


FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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ESSAYS

LETTER FROM THE EDITOR

I would not consider myself to be a gardener but I have come to know a thing or two about growing seeds. The Florida Entertainment and Sports Law Review (FESLR) began as a seed.

FESLR is one of the first academic journals in the country to be founded or co-founded by a Black woman. It is the newest of its kind in the State of Florida. It is the first student-run academic journal founded at the University of Florida Levin College of Law (UF Law) in 27 years – officially. In the early 2000s, several law students affiliated with the University of Florida College of Journalism and Communications curated an entertainment and sports law journal. While their seed blossomed, it ceased to grow without the proper amount of administrative support.

This Inaugural Issue bloomed as a labor of love. To the Inaugural Committee turned Executive Board, your continuous work and course correction leads FESLR steps closer to becoming a permanent fixture in UF Law's student-run publications. To the Inaugural Editorial Staff Members, who challenge us to be efficient and put out relevant Essays, this Issue is the product of your work.

I am thankful to the deans and committees for providing us with a hearty starter pot. I am thankful to our faculty advisor, Rachel Arnow-Richman, for watering the seed. I am thankful to my co-founder, Jeff Parry (JD '21), for keeping me rooted.

Aforementioned, FESLR was a seed. It took months of planning to go from a Curriculum Committee proposal, to bylaw drafting, to welcoming our Inaugural Editorial Staff Members, with all the steps in between. It has been an honor to help create this Law Review and serve as your leader. Ultimately, our hope is that this Law Review will push UF Law to build an entertainment and sports law program worthy of its students' commitment to the industry.

With Excellence,

Adrienne E. Washington
Co-founder and Editor-in-Chief, *Florida Entertainment and Sports Law Review*
Juris Doctor and Master of Science in Sports Management Dual Degree Candidate 2022

FOREWORD

Florida Entertainment and Sports Law Review

I believe in passion. It is the starting point for so many wonderful accomplishments. The truth is that without passion, many projects never get started, many ideas never take flight, and many days remain wasted. So, to those who invest in, read, use, and contribute to this Law Review and its progeny, I hope you do so with passion.

I started at the University of Florida Levin College of Law with a simplified list of goals, one of which was to start a new sports and entertainment law-related journal. I saw the gap between what I wanted the sports and entertainment law program to become and where it currently stood. Like many passion projects, I didn't know where to start. I only knew what I wanted to give. It is my hope that this Law Review remains relevant, vibrant, and a living document for a long, long time into the future. I hope to tell my children when they apply to law school (if I can't talk them out of it) that their father created something out of whole cloth, a legacy based on pure passion. This is the legacy of the Florida Entertainment and Sports Law Review. It is designed for the passionate. It is for the practitioner. It encapsulates the scholar and challenges the student.

At the end of the day, I want any lawyer, businessperson, administrator, professor, or other professional who in any way touches the law, entertainment or athletics to pick up this Law Review and use it for good. Just like the law has no bounds as to what it touches and influences, so too do entertainment and sport. Every facet of American -- and indeed, world -- daily life can be traced in some way back to the idea that entertainment and athletics play an essential role in our society. At least, that's my belief. And it was the belief of a young law student who saw a magnificent marriage between his passion and his studies. So again, I hope the passionate out there contribute to this Law Review. I hope that someday I'll see it on a colleague's desk. And I'll tell them the story of how the Law Review was founded…on passion.

I want to specifically recognize those who made this Law Review a reality. No man is an island, and similarly, no man or woman accomplishes anything on their own. To my co-founder, Adrienne, thank you for teaching me humility and patience. I will cherish our common friendship throughout life. To Professor Arnow-Richman, thank you for teaching me how to be an advocate for others, the purpose of all legal study. To the initial Executive Board, thank you for taking up the mantle of a project that was hard to define and harder still to execute. To the Levin College of Law professors, deans and committees, thank you for taking a chance on us. To the too-many-to-be-named advisors, consultants, friends, and contacts that lent any help and advice to this project, thank you for being willing to share expertise with an over-his-head law student. Finally, to the future law students at the Levin College of Law, please take care of this Law Review. It represents what we all hope to accomplish - turning our passions into meaningful work. The future of "my baby" is in your hands.

With love,

Jeffrey C. Parry (JD '21)

Co-founder, *Florida Entertainment and Sports Law Review*

NEW NAME, SAME TEAM: THE INTELLECTUAL PROPERTY REALITIES OF CHANGING A PROFESSIONAL SPORTS TEAM NAME

Darren Adam Heitner[*] *and Hayes Rule*[**]

INTRODUCTION

In light of recent social justice movements, sports team nicknames have been placed under a larger microscope than possibly any time before now. Discussions surrounding team names have recently prompted at least two professional organizations—the Washington Football Team and Cleveland Guardians—to move away from racially-insensitive names. These franchises were not the first sports entities to change their name and they will certainly not be the last. This Essay seeks to provide a short guide of the legal considerations for changing a team's name.

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* Darren Adam Heitner, Esq. is the Founder of Heitner Legal, P.L.L.C., which is a law firm with many practice areas, including sports law and intellectual property law. Heitner has represented numerous athletes and sports agents as legal counsel. Heitner also serves as an Adjunct Professor at the University of Florida Levin College of Law, where he teaches a Sports Law class. Heitner was named to UF's 40 Under 40 and honored with UF Law's Outstanding Young Alumnus Award. He is the author of How to Play the Game, What Every Sports Attorney Needs to Know, published by the American Bar Association.

** Hayes Rule is a J.D. Candidate, 2022, at Florida State University College of Law and current corporate law clerk at Holland & Knight LLP. Before law school, Hayes played NCAA Division I golf and received a B.A. in journalism from Mercer University. Passionate for the intersection of sports and law, Hayes is the Co-Founder of the Student Sports Law Network and a member of the Sports Lawyers Association's NextGen Committee. Hayes would like to give special thanks to his wife, Kristen, and his 1-year-old son, Xander, for all of their love and support.

The National Football League (NFL) and NFL Properties LLC, which controls the merchandising and licensing for all thirty-two teams in the American Football Conference and National Football Conference, takes branding and use of teams' rights incredibly seriously. As part of enforcement efforts, NFL Properties LLC and various NFL teams have filed lawsuits against other parties who use the phrase "Super Bowl" without consent and counterfeiters who sell goods that are not officially licensed but bearing the trademarks of various teams. Owning and possessing valid trademark registrations is key to these efforts. All teams must control such trademark registrations to initiate lawsuits in federal court and seek statutory damages in connection with alleged trademark infringement. Failure to possess such registrations may also diminish the impact that demand letters may otherwise have on intended recipients.

Sports franchises should not only take their time and conduct the requisite diligence in coming up with appropriate and cleared branding before they are first announced, but they must also take such care in any rebranding efforts. Failing to appreciate the importance of trademark diligence will often result in frustrations for the franchise that may include a failure to register important brand identifiers as well as result in the worst consequence, being named a defendant in a public, high-profile lawsuit. Part I of this Essay discusses past and ongoing franchise name changes in professional sports. Part II addresses the intellectual property considerations franchises must consider when changing their name, and Part III explains how a franchise can make the appropriate corporate changes to finalize name changes with its Secretary of State (or other applicable body).

I. SPORTS TEAMS CHANGING THEIR NAME

While team names have recently been in the spotlight, there is not a robust history of professional sports franchises changing their names. Part A of this section considers the history surrounding two professional sports franchises that changed their name in the past. Lessons from these teams' name change are still relevant today. Part B of this section considers the current landscape as two professional sports franchises have recent or ongoing name changes with name change legal hurdles.

A. *Changes in the Past*

1. Washington Bullets

"Faster than a speeding bullet"—that was the slogan of the Baltimore Bullets when the team was purchased by Abe Pollin in 1964.[1] After moving to Landover, Maryland, in 1973 and becoming the Washington Bullets a year later,[2] the name stuck for more than twenty years—enough time to watch Wes Unseld and Elvin Hayes win an NBA championship, which paved the way for consistent success.[3] Yet, eventually the name's social and political implications grew too much to bear for Pollin. The straw that broke the camel's back was, unfortunately, a literal bullet. In November of 1995, Israeli Prime Minister Yitzhak Rabin was shot twice by a Jewish ultranationalist while attending a Tel Aviv peace rally.[4] He was a close friend of Pollin's.[5] Not even a week later, Pollin announced that he was changing the team's name.[6] Although Pollin made the announcement quickly, it was not out of the blue; Pollin mentioned in May of 1995 the team may re-name itself.[7] In fact, Pollin said he had been thinking about changing the name for thirty-one years.[8] Pollin said in 1995, "Bullets connote killing, violence, death . . . Our slogan used to be, 'Faster than a speeding bullet.' That is no longer appropriate."[9] The name had been even more controversial because of rampant crime in the District of Columbia, which had been given the nickname "the murder capital of the country."[10]

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1. George Vecsey, *Sports of the Times; Say Goodbye To 'Bullets' As Nickname*, N.Y. TIMES (Nov. 12, 1995), https://www.nytimes.com/1995/11/12/sports/sports-of-the-times-say-goodbye-to-bullets-as-nickname.html [https://perma.cc/9AE6-U2CP].

2. Adam Augustyn, *Washington Wizards*, BRITANNICA (Nov. 5, 2021), https://www.britannica.com/topic/Washington-Wizards [https://perma.cc/44PV-ACL6].

3. *Bullets and Wizards History*, NBA.COM, https://www.nba.com/wizards/wizards-history.

4. Jacob Bogage, *'My friend was shot': How an assassin's bullets in Israel changed an NBA team's name in D.C.*, WASH. POST. (Apr. 14, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/04/14/my-friend-was-shot-how-an-assassins-bullets-in-israel-changed-an-nba-teams-name-in-d-c/ [https://perma.cc/MT9U-TKSV].

5. *Id.*

6. *Id.*

7. *Id.*

8. Vecsey, *supra* note 1.

9. *Id.*

10. Debbie M. Price, *'Murder Capital' Label Has Long Stalked D.C.*, WASH. POST (Apr. 4, 1989), https://www.washingtonpost.com/archive/politics/1989/04/04/murder-capital-label-has-long-stalked-dc/06a3c715-5888-4c26-b6c7-64ef290b305d/ [https://perma.cc/GFR6-LP5N]; *see also Ever Wonder: Why the name change from Bullets to Wizards?*, NBC SPORTS (May 27, 2020), https://www.nbcsports.com/washington/wizards/ever-wonder-why-name-change-bullets-wizards [https://perma.cc/UJ74-QCHN] ("On top of the gun violence that took a close friend away from

The team ultimately gave fans the chance to pick the team's new name; three thousand names were submitted, Pollin cut the list to five names, and fans voted on their favorite of those five.[11] For each vote received, a one-dollar donation was made to anti-violence efforts.[12] Although *Washington Post* sports writer Tony Kornheiser blasted the team for its team name options,[13] the franchise ultimately landed on the Wizards. Yet, changing the name brought a new issue—a legal one. The Harlem Wizards, a Harlem Globetrotters-esque basketball team, sued the Washington NBA team for trademark infringement, claiming reverse confusion.[14] The court eventually dismissed the complaint, and the Wizards name moved forward without further legal interruption.[15] Pollin, in light of the social environment and his friend's murder, was thankful to change the name from the Bullets, saying, "If I save one life, make a change in one life . . . it'll be worth it."[16]

2. Tennessee Oilers

While the Tennessee franchise's name change was not quite as socially and politically charged as the Bullets', this example offers another motivation for changing a team name: a geographic move. The franchise was the Houston Oilers from 1960–1996 before moving to Tennessee, where it kept the "Oilers" name for two years.[17] Owner Bud Adams, who had owned the team since 1960, considered holding a fan vote contest like Pollin did with the Bullets, but he decided against doing so when franchise legends such as Earl Campbell questioned how changing the name would affect their legacy.[18] However, Tennessee

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Pollin, Washington D.C. was in the midst of a terrible reign of drug abuse and gang-affiliated gun violence in the 1990s, marking it as one of the most dangerous, and deadly cities in the country.").

11. Josh Chaimson, *The Bullet That Changed the Washington Bullets' Name to the Washington Wizards*, THE GAME HAUS (May 2, 2020), https://thegamehaus.com/nba/the-bullet-that-changed-the-washington-bullets-name-to-the-washington-wizards/2020/05/02/ [https://perma.cc/H676-LUAQ].

12. *Id.*

13. Tony Kornheiser, *Any Other Name – Please!*, WASH. POST (Feb. 20, 1996), https://www.washingtonpost.com/archive/sports/1996/02/20/any-other-name-please/6cbff02f-5a2c-452d-bb2c-341f1e56e069/ [https://perma.cc/L8YG-SUU5].

14. Harlem Wizards Ent. Basketball, Inc. v. NBA Properties, Inc., 952 F. Supp. 1084, 1086 (D.N.J. 1997); *see also* Thomas Heath, *Bullets in a Battle for Name's Sake*, WASH. POST (Nov. 6, 1996), https://www.washingtonpost.com/archive/sports/1996/11/06/bullets-in-a-battle-for-names-sake/d6a13874-0662-4cd1-bec0-2653457186b9/ [https://perma.cc/U5VN-U2HM].

15. Harlem Wizards Ent. Basketball, Inc. v. NBA Properties, Inc., 952 F. Supp. 1084, 1099 (D.N.J. 1997).

16. Jacob Bogage, *supra* note 4.

17. *Oilers Change Name To Titans*, CBS NEWS (Nov. 14, 1998), https://www.cbsnews.com/news/oilers-change-name-to-titans/ [https://perma.cc/BFV7-5TT5].

18. *Id.*

media wanted a name that was more relevant to the new location.[19] The media ultimately received its wish when Adams changed the name to "Titans". Of the name, Adams said, "Titans come from early Greek mythology and the fact that Nashville is known as the 'Athens of the South' makes the Titans name very appropriate."[20] This name change also shed light on the aftereffects of a name change on retailers; one news story showed some local retailers struggling to sell Tennessee Oilers apparel since the new Titans name was announced in November, right before the Christmas holiday season.[21]

B. *Recent and Ongoing Changes*

1. Washington Football Team

Another NFL franchise, Washington, plans to unveil its new name on February 2, 2022, which will be the second change for the franchise over a two-year span.[22] On July 13, 2020, the franchise rid itself of the "Redskins" moniker it had utilized since 1933, when it was originally the Boston Redskins.[23] The name change came approximately one month after public scrutiny and pressure reached what seemed like a boiling point—Nike, FedEx, and PepsiCo investors even called for the companies to end their relationships with the franchise until the name was changed.[24] The kettle had been boiling for about fifty years—journalists in the early 1970s called the team's name a slur and compared it to slurs used against African Americans.[25] The following fifty years included:

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19. *Id.*

20. *Id.*

21. Keith Russell, *Oilers' name change to Titans leaves retailers with titanic chore*, NASHVILLE BUS. J. (Nov. 22, 1998), https://www.bizjournals.com/nashville/stories/1998/11/23/story2.html [https://perma.cc/5H9P-KT54].

22. President's Brief: Why Wolves Won't Work, WASHINGTON FOOTBALL TEAM (Jan. 4, 2022), https://www.washingtonjourney.com/homepage/presidents-brief-why-wolves-wont-work-and-a-date-to-save/ [https://perma.cc/775H-5SLT]; Ben Pickman, *New Washington Football Team Name to Be Released in 2022*, SPORTS ILLUSTRATED (Feb. 23, 2021), https://www.si.com/nfl/2021/02/23/washington-football-team-name-coming-2022 [https://perma.cc/RN9G-JHY4].

23. Jeff Kerr, *Washington Redskins change name: Here's a timeline detailing the origins, controversies, and more*, CBS SPORTS (July 13, 2020), https://www.cbssports.com/nfl/news/washington-redskins-name-change-heres-a-timeline-detailing-the-origins-controversies-and-more/ [https://perma.cc/7ZJE-REY2].

24. *Id.*

25. *Id.* One article from 1971 which is mentioned in a 2014 Washington Post article said, "John Parker, however, a Choctaw from Oklahoma who works for the Bureau of Indian Affairs, was indignant. 'They should change the name . . . It lacks dignity, a haphazard slang word that refers to Indians in general but on a lower scale. It is the white people's way of making a mockery, like they used to do to the blacks in the South.'" Dan Steinberg, *The Great Redskins Name Debate*

> (1) a petition by six Native Americans of various tribes in 1992 to strip the team of its trademark registrations granted in 1967.[26] After the lower court ruled in favor of the plaintiffs, the appellate court in 2009—seventeen years after the petition was filed—reversed, holding that the doctrine of laches did not apply and that the suit was filed too late.[27]
>
> (2) In the face of another trademark lawsuit brought by a Navajo Indian, owner Daniel Snyder said, "'We'll never change the name . . . It's that simple. NEVER—you can use caps.'"[28] Snyder also stated that the "Redskins" name originated out of respect for Native Americans and that, at the time, the coach and four players were Native American.[29]
>
> (3) After the Cleveland Indians removed Chief Wahoo from its stadium and uniforms, NFL Commissioner Roger Goodell emphasized that the "Redskins" name would remain, citing origins and tradition as the reason.[30] The surrounding social justice events of 2020, along with pressure from corporate partners, may have been the final nail in the coffin for the franchise. Now, the franchise is on the path toward a new, more accepted name and has sought fan input.[31]

2. Cleveland Guardians

Like the Washington Football Team, Major League Baseball's Cleveland Guardians announced in 2020 it would officially be changing

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of ... 1972?, WASH. POST (June 4, 2014), https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/06/03/the-great-redskins-name-debate-of-1972/?arc404=true [https://perma.cc/42EN-RWSW] (quoting Tom Quinn, *Redskins/Rednecks*, WASH. DAILY NEWS (Nov. 1971).).

26. Kerr, *supra* note 23.

27. Bill Mears, *Court rejects appeal over Redskins trademark*, CNN (https://www.cnn.com/2009/CRIME/11/16/scotus.redskins/index.html [https://perma.cc/2S8W-C5KF].

28. Erik Brady, *Daniel Snyder says Redskins will never change name*, USA TODAY SPORTS (May 10, 2013), https://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/ [https://perma.cc/XED4-4PYZ].

29. Kerr, *supra* note 23. For a more thorough discussion on this history of the name, *see* J. Gordon Hylton, *Why the Redskins are Called the Redskins*, MARQ. U.L. SCH. FAC. BLOG (May 30, 2014), https://law.marquette.edu/facultyblog/2014/05/why-the-redskins-are-called-the-redskins/?utm_source=homepage&utm_medium=callout&utm_campaign=blogblock [https://perma.cc/5EZH-63TS]. Hylton says six Native American players were on the 1933 team and that co-owner George Preston Marshall was fascinated with the idea of "Indian Football," thus he wanted to name the team something unique in relation to Native Americans. *Id.*

30. Kerr, *supra* note 23.

31. The team put together a website for fans to submit ideas and follow the process. *See generally* https://www.washingtonjourney.com [https://perma.cc/FV2Z-MQW2].

its name.[32] On July 3, the same day the Washington Football Team declared it would investigate changing its name, the Guardians released a statement that said, "We have had ongoing discussions organizationally on these issues. The recent unrest in our community and our country has only underscored the need for us to keep improving as an organization on issues of social justice."[33]A little over five months later, the team announced its name change, but unlike the Washington Football Team, the Guardians did not choose a "placeholder" name and continued using its previous "Indians" logo throughout the 2021 season.[34] On July 23, 2021, the franchise announced its new name would be introduced at the beginning of the 2022 season: the Guardians.[35] But almost immediately after the announcement, chaos ensued because a Cleveland men's amateur roller derby team had been using the "Cleveland Guardians" name, logo, domain name, and social media accounts for years.[36] The roller derby team filed a lawsuit against the baseball team, but according to reports, a settlement has been reached allowing both teams to use the name.[37] Part II addresses how a franchise could have avoided the legal hurdles the Guardians ultimately faced.

The Cleveland franchise was one of the American League's eight original charter members in 1901 and eventually named itself the Indians in 1915.[38] Although there is debate about the true origins of the name,[39]

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32. David Waldstein & Michael S. Schmidt, *Cleveland's Baseball Team Will Drop Its Indians Team Name*, N.Y. TIMES (Dec. 13, 2020), https://www.nytimes.com/2020/12/13/sports/baseball/cleveland-indians-baseball-name-change.html [https://perma.cc/T4DK-4NPC].

33. Mike Axisa, *Cleveland Indians name change: History of franchise nickname, Chief Wahoo logo and calls for a switch*, CBS SPORTS (Dec. 16, 2020), https://www.cbssports.com/mlb/news/cleveland-indians-name-change-history-of-franchise-nickname-chief-wahoo-logo-and-calls-for-a-switch/ [https://perma.cc/A83E-WEMY].

34. David Waldstein & Michael S. Schmidt, *Cleveland's Baseball Team Will Drop Its Indians Team Name*, N.Y. TIMES (Dec. 13, 2020), https://www.nytimes.com/2020/12/13/sports/baseball/cleveland-indians-baseball-name-change.html [https://perma.cc/5HT5-9PE5].

35. Chelsea Janes, *Cleveland's MLB team announces its new name, will rebrand as the Guardians*, WASH. POST (July 23, 2021), https://www.washingtonpost.com/sports/2021/07/23/cleveland-guardians-mlb-name-change/ [https://perma.cc/8TSL-ZPL9].

36. Jeff Eisenberg, *The original Cleveland Guardians? This roller derby team could cash in on Indians' name change*, YAHOO! SPORTS (July 26, 2021), https://sports.yahoo.com/the-original-cleveland-guardians-this-roller-derby-team-could-cash-in-on-indians-name-change-030536652.html [https://perma.cc/Q53F-BFCE].

37. *Cleveland Guardians' launch starts with store sign crashing to sidewalk*, ESPN (Nov. 19, 2021), https://www.espn.com/mlb/story/_/id/32667138/cleveland-guardians-launch-starts-store-sign-crashing-sidewalk [https://perma.cc/6KX3-HSS9].

38. Axisa, *supra* note 33.

39. *See* Joe Posnanski, *The Cleveland Indians, Louis Sockalexis, and The Name*, NBC SPORTS (Mar. 18, 2014), https://mlb.nbcsports.com/2014/03/18/the-cleveland-indians-louis-sockalexis-and-the-name// [https://perma.cc/ZL2T-CD8W] (offering a skeptical view of the widely-accepted reasoning).

the most widely-accepted story is that "Indians" was chosen as a reference to the first recognized Native American baseball player, Louis Sockalexis.[40] As was true for the Redskins name, protests surrounding the "Indians" name and the Chief Wahoo logo began in the early 1970s.[41] In 2015, The Real Cleveland Indians, LLC was registered in Ohio as a 501(c)(3) non-profit organization with the purpose of "educating the public about issues concerning Native American Indians, especially those concerning racism, stereotypes and the use of Native American imagery/culture in sports by non-Native American Indian entities."[42] One year later, in 2016, Canadian activists filed a lawsuit to ban use of the Chief Wahoo logo and Indians name before an ALCS game against the Toronto Blue Jays in Toronto, but the lawsuit was dismissed.[43] Yet, just two years later, the team announced it would no longer use the Chief Wahoo logo on its uniforms.[44] In 2019, the team had completely gotten rid of the logo.[45] The following year, 2020, saw the "Indians" name dropped after being used for about one hundred five years.[46]

II. CHOOSING A NEW NAME

Any franchise that is considering changing the word mark and stylized design marks attached to its brand, such as the Washington Football Team and Cleveland Guardians, must take into consideration the ramifications from a trademark law perspective. First, the franchise should be cognizant of existing marks that have been previously registered with the United States Patent and Trademark Office (USPTO) and have a "live" status attached to such registrations. Proper diligence in this regard includes an exhaustive search of the USPTO's Trademark Electronic Search System (TESS) for any marks that the franchise may be interested in as well as

40. Axisa, *supra* note 33.

41. *Id.*

42. The Real Cleveland Indians, LLC Certificate of Incorporation, OHIO SEC'Y OF STATE, https://bizimage.ohiosos.gov/api/image/pdf/201511201132 [https://perma.cc/AX64-PARU].

43. Steve Keating, *Baseball: Judge rules in favor of Indians in logo lawsuit*, REUTERS (Oct. 17, 2016), https://www.reuters.com/article/us-baseball-indians-lawsuit-idUSKBN12I035 [https://perma.cc/UCT8-29SL].

44. Pete Blackburn, *Cleveland Indians Fully Phase Out Chief Wahoo Logo, Unveil New Uniforms for 2019*, CBS SPORTS (Nov. 19, 2018), https://www.cbssports.com/mlb/news/cleveland-indians-fully-phase-out-chief-wahoo-logo-unveil-new-uniforms-for-2019/ [https://perma.cc/BJ2Y-2G64] (statement of MLB Commissioner Rob Manfred) ("Major League Baseball is committed to building a culture of diversity and inclusion throughout the game . . . Over the past year, we encouraged dialogue with the Indians organization about the Club's use of the Chief Wahoo logo. During our constructive conversations, Paul Dolan made clear that there are fans who have a longstanding attachment to the logo and its place in the history of the team.").

45. *Id.*

46. *Id.*

similar variations thereof. Additionally, a deep search should be accomplished that goes beyond scraping TESS to also account for any commercial use of the marks, as well as alternative and similar versions of the marks, outside of those marks that may have been registered with the USPTO and in good standing. Even though there may not be registrations of concern in place, the franchise will want to avoid any third-party from having a claim of infringement based on their common law rights derived from mere use in commerce. Second, the franchise should have an appreciation as to the strength of the marks that it wishes to develop as its brand. A generic or descriptive brand will have a diminished likelihood of success in having its associated marks properly registered by the USPTO, whereas fanciful and arbitrary are marks with strength that can be useful in the prosecution against individuals and companies that choose to infringe upon or dilute the franchise's brand.

Franchises will typically sift through several marks before deciding as to which group of marks is best suited for the future of the organization. An important part of that process is an understanding of any existing rights holders who could serve as a thorn in the side of the teams. It took the NHL expansion team in Seattle roughly four years before settling on the Kraken brand, and the Los Angeles Rams spent approximately two years in finalizing its new logo after the franchise moved geographical locations from St. Louis.[47] The Washington Football Team considered whether it was in its best interest to remain as the Washington Football Team. Team president Jason Wright understands that part of the process of choosing a new brand for his football team is filing for and receiving trademark registrations.[48] He has an appreciation for the fact that third parties have proactively filed trademark applications on over thirty potential names that the franchise may be considering.[49] Wright has also mentioned that, prior to his hiring, the organization determined that it would take eighteen to twenty-four months to establish a new brand, but he understood that the process could take even longer than that.[50]

Strategically, Wright has acknowledged that it would not make sense for the organization to announce new branding before clearing all of the

47. John Keim, *Washington president Jason Wright: On new name, culture, NFL investigation*, ESPN (Nov. 19, 2020), https://www.espn.com/blog/washington/post/_/id/40669/washington-president-jason-wright-on-new-name-culture-nfl-investigation [https://perma.cc/3DEC-9HC8].

48. *Id.*

49. *Id.*

50. Jason Wright, *President's Weekly Brief: Let's Talk About The Name*, WASHINGTON FOOTBALL TEAM OFFICIAL WEBSITE (Oct. 27, 2020), https://www.washingtonfootball.com/news/presidents-weekly-brief-lets-talk-about-the-name [https://perma.cc/66GQ-YFJV].

legal hurdles to secure the brand, adding that, "not only would that make for a trademarking headache, but it would also be an embarrassing and chaotic launch to what should be a proud and poignant moment for the franchise."[51] In deciding to depart from the Washington Football Team brand, the team needed to confront the fact that individuals, such as a man named Martin McCaulay who has filed trademark applications to register more than forty names and images, could either present roadblocks to registration of a new brand or stall the process for the franchise. McCaulay has live registrations for Washington Red-Tailed Hawks, Washington Veterans, Washington Monuments, Washington Americans, and Washington Renegades Gridiron Football, amongst others. Those registrations could cause an examining attorney at the USPTO to outright reject applications filed by others, including the Washington Football Team, that contain marks likely to be confused with McCaulay's. The Washington Football Team could file petitions to cancel McCaulay's registrations, but that process requires the team to devote substantial time and resources attached to such efforts. McCaulay also possesses live applications for numerous other trademarks, including but not limited to: Washington Redtails, Washington Sentinels, and Washington Liberty. If, for instance, the Washington Football Team was extremely interested in rebranding to the "Washington Redtails" and McCaulay's application remained pending, then the franchise's application would likely be suspended until the USPTO fully processed McCaulay's application. The USPTO could deny Washington's application outright without McCaulay exhausting his ability to respond to office actions or to appeal any final decision to the Trademark Trial and Appeal Board (TTAB) or allowing McCaulay to proceed to registration. In the case of the latter being true, the franchise's suspension would likely be lifted, and it would be in a worse situation, with McCaulay's registration standing in the organization's way.

However, the complication of choosing a new brand can prove to be much harder than getting around the issues presented by individuals like McCauley, who has joyfully adopted the moniker "Trademark Hog," granted to him by many who believe he has hogged many of the names that the Washington Football Team may be interested in acquiring. If the Washington Football Team felt most attached to a "Red Wolves" rebrand and decided to use that name (Wright has said the team will not), then it could have faced a legal battle from Arkansas State University, which has demonstrated its desire to strongly enforce its registered marks

51. *Id.*

surrounding the brand.[52] On December 18, 2019, the university initiated an opposition proceeding in the TTAB against Chattanooga Professional Soccer Management LLC, which had filed a couple of applications to register its Chattanooga Red Wolves SC marks.[53] In its opposition filing, Arkansas State University highlighted that it has continuously used and promoted goods attached to its Red Wolves marks since as early as 2008.[54] The university also highlighted that the Chattanooga pro soccer team had not used any mark having Red Wolves within the mark prior to Arkansas State University's use.[55] The university's request for relief was that the TTAB should refuse registration of the Chattanooga pro soccer team's applications because Arkansas State University is being and will be damaged by such a registration.[56] More than two years later, the case is still pending, and the soccer team has failed to receive a registration.[57] Chattanooga Professional Soccer Management, LLC filed a civil action in the United States District Court for the Eastern District of Tennessee against Arkansas State University during the time that the opposition has been pending, asking for the federal court to declare that the soccer team's use of Red Wolves does not infringe upon Arkansas State University's trademark registrations. The federal court quickly disposed of the case, finding that Arkansas State University was immune from the lawsuit under the Eleventh Amendment and that no exceptions applied.[58] The type of delay, unreasonable expense, and legal exposure that Chattanooga Professional Soccer Management, LLC has endured over two years and counting is precisely what an organization like the Washington Football Team would want to avoid. By conducting the requisite trademark diligence and entering into any necessary co-existence agreements, teams must ensure that they will be able to reap all of the benefits of receiving and maintaining trademark registrations with the USPTO. These benefits include, but are not limited to, providing the public with notice of the registration, possessing the right to initiate a lawsuit in federal court for trademark infringement, creating a legal presumption of ownership of the trademark, using the registration as a

52. Complaint at 3, Chattanooga Professional Soccer Management, LLC v. Arkansas State University, (E.D. Tenn. 2019) (No. 1:2019cv00339). Wright referenced trademark concerns as a reason for not using "Wolves" as part of the team's new name. *See* "President's Brief: Why Wolves Won't Work," *supra* note 22.

53. *Id*.

54. *Id*. at 4.

55. *Id*. at 6.

56. *Id*. at 3.

57. *Id*.

58. *Id*.

basis to earn protection outside of the United States, and the capacity to use the registration symbol attached to the marks at issue.

For now, the Washington Football Team is proactively seeking to register marks associated with its current name, whether it be a placeholder or more permanent than originally thought. It has three pending applications with the USPTO that relate to the current brand, all filed under its parent company—Pro-Football, Inc.—and all initially filed on an intent-to-use basis. The organization will ultimately be required to provide statements of use, shifting the applications from intent-to-use bases to actual use bases, to receive registrations for the trademark applications. As of publication, the USPTO has not assigned examining attorneys to any of the pending applications and, thus, no action is necessary on the part of Pro Football, Inc. for the time being.

III. LEGALLY CHANGING THE NAME

Along with choosing a new name and fulfilling the necessary intellectual property registrations to utilize the name and marks in commerce, the franchise may choose to change the name of its business, if necessary. Both the Washington Football Team and the Cleveland Guardians have incorporated entities within their respective states. For example, a search on the Virginia Corporation Search shows "Washington Football, Inc.," "Pro-Football, Inc." (Washington Football, Inc.'s parent company), and "The Washington Football Charitable Foundation, Inc." can transact business in the state.[59] Washington Football, Inc. (a Maryland corporation), filed its application to transact business in Virginia in 2000, to the tune of $125. Given the generality of the current corporation's name, the Washington franchise could choose to keep its current name. However, a look at the history of The Washington Football Charitable Foundation, Inc. shows the franchise just changed that entity's name. It was previously "The Washington Redskins Charitable Foundation, Inc." until the name was changed November 20,

59. Clerk's Information System VA. STATE CORP. COMM'N. CLERK'S INFO. SYS., https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=11294&source=FromEntityResult&isSeries=False [https://perma.cc/TC5C-4GUB] (last visited Nov. 11, 2021); Clerk's Information System, State Corporation Commission, https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=15418&source=FromEntityResult&isSeries%20=%20false [https://perma.cc/YAY4-J3HJ] (last visited Nov. 11, 2021); Clerk's Information System, VA. STATE CORPORATION COMMISSION, https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=292750&source=FromEntityResult&isSeries=False [https://perma.cc/49LP-NJ4D] (last visited Nov. 11, 2021).

2020.[60] To achieve this name change, the Football Team's foundation had to file an amendment to its certificate of incorporation in Delaware and a shareholder resolution along with an amended certificate of authority to transact business in Virginia.[61] Additionally, Pro-Football, Inc. (a Maryland corporation) filed a trade name registration for "Washington Football Team" in May 2021. Washington's example highlights the advantage of forming a broad name for the corporation or LLC (like "Washington Football, Inc.") because the corporation's name does not need to change; the entity only has to file a trade name registration for the team's nickname.

Before the Indians name change, a search on the Ohio Corporation Search would have shown the "Cleveland Indians Baseball Company, Inc.," "Cleveland Indians Baseball Company, LLC," and "Cleveland Indians Charities, Inc."[62] Now, an Ohio search shows the Guardians name for the corporation, LLC, and charitable arm. To change the names of those business entities, the franchise had to file an amendment to the articles of incorporation for each business entity.[63] Ohio companies must use the standard certificate of amendment form as prescribed by the Secretary of State[64] and pay a $50 certificate filing fee. Unless otherwise stated in the articles of incorporation, directors for the entity can agree to the amendment that changes the name of the entity.[65] Shareholders can also agree to an amendment.[66] Once the amendment is adopted, the entities must then file a certificate on the Secretary of State's prescribed form, which contains: (1) a copy of the resolution; (2) a statement of the manner of its adoption; and (3) a statement of the basis of its adoption, if adopted by resolution of the directors.[67] The amended articles must include a statement saying they supersede the corporation's current articles of incorporation,[68] the certificate must include the corporation's

60. The Washington Football Charitable Foundation, Inc., Name History, https://cis.scc.virginia.gov/EntitySearch/BusinessNameHistory [https://perma.cc/S9C2-FNEA] (last visited Nov. 11, 2021).

61. The Washington Football Charitable Foundation, Inc., Filing History, VA. STATE CORP. COMM'N. CLERK'S INFO. SYS., https://cis.scc.virginia.gov/EntitySearch/BusinessFilings [https://perma.cc/W9F3-NVW3] (last visited Nov. 11, 2021).

62. Cleveland Indians Baseball Company, Inc., OHIO SEC'Y OF STATE, https://businesssearch.ohiosos.gov/?=businessDetails/CP10239 [https://perma.cc/AQ8H-TPBK] (last visited Nov. 11, 2021).

63. OHIO REV. CODE ANN. § 1701.69(B)(1) (West 2002).

64. OHIO REV. CODE ANN. § 111.25 (West 2002).

65. OHIO REV. CODE ANN. § 1701.70(B)(6) (West 2008).

66. OHIO REV. CODE ANN. § 1701.71(A) (West 2004).

67. OHIO REV. CODE ANN. § 1701.73(A)(1) (West 2002).

68. OHIO REV. CODE ANN. § 1701.04(A) (West 2021); OHIO REV. CODE ANN. § 1701.72(C) (West 1955).

currently-registered name and assigned number by the Secretary of State, and an authorized officer must sign the certificate.[69] For the Guardians' for-profit corporation, the changes included the amendment to the articles along with a shareholder resolution and consent to use a similar name. Interestingly, the charitable arm's name was changed to "Cleveland Guardians Charities, Inc." in July but was then changed to "Cleveland Guardians Foundation, Inc." four months later. One week after that, the name was changed back to "Cleveland Guardians Charities, Inc."—possibly because the charity had filed a trade name registration for "Cleveland Indians Charities" back in July. Additionally, the Guardians' LLC filed four trade name registrations within the three days of amending its articles—"Cleveland Indians", "Cleveland Indians Baseball", "Guardians Baseball", and "Cleveland Guardians Baseball"; each cost $39.

CONCLUSION

Coming up with new brand identifiers is not as simple as conducting focus groups and polling the relevant audience about what they believe to be a desirable name and logo for future use. Exhaustive diligence in connection with existing trademark registrations as well as any third party who may possess common law trademark rights is an important element of rebranding an organization. Sometimes, the most desirable branding may not be the best option based on the results of that exhaustive diligence. Many organizations have taken multiple years either in developing a brand attached to their franchises for the first time or in the rebranding process. A big reason for that is the legal diligence that is so particularly important which, when ignored, as may have been the case for Chattanooga Professional Soccer Management LLC, results in frustrations such as unintended and undesirable litigation.

69. OHIO REV. CODE ANN. § 1701.73(C) (West 2014).

WHEN MUSIC ROW BECOMES WALL STREET: CREATORS' INTERESTS IN COPYRIGHT TRANSACTIONS

*Rebekah J. Griggs**

I. INTRODUCTION

Creators often seek to obtain and maintain control over their exclusive rights and copyright protection of their works, especially in musical compositions and sound recordings. Prince famously referenced his own battle over his master recordings with this remark: "If you don't own your masters, your master owns you."[1] Attainment of ownership, however, has become more and more difficult for artists to achieve in an increasingly transactional environment. Copyrights, in both sound recordings and their underlying musical compositions, are licensed, sold, and assigned in a multitude of different scenarios and methodologies for equally multitudinous reasons. This phenomenon has become more visible as of late with private equity funds and third parties both expressing and obtaining interest in creators' and companies' copyrights.[2] The increased volume of transactions brings to light the problems that creators are facing with respect to their copyright protections and their access to those protections. There are both opportunities and downfalls for creators,

* Juris Doctor Candidate, 2022, University of South Carolina School of Law; Master of Public Administration Candidate, 2022, University of South Carolina; Master of Sport and Entertainment Management, University of South Carolina; Bachelor of Arts, Production Studies in Performing Arts, Clemson University.

1. Will Richards, *New bands: own your masters, it's more important than you think*, NME (Aug. 13, 2019), https://www.nme.com/blogs/nme-radar/new-bands-ownership-masters-recording-important-think-2537707#:~:text=In%201996%2C%20Prince%20was%20gave,have%20put%20it%20better%20ourselves [https://perma.cc/5KWQ-WSDG].

2. *See generally* Ben Sisario, *This Man Is Betting $1.7 Billion on the Rights to Your Favorite Songs*, N.Y. TIMES (Dec. 18, 2020), https://www.nytimes.com/2020/12/18/arts/music/merck-mercuriadis-hipgnosis.html [https://perma.cc/S4R9-K3YG].

specifically songwriters and artists, in these arrangements. All creators could face the devastation of their work falling into unapproved hands, possibly without their knowledge.

Several potential policy solutions exist in the underlying copyright provisions in addition to business solutions in creators' contractual negotiations, including changes in assignment clauses. These solutions could generate a situation where creators retain or more quickly regain their copyrights while still upholding traditional revenues.

This Essay will integrate current events as well as recent and ongoing litigation to emphasize the everchanging landscape of copyright transactions and creators' rights as a whole. It will specifically explore this problem by first discussing some of the more recently involved parties in these copyright transactions: private equity funds. Next, it will discuss some of the opportunities and implications for creators in these transactions, including several high-profile examples of recent transactions in both publishing and recordings. Then, the potential solutions for creators in the spheres of both statutory policy and business dealings will be explored. While discussing potential solutions, this Essay will spotlight some of the emerging issues surrounding categorizing "works made for hire" and "joint works" before examining termination rights and shorter assignment periods. Before concluding, this Essay will then consider some potential regulations for private equity funds. This Essay will finish by introducing contractual changes that could specifically allow record labels and creators to contract around the current copyright provisions for creators to retain their masters or attain better re-recording clauses.

II. PRIVATE EQUITY FUNDS IN THE MUSIC INDUSTRY

Private equity funds, where investors use pooled money to invest in and take controlling interests in companies,[3] have recently assembled significant interest in multiple sectors of the music industry from record labels[4] to the musical instruments.[5] These private equity funds are minimally regulated and often spawn conflicts of interest as a result of their holdings and acquisitions having competing or contradictory

3. *Private Equity Funds*, U.S. SECS. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity [https://perma.cc/L85M-HUG7] (last visited Oct. 3, 2021).

4. Anne Steele, *Scooter Braun Makes $300 Million Deal for Big Machine Records*, WALL ST. J. (June 30, 2019), https://www.wsj.com/articles/scooter-braun-makes-300-million-deal-for-big-machine-records-11561893008 [https://perma.cc/LCL4-NXT9].

5. Lauren S. Murphy & Jodi Xu, *Steinway Agrees to Be Bought by Paulson for $512 Million*, BLOOMBERG (Aug. 14, 2013), https://www.bloomberg.com/news/articles/2013-08-14/paulson-co-to-buy-piano-maker-steinway-for-512-million [https://perma.cc/JBZ8-8FSV].

investments.[6] This combination can actualize problems for the music industry because of its many intricacies and relationships with creators. One such problem in the copyright sphere is where a song's underlying composition and sound recording copyrights can be easily and quickly pitted against each other during and after sales to private equity firms. For example, if a singer-songwriter both writes and records a song but only holds the rights to the underlying composition, their recording could be sold without their approval. This could become problematic in licensing the recording, which requires both the composition and sound recording rightsholders' approval to move forward.[7] The singer-songwriter could block the sound recording's rightsholder from licensing the recording for a movie and vice versa.

Private equity firms are not the sole interested parties seeking to purchase copyrights. Startups and established companies interested in acquiring and managing catalogs have also gained steam;[8] while record labels and major publishing companies have been acquiring and selling off copyright interests of their own artists and other creators.[9] These transfers can be both opportunistic and problematic for creators.

A. *Opportunities for Creators*

Songwriters can choose to seek out third parties, private equity firms, and companies to purchase their publishing catalogs and raise significant funds in the process. Such a transaction could create new revenue and career opportunities for songwriters and potentially even bring new life to older songs.

Transfers of publishing catalogs are not a new phenomenon. The Beatles' early catalog has been famously shuffled around since the beginning of their career. Paul McCartney ended this series of transactions half a century later by terminating their publishing license in

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6. *See* U.S. SECURITIES & EXCH. COMM'N, *supra* note 3.

7. *E.g.*, *How To Acquire Music For Films*, ASCAP (last visited Dec. 16, 2021), https://www.ascap.com/help/career-development/How-To-Acquire-Music-For-Films [https://perma.cc/QPN2-K9BU].

8. Mark Latham, *Sweet melody: How private equity is taking a slice of music's digital future*, PRIVATE EQUITY NEWS (Dec. 7, 2020), https://www.penews.com/articles/sweet-melody-how-private-equity-is-taking-a-slice-of-musics-digital-future-20201207 [https://perma.cc/U38L-X73S].

9. Melinda Newman & Ed Christman, *Bruce Springsteen Sells His Masters and Music Publishing to Sony in $500M Deal*, BILLBOARD (Dec. 15, 2021), https://www.billboard.com/pro/bruce-springsteen-sells-masters-publishing-sony/ [https://perma.cc/B8PP-33F2]; Ben Sisario, *Bob Dylan Sells His Songwriting Catalog in Blockbuster Deal*, N.Y. TIMES (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/arts/music/bob-dylan-universal-music.html [https://perma.cc/TAQ3-4RLA].

2017.[10] Nevertheless, transactions still continue today. Stevie Nicks and Bob Dylan chose to engage in transactions in late 2020 when Nicks sold a majority stake in her extensive catalog to an independent publisher[11] and Dylan sold his full stake of publishing rights to Universal Music.[12] In December 2021, Bruce Springsteen sold both his publishing and master rights to Sony Music and Sony Publishing.[13] These transactions have been swelling in the midst of the following conditions that encourage such sales for both parties: current low interest rates, potential upcoming tax changes in the United States, individual circumstances, the streaming era, and the record market for transferring rights.[14]

B. *Implications for Creators*

However, the sales to private equity firms and startups, potentially without the requisite knowledge and expertise of seasoned music industry professionals, could result in mismanagement of the "crown jewels" of modern music. It is possible that financial woes could cause even the savviest of songwriters to be faced with the decision to sell their life's work to the highest bidder even with knowledge that bidder does not necessarily have their best interests in mind. This is especially true with economic downturns and the recent unprecedented impacts from the COVID-19 pandemic on the entertainment sector, preventing touring and live performances for nearly two years, which decreased revenue opportunities for creators.[15]

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10. Dan Rys, *A Brief History of the Ownership of the Beatles Catalog*, BILLBOARD (Jan. 20, 2017), https://www.billboard.com/articles/columns/rock/7662519/beatles-catalog-paul-mccartney-brief-history-ownership [https://perma.cc/39R2-GXV3]; Agence France-Presse, *Beatles song rights dispute: Paul McCartney and Sony ATV work it out*, THE GUARDIAN (July 3, 2017), https://www.theguardian.com/music/2017/jul/04/beatles-song-rights-dispute-paul-mccartney-and-sony-atv-work-it-out [https://perma.cc/BLF4-HLZC].

11. Cathy Applefeld Olson, *Stevie Nicks Sells Majority Stake In Songwriting Catalog*, FORBES (Dec. 4, 2020), https://www.forbes.com/sites/cathyolson/2020/12/04/stevie-nicks-sells-majority-stake-in-songwriting-catalog/?sh=2c3d9f0239ad [https://perma.cc/D9C4-CM69].

12. Sisario, *supra* note 9.

13. Newman & Christman, *supra* note 9.

14. Tim Ingham & Amy X. Wang, *Why Superstar Artists Are Clamoring to Sell Their Music Rights*, ROLLING STONE (Jan. 15, 2021), https://www.rollingstone.com/pro/features/famous-musicians-selling-catalog-music-rights-1114580/ [https://perma.cc/3CVK-K49P]; Faith Blackinton, *What's behind the boom in iconic boomer musicians selling their songs*, CNBC (Apr. 4, 2021), https://www.cnbc.com/2021/04/04/why-theres-a-boom-in-boomer-rock-stars-selling-their-songs.html [https://perma.cc/UPT7-DRSQ]; Nicole Lyn Pesce, *5 reasons musicians like Bob Dylan, Neil Young, and Stevie Nicks are selling their song catalogs right now*, MARKETWATCH (Jan. 6, 2021), https://www.marketwatch.com/story/5-reasons-why-musicians-like-bob-dylan-and-stevie-nicks-are-selling-their-song-catalogs-right-now-2020-12-15 [https://perma.cc/9RD9-RRXH].

15. *E.g.* Marisa Henderson & Amy Shelver, *How COVID-19 exposed music industry fault lines and what can be done*, UNITED NATIONS CONF. ON TRADE & DEV. (Sept. 28, 2021), https://unctad.org/news/how-covid-19-exposed-music-industry-fault-lines-and-what-can-be-done

A similar set of circumstances also await artists, engineers, and producers when their recordings' masters are sold to other parties. If any of these parties hold the copyrights to the recordings, they can seek out buyers, similar to how songwriters would, to raise likely significant capital for themselves. However, due to contractual structures, it is relatively rare for these parties to hold the copyrights for their works when labels often hold the rights.[16] Though the labels are contractually considered the "author," it is the creatives who are integral for creating the sound of the recordings from the vocal tonalities to the intrinsic and deliberate choices like preamps, microphones, room treatment, and microphone placements. These are the elements that culminate in some of the most recognizable and indispensable aspects of modern analog and digital recording. Because the engineers and artists who record others' songs often do not have any claim to the song or recording's copyrights, they regularly have relatively little input or leverage in any deals that transfer the sound recording copyrights to other parties like private equity funds, companies, or other publishers and labels. It is entirely possible that these parties do not have an existing relationship with the creators, causing potential dissonance. This can be perilous for creators who labored over these recordings just for the copyright holders to sell them to the highest bidders, potentially without their best interests or the recording's preservation and integrity in mind.

Taylor Swift experienced this situation in the summer of 2019 and again in late 2020 when the masters from her first six albums were sold to a private equity fund then resold to another investment company.[17] Swift suggests that she was not able to interject input into the sale nor was she able to place an offer herself in either deals which were against her wishes.[18] Because she is an author or joint author of each of the musical compositions included in the masters, she holds a veto right for synchronization licenses and is exercising that power,[19] but still lacks the ability to reap the significantly larger revenues from streaming and sales

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[https://perma.cc/BW8G-JLGJ].

16. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 76 (10th ed. 2019).

17. Melinda Newman, *Taylor Swift's Masters Sold Again: Why She Refused to Negotiate with Scooter Braun*, BILLBOARD (Nov. 16, 2020), https://www.billboard.com/articles/business/9485144/taylor-swift-masters-sold-again-scooter-braun-shamrock/ [https://perma.cc/5YU6-P84H]; Tim Ingham, *Why Did Shamrock Capital Spend $300 Million on Old Taylor Swift Albums?*, ROLLING STONE (Nov. 17, 2020), https://www.rollingstone.com/pro/features/why-taylor-swift-scooter-braun-shamrock-1091742/ [https://perma.cc/2X62-MQNR].

18. Newman, *supra* note 17; Ingham, *supra* note 17.

19. Jason Lipshutz, *Billboard Woman of the Decade Taylor Swift: 'I Do Want My Music to Live On'*, BILLBOARD (Dec. 11, 2019), https://www.billboard.com/amp/articles/columns/pop/8545822/taylor-swift-cover-story-interview-billboard-women-in-music-2019?_twitter_impression=true [https://perma.cc/SBA2-YR4G].

associated with the recordings without the ownership of the sound recording copyright.[20]

In response, Swift planned to re-record these albums to obtain ownership of the new masters and try to position those as alternatives for the original recordings in streaming, synchronization licenses, and more.[21] She released the first of these re-recordings in early 2021 and the second in late 2021.[22] The first released re-recording, *Fearless (Taylor's Version*), appears to have achieved this positioning feat based on equivalent album units, inclusive of both streams and sales, through its first six weeks of release, according to Billboard.[23]

Singer JoJo also undertook a re-recording journey after a heated legal battle[24] with her former record label responsible for her first recordings and the absence of her first two albums on streaming services.[25] JoJo re-recorded and released new versions of these albums in late 2018.[26] Re-recording old hits is not a new phenomenon, however. Artists like Def Leppard and Journey went through this process in the past decade and artists like Frank Sinatra and Chuck Berry re-recorded decades before that.[27]

Taylor Swift and JoJo are not the only artists to recently and publicly address their attitudes towards such transactions. Anita Baker also expressed frustrations over her lack of control of her masters but revealed in September 2021 that she has regained control of her masters—a rare win for artists fighting for sound recording rights.[28]

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20. Ingham, *supra* note 17.

21. Lipshutz, *supra* note 19.

22. Chris Willman, *Taylor Swift Bumps Up Release of 'Red (Taylor's Version)' by a Week*, VARIETY (Sept. 30, 2021), https://variety.com/2021/music/news/taylor-swift-red-shifts-release-date-taylors-version-1235077968/ [https://perma.cc/9R6Q-KPH3].

23. Jason Lipshutz, *Here's How 'Fearless (Taylor's Version)' Performed in Its Sixth Week Compared to Taylor Swift's Original 'Fearless'*, BILLBOARD (May 26, 2021), https://www.billboard.com/articles/business/chart-beat/9578591/taylor-swift-fearless-chart-comparison-week-6 [https://perma.cc/TBQ3-L3XK].

24. JoJo & Dee Lockett, *JoJo Spent Nearly a Decade Fighting Her Label and Won. Here's What She Learned, in Her Own Words*, VULTURE (Nov. 2, 2015), https://www.vulture.com/2015/10/jojo-fighting-the-major-label-man-in-her-own-words.html [https://perma.cc/9HN5-RH64].

25. Taylor Weatherby, JoJo On Rerecording Her First Two Albums After Legal Battle: 'This Is Closing a Chapter For Me,' BILLBOARD (Jan. 15, 2019), https://www.billboard.com/music/pop/jojo-interview-new-versions-the-high-road-old-albums-8493194/ [https://perma.cc/4YF3-6U4M].

26. *Id.*

27. Annie Zaleski, *The Rhymes And Reasons Behind Re-Recording Your Own Classics*, NPR (Apr. 12, 2021), https://www.npr.org/2021/04/12/986430235/the-rhymes-and-reasons-behind-re-recording-your-own-classics [https://perma.cc/FX34-M3QQ].

28. Okla Jones, *Anita Baker Says You Can Stream Her Music Again*, ESSENCE (Sept. 5, 2021), https://www.essence.com/entertainment/anita-baker-says-you-can-stream-her-music-again/ [https://perma.cc/RH4S-86T8].

III. POTENTIAL SOLUTIONS

The influx of interest from investors, companies, and third parties in the ownership of creators' copyrights has been exacerbated in the streaming age with the new potential revenue opportunities continuing to climb. These conflicts between creators and copyright owners or buyers will likely continue to mound as more and more transfers occur. Creators have several potential solutions to retain, regain, and profit from their creative works through copyright law revisions, private equity fund regulation, and changes in contract culture. Record labels and organizations can also be a part of these changes to achieve a compromise that keeps their business models intact while still providing creators meaningful access to their works to avoid possibly significant conflict later.

A. *Copyright Law Revisions and Specifications*

Much of the conflict between creators and their copyrights is a direct result of contract provisions, which in turn could allow third parties to easily purchase and potentially exploit the creators' works from record labels. These contract provisions usually consider masters as works made for hire,[29] meaning the artists do not have a termination provision under 17 U.S.C. § 203—a significant power for creators. Works made for hire are somewhat ambiguous but are outside of a traditional employment arrangement. The agreement must be in a writing and is limited to certain types of commissioned works, none of which explicitly include sound recordings.[30] Record labels suggest that masters fit into the included category of collective works.[31] The 1976 U.S. Copyright Act's definition of a collective work is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[32] Although an album could be comprised of works from different authors that are then assembled into a "collective whole" or even a single recorded song could include contributions from several individuals, albums or songs are not perfect fits as definitive collective works.

Congress attempted to put an end to this blurred area of commissioned works in 2000 with an amendment to the Digital Millennium Copyright Act (DMCA) that explicitly included sound recordings in the categories of commissioned works applicable in works made for hire, but was quickly met with the creative community's backlash and was ultimately

29. PASSMAN, *supra* note 16, at 336.
30. 17 U.S.C. § 101.
31. PASSMAN, *supra* note 16, at 335–36.
32. 17 U.S.C. § 101.

removed.[33] An amendment unambiguously stating the opposite—that sound recordings cannot be works for hire—could be a proposed solution to this blurred area as well, though it would likely be met with as much, if not more, backlash as the original amendment from industry executives.[34]

Marybeth Peters, the then Register of Copyrights, proposed a middle ground in her Congressional statement regarding the DMCA amendment. Classifying sound recordings as joint works with the artists, musicians, and potentially producers as authors could provide a solution.[35] 17 U.S.C. § 203 provides that, if a multitude of joint authors, a majority of authors could enact a termination; though only one author is necessary to decide for works terminated under Section 304.[36] Conversely, and perhaps a more realistic compromise, if sound recordings were to be considered in the commissioned categories of works made for hire, Peters suggests that "key contributors" should have termination rights, and those contributors' contributions would be exempt from the works made for hire provisions, allowing creators to retain their termination rights and thus potentially avoid conflict later on.[37]

In early 2020, the Southern District of New York explored works made for hire in the recording context in *Waite v. UMG Recordings, Inc.* case.[38] *Waite* suggested that contract provisions establishing recordings as works made for hire are inconsistent with the goals of Section 203 due to unequal bargaining power between the parties and a three-year statute of limitations to dispute works made for hire provisions.[39] Although the court did not entertain declaratory relief for the artists earlier this year, upon the plaintiff's amendment and joinder in August 2020, the court expressed its interest in entertaining such relief.[40] This case and others like it that are probable to emerge in the near future could create

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33. Scott Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing, Tracks for Free*, 37 U.S.F. L. REV. 783, 792–94 (2003). *See also Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Prop. and H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights), https://www.copyright.gov/docs/regstat52500.html [https://perma.cc/U3RP-YG5E] [hereinafter Peters Statement].

34. *See* Steven Bolaños, *"Knock, Knock, Knockin' on [Congress'] Door": A Plea to Congress to Amend Section 203 of the Copyright Act of 203*, 41 WESTERN ST. U. L. REV. 391, 406–07 (2014).

35. *See* Peters Statement at Joint Authorship section.

36. Peters Statement at Joint Authorship section.

37. Peters Statement at Analysis of Amendment and Recommendation section.

38. 450 F. Supp. 3d 430 (S.D.N.Y. 2020).

39. *Id.* at 438.

40. *See* Waite v. UMG Recordings, Inc., No. 19-cv-1091 (LAK), 2020 WL 4586893 at *10 (S.D.N.Y. Aug. 10, 2020). Please note that this class action suit is still ongoing as of Essay publication.

significant ramifications for creators and record labels regardless of how the cases are decided.

The situation becomes more complicated for third parties to an alleged work for hire because of a circuit split as to whether there is a relationship to uphold the work for hire between the contracting party and the third party like an engineer or producer.[41] As artists become more autonomous and their relationships with other creators continue to strengthen, this conflict could become even more significant, especially as producers and engineers now have the ability to receive royalties through the AMP Act.[42] Engineers and producers are also particularly impacted when portions of their recorded works are infringed and sampled, potentially preventing these creators from effectively fighting their infringement claims because of others owning the copyright in contention.

1. Shorter Assignment Termination Period

Another way to ameliorate creators' ownership issues arises in creators' assignment rights. 17 U.S.C. § 201(d) provides creators the opportunity to establish assignments of their copyrights while 17 U.S.C. § 203 allows creators to terminate any assignment, other than works made for hire, they made thirty-five years after the assignment.[43] This thirty-five-year term is statutorily set. Termination can allow creators to regain control of their work, such as songwriters being able to recall their songs back from publishers after thirty-five years, though this thirty-five-year period is somewhat lengthy.

Many copyrighted works may have lost their luster and revenue capabilities after three and a half decades, leaving the creators the rights and protections for the work but with a limited ability to profit extensively. A shorter termination period of fifteen or twenty years could create a more formidable arrangement for creators while still allowing the assignee the ability to realize profit from the transaction. This arrangement would allow songwriters the ability to recall all of their rights or reassign to the same publisher or another for more desirable terms after a shorter period as well. This would not solve the problem artists face regarding their master recordings or publishing rights but could be a compromise that allows creators to gain control faster than they would under the current provisions.

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41. Urbont v. Sony Music Entertainment, 831 F.3d 80, 86 (2d Cir. 2016).

42. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. 115-264, tit. III, 132 Stat. 3676 (2018).

43. 17 U.S.C. § 203. *See also* Margo E. Crespin, *A Second Bite of the Apple: A Guide to Terminating Transfers Under Section 203 of the Copyright Act*, THE AUTHOR'S GUILD (2005), https://www.authorsguild.org/member-services/legal-services/terminating-transfers/ [https://perma.cc/XET7-DV79].

B. *Private Equity Funds Regulation*

Private equity funds are emerging as a potential powerhouse of copyright purchasing and management. However, private equity funds, as discussed above, are notoriously private. More public accountability on their financial structure, intentions, transactions, conflicts of interest, and members could provide creators with more information about who has purchased or potentially could purchase the rights to their works. This could perhaps further allow these creators to facilitate their own relationships with these entities. Such information would also permit creators to make more informed decisions if they are looking to sell their rights to an organization with which they identify with or hold similar values to. Conversely, this information would be immensely helpful to artists whose labels or publishers sold the rights to their creations to such organizations so that they too would have access to information regarding the new owners of the rights to their works.

Such reforms would likely need to be made at the federal level to effectuate change. Most recent discussions among federal legislators have been centered on private equity funds' practice of acquiring companies that subsequently become bankrupt.[44] In the federal agency space, the Securities and Exchanges Commission is currently undertaking its own investigation as to potential reforms relating to transparency, fees, and conflicts of interests.[45]

C. *Changes in Contract Culture*

Changing standard contract provisions is one of the most readily available ways to address creators' potential ownership problems. First, contracts could include assignment provisions instead of classifying sound recordings as works made for hire. Doing so would allow artists to assign their rights to the record labels upon signing their contract, instead of having ownership originally lie with the label. This allows the creators to retain their Section 203 termination rights. Olivia Rodrigo, one of 2021's biggest breakout pop stars, attained just that—she retains control of her masters through her record deal's provisions.[46]

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44. Thomas Franck, *Sen. Warren, other Democrats revive legislation to crack down on private-equity buyouts*, CNBC (Oct. 20, 2021), https://www.cnbc.com/2021/10/20/top-democrats-revive-legislation-to-crack-down-on-private-equity-buyouts.html [https://perma.cc/F45B-PE3N].

45. Chris Witkowsky, *SEC explores potential reforms around private equity fee, expense disclosure*, BUYOUT INSIDER (Sept. 15, 2021), https://www.buyoutsinsider.com/sec-explores-potential-reforms-around-private-equity-fee-expense-disclosure/ [https://perma.cc/3J8S-J8JC].

46. Callie Ahlgrim, *Olivia Rodrigo has full control of her masters because she paid attention to Taylor Swift's battle over her own music*, INSIDER (May 7, 2021), https://www.insider.com/olivia-rodrigo-owns-master-recordings-taylor-swift-battle-2021-5 [https://perma.cc/2R4G-YVPT].

Although this assignment clause would be an easy fix on paper, there would be major drawbacks for record labels that invested resources into the recordings with now potentially less revenue opportunities and more risk. However, provisions like higher royalty rates for the label during and potentially after the assignment period or creators licensing part, but not all, of their ownership rights could be implemented to attempt to counter this. A shorter statutory termination period could also be imperative here where the creators could assign all of their rights for the full, but shortened, assignment period then regain their works after fifteen to twenty years instead of the current thirty-five-year period. Conversely, assignment of rights could be tied to creators' obligations to turn in additional works through earn back provisions.[47]

Alternatively, contractual language that gives creators a veto, right of first refusal, right of knowledge over any potential or pending sale of their works, or a combination of these provisions, would also be beneficial for creators.[48] These suggestions would allow creators to be aware of the possible transfer and potentially allow them to make their own bid to gain the rights to their works. The veto right, specifically, would give the artist immense authority to dictate where the rights to their work should not go.

Additionally, lenient re-recording provisions with shorter wait periods could also be incorporated into record contracts to allow those creators who wish to make, and likely fund, their own versions of their recorded works more quickly so as to not lose valuable time and relevance. It appears that record labels are already beginning to shift in the opposite direction from this, with Universal Music Group reportedly increasing the wait period for re-recording but increasing royalties.[49] Although re-recording is a potentially promising route that could provide creators significant creative control, re-recordings have not always returned profits like their original counterparts.[50]

Of course, renegotiating terms of the current contract with more favorable terms for the creators could also be another method for both songwriters and recording artists and could avoid later problems.[51] Such negotiation, however, would be most favorable to established artists with the leverage to achieve favorable terms.[52]

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47. *See* Lipshutz, *supra* note 19.

48. *See* Lipshutz, *supra* note 19.

49. Anne Steele, *As Taylor Swift Rerecorded Her 'Red' Album, Universal Reworked Contracts*, WALL ST. J. (Nov. 12, 2021), https://www.wsj.com/articles/as-taylor-swift-rerecorded-her-red-album-universal-reworked-contracts-11636741201 [https://perma.cc/7DVE-VNAA].

50. *See* Tim Ingham, *Taylor Swift Plans to Re-Record Her Hits. Here's What She Might Be Facing*, ROLLING STONE (Dec. 9, 2019), https://www.rollingstone.com/pro/features/taylor-swift-plans-to-re-record-her-hits-heres-what-she-might-be-facing-923019/ [https://perma.cc/V98B-MALX].

51. *See* Bolaños, *supra* note 35, at 407–09.

52. *E.g.* Karl Fowlkes, *Can You Really Own Your Own Masters?*, MEDIUM (Feb. 21, 2019),

IV. CONCLUSION

Sales of creative works can be both beneficial and devastating to creators. The increased volume and profitability of such transactions, especially to third parties and private equity funds, introduce new opportunities but creators, especially recording artists, can be deprived of a vast proportion of the revenue and a meaningful voice over the control of their works. This problem is likely to be exacerbated as pandemic-related economic problems plague creators and as more and more musical works reach their potential termination age. Measures like copyright reform, private equity fund regulation, and a change in contract culture could ameliorate creators' problems and allow both the creative and business spheres to coexist in instances where creators want more access to the ownership of their works. The ability for creators to maintain their artistic integrity is paramount. Being able to retain or more quickly regain control over their works, or have greater transparency regarding sales and licensing of their works, would allow creators to better facilitate such integrity. This can likely be achieved while still maintaining record labels' and publishers' functions and business structures through contractual provisions that can provide an arrangement that does not compromise creators' rights.

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https://medium.com/the-courtroom/can-you-really-own-your-masters-4dcd4bec3960 [https://perma.cc/SVD8-72HZ].

HOW FALSE ACCUSATIONS OF RAPE AND DOMESTIC VIOLENCE AFFECT THE LIVES OF BLACK MALE ATHLETES: ANALYSIS OF A FLAWED TITLE IX

Nichelle Womble[*]

INTRODUCTION

Have you ever been falsely accused of something you did not do? Perhaps by a friend or a sibling? Have you ever been accused of something that prevented you from applying to school or completing a degree? Have false accusations followed you persistently? Or did they just dissipate? For some, the answers are all yes; false accusations have followed them, ruined their lives, and put them in unimaginable predicaments.

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* Nichelle L Womble, Esq, MS.Ed, Registered FIBA Agent. I want to thank Dr. Tibbs, Professor of Law at Drexel University School of Law, and Todd Clark, Professor of Law at St. Thomas University School of Law (Miami)for always pushing us to our limits and helping me develop this note. I also want to thank my parents, Cheryl and Wendell Womble, and my twin boys, Jayden and J'Wan, and for hanging in there with me through all my accomplishments. Working with athletes over the last few years has opened so many doors ones that I couldn't have even imagined. So many times, their voices get overlooked for the simple fact people forget that even though they entertain us they are still human. So, this Essay is dedicated to those athletes whether it be professional or college who have had their voice snatched in any way and fighting different battles. We see you and we hear you!

Have you ever heard of five Black men named Kevin Richardson, Raymond Santana, Antron McCray, Yusef Saleem, and Korey Wise?[1] You may recognize those names from the popular Netflix documentary: *When They See Us* by Ava DuVernay.[2] Whether you know them by name because you're familiar with the case or because you watched the documentary, the group of young teenagers were dubbed the Central Park Five ("the Five").[3]

When the Five were arrested in 1989, they were teenagers ranging in age from 14 to 16, and all had so much life left to live.[4] One accusation changed all of that in the blink of an eye.[5] On April 19, 1989, a White woman named Trisha Meili was found by police in Central Park. The victim was raped multiple times and was so badly beaten that she lay in a coma for two weeks. The comatose was so severe, the victim could not remember what happened to her the night of the attack.[6] In Meili's book, released in 2003, she describes the injuries she suffered in detail:

> The woman is bleeding from five deep cuts across her forehead and scalp; patients who lose this much blood are generally dead, her skull has been fractured, and her eye will later have to be put back in its place . . . . The victim's arms and legs are flailing violently, the aftereffects of the massive brain damage, and that night had to be tied to the gurney since there were not enough night nurses to watch her constantly. . . .[7]

Of course, it is the upmost priority to catch the people who caused these unspeakable injuries; but placing blame on a group solely for the sake of judicial expediency was inappropriate and immoral. Those actions ultimately led to the accusation and conviction of the wrong individuals. Antron McCray was tried as a juvenile and convicted of rape and assault. McCray was handed a sentence of five to ten years and would end up spending six years behind bars. Kevin Richardson was just fourteen years old when he was sentenced five to ten years in prison and would end up spending five and a half years behind bars. Fifteen-year-old Yusef Salaam was convicted of Meili's rape and assault and handed

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1. History.com editors, *The Central Park Five*, HISTORY, https://www.history.com/topics/1980s/central-park-five [https://perma.cc/FX2J-TD2L] (last updated Sept. 23, 2019).

2. WHEN THEY SEE US (Netflix Series 2019) (a documentary series by Ava DuVernay detailing the life and case of the Central Park Five).

3. History.com editors, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Trisha Meili, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY, 15 (Scribner 2003).

a five to ten-year sentence.[8] Salaam would go on to spend six years and eight months in jail. Raymond Santana was tried as a juvenile and spent five years in prison. Korey Wise, who has hearing issues and learning disabilities, was questioned without his parents. Wise, then sixteen years old, spent twelve years behind bars.[9] In 2002, the Five's charges were vacated when a confession was received from the actual perpetrator.[10] In 2013, after fighting a lawsuit against the city for a decade, the Five received a settlement of $41 million.[11]

While most have probably heard of the Central Park Five, some may not have heard of National Football League (NFL) player, Reuben Foster. Foster was falsely accused of domestic violence by his ex-girlfriend, Elissa Ennis.[12] Ennis admitted under oath that she's a liar who tried to extort Foster after he dared to break up with her; she said, she wanted to "[screw] up his career."[13] Ennis claimed that Foster struck her ten times with a closed fist and even claimed he threw her bulldog across the room in a heated rage.[14] She had a history of accusing boyfriends of domestic violence who tried to break up with her and she attempted the same in 2011 with another man.[15] Foster struggled to reestablish his reputation and career after those accusations. Foster was suspended and placed on the commissioner's exempt list,[16] causing him to lose money and possible future employment with other teams.[17] Controversy arose after the prosecutor opted not to charge Ennis for filing a false police report nor

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8. Alfred Joyner, *How Long Were The Central Park Five Incarcerated? 'When They See Us' Victims Spent A Number Of Years Behind Bars*, NEWSWEEK (June 19, 2019), https://www.newsweek.com/how-long-central-park-five-incarcerated-when-they-see-us-1443119 [https://perma.cc/6XLJ-U3QL] (explaining the time each person received).

9. Joyner, *supra* note 8.

10. *See id.* (explaining the vacated conviction for each of the five after an appeal).

11. *See id*. (explaining that this is a civil lawsuit against New York City for malicious prosecution, racial discrimination and emotional distress).

12. Lisa Olson, *Olson: After damaging false accusations, how does Reuben Foster regain his reputation?*, THE ATHLETIC (May 20, 2018), https://theathletic.com/361074/2018/05/20/olson-after-damaging-false-accusations-how-does-reuben-foster-regain-his-reputation/ [https://perma.cc/SUD8-44EC].

13. Olson, *supra* note 12.

14. *Id.*

15. *Id.*

16. Phil Perry, NBC SPORTS (Sept. 11, 2019), https://www.nbcsports.com/boston/patriots/just-what-nfl-commissioners-exempt-list [https://perma.cc/M9NL-4EC4] ("The Exempt List is a special player status available to clubs only in unusual circumstances," NFL.com points out, citing the league's manual. "The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Only the Commissioner has the authority to place a player on the Exempt List; clubs have no such authority, and no exemption, regardless of circumstances, is automatic").

17. *See generally* Olson, *supra* note 12.

forced her to pay damages to Foster in an effort not to deter real victims from coming forward.[18]

Perhaps you have heard of Brian Banks. Banks was falsely accused of rape in 2002 by a classmate at Long Beach Poly High School, Wanetta Gibson.[19] At the time Banks was accused of rape, he was a top football prospect and was being scouted by schools like UCLA, USC, and other big football powerhouses.[20] Banks and Gibson had consensual intercourse however, Gibson presented a false story. Banks was faced with a choice: either go to trial and serve a possible forty-one years or take a plea deal for forcible rape and serve five years.[21] "Banks pleaded no contest to one count of forcible rape, spent five years in prison and, upon his release, was forced to register as a sex offender and wear an electronic monitoring bracelet."[22] After Banks' release, he could not find a job anywhere because no one wants to hire a convicted rapist.[23] Eventually, Gibson admitted she lied and Banks, now thirty-six years old, had his conviction overturned. While the overturned conviction meant a new chance at life, the damage was already done: he had lost his promising future.[24] In 2013, Gibson was ordered to pay $2.6 million for restitution and fees.[25]

How do you put a price on the aftermath of false criminal accusations? False accusations of domestic violence and sexual assault or misconduct, including false rape accusations, continue to affect the lives of Black athletes. When someone is falsely accused, there is a chance of loss of time to live life, scholarships, loss of employment, and so much more. However, the only recourse falsely accused individuals have are civil suits for libel or slander or Title IX lawsuits. Yet, these options are not enough as it does not rectify the damage caused. For these reasons, this Essay will be split into two parts. Part I will discuss the background of false accusations, racial discrepancies between Blacks and Whites with respect to false sexual assault accusations, and the history of Title IX and specific cases. Part II will suggest how the courts could reevaluate due process under Title IX and create more civil and criminal recourse for

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18. *Id.*

19. Ashley Powers, *A 10-year nightmare over rape conviction is over*, LA TIMES (May 25, 2012), https://www.latimes.com/local/la-xpm-2012-may-25-la-me-rape-dismiss-20120525-story.html [https://perma.cc/W3CN-UMTD].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Jason Kandel, *Woman Who Falsely Accused Brian Banks of Rape Ordered to Pay $2.6M*, NBC LOS ANGELES (June 15, 2013), https://www.nbclosangeles.com/news/local/woman-falsely-accused-brian-banks-rape-ordered-to-pay-26m/1971672/ [https://perma.cc/ZC2K-PSQ7].

those who have been falsely accused while responding to the recent Title IX changes.

I. BACKGROUND

The history of rape in this country has been fixated on rapes against White women perpetrated by Black males.[26] Even though rape can happen to any race and any gender, rape cases centered around White women by Black males are treated more seriously than rapes committed by men of other races.[27] False accusations of Black males is not a new phenomenon. Back in 1955, Emmett Till was falsely accused of whistling at and harassing a White woman at a grocery store. He was lynched in what appeared to the nation as a heinous racial attack on Blacks.[28]

During the "lynching era," the most common justification to lynch a Black man was to protect White women from Black rapists and attempted rapists.[29] Black men were constantly painted as "sexually deviant monsters" to society and it was important that White men's women were always protected from those monsters.[30] Rebecca Latimer Felton, who was both a writer and politician once said, "[i]f it needs lynching to protect woman's dearest possession from the ravening human beasts, then I say lynch a thousand times a week if necessary."[31] The "Jim Crow Era" was infamous for White men using rape and false accusations of rape to send a message to Black people.[32] To the Black men, White men wanted to send the message that violence against them was always going to be justified. To Black women, they wanted them to know that their bodies did not belong to them; White men owned them.[33]

White America moved into "legalized lynching" by enforcing capital punishment against any Black male accused of rape whether true or not.[34] When the victim of the alleged rape was a White woman, the courts would allow a jury, "not of their peers," to convict based upon race alone if the accused was a Black male:[35] beginning the presumption of "guilty until proven innocent" instead of "innocent until proven guilty."[36] If you

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26. Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).
27. *Id.* at 104–05.
28. *See* Chelsey Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till*, AM. BAR (July 16, 2019), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/ [https://perma.cc/2QHQ-N4RD].
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Hale & Matt, *supra* note 28.
35. *Id.*
36. *Id.*

were Black, you were automatically guilty of rape no matter the amount of evidence, if there was any at all.[37]

According to the U.S. Department of Justice, between 1930 and 1972, 455 people were executed for rape, and 405 of those people were Black. Moreover, according to the Wolfgang and Riedel study, Black defendants whose victims were White were sentenced to death about eighteen times more frequently than defendants in any other racial combination of defendant and victim.[38] Notably, no White man has ever been executed in the U.S. for the non-homicide rape of a Black woman or child.[39]

Angela Davis in her 1983 essay "Rape, Racism, and the Myth of the Black Rapist" in Women, Race, and Class says:

> The myth of the Black rapist continues to carry out the insidious work of racist ideology. It must bear a good portion of the responsibility for the failure of most anti-rape theorists to seek the identity of the enormous numbers of anonymous rapists who remain unreported, untried, and unconvicted. As long as their analyses focus on accused rapists who are reported and arrested, thus on only a fraction of the rapes actually committed, Black men—and other men of color—will inevitably be viewed as the villains responsible for the current epidemic of sexual violence. The anonymity surrounding the vast majority of rapes is consequently treated as a statistical detail—or else as a mystery whose meaning is inaccessible. Might not this anonymity be a privilege enjoyed by men whose status protects them from prosecution? Although white men who are employers, executives, politicians, doctors, professors, etc., have been known to "take advantage" of women they consider their social inferiors, their sexual misdeeds seldom come to light in court.[40]

From slavery until now, the legal system constantly treats rape of White women by Black men with much more severity than other rapes.[41] No race has ever received a harsher punishment than Black men for the accusation of rape: Black men have been castrated, legally lynched, and sent to prison for life.[42] No matter how far society progresses, there are still racial discrepancies between how White men and Black men are treated for a crime.

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37. *See generally id.*

38. *Id.*

39. *Id.*

40. Angela Davis, *Rape, Racism, and the Myth of the Black Rapist*, WOMEN, RACE, AND CLASS 115 (1983).

41. Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 116 (1983).

42. *Id.*

A. *Racial Discrepancies Between Black Men and White Men in Relation to False Accusations*

The racial disparities between Blacks and Whites are a social reality that has remained stagnant over time.[43] The tension fluctuates between the dominant race wanting to remain privileged and for the inferior race trying to overcome the status quo. Throughout history, when Blacks create movements of change, Whites retaliate.[44] One thing that perpetuates racial disparities and threatens a White man's ego and masculinity is "interracial sexuality",[45] which represents the White man's loss of his natural rights to White women.[46] Presumably because of the way rape has constantly been viewed in this country, another myth is that rape is primarily a crime Black men commit against White women.[47] These myths date back to the time of slavery, where White women allegedly needed protection from Black men.[48]

In 2016, the wife of Buffalo Bills kicker Dan Carpenter, Kaela Carpenter, went on Twitter and claimed she felt threatened by then Seattle Seahawks cornerback, Richard Sherman, and that she would "castrate him" after he delivered a late hit on her husband.[49] She, a White woman, passed her tweet off as a joke with no repercussions. If a Black man had threatened her like that, he would not have received the same leniency as someone just laughing it off.[50] From the moment they are born, Black men are perceived as more of a threat to society than their White counterparts.[51] Even though there is equality in the likelihood of committing a crime, inequality persists given a Black man is more likely to be incarcerated over a White man.[52] White men are largely not perceived as a threat and tend to get leaner sentences, even for crimes such as rape.[53]

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43. Nichelle Womble, *The Birth of a Monster*, 33(1) ST. THOMAS. L. REV. 55, 57 (2020).

44. *Id* at 58.

45. Abby L. Ferber, *The Construction of Black Masculinity : White Supremacy Now and Then*, 31(1) J. OF SPORT & SOCIAL ISSUES 11, 18 (2007).

46. *Id.*

47. Tracey Owens Patton & Julie Snyder-Yuly, *Any Four Black Men Will Do: Rape, Race, and the Ultimate Scapegoat*, 37(6) J. OF BLACK STUDIES, 859, 862 (2007).

48. *Id.* at 862.

49. Martenzie Johnson, *Being Black in a World Where White Lies Matter*, THE UNDEFEATED (Jan. 30, 2017), https://theundefeated.com/features/being-black-in-a-world-where-white-lies-matter/ [https://perma.cc/ERE4-KBZ2].

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally id.* (explaining the example of convicted rapist Brock Turner only spending 3 months in jail for assaulting a co-ed University of Sanford student and how the judge said the punishment would be too severe on him).

A new report on exonerations concluded that Blacks were wrongfully convicted at an alarming rate. The National Registry of Exonerations, a joint project among the University of California at Irvine, the University of Michigan Law School and the Michigan State University College of Law showed that forty-seven percent of the people who were exonerated were Black. Remember, just fourteen percent of the U.S. population is Black.[54]

Racial practices that in turn create inequalities in America today are increasingly secretive and are embedded in normal operations of society. This is better known as "institutionalized racism," which avoids direct racial terminology to get around laws and is imperceptible to most Whites.[55] Donald Trump once said, "When you are 'guilty until proven innocent,' it's just not supposed to be that way. That's a very dangerous standard for the country."[56] However, he also said the Central Park Five deserved the death penalty during the original case in 1989 without knowing whether they were guilty.[57] Even after they were exonerated, he explained that the Five admitted they were guilty so they deserved to be punished while on his campaign trail in 2016. He added that the city should have never settled even though the Five were coerced into a confession by the police.[58] His conflicting statements showcase how institutionalized racism is a norm that has manifested as discrimination in the criminal justice system.

Those stereotypes and discrepancies are amplified by the media's portrayal of Black men.[59] Sometimes those stereotypes are created because of representations presented by others.[60] According to *The Opportunity Agenda*, many scholars who focus on the connection of

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54. Petula Dvorak, *Black men—Not white guys—Face False Allegations and A Presumption of Guilt*, WASH. POST (Oct. 8, 2018), https://www.washingtonpost.com/local/black-men--not-white-guys--face-false-allegations-and-a-presumption-of-guilt/2018/10/08/a397fb44-cb06-11e8-a3e6-44daa3d35ede_story.html [https://perma.cc/K3HV-AT33].

55. *See* Eduardo Bonilla-Silva & Amanda Lewis, *The "New Racism": Toward an Analysis of the U.S. Racial Structure, 1960s-1990s*, 536 CTR. FOR RES. ON SOC. ORG. 1, 2 (1996).

56. Dvorak, *supra* note 54.

57. *See* Rebecca Mornin, *'They admitted their guilt': 30 years of Trump's comments about the Central Park Five*, USA TODAY (June 19, 2019), https://www.usatoday.com/story/news/politics/2019/06/19/what-trump-has-said-central-park-five/1501321001/ [https://perma.cc/D2DU-FC8Z].

58. Dareh Gregorian, *Trump digs in on Central Park 5: 'They admitted their guilt*,' NBC NEWS (June 18, 2019), https://www.nbcnews.com/politics/donald-trump/trump-digs-central-park-5-they-admitted-their-guilt-n1019156 [https://perma.cc/7HYR-QRZQ].

59. The Opportunity Agenda, *Social Science Literature Review: Media Representations and Impact on the Lives of Black Men and Boys*, RACIAL EQUALITY TOOLS (Oct. 2011), https://www.opportunityagenda.org/sites/default/files/2018-04/2011.11.30%20-%20Report%20-%20Media%20Representation%20and%20Impact%20on%20the%20Lives%20of%20Black%20Men%20and%20Boys%20-%20FINAL.pdf [https://perma.cc/E679-K392].

60. The Opportunity Agenda, *supra* note 59, at 14.

media portrayal and Black male reputations and life chances will say there is a clear link.[61] Most scholars describe the connection as: "For various reasons, media of all types collectively offer a distorted representation of the lives and reality of [B]lack males." In turn, media consumption negatively affects the public's understandings and attitudes around Black males.[62] Finally, these distorted understandings and attitudes towards Black males lead to negative real-world consequences for them."[63] According to Professor Robert Entman and Dr. Andrew Rojecki ". . . in the 1993–94 sample that stories about Blacks were four times more likely to include mug shots (though the actual numbers were small: eight for Blacks, two for Whites)."[64]

Other research and studies show that the laws and procedural mechanisms applied in cases where Black men are accused of raping White women in fact void the presumption of innocence or tend to apply a different standard of law than in cases where White men are accused of raping women.[65] When looking at cases of rape, Blacks may receive the same protection under the law but they do not receive equality in the applications of those laws to their cases.[66]

A legal scholar once commented, "While White women have been spared at all costs, [Black] women's bodies have always been like a buffet for White men to have, and take, and come back as often as they wanted. Both history and our present legal system prove this to be true."[67] While the crime of rape is a traumatic incident, false accusations should hold just as much weight when they are destroying the lives of Black men and Black athletes on college campuses.[68]

B. *The Depiction of Black Bodies as Sexual and Violent*

When looking at college athletic rosters, it is no surprise that a majority of the athletes are Black athletes, depending on the sport.[69] Athletes are endorsed by everyday household products such as cereal, cleaning products, clothes, shoes, etc., and according to Dr. Erica Childs, "It can be argued, though, that White America's fixation on the Black male athlete is simply an extension of White America's history of

61. *Id* at 22.
62. *Id.*
63. *Id.*
64. ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND MEDIA AND RACE IN AMERICA 82 (2000).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. Erica Childs, *Images of the Black Athlete: Intersection of Race, Sexuality, and Sports*, 4(2) J. OF AFRICAN AM. MEN 19, 19–38 (1999).

obsession with the Black body and Black sexuality.[70] White Americans developed an ideology of Black male sexuality as 'hypersexual,' 'animalistic,' and having no self-control of their sex drive."[71] The notion that a Black man is not able to control his sexual drive, especially around White women, and the fixation with ideologies created around the Black male body are attributable for why a Black male athlete can be pinned as guilty of a sexual assault accusation before the investigation is even completed.

Many scholars have discussed the "hypersexual Black male" over the years and one, in particular, Angela Davis, shed light on the conclusion that "Black men were a threat to White women and hypersexualized Black men, who were well-endowed, would have a desire for White women they would take through 'rape' that they could not control."[72] It is believed Black men have a goal of having as many women as possible.[73] Black men have been fetishized and are thought to have sex like animals.[74] With the perpetuation of continued stereotypes, Black men have become the sexual attraction of White women; angering White men. Even though Black male bodies are a commodity, and they are still used to invoke fear simultaneously.[75] According to Dr. Earle V. Bryant, "the sexual attraction that the White female reputedly feels for the Black male is essentially a corollary of the projected sexual image of the Black male is, in effect, one of the by-products of sexualized racism." The images of hypersexuality breed fear and thus, White men felt the need to control these Black men.[76]

The continued stereotypes and projected narratives surrounding Black men and their bodies, demonstrates how a White man's fear of sexuality could cause brazen and appalling violence to ensue against those same Black men.[77] The violence against Black men throughout history was attached to the accusations of rape.[78] Violence, such as lynching, castration, and beating, were the tools used to make an example of Black men and feed the egos of the White men who were threatened by the narrative of Black sexuality.[79]

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70. *Id.*

71. Earl Smith & Angela J. Hattery, *Hey Stud: Race, Sex, And Sports*, 10 (2) SEXUALITY & CULTURE 3, 30–32 (2006).

72. Ferber, *supra* note 45.

73. *Id.*

74. *Id.*

75. Ferber, *supra* note 45.

76. Earle V. Bryant, *The Sexualization of Racism in Richard Wright's 'The Man Who Killed a Shadow*,' 16(3) BLACK AMERICAN LITERATURE FORUM 119, 119–21 (1982).

77. Seth Young, *The Myth of Promiscuity: Examining Black Male Sexual Narratives and Sexual Identity* (2018) (Ph.D. dissertation, Duquesne University).

78. *Id.*

79. *Id.*

II. LEGAL DISCUSSION

A. *What is Title IX?*

The Department of Education Office of Civil Rights enforces, among many other statutes that relate to educational institutions, Title IX. Title IX is a statute protecting people from discrimination based on sex in educational programs or activities that receive federal financial assistance.[80] Title IX says, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[81] Title IX outlines that many different areas that educational programs receiving funds may not discriminate within; "recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment."[82]

The history and the purpose of Title IX has been a controversial area that no one group of people can seem to agree on. The origins of Title IX date all the way back to the Civil Rights Movement and is a follow up to the Public Law 88-352 (78 Stat. 241), popularly known as the Civil Rights Act of 1964.[83] The Civil Rights Act began the fight against discrimination based on race and sex, in hiring, promoting, and firing.[84] According to the National Archives, Section 703(a) made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin."[85] However, women's rights groups still felt excluded from Civil Rights Act protections and that there must be some legislation enacted strictly for the betterment of women.

Before Title IX was enacted, there was a disproportionate amount of woman in education compared to men. Then, men made up fifty-seven percent of college students compared to the forty-three percent of women college students.[86] The Women's Rights Movement fought to have educational provisions added to the Civil Rights Act that would advance

80. 20 U.S.C.A. § 1681 (West 1986).

81. *Id.*

82. *Id.*

83. National Archives, *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission* (last accessed Jan. 31, 2021), https://www.archives.gov/education/lessons/civil-rights-act [https://perma.cc/DBA6-99T9].

84. *Id.*

85. *Id.*

86. R. Shep Melnick, *The Strange Evolution of Title IX* (last accessed Jan. 31, 2021), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/QN8V-KN33].

women's opportunities in education and athletics.[87] Then in 1972, Congress passed Title IX as an amendment to the Civil Rights Act under education.[88] With this new provision in place, women would be entitled to have some footing in the education system and have recourse if they faced harrassment in the workplace or at school.[89]

When Title IX was passed, it was in response to intense campaigning by a feminist who wanted to call attention to discrimination in educational employment which was an area that was purposely left out of other areas of legislation.[90] To give rise to a Title IX complaint, sexual harassment must be so severe, persistent, or pervasive that it affects a student's education in an adverse manner or creates a hostile or abusive educational environment.[91]

In 2011, the conversation shifted from the inequalities and the growth of college athletics to sexual harassment.[92] While Title IX seemed to increase the number of women in education and athletics over the years, the one problem that consistently emerged was how sexual harassment interacted with Title IX provisions.[93] When President Obama took office, his administration worked with the Office of Civil Rights within the Department of Education to create detailed explanations of sexual-harassment and launched publicized investigations into colleges and universities over sexual-assault allegations.[94] Then in 2016 when President Trump took office, his administration made some controversial changes and then Secretary of Education, Betsy DeVos, withdrew the Obama Administration's guidelines on sexual harassment.[95]

The current concerns over the changes to Title IX have moved away from whether women will be set back in the education system and moved towards who is protected from sex discrimination. Professor R. Shep Melnick said:

> The key to understanding current disputes over Title IX is to appreciate just how far federal regulations have departed from the law's original purpose. Title IX initially focused on what happens in the classroom. That focus soon shifted to the playing field, then shifted again to bedrooms and

87. Iram Valentin, Title IX: A Brief History, 2 HOLY CROSS J.L L. & PUB. POL'Y 123, 130 (1997).

88. *Id.*

89. *See generally* Valentin, *supra* note 87.

90. Am. Ass'n of Univ. Professors, *The History, Uses, and Abuses of Title IX*, 102 BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 69, 70 (2010) [hereinafter Bulletin].

91. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997).

92. *Id.*

93. *See* Melnick, *supra* note 86.

94. *Id.*

95. *Id.*

> bathrooms. Over the past five decades, the understanding of nondiscrimination underlying Title IX has steadily drifted away from eliminating institutional barriers to educational opportunity for women and girls, and toward the much more ambitious project of changing the way we think about sex differences, gender roles, and sexuality in general.[96]

Another concern with Title IX moving away from its original purpose is that there are no clear guidelines and no clear path for rectification. With neither of those and the perception that Title IX is moving toward what happens in the bedroom, the lives of those who may be involved in a Title IX claim could be altered forever.

B. *What Is the Problem?*

In a Law Review Article titled, *Trading the Megaphone for the Gavel in Title IX Enforcement*, Janet Halley wrote:

> American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all. […] But nothing so malign need be at work when black men show up in the dock: morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them.[97]

To this day, the legal process is not as fair for Black men accused of rape versus their White counterparts.[98] Where are the protections for Black athletes falsely accused on campus of rape or domestic violence? Should those protections fall under Title IX? The rollbacks from the Trump Administration on the definition of "sexual harassment" did nothing but further amplify the problem of the justice system turning its back on the underserved community.[99]

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96. *Id.*

97. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. 103, 106–07 (2015).

98. See generally Elizabeth Hinton, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/7TJN-AUBU].

99. Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, REALCLEAREDUC. (Jan. 21, 2021), https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html [https://perma.cc/5GQ4-X4UU].

The problem students had was that Title IX does not explicitly mention "rape" or "assault" and it also does not require or force colleges and universities to adjudicate such allegations.[100] Because of those omissions, a Yale student went before a district judge and argued if women were forced to face their rapist on campus it would be a form of discrimination because she would be deprived of education benefits in that situation.[101] The judge agreed.[102] At that point, the Campus Consent law got folded into the federal mandate of Title IX and colleges and universities were able to act as quasi-criminal courts that adjudicate sexual assault complaints.[103] "In these tribunals, there appears to be no consideration of reasonable doubt, just that a preponderance of evidence be pointing to assault. That evidence is largely, of course, the girl's say-so."[104]

Higher education institutions have become extremely aggressive in pursuing sexual misconduct investigations since the United States Department of Education's Office for Civil Rights issued a letter in 2011 discussing how schools are to address sexual assault and misconduct to comply with the Department's view of Title IX.[105] Once more, policies developed by former Secretary DeVos meant to clarify federal objectives seem to have exacerbated reactions by higher education institutions, who are drawing a battle line: "The administration is trying to roll back protections for women, and we're not going to let them do that."[106] In cracking down harder on sexual misconduct, even if accusations are not true, colleges and universities seemingly continue to violate due process for the accused, who most of the time end up being Black athletes.[107]

The different interpretations of Title IX definitions and provisions continue to undermine academic freedom, while the enforcement of Title IX does not adequately protect due-process rights and academic governance.[108] Once again, some parallels still exist between how Black

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100. Brad Koffel, *The Changing Narrative of Sexual Assault*, KOFFEL LAW (2020), https://www.koffellaw.com/sex-crimes/rape/title-ix-and-false-accusations/ [https://perma.cc/L8T5-N9UA].

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. The Assistant Secretary, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html [https://perma.cc/XYX3-FECY].

106. Nesenoff & Miltenberg LLC., *University Misconduct Due Process & Title IX – Students & Faculty*, NMLLP LAW (Aug. 8, 2020), https://nmllplaw.com/practices-expertise/campus-assault-due-process-civil-rights/?utm_campaign=Title+9+-+Broad+
+NY+Office+%5BTitle+9%5D&utm_source=bing&utm_medium=ppc&utm_term=title%20ix&utm_content=1860357xf63a7b4450dd1ff143102501f8376648 [https://perma.cc/U9JE-UEYJ].

107. *See generally id.*

108. Bulletin, *supra* note 90.

men accused of rape and domestic violence back in the "Jim Crow Era" and how those same cases are adjudicated in present day.

According to Harvard Law Professor, Janet Halley, who has represented both the accused and alleged victims, male students of color are punished and accused at an unreasonably high rate.[109] Former federal judge and a colleague of Halley's, Nancy Gertner, said in written testimony to Congress, "the racial implications of rape accusations, the complex intersection of bias, stereotyping, and sex in the prosecution of this crime are [disproportionate]."[110] Black athletes continue to suffer from false allegations investigated by poorly administered college tribunals; they are often expelled, suspended, and lose their scholarship money. Statistics show from 2012–2015 alone, Black male students were twenty-five percent more likely to be the subject of sexual misconduct reported to universities.[111]

In 2014, there were five Black freshmen at William Paterson University who were arrested for allegedly holding a woman hostage in their room while they forced themselves on her.[112] Two of the students involved, Garrett Collick and Noah Williams, said not only was the sex consensual but the young lady had also initiated the encounter. Right after the arrests were made and before any sort of investigation was completed, the University President released a statement saying, "I am angry and dismayed that this crime was committed on our campus and allegedly by students. My deepest concern is for the victim of this criminal act who has courageously stepped forward to take legal action and seek justice."[113] The grand jury in this case decided not to indict the young Black men based on a lack of evidence, all charges were later dropped, and the students were cleared.[114] Although the students were cleared of all charges the University still decided to expel them and not allow the students to continue their education.[115] These young men lost their funding to attend school and because they received financial aid, they were not allowed to enroll anywhere else.[116]

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109. Michael Jones, *Believe the survivor? Here's 11 times young black men were railroaded by campus sexual assault claims*, THE COLLEGE FIX (Nov. 7, 2018), https://www.thecollegefix.com/believe-the-survivor-heres-11-times-young-black-men-were-railroaded-by-campus-sexual-assault-claims/ [https://perma.cc/U3NM-EWW9].

110. *Id.*

111. Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, THE ATLANTIC (last accessed Jan. 31, 2021), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/ [https://perma.cc/E4KN-3RC6].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Nikki Yovino was a student at Sacred Heart University who accused two Black male students of rape in October 2016.[117] She was only in her third month of college when she went to an off-campus party and later told police that she was pulled into a bathroom by two Black guys she did not know and was raped.[118] The accused Black men were football players on scholarship and they lost their scholarships because she fabricated the story of rape.[119] There was no due process for these students and they were presumed guilty because the alleged victim said so, even though her story did not add up.[120] In 2017, Yovino was arrested for making false accusations and was sentenced to a year in prison in 2018.[121]

In 2016, a University of Pennsylvania student was falsely accused of rape.[122] He was expelled after the school conducted their own investigation though the university never notified him of the specific allegations until the report from their investigation was issued.[123] Then, there is the highly publicized story of the UNC football player who was falsely accused of rape when a fellow female student said she was too drunk to consent.[124] Police and the university found she was not too drunk to consent. However, she and her lawyer took the allegations to the media and court and the Black student-athlete was deemed guilty before the case could be tried.[125] While charges were eventually dropped, like in many other cases, the damage was done because he had lost a year of eligibility.[126]

Even though the Office of Civil Rights has embarked on a plan to create system that would prevent sexual assault, students who are being unfairly accused and targeted still have no safety net to fall back on.

C. *Disparate Impact at Work Yet Again*

Disparate impact occurs when policies, practices, rules, or other systems that appear to be neutral result have a disproportionate impact on

117. Tyler Kingkade, *Men's Rights Activists Say This College Student Is Why They Need A #MeToo Moment*, BUZZFEED (July 7, 2018), https://www.buzzfeednews.com/article/tylerkingkade/yovino-jail-charged-false-rape-sentence-sacred-heart [https://perma.cc/S773-ZXHA].

118. *Id.*

119. Jones, *supra* note 109.

120. Kingkade, *supra* note 117.

121. *Id.*

122. *See generally* Jeremy Roebuck, *Penn student accused of rape sues university, citing gender, racial discrimination*, INQUIRER (Sept. 27, 2016), https://www.inquirer.com/philly/education/20160928_Penn_student_accused_of_rape_sues_Penn__citing_gender__racial_discrimination.html [https://perma.cc/J7W8-FYKZ].

123. *Id.*

124. Jones, *supra* note 109.

125. *Id.*

126. *Id.*

a protected group.[127] Title IX's 2011 guidelines that changed how sexual assault cases were adjudicated have caused a disproportionate number of Black students to lose scholarships and be expelled from school.[128] The changes made by the Obama Administration in 2014 fought against disparate impact[129] and served as a warning to all colleges and universities that if their numbers of expulsions and suspensions were disproportionate based on race, then they would be subject to a federal investigation.[130]

Unfortunately, later rollbacks by the Trump Administration reversed this warning and allowed schools to get back to one-sided tribunals and reporting. The Trump Administration made it easy for schools once again to abide by the 2011 guidelines which made it "customary for schools to withhold crucial information about the charges from the accused student. All opportunities for cross-examination either by the accused student or an attorney or advisor ceased to exist. So did the right for the accused to examine the evidence against him."[131]

Black students once again found themselves being disproportionately affected by the guidelines of Title IX because the rollbacks made it easier for schools to conduct their investigations into the sexual assault how they saw fit.[132] When Black students were accused of sexual assault, they were not entitled to the same due process as the accuser.

III. THE JUSTICE SYSTEM SOLUTION AND ARE THE NEW CHANGES TO TITLE IX ENOUGH?

A. *Recent Changes*

Former Secretary DeVos decided to implement some historic changes to strengthen Title IX: to ensure there are greater protections for survivors of sexual misconduct and to ensure that all students are afforded an education free of sexual discrimination.[133] The most meaningful change was that "sexual harassment" is now defined to include sexual assault as unlawful sex discrimination. It provides:

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127. SHRM, *What are disparate impact and disparate treatment?* (2021), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpact disparatetreatment.aspx [https://perma.cc/X8FK-6H7A].

128. Sanzi, *supra* note 99.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Press Release, U.S. Department of Education, Department Statement on Title IX (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students [https://perma.cc/KVB2-UGG9].

> a consistent legally sound framework on which survivors, the accused, and schools can rely; Requires schools to offer clear, accessible options for any person to report sexual harassment; Empowers survivors to make decisions about how a school responds to incidents of sexual harassment; Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders; Restores fairness on college and university campuses by upholding all students' right to written notice of allegations; the right to an advisor; and the right to submit, cross-examine, and challenge evidence at a live hearing; Requires schools to select one of two standards of evidence; the preponderance of the evidence standard or the clear and convincing evidence standard –and to apply the selected standard evenly to proceedings for all students and employees, including faculty; and Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding.[134]

One of the problems many of these students faced was not being given enough time to prepare for the investigation because lack of notice about the accusations. One of the new changes to Title IX is that accused students must now receive accusations in a timely matter, although there is still no clear timeline. Requiring schools to present the accused with the accusations needed to prepare a defense is a step in the right direction. To create a more transparent process, schools should be required to disclose all charges and information against the student before an investigation is completed, during a very specific time period so said student has enough time to gather information and representation, if needed.

B. *Are the Changes Enough?*

There are so many stories of Black men in general and Black athletes suffering immense damage from false accusations of domestic violence and rape as seen throughout this Essay. Throughout history, Black men have ended up in prison for numerous years until a new investigation clears them because DNA and witness statements were not thoroughly evaluated, like the Central Park Five. Many athletes were expelled or suspended without due process from school and even lost scholarships like Brian Banks and the athletes from Ohio did, because colleges and universities have been allowed to run their own tribunals and investigations under Title IX. In the perfect world, the accusers who are found to have lied would get the same amount of time in jail the accused would have if they were convicted. Those same accusers would be made

134. *Id.*

to pay damages for whatever time those Black men lost and reputations of those men would be immediately restored. The legislators and courts have the power to implement these changes.

Courts should change the way they apply the "innocent until proven guilty" concept because innocent men are losing significant time in their lives and families are being torn apart. The courts are responsible for upholding the law and upholding the standard of justice. What does it say about the judicial system when its pursuit of justice often disregards the lives of Blacks? Courts should institute legal safeguards that allow for continued transparency and adequate due process to best protect the accused's civil liberties and the constitutional rights. Protecting those rights may lead to individuals cooperating with sexual assault investigations and highlighting their participation in their duties and obligations under the law are essential portions of due process. It is imperative to make sure innocent Black men remain free, in school, and on their scholarships. Due process is a constitutional right and if courts violate that, even on a collegiate level, someone needs to be held responsible.[135]

Title IX is supposed to protect against race and sex discrimination for those attending colleges and universities that receive federal funds; that needs to include Black students that have been falsely accused as well.[136] While there is now a definitive mention of "sexual assault" and "abuse," it needs to be added to the guidelines that collegiate tribunals must comply with. Outside investigations need to be conducted where there is no bias and each side has a fair chance at due process. Discrimination based on sex and race needs to include those who have been accused as well to stop schools from holding one-sided trials and protect both the accused and accusers. While things have changed due to the new regulations, one thing remains the same: the consequences of false accusations. The changes to Title IX provide an uneven number of protections for survivors and recourse for those who have committed assault, yet still no change to the recourse available for those who are falsely accused. The justice system would be best served to evaluate the remedies available for the falsely accused who are subject to school-sanctions the same level as they would for sexual assault victims. There needs to be an evaluation of expulsions executed through schools and criminal charges outside of school, to include incarceration time.

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135. Linda Monk, *Due Process Clause, Equal Protection Clause, and Disenfranchising Felons*, PBS (Mar. 25, 2013), https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/ [https://perma.cc/2WDP-PB6H].

136. *See generally* 20 U.S.C.A. § 1681 (West 1986).

CONCLUSION

Title IX has become another form of policing in America. It has become a way for Black men to once again be accused and convicted by societal standards without receiving fair due process. Times have changed but the disparate impact in the Black community remains.

The narrative that Black men only rape White women needs to change. Black men need the same chance their White counterparts receive to prove their innocence. The Courts, and the rest of the United States government needs to set that precedent and those standards for all to follow. This situation is not just going to disappear over-night and it is not just going to go away with the basic changes made to Title IX; there needs to be a complete overhaul and reevaluation.

WHO REALLY RUNS SPORTS?: THE POWER OF STAKEHOLDERS AND BENEFITS OF STAKEHOLDER THEORY IN SPORTS

Stewart Brumbeloe[*]

INTRODUCTION

Who holds the ultimate decision-making power in the world of sports? Is it the owners? The athletes? Fans? Someone else? While the average person may likely answer that it is the owners and league commissioners, that would only be partially correct. Every decision made in sports—from collective bargaining agreements between leagues and athletes, to game rules, to league handling of controversies and scandals, to the order in which games are played—is influenced by stakeholders. Keeping these stakeholders' interests in mind through the utilization of stakeholder

* J.D., University of Memphis Cecil C. Humphreys School of Law 2021; B.S., Sports Management, Georgia Southern University 2018. I thank Professor Peter Letsou, my family, and friends for their support, along with FESLR for giving me this opportunity.

theory, which seeks to maximize consideration of stakeholders' values in an organization's decision-making, is essential for the overall success of sports corporations. The traditional theory used in American corporations—"shareholder primacy theory"—tends to focus heavily on the overall goal of wealth maximization for owners rather than focusing on how decisions will impact all of the corporation's stakeholders as so with the "stakeholder theory." The ramifications of even partial neglect of some stakeholders can result in extreme revenue loss. In the world of sports, stakeholder satisfaction is a requirement for successful operations due to external stakeholder (e.g., fans) demand and the product supplied by internal stakeholders (e.g., athletes).

Stakeholders have a considerable amount of power that can go unseen by the public without a close examination of both decision-making processes in sports and various corporate law cases involving sports. A closer look at the operations procedures of sports reveals that decisions made by commissioners and owners are usually highly influenced by the various internal and external stakeholders. Therefore, aside from the owners, commissioners, and executives, the remaining stakeholders are the ones that possess the real decision-making power in sports.

This Essay argues the power that stakeholders have in the operations and decision-making process in sports, the difference between stakeholder theory above shareholder primacy theory, the pros and cons of both theories in the sport corporation's decision-making process; making the argument as to why more sport organizations should lean toward wider utilization of the stakeholder theory. Part I discusses what a stakeholder is, explains the differences between stakeholders and shareholders, identifies the categories of stakeholders and explains each group's stake, and notes how decision-making in sports affects that stake. Part II expands on the shareholder primacy theory and the stakeholder theory. This Part recommends stakeholder theory over shareholder primacy theory as the most efficient theory to utilize when operating a team or league. Part III analyzes real-world instances where Major League Baseball (MLB), the National Football League (NFL), and the National Hockey League (NHL) activated the shareholder primacy theory and what the result would have been if stakeholder theory had instead been used.

I. WHAT IS A STAKEHOLDER?

Because corporate law is such a shareholder-dominated area of law, the term "stakeholder" may be one that some are not as familiar with and may be overshadowed by different synonyms. Stakeholders play a large role in the corporate or operational decision-making process. Because every move that a corporation makes will affect stakeholders, stakeholders are vital to the success and general operations of a company.

Generally, a "stakeholder" is a person who is "directly affected by the acts and decisions of the corporation."[1] This can include employees, suppliers, charities, communities, and anyone else "whose financial well-being is tied to the corporation's success."[2] As the name states, they hold some kind of stake in the company. This is different from the synonymous terms, "shareholder" or "stockholder," one who owns stock in a corporation, and therefore have an equity and ownership interest in a company.[3] However, when shareholders or stockholders have an equity interest in the company, they are stakeholders as well. To clarify, a stakeholder is not necessarily a shareholder, but a shareholder is one type of stakeholder.

Stakeholders are generally broken down into different categories. Each of these categories has a different type of stake at interest. There are internal stakeholders, those working inside a corporation, and external stakeholders, those outside the corporation who are affected by the corporation's decisions. External stakeholders and internal stakeholders are vital to a corporation's success. The following list of stakeholders is guided by Ian Linton's *What is a Stakeholder in Sports*?[4]

A. *External Stakeholders*

1. Fans and Communities

The most obvious external stakeholder in sports are the fans. Fans are the reason that sports exist—they are the primary consumer—and satisfying fans is the glue that holds the entire industry together.

Fans can be anywhere, but they are also part of communities. Communities possess a geographical nexus to the team and hold a stake in job opportunities, economic growth, and a more local sense of pride for their team.[5] While fans have a stake in the entertainment value of the product that teams put out on the field, court, and ice, having a local team increases a community's economic activity in the town through tourism and other game attendance-related spending.[6] The decisions that teams and leagues make affect what fans and communities see when they watch

1. Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Stakeholder-Shareholder Debate*, 14 U. MIAMI BUS. L. REV. 193, 198 (2005).

2. Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. LAW REV. 823, 825 (2003).

3. Paula J. Dalley, *The Misguided Doctrine of Stockholder Fiduciary Duties*, 33 HOFSTRA L. REV. 175 (2004).

4. Ian Linton, *What is a Stakeholder in Sports?*, CHRON., https://smallbusiness.chron.com/stakeholder-sports-54584.html [https://perma.cc/838C-TS2B] (last visited Jan. 10, 2022).

5. *Id*.

6. *See* Jason Gewirtz, *Study: $45 Billion Spent in 2019 on Sports-Related Travel*, SPORTSTRAVEL (Sept. 1, 2020), https://www.sportstravelmagazine.com/study-45-billion-spent-in-2019-on-sports-related-travel/ [https://perma.cc/537Y-A8V5].

and engage in the sport. When teams acquire, release, draft, and trade athletes or when teams choose their head coach and coaching staff, these decisions affect the talent, scheme, and strategy that fans see when watching a sporting event. Leagues make rules, schedules, and govern the overall operations of that league's respective sport, which are decisions that affect the way that league's game is run, and therefore, the entertainment that fans obtain from sporting events.

2. Television Providers

Television providers, and its employees, have a financial stake in sports. They rely on the success, popularity, and decision-making of sports to earn profits through advertisement revenue and viewership.[7] For example, in 2018, FOX inked a deal with the NFL to broadcast eleven of the league's *Thursday Night Football* games.[8] As part of the deal, FOX will pay the NFL over $550 million per year through the end of the 2022 season to air these games.[9]

In this example, FOX relies on the decisions made by the NFL and its teams to have a marketable product to air on its network. If the NFL and its teams make decisions that make the games less appealing to fans, FOX may suffer lower viewership, advertisement revenue, which may result in lower profits. This is just one fish in a sea of television deals amongst every sport and television networks.[10]

3. Sports Venues, Food and Merchandise Vendors and Suppliers

Sports venues, distributors of team merchandise, and in-stadium concession vendors and suppliers have a financial and job security stake in sports. People in this group rely on teams and leagues to make decisions to increase the attraction of attending a game live. Teams and leagues affect this stakeholder interest by deciding ticket prices and planning benefits to fans who attend games live, as opposed to watching them on television. When fans attend games live, they are more likely to

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7. Billy Heyen, *Super Bowl Commercials 2021: How much does an ad cost for Super Bowl 55?*, SPORTINGNEWS (Feb. 7, 2021), https://www.sportingnews.com/us/nfl/news/super-bowl-commercials-cost-2021/o496m61j4lkn19kxoygv9690a [https://perma.cc/RSV3-JZYM] ("CBS opened the bing for 30-second commercial spots for Super Bowl 55 at $5.6 million.").

8. Matt Bonesteel, *'Thursday Night Football' Will Move to Fox Next Season*, WASH. POST (Jan. 31, 2018, 6:05 AM), https://www.washingtonpost.com/news/early-lead/wp/2018/01/31/thursday-night-football-reportedly-will-move-to-fox-next-season/ [https://perma.cc/GPL5-7DLK].

9. *Id.*

10. *E.g.*, Morten Jensen, *With New TV Deal Looming, NBA Teams Could Spend Big On Extensions*, FORBES (Sept. 19, 2021), https://www.forbes.com/sites/mortenjensen/2021/09/19/with-new-tv-deal-looming-nba-teams-could-spend-big-on-extensions/?sh=743a15d83e85 [https://perma.cc/46EH-77T7] ("In 2014, the NBA signed a nine-year boadcasting contract, worth $24 billion, with ESPN and Turner[.]").

purchase team merchandise and concessions while at the stadium.[11] Thus, failure to bring in attendance to live games can have a negative effect on the financial stake of concessions vendors and suppliers.

4. Sponsors

Sponsors have a similar financial stake to that of television providers. Sponsors pay for advertisement space during the airing of sporting events on television and pay for signage to be placed around the stadium during games. An example of a professional sports league and it's sponsor is the Ultimate Fighting Championships (UFC) and Modelo.[12] "The multimillion-dollar deal will place Modelo branding inside the octagon at UFC events. [Modelo's logo] will also be visible during UFC live broadcasts and on [UFC's] website. UFC athletes and personalities will also be featured in Modelo advertising."[13] To earn the full benefit of their input into sponsoring an event, sponsors rely on leagues to instill gameday operations and procedures to ensure that an entertaining game will happen. This increases the interest of fans to watch and attend games, thus benefiting these sponsors by maximizing the audience exposure of their brand.

5. Sports Betting Platforms

A newer stakeholder in sports are casinos and sports wagering platforms, sports betting apps, and websites. At the time of this Essay, nineteen states have legalized sports betting, with a majority of other states moving toward legalization.[14] Legal states require casinos and other sports betting platforms to pay a one-time licensing fee and a percentage of their profits from sports betting to be taxed by the state.[15]These platforms have a stake in the entertainment value and unpredictability ensured in sports through competitive balance—the strategy that leagues use to develop a higher level of entertainment in

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11. Jakob Eckstein, *How the NFL Makes Money*, INVESTOPEDIA (Sept. 10, 2021), https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp [https://perma.cc/6DTP-VDWL] ("Concessions contribute only about $3 to $5 million to the average NFL team's revenue, but the margins on selling food at games are extremely high.").

12. Trent Reinsmith, *UFC Signs Multimillion-Dollar Deal With Modelo*, FORBES (Oct. 10, 2017), https://www.forbes.com/sites/trentreinsmith/2017/10/10/ufc-signs-multi-million-dollar-deal-with-modelo/?sh=40023250b9df [https://perma.cc/CJB8-S7EK].

13. *Id.*

14. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Oct. 19, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united- states-sports-betting-where-all-50-states-stand-legalization [https://perma.cc/56DK-BDPP].

15. *See, e.g.*, C.R.S. 44-30-1508(1) (imposing a sports betting tax "at the rate of ten percent of net sports betting proceeds.").

games. This ensures these platforms profit from their initial licensing fee, platform sponsors, and employee wages.

B. *Internal Stakeholders*

1. Athletes

Athletes are the lifeline to the sports industry, the primary internal stakeholders, the internal glue in sports, and are the product that is put out by leagues. Athletes possess a diverse variety of stake: their safety, a salary to provide for them and their family, health benefits, and for some, maybe even the fame of being a professional athlete.

Every decision that leagues and teams make impact their athletes. For example, a team drafting a new athlete may affect the playing time and public opinion of a player of that same position. An athlete losing playing time to another player can potentially hurt that athlete's value in a league. It can also make the athlete appear less desirable to teams in the league, resulting in contracts of a lesser value. These things can decrease the popularity of the athlete, leading to loss of potential sponsorships, marketing deals, and a diminished public opinion of that athlete or team. Additionally, a league may instill rules that protect the safety of the athletes, such as the college football's "targeting" penalty and the COVID-19 vaccine mandates in the NFL, NBA, and NHL.

2. Team and League Ownership and Executives

This category of stakeholder contains the fan-facing, decision-makers in sports: team owners, team general managers, league commissioners, and other high-ranking executives. League commissioners and team owners are the shareholders in sports because they control a major financial stake in sports. Some may even have a reputational stake in the quality of the product that they are responsible for. Team and league owners and executives are the most likely stakeholder group to utilize a shareholder primacy theory since they would be the main beneficiary. This is also because most owners may see their ownership as a profitable-venture and believe that satisfying the fan is a step toward the goal of profits, as opposed to earning profits in the process of maximizing fan satisfaction.

3. Team and League Personnel

Team and league personnel consists of coaches, trainers, referees, stadium personnel, and any other league or team officials. They have a stake in their safety, job security, finances, and employee benefits. Many of the decisions made regarding this group in sports are similar to the typical ones that occur in employer-employee relationships, such as budgeting, planning, reasonableness of job demands, safety standards, and more.

Team and league personnel are internal stakeholders because they control lineups, play-calling, and penalties in games, making them a key part of the product being supplied. This stakeholder group is also responsible for ensuring that gamedays operate smoothly on the field through officiating, groundskeeping, recording statistics, and more.

II. IDENTIFYING THEORIES IN SPORTS

There are two main theories that corporations use in obtaining its objectives: (1) shareholder primacy theory; and (2) stakeholder theory.[16] The shareholder primacy theory seeks wealth maximization for shareholders and is the dominant theory used in the United States. It is also the dominant theory in the United Kingdom, Canada, Australia, and New Zealand.[17] Stakeholder theory is the primary theory used in Europe, Germany, and Japan.[18] Under stakeholder theory, the duty of a corporation's management is "to create optimal value for all social actors who might be regarded as parties who can affect or are affected by a corporation's decision."[19]

A corporation that operates under shareholder primacy theory is seeking to primarily benefit shareholders. What owners fail to realize is that they and stakeholders have a symbiotic relationship. Owners need the stakeholders in order to function and the stakeholders need the owners' execution, coordination, and experience to reap the sports industry's full entertainment value. Corporations that prioritize shareholder primacy theory alienate key stakeholder groups and therefore stifle its ability to be successful. By shifting to the stakeholder theory that seeks to benefit everyone involved, corporations can better advocate for all its stakeholders and keep them invested.

There are benefits for corporations to utilize stakeholder theory over shareholder primacy theory. As seen above, the stake of most

16. Andrew Keay, *Stakeholder Theory in Corporate Law: Has it Got What it Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 249 (2010).

17. *Id.*

18. *Id.*

19. *Id.* at 256.

stakeholders to some extent depends on fans' demand for the game through attendance and viewership. Because fans are such a vital link in the stakeholder chain, the primary benefit for a corporation's utilization of stakeholder theory puts fan consideration as a top factor when making decisions. This is not to say that fans should be the *only* stakeholder that is considered in decision-making; however, fans may rank first in external stakeholder importance while weighing factors and attempting to benefit the largest number of stakeholders. Moreover, considering the needs of all stakeholders could enable decision-makers to make fully informed, educated decisions that are fair and potentially beneficial to the greatest number of parties.

A potential downside of the stakeholder theory in sports is that the decisions made under a stakeholder-dominant regime may not always lead to the highest profits. Plateau or low profits can be detrimental in the world of sports, where "flash" and "glamor" almost seem like a requirement of fans.[20] This argument may, however, lack merit if fans are happy, interested, and demand the product. Prioritizing fans as the consumer should be the primary step in attaining and retaining a financial form of success.

While shareholder primacy theory can certainly still succeed, the most likely way to succeed—both through profits and longevity—is to prioritize considerations towards all of a team or league's stakeholders through stakeholder theory.

III. ANALYSIS OF REAL-WORLD EXAMPLES THAT DISPLAY THE BENEFITS OF STAKEHOLDER THEORY AND STAKEHOLDER POWER AND INFLUENCE IN SPORTS

The amount of power and influence that stakeholders possess in corporate decision-making is a unique aspect of sports operations and governance. The most practical way to show the value in considering stakeholders is through an examination of a few real-world occurrences in sports that have required leagues and teams to make important decisions that affect stakeholders.

20. *See* Ryan Williamson, *According to College Football Recruits, Flashy Uniforms Matter*, THE COMEBACK (May 25, 2016), https://thecomeback.com/ncaa/uniforms-recruits-college-football-matter.html [https://perma.cc/HUC6-TW8V].

A. *Night Games at Wrigley Field* (Shlensky v. Wrigley)

In the case of *Shlensky v. Wrigley*,[21] Shlensky, a minority shareholder of the defendant Chicago National League Baseball Club (Club),[22] sued Wrigley, the president and 80% owner of the corporation, and the directors of the corporation on the grounds that "fraud, illegality, and conflict of interest."[23] Shlensky attributed the Club's operating losses to low attendance because the team only played day games.[24] Shlensky brought the suit because every other team, but the Club, was playing its games at night with the intent of maximizing attendance and revenue.[25]

Because of the business judgment rule, the trial court's dismissal of the complaint was affirmed. The appellate court found that Wrigley, and the other directors, were acting in the "best interests of the corporation and the stockholders."[26] The court noted the defendant's consideration of the surrounding neighborhood as an example of the defendant acting in the best interests of the baseball Club.[27]

An examination of the case shows that Wrigley's consideration of the community may have totally changed the outcome of the case. Shlensky's position seemed aligned with shareholder primacy theory, shown by his foremost concern of financial loss and eventual unsustainability of the Club. Wrigley's position best aligns with stakeholder theory because of his concern with the well-being of the surrounding neighborhood. If Wrigley had not introduced a non-monetary stakeholder interest by voicing his concern for the surrounding neighborhood, the result of the case would have turned on whether the board had at least reasonably researched whether night games or day games were more profitable and in the better interests of the corporation—a shareholder primacy approach.

The key difference between the two parties' arguments is the sole non-financial argument by Wrigley that installing lights would deteriorate the neighborhood. The court even found the neighborhood factor persuasive enough of a fact to cite as an example of Wrigley and the board acting in the best interests of the corporation and stockholders.[28] Without considering all stakeholders, each side would have had purely financial arguments surrounding the cost of the lights. In the end, the court was

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21. Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968).

22. Chicago National League Baseball Club then, and still to this day, own and operate the Chicago Cubs of the MLB.

23. *Shlensky*, 237 N.E.2d at 778.

24. *Id.* at 777–78.

25. *Shlensky*, 237 N.E.2d at 777.

26. *Id.* at 780.

27. *Id.*

28. *Id.*

persuaded by the defendant's utilization of stakeholder theory and consideration of an external, non-monetary stakeholder.

B. *NFL Chooses to Pay Taxes After Pressure from External Stakeholders*

In 1966, the NFL was classified as a tax-exempt, non-profit entity under Internal Revenue Code (IRC) § 501(c)(6)[29] after lobbying Congress for antitrust protection during the league's merger with the American Football League.[30] Federal income tax exemptions falling under this subsection are given to organizations that perform operations that further the industry or profession in which they belong.[31] In 2015, uproar from fans and political groups commenced as the public learned of the NFL's exemption.[32] Goaded by some members of Congress and an online petition containing the signatures of over 430,000 people, stakeholders were voicing their beliefs that the NFL should not be benefitting from a tax-exemption.[33]

It is estimated that the NFL now spends between $10 million and $15 million per year on federal income taxes after foregoing tax exemption status.[34] Under a shareholder primacy theory, the NFL likely would have chosen to preserve its 501(c)(6) status, thus saving an eight-digit sum per year on taxes. In this circumstance, however, the NFL utilized stakeholder theory.

Though fans and the lobbying communities likely had no direct stake in whether the NFL pays federal income taxes or not, they eventually became the prevailing influence. The league made a profit-sacrificing decision to please fans and communities of people that voiced their opinion on the issue. This example shows the influence that external stakeholders—particularly fans and communities—can have in a league's financial procedures. The NFL made the decision to increase their expenses by millions in an effort to satisfy the stakeholders' personal beliefs rather than their stake in maximizing league profits. Although the amount of taxes now being paid by the league may not be an extremely

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29. I.R.C. § 501(c)(6) grants a tax exemption for "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which insures to the benefit of any private shareholder or individual." *See also* I.R.C. § 501(a) (granting the tax exemption to listed entities falling under I.R.C. § 501(c)).

30. *Id.*

31. Dylan P. Williams, *Taking a Knee: An Analysis of the NFL's Decision to Relinquish Its § 501(c)(6) Federal Tax Exemption*, 26 J. LEGAL ASPECTS OF SPORT 127, 127 (2016).

32. Joe Pinsker, *Why the NFL Decided to Start Paying Taxes*, THE ATLANTIC (Apr. 28, 2015), https://www.theatlantic.com/business/archive/2015/04/why-the-nfl-decided-to-start-paying-taxes/391742/ [https://perma.cc/V6E3-5J99].

33. *See id.*

34. *See id.*

substantial percentage of their total yearly revenue, the NFL's devotion to the personal beliefs of a large group of stakeholders is now a multi-million dollar per year expense.[35]

C. *Collective Bargaining*

In almost every professional sports league in the United States, the athletes have their own union.[36] Each league has an agreement with its respective players association known as a collective bargaining agreement (CBA). When a CBA expires, and a new one needs to be negotiated where the internal stakeholder, employer-employee relationship is key feature in the parties' compromise. As a result, the goal of negotiations is to put itself in the greatest position, while compromising for the opposing party's greatest position.

Although two key stakeholders are involved in CBA negotiations, all sports stakeholders have a high-level of interest in the outcome. CBA negotiations commonly impact the way the game is played and displayed to the public. For example, the latest NFL CBA will add an extra game to the league's regular season, add two teams to the playoffs, and includes a higher share of league revenues to athletes, amongst other terms.[37] This increases the supply of product that the NFL can put out, thus increasing the amount of games for fans to watch and attend, for sponsors to advertise during, for television channels to show, and more.

Some of the non-monetary benefits of the 2020 CBA[38] indicate that the needs of athletes, fans, owners, sponsors, and television providers were likely taken into consideration when negotiating the CBA. As a result, this was a successful negotiation with little tension that shows strong signs that the many stakeholders' groups will continue to benefit from the 2020 CBA.

At the opposite end of the spectrum is the infamous 2004 NHL lockout. With just under a year remaining on their current CBA, the NHL and the players union attempted to negotiate a new deal. Using shareholder primacy theory, owners attempted to save money by limiting

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35. *Id*. (As a result of satisfying these stakeholders' demands, the NFL is expected to "pay between $10 million and $15 million in taxes each year.").

36. The National Football League Players Association (NFLPA); the Major League Baseball Players Association (MLBPA); the National Hockey League Players Association (NHLPA); and the National Basketball Players Association (NBPA).

37. Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoff and Schedule Will Work*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [https://perma.cc/S7YH-8ZV7].

38. The addition of one regular season NFL game gives extra games for fans to watch, justifies increased compensation for players, and grants sponsors, TV providers, and concessions an extra game to earn profits (see 2020 NFL CBA art. 31(a)); current and former NFL players have access to favorable healthcare benefits (see 2020 NFL CBA art. 58, § 1).

athletes' salaries and insisting on implementing a team salary cap.[39] Eventually, after increased unsuccessful negotiations, the parties had no incentive to further negotiate in good faith, resulting in a lockout.[40] This led to a cancellation of the league's 2004–2005 season.[41] This was the first time that a labor dispute caused a North American sports league to cancel an entire season.[42] The parties were eventually able to successfully negotiate a new CBA in 2005.[43] Unfortunately, however, the cancellation of the 2004–2005 season resulted in an estimated loss of $2 billion in revenue for the NHL, and an estimated loss of $1 billion in salaries for athletes.[44]

This is an instance where using the stakeholder theory would have ultimately led to greater wealth maximization for owners than shareholder primacy theory. During the initial negotiations, the owners likely sought to use salary caps as a tool to maximize wealth under the utilization of shareholder primacy theory. Athletes were not in favor of a salary cap, and the failure of the owners to acknowledge the interests of a key internal stakeholder led to a major loss in revenue for the league.[45] It also negatively impacted every one of the NHL's stakeholders. That season there were no games to be aired on television, no opportunity for advertisements, no games to bet on, and no games for people to work. Had the owners utilized a stakeholder theory as opposed to a shareholder primacy theory, the 2004–2005 NHL season could have most likely been salvaged.

These two instances of owners and athletes negotiating a CBA show how stakeholder theory can relieve tension between the parties and can potentially lead to a more efficient, more beneficial agreement for both parties and all stakeholders. These two examples also show the enormous impact that these negotiations can have on stakeholders outside of owners and athletes. In the NFL's CBA negotiations, the parties came to an agreement that grants more games for fans, vendors, sponsors, and TV providers, an increased salary for athletes, and, as a result of stakeholder satisfaction, increased profits for owners.

Regardless of whether negotiating a CBA, discussing the terms of an agreement with a sponsor or TV provider, or making a vote in a league governance meeting, considering the needs of all stakeholders through

39. Braden Shaw, *The Solution to NHL Collective Bargaining Disputes: Mandatory Binding Arbitration*, 10 DEPAUL J. SPORTS L. CONTEMP. PROBS. 53, 59 (2014).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 60.

45. *Id*.

stakeholder theory is more likely to lead to a more beneficial decision for everyone.

CONCLUSION

Stakeholders have the power to persuade courts, influence legislation, and potentially prevent league lockouts; just to name a few things. Understanding this stakeholder power shows the importance of utilizing stakeholder theory in the decision-making process. It is extremely important for the decision-maker of the sport to make a decision that benefits as many stakeholder groups as possible, while also considering their own financial stake in the decision. Therefore, a major goal in making any corporation's determination should be coming to a decision that includes finding a sustainable balance of benefit and satisfaction for every stakeholder's interest through the stakeholder theory.

Ultimately, every stakeholder in sports has a functional purpose, especially fans and athletes. Considering each stakeholder's purpose and value should be prioritized over direct profits in any strategic decision-making process unlike the method deployed by the shareholder primacy theory. Using stakeholder theory tends to lead to a faster, more widely beneficial, more efficient, and overall better decision than the one that would have been made under shareholder primacy theory.

There is a correlation between the amount of commitment to stakeholder theory and the level of power that all stakeholders have. What does all of this mean? It means that for a sports league or team to have the best chance at making the absolute best decision for the corporation, it should use stakeholder theory in coming to that decision, which has the influence of each and every stakeholder behind it.

@FloridaESLR
@FloridaESLR
in/FESLR
https://www.feslr.com/

feslr@law.ufl.edu

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