article *Sports Are Bad for Children*.

Appenzeller moves on with a discussion about litigation in youth sports. He begins by speculating on the reasons, in general, for the increasing litigation in the United States. Unfortunately, Appenzeller provides no new insight; instead, he cites the usual reasons for the rise in lawsuits, i.e. the media, the lure or necessity of large monetary awards, a sense of entitlement, and overaggressive attorneys.

Appenzeller then offers readers some basic instruction in the concepts of negligence, liability, and the assumption of risk. This section would be aptly titled Tort Law 101. While this discussion is oversimplified, there is some value to providing non-legal professionals with this basic information. That is, it informs the public in an easy to read and easy to digest manner about the rights and responsibilities of those injured by another's action or lack of action. Armed with this knowledge, some readers should be inspired to take the appropriate action to avoid liability and litigation.

The book follows a similar format in the majority of its thirteen chapters. Specifically, a problem or area of youth sport law is presented and described. The author then provides an often oversimplified and brief summary or summaries of cases brought under the described area of law. For example, in the chapter titled Organization and Administration, Appenzeller gives *Tarkanian v. NCAA*, a single paragraph of discussion.

Given the context of the book and the intended audience these simplifications are forgivable.

The chapters lacking case discussion, however brief, are less defensible. For example, the chapter dealing with Sports Medicine lacks any discussion of case law. Instead, the author opted to discuss the occurrences of ailments such as heat illness and nose bleeds. This chapter would have provided the reader with a more useful direction with some case law discussion.

The book concludes with numerous examples of forms used in youth sports. The examples include application forms, checklists for athletic trainers, accident reports, emergency contact information, insurance forms, and emergency contact forms. These forms are very useful as they round out the basic information readers need to protect themselves from liability.

Youth Sport and the Law: A Guide to Legal Issues is written from the prospective of a sports professional, sports participant, and parent. It is intended to speak to similar individuals. The book combines case law discussion, personal stories, and basic overviews of legal principles. In the end, Appenzeller has written an informative and easy to digest book for the non-legal professional. Although not detailed and by no means comprehensive, this a worthy and valuable effort for the target audience.

KIRSTEN HAUSER

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Agency

1. Bryan Couch, Comment, *How Agent Competition and Corruption Affects Sports and the Athlete-Agent Relationship and What Can be Done to Control It*, 10 SETON HALL J. SPORT L. 111 (2000).

Amateur Sports

1. Hazel Glenn Beh, *Student versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000).
2. Michael Book, Comment, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637 (2000).
3. W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1 (2000).
4. Jeffrey A. Crossman, Comment, *Mark McGwire Does It, So Why Can't I? High School Student Use of Dietary Supplements and the Failure of DSHEA*, 28 CAP. U. L. REV. 617 (2000).
5. Stephanie M. Greene, *Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX*, 52 MAINE L. REV. 81 (2000).
6. Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law*, 19 N. ILL. U. L. REV. 739 (1999).
7. Louis Hakim, *The Student Athlete vs. the Athlete Student: Has the Time Arrived for an extended-term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145 (2000).
8. Amanda L. Harrison, Comment, *Urinating on the Pennsylvania Constitution? Drug testing of High School Athletes and Article 1, Section 8 of the Pennsylvania Constitution*, 104 DICK. L. REV. 379 (2000).
9. Nathan Hunt, Note, *Fumble! The Flawed Use of Proposition 16 by the NCAA (Cureton v. NCAA, 37 F. Supp. 2d 687, E.D. Pa. 1999)*, 31 U. TOL. L. REV. 273 (2000).
10. Catherine B. Johnson, Note, *Stopping Hate Without Stifling Speech: Re-examining the Merits of Hate Speech Codes on University Campuses*, 27 FORDHAM URB. L.J. 1821 (2000).
11. James M. McCray, Note, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387 (2000).
12. Tyler J. Murray, Note, *Illegalizing the NCAA's eligibility rules: Did Cureton v. NCAA go too far, or not far enough? (Cureton v. National Collegiate Athletic Ass'n, 37 F.Supp.2d 687, E.D. Pa. 1999)*, 26 J. LEGIS. 101 (2000).
13. Eli Denard Oates, Note, *The Recognition of Proposition 16's Misplaced Use of Standardized Tests in the Context of Collegiate Athletics as a Barrier to Educational Opportunities for Minorities (Cureton v. NCAA, 37 F. Supp. 2d 687, E.D. Pa., rev'd, 198 F.3d 107, 3d Cir. 1999)*, 35 WAKE FOREST L. REV. 445 (2000).
14. David J. Pierguidi, Comment, *Civil Rights—State action—Absent Strong Connections to a State Government, a High School Athletic Association cannot be construed as a State Actor—(Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 180 F.3d 758, 6th Cir. 1999, cert. granted, 120 S.Ct. 1156, 2000)*, 10 SETON HALL J. SPORT L. 457 (2000).
15. Charles J. Russo & David L. Gregory, *Legal and Ethical Issues Surrounding Drug Testing in Schools*, 1999 DET. C.L. REV. 751 (1999).

16. Adam S. Taylor & M. Darren Traub, Note, *Scrutinizing Proposition 16 and the Consequences of its Disparate Impact on Prospective Minority Student-Athletes*, (Cureton v. NCAA, 37 F. Supp. 2d 687, E.D. Pa. 1999), 7 SPORTS LAW. J. 59 (2000).

17. Travis T. Tygart, Title IX: *The Monitoring of Private Athletic Donations*, 53 OKLA. L. REV. 57 (2000).

18. Scott C. Williams, Note, *Schools, Peer Sexual Harassment, Title IX, and . . .* (Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1999), 51 BAYLOR L. REV. 1087 (1999).

Antitrust

1. Philip R. Bautista, Note, *Congress Says, "Yooou're out!!!" to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445 (2000).

2. Charles Allen Criswell Jr., Comment, *Repeal of Baseball's Longstanding Antitrust Exemption: Did Congress Strike Out Again?*, 19 N. ILL. U. L. REV. 545 (1999).

3. Philip A. Dominique, Comment, *To Protect a Monopoly: The Hidden Reasons why the National Football League has Purchased an Option to Buy the Arena Football League*, 29 STETSON L. REV. 1329 (2000).

4. William C. Dunning, Note, *Antitrust Law—Baseball—The Sale and Relocation of a Professional Baseball Franchise is an Integral Aspect of the Sport and Therefore Exempt from Antitrust Law so that Civil Investigative Demands cannot be Enforced*. (Minnesota Twins Partnership v. State of Minnesota, 592 N.W.2d 847, Minn. 1999), 10 SETON HALL J. SPORT L. 167 (2000).

5. Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137 (1999).

6. Dan Messeloff, Note, *The NBA's Deal with the Devil: the Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521 (2000).

7. David C. Moran, Comment, *Illegal Procedure? The Antitrust Implications of NFL Sunday Ticket*, 18 J.L. & COM. 397 (1999).

8. Ryan Rodenberg, Student Article, *Age Eligibility Rules in Women's Professional Tennis: Necessary for the Integrity, Viability, and Administration of the Game or an Unreasonable Restraint of Trade in Violation of Antitrust Law?*, 7 SPORTS LAW. J. 183 (2000).

9. Travis T. Tygart, *Antitrust's Impact on the National Football League and Team Relocation*, 7 SPORTS LAW. J. 29 (2000).

Disability Issues

1. Sean Baker, Comment, *The Casey Martin Case: Its Possible Effects on Professional Sports*, (Martin v. PGA, Inc., 984 F. Supp. 1320, D. Or. 1998 [Martin I], *aff'd*, 994 F. Supp. 1242, D. Or. 1998; Martin v. PGA Tour, Inc., 994 F. Supp. 1242, D. Or. 1998 [Martin II]), 34 TULSA L.J. 745 (1999).

2. Jonathan R. Cook, *The Americans with Disabilities Act and Its Application to High School, Collegiate and Professional Athletics*, 6 VILL. SPORTS & ENT. L.J. 243 (1999).

3. Adam Jay Golden, *A Good Walk Spoiled: The Americans with Disabilities Act and the Casey Martin Case*, 7 SPORTS LAW. J. 161 (2000).

4. Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans with Disabilities Act* (Martin v. PGA Tour, Inc., (Martin II), 994 F. Supp. 1242, 1244, D. Or. 1998), 18 LAW & INEQ. 131 (2000).

5. Melissa Krueger, Comment, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607 (2000).

6. Christopher M. Parent, Note, *A Misapplication of the Americans with Disabilities Act* (*Martin v. PGA Tour*, 984 F. Supp. 1320, (D. Or. 1998); *Martin v. PGA Tour*, 994 F. Supp. 1242, (D. Or. 1998), 26 J. LEGIS. 123 (2000).

7. Laura F. Rothstein, *Don't Roll In My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REV. LITIG. 399 (2000).

8. Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049 (1999).

Gender Issues

1. Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORT L. 415 (2000).

2. Lillian Chaves, Note, *Responding to Public School Peer Sexual Harassment in the Face of . . .* (*Davis v. Monroe County Board of Education*, 119 S. Ct. 1661, 1999), 2000 BYU EDUC. & L.J. 287 (2000).

3. Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of Mercer v. Duke University and a Proposal to Amend the Contact Sport Exception to Title IX* (*Mercer v. Duke University*, 190 F.3d 643, 4th Cir. 1999), 84 MINN. L. REV. 1655 (2000).

4. Felice M. Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics does not Exist*, 19 Q.L.R. 67 (2000).

5. Terry W. Dodds, Comment, *Equal Pay in College Coaching: A Summary of Recent Decisions*, 24 S. ILL. U. L.J. 319 (2000).

6. Karen E. Edmonson, Comment, *Davis v. Monroe County Board of Education Goes to College: Holding Post-Secondary Institutions Liable Under Title IX for Peer Sexual Harassment* (*Davis v. Monroe County Board of Education*, 119 S. Ct. 1661, 1999), 75 NOTRE DAME L. REV. 1203 (2000).

7. Vanessa H. Eisemann, Student Article, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125-160 (2000).

8. Kelly Dixon Furr, Note, *How Well are the Nation's Children Protected from Peer Harassment at school?: Title IX Liability In The Wake of . . .* (*Davis v. Monroe County Board of Education*, 120 F.3d 1390, 11th Cir. 1997, en banc, rev'd and remanded, 526 U.S. 629, 1999), 78 N.C. L. REV. 1573 (2000).

9. Dana S. Hardy, Note, *Education Law—The United States Supreme Court Determines the Standard of Liability Under Title IX* (*Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1998), 29 N.M. L. REV. 457 (1999).

10. Ross A. Jurewitz, Comment, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283 (2000).

11. Jarret Raab, Case Comment, *Sexual Discrimination: Peer Sexual Harassment and its Effect under Title IX*. (*Davis v. Monroe County Bd. Of Educ.*, 119 S. Ct. 1661, 1999), 11 U. FLA. J.L. & PUB. POL'Y 225 (2000).

12. Deborah Reed, Note, *Where's the Penalty Flag? A Call for the NCAA to Promulgate an Eligibility Rule Revoking a Male Student-Athlete's Eligibility to Participate in Intercollegiate Athletics for Committing Violent Acts Against Women*, 21 WOMEN'S RTS. L. REP. 41(1999).

13. Thomas M. Rowland, Student article, *Level the Playing Field: The NCAA Should be Subject to Title IX*, 7 SPORTS LAW. J. 143 (2000).

14. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000).

Intellectual Property Issues

1. Jack Achiezer Guggenheim, *Renaming the Redskins (and the Florida State University Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 FLA. ST. U. L. REV. 287 (1999).
2. Jonathan Berger, Student article, *Marching to Madness: "Dual Use" Trademarks after Illinois High School Association v. GTE Vantage*, 21 HASTINGS COMM. & ENT L.J. 785 (1999).
3. Robert G. Bone, *From Property to Contract: The Eleventh Amendment and University-Private Sector Intellectual Property Relationships*, 33 LOY. L.A. L. REV. 1467 (2000).
4. Proloy K. Das, Note, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073 (2000).
5. Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 4 FLA. TAX REV. 685 (2000).
6. Alvin B. Lindsay, Comment, *Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership*, 21 WHITTIER L. REV. 915 (2000).
7. Nicole M. Rhoades, Note, *The Constitutional Shaping of Oregon's Trade Secret Law: (State ex rel. Sports Management News v. Nachtigal, 921 P.2d 1304, Or. 1996)*, 35 WILLAMETTE L. REV. 629 (1999).
8. Robert L. Saltzman, Student article, *Television News Access to Exclusively Owned Sporting Events: A Comparative Study*, 7 SPORTS LAW. J. 1 (2000).

International Sports

1. Mary K. Fitzgerald, Student article, *The Court of Arbitration for Sport: Dealing with Doping and Due Process During the Olympics*, 7 SPORTS LAW. J. 213 (2000).
2. David Galluzzi, *The Doping Crisis in International Athletic Competition: Lessons from the Chinese Doping Scandal in Women's Swimming*, 10 SETON HALL J. SPORT L. 65-110 (2000).
3. Ethan Glass, Note, *Slicing the Rent-Seeking Onion: Why Differential Rent-Seeking Explains the Competitive Disadvantage of United States Sports Franchises in Canada*, 9 MINN. J. GLOBAL TRADE 691 (2000).
4. Aaron Goldstein, Note, *International Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots*, 3 J. GENDER RACE & JUST. 689 (2000).
5. Julie King, *The Protection of Personality Rights for Athletes and Entertainers under English Intellectual Property Law: Practical Difficulties in Relying on an Action of Passing Off*, 7 SPORTS LAW. J. 351 (2000).
6. Amikam Omer Kranz, *The Bosman Case: The Relationship Between European Union Law and the Transfer System in European Football*, 5 COLUM. J. EUR. L. 431 (1999).
7. Mark Meltz, Note, *Hand it Over: Exclusive EU Sports Broadcasting Rights, and the Article 85(3) Exemption*, 23 B.C. INT'L & COMP. L. REV. 105 (1999).
8. Jens Pelle Van den Brink, *EC Competition Law and the Regulation of European Football*, 7 SPORTS LAW. J. 105 (2000).

Professional Sports

1. Robert Bacon, Comment, *Initial Public Offerings and Professional Sports Teams: The Regulations Work, but are Owners and Investors Listening?*, 10 SETON HALL J. SPORT L. 139 (2000).
2. Scott Baglio, Note, *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 FORDHAM L. REV. 2257 (2000).

3. Richard Dewland & Joseph Majka, *Joe DiMaggio: The Yankee Clipper Has Left and Gone Away*, 10 SETON HALL J. SPORT L. 1 (2000).
4. Alfred G. Feliu, *Foreword: Discipline in Professional Sports*, 17 HOFSTRA LAB. & EMP. L.J. 129 (1999).
5. Franklin M. Fisher & Christopher Maxwell et al., *The Economics of Sports Leagues and the Relocation of Teams: The Case of the St. Louis Rams*, 10 MARQ. SPORTS L.J. 193 (2000).
6. Adam W. Heller, Student Article, *Creating a Win-Win Situation Through Collective Bargaining: the NFL Salary Cap*, 7 SPORTS LAW. J. 375 (2000).
7. Jason S. Weiss, Student Article, *The Changing Face of Baseball: In an Age of Globalization, Is Baseball Still as American as Apple Pie and Chevrolet?*, 8 INT'L & COMP. L. REV. 123 (2000).

Sports Facilities

1. David E. Cardwell, *Sports Facilities & Urban Redevelopment*, 10 MARQ. SPORTS L.J. 417 (2000).
2. Michael J. Cremonese, Comment, *Building New Stadiums With Your Money Whether You Like it or Not: The Pennsylvania Constitution Does Not Prohibit the Use of Public Funds to Construct New Stadiums*, 37 DUQ. L. REV. 423 (1999).
3. Tim Chapin, *The Political Economy of Sports Facility Location: An End-of-the-Century Review and Assessment*, 10 MARQ. SPORTS L.J. 361 (2000).
4. John R. Dorocak, *Tax Advantages of Sports Franchises: Part I – the Stadium*, 1999 DET. C.L. REV. 579 (1999).
5. Kevin Clark Forsythe, *The Stadium Game Pittsburgh Style: Observations on the Latest Round of Publicly Financed Sports Stadia in Steel Town, U.S.A.; and Comparisons with 28 other Major League Teams*, 10 MARQ. SPORTS L.J. 237 (2000).
6. Rodney Fort, *Stadium and Public and Private Interests in Seattle*, 10 MARQ. SPORTS L.J. 311 (2000).
7. Martin J. Greenberg, *Stadium Financing and Franchise Relocation Act of 1999*, 10 MARQ. SPORTS L.J. 383 (2000).
8. Scott A. Jensen, Comment, *Financing Professional Sports Facilities with Federal Tax Subsidies: Is It Sound Tax Policy?*, 10 MARQ. SPORTS L.J. 425 (2000).
9. W.S. Miller, "What Do You mean My Facility is Obsolete?": *How 21st Century Technology Could Change Sports Facility Development*, 10 MARQ. SPORTS L.J. 335 (2000).
10. Marc D. Oram, Note, *The Stadium Financing and Franchise Relocation Act of 1999*, 2 VA. J. SPORTS & L. 184 (2000).
11. Mark S. Rosentraub, *Sports Facilities, Redevelopment, and the Centrality of Downtown Areas: Observations and Lessons from Experiences in a Rustbelt and Sunbelt City*, 10 MARQ. SPORTS L.J. 219 (2000).
12. Allen R. Sanderson, *In Defense of New Sports Stadiums, Ballparks and Arenas*, 10 MARQ. SPORTS L.J. 173 (2000).
13. Lisa-Michele Smith, Student Article, *History, Rivalry, Envy, and Relocation: Will the Sale of the New York Jets Give Rise to a New Stadium?*, 7 SPORTS LAW. J. 309 (2000).

Torts

1. Terrence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1 (2000).
2. Melissa Cohen, Note, *Tort Law—Recreational Activity—Standard of Care—Co-Participants in Recreational Activities Owe Each Other a Duty Not to Act Recklessly (Ritchie-*

Gamester v. City of Berkley, 597 N.W.2d 517, Mich. 1999), 10 SETON HALL J. SPORT L. 187 (2000).

3. Jason R. Jenkins, Comment, *Not Necessarily the Best Seat in the House: A Comment on the Assumption of Risk by Spectators at Major Auto Racing Events*, 35 TULSA L.J. 163 (1999).

4. Jonathan H. Katz, Note, *From the Penalty Box to the Penitentiary—The People versus Jesse Boulerice*, 31 RUTGERS L.J. 833 (2000).

5. Annmarie Pinarski, Note, *When Coaches “Cross the Line”: Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911 (2000).

Miscellaneous

1. Robert D. Manfred Jr., *Labor Law and the Sports Industry*, 17 HOFSTRA LAB. & EMP. L.J. 133 (1999).

2. Gene Orza, *The Perception and Reality of Discipline in Sports*, 17 HOFSTRA LAB. & EMP. L.J. 139 (1999).

3. George Nicolau, *Discipline in Sports*, 17 HOFSTRA LAB. & EMP. L.J. 145 (1999).

4. Amy Wang, Note, *Consumer Advocacy in the Sports Industry: Recognizing and Enforcing the Legal Rights of Sports Fans*, 21 HASTINGS COMM. & ENT. L.J. 809 (1999).

5. Alfred R. Light, *Conscripting State Law to Protect Volunteers: The Odd Formulation of Federalism in “Opt-Out” Preemption*, 10 SETON HALL J. SPORT L. 9 (2000).

6. Robert A. Baade & Victor Matheson, *High Octane? Grading the Economic Impact of the Daytona 500*, 10 MARQ. SPORTS L.J. 401 (2000).

7. Karen Ahearn, Student article, *HIV-Positive Athletes*, 7 SPORTS LAW. J. 279 (2000).

8. Teresa Herbert, *Are Player Injuries Adequately Compensated?*, 7 SPORTS LAW. J. 243 (2000).

9. *Tulane Moot Court Mardi Gras Invitational*, 7 SPORTS LAW. J. 409 (2000).

10. *Problem*, 7 SPORTS LAW. J. 409 (2000).

11. *Winning Brief*, 7 SPORTS LAW. J. 417 (2000).

12. David G. Cotter, *Outdoor Sport Shooting Ranges: An Endangered Species Deserving of Protection*, 16 T.M. COOLEY L. REV. 163 (1999).

13. Misti Weeks, Comment, *Establishment Clause Meets Free Exercise Clause in Friday Night Football: With Supreme Court Misguidance, Fifth Circuit drops the First Amendment Ball on the 1-yard line*, 31 TEX. TECH L. REV. 1083 (2000).