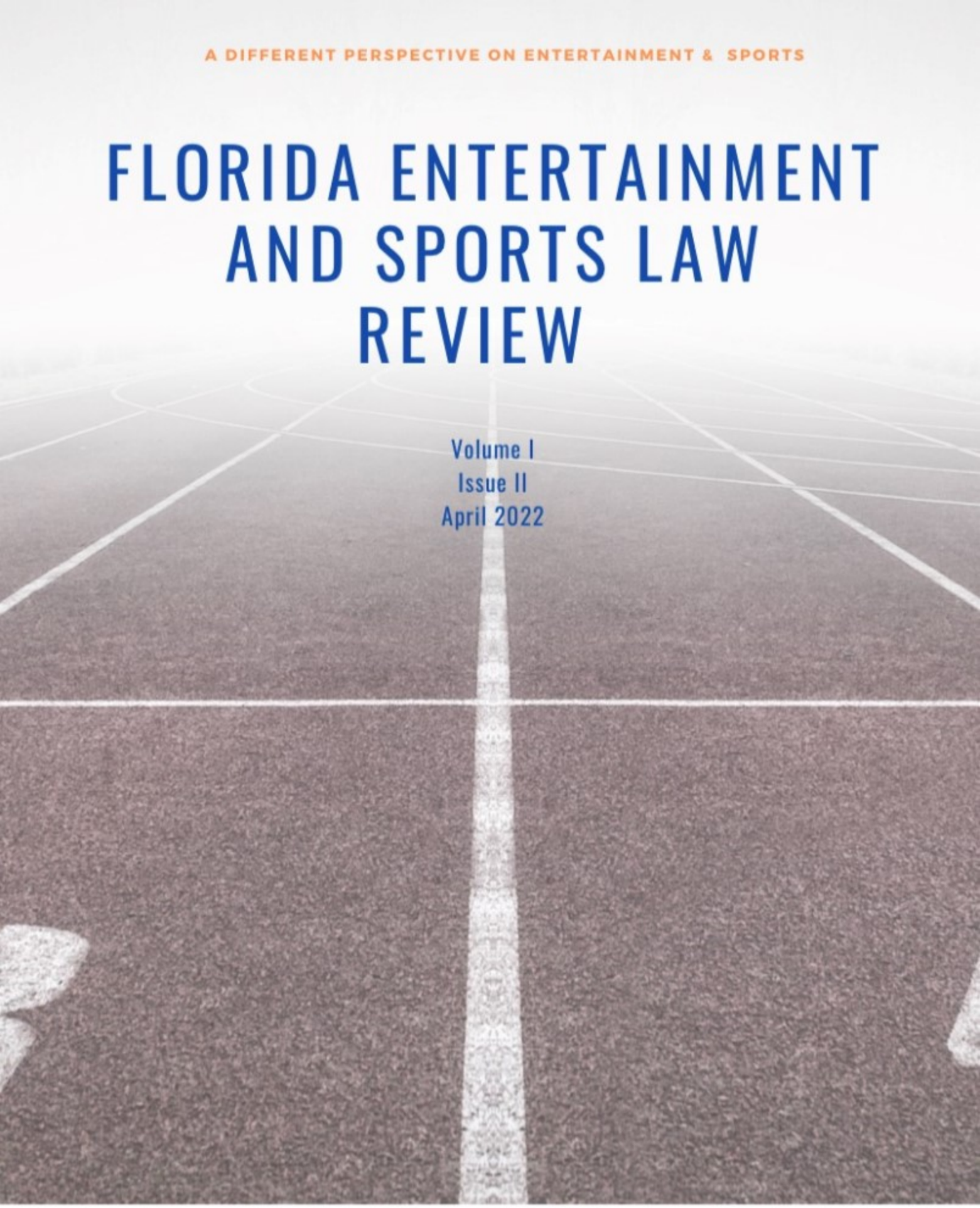
A DIFFERENT PERSPECTIVE ON ENTERTAINMENT & SPORTS

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

Volume I
Issue II
April 2022



Florida Entertainment and Sports Law Review

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

VOLUME I **APRIL 2022** **ISSUE II**

LETTER FROM THE EDITOR

Many people spend time thinking about "firsts," and rightfully so. The *Florida Entertainment and Sports Law Review* (FESLR) was a first at UF Law. With courage and innovative thinking, FESLR is now on its way to cementing its place in UF Law history.

FESLR was a first for me. Although I have led a plethora of projects, it was typically based on working off another's idea and running with it. Now, I know what it means to collaborate and create a platform from the ground up. Seeing FESLR publications evolve from mere portions of a proposal to an Executive Board, then to Inaugural Editorial Staff Members, and finally to a website domain name was exhilarating. Being part of Black History and co-founding an academic student-run journal was enthralling. Now, leaving it all behind is bittersweet.

Soon, I will be graduating and putting my blinders on to take the bar. The word "transition" now comes to mind because we developed something for a new executive board to inherit.

It is empowering to note that the buck did not stop with my co-founder. Nor will it stop with me. The message I want to leave behind for all readers and supporters is rooted into how FESLR started in the first place. If you are truly adding value, you are looking for the gaps in what is already out there and closing them. Sure, it is somewhat simple to replicate what someone else has already done because each individual person brings their own flavor to how and what they are executing. But, move away from replication. Move away from uniformity and following "the rules" of how things are normally done. Why? Because you would not be filling in a gap, just creating a duplicate space.

Truthfully, FESLR is not the only entertainment and sports law review out there. But we pride ourselves on literally adding color, in our brand and through our authors, so that we do not look or act like other journals out there. We were founded to provide commentary on the ever-evolving industry with some added legal perspective and practicality. We aim to provide bite-sized and often more digestible content through blogs and our publications.

FESLR is the greatest legacy I can leave behind at UF Law. It is my hope that when you read our publication, when you see us post on social media, and when you attend our events, that we do not blend in with the other law reviews. Hopefully, you will see us filling a gap, standing out from other law reviews, and acknowledging novel industry trends, rather than living or operating in a duplicated space.

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

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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VOLUME I **APRIL 2022** **ISSUE II**

INTERVIEWS

ESSAYS

VIRGIL D. HAWKINS CLINIC
SPEAKER SERIES TRANSCRIPT

CAREER SPOTLIGHT: NORMAN WAIN

Norman Wain is the Chief of Business & Legal Affairs of USA Track & Field. University of California-Berkeley in 1992; Pepperdine University School of Law in 1996.

QUESTIONS & ANSWERS

I. CAREER QUESTIONS

1. What sort of current challenges do you face in executing your role?

The current challenges, and the ones making the headlines these days, tend to be issues related to governance, transgender athletes, and safe sport. These are all complicated issues that impact our constituents, stakeholders, and fans. This need to balance all of those interests and remain true to our mission of achieving competitive excellence and popular engagement in our sport presents a lot of challenges.

2. From your experience, what are ways junior attorneys can be immediately impactful to their employers?

I think the immediate impact junior lawyers bring to employers is their fresh perspective on the issues and their technological prowess. Junior lawyers can also provide value with their social network and access to others who might have different approaches to tackling some of the challenges their respective organizations face.

II. TREND QUESTIONS

3. What changes or developments have you seen in entertainment and sports over the past few years?

The manner in which the entertainment and sports product is being consumed and monetized continues to evolve. My interests have always been in the business of sports, so I have been paying close attention to how those business models change as we continue to embrace new technologies. The digital media rights landscape and the newer ways sports properties exploit their intellectual property (IP) are the changes that I have been following over the past few years. Hello Amazon! Wait, I can watch edited versions of games on replay now, or watch multiple games at the same time (tuning into games when teams get into scoring position)?!? I can tune into a different platform and get extra audio from the field of play too? I can consume sports while streaming within a digital community? These developments are exciting to watch (and learn about).

4. Law students interested in entertainment and sports are learning that it is an industry or client base and less of a practice area. What practice area expertise do you see a need for in the industry in the next few years? (ex.: IP, labor, advertising, privacy, real estate, etc.)

For me, it would have to be IP. Between esports, the metaverse, Non-Fungible Token (NFT)s, etc. And that doesn't even address the issues with evolving media rights. The IP components are real and the more educated you become in this area, the more valuable you can be within the entertainment and sports industry.

III. ADVICE QUESTIONS

5. With entertainment and sports being a difficult field to break into, what advice would you have for law students trying to do just that?

It's your journey—don't sell yourself short! The path is very difficult, but it's not impossible. The obstacles are challenging and real, but only you know the extent of your commitment and your own willingness to confront that adversity. The journey starts with a commitment to learning how to be a really good lawyer first. There are four core areas of the law that are integral to any corporate generalist (labor & employment, IP, corporate transactions, and litigation), so gaining experience in these areas while you are early in the journey is important. From there, you start building your social network and finding opportunities to get involved in different areas of sports to keep yourself relevant and ensure your intentions are clear. Lastly, you have to be willing to get through the constant rejection and disappointment (which is certainly not easy) as you continue progressing in your career.

6. Practicing law is relationship-based. How do you balance getting to know new people and maintaining your network?

Meeting new people has always remained a priority. When I attend conferences, I am constantly looking to meet new people in addition to catching up with friends. If I collaborate with someone on a panel, I try to reach out and get to know the person and develop a relationship. As previously mentioned, building a network is extremely important on multiple levels, so it requires prioritization and commitment. That said, the benefits are enormous on multiple levels.

IV. PERSONAL QUESTIONS

7. If someone made a movie about your life, who would play you and what would the title of the movie be?

It would have to be Adam Sandler starring in a movie entitled, "How Did HE Get Here?" There have been so many times I have been blessed by certain accomplishments where I just look around and am amazed about how things happened. For example, the national boards of Association of Corporate Counsel (ACC) and the Sports Lawyers Association (SLA) are so distinguished that it genuinely feels surreal that I was selected to serve and collaborate with such brilliant and accomplished individuals. Like Sandler, I do tend to be reclusive, but when I do step out publicly, my quirks and my humor are what stands out.

8. What is your favorite music album of all-time?

Depeche Mode 101. It was just that time in my life where the group was alternative (as opposed to mainstream), and they were crossing over and exploding in popularity, which was awesome. The lyrics resonate more than music, and every time I hear the songs, it is like getting in a Bill & Ted's phone booth time machine and transporting back to that era and those emotions. A most excellent experience!

CAREER SPOTLIGHT: SCOTT WILKINSON

Scott Wilkinson is Executive Vice President and Chief Legal Officer for the Atlanta Hawks and State Farm Arena. In 2004, Wilkinson assumed responsibility for all Hawks and State Farm Arena legal matters. He is currently responsible for all legal and business affairs of Atlanta Hawks, LP, Arena Operations, LLC, Atlanta Hawks Foundation, Inc. and ATL Investco, LLC (and its various related affiliates). Wilkinson attended Duke University on a football scholarship and earned his A.B. degree, *cum laude*, in 1985. He earned his Juris Doctor from Duke in 1988.

QUESTIONS & ANSWERS

I. CAREER QUESTIONS

1. What sort of current challenges do you face in executing your role?

The newest and biggest challenge is pandemic-related. Before COVID, developing relationships with my internal clients was easier with everyone in the office or with everyone physically present at Hawks games. By walking around the three floors of our office or by attending games, I could interact with my clients and often received legal questions or projects by being in their line of sight and easy to access. "I meant to call you and ask if you could help with . . ." was a phrase I heard often before COVID. Now, I am hearing less with our new flexible, remote work policies and less employees at their workstations. Also, turnover within the company during COVID for the past two years has made meeting new internal clients more difficult. I am informed of names and titles when new employees are onboarded, but it could be a month or two before I actually meet them. I believe that being in the office and accessible to all levels of employees is critical to being an effective, trusted in-house lawyer, so adapting to the new remote workplace is (and will continue to be) a major challenge. With my two outstanding Hawks' co-counsel, Caren Cook and Allie Chinsky, we try to schedule short legal updates/educational classes with various departments during their weekly meetings, which has been helping with relationship building.

2. From your experience, what are ways junior attorneys can be immediately impactful to their employers?

Junior lawyers who bring energy and enthusiasm to work every day make almost as much impact with their attitude than they can with their work product. When a young lawyer is going full speed and embraces new work—no matter how boring, mundane or even administrative—small mistakes are easier for senior lawyers to deal with and correct.

Having an open mind to professional improvement and not being defensive in a learning environment is also a plus.

Further, while seeking and taking on new work from your direct report lawyers, it is important to strike a balance between knowing what you do not know and stretching your legal skill set into new areas. Being confident in your abilities as a lawyer is one thing, but charging ahead alone in a totally new area of the law can be a mistake. It is a difficult balance to describe, but you will know it when you see it. Make your impact by aggressively accepting new challenges, but do so responsibly and by seeking appropriate guidance.

II. TREND QUESTIONS

3. Law students interested in entertainment and sports are learning that it is an industry of client base and less of a practice area. What practice area expertise do you see a need for in the industry in the next few years?

I think that a legal generalist will always be useful and successful in the General Counsel role, especially in entertainment and sports. For example, most people would not connect legal experience in the military with in-house success, but thirty years after practicing as a Marine Corps Staff Judge Advocate, I still reach back to use things I learned trying criminal cases as a USMC defense lawyer, counseling young Marines and their families and advising senior officers. However, there is growing need for specialists within in-house legal teams. I believe real estate might provide the biggest opportunity for new attorneys trying to break into the industry, with many teams (including the Hawks) in all major sports leagues worldwide leading or participating in real estate developments around their stadiums. Young lawyers may also find opportunity in the areas of tech, data privacy, and environmental, social and governance (ESG). The Hawks have seen an explosion of work in all of these areas over the past two years.

4. What sort of permanent shifts will the industry adopt on the tail-end of the pandemic?

Like most other industries, remote work arrangements are likely here to stay post-pandemic. Obviously, employees will still need to attend games or events in person, but the non-event work week will see a mix of remote and in person work arrangements.

I am still unsure about a full shift to cryptocurrency acceptance, but the Non-Fungible Token (NFT) may catch on beyond its current sports collectible use due to its potential utility as a ticket for a game or event. Teams could track fan data better and capture a piece of each resale. The Hawks and a number of NBA teams have begun experimenting with NFT collectibles as part of their fan experience offerings, like the bobbleheads and Beanie Babies of the past.

5. With entertainment and sports being a difficult field to break into, what advice would you have for law students trying to do just that?

First and foremost, spend at least five years in a large law firm billing hours and learning as much about being a lawyer as you possibly can. It really does not matter what area of the law you work in, just put in the time and get that foundational experience. Second, bill an hour each day to yourself, meaning, spend lunch or dinner building your network or participating in sports and entertainment associations while you are grinding out the law firm hours. Third and most importantly, be patient. It could take you a while to break into the industry, do not give up too early, it is worth it to keep pushing and readjusting your plan and your goals. Note that it took me *almost a decade* after law school graduation to get my first in-house sports team opportunity.

III. PERSONAL QUESTIONS

6. What is your favorite music album of all-time?

It is impossible to narrow down to just one, top ten would be easier, however, I will list three of my top ten in alphabetical order by band: At Filmore East, the Allman Brothers Band; Licensed to Ill, Beastie Boys and Siamese Dream, Smashing Pumpkins. Music-related career facts not on my resume—I was a bouncer for a Grateful Dead concert in 1982 and also for Eric Clapton in 1985. No incidents reported for either show….

7. If you could add two expansion teams for any sport, what sport would it be and where would the new teams be located?

I would add two NHL teams, one in Atlanta and one in Kansas City. I will note that neither of these would be prudent business decisions nor would they be strategic expansion for the NHL. I just miss having an NHL team in Atlanta after the Thrashers left for Winnipeg and I would love to see Kansas City (one of my former hometown areas) add a winter sport.

HAIL MARY: CONSIDERING ALTERNATIVES TO THE NCAA'S INACTION TO REMEDY DISCRIMINATORY HIRING PRACTICES IN DIVISION I FOOTBALL

Danielle M. Lyn[*]

"February is...the month that high school football players choose the college that they will attend in the fall. While it's an exciting day for those seniors, it's a disappointing day for me. You see, many of those players who choose the top schools are African American and yet almost none of them will get the opportunity to play for an African American head coach...one would think that our universities would be leading the way in progressive thinking. You wouldn't think that in 2009 it would be more likely for an African American to become president of the United States than to be hired as head coach of a top-20 football program. But that seems to be the case."[1]

- Tony Dungy, NFL Hall of Fame Head Coach

INTRODUCTION

Over a decade later, Tony Dungy's words still reflect the disappointing reality of the state of Black head coaches in the National Collegiate Athletic Association (NCAA) Football Bowl Subdivision (FBS). The current changing tides in the modern-day sports landscape

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1. Tony Dungy, *Diversity Everywhere but the Sidelines*, N.Y. TIMES (Feb. 19, 2009), http://www.nytimes.com/2009/02/20/opinion/20dungy.html [https://perma.cc/2DR5-FYK5].

makes now the perfect time to understand the crux of the racial disparity issue in an effort to target the groups best suited to ameliorate the issue. At a time where the governance model of the NCAA is in flux, many are calling for federal and state intervention. The changing tides in the modern-day sports landscape make now an appropriate time to revisit the dilemma. This Essay describes racial disparity obstacles in NCAA hiring practices and identifies an array of possible actors best suited to make the fix.

Section I presents statistics that demonstrate the severity of the head coach diversity issue in Division I (DI) NCAA football. Section II seeks to document the NCAA's official response and action steps the entity has implemented to remedy the situation. Section III outlines the most commonly suggested "fix": The Robinson Rule. This section will introduce the NCAA version of the National Football League's (NFL) Rooney Rule and explain why the NCAA has refused to enforce it. Next, Section IV will briefly discuss alternatives to the Rooney Rule that may lead to a solution that appoints qualified Black head coaching positions proportionate to Black student athlete's involvement in the NCAA. Finally, Section V concludes with a call to action.

I. THE STATE OF RACIAL DISPARITY IN DI HEAD COACHING POSITIONS

The issue of imbalanced coaching demographics exists on many planes across the NCAA. Take for instance the gender consideration. In 2020, women made up forty-four percent of the NCAA's student-athletes with 222,920 participating women while men comprised fifty-six percent with 281,699 participants.[2] Collegiate athletes' gender makeup is relatively equal, however when we consider who coaches these athletes, a different image emerges. Men make up seventy-five percent of the head coaches in the NCAA with 15,194 head coaches across all sports in 2020.[3] Women, by contrast, make up only twenty-five percent with just 5,039 head coaches.[4] Thus across the NCAA, men do and are more likely to hold head coaching positions in both women's and men's sports. This is a disparity that exists throughout the NCAA and needs immediate attention, but it is outside the scope of this Essay. Instead, this Essay will narrow in specifically to review the racial disparity in football head coaches at the DI-FBS level. Additionally, this Essay will refer only to "Caucasian/White" and "African-American/Black" racial demographics. The NCAA considers seven separate racial demographics in its data research: Black, Hispanic/Latino, Native Hawaiian/Pacific Islander, Nonresident Alien, two or more races, Unknown, and White. The

2. Demographics by Gender for the year 2020, NCAA https://www.ncaa.org/about/resources/research/ncaa-demographics-database [https://perma.cc/YSV6-NTM4].

3. *Id.*

4. *Id.*

discussion is limited to only two races because representation by White coaches highlights a proverbial "default" to be measured against and coaches identifying as Black are the closest to achieving parity by the numbers. The intent is not to leave out other racial minorities; it is the opposite. Hopefully, demonstrating the substantial gaps between the racial players in slots one (Caucasian/White) and two (African-American/Black) exacerbates the importance of racial disparity issues both as they relate to the remaining racial demographics and as a whole.

For the last nine years, Black student-athlete participation in D1 football has increased from 12,670 to 14,160 participants.[5] During the same period, similarly situated White student-athlete participation has decreased from 11,798 to 10,666 participants.[6] Remarkably, however, the outcome switches when the input "student-athletes" is replaced with "head coach." From 2012–2020, White head coaches at the DI level increased from 199 to 210, peaking at 211 White head coaches in 2019[7] while similarly situated Black head coaches decreased from 45 in 2012 to 40 in 2020.[8] The number of Black head coaches peaked at 45 in 2012, the first year recorded and spent four of the next eight years bottoming out at 38 head coaches.[9] Of the 66 head coaches in the FBS division, ten identified Black in 2020—their highest representation of the recorded period.[10] White head coaches, in contrast, held 52 of the head coaching positions in 2020.[11]

These statistics, collected and published by the NCAA, reveal that the head coaching position is not proportionate to student-athlete participation on racial grounds. At this point, one might wonder why this disparity matters given that the present system has a demonstrated ability in ushering all parties, athlete and coach alike, to success. The importance lies within the one group being left out: the class of qualified coaches that belong to a racial minority and are therefore overlooked for the most coveted position on the sideline. The answer is a simple one: this issue implicates an interest in general fairness.

The discrimination of racial minorities at the head coaching level of NCAA football ran so rampant that it caught federal attention in 2007

5. NCAA Demographics Database Spreadsheet for Student Athletes and Coaching Staff for the years 2012–2020, NCAA https://www.ncaa.org/about/resources/research/diversity-research [https://perma.cc/9Y5T-4NVB] (following hyperlink; then clicking "NCAA Demographics Database").

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Demographics of student athletes and coaching staff by sport, NCAA, https://www.ncaa.org/about/resources/research/diversity-research [https://perma.cc/LNN5-QE6G] (following hyperlink; then clicking "NCAA Demographics Database").

11. *Id.*

when Congress held a hearing on the lack of diversity in leadership positions in NCAA collegiate sports. In his opening address Representative Bobby Rush (D-IL), the chairman of the subcommittee holding the hearing, outlined why this issue matters:

> First, athletic scholarships are often the only way qualified students from disadvantaged backgrounds can obtain a college education. A large percentage of these student-athletes are minorities and it is extremely important that these young men and women have access to role models and mentors who reflect their diverse background. . . . Second, NCAA college sports is literally a multibillion dollar business . . . [t]he fact that a sizable portion of this billion-dollar revenue stream is being generated by minority student-athletes but minorities are not part of the upper tier of strategic and decision-making leadership roles presents a disturbing two-tier situation that should raise a lot of eyebrows and a lot of tough questions.[12]

It is important to note that at the time of Representative Rush's remarks in 2007, only about six percent of Division 1-A football head coaches were Black.[13] The NCAA structure has changed since then,[14] but the head coach statistic has only shifted up by ten percent.[15] At the time of this Essay's drafting, Division 1 head coaches sat at just over fifteen percent Black head coaches.[16] Evidence of progress over the last thirteen years should not be taken to mean that the problem has been resolved. However, it is beneficial to highlight the strides toward progress. As discussed in the next section, the NCAA has been long aware of the discrepancy and, according to them, have been working to remedy it.

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12. *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before the Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.*, 110th Cong. 2 (2007) (statement of Bobby L. Rush, Congressman from Illinois).

13. *See id.* (explaining that 119 college football programs were considered affiliates of NCAA's Division I-A designation, and only seven of those programs had African-American head football coaches).

14. *See* Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014, 11:49AM), https://www.ncaa.org/news/2014/8/7/board-adopts-new-division-i-structure.aspx [https://perma.cc/Y4QW-2FVK] (explaining that in 2014, the NCAA restructured schools and conferences to give student athletes more of a voice in decision-making "at every level").

15. *Compare id*., establishing that only about six percent of D1 Football Head Coaches were Black in 2007, *with infra*, note 16.

16. *See* NCAA, *supra* note 10 (showing that per the NCAA, of the 63 football programs in the FBS Autonomy division, 8 had black head coaches in 2020).

II. THE NCAA'S COMMITMENT TO CHANGE

Myles Brand, the fourth president of the NCAA, repeatedly commented on the disparity in head football coach hires during his tenure from 2002 to 2009.[17] In a State of the Association address, for example, Brand commented that "the proportion of ethnic minority head football coaches is inexcusably low."[18] In another instance, he acknowledged that "college football head coaching was the most segregated position in all of collegiate athletics."[19] In his comments at the 2007 Congressional subcommittee hearing, Brand noted:

> Chief among [the challenges of the NCAA], in my view, is the dismal record of hiring people of color as head coaches, especially in football. . . . Sadly, if the pace of progress remains the same, it will be more than 80 years before we reach a percentage that even approximates the number of African-Americans in the general population...this is not only unacceptable, it is unconscionably wrong.[20]

Brand posited that to be most helpful, the NCAA should do two things: first, call attention to the problems and publicize best practices for hiring searches, and secondly, help prepare minority candidates for the search process.[21] His tenure saw the development and implementation of nineteen programs to achieve these ends.[22] After he passed away in 2009, Mark Emmert took over as the fifth president of the NCAA and continued Brand's commitment to the issue of racial discrimination in head coach hiring practices. Just days after taking the reins of the NCAA, Emmert went on record saying that "the fact that we have to grow diversity among the coaching ranks . . . is self-evident."[23] As discussed in Section IV *infra*, Emmert continues to comment on and consider avenues to address the issue, though nothing has been formally enacted since Brand's tenure came to an end.

Despite official NCAA efforts to address the issue, racial minorities remain without head coaching positions at alarming rates compared to their White male counterparts. The number of hired minority head coaches remained steady at around five percent before the NCAA

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17. *See infra*, notes 18–22.

18. Myles Brand, President, NCAA, State of the Association, *In All, Fairness*: (Jan. 6, 2007), https://mylesbrand.com/wp-content/uploads/2007/01/2007-NCAA-State-of-the-Association.pdf).

19. Justin Pike, *From the Rooney Rule to the Robinson Rule: NCAA Football and the Quest for Equal Opportunity in Head Coaching*, 3 WIDENER J.L. ECON. & RACE 26, 44 (2011).

20. *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before Congressional Subcommittee*, *supra* note 12.

21. Brand, *supra* note 18.

22. *Id*.

23. Pike, *supra* note 19.

development programs were in place and throughout the implementation of Brand's programs.[24] It is clear that even with the addition of the "Brand era" programs and the public denunciations of the issues with minority hiring practices, the issue remains. The predicament begs the question: How can this issue be remedied? Many have turned to the NFL for a potential answer.

III. THE ROBINSON RULE

The NFL faced a similar problem with racial minority head coach hires. The first Black head coach came in 1921, the second would not come until 1989—sixty-eight years later.[25] After a report publicized the reality for Black coaches in the NFL—among the conclusions, that NFL team owners expected far more from Black head coaches than their White counterparts[26]—the NFL sprang to action. The NFL Commissioner created a committee on workplace diversity tasked with coming up with best practices for minority hiring.[27] The committee's recommendation resulted in the implementation of the league-wide mandate now known as the Rooney Rule.[28] The Rooney Rule requires:

> all NFL teams to interview a minority candidate [face to face] before making a final decision in their quest for a new head coach. . . . Teams are required to: (1) publicize a detailed job description for the candidate they seek to hire as head coach; (2) publicize a hiring timeline; (3) maintain records of candidates that the team contacted for the position; and (4) maintain records of the outcome of those contacts. Finally, the NFL reserves the right to fine teams $500,000 for non-compliance.[29]

The rule initially saw success in the NFL and was lauded when just a few years after its implementation, two Black head coaches faced each other in the Super Bowl.[30] However, almost 20 years after the Rule's implementation, a lawsuit by former Black NFL Head Coach Brian Flores called into question the Rooney Rule's overall success. In

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24. *See* Hannah Gordon, *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring of NCAA Head Football Coaches*, 15 SPORTS L. J. 1, 14 (2008).

25. Pike, *supra* note 19, at 31–32.

26. *Id.* at 32.

27. *Id.* at 33.

28. *Id.* at 33–34.

29. Pike, *supra* note 19, at 34–35 (Note that this is the initial requirement of the Rooney Rule. Amendments now apply that extend the Rooney Rule to hiring practices of certain front office positions, assistant head coach, coordinator positions, and general managers. *See* Complaint in Flores v. Nat'l Football League, *infra* note 31).

30. In 2005, Black head coaches Lovie Smith (Chicago Bears) and Tony Dungy (Indianapolis Colts) became the first Black head coaches in a Super Bowl game. *Id*. at 36.

February 2022, Flores filed a class action lawsuit against the NFL and each of its 32 teams alleging hiring discrimination against Black candidates. In reference to the Rooney Rule, the complaint alleged:

> Since its passage, the Rooney Rule has been amended several times in an effort to strengthen its impact on diversity and inclusion, or to at least appear to do that. It now applies to General Manager and other front office positions, as well as Assistant Head Coach and Coordinator positions. Moreover, teams are now required to interview two minority Head Coach candidates, and at least one in person. However, the Rooney Rule has failed to yield any meaningful change to an institution so fully steeped in discriminatory practices.[31]

Still, because of its initial trajectory in the NFL, it is no surprise that many call for a similar rule to be implemented at the NCAA level. The proposed NCAA counterpart has been dubbed "The Robinson Rule" after legendary Grambling State football head coach Eddie Robinson.[32] Coach Robinson remains the third-winningest coach in college football history and is famous for having sent over 200 players to the NFL during his career at Grambling State.[33] Notwithstanding his resume and a long list of accolades, however, Coach Robinson was never considered for a coaching position at the DI level.[34] Despite wide support for such a rule and a clear demonstration of the need for some kind of intervention, the NCAA has declined to impose any such rule on its member institutions thus far.[35]

IV. NCAA REJECTION OF THE ROBINSON RULE

Myles Brand argued that the hiring of head coaches is solely within the purview of the NCAA's member institutions. According to him, an NCAA Robinson Rule would inevitably fail since schools do not want to give up autonomy and yield authority to the NCAA to streamline the hiring process.[36] The NCAA renewed its rejection of the Robinson Rule as recently as November 2020 when the NCAA Committee to Promote Cultural Diversity and Equity was tasked with identifying and

31. Complaint at 25, Flores v. Nat'l Football League et al., No. 1:22cv871 (S.D.N.Y. 2022).

32. Pike, *supra* note 19, at 42.

33. *See* Gordon, *supra* note 24, at 2 (Grambling State is a historically black university).

34. *Id.* at 2–3.

35. Adam Rittenberg, *No Action from NCAA Committee on Pair of Minority Hiring Policies* ESPN (Nov. 13, 2020), https://www.espn.com/college-sports/story/_/id/30312570/no-action-ncaa-committee-pair-minority-hiring-policies [https://perma.cc/8SC5-FPFL] (Last considered in 2020, the NCAA refused to action on an association-wide rule that would mandate a college-level Rooney Rule.).

36. Pike, *supra* note 19, at 42.

considering policies that would broaden minority hiring.[37] Although Mark Emmert wrote a letter reinforcing the commitment to remedying the issue,[38] the committee ultimately declined to vote on the Robinson Rule and a similar alternative, citing legal reasons: "[t]he NCAA is a voluntary association with public and private members who are subject to different laws . . . [t]hus, the NCAA cannot mandate the individual hiring practices of colleges and universities or campus employment practices. As a result, the employment decisions are made at the individual campus level."[39]

Although the legality of the Robinson Rule is outside the scope of this Essay, it is worth noting here that some argue that the NCAA's justification for refusing to implement the Rule is a farce. Justin Pike, for example, contends that it is the "very nature" of the NCAA to impose such rules.[40] He points to the NCAA's lengthy manual as evidence of their practice of usurping authority from member institutions through NCAA regulations.[41] The reality remains, however, that the NCAA is reluctant to conform to this view. One must then consider what, if any, avenues exist to get the ball rolling in the event the NCAA remains idle.

V. ALTERNATIVES TO NCAA ENFORCEMENT

Several alternatives to remedy the disparity between minority head coaches and student athletes have been considered and attempted in the past. This section will briefly discuss three of those alternatives: shifting the responsibility to individual institutions, a private lawsuit to compel change, and legislative changes.

A. *Shifting the Responsibility*

A person sympathetic to the NCAA's justification that it lacks the power to compel the schools' action might suggest that the solution to this issue is to shift the responsibility. Instead of the NCAA, put the onus on the individual institutions to make an internal change. While this thought is not without merit, a recent study by Guillermo Ortega, Z.W. Taylor, and Joshua Childs illustrate why such a move does little, if anything, to remedy the situation. The researchers conducted a study on athletic mission statements from NCAA member institutions to calculate the level of importance the athletic departments at these institutions place

37. Rittenberg, *supra* note 33.

38. *Id.* (In a letter obtained by ESPN, Mark Emmert wrote "[w]e know the Association and its members have more work to do around racial justice and fostering inclusive environments. . . . I look forward to our continuous engagement in this meaningful work to ensure an equitable and inclusive environment for all.").

39. *Id.*

40. Pike, *supra* note 19, at 43.

41. *Id.*

on diversity.[42] A mission statement generally "represents campus-wide values, expectation[s] for student-learning and development and campus priorities . . . [M]ission statements have developed into instruments that shape the institution's culture and goals, help create the institution's purpose[,] . . . help represent the strategic process of institutions and are used to state an institutions commitment to diversity."[43]

The results found that member institutions do not adhere to the NCAA's inclusion statement stating that "athletes, coaches, and *administrators must commit to diversity*, inclusion, and gender equity."[44] Across the 250 NCAA member institutions included in the study, only 29 published athletic diversity statements.[45] What is more:

> Although the NCAA has posited that diversity, equity, and inclusion are organizational priorities, data in this study suggests that some member institutions express their beliefs and values toward diversity in terms of women and gender: rarely of race, if at all. Subsequently, for the NCAA to better convey its message of diversity, equity, and inclusion amongst all of its members, the NCAA must make clear their own stance toward diversity in all of its forms, including gender and race.[46]

If we assume that the takeaways from the study into athletic diversity statements are reflective of the athletic departments' priorities (that institutions tend to think of and prioritize diversity in the athletic sense as a question of gender diversity),[47] it is not a logical leap to see that yielding to institutional controls puts diverse head coach prospects in a worse position. This method is unlikely to be successful.

B. *Title VII Lawsuit*

Alternatively, a private suit brought by a well-poised plaintiff might have the potential to stir change. Title VII of the Civil Rights Act is the prohibition of discrimination on the basis of sex, race, religion, color, or national origin in the workplace.[48] Cases brought under Title VII

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42. Guillermo Ortega et al., *What Are We Saying by Saying so Little? Mission Statements, Diversity Mission Statements, and NCAA Programs*, *in* J. DIVERSITY IN HIGHER EDU. 1, 1 (2020).

43. *Id.* at 2.

44. *Id.* at 2 (emphasis added).

45. *Id.* at 6.

46. *Id.* at 8 (emphasis added). *See also id*. at 5 ("the majority of athletics mission statements do not discuss diversity, and those that do are primarily focused on gender with few focused on race").

47. *See id*. at table 5 (showing that of the twenty-nine commonly used words among examined athletic diversity statements, racial diversity ranked 21st on the list with only ten occurrences, while gender ranked 7th with twenty occurrences).

48. Civil Rights Act of 1964 § 7, 42 U.S. § 2000e et seq. (1964).

normally proceed under one of three broad categories of theories: individual disparate treatment, systemic disparate treatment, or disparate impact (of a facially neutral rule or practice).[49] Though a racial minority kept out of a head coach position can arguably construct a suit under any theory, a coach would presumably sue under a disparate treatment theory[50] and thus, disparate treatment will be the focus of this Section.

In order to establish a prima facie case under a disparate treatment theory, the plaintiff will need to show several elements. First, that the plaintiff is part of a protected class. Second, that the plaintiff was subjected to adverse job action. Third, that the employer treated similarly situated employees of other races more favorably, and finally, that the plaintiff was qualified to do the job.[51] Once established, the burden shifts to the employer to prove that the challenged conduct was not a result of the plaintiff's status in a protected class.[52] A plaintiff can still ultimately prevail if they show that the employer's reasons were a "pretext for unlawful discrimination."[53]

Despite the burden shift, no DI head football coach has filed such a complaint to be analyzed, presumably because the cost to the plaintiff would be the forfeiture of their career.[54] Perhaps, however, a viable threat of legal scrutiny towards the NCAA or NCAA member institution would provide enough of a catalyst for sparking change.

Brian Flores' recent class action lawsuit against the NFL may shed light on another cause of action under the Civil Rights Act available to minority coaches. Flores alleges discrimination under Section 1981 of the Civil Rights Act, in lieu of a Title VII challenge, to attack discriminatory hiring practices.[55] At the time of this Essay's writing it is too early to determine the impact of Flores' claim, however, a few initial takeaways illuminate integral factors that would punctuate a similar lawsuit at the NCAA level.[56]

First, Flores' discrimination claim takes the NFL's Rooney Rule into account and alleges that the interviews held in compliance with the rule

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49. Gordon, *supra* note 24, at 6.

50. Bram Maravent & Ben Tario, *Leveling the Playing Field: Can Title VII Work to Increase Minority Coaching Hires in NCAA Athletes*, 81 FLA. BAR J. 42 (2007). (retrieved from: https://www.floridabar.org/the-florida-bar-journal/leveling-the-playing-field-can-title-vii-work-to-increase-minority-coaching-hires-in-ncaa-athletes/ [https://perma.cc/QJR3-BTHG]).

51. *Id.*

52. Gordon, *supra* note 24, at 7.

53. *Id*.

54. *Id.* at 8.

55. *See* Flores, *supra* note 31, at 52.

56. At the time of this Essay's's writing, no Answer has been filed on behalf of the defendants in Flores v. Nat'l Football League, et al. All conclusions drawn in this Article from the lawsuit, therefore, are derived from the Complaint alone.

are a sham and evidence of discrimination.[57] Secondly, Flores' discrimination claim appears to rest on a text message that suggests Flores had no chance at a successful interview as smoking gun proof of discrimination.[58] Thus, it would likely be harder to allege discrimination in a similar suit on the NCAA level since there is no Rooney Rule equivalent in the NCAA, and—at least until now—there is no evidence that can be reasonably construed as a smoking gun of hiring discrimination.

C. *The Legislative Route*

Others have stressed the consideration of official legislation to remedy the issue. In 2008, the state of Oregon unanimously approved a bill that requires state universities to interview at least one minority candidate when selecting a head coach.[59] Inspired by the Rooney Rule and concerned with the NCAA's inaction, Oregon decided to address the issue head on.[60] The state has seen an increase in minority hiring since it passed the law over a decade ago. Portland State and Western Oregon University both have Black athletic directors.[61] In addition, since the law's passing, three of the four head football coaches hired at the University of Oregon have been from a minority origin.[62] Two, Willie Taggart and Bryan McClendon, are Black while Mario Cristobal is Latin American.[63] Due to this perceived success, other states have since considered similar alternatives, but none have passed any into law yet.[64]

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57. Flores, *supa* note 31 ("As described above, Defendants have discriminated against Plaintiff and the Proposed Class on the basis of race and/or color in violation of Section 1981 by . . . (ii) discriminatorily subjecting them to sham and illegitimate interviews . . . ."). *Id.*

58. *See id.* at 36–39 (Three days before Flores' interview for a head coach position, New England Patriots Head Coach Bill Belichik mistakenly texted Flores, thinking he was another candidate, and congratulated Flores, who he thought was the other candidate, for landing the position Flores was scheduled to interview for). *Id.*

59. Pike, *supra* note 19, at 47.

60. *See* Affirmative action plan; interview of qualified minority applicants, Oregon Revised Statute § 352.281(2)(b) (2015) ("Each public university shall . . . Interview one or more qualified minority applicants when hiring a head coach or athletic director. . . .") *Id*.

61. Patrick Hruby, *State Of Oregon's 'Rooney Rule' Shifts The Game*, GLOBAL SPORTS MATTERS (Sept. 24, 2020), https://globalsportmatters.com/business/2020/09/24/oregons-rooney-rule-shifts-the-game/ [https://perma.cc/VZN9-5G36]

62. *See id.*

63. *See* Khobi Price, *Willie Taggart's roller coaster ride brings coach to FAU*, S. FLA. SUN SENTINEL (Sept. 15, 2020, 11:38 AM), https://www.sun-sentinel.com/sports/fau-owls/fl-sp-fau-willie-taggart-20200915-nvzt7txvevbexk6mr7zllc3774-story.html [https://perma.cc/4ZMB-EEK4]; Dennis Dodd, *Mario Cristobal has been fighting all his life; now he's doing it for the Oregon Ducks*, CBS SPORTS (Sept. 18, 2018, 11:34 AM), https://www.cbssports.com/college-football/news/mario-cristobal-has-been-fighting-all-his-life-now-hes-doing-it-for-the-oregon-ducks/ [https://perma.cc/R4DP-RVN7].

64. *Id.*

In 2020, the West Coast Conference (WCC) became the first conference to adopt a rule mandating diverse consideration in hiring decisions.[65] The "Russell Rule," named after legendary basketball Hall of Famer Bill Russell, requires that "each school within the WCC will have to include 'a member of a traditionally underrepresented community' in its final pool of candidates when hiring for key positions.[66] This includes head coaches and assistant coaches as well as athletic director and senior administrator positions."[67] This development shows that it may be the conferences that are in the perfect position to take action through legislative measures.

Finally, federal legislative action may be on the table as an option to stir change. Though no legislative end came of the 2007 Congressional hearing on the subject, its mere occurrence might hint at the possibility of future action. Especially, given the current state of collegiate athletics and the propensity for federal intervention—now might be the perfectly poised time to lobby Congress and show that over a decade since they last reviewed the issue, it remains.

CONCLUSION

The NCAA constitution claims to aim for an inclusive and equitable culture,[68] but it cannot both maintain this claim and stand idly by as the age-old problem rages on. In the interim, an alternative actor must be identified and selected to implement the long-awaited change to balance the playing field. Whether it be the individual institutions, private action, or a legislative change, two things are certain: the time for change is now and there will be no success without a social backing of the cause. Thus, whether immediate action can be taken or not—one key action step to remain at the forefront of the battle to parity must never be forgotten. Summarized best by the late Myles Brand, we must never stop "call[ing] attention to these problem areas . . . ."

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65. Adam Rittenberg, *No Action from NCAA Committee on Pair of Minority Hiring Policies* ESPN (Nov. 13, 2020), https://www.espn.com/college-sports/story/_/id/30312570/no-action-ncaa-committee-pair-minority-hiring-policies.

66. *Id*.

67. Rob Goldberg, *West Coast Conference Adopts the 'Russell Rule' for Diversity Hiring Commitment*, BLEACHER REP. (Aug. 3, 2020), https://bleacherreport.com/articles/2902891-west-coast-conference-adopts-the-russell-rule-for-diversity-hiring-commitment#:~:text=West%20Coast%20Conference%20Adopts%20the%20'Russell%20Rule'%20for%20Diversity%20Hiring%20Commitment,-Rob%20Goldberg%20Invalid&text=Similar%20to%20the%20%22Rooney%20Rule,when%20hiring%20for%20key%20positions [https://perma.cc/SWC8-ACZW].

68. Ortega et al., *supra* note 42, at 1.

TRADEMARKING VIRTUAL GOODS IN THE METAVERSE: JUST BECAUSE YOU CAN'T TOUCH THEM DOESN'T MEAN THEY AREN'T REAL

Ryan S. Hilbert[*]

INTRODUCTION

The idea of the "metaverse" has been percolating in popular culture for many years. In the 1992 novel "Snow Crash," author Neal Stephenson first coined the term to describe a three-dimensional virtual world in which people interacted through the use of digital avatars.[1] Thereafter, the concept of the metaverse appeared in numerous books and movies,[2] including, perhaps most notably, in Ernest Cline's 2011 novel "Ready Player One," which Steven Spielberg adapted into a big-budget movie in

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1. Tom Huddleston Jr., *This 29-year-old book predicted the 'metaverse' — and some of Facebook's plans are eerily similar*, CNBC (Nov. 3, 2021), https://www.cnbc.com/2021/11/03/how-the-1992-sci-fi-novel-snow-crash-predicted-facebooks-metaverse.html [https://perma.cc/3UAH-7PMC]; WIKIPEDIA, *Metaverse*, https://en.wikipedia.org/wiki/Metaverse [https://perma.cc/LB2W-NWC4] (last visited Feb. 3, 2022, 11:11 GMT).

2. Jon Radoff, *Books about the Metaverse*, MEDIUM (June 24, 2021), https://medium.com/building-the-metaverse/books-about-the-metaverse-b73f033f98f4 [https://perma.cc/D3GW-F2TW]; Jon Radoff, *Movies About the Metaverse*, MEDIUM (July 14, 2021), https://medium.com/building-the-metaverse/movies-about-the-metaverse-a0797323e7f6 [https://perma.cc/9EQH-2V2Z].

2018.[3] Even the 2021 movie "Free Guy" starring Ryan Reynolds invoked the idea of the metaverse, if only to show what it was not but could become.[4]

A lot has changed since 1992. What was once merely an idea fomenting in Neal Stephenson's mind has not only become a reality of sorts, it has the potential to create a market opportunity worth hundreds of billions of dollars. In December 2021, Bloomberg estimated that revenues from the metaverse could approach $800 billion by 2024, nearly half of which could be attributed to makers of online game makers and gaming hardware.[5] Some of the world's biggest brands are even trying to cash in on the action. In March 2021, it was reported that Facebook had almost 10,000 employees—around a fifth of its total staff—working on augmented and virtual reality devices.[6] In fact, Facebook's CEO, Mark Zuckerberg, is so convinced that the metaverse will become the next major internet innovation, that in October 2021 he announced that Facebook was changing its company name to simply "Meta."[7]

Unsurprisingly, those in the sports industry have also indicated a willingness to exploit the incredible potential of the metaverse. Many of these participants are focused on the ways in which the metaverse may lead to a better or different viewing experience for live sporting events.[8] Indeed, in January 2022, it was reported that the Brooklyn Nets had filed several federal trademark applications suggesting that the team had a "potential interest in broadcasting—or at least replaying—games in the

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3. Charlie Fink, *The Reality Of Virtual Reality In 'Ready Player One'*, WIRED (Oct. 23, 2017), https://www.forbes.com/sites/charliefink/2017/10/23/the-reality-of-virtual-reality-in-ready-player-one/?sh=286e134d20d0 [https://perma.cc/39V5-MG8J].

4. Angela Watercutter, *Free Guy Sees the Metaverse Through Rose-Colored Glasses*, WIRED (Aug. 13, 2021), https://www.wired.com/story/free-guy-ai-metaverse-review/ [https://perma.cc/WM55-Q8BN].

5. Matthew Kanterman & Nathan Naidu, *Metaverse may be $800 billion market, next tech platform*, BLOOMBERG INTELLIGENCE (Dec. 1, 2021), https://www.bloomberg.com/professional/blog/metaverse-may-be-800-billion-market-next-tech-platform/ [https://perma.cc/YF6X-NY Y6].

6. Eoin Connolly, *Into the metaverse: What is it and what does it mean for the sport industry?*, SPORTSPRO (Oct. 22, 2021), https://www.sportspromedia.com/from-the-magazine/metaverse-sports-industry-tech-ar-vr-unity-roblox-facebook-peter-moore/ [https://perma.cc/T5YW-SUYG].

7. Eddie Makuch, *Mark Zuckerberg Outlines His Vision For A Ready Player One-Like Metaverse And It Sounds Wild*, GAMESPOT (July 27, 2021), https://www.gamespot.com/articles/mark-zuckerberg-outlines-his-visio…r-a-ready-player-one-like-metaverse-and-it-sounds-wild/1100-6494443/ [https://perma.cc/GKU4-NWFL]; Salvador Rodriguez, *Facebook changes company name to Meta*, CNBC (Oct. 28, 2021), https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html [https://perma.cc/QH2T-R9RT].

8. Connolly, *supra* note 6; Sponsored Content, *What does the metaverse mean for sport?*, SPORTBUSINESS (Nov. 22, 2021), https://www.sportbusiness.com/2021/11/what-does-the-metaverse-mean-for-sport/ [https://perma.cc/Q2HE-JGRE].

metaverse's virtual worlds."[9] Others, however, are interested in the possibility of selling branded versions of their goods virtually.[10] This leads to the subject of trademarks.

Over the last several months, many of the world's largest brands—including footwear and apparel companies like Adidas, Nike and New Balance—have filed a series of trademarks suggesting that they will soon offer virtual versions of their goods in the metaverse.[11] Not to be outdone, several professional athletes also have followed suit. As more and more brands and athletes seek to ply their wares in the metaverse, it is inevitable that numerous legal issues will arise about protecting and enforcing trademarks for virtual goods.

For example, do one's trademark rights for tangible goods extend to the use of the same mark on virtual goods? Moreover, what impact, if any, does the first sale doctrine have on one's ability to advertise or resell goods in the metaverse? What rights, if any, does an artist who wishes to sell digital images incorporating another's brand in the metaverse possess? Well-known brands such as Nike and Hermès have already initiated lawsuits that could potentially answer some of these questions. But even as some questions are answered, it is likely that more will arise.

The purpose of this Essay is to discuss how brands are venturing into the metaverse particularly through the use of trademarks and to address some of the legal issues such brands may face. Section I of this Essay provides background information about the metaverse and discusses the ways in which brands are currently engaging consumers in the metaverse. Section II then focuses on the various trademarks filed by brands and professional athletes for virtual goods. Having laid the foundation, Section III then seeks to address a number of legal issues that have arisen recently in connection with brands in the metaverse.

I. UNDERSTANDING THE METAVERSE

A. *What is the Metaverse?*

Before one can discuss how to protect and enforce trademarks in the metaverse, it is necessary to understand what the metaverse is and how it operates. Put simply, the metaverse has been described as "a world of endless, interconnected virtual communities where people can meet, work and play, using virtual reality headsets, augmented reality glasses,

9. Randall Williams, *Into the Netaverse*, BOARDROOM (Jan. 24, 2021), https://boardroom.tv/brooklyn-nets-metaverse-trademark-netaverse/ [https://perma.cc/FJP7-XLW2].

10. Jamie Redman, *New Balance 'Virtual Goods' Trademarks Hint of Upcoming Metaverse and NFT Venture*, BITCOIN.COM (Feb. 5, 2022), https://news.bitcoin.com/new-balance-virtual-goods-trademarks-hint-of-upcoming-metaverse-and-nft-venture/ [https://perma.cc/U7TD-6X2V].

11. *Id.*

smartphone apps or other devices."[12] It has also been described as "persistent online worlds, where users can have shared experiences, often through virtual or augmented reality interfaces, allowing for richer immersion than existing online services."[13]

In some ways, the metaverse is like a more immersive version of the two-dimensional interactive worlds currently shared by the millions of people who play online games such as Fortnite.[14] One of the big differences, however, is that whereas people log on to Fortnite or to other popular online platforms like Roblox primarily to play games, the concept of the metaverse is more experiential and communal in nature. In the metaverse, "people can wander around with friends, visit buildings, buy goods and services, and attend events."[15] The goal is not simply to run around and shoot people for points.

Another difference between online platforms like Fortnite and Roblox, on the one hand, and the metaverse, on the other hand, is that "[m]any of the new [metaverse] platforms are powered by blockchain technology, using cryptocurrency and non-fungible tokens (NFTs), allowing a new kind of decentrali[z]ed digital asset to be built, owned and moneti[z]ed."[16] This difference is significant because it is these features that allow consumers to actually own and trade virtual goods—and even virtual land—in the metaverse.

Many believe that the advent of blockchain technology is one of the reasons why the metaverse has become so popular recently.[17] Indeed, it is the decentralized nature of blockchain technology that some suggest

12. Associated Press, *EXPLAINER: What Is the Metaverse and How Will It Work?*, U.S. NEWS (Oct. 28, 2021), https://www.usnews.com/news/business/articles/2021-10-24/explainer-what-the-metaverse-is-and-how-it-will-work [https://perma.cc/QM39-Z4JC].

13. Bernard Marr, *The Important Links Between NFTs, Blockchain, And The Metaverse*, BERNARD MARR & CO. (Nov. 30, 2021), https://bernardmarr.com/the-important-links-between-nfts-blockchain-and-the-metaverse/ [https://perma.cc/PD2R-VLUC].

14. John Herrman and Kellen Browning, *Are We in the Metaverse Yet?*, N.Y. TIMES (July 10, 2021), https://www.nytimes.com/2021/07/10/style/metaverse-virtual-worlds.html [https://perma.cc/FT47-LF28].

15. Joori Roh, *Factbox: What is the 'metaverse' and how does it work?*, REUTERS (Sept. 7, 2021), https://www.reuters.com/technology/what-is-metaverse-how-does-it-work-2021-09-08/ [https://perma.cc/U8G6-PSZQ].

16. *Id.*

17. Marr, *supra* note 13; Meagan Loyst, *The Metaverse: 101* (Jan. 4, 2022), MIRROR.XYZ, https://mirror.xyz/themeaganloyst.eth/kUmuLvRKFs6CimhFGVmlP7kBHPKCswPra_U05Clwncw [https://perma.cc/ME94-CTBD]; Fintelics, *IMPORTANCE OF BLOCKCHAIN FOR A METAVERSE TO EXIST*, MEDIUM (Jan. 20, 2022), https://fintelics.medium.com/importance-of-blockchain-for-a-metaverse-to-exist-61ac669a4e97 [https://perma.cc/N33Q-VQRW].

will eventually allow people to move freely between various virtual worlds, "eventually interconnecting to form the metaverse."[18]

To understand the role "blockchain" plays in the metaverse, one must first understand the meaning of "blockchain." As one commentator put it, "blockchain" is:

> [A] digital ledger that contains a growing list of records (or blocks) interconnected using cryptography techniques. Every block on the blockchain will have a cryptographic hash or mathematical algorithm describing the previous block on the chain, a timestamp for when the block was accessed/modified, and any other transaction data. As a result, the blockchain is immutable and is virtually impenetrable to fraud, as there is always an end-to-end record for transparency. The security of blockchain derives from the fact that it is powered by a peer-to-peer network. This means that the computing power for a block is shared across a public network, and every node on the network has a copy of the blockchain.[19]

There are several ways in which blockchain technology can be used in the metaverse. The most obvious use, however, is as the basis for cryptocurrencies.[20] A "[c]ryptocurrency is a purely digital currency or a digital asset that is traded only via online systems and the transactions are authenticated using a decentralized network on the blockchain."[21]

One of the appealing aspects about cryptocurrencies is transparency. Indeed, because "[a]ll transactions are visible to anybody on the internet," it is "exceedingly difficult to deceive or manipulate [the] dispersed recording system."[22] Another appealing aspect of cryptocurrencies is independence. Because cryptocurrencies are "completely untethered from real world fiat currencies, both in terms of value and physical form," they serve as a "convenient mode for payment and transactions in the virtual world."[23] The idea is for people to eventually use cryptocurrencies as a common source of currency throughout the metaverse.[24]

Some of the more popular and ubiquitous cryptocurrencies currently bought and sold by consumers are Bitcoin and Ethereum.[25] Some

18. Fintelics, *supra* note 20; *see generally* Anwesha Roy, *What is Blockchain and what does it have to do with the Metaverse?*, XR TODAY (Dec. 3, 2021), https://www.xrtoday.com/virtual-reality/what-is-blockchain-and-what-does-it-have-to-do-with-the-metaverse/ [https://perma.cc/SM57-8G82].

19. Roy, *supra* note 18.

20. *Id*.

21. *Id.*

22. Fintelics, *supra* note 18.

23. Roy, *supra* note 18.

24. Fintelics, *supra* note 18.

25. Roy, *supra* note 18.

cryptocurrencies, however, are specific to certain virtual worlds. In an online platform called The Sandbox, for example, users can use the SAND cryptocurrency to buy and sell assets—including land—and play games.[26] In fact, in November 2021, it was reported that The Sandbox had already sold more than $144 million in gross merchandise value for its land with over 12,000 virtual land owners, including rapper Snoop Dogg.[27] In another online platform called Decentraland, the native cryptocurrency is called MANA.[28] As in The Sandbox, users in Decentraland can use Decentraland's native cryptocurrency to buy and sell virtual land.[29] Coincidentally, in the same month the value of land in The Sandbox was reported, it also was reported that a single user had spent 618,000 MANA—which was around $2.4 million at the time—to buy a single patch of virtual real estate in Decentraland.[30]

Another perhaps equally important way in which blockchain technology can be used in the metaverse is through non-fungible tokens (NFTs.) "Put as simply as possible, NFTs are tokens that live on a blockchain and can be used to prove ownership of connected digital assets."[31] "Nonfungible objects, in contrast to fungible items such as currency, are one of-a-kind and cannot be replaced."[32] Though NFTs have frequently been used in connection with digital art like paintings and music, they can essentially apply to anything, including digital avatars, game assets and real estate.[33] One benefit to NFTs is that they "can be used to prove that someone is the rightful owner of a particular object."[34] Another benefit is that such "[a]ssets would remain completely undamaged even if the user quit the game, the game was deleted, or there is an adverse event in the metaverse."[35]

Having explained what the metaverse is and how it operates—including the significant role blockchain has played and can play in the metaverse—the next section will discuss some of the ways in which brands are currently engaging in the metaverse.

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26. Felicia Hou, *How to shop in the metaverse: The cryptocurrencies you'll need to buy, and how to get them*, FORTUNE (Dec. 10, 2021), https://fortune.com/2021/12/10/metaverse-shopping-cryptocurrency/ [https://perma.cc/C2AH-PDFK].

27. Dean Takahashi, *SoftBank invests $93M in The Sandbox's 'metaverse' game*, VENTUREBEAT (Nov. 2, 2021), https://venturebeat.com/2021/11/02/softbank-invests-93m-in-the-sandboxs-nft-game-platform/ [https://perma.cc/8HEV-PFFC].

28. Hou, *supra* note 26.

29. *Id.*

30. Elizabeth Howcroft, *Virtual real estate plot sells for record $2.4 million*, REUTERS (Nov. 23, 2021), https://www.reuters.com/markets/currencies/virtual-real-estate-plot-sells-record-24-million-2021-11-23/ [https://perma.cc/X5GF-YB7E].

31. Marr, *supra* note 13.

32. Fintelics, *supra* note 18.

33. Marr, *supra* note 13; *See also* Roh, *supra* note 15.

34. Marr, *supra* note 13.

35. Roy, *supra* note 21.

B. *How Are Brands Engaging in the Metaverse?*

Even though the concept of the metaverse as an immersive three-dimensional universe of interlocking worlds is still evolving, this has not stopped a number of brands from trying to exploit its potential. One way brand owners have tried to engage with consumers in the metaverse is by offering unique digital versions of their goods as NFTs through online games and marketplaces. Perhaps the best example of this is Dolce & Gabana (D&G), which, on September 30, 2021, sold a nine-piece collection of NFTs auctioned alongside some physical couture for approximately $5.7 million.[36] Though the D&G pieces were allegedly purchased by several NFT collectors primarily for investment purposes,[37] it was later reported that the person who bought a digital dress from a completely different designer for approximately $9,500 then gifted the dress to his wife so that she could "wear" it on social media.[38]

Another way brand owners are trying to engage with consumers in the metaverse is by partnering with existing online ecosystems to open their own virtual storefronts. For example, in September 2021, Vans announced that it had partnered with Roblox to create Vans World, an interactive in-game experience where users could skateboard in virtual skate parks and "buy custom parts for their skateboards including decks and wheels, as well as apparel such as customizable Vans sneakers."[39] In November 2021, Nike announced that it had partnered with Roblox to create a virtual world called Nikeland.[40] Not only can visitors to Nikeland play "classic games with a fresh twist," they can also browse the online showroom of virtual Nike shoes, clothes, and accessories and even obtain a "free exclusive Nike cap and backpack" that can be taken anywhere in

36. Cathy Hackl, *Accessorizing The Metaverse With Luxury AR Wearable NFTs*, FORBES (Jan. 2, 2022), https://www.forbes.com/sites/cathyhackl/2022/01/02/accessorizing-the-metaverse-with-luxury-ar-wearable-nfts/?sh=1e137ef412a6 [https://perma.cc/S759-5E84].

37. Zofia Zwieglinska, *What makes the D&G NFT different from the rest?*, GLOSSY (Oct. 15, 2021), https://www.glossy.co/fashion/what-makes-the-dg-nft-different-from-the-rest/ [https://perma.cc/4FYP-GLLW].

38. Mark Ellwood, *Luxury Brands Are Already Making Millions in the Metaverse*, BLOOMBERG (Dec. 9, 2021), https://www.bloomberg.com/news/articles/2021-12-09/luxury-fashion-brands-are-already-making-millions-in-the-metaverse [https://perma.cc/ND8Q-WM3T].

39. Brett Molina, *Shoe company Vans launching 'Vans World' within Roblox as part of metaverse push*, USA TODAY (Sept. 1, 2021), https://www.usatoday.com/story/tech/gaming/2021/09/01/vans-world-roblox-new-hub-metaverse/5678718001/ [https://perma.cc/Y76F-PMLU].

40. Jessica Golden, *Nike teams up with Roblox to create a virtual world called Nikeland*, CNBC (Nov. 18, 2021), https://www.cnbc.com/2021/11/18/nike-teams-up-with-roblox-to-create-a-virtual-world-called-nikeland-.html [https://perma.cc/25CS-9M3D].

Roblox.[41] Brands such as Forever 21,[42] Ralph Lauren[43] and Tommy Hilfiger[44] have also announced their own partnerships with Roblox.

The number of brands seeking to engage with consumers in the metaverse has become so pervasive that some have even resorted to purchasing virtual land on certain online platforms from which to better offer their goods and services. In February 2022, for example, it was reported that Gucci, almost nine months removed from its two-week popup on Roblox where a digital version of its Dionysus Bag was later resold for almost $4,100 (thereby exceeding the price of the real world bag),[45] had purchased an undisclosed amount of land in The Sandbox for a new interactive experience called Gucci Vault.[46] Though Gucci refused to provide more details at the time, The Sandbox said that "select metaverse fashion items created by Gucci designers will be available for people to buy, own and use in their own Sandbox experience."[47] Gucci also joins Adidas—which was reported to have acquired its own plot of virtual land in December 2021—in The Sandbox.[48]

Even brands in the more traditional banking and legal industries are beginning to purchase land in the metaverse from which they can presumably render services virtually. On February 15, 2022, JP Morgan announced that it had "become the first lender to arrive in the metaverse, having opened a lounge in Decentraland . . . ."[49] Two days later on

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41. *Nikeland*, Roblox, https://www.roblox.com/nikeland [https://perma.cc/5CHN-XLV7] (last visited Feb. 10, 2022).

42. Robin Driver, *Forever 21 launches shop management simulator on Roblox*, FASHION NETWORK (Dec. 21, 2021), https://us.fashionnetwork.com/news/Forever-21-launches-shop-management-simulator-on-roblox,1363431.html [https://perma.cc/FBQ7-Q2JC].

43. Robin Driver, *Ralph Lauren unveils holiday experience and digital fashion collection on Roblox*, FASHION NETWORK (Dec. 9, 2021), https://ww.fashionnetwork.com/news/Ralph-lauren-unveils-holiday-experience-and-digital-fashion-collection-on-roblox,1360193.html [https://perma.cc/6W9B-2N5N].

44. AFP-Relaxnews, *Tommy Hilfiger has created a virtual clothing collection for Roblox*, FASHION NETWORK (Dec. 16, 2021), https://ww.fashionnetwork.com/news/Tommy-hilfiger-has-created-a-virtual-clothing-collection-for-roblox,1362598.html [https://perma.cc/X6P8-7ZWG].

45. Colleen Barry, *Gucci digitally outfits Gen-Z in metaverse foray with Roblox*, USA TODAY (June 9, 2021), https://www.usatoday.com/story/tech/gaming/2021/06/09/gucci-meets-roblox-designer-rolls-out-digital-only-collection/7616940002/ [https://perma.cc/FGR6-JAEN].

46. Maghan McDowell, *Gucci plans virtual world for Gen Z on The Sandbox*, VOGUE BUS. (Feb. 9, 2022), https://www.voguebusiness.com/technology/gucci-plans-virtual-world-for-gen-z-on-sandbox [https://perma.cc/YS3U-RJYM].

47. *Id.*

48. Dean Takahashi, *Adidas Originals launches NFTs and buys a plot in the Sandbox metaverse*, VENTUREBEAT (Dec. 15, 2021), https://venturebeat.com/2021/12/15/adidas-originals-launches-nft-drop-and-buys-a-plot-in-the-sandbox-metaverse/ [https://perma.cc/A7ZR-WHEZ].

49. Ian Allison, *JPMorgan Is the First Bank Into the Metaverse, Looks at Business Opportunities*, COINDESK (Feb. 15, 2022), https://www.coindesk.com/business/2022/02/15/jpmorgan-is-the-first-bank-into-the-metaverse-looks-at-business-opportunities/ [https://perma.cc/S9ZR-Y4G8].

February 17, 2022, law firm Arent Fox announced that it was "opening a virtual office in the metaverse in the fashion and retail district" of Decentraland, thereby making it "the first major law firm to open in the metaverse."[50] One suspects that there will be even more self-proclaimed "firsts" in the coming months.

As the potential for the metaverse continues to grow, it is likely that more and more brands will continue to experiment with new ways to engage consumers in the metaverse. Indeed, considering that there are no raw materials to buy to make digital goods, and labor is minimal, the margins for such goods can be huge.[51] And if this was not enticing enough, "the limitations normally imposed by market practicalities—or even gravity or logic—are gone."[52] As one commentator put it, "[a]ny company with decades of archival designs can convert that intellectual property into a new revenue stream, reissuing pieces as metaverse-only."[53] This means that even "[d]efunct brands can have a new virtual life with minimal investment . . . ."[54] Most brands are not going to be able to ignore the possibilities.

As further proof that brands are committed to exploiting the metaverse, one need only consider the number and type of brands that have already filed federal trademark applications with the U.S. Patent & Trademark Office (USPTO) for metaverse-related goods and services. The next section will discuss these trademark filings in more detail.

II. TRADEMARKS IN THE METAVERSE

The number of federal trademark applications filed by brands for metaverse-related goods and services seems to be increasing in frequency every day. Many of these applications have been filed by footwear and apparel companies for "virtual goods," "non-fungible tokens (NFTs)," or both in connection with their products. For example, among the numerous "metaverse-related" applications currently pending before the USPTO are applications to register the marks NIKE & Design,[55] NEW BALANCE,[56] SKECHERS,[57] FOREVER 21,[58] POTTERY BARN,[59]

50. Debra Cassens Weiss , *Major law firm buys property in the metaverse and opens virtual office*, ABA J. (Feb. 17, 2022), https://www.abajournal.com/news/article/major-law-firm-buys-property-in-the-metaverse-and-opens-virtual-office https://perma.cc/L982-JA2P].

51. Ellwood, *supra* note 38.

52. *Id.*

53. *Id.*

54. *Id.*

55. U.S. Trademark Application Serial No. 97096366 (filed Oct. 27, 2021) .

56. U.S. Trademark Application Serial No. 97217308 (filed Jan. 13, 2022) .

57. U.S. Trademark Application Serial No. 97227587 (filed Jan. 19, 2022) .

58. U.S. Trademark Application Serial No. 97242059 (filed Jan. 27, 2022) .

59. U.S. Trademark Application Serial No. 97231081 (filed Jan. 21, 2022) .

CHACO,[60] VICTORIA'S SECRET,[61] and KIEHL'S.[62]

Even non-apparel-related brands are attempting to expand into the metaverse. For example, soon after the company behind the MIRACLE-GRO garden products filed an application to register its mark MIRACLE-GRO & Design for "downloadable virtual goods, namely, computer programs featuring grass seed [and] fertilizer . . . for use online and in online virtual worlds,"[63] that same company also filed an application for TOMCAT & Design for virtual rodent traps.[64] And in the event one's digital avatar accidentally injures itself while placing traps, on March 11, 2022, Johnson & Johnson filed a trademark application to register its BAND-AID mark for "virtual wound care and first-aid products," among other goods and services.[65]

And lest one's digital avatar need something to do after "fertilizing" their virtual land with virtual fertilizer or laying out virtual rodent traps, Spin Master Ltd. filed an application on January 17, 2022 for the mark ETCH A SKETCH for, among other goods, "downloadable virtual goods, namely, computer programs featuring toys and games for use online and in online virtual worlds."[66] There is even an abundance of virtual reading material; currently pending before the USPTO are applications for BON APPETIT,[67] WIRED,[68] VANITY FAIR,[69] VOGUE[70] and GQ, all for various metaverse-related goods.[71]

Just as there appears to be a need for virtual fertilizer, virtual mousetraps, virtual bandages, and virtual reading material, it also appears that digital avatars apparently need digital food. Thus, it was reported in February 2022 that McDonald's had filed a series of federal trademark applications suggesting that it, too, intended to expand into the metaverse.[72] Among these filings is an application dated February 4, 2022

60. U.S. Trademark Application Serial No. 97254456 (filed Feb. 4, 2022) .

61. U.S. Trademark Application Serial No. 97257455 (filed Feb. 8, 2022) .

62. U.S. Trademark Application Serial No. 97255989 (filed Feb. 7, 2022) .

63. U.S. Trademark Application Serial No. 97246062 (filed Jan. 31, 2022) .

64. U.S. Trademark Application Serial No. 97255945 (filed Feb. 7, 2022) .

65. Cindy Tan, *Metaverse is Coming to Chuck Norris and it Needs a Band-Aid*, NFT GATORS (Mar. 16, 2022), https://www.nftgators.com/metaverse-is-coming-to-chuck-norris-and-it-needs-a-band-aid/ [https://perma.cc/56VJ-Y69N].

66. U.S. Trademark Application Serial No. 97223677 (filed Jan. 17, 2022) .

67. U.S. Trademark Application Serial No. 97183973 (filed Dec. 22, 2021) .

68. U.S. Trademark Application Serial No. 97183972 (filed Dec. 22, 2021) .

69. U.S. Trademark Application Serial No. 97183969 (filed Dec. 22, 2021) .

70. U.S. Trademark Application Serial No. 97183966 (filed Dec. 22, 2021) .

71. U.S. Trademark Application Serial No. 97183967 (filed Dec. 22, 2021) .

72. Mason Bissada, *McDonald's Files Trademark For Metaverse-Based 'Virtual Restaurant'*, FORBES (Feb. 9, 2022), https://www.forbes.com/sites/masonbissada/2022/02/09/mcdonalds-files-trademark-for-metaverse-based-virtual-restaurant/?sh=516f7fbc6678 [https://perma.cc/VG97-NF2R].

to register the mark MCDONALD'S[73] that includes "operating a virtual restaurant featuring actual and virtual goods." This, of course, follows Panera's application dated one day earlier, February 3, 2022, to register the mark PANERAVERSE[74] for a variety of virtual goods and virtual restaurants. Notably, both McDonald's and Panera's trademark filings suggest that users will be able to order food from a virtual restaurant in the metaverse and then have it delivered to them in the real world.[75] With advantages such as this, it is not hard to imagine that more restaurant chains follow.

Not even professional athletes are immune to the lure of the metaverse. Several months after Shaquille O'Neal (in partnership with Authentic Brands Group) filed applications to register SHAQ[76] for virtual goods,[77] it was reported that the estate of Kobe Bryant had filed applications to register KOBE BRYANT,[78] MAMBA FOREVER[79] and MAMBACITA[80] for similar goods.[81] Several active NBA players also have expressed a desire to expand into the metaverse through trademark filings as well. On June 11, 2021, NBA superstar Luka Doncic presciently filed an application to register an eponymous mark[82] for a variety of virtual goods. Moreover, in the last several months alone, both future NBA Hall of Famer LeBron James[83] and reigning NBA Rookie of the Year LaMelo Ball[84] filed their own applications for various virtual goods related to the metaverse.

In a now-decade-old article about the proliferation of trademark filings among professional athletes, it was said that one of the main reasons professional athletes had been increasingly turning to trademark

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73. U.S. Trademark Application Serial No. 97253179 (filed Feb. 4, 2022) .

74. U.S. Trademark Application Serial No. 97251535 (filed Feb. 3, 2022) .

75. Bissada, *supra* note 72.

76. U.S. Trademark Application Serial No. 97184867 (filed Dec. 22, 2021) .

77. Shoshy Ciment, *Virtual Footwear Could Be Up Next for Shaquille O'Neal and Other ABG Brands, Trademark Filings Indicate*, FOOTWEAR NEWS (Jan. 12, 2022), https://footwearnews.com/2022/business/athletic-outdoor/shaquille-o-neal-trademark-metaverse-abg-1203228454/ [https://perma.cc].

78. U.S. Trademark Application Serial No. 97244916 (filed Jan. 28, 2022) .

79. U.S. Trademark Application Serial No. 97244877 (filed Jan. 28, 2022) .

80. U.S. Trademark Application Serial No. 97244917 (filed Jan. 28, 2022) .

81. Jeff Pratt, *NFT News: Kobe Bryant to Enter the Metaverse*, DRAFTKINGS (Feb. 4, 2022), https://dknation.draftkings.com/playbook/22918115/nft-news-kobe-bryant-estate-to-enter-the-metaverse-mamba-mambacita-nba-web3-crypto [https://perma.cc/_].

82. U.S. Trademark Application Serial No. 90768512 (filed June 11, 2021) .

83. Jonathan Sherman, *Report: LeBron James files for 4 trademarks indicating plans for the metaverse*, LAKERS DAILY (Mar. 9, 2022), https://lakersdaily.com/report-lebron-james-indicates-plans-for-the-metaverse-after-filing-for-4-trademarks/ [https://perma.cc/K562-DLQS].

84. Bernadette Doykos, *LaMelo Ball Pulls Up to the Metaverse*, BOARDROOM (Feb. 21, 2022), https://boardroom.tv/lamelo-ball-trademark-fi ling-metaverse/ [https://perma.cc/2G2X-PAR5].

protection for those phrases, slogans or nicknames with which they were associated was "for economic reasons."[85] Jaia Thomas, an intellectual property (IP) attorney, said at the time:

> [Athletes] don't want other companies, other individuals, making a profit off of [his or her] name or [his or her] logo or [his or her] brand, so it's extremely important for athletes to rush to secure all the IP rights so others don't make a profit off of them. It's also good just in terms of brand building. As athletes start to build their brand it's good to start to protect their individual property rights as soon as possible.[86]

It appears that not much has changed in the past ten years. Professional athletes continue to be proactive about protecting their intellectual property rights, this time in the metaverse.

Having now discussed which brands have filed for which marks in the metaverse, the next section will address some of the legal issues one might encounter in the course of protecting and enforcing one's marks in the metaverse.

III. PROTECTING AND ENFORCING TRADEMARKS IN THE METAVERSE

As the above examples make clear, many companies are already seeking to protect their brands in the metaverse by filing federal trademark applications. And if recent history is any guide, it is likely that the number of brands filing federal trademark applications for metaverse-related goods and services will only increase.

Of the 1,792 live marks that include the two-word term "virtual goods" in the goods or services description and that were pending before or registered by the USPTO as of February 13, 2022,[87] nearly half—i.e., 993 marks—were filed since August 1, 2021,[88] including 629 since December 1, 2021 alone.[89] Perhaps more notably, 1,206 of these 1,792

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85. Doug Williams, *Athletes trademarking the phrase that pays*, ESPN (July 13, 2012), https://www.espn.com/blog/playbook/fandom/post/_/id/6108/athlete-trademarks-becoming-commonplace [https://perma.cc/HF9N-BGV8].

86. *Id.*

87. These marks were identified using the "Word and/or Design Mark Search (Free Form)" search option in the USPTO's Trademark Electronic Search System (TESS) at http://tmsearch.uspto.gov. The precise search phrase, which was entered on February 13, 2022, was ("virtual goods") [GS] and (live)[LD].

88. Search for Number of Results. USPTO TESS. http://tmsearch.uspto.gov. The precise search phrase for this search, which was entered on February 13, 2022, was ("virtual goods") [GS] and (live)[LD] and `FD > "20210801".

89. Search for Number of Results. USPTO TESS. http://tmsearch.uspto.gov. The precise search phrase for this search, which was entered on February 13, 2022, was ("virtual goods") [GS] and (live)[LD] and `FD > "20211201".

live marks[90]—and 564 of the 629 filed since December 1, 2021[91]—currently list Section 1B of the Trademark Act as the filing basis. Considering that Section 1B typically applies only to those marks that are not currently in use but for which one has "a bona fide intention to use" the mark at some point in the future,[92] this suggests that many brands are still trying to figure out (or at least have yet to implement) their strategy for the metaverse. It also suggests that many brands would rather take a chance and file for marks they might never use than risk missing out on the next big thing. On February 9, 2022, Josh Gerben, a Washington, D.C.-based trademark attorney, said in Forbes: "I think you're going to see every brand that you can think of make these filings within the next 12 months. I don't think anyone wants to be the next Blockbuster and just completely ignore a new technology that's coming."[93]

Yet another reason for why brands are filing so many applications on an "intent to use" basis may be because of the inherent uncertainties in registering marks for the metaverse. One attorney, for example, believes that because the USPTO has not yet provided any guidance as to "what actual categories of goods or services in its system would match the actual or virtual use that would be provided by the trademark applicant as a specimen of use," there is a "real possibility" that one's filings would be rejected as being in the wrong class (i.e., category) or with an incurably inaccurate goods or services description.[94] Jeff Trexler, associate director of Fordham University's Fashion Law Institute, even thinks "[r]evisions allowing for a separate class for digital goods is likely . . . ."[95] Though such concerns are well-taken, the reality is that such concerns are likely not affecting one's trademark filing strategy, at least materially. This is especially the case considering that over a hundred marks for "virtual

90. Search for Number of Results. USPTO TESS. http://tmsearch.uspto.gov. The precise search phrase for this search, which was entered on February 13, 2022, was ("virtual goods") [GS] and (live)[LD] and 1B[CB].

91. Search for Number of Results. USPTO TESS. http://tmsearch.uspto.gov. The precise search phrase for this search, which was entered on February 13, 2022, was ("virtual goods") [GS] and (live)[LD] and `FD > "20211201" and 1B[CB].

92. *Basis*, U.S. PATENT & TRADEMARK OFFICE, https://www.uspto.gov/trademarks/apply/basis [https://perma.cc/2GCS-U8Z9].

93. Bissada, *supra* note 72.

94. Marc Reiner, *PROTECTING TRADEMARKS IN THE METAVERSE – WHAT CAN BE DONE?*, Hand Baldachin & Associates LLP (Jan. 14, 2022), https://hballp.com/protecting-trademarks-in-the-metaverse-–-what-can-be-done [https://perma.cc/C5SS-NMMX].

95. Maghan Mcdowell, *How to trademark the metaverse*, VOGUE BUS. (Jan.11, 2022), https://www.voguebusiness.com/technology/how-to-trademark-the-metaverse [https://perma.cc/R5DF-4749].

goods" have already been registered by the USPTO since January 1, 2020 alone.[96]

The greater concern among brands that are looking to venture into the metaverse is likely the scope of one's rights to his or her marks, especially as they relate to the first sale doctrine and the First Amendment. To date, many of the intellectual property disputes related to the metaverse have been NFT controversies involving copyright infringement allegations.[97] For example, in November 2021, film studio Miramax sued director Quentin Tarantino (primarily) for copyright infringement in connection with the latter's "announced plans to auction off seven 'exclusive scenes' from the 1994 motion picture Pulp Fiction in the form of NFTs."[98] But two more recent actions involving trademark law are the ones most brands are watching.

One of the most closely-watched cases—and "the first major example of a brand taking action against the unauthorized use of its trademarks in the virtual world"—involves fashion designer Hermès and digital artist Mason Rothschild.[99] Hermès has accused Mr. Rothschild of violating the former's rights to its BIRKIN mark, which Hermès uses in connection with a well-known tote bag.[100] It is important to note that Mr. Rothschild is not making counterfeit BIRKIN bags or any tangible items for that matter.[101] Instead, Mr. Rothschild created a viral line of digital images depicting tote bags—which he conspicuously titled "MetaBirkins"—and then sold as NFTs.[102] Clearly unhappy with this, Hermès filed a lawsuit against Mr. Rothschild in the Southern District of New York for trademark infringement and trademark dilution.[103] Mr. Rothschild

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96. Search for Number of Results. USPTO TESS. http://tmsearch.uspto.gov. According to a search conducted on February 14, 2022, there were 123 marks with the words "virtual goods" in the goods or services description registered by the USPTO. These marks were identified using the "Word and/or Design Mark Search (Free Form)" search option in the USPTO's Trademark Electronic Search System (TESS) at http://tmsearch.uspto.gov. The precise search phrase was ("virtual goods")[GS] and (live)[LD] and `RD > "20200101".

97. Adi Robertson, *Nike is testing NFT trademark law by suing a sneaker reseller*, THE VERGE (Feb. 10, 2022), https://www.theverge.com/2022/2/10/22925252/nike-stockx-shoe-lawsuit-vault-nft-trademark-infringement [https://perma.cc/U47E-Q2C9].

98. *Miramax v. Tarantino Joins a Growing List of NFT Lawsuits*, THE FASHION L. (Nov. 17, 2021), https://www.thefashionlaw.com/miramax-v-tarantino-joins-a-growing-list-of-nft-lawsuits/ [https://perma.cc/4L6T-2HBQ].

99. *What Do Brands Stand to Gain in Fights Over Their Marks in the Metaverse?*, THE FASHION L. (Jan. 20, 2022), https://www.thefashionlaw.com/hermes-names-metabirkins-creator-in-trademark-lawsuit/ [hereinafter *Brands*][https://perma.cc/T9QN-DRGM].

100. *Explained: Why Hermès is suing American digital artist over MetaBirkins NFTs*, THE INDIAN EXPRESS (Jan. 24, 2022), https://indianexpress.com/article/explained/hermes-lawsuit-metabirkins-mason-rothschild-nft-7736973/ [https://perma.cc/TVM3-UJ9P].

101. *Id.*

102. *Id.*

103. *Id.*

responded to the lawsuit by seeking dismissal of all of Hermès' claims based primarily on the First Amendment.[104]

The dispute between Hermès and Mr. Rothschild raises a number of interesting issues concerning trademarks in the metaverse. For example, it is worth noting that at least as of January 2022, Hermès was neither operating in the metaverse nor, unlike many of the brands discussed above, indicated an intent to do so by filing a federal trademark application for the BIRKIN mark for any metaverse-related goods or services.[105] This begs the question: Should Hermès be able to rely on its trademark rights to BIRKIN for tangible goods against the maker of virtual goods? Assuming that it can—which is likely the case—this leads to the next question: Are consumers likely to confuse Hermès' use of its BIRKIN mark for tangible goods in the real world with the use of the same or a similar mark for virtual goods in the metaverse?

In some cases—such as when Nike offers virtual goods in the form of a "free exclusive Nike cap and backpack" that can be taken anywhere in Roblox[106]—it is likely that consumers would believe that certain goods or services in the metaverse are associated with their real-world analogue. This is especially true given the increasing rate by which real world brands are indicating their plans for the metaverse either through press releases, news reporting or even the mere filing of trademark applications. In other cases, however, consumers might justifiably assume that a particular brand does not intend to offer goods or services in the metaverse perhaps because of its silence on its plans or because of other factors, such as non-overlapping consumer demographics. If this occurs, consumers are less likely to believe that the provider of the virtual goods is associated or affiliated with the owner of the tangible goods.

Further complicating an analysis of the dispute between Hermès and Mr. Rothschild is the fact that the latter is offering "artistic renderings" of Hermès tote bags called "MetaBirkins" as NFTs, not literal depictions of the goods themselves using the mark BIRKIN. This is akin to one offering artistic renderings of Nike's shoes in Roblox under the name "MetaNike" instead of literal depictions of footwear using the mark NIKE. While the latter are likely to be associated with Nike, the link between Nike and the former arguably becomes more tenuous.

Putting aside the issue of likelihood of confusion, there also is the question as to whether Mr. Rothschild's alleged use of the BIRKIN mark in NFTs is protected by the First Amendment. Where, as in the case of Mr. Rothschild, one invokes the First Amendment as a defense to a claim

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104. *MetaBirkins Creator Aims to Get Hermès Lawsuit Tossed Out*, THE FASHION L. (Feb. 10, 2022), https://www.thefashionlaw.com/metabirkins-creator-aims-to-get-hermes-lawsuit-tossed-out/ [https://perma.cc/WA83-4CVF].

105. *Brands*, *supra* note 99.

106. *See supra* Section II.B.

for trademark infringement, most courts apply the test set forth by the Second Circuit in *Rogers v. Grimaldi*.[107] In that case, the Second Circuit held that an artistic work's use of a trademark that otherwise would violate the Lanham Act is not actionable "unless the [use of the mark] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless [it] explicitly misleads as to the source or the content of the work."[108] In this situation, the key will be whether Mr. Rothschild will be able to show the second element—namely, that consumers are not explicitly misled—which could be a close question in light of Hermès current relationship to the metaverse (or lack thereof).

Mr. Rothschild has already indicated that he intends to rely on the test in *Rogers v. Grimaldi* as one of the primary bases for his First Amendment defense.[109] Though it is too soon to predict whether he will be successful, needless to say, a result in favor of either party could have major ramifications about the scope of one's trademark rights in the metaverse.

Another closely-watched case regarding trademarks in the metaverse involves Nike and StockX, "a reseller for streetwear, bags, and sneakers, among other items."[110] On February 3, 2022, Nike sued StockX in the Southern District of New York (which also is where the dispute between Hermès and Mr. Rothschild is pending) alleging trademark infringement and related claims based on StockX's sale of NFTs containing digital images of Nike's products."[111] One distinguishing feature between this dispute and the preceding dispute is that, in this case, StockX claims to be using images of Nike's products as NFTs merely as "digital receipts" for goods it has already acquired and intends to resell, not as "digital or virtual sneakers."[112] Because of this, StockX alleges that its conduct is protected under the first sale doctrine,[113] which essentially allows one to resell a trademarked item after it has been sold by the trademark owner

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107. Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989); *see* also E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1101 (9th Cir. 2008) (depicting plaintiff's logo in a video game featuring real locations did not infringe the plaintiff's trademark rights); University of Alabama Board of Trustees v. New Life Art., Inc., 683 F.3d 1266, 1278–79 (11th Cir. 2012) (depicting University and athletic trademark logos in documentary-style paintings of famous plays did not infringe the University's trademarks).

108. Rogers v. Grimaldi, 875 F.2d 994,999 (2d Cir. 1989).

109. *Brands*, *supra* note 99.

110. Robertson, *supra* note 97.

111. *Nike Names StockX in New Lawsuit Over Unauthorized Sneaker NFTs*, THE FASHION L. (Feb. 3, 2022), https://www.thefashionlaw.com/nike-names-stockx-in-lawsuit-over-sale-of-unauthorized-sneaker-centric-nfts/ [hereinafter *Nike Lawsuit*] [https://perma.cc/2CU6-3RM9].

112. Robertson, *supra* note 97.

113. *Id.*

in an authorized sale, even if the resale is without the trademark owner's consent.[114]

For its part, Nike has alleged that StockX's NFTs are actually separate and distinct products as noted by the fact that one cannot yet redeem the NFTs for actual shoes.[115] Nike even goes so far as to accuse StockX of "minting" NFTs that make "prominent use [of] Nike's trademarks, marketing those NFTs using Nike's goodwill, and selling those NFTs at heavily inflated prices to unsuspecting consumers who believe or are likely to believe that those 'investible digital assets' (as StockX calls them) are, in fact, authorized by Nike."[116] Nike claims that StockX is doing so in order to "garner attention, drive sales, and confuse consumers into believing that Nike collaborated with StockX on [StockX's] NFTs."[117]

As with the dispute between Hermès and Mr. Rothschild, the dispute between Nike and StockX is still in its infant stages. However, as also is the case with the dispute between Hermès and Mr. Rothschild, a result in favor of either Nike or StockX could have major ramifications about the scope of one's trademark rights in the metaverse.

CONCLUSION

Based on the foregoing, it is clear that the concept of the metaverse as envisioned in popular culture is still many years away. At the same time, numerous brands are moving forward expeditiously in pursuit of its potential. As more and more brands venture into the metaverse, more and more ancillary companies will likely look to ways to capitalize on this phenomena. This will, in turn, lead to a number of interesting legal disputes for which existing law may prove to be inadequate.

Hopefully, the current lawsuits involving Hermès and Nike will provide at least some guidance to brands going forward. In the meantime, however, any person or entity with a brand worth protecting in the real world would be well-served by filing a corresponding trademark application for that brand in the metaverse. Not only is the financial cost of doing so likely eclipsed by the potential of the metaverse, the real question is whether one can afford not to take a chance and thus risk missing out.

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114. *The First Sale Doctrine: A Potential Defense to Lanham Act Claims*, THE FASHION L. (July 7, 2019), https://www.thefashionlaw.com/the-first-sale-doctrine-a-potential-defense-to-lanham-act-claims/ [https://perma.cc/34FJ-8B3B].

115. Robertson, *supra* note 97.

116. *Nike Lawsuit*, *supra* note 111.

117. Robertson, *supra* note 97.

NO RELO, NO MOVE: THE KEY TO THE NFL'S RELOCATION QUANDARY

Josh Levey[*]

INTRODUCTION

If you were to poll the average American sports fan, it would likely be uncontroverted that the National Football League (NFL) would be the sport that carries the most popularity and fanfare amongst the "big four" American sports. Every fall through the winter, fans come together every week to rally around the NFL franchise that inhabits the city they call home. For municipalities, these NFL franchises are moneymaking machines that are sometimes the lifeblood of a city's economic well-being. But just like many things in life, nothing lasts forever. Throughout its history, the NFL—like other professional sports leagues—has seen its fair share of teams relocating from one city to another. The decision to relocate a team may be driven by a variety of factors, such as a perceived lack of fan support, deteriorating facilities, or a myriad of incentives offered by a city hoping to land an NFL franchise. As a result, these NFL

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owners decide to relocate their NFL franchise to another city, leaving their loyal fans in the dust without an NFL franchise to call their own.

"No relo, no move." Four words that can seemingly alter the course of a city's identity. With just one simple stroke of a pen, a sports fan's favorite hometown team could be on the move; for good. The implications of these moves can prove colossal, as some professional sports franchises are the hallmark and cash cow for a city that may not have much beyond a sports team and the venue that team plays in. When this situation presents itself, municipalities must undertake a cost-benefit analysis and decide whether letting its prized sports team go is worth it, or whether city funds would be better spent in other municipal ventures. However, these situations could be avoided through good lawyering and contract drafting—a clause known as "relocation clause."

This Essay will analyze the complexities surrounding the NFL and its policies and procedures regarding NFL franchises relocating to new cities. First, Section I of this Essay will dive into the evolution of the NFL Relocation Policy and how the rule has been legally challenged since its inception. Section II will delve into the history of NFL franchises that decided to relocate to other cities and the legal implications of those moves. Section III will analyze the most recent relocation and the legal implications from the city of St. Louis and the Los Angeles Rams legal battle. Lastly, Section IV will dive into the nuances of drafting a sports venue agreement and how these franchises can avoid having to defend themselves by crafting a strong "no relocation" clause.

I. THE TRANSFORMATION OF RULE 4.3

The NFL does not make it easy for one of its precious franchises to relocate outside of its own city. Even with roadblocks in the way, the NFL has awarded its franchises exclusive territories across the country dating back as early as the 1930s.[1] The league wanted to create these exclusive territories to establish stability. Essentially, the NFL prevented owners of these teams from moving their franchise into the same city or surrounding area as another team. From that concern emerged Article IV, Section 3 of the NFL Constitution and Bylaws (Rule 4.3).[2] Prior to its amendment in 1978, the NFL required unanimous approval among its owners for a move into another team's home territory, ultimately giving each owner an exclusive territory in which it could operate its franchise.[3]

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1. Jeffrey A. Mishkin, *Rex Sport – CEU UCH Executive On-Line Master in International Sport Law – U.S. Professional Sports Leagues*, 26 (2018), https://docs.google.com/document/d/1oDR4TxTwUJVK4zLvUE0vP7uZtsq3bWhz/edit [https://perma.cc/KRZ8-PTSA].

2. *Id.*

3. *See* Daniel B. Rubanowitz, *Who Said There's No Place Like Home – Franchise Relocation in Professional Sports*, 10 LOY. L.A. ENT. L. REV. 163, 197 (1989).

Now, only three-fourths approval is required for such a move.[4] In essence, Rule 4.3 seeks to prevent a unilateral move by a franchise into another existing team's market.[5]

Rule 4.3 confirms that each team's primary obligation to the NFL and to all other teams in the league is to "advance the interests of the League in its home territory."[6] Ironically, it also confirms that no club has an "entitlement to relocate simply because it perceives an opportunity for enhanced club revenues in another location."[7] Relocation pursuant to Rule 4.3 may be available if a team's viability in its home territory is threatened by circumstances that cannot be remedied by diligent efforts of the club working, as appropriate, in conjunction with the NFL league office, or if "compelling league interests" warrant a franchise relocation.[8] In that vein, the NFL weighs a variety of factors when considering and evaluating a proposed transfer of a team's location. In presenting to the other NFL teams and the Commissioner, a franchise with the desire to relocate must show why such a move would be justified through a showing of various mandated factors. These factors include:

> (1) the extent to which the club has satisfied its obligation of effectively representing the NFL and serving the fans in its current community; (2) the extent to which fan loyalty to and support for the club has been demonstrated during the team's tenure in the current community; (3) the adequacy of the stadium in which the club played its home games in the previous season, the willingness of the stadium authority or the community to remedy any deficiencies in or to replace such facility; (4) the extent to which the club, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment, or any other form of public financial support and the views of the stadium authority (if public) in the current community; (5) the club's financial performance and the club's financial prospects in the current community; (6) the degree to which the club has engaged in good faith negotiations with appropriate persons concerning terms and conditions under which the club would remain in its current home territory and afforded that community a reasonable amount of time to address different proposals; (7) the degree to which the owners or managers of the club have contributed to

4. *Id*.

5. *Id*.

6. Policy and Procedures for Proposed Franchise Relocations, MINN. LEGIS. REFERENCE LIBR. (Sept. 2009), https://www.lrl.mn.gov/webcontent/lrl/guides/FootballStadium/NFL FranchiseRelocationRules.pdf [https://perma.cc/WZG6-YYC3].

7. *Id*.

8. *Id*.

> circumstances which might demonstrate need for such relocation; (8) whether any other member club is located in the community in which the club is currently located; (9) whether the club proposes to relocate to a community or region in which no other member club of the League is located and the demographics of the community to which the team proposes to move; (10) the degree to which the interests reflected in the League's collectively negotiated contracts and obligations (e.g., broadcast agreements) might be advanced or adversely affected by the proposed relocation; (11) the effect of the proposed relocation on NFL scheduling patterns, travel requirements, divisional alignments, rivalries, and fan and public perceptions of the NFL and its member clubs; and (12) whether the proposed relocation would adversely affect a current or anticipated League revenue or expense stream (e.g., network television) and if so, the extent to which the club proposing to transfer is prepared to remedy the adverse effect.[9]

These factors, while not exhaustive, are just the beginning of the task that an NFL franchise must undertake before even receiving due consideration for relocation. A tall order to say the least. However, this has not stopped many popular franchises from making the plunge to other cities, even if that means ruffling the feathers of the many hometown-faithful fans and the city officials who will not go quietly into the night.

II. A CHECKERED PAST: THE HISTORY OF NFL RELOCATION

There has been a long history when it comes to a franchise packing up its bags and finding a new home. In addition to the NFL rules on relocation, teams wishing to relocate from their current city must also comply with antitrust laws. Federal courts are often called upon to intervene and determine whether preventing teams from playing games in the city in which it chooses without league consent would violate Section I of the Sherman Antitrust Act.

A. *The Raiders Pave the Way*

One of the most notable, and groundbreaking examples of relocation in the NFL came in 1978, when the then owner of the Los Angeles Rams, Carroll Rosenbloom, decided to relocate the team to a new facility in Anaheim, California. This meant that the Los Angeles Coliseum, ran by the Los Angeles Coliseum Memorial Commission, (Coliseum) needed a new major tenant; and from there the officials of the Coliseum began the search for a new NFL franchise to occupy its stadium. Initially, they inquired with the then NFL commissioner, Pete Rozelle, as to whether

9. *Id.*

the league would move an expansion franchise to Los Angeles. This request was met with a resounding "no," causing them to pivot to their next plan of negotiating with existing NFL teams with the hopes that one might relocate to Los Angeles.[10]

The Coliseum ran into issues while trying to convince a franchise to move. The most major obstacle was aforementioned Rule 4.3. At the time, the Rule required unanimous approval of all the teams of the League whenever a team sought to relocate into the "home territory" of another team.[11] In the same Article IV, Section 1 defines a "home territory" as "the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city. . . ."[12] And, in this case, the Coliseum was still the place the Rams called "home." The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act, and brought suit challenging the rule in the United States District Court for the Central District of California.[13] To the Coliseum's dislike, the District Court concluded that the Coliseum had no standing to sue due to the fact that no NFL team had committed to moving to Los Angeles.[14]

Soon after, the Oakland Raiders came into the fold. In 1978, the Oakland Raiders' lease with the Oakland Coliseum expired. Due to poor facility conditions, Al Davis, who was the managing general partner of the Oakland Raiders franchise at the time, believed it was time for a change, and turned his attention to the Los Angeles Coliseum as a possible place to play the Raiders' home games.[15] On March 1, 1980, Al Davis and the Los Angeles Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation to Los Angeles and announced its intentions to the NFL to move the team to Los Angeles.[16] However, once NFL team owners voted 22-0 to block the move, the Raiders joined as co-plaintiffs in the existing lawsuit filed by the Coliseum against the NFL, alleging that Rule 4.3 violated antitrust laws.[17]

After years of litigating and various appeals through the judicial system, the Ninth Circuit Court of Appeals determined that antitrust

10. Mishkin, *supra* note 1, at 26.

11. *Id*.

12. *Id*. at 26–27.

13. *Id*.

14. *See* Los Angeles Memorial Coliseum Commission v. NFL, 468 F. Supp. 154, 155 (C.D. Cal. 1979)

15. Christopher David Ruiz Cameron, *The More Things Stay the Same, the More They Change: The Influence of Judge Harry Pregerson on Franchise Movement in Professional Team Sports*, 61 SANTA CLARA L. REV. 283, 288 (2020).

16. *Id.* at 289.

17. *Id*.

principles are "sufficiently flexible" to account for the NFL's structure.[18] It held that the NFL was liable to the Coliseum and the Raiders, and enjoined the league from preventing the Raiders from relocating in Los Angeles.[19] This decision caused the NFL to amend Rule 4.3. Ultimately, the NFL and a voting member of each of the 28 NFL teams met and changed the rule to require only three-fourths approval by the members of the League before permitting a move into another team's home territory.[20] From this point on, the NFL's relocation game changed forever, equally for the better and for worse.

B. *Other Teams Follow Suit*

The Raiders relocation and the subsequent change to the NFL Relocation Policy opened the floodgates for an NFL franchise to relocate to new territories. While some were clean and some were messy, many NFL franchises found new homes. The first came in 1984, when Baltimore Colts owner Bob Irsay decided to relocate the franchise in the wake of stadium issues, declining attendance at games, and an ongoing spat with city officials.[21] In dramatic fashion, one day after the Maryland state legislature began the process of trying to claim the Colts as part of an eminent domain action, Irsay hired fourteen Mayflower trucks to transport the team's property to Indianapolis in the middle of the night.[22] This resulted in the NFL franchise that we see today—the Indianapolis Colts.

In 1988, the St. Louis Cardinals football team made the move to Phoenix in an attempt to jolt a franchise in competitive despair. Throughout the seasons prior to this move, the Cardinals played at Busch Stadium in front of crowds that displayed many empty seats. After political disagreements in St. Louis delayed a move to a new stadium, owner of the Cardinals, Bill Bidwill pitched a move to Phoenix.[23] Unlike other relocation plans, Bidwill notified the NFL of his plans to relocate the franchise well before the move took place. In fact, he kept the league informed over the course of four years about the team's issues with fan and city support in St. Louis.[24] The inciting reason for the move to

18. *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1381 (9th Cir. 1984).

19. *Id.*

20. *Id*. at 1385.

21. Alex Marvez, *The Long Goodbye: 11 Most Painful NFL relocations*, FOX SPORTS (Oct. 20, 2016), https://www.foxsports.com/nfl/gallery/san-diego-chargers-st-louis-rams-oakland-raiders-los-angeles-nfl-teams-different-cities-122115 [https://perma.cc/JKB7-3NNK].

22. *Id*.

23. Associated Press, *Cardinals Seek Approval for Phoenix Move* (Jan. 16, 1988), https://www.latimes.com/archives/la-xpm-1988-01-16-sp-9366-story.html [https://perma.cc/B8UZ-L7B9].

24. *Id*.

Phoenix was the offer of nearly $17 million annually in ticket and concession incentives to play at Sun Devil Stadium on the Arizona State University campus, with the option of moving into a proposed dome stadium built in downtown Phoenix.[25] In fact, one year prior to the move, Bidwill rejected a proposed 70,500 seat, open-air stadium in St. Louis County.[26] And, one week prior to the official announcement, St. Louis city officials came up with a proposal for a domed stadium in downtown St. Louis.[27] This last ditch effort was not enough, as the proposal to move to Phoenix was already well in motion, and subsequently approved by three-fourths of the NFL owners pursuant to Rule 4.3. Eventually, this move created the franchise that we see today—the Arizona Cardinals.

On January 17, 1995, the Los Angeles Rams announced that they would be departing Southern California after forty-nine years to move the franchise to St. Louis. At the time, the proposal to move to St. Louis was a package that included a new $260 million 65,000 seat stadium and a $15 million practice facility.[28] The new stadium was proposed to bring in $25 million per year in profits, but the Rams ownership would have to pay the NFL $20 million of the relocation fee up-front, as opposed to over a period of time.[29] Nonetheless, the St. Louis Rams were born.

The next move presents some irony. In 1995, thirteen years after abandoning the city of Oakland, Al Davis decided that it was time to return, and relocated the Raiders back to Oakland after receiving an offer he simply could not refuse from Alameda County officials.[30] The deal included a fifteen-year lease with the City of Oakland and a juicy $85 million renovation to the Oakland Coliseum, including expansion from 54,000 seats to over 65,000, new locker rooms, and the addition of 121 luxury boxes to the stadium.[31] The key to facilitating this move was the prospect of the city issuing bonds to cover the costs for stadium renovations.[32] These bonds would be repaid through the sale of personal seat licenses, which provide a buyer the exclusive rights to purchase tickets in any given season.[33] At the time, these personal seat licenses

25. *Id*.

26. *Id*.

27. *Id*.

28. Leonard Shapiro, *Rams Approved For St. Louis Move*, WASH. POST (Apr. 13, 1995), https://www.washingtonpost.com/archive/sports/1995/04/13/rams-approved-for-st-louis-move/e2167293-a69f-431e-aaca-cb57ec13296c/ [https://perma.cc/9TF3-DRDP].

29. *Id*.

30. *Id*.

31. David Aldridge, *Davis Sings Letter To Move Raiders Back To Oakland*, WASH. POST (June 24, 1995), https://www.washingtonpost.com/archive/sports/1995/06/24/davis-signs-letter-to-move-raiders-back-to-oakland/a98c9d07-4a86-4c17-84b6-0a3600b076da/ [https://perma.cc/N6GC-L9ZA].

32. *Id*.

33. *Id*.

were estimated to last over ten years and ranged in price from $250 to $4,000 for seats on the 50-yard line.[34] The City of Oakland's lack of financial responsibility is what ultimately made the move attractive, and what pushed it across the finish line prior to approval by twenty-three out of the thirty NFL owners.[35]

In 1996, when Cleveland Browns owner Art Modell could not secure the requisite funds to build a new stadium, he struck a "secret deal" with the City of Baltimore to house the "Baltimore Browns" football franchise.[36] However, after public backlash for the move, and a failing football team, Modell decided to leave the "Browns" name behind for new ownership and decided to name the new franchise the team that remains in Baltimore today—the Baltimore Ravens.

The next move came in 1997. It was known for quite some time that Bud Adams, the Houston Oilers owner, wanted to move the franchise away from Houston. In years past, he had repeatedly threatened to displace the team if public funds did not roll in to help finance stadium renovations. So, in 1997, when the mayor of Houston would not support building a new facility to replace the historic Astrodome, Adams reached an agreement with Nashville city officials to move the Oilers franchise to Tennessee.[37] The Tennessee Oilers played its first two seasons in various venues across Tennessee before going through a total rebrand and emerging as the current Tennessee Titans franchise.

All of these moves paved the way for other NFL franchises to make their plunge to relocate to other cities that would welcome them with open arms. While these moves are not always successful, history has shown that relocating can prove to be a lucrative business decision. No move is ever perfect, and some franchises must find out the hard way; even if that means footing a bill nearing $1 billion amidst tremendous legal and public scrutiny.

III. THE $790 MILLION COST OF DOING BUSINESS

Enter the St. Louis Rams ownership group, led by billionaire Stan Kroenke, who dealt with a monstrous lawsuit in the wake of its relocation from St. Louis to Los Angeles in 2017. Prior to moving to Los Angeles, Kroenke decided to relocate the franchise outside of St. Louis and pointed to the poor condition of the Edward Jones Dome and lack of fan engagement from native St. Louisans as the main reasons for their

34. *Id*.
35. *Id*.
36. Marvez, *supra* note 21.
37. *Id*.

departure.[38] As noted by the NFL's history of relocation, this justification to move—poor facilities, stadium conditions, and fan support—is quite similar to other franchises' decisions to leave their current city and fans. St. Louisans would staunchly beg to differ.

In April 2017, the City of St. Louis, St. Louis County, and the St. Louis Regional Convention and Sports Complex Authority (Plaintiffs), filed suit against Kroenke, the NFL, and the various owners of the thirty-two member institutions that make up the league (Defendants) collectively after the Rams relocated to sunny Los Angeles. In the petition, the Plaintiffs outlined the NFL Relocation Policy and noted that the NFL has acknowledged that it has an "obligation, which [it] take[s] very seriously" to do whatever it takes to keep NFL teams strong in their existing markets.[39] In arguing that they deserved to have their franchise stay in St. Louis, they stated, among other things, that the Plaintiffs made substantial investments in their stadium, paid expenses and interest on thirty-year bonds used to finance the construction of the stadium, paid twenty-five percent of the bond obligations, including millions in maintenance expenses, each incurred bond cost obligations of $180 million, and lastly, each collected hotel taxes to service their obligations and paid these obligations out of general revenue funds.[40] The Plaintiffs also stated that they agreed to and installed a new playing surface and performed $30 million in renovations.[41]

Moreover, the Plaintiffs alleged that they relied on various statements, spanning from 2012 through 2016, from Rams representatives and ownership, relating to the team's intent to engage in good faith negotiations and to stay in St. Louis. Additionally, for purposes of the lawsuit, it bears importance to note that, unbeknownst to anyone, Kroenke purchased land in Inglewood, California in 2014.[42] However, upon the news surfacing at a Rams season ticket holder event, Kevin Demoff, Rams Chief Operating Officer and Executive Vice President of Football Operations, attempted to put any relocation rumors to bed, stating: "I promise you[,] Stan is looking at lots of pieces of land around the world right now and none of them are for football stadiums."[43] Kroenke further added to this alleged rumor stating that "[w]e have yet to decide what we are going to do with the property but we will look at

38. Katie Hoffecker, *Touchdown St. Louis: A Recap of the NFL and Rams Lawsuit*, ST. LOUIS U. L.J. (Nov. 27, 2021), https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1082&context=lawjournalonline [https://perma.cc/NS22-SQCJ].

39. Brief for Petioner at ¶ 21 St. Louis Reg'l Convention & Sports Complex Auth. v. NFL, (No. 1722-CC00976) Mo. Cir. Ct. 2017.

40. *Id*. at ¶ 22.

41. *Id*. at ¶ 23.

42. *Id*. at ¶ 26.

43. *Id.*

all options[.]"[44] During that same year at a fan forum, Demoff stated that there was a "one-in-a-million chance" the Rams would move.[45] These were just a few of many statements made by the Rams ownership group and representatives.

The Plaintiffs took these statements literally, and took drastic measures in reliance thereof. For example, in relying on these statements, the Plaintiffs took many actions to develop and finance a new stadium complex suitable for an NFL franchise. These measures included, but were not limited to: entering into option contracts concerning land in the development area, entering into an agreement concerning movement of railways and transmission lines within the development area, hiring consultants for engineering, environmental conditions, geotechnical conditions, sponsorship and naming rights opportunities, and bonding, applying for and conditionally receiving $50 million in contribution tax credits, and passing an ordinance providing for assistance to the proposed stadium complex.[46] The list goes on.

The Petition also stated that during this time period, instead of performing its primary obligation "to work diligently and in good faith to obtain and maintain suitable stadium facilities in their home territories, and to operate in a manner that maximizes fan support in their current home community," as the NFL Relocation Policy mandates, the Rams franchise and Kroenke announced new plans for a stadium in Inglewood, California, moved Rams practices to California, and took other actions allegedly "inconsistent with the club's obligations to Plaintiffs, the local community, and others.[47]

Ultimately, the Plaintiffs' petition alleged that the Rams and the NFL, through its member clubs, in addition to other breaches and violations of the NFL Relocation Policy:

> (1) failed to require the Rams to meet its "primary obligation . . . to advance the interests of the League in its home territory" including "maximizing fan support;" (2) allowed relocation when the Rams' "viability in its home territory" was not "threatened;" (3) failed to require the Rams to "work diligently and in good faith to obtain and to maintain suitable facilities in their home territory;" (4) failed to provide the notice of relocation, statement of reasons, and accompanying material to the Rams Stadium Authority or home market in a timely fashion to allow Plaintiffs to respond adequately to the "proposed transfer;" (5) failed to have any notice of relocation published in newspapers of

44. *Id*.
45. *Id*.
46. *See id*. at ¶ 30.
47. *Id*.

> general circulation; and (6) failed to require the Rams to address "specifically" "each of the factors" identified in the Relocation Policy.[48]

In spite of everything that transpired, relocation to Los Angeles from St. Louis received the requisite three-fourths votes required by the NFL Relocation Policy.

In lieu of these factual assertions, the Plaintiffs' asserted five legal grounds for liability against the St. Louis Rams and the NFL. There was one count for breach of contract against all Defendants, one count for unjust enrichment against all Defendants, one count for fraudulent misrepresentation against the Rams and Stan Kroenke, one count for fraudulent misrepresentation against all Defendants, and lastly one count for tortious interference with business expectancy against all Defendants, with the exception of the Rams.

A. *The Aftermath of Filing*

After the lawsuit was filed, the Defendants did what they could to spurn any sort of legal of liability. First, Kroenke and the Rams filed motions to compel arbitration pursuant to a relocation agreement between the City of St. Louis and the Rams, which would have been a favorable legal venue for the Defendants.[49] However, the St. Louis Circuit Court denied the motion and noted that the dispute had nothing to do with the relocation agreement, but rather, had everything to do with the NFL Relocation Policy.[50] The Circuit Court also noted that the City of St. Louis and the County were third-party beneficiaries to the NFL Relocation Policy, ultimately dispelling any necessity for arbitration under the relocation agreement. Then, in September 2021, the Defendants' motion for summary judgment was denied, meaning that the case was one step closer to trial in front of a jury.[51]

As trial loomed nearer, Kroenke decided to offer a $100 million settlement to the Plaintiffs, which shockingly was rejected, but proved to be worthwhile for St. Louisans.[52] In November 2021, just two months

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48. *Id*. at ¶ 34.

49. Hoffecker, *supra* note 38, at 3.

50. St. Louis Reg'l Convention & Sports Complex Auth. v. NFL, No. 1722-CC00976, at 2–3 (Mo. Cir. Ct. Dec. 27, 2017).

51. Corey Miller, *Judge denies Rams' motion for summary judgement in St. Louis Lawsuit*, KSDK (Sept. 14, 2021), https://www.ksdk.com/article/sports/nfl/rams/rams-st-louis-lawsuit-summary-judgement-denied-nfl/63-24093fb6-7562-42f2-8318-f4f7e7ae1b52 [https://perma.cc/3DUN-RJ3G].

52. *See* John Breech, *Rams Owner Stan Kroenke Offered $100 Million to Settle Relocation Lawsuit with St. Louis, Per Report*, CBS (Nov. 11, 2021), https://www.cbssports.com/nfl/ news/rams-owner-stan-kroenke-offered-100-million-to-settle-relocation-lawsuit-with-st-louis-per-report [https://perma.cc/84PV-97TX].

before the case was set for trial, the NFL, Kroenke and the Plaintiffs reached a whopping $790 million settlement agreement, which was reached in mediation, ending the four-and-a-half-year-old legal battle between the parties.[53]

The Rams and City of St. Louis suit will certainly set an example for what teams and their owners should or should not do in the event they plan on relocating their franchise to a new city. So, how can this be avoided in the future? The answer is simple: savvy contract drafting.

IV. RELOCATION CONTRACT DRAFTING 101

It is no longer a mystery that NFL teams are often potentially seeking to move from their current city. As noted, sports teams wishing to relocate are subject to league constitutions and bylaws, which can prevent a team from moving to a new facility within the same market. In order to bulk up their protection, cities have inserted "no relocation, no move" clauses, otherwise known as "no relo/no move" provisions, in their stadium leases. Or, they have drafted ancillary "relocation agreements," that protect a city in the event an NFL franchise wishes to pack its bags and get out of town earlier than anticipated. These clauses or agreements provide massive advantages to a city by imposing mammoth-sized financial penalties on the team in the event the team wishes to leave its current city in advance of the expiration of the current lease term.[54] Additionally, some cities have gone the route of providing a right of first refusal before a team attempts to move or relocate.[55]

When drafting a stadium lease agreement, the term of the agreement is very important. This will set the parameters on how long a team will be locked into their stadium. This is also important because it will provide a timeline for when a city may want to head back to the table to negotiate new terms and subsequently prevent any chance of relocation. In doing so, a city should seek to keep the team in the current stadium for perpetuity, or at least for the duration of the agreed upon term. In that capacity, the city would be wise to seek injunctive relief should the team attempt to move during the term, and, should also seek plenty of prior notice of the team's intent to relocate or move out of the city.[56] Similarly, cities should also attempt to include language into their relocation clauses such as "irreparable harm" in the event that a team threatens to leave the stadium prior to the expiration of the lease term.[57]

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53. *Id*.

54. PETER A. CARFAGNA, NEGOTIATING AND DRAFTING SPORTS VENUE AGREEMENTS, 30 (2d ed. 2016).

55. *Id*.

56. *Id.*

57. *Id*.

For example, the Buffalo Bills, the County of Erie, and the Erie Stadium Corporation, located in New York, have the model relocation agreement that is incorporated into the 2013 Stadium Lease between the Erie County Stadium Corporation and the Buffalo Bills (Stadium Lease). The Relocation Agreement carefully provides three "Non-Relocation Convents" and incorporates the ten-year Stadium Lease Term, defining it as the "Non-Relocation Term."[58] It also provides and defines a "Non-Relocation Default" as a "breach by the Bills of any of the terms, covenants, or agreements" of the Non-Relocation Covenants.[59] The lawyers behind this relocation did a masterful job, as evidenced by the beautifully drafted provision whereby the Bills agree during the Non-Relocation Term to: (1) not apply to the NFL or even seek approval to relocate the team; (2) attempt to move the team; or (3) even entertain any offer or proposal to relocate the Team to a location that is not the Bills stadium.[60] The Non-Relocation Agreement also entitles the city to relief in the form of equitable remedies if the team does breach these promises. The Bills Relocation Agreement explicitly provides that the parties acknowledge and agree that "equitable relief by way of decree of specific performance or an injunction (such as prohibitory injunction barring the Bills from relocating or playing the games in a facility other than the Stadium or a mandatory injunction requiring the Bills to play the Games at the Stadium) is the *only* appropriate remedy for the enforcement of this Agreement notwithstanding the provisions for liquidated damages."[61] In contrast to monetary damages that a party may receive, equitable relief is typically granted when monetary compensation cannot adequately and properly resolve the wrongdoing suffered by a non-breaching party.[62] By including this provision, the parties are already agreeing at the outset what potential remedies would be, avoiding the mess of having to litigate the matter in court. While it sounds one sided in favor of the city, it also helps the team in terms of knowing from the outset what trouble lies ahead of it even *ponders* relocation.

Another drafting option in lieu of all equitable remedies, is the inclusion of a "liquidated damages" provision that is either tied to a "no relo, no move" clause or one that is placed in a relocation agreement. Liquidated damages are a specified and predetermined amount that a party must pay to the other party in the event they breach the agreed upon

58. Buffalo Bills Non-Relocation Agreement, ERIE CTY. N.Y. https://www2.erie.gov/exec/sites/www2.erie.gov.exec/files/uploads/Buffalo%20Bills%20Non-Relocation%20Agreement.pdf at Article 1 [hereinafter *Non-Relocation Agreement*].

59. *Id*.

60. *Id*. at Article 3(b).

61. *Id*. at Article 5(a) (emphasis added).

62. *See* Tobin O'Connor & Ewing, *Equitable versus Legal Remedies in a Breach of Contract Case* (Sept. 27, 2018), https://www.tobinoconnor.com/equitable-versus-legal-remedies-in-a-breach-of-contract-case/ [https://perma.cc/E2E2-ELBM].

contract.[63] In this situation, the city would be wise to include exorbitant liquidated damages to essentially deter any possibility of the team leaving early or even contemplating leaving the city prior the expiration of the lease term.[64] However, the team will desire flexibility to relocate on its own terms, and would likely, and wisely, offer to pay liquidated damages at a *reasonable* price in order to free itself from its applicable lease.[65] In the negotiating phase, the city would be wise to have a liquidated damages provision that decreases in cost over time as the lease approaches the end of its term.[66] This effectively makes relocation for a team only enticing towards the very end of the lease expiration with the knowledge that if it leaves early, the cost of doing so will be very high. At the end of the day, a liquidated damages provision meshed in with a "no relocation, no move" provision will provide a city with an option to choose whether to pigeon hole a franchise to stay in the current stadium or to accept a hefty payout for allowing them to leave.[67]

Using the Bills' Stadium Lease masterclass as an example again, the Relocation Agreement explicitly states that if a court does not grant the equitable relief that was initially contemplated, then "the payment by the Bills of liquidated damages is the next appropriate remedy."[68] It then provides that "in the event of a Non-Relocation Default, and the failure of any court to grant the equitable relief" described in the Agreement, the Bills must pay $400 million in liquidated damages to the County and the Erie County Sports Commission.[69] As such, in this instance, the Bills now know the cost of attempting to relocate from Buffalo, without the likelihood of having to engage in a messy legal battle like many NFL predecessors have gone through over the last fifty years.

CONCLUSION

NFL teams and the owners will continue to move around like nomads, continuously searching for the next big move and the NFL relocation conundrum will likely continue to evolve as the years come and go. Whether teams and their owners continue to follow their predecessors' paths remains to be seen, but it is likely that the Rams will not be the last NFL franchise to face difficulties associated with relocation. The visions of grandeur for something seemingly bigger and better are always going

63. *See* Christine Mathias, *What is a Liquidated Damages Provision*, Nolo (last visited Mar. 17, 2022), https://www.nolo.com/legal-encyclopedia/when-are-liquidated-damage-provisions-enforceable.html [https://perma.cc/V53B-ERDP].

64. Carfagna, *supra* note 50, at 31.

65. *Id.*

66. *Id*.

67. *Id*.

68. *See Non-Relocation Agreement*, *supra* note 58.

69. *Id*.

to be present, especially with deep pocketed owners who can afford to continuously take large risks. It will take a collective effort between the NFL, its teams, and municipalities to come together and find equitable solutions to keep their names out of headlines and their teams in one singular location. For now, savvy contract drafting and reasonable negotiating in stadium lease agreements are a great start to setting clear parameters and guidelines as to what will happen if a team attempts to leave a city prior to the expiration of its agreed upon term. Until then, not doing so is only going to harm one subset of people: the loyal, diehard, football fanatics.

SPENDING MONEY ON A FREE GAME: FINDING THE KEY TO LOOT BOX CONSUMER PROTECTION ISSUES

Alex Dubur[*]

INTRODUCTION

Excessive video game use, coined a "gaming disorder" by the World Health Organization,[1] has long been tied to negative side effects and patterns of behavior. These include more easily treatable physical conditions[2] like joint pain or numbness, blisters or calluses, sleep disorders, and harder to treat psychological conditions[3] such as decreased self-esteem, aggressive tendencies, and a sense of loneliness or anxiety which frequently progress into mental health diagnosis' such as depression.

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1. *Addictive Behaviours: Gaming Disorder*, WORLD HEALTH ORG. (22 Oct. 2020), https://www.who.int/news-room/questions-and-answers/item/addictive-behaviours-gaming-disorder [https://perma.cc/9HKN-DRU6].

2. *Video Game Addiction: Signs, Effects and Treatment*, UNITYPOINT HEALTH, https://www.unitypoint.org/livewell/article.aspx?id=ce341f2d-1bdc-49d1-9a4b-b524e782cbbe [https://perma.cc/BE44-YLX9].

3. Juliane M. von der Heiden, et al., *The Association between Video Gaming and Psychological Functioning* FRONTIERS IN PSYCHOLOGY (July 26, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6676913/ [https://perma.cc/9XA6-DHVC].

Recently, however, a less obvious impact of video game use has become the subject of increased scrutiny–whether video game mechanisms known as "loot boxes" are encouraging a form of gambling. And, given the high level of video game use by minors—ninety percent[4] of minors play video games and twenty percent[5] of video gamers are minors—this gambling debate inevitably casts a light on consumer protection needs. The question begs, however: what are these allegedly "destructive" loot boxes and why are they a part of an ongoing legal debate?

This Essay seeks to provide readers with a holistic consideration of the consumer protection issues surrounding loot boxes. Section I discusses the role of loot boxes in the video game industry, how they became a hot topic, and a look into class action suits. Section II provides an analysis of how non-American countries approach the loot box and gambling debate. And, finally, Section III provides a brief set of solutions to this rapidly growing issue—showing that it could all be so simple.

I. LOOT BOXES AND THEIR EVOLUTION

Loot boxes, grab bags, or as Electronic Arts (EA) Sports ingeniously calls them "surprise mechanics,"[6] are virtual containers accessible in many video games that contain items, or "loot", that players use to enhance their gaming experience and progress in the game. Loot ranges in desirability to the player and includes customization options to a character's outfit (also known as "skins"), equipment such as armor and weapons, and longevity bonuses, such as an extra life or game time to increase playing time. There's a catch though, well two catches, that have brought rise to the issue of gambling in this space. First, loot boxes are randomized so players have no inkling as to what they are getting until their surprise reveals itself. And secondly, loot boxes must often be purchased. Loot boxes can be obtained by either purchasing in-game currency or by reaching certain milestones in the game.

Game manufacturers have long seen the success of their loot boxes. Players report their enjoyment of being able to express their personalities

4. Rachel Barclay, *Do Video Games Make Kids Saints or Psychopaths (and Why Is It So Hard to Find Out)?*, HEALTHLINE (Oct. 20, 2018), https://www.healthline.com/health-news/video-games-saints-or-psychopaths-082814 [https://perma.cc/7XEA-2MGK].

5. J. Clement, *U.S. Average Age of Video Gamers 2021*, STATISTA (Aug. 20, 2021), https://www.statista.com/statistics/189582/age-of-us-video-game-players/ [https://perma.cc/QMM9-W9Y4].

6. Erica Johnson & Kimberly Ivany, *Video Game Giant EA Steering Players into Loot-Box Option in Popular Soccer Game, Insider Says*, CBC NEWS (Apr. 26, 2021), https://www.cbc.ca/news/gopublic/fifa21-loot-boxes-electronic-arts-1.5996912 [https://perma.cc/4FFS-CNXZ].

through the persona of their avatars fitted with skins and other loot.[7] Other players appreciate the functional value that loot brings, allowing them to get past exceedingly difficult stages in a game.[8] As the demand for loot boxes increased, game manufacturers have released loot boxes in different designs and formats. "Traditional" loot boxes positioned the player to potentially receive duplicate loot, whereas new, or "unique" loot boxes guarantee the player a different item each time[9].

The success manufacturers have seen with loot boxes, however, has not been limited to the happiness of their players. Loot box sales have proven to be quite the profitable business model. Research suggests that in 2020, $15 billion in revenue was generated from the sale of loot boxes, with that number expected to rise five percent annually.[10] This, amongst other factors, explains the industry's expansion to unique loot boxes. After all, a player is going to stop spending money on traditional loot boxes once they receive duplicates or all items in any given loot set because there is no value to such a continued expenditure.

A. *The Rise of a Consumer Protection Problem*

Video game users did not just wake up one morning and uncover a causal link to their purchase of loot boxes to an emerging legal issue. Rather, and most often, the parents of minors who play such games were alarmed by the preferences of their children to play a virtual game rather than a real life one outside. Additionally, the change in habits and behaviors of their kids or the fact that their credit card statements were higher than anticipated would cause surprise. After investigation, parents would often connect these changes to their children's excessive video game use and in-game elements such as loot boxes.

A commenter on a Federal Trade Commission blog post reported[11] spending over $3,000 on in-game chance purchases in the once uber popular online game "Farmville".[12] Until its end in 2020, Farmville

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7. FED. TRADE COMM'N, INSIDE THE GAME: INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES, AT 22 (Aug. 7, 2019), https://www.ftc.gov/system/files/documents/public_events/1511966/loot_boxes_workshop_transcript.pdf [https://perma.cc/F4PP-MD8G].

8. *Id.* at 131.

9. *Id.* at 139.

10. *Juniper Research: Video Game Loot Boxes to Generate over $20 Billion in Revenue by 2025, but Tightening Legislation Will Slow Growth*, BUS. WIRE (Mar. 9, 2021), https://www.businesswire.com/news/home/20210308005767/en/Juniper-Research-Video-Game-Loot-Boxes-to-Generate-over-20-Billion-in-Revenue-by-2025-but-Tightening-Legislation-Will-Slow-Growth [https://perma.cc/T5EA-YTYJ].

11. *Video Games, Loot Boxes, and Your Money*, CONSUMER INFO. (Sept. 30, 2019), https://www.consumer.ftc.gov/blog/2019/09/video-games-loot-boxes-and-your-money [https://perma.cc/7L62-GX2K].

12. *Id.*

described its in-game purchase options as "microtransactions" but they had the same effect as loot boxes. In fact, the practice of labeling such exchanges as microtransactions mainstreamed loot boxes in the video game industry.[13]

One Connecticut mom, Jessica, grappled tirelessly with Chase Bank and later with Apple after discovering over $16,000 in charges to her account.[14] Initially being told by Chase that she was likely an addition to the sea of fraud victims experiencing unauthorized charges from Apple, Jessica didn't initially reach out to Apple. It was not until four months after her fraud claim that Chase confirmed the charges were hers and that she needed to contact Apple. Apple then shared that the charges were tied to spending on "Sonic Forces", the preferred video game of Jessica's son, George. Jessica, crushed by her new inability to pay her mortgage, analogized George's in-game pack purchase of "Gold Ring" packs, each costing $99.99, to "lines of cocaine".

If these numbers seem high, research conducted by the United Kingdom's Gambling Health Alliance (GHA) suggests the purchasing patterns of loot boxes by minors are more dangerous. It found that a handful of families had to refinance their homes to cover the debts created by their minors' loot box purchases.[15] While some will be quick to assign blame to parents for gross oversight of their children, GHA further found that fifteen percent of children stole money from their parents to buy loot boxes[16] and nearly ten percent of children borrowed money that they knew they could not repay.[17]

B. *Class Actions*

The presence of loot box consumer protection claims in the courts have ebbed and flowed over the years, but they appear to be making a return. Claimants, many of whom are trying to bolster their bargaining power by seeking qualification as a class action group, rigorously argue that loot boxes are akin to gambling. Across state lines, the elements necessary to establish the existence of illegal gambling vary, but they can generally be deduced to the following: (1) the claimant putting something

13. Matthew Gault, "*Farmville' Changed Online Gaming Forever, Now It's Going Offline*, VICE (Sept. 28, 2020), https://www.vice.com/en/article/z3ea89/farmville-changed-online-gaming-forever-now-its-going-offline [https://perma.cc/B3RV-FE5N].

14. Doree Lewak, *This 6-Year-Old Racked up $16K on Mom's Credit Card Playing Video Games*, N.Y. POST (Dec. 14, 2020), https://nypost.com/2020/12/12/this-6-year-old-racked-up-over-16k-on-his-moms-credit-card/ [https://perma.cc/W5SE-X87L].

15. *Over 1 in 10 Young Gamers Get into Debt by Buying Loot Boxes*, RSPH (Dec. 23, 2020), https://www.rsph.org.uk/about-us/news/over-1-in-10-young-gamers-get-into-debt-because-of-loot-boxes.html [https://perma.cc/ZU3D-AZKX].

16. *Id.*

17. *Id.*

of value at risk (2) to potentially win a valuable prize (3) in a drawing method based on chance.

Like most legal debates, a determination of whether loot boxes constitute a form of gambling requires a further breakdown of the elements. "Something of value" typically refers to any form of money or property, including a token or other object that may be exchanged for money or other property.[18] A "chance method" is a type of game that depends, in a material degree, on an element of random chance, notwithstanding the possibility that skill of a player may be a factor therein.[19]

As the law evolves, new cases show claimants are arguing that much like the draw of gambling in a casino, loot boxes are pushed onto them through psychological manipulation and deceptive marketing tactics. In strong opposition, game manufacturers stand by the position that the purchase of loot boxes is a personal choice guided by accurate representations and that players get exactly what they buy. To further analyze this novel legal issue, let's take a peek inside the courtroom walls.[20]

1. Unfair Competition

In *Coffee v. Google, LLC*, plaintiffs John Coffee and Mei-Ling Montanez claim they have standing under unfair competition laws because they suffered economically from Google's facilitation of third-party apps who sell loot boxes.[21] They brought this lawsuit after purchasing countless loot boxes through games they downloaded through the Google Play platform, such as "Final Fantasy" and "Dragon Ball Z".[22]

Plaintiffs' point to their state's Unfair Competition Law (UCL), which prohibits any "unlawful, unfair or fraudulent business act or practice."[23] To recover under UCL, Coffee and Montanez must establish that they suffered from economic injury due to its dealings with Google.[24] They argue they meet the burden due to Google splitting up loot box

18. N.Y. PENAL L. § 225.00(6) (MCKINNEY 2018). While it is important to note that this is the state of New York's legal definition of "something of value," other state and federal law define this term similarly. Washington state has exactly the same language, but instead described the term "thing of value" (WASH. REV. CODE § 9.46.0285 (1987)). America's proclaimed gambling capital, Atlantic City (New Jersey), adopted this language too, though it excluded those games which don't require a charge from the player in exchange for a chance at an award (N.J .REV. STAT. § 2C:37-1(D) (2021)).

19. N.Y. PENAL L. § 225.00(1) (MCKINNEY 2018).

20. While the cases presented are from various jurisdictions, many of the claimants' arguments are consistent therefore nuances across state laws should not be overthought.

21. Coffee v. Google LLC, 20-cv-03901-BLF, 3 (N.D. Cal. Jan. 10, 2022).

22. *Id.* at 4.

23. CAL. BUS. & PROF. CODE § 17200 (WEST 2021).

24. CAL. BUS. & PROF. CODE § 17204 (WEST 2021).

transactions into two parts. First, by requiring the purchase of virtual currency in Google Play, then by only allowing in-game purchases through the exchange of virtual currency. By framing the process this way, the plaintiffs argue that Google has set up a "predatory scheme" designed to deceive the buyer into gambling his or her money on random chance prizes, like a casino does with a slot machine, by removing the component of "real" money. Outside of this, plaintiffs argue that Google plays a key role in facilitating the second stage of loot purchases. It not only implements strict guidelines onto app developers that it works with for their product releases, but it provides them with app development tools.

Google, in turn, urges the court to assess its practices only under the first step to buying loot boxes. The exchange of real money for virtual money between Google and consumers has no role in the second step. Viewed this way, no plaintiff can claim economic injury because they knew they'd get "X" amount of virtual money for "X" amount of real currency provided. As for its involvement with app developers, Google claims immunity as the provider of an "interactive computer service". In other words, Google merely provides a host site for developers to release their apps to consumers like Coffee and Montanez, and thus did not contribute to the alleged illegal conduct.

The District Court ultimately ruled in favor of Google, stating that the plaintiffs lacked sufficient grounds to maintain their UCL claim because they failed to prove they suffered from economic injury.[25] Quite the opposite, the plaintiffs received the exact amount of "lapis crystals" and "dragon stones" they paid for in their Play Store transactions.[26] Further, the plaintiffs are unable to impose liability on Google for the exchange of these virtual currencies with loot boxes as Google has immunity under the Communications Decency Act (CDA).[27] To receive cover under CDA immunity, a defendant must: (1) be a provider of an interactive computer service; (2) who plaintiff alleges is a publisher or speaker of the allegedly offending content; and (3) that a third party in fact served as the information content provider for.[28]

An "interactive computer service" is defined as an information service that enables computer access by multiple users to a computer server.[29] Neither party contests that this prong is satisfied as Google hosts millions of third-party apps on its system, which is virtually accessible to consumers. As for the second element, a party acts as a publisher or

25. *Coffee v. Google LLC*, 20-cv-03901-BLF, 13 (N.D. Cal. Jan. 10, 2022).

26. *Id.*

27. 47 U.S.C. § 230(c)(1).

28. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009), as amended (Sept. 28, 2009).

29. 47 U.S.C. § 230(f)(2).

speaker if he or she engages in some decision making as to whether to post online content submitted by a third party. Plaintiffs initially argue that Google should screen all apps whose developers request inclusion in the Play Store, and later proceed to argue that they are not trying to label Google as a publisher of the apps, but instead that Google is "permitting and facilitating illegal gambling."[30] Recognizing that plaintiffs' entire lawsuit was premised on the content of Google's app listings, the court found the second prong to be satisfied. Lastly, Coffee and Montanez failed to demonstrate that Google collaborated with the makers of Dragon Ball Z or Final Fantasy as a co-developer. A defendant fails to satisfy this final prong so long it does not "contribute materially to the alleged illegality of the conduct."[31] Plaintiffs' contention that Google requires their app developers to sign a Developer Distribution Agreement and provides them with software development tools is moot—Google's conduct is uniform across the board and did not create the content within the apps.

2. Consumer Legal Remedies Act

In *Mai v. Supercell Oy*, plaintiff Peter Mai brought a putative class action against game manufacturer Supercell Oy (Supercell). Mai argued that he had standing under the Consumer Legal Remedies Act (CLRA)[32] because Supercell exploited human psychology to encourage loot box sales in its popular game "Clash Royale" by mimicking the features of casino machines. The CLRA allows a consumer to recover if they suffer from a loss or deprivation of money or property[33] due to any one of more than two dozen unlawful actions taken by the defendant.[34] These include misrepresenting goods, whether as to their source or quality, passing off goods as if it has sponsorship or approval from a third party it does not, and suggesting that a good confers rights or benefits that it does not have.[35]

Mai alleged that Supercell deceived him into repeatedly purchasing gems, the in-game currency for Clash Royale, by giving loot boxes dramatic sound and visual effects. However, the court did not agree with Mai, instead stating that not only did Mai fail to connect Supercell's conduct to an illegal act under the CLRA, but he didn't suffer from economic harm. Mai received the exact number of gems he purchased.

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30. Coffee v. Google, LLC, No. 20-CV-03901-BLF, 2022 WL 94986, at *5 (N.D. Cal. Jan. 10, 2022).

31. *Id.* at 7.

32. CAL. BUS. & PROF. CODE § 1770 (West 2001).

33. Mai v. Supercell Oy, No. 5:20-CV-05573-EJD, 2021 WL 4267487, at *3 (N.D. Cal. Sept. 20, 2021).

34. CAL. BUS. & PROF. CODE § 1770 (West 2001).

35. *Id.*

Further, the District Court found Mai's analogy comparing Clash Royale gems to casino gambling chips to be unsubstantiated because the former cannot be exchanged back for real money.[36]

II. A LOOK AT OTHER COUNTRIES

As the popularity of video game loot boxes continues to rise, with an anticipated revenue growth from $15 billion in 2020 to $20 billion in 2025,[37] American lawmakers would be wise to look at how foreign jurisdictions approach loot box regulation. While many European nations are taking a consumer-focused direction, U.S. legislation and case law is reacting minimally at best to consumers' concerns that loot boxes present a grave gambling danger.

A. *Netherlands*

Take the Netherlands strict treatment of loot boxes, as supported by its Betting and Gaming Act (the Netherlands Act). The Netherlands Act permits a provider of a "game of chance" to offer and promote its game if it holds a license to do so. Otherwise, the provider is subject to harsh penalties.[38] A "game of chance" under the Netherlands Act is defined as "an opportunity to compete for prizes or premiums if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence," with a prize or premium characterized as anything with economic value.[39] For purposes of clarity, the Netherlands Act considers in-kind prizes to hold economic value within the game, which is quite the unique approach, especially compared to that of the United States.

As part of its effort to enforce the Netherlands Act, the Netherlands Gaming Authority (NGA) regularly conducts studies of loot boxes purchased in the country. A 2018 study revealed that four out of ten video games it examined were in violation of the Netherlands Act, including EA Sports.[40] EA Sports took issue with the allegation that it's in-game "packs", which provide varying levels of virtual football players in its

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36. Mai v. Supercell Oy, No. 5:20-CV-05573-EJD, 2021 WL 4267487, at *3 (N.D. Cal. Sept. 20, 2021).

37. J. Clement, *Global Video Game Loot Box Market Size 2025*, STATISTA (Sept. 7, 2021), https://www.statista.com/statistics/829395/consumer-spending-loot-boxes-skins/ [https://perma.cc/ZX5B-BMS5].

38. Alan Littler et al., *The Gambling Law Review: Netherlands*, THE LAW REVIEWS (June 7, 2021), https://thelawreviews.co.uk/title/the-gambling-law-review/netherlands [https://perma.cc/8JRD-4CFN].

39. *Id.*

40. Andy Chalk,*Netherlands Gaming Authority Cracks down on Loot Boxes in Some Games*, PC GAMER (Apr. 19, 2018), https://www.pcgamer.com/netherlands-gaming-authority-cracks-down-on-loot-boxes-in-some-games/ [https://perma.cc/F2YT-VEFY].

highly popular FIFA game, constituted "games of chance."[41] EA Sports argued the position that earning packs is possible only in "FUT Mode", a game of skill, with the player's abilities being the predominant factor in determining the outcome of a football match. Further, EA Sports contends that the players don't intend to gamble and that opening packs is not what FUT Mode is about, but rather that winning the virtual football league is. Unsurprisingly, given the Netherlands' pro-consumer stance, the Hague Court adopted the views of the NGA.

The Hague Court insisted that opening game packs should be analyzed by themselves, rather than as part of the overall game, and when done so, they fit within the "game of chance" category. After all, EA Sports players, by opening packs, have the opportunity to win prizes holding an economic value whereby they lack an influence, let alone a dominant one, as to which prize, if any, they will win. While the prizes may not be exchanged for real world money on the defendant's game, they hold value within the game either by themselves or as trade value for FUT Coins on the EA Sports platform. EA Sports doesn't contest this, even stating that the packs have "relevant game value . . . within FUT mode."[42]

Recognizing that EA Sports' does not hold a license for its "game of chance", the NGA, later supported by the Hague Court in an appeal by EA Sports, imposed fines of up to $10 million euros ($11.7 million U.S. dollars) onto EA Sports.[43] The NGA emphasized the importance of upholding the Netherlands Act for the protection of consumers, particularly those populations vulnerable to gambling like children. Either way, it is clear that the ruling will benefit children and adults alike, both of whom should be conscious of the type of games they are playing and how it might influence their spending behavior.

B. *Belgium*

In a move that other nations might characterize as extreme, Belgium outright banned and made illegal loot boxes in video games[44] based on guidance from the Belgium Gaming Commission (KSC).[45] KSC, as an early bird in the world of loot box issues, conducted a study of a handful

41. Elec. Arts Inc. v. D.G.A https://uitspraken-rechtspraak-nl.translate.goog/inzien document?id=ECLI%3ANL%3ARBDHA%3A2020%3A10428&_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=en-US [https://perma.cc/U42G-JS5M].

42. *Id.*

43. Andy Chalk, *Electronic Arts Faces €10 Million Fine over FIFA Loot Boxes in the Netherlands*, PC GAMER (Oct. 29, 2020), https://www.pcgamer.com/electronic-arts-faces-euro10-million-fine-over-fifa-loot-boxes-in-the-netherlands/ [https://perma.cc/PT4B-44T3].

44. Tom Gerken, *Video Game Loot Boxes Declared Illegal under Belgium Gambling Laws*, *BBC NEWS* (Apr. 26, 2018), https://www.bbc.com/news/technology-43906306 [https://perma.cc/9UK9-R55V].

45. For clarification of the acronym's source, the commission's name is "De Kansspelcommissie" in Dutch.

of games widely used in the country to determine if loot boxes were in violation of the Belgium Gaming Act (Belgium Act).

Those games that were analyzed, such as Overwatch, Star Wars Battlefront (Battlefront), FIFA, and Counter-Strike: Global Offensive (Counter-Strike), came under the scrutiny of various lenses. KSC focused on: (1) strict age limits the Belgium Act imposes on game use based on its content; (2) the manner in which loot boxes can be accessed in the games, including illusions or techniques the developers use to encourage loot box use by players; and (3) the conditions necessary for a game of chance.[46] Some opponents of Belgium's consumer friendly approach may argue there is an imbalance in the factors above in that it is based too heavily on social impacts rather than the law.

KSC implements a number of techniques aimed at protecting players it deems vulnerable or susceptible to gambling and games of chance. First, there are minors up to 18 years old, who have a complete ban on game of chance participation. The second category allows those between 18 and 21 years old to engage in some forms of lotteries and betting, with the final category permitting those only 21 and older to enter and play games at casinos. By comparing these age limits to the age categories set for the analyzed games by the gaming industry itself, KSC concluded that this form of self-regulation neglected to take the Belgium Act's age limits into account and violated it.

The age categories decided upon by the gaming industry were: Overwatch - 12 years old, Battlefront - 16 years old, FIFA - all ages, and Counter-Strike - 18 years old. While the reference to the age categories does not provide specific intel into the loot box issue, KSC does find it to be a worthwhile factor in determining the game developers' approach to safeguarding its younger audiences from games of chance. For instance, KSC found it problematic that despite Overwatch being labeled for those 18 and up, the developer imposed an age limit of only 13 years old to provide payment and make financial transactions in the game.

Next, KSC analyzes the mechanisms in which loot boxes are obtained and noted the following in its report:[47] the game developers (1) exploited players based on their anticipated social behavior in games; (2) framed the games so as to make them appear to be based on skill; and (3) came up with their own financial exchange system.[48] Activision, the owner of

46. KANSSPEL COMMISSIE, ONDERZOEKSRAPPORT LOOT BOXEN (2018), https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf [https://perma.cc/CX3U-6BQD].

47. This list is not exhaustive due to the number of conclusions reached by KSC. For the sake of efficiency, a handful of points were selected for discussion.

48. KANSSPEL COMMISSIE, ONDERZOEKSRAPPORT LOOT BOXEN (2018), https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf [https://perma.cc/RDW8-2EPQ].

the Overwatch game franchise, got quite crafty with its selling technique by filing for a patented process of selling loot boxes. This two-step process involves having a player indicate his or her favorite loot box prize from a host of options, then putting the player up against a more experienced player already in possession of the favorite item. Activision, in turn, is increasing the likelihood that the player will buy a loot box to get that item.

KSC further found that the game developers further dug players into the loot box hole by implementing its own "coin" or "credit" system to buy loot boxes.[49] For Star Wars, this looks like "Galactic Credits", an idealistic play on the currency used in the highly popular movie series. While for FIFA, it's FUT Coins. The development of these exchange systems, KSC says, results in a dissociation in the player's mind between money with real world value and in-game currency.[50] By thinking in "coin" or "credit", rather than "euros", the player is more likely to use up in-game currency purchased off the platform and find him or herself having to refill—again and again. Further, the developers impose a higher value on in-game currency than what it costs to purchase it with actual money, and thus makes the players believe they are getting a deal.[51]

As for the presence of chance, KSC played devil's advocate for a moment prior to conceding that the games do indeed have this element. KSC pointed out that from the perspective of the game developers, there was little to no involvement of chance since the loot box items could be manipulated or customized based on player collected data.[52] In other words, by analyzing player information such as gaming behavior like time spent playing, payment history, and their personal background, the developers could stage certain prizes based on the player buying the loot box. Nevertheless, to the player, the loot box prize outcome was based solely on a random generator, and thus there was a presence of chance for the players.

III. PROPOSED LEGISLATIVE APPROACH

Given that the international approach to loot boxes and consumer protection stands in stark contrast to that of the U.S. legislature and courts, what can America adopt from their methodologies? Perhaps the better question to ask is: should they?

Consumer advocates could argue for a variety of new legislative approaches towards loot box regulation. For starters, they might propose

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49. *Id.*

50. *Id.*

51. *Id.*

52. Kansspel Commissie, Onderzoeksrapport Loot Boxen (2018), https://gamingcommission.paddlecms.net/sites/default/files/2021-02/2018%20Rapport%20-%20Loot%20boxen%20%28NL%29.pdf [https://perma.cc/CX3U-6BQD].

labeling loot boxes as unlawful competition or practice under the Federal Trade Commission Act[53] because their disguised presence in video games is deceiving to the consumer. A less aggressive approach would look like restrictions on when video game developers may include loot boxes in their games or how they can be accessed. For instance, giving the option to earn loot boxes through game play. Or, like Senator Josh Hawley attempted to introduce in the Protecting Children From Abusive Games Act (Senate Bill 1629), prohibiting loot boxes in games advertised to those under 18 years old.[54] These attempts are not unheard of. In fact, a handful of states including Hawaii, California, and Washington, whose courts have repeatedly struck down loot box cases, have tried to introduce such legislation to regulate loot boxes. A focus on the psychological and financial impacts of loot box purchases can serve as the necessary traction to get this legislation off the ground. Often, avid players are not connecting loot box purchases with their financial implications, especially children. The social aspects of game play combined with marketing tactics employed by game developers can easily get players into a psychological hold.

Important too is the proper regulation of the gaming industry, which is arguably in a stronger position of power than the consumer. Perhaps host sites like Google Play shouldn't receive automatic immunity simply because they are not completely entangled with every third-party app it hosts, thus requiring them to maintain stronger oversight of the apps' contents. On the other hand, the gaming industry would argue that a restriction on its product selection would prohibit free trade and that the loot boxes should be allowed, provided that there is a demand for it. That the consumer does not need overt protection because their exchange of real money for virtual in-game currency is the product of "mutual consent to mutual advantage"[55]—in other words, the deal is not forced, but is instead sought after.

There is clearly no cut and paste solution, but there can be middle ground and it should be implemented to protect the consumer. While parents should be required to maintain oversight of their children's activities, the gaming industry should not be allowed to prey on their developing minds. Some options include: (1) requiring game developers to provide sneak peeks into loot box contents; (2) removing or limiting exchange markets amongst players that increase the perceived value of loot box items; and (3) imposing greater parental control measures for minor users.

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53. 15 U.S.C. §§ 41–58 (1950).

54. Protecting Children From Abusive Games Act, S.1629, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/1629/text [https://perma.cc/D9EN-WBW7].

55. A quote from the Fountainhead, AYN RAND, THE FOUNTAINHEAD 605 (25th ed. 1971).

CONCLUSION

While it remains unclear what direction legislators will take in the world of consumer protection as it regards loot boxes, there is no doubt that the video game industry will only grow larger and so too will loot box features. Most often, consumers seek recovery under some combination of the following legal arguments: (1) unfair competition; (2) the Consumer Legal Remedies Act; or both. Regardless of the position taken, there remains little room to say that loot boxes pose no consumer protection issue whatsoever.

With this said, legislative analysis should be undertaken to better address this issue, with influence from all players involved (the game developers and consumers), international approaches (which have proved to be successful), and existing case law. It is then that a more tailored solution can be developed for America's unique video game market.

THE PGA TOUR: CRISIS MANAGEMENT AND SOCIAL JUSTICE IN PROFESSIONAL SPORTS

Allison Keller[*]

Allison Keller works for PGA TOUR. The PGA TOUR is basically the league and player union all in one.

- We are based in Ponte Vedra Beach which is about seventy miles East of Gainesville.
- *Mission Statement*–By showcasing golf's greatest players, the PGA TOUR engages, inspires and positively impacts our fans, partners and communities worldwide.

The PGA TOUR co-sanctions more than 130 tournaments on 6 tours around the world, including: PGA TOUR, PGA TOUR Champions, Korn Ferry Tour, and our three international developmental tours in Latin America, Canada, and China.

- Players come from 29 countries.
- Worldwide, PGA TOUR tournaments are broadcast to 226 countries and territories in 23 languages.

Virtually all tournaments are organized as non-profit organizations to maximize charitable giving.

- $3 billion in all-time total charitable contributions across our Tours.

Questions from FESLR

1. For the law students who hope to work in a non-legal role during their career, how has your experience as a litigator helped you serve in your different roles at the PGA TOUR, especially as Chief Administrative Officer?

As far as litigation preparing me for other roles -- I love this question because I am a big believer that the study and practice of law has broad application.

- Litigation teaches you how to think, react, and problem-solve on the fly—promotes critical thinking and leadership skills—skills needed for leadership in most businesses and organizations today.

To demonstrate this point - our core executive team is made up of thirteen leaders and six of them have law degrees.

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* Chief Administrative Officer, PGA Tour.

- These lawyers lead business areas as varied as our Global Media, our NFT/virtual gaming strategy, and even the head of our Player Relations—all attorneys.

ALLISON KELLER'S JOURNEY

She practiced employment, labor and commercial litigation for about five years before joining the PGA TOUR.

- She worked for two different law firms—one was a local firm in Orlando and the other was McGuire Woods in JAX.
- She loved the law, particularly the intellectual rigor combined with the "game day" feeling of preparing for trial. That feeling when you need to step up and "bring it."
- My partner playing "Bad to the Bone" the morning of trial.
- Some people really embrace the competitive and adversarial nature of litigation but I admit I did find employment litigation a bit emotionally draining given the nature of cases, i.e., nasty divorces and other emotional disputes.

My favorite course at UF LAW was Professor Nunn's class called Race & Race Relations Law. Doing well in this class inspired me that I could someday make a positive impact in the area of racial justice.

- BUT defending fortune 50 clients in racial and sexual harassment cases wasn't exactly the impact I had idealistically hoped for.
- Suffice it to say - I felt drawn to the more positive employee culture and talent areas, the healthy lifecycle of employment—not the "rather nasty divorce" that was litigation.

So fast forward 27 years to today where one of the most inspiring responsibilities I have is to oversee our Office of Social Responsibility, which develops and drives our Diversity Equity and Inclusion strategy, with Neera Mahajan Shetty directly leading this area reporting to me in the Office of the Commissioner.

More specifically to your question about litigation, there is no doubt that litigation can be an excellent springboard for non-legal jobs:

- Hone your ability to think on your feet, process information quickly
- Learn to control your fight or flight instinct and get better at controlling emotions under pressure, which is good in any executive role.
- Speak persuasively and bring others along.

2. Failures often drive personal and professional growth – can you discuss an instance at the TOUR where you faced failure and how that facilitated your professional development?

In 2008, at age 38, I was leading the launch of the PGA TOUR's antidoping program—the first one we had as this was required to become an Olympic sport.

- So I just moved from really a pure legal role into more of a competitions and player facing role, and I was nervous about being a woman and talking about topics such as urine specimens and drugs and things of that nature.

This was controversial because golf is culturally a game of honor where players call penalties on themselves. Golf is typically not associated with cheating (Be it doping, baseball bats that have been changed, intentionally losing games, Deflategate no disrespect ha ha).

So back in 2008, everything was new and lots of administrative details to get right as far as medications that players were taking that had to be vetted by a physician for what is called a Therapeutic Use exemption.

- My team and I failed to send required forms and this resulted in a player not being able to play in an important tournament overseas. The player was understandably very frustrated.

It was a mistake on Allison's part, and it ended up keeping this player out of an international tournament that was really important to him, and so she just remembers the long walk down the hall to our commissioner's office and.

- She decided to not try to know make excuses to the Commissioner and it turned out okay, but there were some positive lessons came from this experience.

An attorney told me early in my career that 99.9% of mistakes I would make as an attorney are fixable. *Don't try to cover it up, just own it and fix it*.

- I also think quickly owning my mistake with a plan to fix it helped me build trust with our CEO/Commissioner at the time – he knew I wouldn't try and cover my tracks.
- I also learned that while speed of work is important, when I mess up most of the time because I moved too fast. I prized speed over accuracy.
- On the other hand, a theme I want to share is we must get comfortable with risk of mistakes and even failure.

To continue to grow you have to get comfortable with risk, and even failure.

- A mentor once shared with me, "if you are not messing up or "stubbing your toe" with some regularity, you are not pushing things enough." So I do take comfort that while playing it safe can allow you to avoid some mistakes, there is less chance for growth and impact.
- The best opportunity to learn is to work on a stretch project or put yourself out there for risk. I don't think I would have been given a chance to lead or take more responsibility without willingness to fail.
- *You will learn more from those opportunities than perfection and playing it safe.*

People must develop a healthy relationship with adversity and failure. Very little learning comes from success. Nearly 100% of our learning comes from failure.

3. Vaccinations are a hot-button issue in sports leagues across the nation, namely in the NBA – how has the TOUR navigated this sensitive topic to ensure the season is a successful one?

To answer this question I thought it would be at least interesting to see where the PGA TOUR was on the day life changed dramatically for all of us here in the USA. March 11, 2020.

- We were conducting our largest flagship event here in Ponte Vedra Beach, Florida, where we host nearly 200k fans onsite during the week.
- Millions of viewers and reach a billion homes through our media platforms.
- We spend a year planning THE PLAYERS Championship and have visitors from around the globe.
- COVID-19 had made landfall in US but was seen as contained and mostly in isolated spots in SF and Washington state.
- Like all other major league sports, we were closely monitoring with CDC and local experts but at this point no one was cancelling anything.

CDC sports specialist advising us and other professional sports leagues advised us to keep playing but with social distance recommendations and hand sanitizer!

- When we kicked off our event that week, the only sports events that had been cancelled were all in Asia.
- There were no cases in Northeast Florida and so we were comfortable moving forward.
- Our beautiful global stage was set and we were anticipating our most successful event to date.

Our defending champion was a household name in Rory McIlroy, the number one player in the world.

- The course conditions were perfect. Weather was outstanding.
- International player field was in place and stronger than ever.

Before the competition started on Thursday, on Tuesday, we had our military appreciation day and Concert.

Wednesday night at about 10pm we learned that the President had instituted an international travel ban.

- We were all shocked.
- Rudy Goubert of the Utah Jazz had tested positive and the NBA cancelled the game with the Oklahoma city, and then later suspended their 2020 season.

We quickly activated our crisis management team and our senior executives held a call at 11pm. This is before any of us were proficient at video conferences so it was just audio.

- We had a heavy debate.
- We considered whether to "pause" the tournament or move forward.
- We decided to move forward based on zero cases.

To quote one of our Board members after the crisis, today's overreaction will seem tomorrow's underreaction and that is true.

So our players teed off that Thursday to strong crowds.

- After crisis management meetings and phone calls with governors, mayors, the white house CDC and news reports starting to stream in….
- At 9:15 pm Thursday night 3/12 we decided to cancel the event and said Commissioner Monahan would address the media the next morning.

Soon after, with the arrival of the pandemic in earnest, we like most sports and businesses suspended play across all Tours for a 12-week period before resuming play in June 2020, ultimately becoming one of the first sports leagues to return to competition amid the pandemic.

When we resumed playing, we developed a comprehensive health and safety program created in consultation with our Chief Medical Advisor, Dr. Tom Hospel, and infectious disease experts from the Mayo Clinic and Harvard. We also had the opportunity to share and get our policy approved by the CDC prior to our return.

Next, we went thru an extensive education program with our players, caddies, staff, media, and tournament operators to ensure that everyone knew their responsibilities upon our return. It should be noted that we would not have been successful had our players and other constituents not been extremely focused and compliant to our protocols. They understood the importance of staying in the bubble that was created at each tournament site. Eating in their rooms, not traveling together, wearing a mask and socially distancing from one another.

Also, golf generally has thrived both recreationally and professionally because of the inherent nature of the game. It is played outdoors and across acres of land – allowing participants to spread out and do their jobs in a socially-distanced manner.

Finally, and to answer your question about the vaccinations, once our constituents became eligible, we made vaccinations available thru a variety of different means:

We partnered with the Mayo Clinic and Walgreens so any one associated with our organization could get vaccinated. Players and tournament ops employees are constantly on the road, so the ability to go to a Walgreens in any town was of key. We also provided vaccines onsite.

- Once the vaccine became accessible and our player vaccination rate was deemed high enough, we decided that we didn't have to mandate the vaccine.

Things have not been perfect but we have tried to be transparent with our fans, players, tournaments and employees in this quickly changing environment.

One low point was when John Rahm, the six stroke leader in the Memorial Tournament in was informed following Saturday's third round that he tested positive for COVID-19 and was withdrawn from the tournament – he was going to win millions of dollars.

- Rahm, was ranked second in the world, and was given the news by PGA Tour medical team as he walked off the 18th green at Muirfield Village Golf Club, where he is the defending champion.
- In retrospect we wish he had been told privately and outside of cameras. People thought he had been given news about family or death of a loved one.

4. Can you talk more about how what skills in-house departments look for in attorneys who want to work in entertainment and sports?

Most of our in house attorneys did not have direct sports or media experience before coming to the TOUR.

They had expertise in contract negotiation, licensing, litigation, intellectual property, real estate and other core legal functions.

A few areas of the law that I see being in increased demand in sports and media include intellectual property/digital media rights, licensing, internet privacy and cryptocurrency.

My advice would be to set a goal to become the best technical lawyer you can be and work to develop **strong, trusting relationships with clients**.

I would also say that demonstrated ability to work with people with different backgrounds and experience.

When I worked in a law firm, most of my day was spent with other attorneys.

Working in a legal department, you may work with operations teams, Digital and media production types, HR leaders, and creative/artists types, so having a broad ability to connect and listen.

Finally, a healthy balance of risk versus business development.

- Being practical and understanding the business side (not just the legal risk analysis) is important. I did hear that some in house teams are called the anti-sales department!

For instance, when the USSC overturned the 1992 PAPSA which banned sports betting, our legal team led the charge to develop a strategy with other sports leagues on a state by state basis to develop laws that would protect and benefit sports rights holders. They were proactive business partners, helping to drive the business forward while mitigating risk.

Florida Entertainment and Sports Law Review